

Client Alert

Environmental, Health and Safety Practice Group

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EPA Proposes Amendments for Hazardous Waste Generators *Flexibility and Clarity May Benefit Many Stakeholders*

Generators of hazardous waste have been navigating the labyrinth of the Resource Conservation and Recovery Act (RCRA) regulatory program for more than three decades. While industries and the products they offer have seen dramatic changes over that time, the RCRA program has changed little. Not surprisingly, the Agency has heard extensively from stakeholders that the RCRA hazardous waste program is a poor fit for today's generators other than large-scale chemical manufacturing and similar facilities. These "square pegs in round holes" have led to inconsistency in interpretation, imbalance in enforcement, and imprecise coverage of the wide range of generators. On August 31, 2015, EPA issued a proposal that aims to address, at least in part, these concerns.¹

Intra-Company Waste Consolidation

A significant element of the proposal would allow companies with at least one large quantity generator (LQG) to act as a consolidator for very small quantity generators (VSQGs)² owned by that same company. Under current rules, a company's LQG must have a TSD permit or interim status to accept wastes from other locations. EPA has proposed this flexibility because LQGs are more accustomed to managing hazardous waste than VSQGs and have shorter accumulation deadlines. Moreover, unlike VSQGs, LQGs have more stringent requirements for where they can send hazardous waste for disposal, and potentially more opportunities to recycle hazardous wastes. For these reasons, EPA believes that its proposal to allow intra-company consolidation at an LQG will improve overall hazardous waste management, provided that the generators comply with additional notification and recordkeeping requirements.

Management of Episodic Waste Events

The proposal offers to allow generators to retain their usual generator category even if an episodic event results in exceeding the maximum generation amount for that category. Such events may be planned, such as a demolition project or remediation, or unplanned, such as process upsets or floods. Accordingly, a VSQG that generates more than 100 kilograms of non-acute hazardous waste due to an episodic event may nonetheless stay a VSQG with its reduced regulatory requirements.³

Enhanced Labeling of Containers

EPA's proposal also seeks to address concerns that the current requirement to label containers as "Hazardous Waste" does not provide enough information to

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inform and protect emergency responders and the public. The proposed rule therefore supplements the existing provision and incorporates more descriptive labeling for containers. The additional labeling requirements include:

- Content identification - chemical name or class or DOT-compliant shipping name
- Hazard identification – type (such as flammable, corrosive, or other characteristic), classification (such as DOT hazard class, or classification consistent with OSHA Hazard Communication Standard or NFPA label requirements), Globally Harmonized System (GHS) hazard pictogram, or similar nationally recognized hazard labeling
- Applicable EPA waste code(s)

Other Clarifications and Amendments

EPA also proposes a number of clarifying provisions, either through new definitions or additional regulatory text. Several of the more comprehensive provisions include:

- Distinction between an independent requirement – which all generators must meet – and conditions for exemption, which a generator must satisfy if it wants to qualify for an exemption. The Agency explains in the preamble that only noncompliance with independent requirements will subject a generator to enforcement. Accordingly, a VSQG who generates more than 100 kilograms of hazardous waste in a month but has no EPA ID number is subject to enforcement for failing to obtain an EPA ID, not for losing its VSQG exemption.
- Waste determination – In response to data suggesting that one in three generators has not properly conducted waste determinations, EPA proposes to add explanatory text on making the determination at the point of generation. The proposed rule would also clarify when changes to a waste prompt a new determination, and it provides more detail regarding the data and other records generators must retain regarding waste determinations.
- Reporting – The proposal adds a requirement for small quantity generators (SQGs) to not only obtain an EPA ID, but also refresh the Form 8700-12 site information in biennial reports.⁴

Areas for Stakeholder Input

Throughout the proposal, EPA seeks input on whether and to what extent it has achieved the clarity and flexibility it aims to provide. The Agency also encourages input on next generation provisions it has under consideration.

- Electronic decision tool to assist in hazardous waste determinations, including applicability of exclusions and whether the waste exhibits a characteristic or meets the criteria for any listed waste.
- Electronic submission of contingency plans for use by emergency responders.

Key Limitations of the Proposal

While the proposed changes outlined above will offer welcome clarity or relief to many, other stakeholders may see little benefit. First, many state hazardous waste programs are more stringent than the federal program, making the availability of the proposed flexibility provisions contingent on state adoption. In the past, at least a certain minority of states have rejected EPA's attempts to streamline, modernize, or otherwise add flexibility to the hazardous waste rules.

Also, with respect to the LQG consolidator option, the proposal only applies when the LQG and its VSQGs are under common control. The proposal would not apply where a generator seeks to return an unusable product back to its manufacturer for credit or in similar so-called “reverse logistics” scenarios. EPA has requested comment on whether it should extend the LQG consolidator option to these broader scenarios,⁵ and manufacturers may wish to urge the Agency to take this wider view. Moreover, the proposed option would not apply unless the states in which both the generator VSQGs and the consolidator LQG are located have adopted the flexibility provision.

EPA has densely populated its proposed RCRA hazardous waste generator amendments with options for flexibility, reorganization for clarity, and explanations aimed at reducing ambiguity in the rules. Companies potentially impacted by the proposed rule—particularly those with multiple facilities—should review the proposal and consider accepting the Agency’s invitation to provide input.

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¹ A pre-publication copy of the proposed rule is available at http://www2.epa.gov/sites/production/files/2015-08/documents/pre_publication_eo12866_hw_generator_2050-ag70_nprm_2015_08_30.pdf.

² The proposal would rename the former conditionally exempt small quantity generator (CESQG) as a VSQG.

³ The proposal allows one automatic episodic claim each year, although generators may petition for a second episodic event.

⁴ LQGs already have this requirement.

⁵ The Agency has particular interest in feedback on whether the request for approval when generators are not under common control should be self-implementing.