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Big Changes on the Horizon for Hazardous Waste Generators

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Special to the Legal

Last fall, the U.S. Environmental Protection Agency (EPA) issued a proposed rule that will dramatically impact businesses that generate hazardous waste. Published Sept. 25, 2015 (80 Fed. Reg. 57918), the “Hazardous Waste Generator Improvements Rule” is the first comprehensive overhaul of the federal framework governing hazardous waste management by generators since the program was promulgated in the 1980s under the Resource Conservation and Recovery Act (RCRA).

While some of the proposed changes should improve a complex program, other aspects will make compliance more burdensome and costly, and in some cases may not justify the accompanying environmental benefits. This article briefly highlights some of the more significant proposed changes, and suggests potential implications for generators based on comments submitted to the EPA during the rulemaking process.

MAKING AND DOCUMENTING HAZARDOUS WASTE DETERMINATIONS

A key tenet of the hazardous waste program is that generators of solid waste must determine if those wastes qualify as hazardous. Generally, this requires evaluating the potential applicability of RCRA exemptions, and determining if the waste is a listed or characteristic hazardous waste, the latter based on testing or generator knowledge.

In the proposal, the EPA emphasized and expanded this concept by stating that



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the determination must be made at the point of generation and, for potentially characteristic wastes, at any subsequent point when the waste may change. The rule would also require maintaining records of hazardous waste determinations, including where a solid waste is found not to be hazardous.

Several commenters critiqued these changes as imposing considerable additional burdens and costs on generators, and being difficult to implement, particularly where wastes streams are numerous and constantly changing as in a research and development or retail setting. Commenters also argued that these changes will lead to unnecessary enforcement due in part to the provision’s vagueness, e.g., the absence of clear exemptions and lack of clarity on the required frequency of determinations.

CLARIFYING GENERATOR CATEGORIES

Currently, generators are divided into three categories based on the amount of hazardous waste generated per month. These categories, which correspond to increasing regulatory obligations, include conditionally exempt small quantity generators (CESQGs), small quantity generators (SQGs) and large quantity generators (LQGs). The EPA proposed several changes to help facilities determine their applicable tier, including adding new definitions for each category (and renaming CESQGs to “very small quantity generators,” or VSQGs) specifying the related monthly thresholds. The EPA also proposed a new “episodic generator” provision allowing a VSQG or SQG to maintain its normal category despite one atypically large waste generation event per calendar year (with the ability to petition for a second in the same year) if the generator meets certain conditions. Under the current framework, an episodic event could bump the facility into the next generator category for that month.

While the regulated community generally believes the proposed episodic generator provision will provide additional flexibility, commenters raised concerns that certain aspects of these changes would create unnecessary burdens and increased compliance costs. These commenters argued that calculating generation amounts every month is unduly onerous and that generator classification should be based on average generation rates over time rather than on a strict monthly basis to account for natural

variability. They also felt some conditions of the episodic generation provision are impractical.

'INDEPENDENT REQUIREMENTS' VERSUS 'CONDITIONS FOR EXEMPTION'

The generator regulations contain two types of obligations: those a facility must satisfy because it generates hazardous waste (e.g., manifesting requirements), and those it must meet if it chooses to seek an exemption from RCRA permitting (e.g., the "90 days or less" accumulation conditional exemption for LQGs).

Violating the first type of requirement has always carried the possibility of civil penalties and/or injunctive relief. Conversely, in some enforcement actions, the EPA has maintained that failure to satisfy a condition for a permitting exemption causes the generator to lose the exemption and become subject to full permitting from that point forward (or until it resumes satisfying the exemption). Through the proposal, the EPA would codify that approach by defining the terms "independent requirement" and "condition for exemption," and explicitly stating that noncompliance with a condition for exemption, rather than triggering enforcement for violating that condition, results in failure to maintain the exemption and constitutes violation of the independent requirements to obtain a storage permit and satisfy the obligations of a permitted facility.

Adopting this proposed change could reduce the EPA's enforcement flexibility and result in significant liability exposure stemming from relatively minor lapses in compliance. Several commenters echoed these concerns, asserting that this change, rather than clarifying existing policy, attempts to promulgate an aggressive new enforcement strategy; would be unnecessarily heavy-handed in most cases; and would unlawfully erase the fundamental statutory distinction between generators and permitted transportation, storage and disposal facilities.

UPDATING CENTRAL, SATELLITE ACCUMULATION AREA PROVISIONS

The proposal would impact several conditions of managing hazardous waste in central accumulation areas. For example,

SQGs and LQGs would have to mark drums and other containers not just as "hazardous waste" but also by identifying the contents and associated hazards. In addition, if an LQG cannot "clean close" its container accumulation area when shutting down operations by removing or decontaminating all contaminated soil, the revisions would require "post-closure care" akin to landfill requirements (currently applicable when closing accumulation tanks, drip pads, and containment buildings), including long-term maintenance, monitoring, and financial assurance obligations.

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The EPA is also proposing to update the satellite accumulation area provisions, which provide SQGs and LQGs flexibility to manage small quantities of hazardous waste near the point of generation while under control of the operator of the process generating the waste without triggering centralized accumulation requirements. Proposed changes include allowing additional circumstances when satellite containers may remain open, enhancing labeling and marking requirements, and clarifying that excess wastes above the satellite threshold must be managed under the applicable provisions within three consecutive calendar (not business) days. Significantly, the proposal would also require satellite containers to be secured, e.g., in a locked room or cabinet, to qualify as "under the control of the operator."

The regulated community welcomed the additional exemptions for allowing satellite containers to remain open, but sees the expanded labeling and marking requirements and new closure provisions (for central accumulation areas) as unduly burdensome and costly. Commenters also expressed concern over how the

"under the control of the generator" and three-calendar-day approach will be interpreted and implemented, which could increase enforcement exposure on these issues.

MORE EFFICIENT WASTE HANDLING FOR CESQGS

Currently, CESQGs may only treat or dispose of their waste on-site, or have it delivered to permitted or authorized off-site facilities. The existing regulations do not give companies with multiple CESQG facilities flexibility to consolidate waste first at a single site within the company. To address this issue, the EPA proposed to allow CESQGs to consolidate their waste at an LQG facility under control of the same person (such as a corporate affiliate), provided the CESQGs and LQG comply with certain conditions.

Generators expect these proposed changes to enhance operational efficiency at many facilities. Many commenters, however, urged the EPA to expand this concept to allow CESQGs to consolidate waste at other CESQGs or SQGs under the control of the same person, and at non-affiliated third parties.

In addition to the key proposed changes highlighted above, the rulemaking includes many other important proposed changes and clarifications. If finalized, the proposal will significantly alter the regulatory landscape for tens of thousands of hazardous waste generators and undoubtedly require most, if not all, generators to update their compliance programs to satisfy the applicable requirements. •

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