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Hazardous Waste

Practitioner Insights: Hazardous Waste Reforms Not in Trump's Sights

BY TOM MOUNTEER

During the past few months, federal environmental rules that the Trump administration wants to reconsider for possible rescission have made headlines. The March 28 executive order directing the dismantling of the many-faceted Obama administration climate change legacy is the most noteworthy example. There have been many others, including stream protection rules, methane control at new oil and gas facilities, etc.

One set of rules the new administration has not set its sights on was a thorough revision of the nation's hazardous waste management ''generator'' rules. These are the rules that apply to facilities that generate hazardous waste but don't treat or dispose of it on-site. The Obama administration issued a comprehensive rewrite of generator rules just days before the presidential election, and the rules weren't published in the Federal Register until four weeks afterward.

While certain aspects of the generator rules rewrite have drawn criticism, one imagines the Trump administration didn't set its sights on them because, in part, they constitute true regulatory relief. For those facilities subject to the rules, the relief couldn't have come soon enough. It had been 35 years since the Environmental Protection Agency undertook to revamp its hazardous waste generator rules so thoroughly.

From the regulated community's perspective, the generator rules rewrite has both positive and negative aspects. A couple of aspects of the rules seem to offer real relief. A business operating a smaller facility near a larger facility might like to consolidate the waste from the smaller facility at the larger facility for subsequent off-site management. The new rules provide the flexibility to do so for the first time. The new rules also allow facilities to avoid becoming subject to much more stringent regulatory requirements when conducting a facility cleanup (or dealing with the aftermath of an upset event). This option addresses a long-standing conundrum under the existing rules.

Less advantageous may be the more stringent documentation required for waste determinations and, certainly controversial, will be prosecuting smaller quantity generators that exceed their permissible accumulation periods as unpermitted storage facilities. Traditionally, only generators of more substantial quantities of hazardous waste confronted that type of enforcement risk.

Except in two states where the EPA carries out the program, facilities won't benefit (or suffer, as the case may be) from any of the changes in the 2016 generator rules rewrite until state environmental protection agencies revamp their own rules to conform. Once they are written into state programs, there are other aspects of the 2016 rules rewrite that will have impacts on generators. For example, the need for small quantity generators to re-register with their state agencies quadrennially, tightening of the so-called satellite accumulation rule, and greater stringency to the central container storage area closure requirements will affect subject facilities. The aspects of the 2016 rules rewrite that are the focus of this article, however, are those I consider most significant.

Heightened Waste Documentation A fundamental obligation of all waste generators is they identify which of their ''solid wastes'' are ''hazardous.'' (I put ''solid waste'' in quotations because, as environmental lawyers are quick to point out, ''*solid*'' waste, by statute, includes semisolids, liquid, and gases.) In the 2016 rules rewrite, the EPA imposed tighter rules on generators with respect to making the determination whether their solid wastes are hazardous.

In the 2016 rules rewrite, the EPA required that generators specifically determine whether solid wastes they generate are hazardous waste ''*at the point of waste generation, before any dilution, mixing, or other alteration of the waste occurs, and at any time in the course of this management that it has, or may have, changed its properties as a result of exposure to the environment or other factors that may change the properties of the waste such that the . . . classification of the waste may change.*'' The hazardous waste determina-

tion must be ''accurate,'' and if the generator has insufficient knowledge as to whether a waste exceeds a regulatory threshold, such as the pH limit for corrosivity or flashpoint for ignitability, then the generator must conduct tests on the waste.

The second aspect of this new waste determination standard reminded me of a problem a client encountered a few years ago. Ancillary to its core business, the client operated scores of car washes across the country. As a condition of their regulatory authorization to discharge their wastewater to the local sewer district, many of these car washes had oil/water separators. From time-to-time, the accumulated sludge had to be removed to keep these oil/water separators functioning effectively. When removed, the client had a ''solid waste'' that had to be properly managed.

The client believed it had a sound basis for establishing its car wash wastewater treatment sludge was not hazardous under regulatory definitions. Under those definitions, there are essentially two ways for a solid waste to be deemed hazardous. It can be listed as hazardous, or it can display a hazardous characteristic: ignitability, corrosivity, reactivity, or toxicity (demonstrated by means of a leachate procedure).

Car wash wastewater treatment sludge is not listed as a hazardous waste. It might, however, display one of the characteristics. The client's belief that it had a sound basis for establishing its car wash wastewater treatment sludge was not hazardous was based on evidence. Throughout the years, the client collected representative samples of its car wash wastewater treatment sludge and subjected the sludge to analysis to ensure it was not ''toxic'' under the prescribed leaching procedure. The client tested treatment sludge from a variety of facilities, large and small, and from a variety of geographic locations.

Threatened with an enforcement action in California in connection with wastewater treatment sludge from a facility the client had not specifically subjected to analysis, the client wanted to rely on its general familiarity—based on sample collection and analysis from comparable operations—with the chemical characteristics of the sludge. At the time, there was a long-standing rule that hazardous waste generators could rely on their ''knowledge of process'' to determine whether waste they generate is characteristically hazardous. The client reasoned that the process of washing cars did not much differ from location-to-location, and the pollutants that could collect in the oil/water separators weren't expected to differ much either.

What the client ran afoul of, however, was a California state rule that was more stringent than its federal template. The California rule required contemporaneous memorialization of the exercise of one's ''knowledge of process'' in order to take advantage of this leniency (i.e., not testing the specific waste stream). In other words, at the time the client's facility determined that its wastewater sludge wasn't hazardous—based on its familiarity of sample analysis performed at other, comparable locations—the client needed to have put a memorandum in the file documenting its judgment. The client hadn't done this and so was in violation.

The hard lesson that my client learned years ago from its California experience eventually may be exported to other states.

Consolidating Waste at Facilities An aspect of the 2016 generator rules rewrite that I can imagine could help certain businesses under the right circumstances is the ability for facilities under the same corporate ownership to consolidate their waste at one facility in preparation for off-site management. The facts have to be just right for the rules to provide relief, but the relief could be meaningful.

Federal hazardous waste management rules divide the universe of parties handling hazardous waste into three general categories. This article, obviously, focuses on generators. The other two categories are ''transporters,'' (equally obvious) the businesses that haul hazardous waste from generator facilities to management facilities, and waste management facilities, called ''treatment storage and disposal facilities'' in regulatory parlance. Generators have to get identification numbers and transporters have to register. Treatment, storage, and disposal facilities have to hold permits.

Under the hazardous waste management rules, the three categories of parties' operations generally are mutually exclusive. With limited exceptions, generators can't treat their hazardous waste. Nor can they transport it. To do so, they would have to register as transporters and abide by the transporter rules. Storage for longer than allowed based on quantity of waste produced in a calendar month also would trigger an obligation to be a permitted storage facility.

The 2016 generator rules rewrite broke through this operational mutual exclusivity. In limited circumstances, it allows a very small quantity generator (< 100 kilograms/month) to transport its hazardous waste to a large quantity generator under common ownership. That large quantity generator then—without having to hold a permit—will arrange for the off-site management of its smaller, affiliated facility's hazardous waste.

The rules define common ownership for these purposes as being ''under the control'' of the same person and define ''control'' in terms of ''power to direct'' either by virtue of stock ownership or voting rights. The very small quantity generator must mark containers being sent to its affiliated facility with the words ''Hazardous Waste'' and an indication of the hazard present. The receiving large quantity generator facility will have a host of additional obligations. It has to notify its state agency of the first such shipment; identify (by name, address, contact person, and telephone number) the very small quantity facility that sent the waste; keep records of each shipment; and manage the waste at its facility as if it generated it itself.

I can recall past circumstances in which this new allowance could benefit a business. It's a not uncommon situation in my experience for a business to have multiple facilities in the same general vicinity. One of the facilities might be a large quantity generator and the other (or others) might generate much smaller amounts of hazardous waste. The larger facility might be staffed with dedicated environmental personnel who could easily carry out the generator rules, while the smaller facilities might not have that level of staffing. Allowing the business to fulfill all the hazardous management rules at its larger, and presumably more expertly staffed, facility might make a lot of sense for the business.

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Avoid Slew of New Requirements An organizing principle of the federal hazardous waste management regime is the rules get stricter the more hazardous waste a facility generates in a calendar month. Facilities that generate 1,000 kilograms or more of all types of hazardous waste in a calendar month—''large quantity generators''—face the greatest regulatory burden. Facilities that generate less than 100 kilograms per calendar month—''very small quantity generators'' under the new rules—are the least burdened.

A fundamental precept of the regulatory regime has been that a facility's ''generator'' status, and hence the requirements it has to satisfy, can change month-to-month based on the amount of hazardous waste it generates. This has led to facilities that typically generate far below the large quantity threshold, but that experience an unusual increase one month, to be hit with violations for not satisfying the greater regulatory burdens that apply to large quantity generators.

There is a case from Virginia that I've used for the past decade to illustrate the problem for my law students. In the case, a facility that typically generated far less hazardous waste on a monthly basis cleaned out more than 1,000 kilograms of tank bottoms from its solvent storage tanks. In the month it shipped the tank bottoms material off-site for management, it became a large quantity generator. Among the host of new regulatory obligations that befell the facility that month were an obligation to register as a large quantity generator and provide notice of the existence of a hazardous waste accumulation area (a Virginia-specific requirement apparently), more robust contingency and emergency procedure plan requirements, and enhanced employee training requirements. As a result of stumbling into large quantity generator status without fulfilling these attendant requirements, the facility was hit with an $11,000 penalty.

The 2016 generator rules rewrite provides a means for smaller quantity generators to avoid stumbling into these more stringent requirements. It does so by creating what is called ''Alternative Standards for Episodic Generation.'' Under these new standards, ''very small'' (< 100 kilograms/month) and ''small quantity'' (between 100 to 1,000 kilograms/month) generators can exceed their categorical generation limits once a year during a planned or unplanned event without requiring the generator to be subject to the requirements of the next higher category. The exception generally is limited to one event a year, but the generator can petition for one additional event a year if the events are of ''opposite'' types—one planned, the other unplanned.

To take advantage of this episodic relief, generators have to satisfy a number of conditions, which some have characterized as ''onerous.'' For planned events, the generator has to petition at least 30 days before the event; for ''unplanned'' events, within 72 hours of event's start, and it can manage waste pursuant to new rule while awaiting approval. A very small quantity generator wanting to take advantage of the relief will have to obtain a generator identification number if it operates in a state that doesn't already require it to have such a number. Containers in which wastes are accumulated have to be marked ''Episodic Hazardous Waste'' and identify the waste's hazard. There are attendant record retention obligations.

No doubt a facility seeking to take advantage of the episodic generation relief will have some additional burden to access this relief. I can imagine, however, that the Virginia facility that stumbled into large quantity generator status when it cleaned out its tank bottoms in the illustrative case I use with my students might have been happy to have this alternative available.

Store Too Long; Risk Being Unpermitted Perhaps the most controversial aspect of the 2016 generator rules rewrite is its application of an enforcement tactic long-used against large quantity generators to small quantity generators. For years, regulators have prosecuted large quantity generators (> 1,000 kilograms/month) that have exceeded their permissible accumulation period as if they were operating unpermitted storage facilities. Under the rewritten rules, EPA indicates its intent that small quantity generators (100 to 1,000 kilograms/month) be prosecuted in essentially the same way.

Tracking the large/small/very small generator categories, one of the fundamental constructs of the hazardous waste management rules is the length of time facilities can store hazardous waste before sending it off-site for management, so-called permissible accumulation periods. Large quantity generators have the shortest accumulation period, just 90 days. Enforcement agencies typically wouldn't charge a large quantity generator that exceeded its accumulation period only with violating the accumulation period. Rather, they would charge the violator with operating a ''storage'' facility without a permit. It is not unheard of for a small quantity generator that exceeded its permissible accumulation period to be charged with operating an unpermitted storage facility, but it is more common for the violation against the small quantity generator to be only for exceeding the accumulation time limit.

In the 2016 generator rules rewrite, EPA makes the prior exception into the rule. A new rule provides that, by violating their ''condition for exemption'' (removal of waste within 180/270 days) for their ''small quantity generator'' status, the generator has become a storage facility without a permit and is in violation of the permit requirement.

This is likely the most controversial portion of the rule and has drawn the most ire. One wonders why the EPA felt compelled to write this provision into the text of the rules, rather than preserve the charge in the arsenal of the prosecutor's discretion. Problematically, states carrying out the hazardous waste management program within their borders (and that is the lion's share of the states) will have to adopt this measure into their state rules or risk not being authorized by the EPA to carry out the program.

States's Rules Critical Like many federal environmental programs, the EPA authorizes states to carry out the hazardous waste management program within their borders. The agency issues template rules, like these new generator rules. States then adopt a parallel set of rules—no ''less stringent'' than the federal template—and corresponding enforcement authorities. (State agencies might need state legislatures to adopt enabling legislation in the first instance.) The state agencies apply to the EPA to carry out the program, and after the EPA's review and approval, carry out the program in lieu of the EPA.

The situation is no different with the 2016 generator rules rewrite. State environmental agencies have to decide which federal reforms they want to adopt and re-

vise their rules accordingly. So, at this writing, the new rules are effective in only the two states that lack final authorization: Alaska and Iowa. In the other 48 states and the District of Columbia, regulators have to undertake rule-making to incorporate the new changes.

Affected entities will want to monitor, and potentially participate in, their state agencies' rule-makings to integrate the 2016 generator rules rewrite. They will have to be realistic about what state agencies can, and cannot, do in the context of those state agency rule-makings. As noted above, states seem compelled to adopt the new measure providing that small quantity generators exceeding their permissible accumulation limits are guilty of being unpermitted storage facilities.

State agencies need not adopt the reforms that would make their state programs less stringent. A state agency would be able to maintain its more stringent rules by not adopting either the intra-company shipment or episodic generation reforms described above. Both of those aspects of the 2016 generator rules rewrite would be less stringent than current state rules. Those are precisely the aspects of the 2016 generator rules rewrite that provide regulatory relief, so the regulated community will be interested in seeing their adoption in their home states.

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