



Significant Changes Proposed for RCRA's Hazardous Waste Generator Requirements – EPA Looking to Overhaul the Generator Program

Businesses that generate hazardous waste are subject to a complex regulatory program established by the U.S. Environmental Protection Agency (“EPA”) under the federal Resource Conservation and Recovery Act (“RCRA”). An estimated 350,000 to 500,000 facilities nationwide generate hazardous waste across a wide range of sectors, including manufacturing, retail, health care, and many others. The generator regulations, mostly found at 40 C.F.R. Part 262, impact every facet of hazardous waste management such as on-site accumulation, personnel training, emergency planning, preparing shipments for treatment, storage or disposal facilities (“TSDFs”), recordkeeping and reporting. Understanding and complying with these requirements can involve substantial commitments of time and financial resources.

The generator regulatory framework was originally put in place in the 1980s, and a comprehensive updating of the program is long overdue. After several years of evaluation, EPA recently issued a proposed rule which the agency believes will boost the program’s effectiveness, reduce compliance costs, and improve relationships with the states and regulated community. The proposal, entitled the “Hazardous Waste Generator Improvements Rule,” was published in the *Federal Register* on September 25, 2015 (80 *Fed. Reg.* 57918, available [here](#)). The public comment period will end on December 24, 2015.¹

The proposed changes, if finalized, will touch virtually all aspects of the generator program. While generators may applaud some of the changes as sensible improvements, other changes would introduce new burdens that may be challenging and costly to implement. The following will briefly summarize the key proposed changes and suggest some potential implications for the regulated community.

¹ EPA recently published two other hazardous waste rulemaking proposals, “Management Standards for Hazardous Waste Pharmaceuticals” on September 25, 2015 (80 *Fed. Reg.* 58014, available [here](#)), and “Hazardous Waste Export-Import Revisions” on October 19, 2015 (80 *Fed. Reg.* 63284, available [here](#)). These proposals, which are beyond the scope of this Special Alert, would make further changes to the existing regulatory framework governing these narrower generator issues. The public comment periods for these proposals will end on December 24 and December 18, 2015, respectively.

Clarifying Generator Categories

The existing regulatory framework divides generators into three categories based on the amount of hazardous waste a facility generates per month. These categories currently include conditionally exempt small quantity generators (“CESQGs”), small quantity generators (“SQGs”) and large quantity generators (“LQGs”). This threshold determination is significant because it dictates the appropriate set of regulations the generator must follow.

To clarify generator categories based on the types and amounts of waste generated per month, EPA is proposing at Section 262.1 to add new definitions of “Small Quantity Generator,” “Large Quantity Generator,” and “Very Small Quantity Generator” (“VSQG,” replacing the CESQG terminology). These definitions will explicitly incorporate the three relevant types of hazardous waste – acute hazardous waste, non-acute hazardous waste, and residues from cleanup of acute hazardous waste spills – and the related monthly generation thresholds applicable to LQGs, SQGs, and VSEQs. The proposed rule also includes a new Section 262.13 outlining a detailed procedure for determining the appropriate generator category, including whether certain wastes and other materials should be included in the monthly tally.

These changes should help facilities identify the correct generator category, particularly those generating combinations of acute hazardous waste, non-acute hazardous waste, and/or acute spill residues in a given month. However, SQGs and VSQGs that generate an acute hazardous waste may be potential losers under this new scheme. Under the existing framework, if in a given month one of these facilities had generated acute waste or spill residue at or above the acute waste or residue thresholds, but kept its non-acute hazardous waste below the non-acute waste threshold, some EPA interpretations suggested that the generator should follow the more stringent LQG requirements for the acute waste or residue while applying the less stringent SQG or CESQG requirements to its non-acute wastes. In proposed Section 262.13, however, EPA has stated that a generator should fall within only one category for a given month, and manage all of its waste streams under the most stringent category applicable to any of those streams for that month. SQGs and VSQGs will need to pay close attention to this change to avoid potential enforcement and compliance concerns.

Making and Documenting Hazardous Waste Determinations

Another long-standing requirement of the federal hazardous waste program is that all persons who generate solid waste must determine if those wastes are hazardous, as set forth at Section 262.11. In general, generators make this determination by evaluating the potential applicability of RCRA’s various exemptions, determining if the waste is a listed hazardous waste, and then, as necessary, evaluating whether the waste is characteristically hazardous based on testing or applying knowledge of the hazard characteristics in light of the materials or processes used.

In the proposed rule, EPA has significantly expanded this regulatory provision to more explicitly address the meaning and intent of these requirements, which EPA hopes will lead to increased compliance. Notable changes to this provision would include: (i) clarifying that the determination must be made at the point of generation (which has been EPA’s long-standing position) *and*, for potentially characteristic wastes, at any time in the course of the waste’s management if its properties may change; (ii) adding provisions addressing the meaning of “acceptable knowledge” for purposes of making hazardous waste determinations; and (iii) requiring SQGs and LQGs to maintain records of any test results, waste analyses,

or other hazardous waste determinations for at least three years, including waste determinations where a solid waste is found *not* to be a RCRA hazardous waste.

Although some of these proposed changes incorporate prior EPA guidance and are intended to help generators better understand the waste determination process, in practice the revisions will likely present additional burdens for many generators. For instance, EPA has clearly stated in the proposal that if there is reason to believe a waste may physically or chemically change during management (e.g., separate into phases) such that the waste, or a portion of it, may become hazardous, the generator must monitor the waste for those changes and, if necessary, notify any subsequent handler to do so. Accordingly, under this new language, performing only an initial hazardous waste determination may not be sufficient. In addition, SQGs and LQGs would now be required to document and maintain records of determinations when a solid waste is found not to be a hazardous waste, as well as those found to be hazardous. While EPA says this change would not apply to wastes that clearly have no potential to be hazardous, many generators would likely need to modify their procedures to document the status of additional waste streams.

Consolidating CESQG Waste at LQGs

The vast majority of hazardous waste generators fall into the CESQG (future VSQG) category by generating 100 kilograms or less per month of non-acute hazardous waste and one kilogram or less per month of acutely hazardous waste. Currently, these very small generators may only treat or dispose of their waste on-site, or have it delivered to a TSD or certain other authorized off-site facilities. The existing regulations do not allow companies with multiple CESQG facilities to consolidate hazardous waste from those facilities first at a single site within the company. To provide more flexibility on this issue, EPA has proposed to allow CESQG facilities to consolidate their waste at an LQG facility under control of the same person (such as an affiliate owned by the same parent company), provided the CESQGs comply with certain container marking and labeling requirements and the receiving LQG provides notification to the state environmental agency and satisfies specified recordkeeping and reporting obligations. This change may help businesses with multiple small facilities ship and manage hazardous waste more efficiently.

Allowing for Episodic Generation without Changing Generator Category

A common challenge arises when a generator that typically falls within one category experiences an unusual event resulting in generation exceeding its normal category limit in a given month. When such events occur – which may either be planned (such as a maintenance or demolition project) or unplanned (production upsets, excess inventory, etc.) – the facility currently is “bumped up” into the larger generator category and required to comply with the additional requirements applicable to that category for that month. For instance, a CESQG temporarily exceeding the 100 kilogram generation limit in a single month would be required to comply with SQG provisions such as obtaining a RCRA identification number and adhering to several hazardous waste accumulation, marking, labeling, and other requirements for the duration of that event. Similar concerns apply to SQGs that temporarily become LQGs.

EPA has proposed some relief for generators in these situations. A new “episodic generator” provision would allow a CESQG or SQG to maintain its normal generator category despite one episodic event per calendar year (with the ability to petition the agency to allow a second event in the same year) if the generator meets certain conditions. These include, among others: (i) notifying EPA or the state at least 30

days prior to a planned episodic event or within 24 hours of an unplanned event; (ii) obtaining a RCRA ID number (for CESQGs); (iii) complying with specified management conditions while the waste is accumulated on-site; (iv) shipping the waste under manifest and by a hazardous waste transporter to a RCRA-designated TSDF or recycling facility within 45 days of the start of the event; and (v) maintaining certain records. In practical terms, this provision as drafted would likely provide more benefit to SQGs, which would mostly follow standard SQG requirements in managing their episodic waste; CESQGs would become subject to several new temporary requirements with respect to their episodic waste (albeit somewhat streamlined as compared to the full set of SQG obligations).

Distinguishing Independent Requirements vs. Conditions for Exemption

As part of the proposal, EPA plans to clarify an important distinction with implications for enforcement actions. The generator regulations contain two types of obligations: those that a party must satisfy merely because it generates hazardous waste, and those it must meet if it wishes to qualify for an exemption from RCRA permitting. This distinction commonly arises with respect to the “90 days or less” accumulation exemption for LQGs (180 days for SQGs), which allows generators to avoid having a permit for on-site hazardous waste storage by satisfying the accumulation conditions currently codified at Section 262.34.

Over the years, EPA has taken the position that failure to satisfy the first type of requirement, such as an SQG or LQG not having a RCRA ID number, can result in a penalty and/or injunctive relief for violating that requirement. Conversely, EPA maintains that failure to satisfy a condition for an exemption – such as an LQG accumulating hazardous waste on-site for more than 90 days without a permit – causes the entity to lose the benefit of the exemption and become subject to full permitting from that point forward (or until it resumes satisfying the exemption). To emphasize this distinction, EPA proposes to expressly define the terms “independent requirement” and “condition for exemption.” The agency also proposes to make these concepts more understandable by outlining and cross-referencing all of the independent requirements for VSQGs, SQGs and LQGs at Section 262.10(a)(1), while reorganizing and consolidating the conditions for exemption for each generator category at Sections 262.14, 262.16, and 262.17, respectively. EPA will also add language explicitly stating that noncompliance with a condition for exemption does not trigger a penalty or injunctive relief for violating that condition, but instead results in failure to obtain or maintain the exemption, which in turn leads to violation of one or more applicable independent requirements (including failure to obtain a storage permit and associated requirements applicable to permitted facilities).

These changes should help generators navigate the regulations more easily. However, while EPA asserts the revisions would not substantively change existing obligations, the explicit contrast between independent requirements and conditions for exemptions may lead more enforcement personnel to frame noncompliance with even minor generator accumulation conditions, such as the required text on a drum label, as voiding the permitting exemption and subjecting the entity to more significant penalties. While the agencies may technically already have this authority, the new language may cause enforcement staff to believe that their enforcement discretion has become more limited.

Adding Renotification Requirements for SQGs and LQGs

Currently, SQGs and LQGs are required to notify EPA of their generator status using EPA form 8700-12 to obtain an EPA identification number. After obtaining an EPA ID, however, the federal regulations do not require LQGs or SQGs to renotify EPA with updated site information (although LQGs do provide updates as part of biennial reports). In the proposal, EPA seeks to require LQGs and SQGs to renotify EPA using form 8700-12 of their generator status every two years: LQGs by March 1 of each even-numbered year (coinciding with the timing for LQG biennial reporting requirements), and SQGs by February 1 of each even-numbered year. By doing so, EPA believes that EPA and state databases will contain more accurate information on which facilities are generating hazardous waste, assisting the agencies with programmatic and enforcement activities. EPA notes that about half of the state programs already require periodic LQG reporting, and some require periodic SQG reporting, for hazardous waste user fee purposes.

Updating Satellite Accumulation Area Provisions

Currently, generators may conditionally accumulate hazardous waste on-site without a permit in one of two areas at their facility: an area at or near the actual point of generation that is under the control of the operator of the process generating the waste, which is known as the satellite accumulation area (“SAA”); and the central accumulation area, which is often referred to as the “90-day” or “180-day” area depending on the generator’s status. With respect to the SAA, up to 55 gallons of non-acute hazardous waste or one quart of an acutely hazardous waste may be accumulated in this area, subject to certain requirements, and only once these thresholds are reached does the generator have to manage the excess above 55 gallons of non-acute hazardous waste or one quart of an acutely hazardous waste in accordance with the applicable RCRA provisions (including moving the excess to a central accumulation area or shipping it directly to a TSDF). SAAs provide SQGs and LQGs with flexibility to manage small quantities of hazardous waste near the point of generation without triggering accumulation start dates and certain other requirements.

EPA has proposed a handful of changes to the SAA rules and is also proposing to move the SAA provisions to a new Section 262.15. The proposed changes include, among others: (i) new requirements for accumulation of incompatible wastes; (ii) additional exceptions to the requirement that containers, while in the SAA, must remain closed at all times; (iii) enhanced container labeling and marking requirements; (iv) clarification that excess wastes in a SAA must be managed in accordance with applicable RCRA provisions within three consecutive calendar days, not business days, of reaching the satellite accumulation thresholds; and (v) examples of what EPA believes constitutes “under the control of the operator.” Notably, EPA states in the preamble that an SAA would be “under the control of the operator” if the operator has *controlled the access* to the area in some fashion, e.g., use of an entry access card or key to a locked room, or accumulating the waste in a locked cabinet. These interpretations of “operator control” could be problematic for some generators and necessitate re-evaluation of existing SAAs to determine whether upgrades would be necessary. In the proposal EPA requested comment on additional practices that would satisfy the operator control criterion.

Strengthening Central Accumulation Area Requirements

The proposal would impact several aspects of managing hazardous waste in 90-day or 180-day central accumulation areas. For instance, EPA has proposed that SQGs and LQGs mark accumulation containers not just as “Hazardous Waste” but also with words identifying the contents and associated hazards. The proposal would give SQGs the option to accumulate waste in containment buildings (as LQGs have been able to do), and insert additional marking and labeling requirements for containment buildings, drip pads and tanks, including the use of inventory logs, monitoring equipment, or other means to document that the applicable accumulation time limit has been met. EPA is also requesting comment on whether to require generators to document the mandated weekly inspections of container accumulation areas, tanks and drip pads to the extent that the regulations do not already require such documentation.

In addition, the agency is seeking to bolster the accumulation area closure provisions applicable to LQGs. First, the proposal would require LQGs that cannot “clean close” a container accumulation area – i.e., where any contaminated soil cannot be removed or decontaminated – to perform post-closure care in accordance with landfill requirements, just as the regulations currently require for tanks, drip pads and containment buildings. Second, EPA seeks to require LQGs to notify EPA or the authorized state agency 30 days prior to closing a hazardous waste accumulation unit, and provide a subsequent notification within 90 days after closure indicating whether the unit was clean closed or must satisfy the landfill post-closure provisions. These changes would lead to more agency oversight of accumulation area closures, and may add significant long-term maintenance, monitoring, and financial assurance obligations if a container area cannot be clean-closed.

Augmenting Emergency Planning and Preparedness Procedures

The existing RCRA framework requires SQGs and LQGs to provide employee training and have certain plans and procedures in place to prepare for and respond in the event of a facility emergency involving hazardous waste. Partially in response to a 2013 Executive Order directing federal agencies to improve safety and security at chemical facilities in light of several recent catastrophic accidents, EPA has proposed in the generator rulemaking a number of changes to the preparedness, prevention, and emergency procedure provisions aimed at facilitating local responses to an emergency or chemical-related disaster. EPA is also proposing to consolidate and move these requirements to a new Section 262.16 for SQGs and a new Subpart M to Part 262 for LQGs.

Some changes that EPA is proposing to these provisions include: (i) clarifying that the contingency planning and emergency procedure requirements only apply to those areas of a facility where hazardous waste is generated and accumulated; (ii) adding a new requirement that generators *must* make arrangements, including entering into agreements, with the local emergency planning committee (“LEPC”) (or other local emergency authority if an LEPC does not exist or is otherwise inapplicable), rather than merely attempting to make such arrangements as the regulation currently provides; (iii) modifying certain contingency planning provisions, including requiring new LQGs to include executive summaries in contingency plans and submit those summaries to emergency management authorities; (iv) providing more flexibility on the required location for storing emergency equipment; (v) explicitly allowing SQGs to utilize trained contractors to respond to hazardous waste spills; and (vi) potentially identifying specific job categories at LQGs for which written job descriptions and hazardous waste training would be required. While certain of these changes would provide SQGs and LQGs with useful guidance and latitude on some

of the emergency planning and response requirements, others would impose additional documentation and training obligations that facilities may need to incorporate into their current procedures.

EPA has aptly described the Hazardous Waste Generator Improvements Rule as an “overhaul” of the generator program. In addition to the key proposed changes highlighted above, the rulemaking includes many other proposed changes and clarifications that would affect, among other provisions: how mixtures of non-hazardous waste and hazardous waste impact the generator categories; reporting requirements for facilities that recycle hazardous waste without storing it prior to recycling; marking and labeling requirements for transporters handling hazardous waste at a 10-day facility; and the 50-foot property line buffer requirement for containers holding ignitable or reactive wastes at LQG facilities. As previously noted, if finalized, the proposed rule will significantly alter the regulatory landscape for tens of thousands of hazardous waste generators. For additional information, or if you are interested in submitting comments to EPA on the proposed rule, please contact Rodd Bender at (484) 430-2317 or rbender@mankogold.com, or Brett Slensky at (484) 430-2322 or bslensky@mankogold.com.