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## EPA Overhauls Rules for Hazardous Waste Generators, Imposing Substantial New Burdens on Hundreds of Thousands of Facilities in Virtually All Industries

### 1 Introduction

On October 28, 2016, the Administrator of the U.S. Environmental Protection Agency ("EPA" or the "Agency") signed a final rule that completely overhauls the long-standing requirements for generators of hazardous wastes under the Resource Conservation and Recovery Act ("RCRA"). By EPA's own estimates, the new rules will affect tens of thousands of both large quantity generators of hazardous wastes ("LQGs") and small quantity generators ("SQGs") in practically every industrial sector, as well as hundreds of thousands of conditionally exempt small quantity generators (renamed "very small quantity generators" or "VSQGs" in the final rule).

The final rule is based on a proposal that the Agency issued on September 25, 2015, in order to clarify the existing regulations and make them more user-friendly, to address purported "gaps" in the regulations, and to provide additional flexibility in certain areas. See [80 Fed. Reg. 57,918](#); see also Beveridge & Diamond, P.C., "[EPA Proposal to 'Improve' Hazardous Waste Generator Rules Is a Mixed Bag, with Many Parts Likely to Have the Opposite Effect](#)" (September 8, 2015). Industry commenters vigorously opposed virtually every aspect of the proposal but, as discussed below, EPA made only modest modifications in the final rule.

In Section 2 below, we discuss two of the most controversial aspects of the proposal, one of which was dropped in the final rule (*i.e.*, the proposed requirement for generators to keep records of all their determinations that wastes are non-hazardous), but the other of which was included in the final rule (*i.e.*, the provision declaring that generators in even minor non-compliance with applicable generator requirements are treatment, storage, and disposal facilities ("TSDFs") subject to the requirements for permitted hazardous waste facilities). In Section 3, we focus on three provisions in the final rule that EPA claims reduce certain requirements for generators, but which likely provide little relief and, in one case, actually appears to increase applicable requirements. In Section 4, we briefly summarize several other key parts of the final rule. Finally, in Section 5, we discuss how the final rule will be implemented, including

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relevant effective dates.

We note at the outset that this News Alert & Analysis is based on the pre-publication copy of the final rule that has been released by EPA. Although we do not anticipate any substantive changes before the final rule appears in the Federal Register, we do not at this point have access to EPA's supporting documentation for the final rule (*e.g.*, its full response to public comments and its assessment of the economic impacts of the rule), which may provide additional insight into the Agency's intent and interpretation of the final rule. We also caution that, in light of the recent election results, it is possible that the new Congress and President might seek to block EPA implementation of the final rule, for example under the Congressional Review Act. Challenges to the final rule might also be filed in court. We do not attempt here to address the potential impacts of any such developments.

## **2 Fate of the Most Controversial Aspects of the Proposed Rule**

### **2.1 Proposal to Require Generators to Keep Records of Their Determinations that Wastes Are Non-Hazardous**

Under the existing RCRA regulations, persons who generate solid wastes must determine if such wastes are hazardous. In addition, LQGs and SQGs are required to keep records of the determinations for any wastes determined to be hazardous. The proposed rule would have dramatically expanded the recordkeeping requirement by mandating that LQGs and SQGs also keep records for all wastes determined to be non-hazardous.

In the final rule, EPA decided not to finalize this proposed recordkeeping requirement for non-hazardous waste determinations. The Agency rejected comments that it lacked the legal authority to impose a broad recordkeeping requirement for non-hazardous wastes, citing unconvincingly to RCRA Section 3007 (which merely authorizes EPA to issue discrete requests for information about particular wastes) and Section 2002 (which merely authorizes EPA to issue regulations as necessary to carry out its functions under the statute, without granting the Agency additional substantive authority over non-hazardous wastes). However, EPA acknowledged that there was "some measure of validity" to arguments raised by commenters that generators already have sufficient incentives to properly characterize their wastes, and that the proposed recordkeeping requirement would pose an undue burden on generators of very large numbers of discrete waste streams (*e.g.*, retail facilities and academic or industrial laboratories). Accordingly, the Agency decided not to adopt the proposal "at this time," but "strongly recommend[ed]" that generators keep records on non-hazardous waste determinations as a "best management practice."

### **2.2 Proposal to Classify Generators with Even Minor Lapses in Compliance as TSDFs**

Under the existing regulations, LQGs and SQGs may accumulate hazardous wastes onsite for limited periods of time without a hazardous waste permit, as long as they meet certain requirements. However, if they store the wastes beyond the relevant time limits (*i.e.*, 90 days for LQGs, or 180 days for SQGs (or 270 days in certain circumstances)), the generators become fully regulated hazardous waste TSDFs. Similarly, SQGs that accumulate more than 6000 kg of hazardous wastes at any time become fully regulated TSDFs.

In the proposal, EPA proposed a radical departure from this long-standing regulatory framework, under which *any* deviation from the accumulation requirements – not just an exceedance of an accumulation time or quantity limit – would convert a generator into a TSDF subject to RCRA permitting requirements. Shockingly, this would be true even for minimal deviations, such as failure to include one applicable waste code on a container label, conducting a required inspection one day late, or loss of a training record for one employee out of a workforce of a hundred.

In the final rule, EPA adopted the proposed approach without any significant changes. The Agency attempts to minimize the importance of what it has done by claiming that the rule merely "clarif[ies] EPA's long-standing position" and "do[es] not alter the way the generator regulatory scheme has operated over the last 30 years." However, at least in the preamble to the final rule, EPA ignores the points made by commenters on the proposal that the new rule is inconsistent with the existing regulations, and that the Agency does not appear to have ever brought an enforcement action against a minimally noncompliant generator for failure to have a TSDF permit.

EPA also tries to reassure the regulated community that federal and state enforcement personnel retain enforcement discretion to ensure that charges brought and penalties sought in enforcement actions are not “disproportionate to the seriousness of the generator’s violations.” However, it expressly reserves the right of enforcement agencies – even when addressing minor noncompliance – to “elect to cite violations based on the failure to obtain a permit ...; or on a specific requirement in the storage facility operating regulations ... that is a companion to the out-of-compliance condition found in the [generator rules]; or both; and/or other violations found in the [TSDF] operations regulations [*i.e.*, requirements that generally apply to TSDFs but not generators, such as financial assurance].”

EPA does not respond (at least in the preamble to the final rule) to the concern of commenters that the Agency’s approach does not in any way constrain federal or state enforcement officials – or citizen groups bringing enforcement actions under RCRA Section 7002 – from pursuing the “nuclear option” of penalizing a minimally noncompliant generator as an illegal operator of an unpermitted TSDF. Nor does it respond to questions raised about the potential long-term implications of classifying a minimally noncompliant generator as a TSDF. For example, would such a generator become subject to facility-wide cleanup requirements under the RCRA corrective action program, given that EPA has long said that its authority to issue Interim Status Corrective Action Orders under RCRA Section 3008(h) extends to facilities that should have obtained a permit but never obtained one? And since the standards for “interim status” TSDFs apply to facilities that should have obtained a permit but never obtained one, would a minimally noncompliant generator be subject to those standards even after the original noncompliance with generator requirements was corrected?

EPA’s approach appears to be on extremely shaky legal grounds. It effectively erases the fundamental statutory distinction between generators and TSDFs, by classifying generators as TSDFs whenever they find themselves in noncompliance with even one of the countless generator requirements (which is inevitable, since even the most robust generator compliance program cannot guarantee 100% compliance 100% of the time). It also authorizes penalties and other consequences for minor noncompliance that would be grossly disproportionate, in likely violation of the U.S. Constitution (although, as noted above, EPA hollowly suggests that federal and state officials will exercise their enforcement discretion to avoid such results). Finally, EPA has not even attempted to justify its approach, other than to falsely claim that this is the way the program has always worked, and it failed provide adequate notice of and opportunity to comment on the severe implications of its rule, in violation of the Administrative Procedure Act.

### **3 New Provisions That EPA Claims Provide Flexibility for Generators**

#### **3.1 Alternative Standards for Episodic Generators**

Under the existing regulations, the status of a generator as an LQG, SQG, or CESQG may vary from month to month, depending upon the amount of hazardous wastes generated during each calendar month. As a result, the generator and its wastes may be subject to different regulatory requirements over time. This is true even if the generator consistently qualifies as a CESQG or SQG, but due to an “episodic” event (*e.g.*, planned facility cleanout or unplanned/accidental spill), temporarily generates an unusually large amount of hazardous wastes.

The final rule will enable VSQGs and SQGs to maintain their “usual” generator status during such episodic events, subject to certain conditions, including the following:

- The VSQG or SQG will generally be limited to one episodic event per calendar year. However, they may petition for and obtain approval from EPA for one additional event per year, if the two events are of opposite “types” (*i.e.*, if one is planned and the other is unplanned). For a *planned* second episodic event, the generator cannot manage hazardous wastes pursuant to the new rule until written approval for the event is received from EPA. For an *unplanned* second episodic event, the generator can petition for the event up to 72 hours after the event starts and can manage hazardous wastes pursuant to the new rule while waiting for approval for the event. If EPA (or the state) rejects a petition for a second episodic event (and the event goes forward anyway, as would already be the case with an unplanned event), the generator must then manage the hazardous wastes from the episodic event – and all other hazardous wastes at the facility – under the general standards for the applicable more

stringent generator category (*i.e.*, SQG or LQG).

The final rule includes definitions of planned and unplanned episodic events for these purposes. Importantly, EPA states in the preamble that if a VSQG generates hazardous wastes in the normal course of its operations and does not discover until the end of the month that it has exceeded the VSQG generation limit, that would not qualify as an episodic event at all, since “[a]n episodic event is an activity that does not occur within normal operations.” However, the Agency does not explain why it thinks it matters if a brief spike above VSQG quantity limits is due to normal operations or not. Nor does it explain how some of the activities that it defines as episodic events (*e.g.*, “regular maintenance, tank cleanouts, short-term projects, and removal of excess chemical inventory”) can be distinguished from “normal operations.”

- The VSQG or SQG will have to notify EPA at least 30 days before a planned episodic event (in writing), or within 72 hours after an unplanned episodic event (by phone or email, followed up in writing). The notification will have to include the start date of the event, the expected end date of the event (no later than 60 days after the start), the reason(s) for the event, the types and quantities of wastes expected to be generated, and a facility contact with 24-hour accessibility. EPA did not move forward with its original proposal to also require notification to the local fire department of episodic events.
- The VSQG or SQG would will have to obtain an EPA identification number, if it does not already have one (although SQGs should already have an identification number).
- The VSQG or SQG will have to accumulate the wastes from the episodic event in a container or tank marked with the words “Episodic Hazardous Waste,” an indication of the relevant hazards, and the date on which the episodic event started. (For tanks, some of this information can instead be logged or recorded in other ways.) The container/tank will have to be in good condition and compatible with the wastes. Containers will have to be kept closed (except when adding or removing waste), and, in the case of SQGs, will have to meet the general requirements for hazardous waste containers. Tanks will have to have equipment and/or procedures in place to prevent overflow and will have to be inspected daily, or, in the case of SQGs, will have to meet the general requirements for hazardous waste tanks. Under the final rule, SQGs, but not VSQGs, are generally allowed to treat their episodic wastes in the accumulation units.
- The VSQG or SQG will have to manifest its wastes to a facility that is RCRA permitted or otherwise authorized to manage hazardous wastes, within 60 days from the start of the episodic event. Normally (*i.e.*, outside of episodic events), SQGs would have to send their wastes to a RCRA facility anyway, but would have 180 days or 270 days to do so. VSQGs are generally allowed to send their non-episodic wastes to certain other types of facilities, and are not subject to any time limitations for such wastes.
- The VSQG or SQG will have to keep records for three years identifying the start and end date of the episodic event, the reason(s) for the event, the types and quantities of wastes generated, the manner in which the wastes were managed, the names of the transporter(s) and the RCRA facility receiving the wastes, and an approval letter from EPA or the state if the episodic event was the second event for the generator during that calendar year.

These final rules for episodic generator are largely the same as EPA originally proposed, except that the Agency has (a) lengthened the time for an episodic event from 45 days to 60 days (and removed the option to petition for an extension), (b) modified the provisions for second episodic events so that a generator may have no more than one planned and one unplanned episodic event in a calendar year, and (c) increased the amount of time for a generator to notify EPA or the state of an unplanned event from 24 hours to 72 hours.

The final rule may provide a measure of regulatory relief to some episodic generators. However, the conditions and limitations may be so numerous and onerous that the rule may be of only limited value. Indeed, in some instances, a generator might prefer to operate under the current rules, which would appear to be allowed.

**3.2 New Rules for Consolidation of CESQG/VSQG Wastes at LQG Sites**

Under the existing rules, CESQGs must “ensure delivery” of their wastes to a treatment, storage, or disposal facility that meets certain criteria (e.g., a facility that is permitted as a hazardous waste TSD, authorized to manage non-hazardous waste (subject to certain conditions), or engaged in recycling). EPA in the past has declined to opine on whether CESQG wastes can be “taken to an intermediate location not identified [in the CESQG rule] for purposes such as consolidation and storage prior to delivery to its final destination.” See Letter from Michael Shapiro, Director, Office of Solid Waste, EPA, to Peter J. Wojdyla, Pima County (AZ) Risk Management (May 1, 1996) (RCRA Online #14031) (“Shapiro Letter”) (stating that “[t]he Agency is in the process of reviewing [this issue]. ... We therefore cannot provide an interpretation on this question until a determination has been made.”). However, under a straightforward reading of the rule, an intermediate location, including another generator location, would be allowed as long as the original generator “ensure[d]” that the waste was ultimately “deliver[ed]” to one of the locations specified in the CESQG rule.

Notwithstanding the above, EPA in the preamble to the final rule asserts that the current CESQG regulations “d[o] not allow a generator to send its hazardous waste off site to another generator unless the receiving generator ha[s] a storage permit or [is] otherwise one of the types of facilities cited [in the CESQG rule].” In support of this statement, the Agency cites to just one document from 1987, without acknowledging the 1996 Shapiro Letter discussed above, which was issued a decade after the 1987 document and, as far as we are aware, has never been superseded. This apparent mischaracterization of existing law is particularly troublesome because it arguably changes the existing rule/interpretation immediately upon publication of the rule in the Federal Register – even before the effective date(s) of the rule, as discussed in Section 5 below. Moreover, even though the Agency says that “[i]t is not EPA’s intention to interfere with existing state consolidation programs [for CESQG wastes],” it seems likely that some existing programs will be disrupted or effectively halted.

Having created a problem that was not there before, the Agency then sets about to solve that problem with a new layer of regulation. Under the final rule, a VSQG will have to send its wastes directly to one of the specified types of facilities or to an LQG under the “control” of the same person. If the wastes are sent to an LQG, the containers will have to be marked with the words “Hazardous Waste” and an indication of the hazards present. The LQG receiving the wastes will have to notify EPA; identify the name, address, contact person and telephone number for each VSQG (updated within 30 days of any change); keep detailed records of each shipment received from each VSQG; and comply with the LQG requirements for the VSQG wastes essentially as if it had generated the wastes itself (although such wastes will not be eligible for management under the satellite accumulation rule and will have to be specially identified on biennial reporting forms).

In the preamble to the proposed rule, EPA addressed interstate shipments under the new consolidation provision, saying that “if a [VSQG] wants to transfer its waste through states that have not adopted the proposed provision, these transit states may ... impose state requirements on the shipment while it is being transported through the state.” In a possible nod to comments that any such state requirements would be preempted under the Hazardous Material Transportation Act (“HMTA”) (which generally preempts state rules governing transport of hazardous materials, including hazardous wastes), EPA in the preamble to the final rule softened its language, stating merely that “if a VSQG wants to transit its waste through states that have not adopted the consolidation provision, EPA recommends that generators contact any transit states ... to ascertain their policy about such shipments.” However, at least in the preamble to the final rule, the Agency did not explicitly address the preemption issue.

**3.3 Waiver from 50-Foot Buffer Zone Requirement for LQG Ignitable/Reactive Wastes**

Under the existing regulations, LQGs are required to store any containers of ignitable or reactive wastes at least 50 feet from the facility property boundary. However, EPA has acknowledged that “there are some cases where it may not be physically possible to meet this standard” (e.g., if the site is less than 100 feet wide).

In order to address this issue, the final rule allows LQGs to apply for and obtain a site-specific written waiver from their

local authority having jurisdiction (“AHJ”) over the fire code (e.g., the local fire department). EPA rejected the recommendation of some commenters that it simply defer to local fire codes, such that a waiver would not be necessary. It also decided not to impose conditions on the waivers (e.g., limits on the quantities of ignitable/reactive wastes on site, or technical requirements such as fire-suppression equipment or fire-resistant walls) on the ground that these factors could be taken into account by the AHJ in deciding whether to grant a waiver.

#### **4 Other Key Aspects of the Final Rule**

##### **4.1 Modification of Hazardous Waste Determination and Recordkeeping Requirements**

Under the existing RCRA regulations, persons who generate solid wastes must determine if such wastes are hazardous (e.g., if they are excluded from regulation, if they are listed as hazardous wastes, or if they exhibit a characteristic of hazardous waste). Both LQGs and SQGs are further required to keep records of their determinations that wastes are hazardous for at least three years after the wastes are sent to onsite or offsite treatment, storage, or disposal. (As discussed in Section 2.1 above, records are not required for any determinations that wastes are non-hazardous.)

The final rule changes these hazardous waste determination/recordkeeping requirements in a number of important ways, including the following:

- EPA is adding language stating that the hazard determinations made by solid waste generators must be “accurate.” The Agency rejected comments that this language would be superfluous in light of the fact that an inaccurate determination that a waste is non-hazardous when it actually is hazardous would already lead to regulatory violations that would be enforceable by EPA (e.g., failure to manifest the waste offsite). According to EPA, the new language is needed to underscore the importance of proper waste determinations. However, one might wonder if the primary impetus is to enable the Agency to pile on additional penalties in the event of an inaccurate determination. In the preamble, EPA clarified that the new language would not prohibit generators from over-classifying and over-managing wastes (e.g., determining that a waste is hazardous when it is not).
- LQGs and SQGs will now have to make – and document – hazard determinations not only when a waste is first generated, but also “at any time in the course of its 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 RCRA classification of the waste may change.” EPA rejected the concerns of commenters that this requirement could require constant re-evaluation of wastes, stating that generators need to know if/when their wastes are changing characteristics in order to ensure their proper management. However, the Agency appears to have ignored concerns that requiring a new record whenever a hazardous waste “may have changed” would lead to endless and unnecessary preparation of documents.
- The records of hazardous waste determinations will have to “comprise the generator’s knowledge of the waste,” arguably meaning everything the generator knows about the waste (or at least everything the generator might want to reference in any investigation or enforcement proceeding). This may effectively require generators to keep voluminous records, including information of little or no value. The records also will have to include several specific items that are likely to be problematic, such as documents showing the “validity and relevance” of any tests performed, and documents “consulted in order to determine the process by which the waste was generated” (as if the generator needs to “determine” how its wastes are generated and needs to consult records to do so). In the preamble to the rule, EPA further indicates that the information in the records must be “organized and presented in a logical way that illustrates how it supports the generator’s conclusions,” which could impose a substantial additional burden on generators. The Agency does not, in the preamble, respond to concerns raised by commenters that, to the extent the rule may be intended to limit the evidence that a generator can present in its defense during an enforcement proceeding, it likely violates Constitutional guarantees of due process.
- LQGs and SQGs will have to identify all applicable hazardous waste codes for each waste determined to be hazardous. EPA does not address the issue of if/how records must be kept on the determination of all the

applicable waste codes. The Agency also does not address over-coding of wastes (*i.e.*, identifying waste codes that are not actually applicable), although by analogy to the Agency's statements referenced above that over-classification of non-hazardous wastes as hazardous wastes is allowed, it would appear that over-coding of hazardous wastes would also be allowed.

Although EPA requested comments in the proposed rule on requiring LQGs and SQGs to keep records of their hazardous waste determinations until closure of the facility, the Agency kept the existing requirement that such records be maintained only for three years after the waste is last sent to onsite or offsite treatment, storage, or disposal. Similarly, although EPA requested comments in the proposed rule about the possibility of requiring VSQGs to keep records on their hazardous waste determinations, the Agency did not move forward with such a requirement in the final rule.

#### **4.2 Changes to Generator Categories for Acutely Hazardous Wastes**

Under the existing regulations, generators are classified as CESQGs if they generate less than 100 kg of hazardous wastes in a calendar month. However, if they generate more than 1 kg of acutely hazardous wastes in a month, or ever accumulate more than 1 kg of such wastes, those acutely hazardous wastes become subject to full regulation (*i.e.*, the rules for LQG wastes).

The final rule subtly, but significantly, changes these rules by classifying all persons who generate more than 1 kg of acutely hazardous wastes in a month as LQGs, even if the total amount of hazardous wastes that they generate is less than 100 kg/month. The significance is that these persons would not just have to manage their acutely hazardous wastes pursuant to the LQG rules, as under the existing regulations, but they would also have to manage their non-acutely hazardous wastes as LQG wastes, as well (*e.g.*, by manifesting the wastes to a permitted hazardous waste facility using a hazardous waste transporter).

EPA does not even attempt to reconcile its approach with the statutory language in RCRA which clearly defines generator categories based on the *total* amount of hazardous wastes generated per month (although it allows for additional regulation for acutely hazardous wastes generated in smaller quantities). Rather, the Agency claims it is merely revising the rules to reflect how many EPA Regions and states are "implementing" the current rules (as if misreading and misapplying the current rules is a legitimate way of implementing such rules). EPA also states that its new approach is necessary because "it does not ... make practical sense to have a generator that is operating in more than one [generator] category." In particular, according to the Agency, it would be "contradictory" to assign a generator to one category but to allow it to "manage acute hazardous waste as one category of generator and non-acute hazardous waste as a different category of generator." Nevertheless, in the next breath, EPA acknowledges that, under the final rule, "VSQGs that *accumulate* more than 1 kg of acute waste ... must manage the waste under the conditions for ... an LQG" (emphasis added). The Agency seems to be talking out of both sides of its mouth.

#### **4.3 Mandatory Re-Notification by LQGs and SQGs**

Under the existing regulations, LQGs and SQGs are required to notify EPA of their hazardous waste management activities in order to obtain an EPA identification number (needed, for example, to manifest wastes off site). LQGs are required to re-submit the notification form every two years, as part of their biennial report. However, SQGs are not required by federal law to update their notification forms.

In order to ensure that EPA has current information, it is requiring in the final rule that all LQGs re-notify every two years, and that all SQGs re-notify every four years (on a staggered schedule, starting in 2021). This differs from the proposed rule, which would have required both LQGs and SQGs to re-notify every two years on the same schedule. The Agency also states in the preamble to the final rule that it is considering (but not finalizing) changes to the notification form, for example to allow generators to certify with a simple check mark that their information has not changed, to deactivate their identification numbers, and/or to allow streamlined re-notification by companies with large numbers of generator sites (*e.g.*, retail chains).

#### **4.4 Enhanced Labeling/Marking of Containers and Tanks**

Under the existing regulations, LQGs and SQGs must label their hazardous waste containers and tanks with the words "Hazardous Waste." Containers must also be marked with the accumulation start date, and must bear additional markings prior to shipment offsite (*e.g.*, the name, address, and EPA identification of the generator, and the manifest tracking number).

The final rule requires that additional information be included on container labels. In particular, containers must be marked with an indication of the hazards present (*e.g.*, DOT, NFPA, or OSHA/GHS hazard markings). In addition, if/when the containers are shipped offsite, they must be marked beforehand with the relevant hazardous waste codes (or with a nationally recognized electronic code, such as a bar code, that identifies the relevant waste codes), unless the containers are lab packs destined for incineration, in which case only certain waste codes need to be identified (because they may affect the handling of the incinerator ash). EPA decided not to finalize the proposal for the marking to also include words identifying the contents of the container, because of concerns about the potential vagueness of such a requirement and the fact that many generators already mark their containers in this way as a best management practice.

Under the final rule, hazardous waste tanks must be marked in much the same way as containers (*i.e.*, with the words "Hazardous Waste" and an indication of the relevant hazards). However, because of the difficulty in marking tanks with accumulation start dates, the final rule provides that generators must use inventory logs, monitoring equipment, or other records to demonstrate that accumulation tanks are emptied, or their contents "turned over," within the applicable time frames allowed under the regulations, *i.e.*, every 90 days for LQGs, or every 180 days for SQGs (or every 270 days in certain circumstances).

#### **4.5 Modifications to the Requirements for Satellite Accumulation Areas**

Under the existing regulations, LQGs and SQGs may accumulate up to 55 gallons of hazardous wastes or one quart of acutely hazardous wastes in containers "at or near any point of generation where wastes initially accumulate which is under the control of the operator of the process generating the waste," as long as they (i) mark the containers with the words "Hazardous Waste" or other words identifying the contents, and (ii) comply with certain limited container requirements (*e.g.*, that the containers be in good condition, compatible with the wastes, and remain closed except when wastes are being added or removed).

The final rule modifies the requirements for these "satellite accumulation areas" in various ways, including the following:

- It prohibits incompatible wastes from being placed into the same container;
- It allows containers in satellite areas (but not in central accumulation areas) to be temporarily vented if/when necessary to ensure proper operation of related equipment or to prevent dangerous situations (*e.g.*, the build-up of pressure);
- It requires containers to be marked with the words "Hazardous Waste" and an indication of the hazards present;
- It changes the accumulation limit for solid-phase acutely hazardous wastes in a satellite accumulation area from 1 quart to 1 kg, while maintaining the 1 quart limit for liquid-phase acutely hazardous wastes, and specifies that that 1 kg limit will apply if a satellite area contains both solid- and liquid-phase acutely hazardous wastes;
- It clarifies that when one of the quantity limits for storage of acutely or non-acutely hazardous wastes in a satellite accumulation is exceeded, the excess must be moved within 3 consecutive calendar days (rather than 3 business/working days) to a central accumulation area or an appropriate onsite or offsite hazardous waste facility (or the satellite accumulation area must be converted within this time frame to a central accumulation area);
- It clarifies that wastes in satellite accumulation areas may be sent directly to an offsite TSD, rather than to an onsite central accumulation area;

- It specifies that if a container is not in good condition or starts to leak, the waste must immediately be transferred to a container in good condition or moved to a central accumulation area; and
- It requires LQG and SQG satellite accumulation areas to meet the preparedness and prevention requirements applicable to the relevant generator category.

In the preamble, EPA also provides several examples of when areas will be deemed “under the control of the operator,” as is required for satellite accumulation areas. However, the Agency makes clear that the examples are not exhaustive, and that implementing agencies have flexibility to interpret and apply the term in accordance with its intent, which is “to ensure that someone familiar with the operations generating the hazardous waste is aware of and able to attend to the operations, if needed, while also providing some measure of controlled access.”

#### **4.6 New Closure Requirements for LQG Central Accumulation Units**

Under the current regulations, generators are generally exempt from closure requirements when they cease handling hazardous wastes in accumulation units, except that LQGs must close their central accumulation units (*i.e.*, accumulation units that are not satellite accumulation areas) in accordance with certain general performance standards, and unit-specific standards in the case of tanks, drip pads, or containment buildings.

The final rule imposes substantial new requirements for closure of LQG central accumulation units:

- It establishes a new closure performance standard for closure of container storage areas, similar to the standards that apply to tanks, drip pads, and containment buildings. In particular, to “clean-close” the unit, the LQG must remove and properly manage all hazardous wastes and residues thereof that may be present, and decontaminate or properly remove/dispose all contaminated equipment, structures, and soils. If the unit cannot be closed in such a manner, the unit must instead be closed as if it were a landfill (including post-closure care and financial assurances).
- It requires that, whenever an LQG closes any central accumulation unit, it must either (a) within 30 days after closure, place a notice in its operating record that identifies the location of the unit (in which case, further cleanup of the unit may be required in the future), or (b) within 90 days after closure, notify EPA that the unit has been clean-closed.
- It requires that, when an LQG closes its *entire* facility, it must notify EPA 30 days in advance, and submit a second notification within 90 days after facility closure stating that all the relevant accumulation units have either been clean-closed or will be closed as a landfill (although extensions may be made for clean-closure in certain circumstances).

These requirements are similar to those that EPA proposed, except that the Agency has provided some flexibility for closing and reopening, or moving, central accumulation units without immediately triggering notification requirements and closure performance standards. In addition, even though EPA requested comments on potentially requiring certification of clean-closure (rather than simple notification) and potentially requiring SQGs to notify after closure of a central accumulation unit, the Agency did not adopt either one of these requirements.

#### **4.7 Recordkeeping Requirements for Container/Tank Inspections by LQGs and SQGs**

Under the existing regulations, LQGs and SQGs must inspect container storage areas at least weekly to ensure that the containers are in good condition. However, the generators are not required to record the results of such inspections. LQGs and SQGs that accumulate hazardous waste in tanks are currently required to inspect the tanks daily (unless the tanks have secondary containment and leak detection systems in place, in which case weekly inspections are allowed). LQGs must record the results of these tank inspections, but SQGs are not.

In the preamble to the proposed rule, EPA requested comments on the possibility of requiring both LQGs and SQGs to keep records of their container and tank inspections, and to maintain such records for three years. In the final rule, the

Agency deferred action on such potential recordkeeping requirements, stating that “further analysis and evaluation is required before a final decision can be made.”

#### **4.8 Modifications to Training Requirements for Generator Personnel**

The current regulations require LQGs to train all personnel involved with handling hazardous wastes to “perform their duties in a way that ensures the facility’s compliance with [applicable] requirements.” The training must include certain elements, be updated annually, and be documented. Under long-standing guidance, however, LQG personnel involved in managing hazardous wastes in satellite accumulation areas are exempt from the training requirements. In addition, under the regulations, SQGs must merely “ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies.”

In the proposed rule, EPA requested comments on a number of potential changes to the training requirements, such as identifying particular types of LQG personnel that require training, and expanding the LQG training requirements to cover personnel handling hazardous wastes in satellite accumulation areas. In the final rule, however, the Agency left the existing personnel training requirements largely untouched. The main substantive change was to clarify that electronic or computer-based training, such as online training, is allowed as an alternative to classroom instruction or on-the-job training.

#### **4.9 Changes to Requirements for Making Arrangements with First Responders**

Under the existing regulations, LQGs and SQGs must “attempt” to make arrangements with various first responders (*e.g.*, local police, fire departments, State/local emergency response teams, and local hospitals), “as appropriate” based on the wastes handled onsite and the potential need for the services of such organizations. In the case of LQGs, the resulting arrangements (or the attempts to make arrangements) must be described in the contingency plan for the facility.

In the final rule, EPA has expanded the requirement for documenting the arrangements with first responders (or the attempts to make such arrangements) to include SQGs. The Agency also established a mechanism for LQGs and SQGs that “possess[ ] 24-hour response capabilities” to obtain from the local AHJ (*e.g.*, the local fire department) a waiver from the requirement to attempt to make arrangements with first responders. EPA has indicated that such a waiver might be appropriate, for example, in the case of an airport or military base.

EPA did not finalize other aspects of the proposal, such as those that would have required LQGs and SQGs not only to “attempt” to make arrangements, but to actually make arrangements with the Local Emergency Planning Committee (“LEPC”) or with other relevant responders.

#### **4.10 New Requirements for LQG Contingency Plans**

Under the current regulations, LQGs are required to prepare and maintain a contingency plan with certain mandatory elements. The plan must be “immediately amended” if key items change (*e.g.*, if there are changes in the materials/operations, emergency equipment, or emergency coordinators). Copies of the plan, and all plan revisions, must be sent to first responders.

The final rule changes the LQG contingency plan requirements in several ways, including the following:

- LQG contingency plans will need to include a “quick reference guide” including certain specified types of information. Sites that already have contingency plans will not have to develop the quick reference guide until they are otherwise required to update their plans. Sites that first become subject to the contingency plan requirement more than 6 months after the final rule is published in the Federal Register will have to include a quick reference guide from the start.
- LQG contingency plans will no longer have to include personal information about emergency coordinator(s), such as their home addresses and phone numbers. Instead, they will require only the names and “emergency telephone numbers” of the coordinators. For sites where an emergency coordinator is always on duty “because

[the facility] operates 24/7/365," the plan can simply "list the staff position[s]" and an emergency telephone number that can be guaranteed to be answered 24/7/365.

- LQG contingency plans will have to cover not only the central hazardous waste accumulation areas, but also other areas at the facility where hazardous waste is generated or accumulated (including satellite accumulation areas). (Although SQGs are not required to have contingency plans, the preparedness and prevention requirements applicable to SQGs will also extend to these additional areas at SQG facilities.)

EPA decided not to make other changes to the contingency planning requirements that were discussed in the proposal, such as requiring electronic submission of contingency plans, allowing facilities to post information about alternative evacuation routes rather than including them in the contingency plan, and requiring SQGs to submit a quick reference guide (formerly referred to as an executive summary) even though they are not required to have contingency plans in the first instance under RCRA.

#### **4.11 Miscellaneous Proposed Changes**

The final rule includes other changes to the hazardous waste generator rules that are so numerous that they cannot all be addressed here. Some of these miscellaneous changes are relevant only to a small subset of generators, such as academic laboratories, wood preservation facilities, or generators who accumulate hazardous wastes in specially designed containment buildings. Other changes in the final rule may be more generally applicable, but in most instances are expected to have little impact (although they be of more significance to some generators). The final rule also includes conforming changes to the rules for hazardous waste transporters and TSDFs, which are not discussed here. Finally, the rule includes countless modifications that EPA characterizes as editorial or technical in nature, but some of these may ultimately prove to be more substantive.

### **5 Implementation of the Final Rule**

Under RCRA, the rules on when newly issued hazardous waste requirements become effective are somewhat complicated. In states that have not previously been authorized by EPA to implement any portions of their hazardous waste programs in lieu of the federal program (currently only Alaska, Iowa, and Puerto Rico), new requirements take effect six months after they are published in the Federal Register, which in this case will likely put the effective date sometime in May 2017. In all other states, known as "authorized" states, new requirements generally do not take effect until they are adopted by the states. And, even then, the requirements are not enforceable by EPA, until the Agency acts to authorize the states for the new requirements (although the rules may be enforceable by the states before then).

The one exception to the timeframes discussed above is for requirements issued pursuant to the 1984 Hazardous and Solid Waste Amendments ("HSWA"). Such requirements generally take effect nationwide 6 months after they are published in the Federal Register, and then are enforceable immediately by EPA (but not enforceable by the states until they adopt the requirements themselves). In the preamble to the final rule, EPA states that the new requirements are non-HSWA rules, and thus not subject to this alternative effective date schedule. However, the Agency appears to have overlooked the fact that the original rules for SQGs were promulgated pursuant to a provision in HSWA, and thus the new amendments to the SQG rules (and perhaps some other portions of the final rule) might properly be viewed as HSWA requirements.

Because, under EPA's view, the new requirements will generally not take effect until they are adopted by the states (except in the few non-authorized states), it is important to consider if/when the states have to adopt the requirements. For those portions of the final rule that are less stringent than the existing regulations, the states are *never* required to adopt the requirements. EPA claims in the final rule that these less stringent provisions include the new requirements for episodic generators, the waiver process to allow storage of ignitable/reactive hazardous wastes within 50 feet of the property boundary at LQG facilities, and the new provisions relating to collection of VSQG wastes at LQG facilities (even though, as discussed above, these last provisions appear to be more stringent than current law, which does not explicitly restrict collection of CESQG wastes as long as the wastes are ultimately delivered to a facility of a

particular type). For more stringent parts of the final rule, the relevant deadlines for state adoption – unless extensions are granted – will be July 2018 (if only changes to the state regulations are required) or July 2019 (if changes to the state statutes are required). Of course, states could act to adopt the rules well in advance of these deadlines. In addition, states have the ability to adopt rules that are more stringent than those adopted by EPA.

As noted above, even after the states adopt the new requirements, they will not be enforceable by EPA until the Agency grants the states authorization for such requirements. There is a long process for a state to seek and obtain authorization (including submission of certain information by the state, and public notice and opportunity to comment), and there is no deadline for EPA to act on authorization requests. As a result, the process can take several months or even years. In this way, it may be many years before the states adopt the new requirements and obtain authorization for such requirements (even for the more stringent requirements that they are required to adopt). In the meantime, there will be a patchwork of regulation across the country.

We note that this schedule for implementation assumes that there are no actions by the new President, the new Congress, or the courts that might affect the final rule. However, legal challenges to the new rule may be filed in the U.S. Court of Appeals for the District of Columbia Circuit up to 90 days after the rule is published in the Federal Register (meaning that the deadline for such challenges will likely be sometime in February 2017). In addition, the new Congress will have several weeks, or even a few months, to consider a joint resolution of disapproval of the final rule under the Congressional Review Act. If it passes such a resolution within the prescribed time period, and the resolution is signed by the new President, the final rule will not take effect, and if any provisions have become effective by that time, they will be retroactively negated such that they will be deemed never to have taken effect.

*Beveridge & Diamond assists clients in a wide range of industrial sectors with solid and hazardous waste regulatory issues under RCRA, its state counterparts, international treaties, and the laws and regulations of countries around the world. We regularly help clients in understanding and complying with the regulatory requirements for hazardous waste generators, as well as transporters and treatment, storage, and disposal facilities. We also assist clients with the threshold issues of when materials qualify as "wastes," when wastes qualify as "hazardous," and when hazardous wastes are eligible for regulatory exemptions or exclusions. We have been lead counsel in many cases challenging key portions of the RCRA regulations, and defend companies in related enforcement actions. For more information about EPA's final rule overhauling the regulations for hazardous waste generators, please contact [Aaron Goldberg](#) or any other members of our [Hazardous Waste/RCRA](#) practice group.*