



Chapter VII

HAZARDOUS WASTE REGULATION

Hazardous wastes are governed by the regulatory program established by the federal Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§6901, *et seq.*, and its implementing regulations at 40 C.F.R. Parts 260-272. RCRA provides for “cradle to grave” regulation of hazardous wastes, from the initial waste generators, to transporters, and finally hazardous waste treatment, storage and disposal facilities (“TSDFs”). The statute allows a state to be delegated primary authority for enforcement and administration of the hazardous waste program, provided it enacts a regulatory program at least as strict as RCRA. RCRA §3006, 42 U.S.C. §6926.

Like many states, New York has done so by enacting the Industrial Hazardous Waste Act in 1978, which is found in Title 9 of Article 27 of the Environmental Conservation Law, and promulgating regulations contained at 6 N.Y.C.R.R. Parts 370-374 and 376. Accordingly, New York's hazardous waste regulations (or any other state that has been delegated the RCRA hazardous waste program), which largely parallel the federal regulations, generally apply *in lieu of* the federal regulations. Nonetheless, to the extent new federal mandates have not yet been added to the New York hazardous wastes regulations, the new federal regulations apply. Regulations in delegated states are updated from time to time to comply with new federal mandates, and in New York are often more stringent than those required by RCRA.

A. Definition of Hazardous Waste

The definition of “hazardous waste” is quite complex. “Hazardous waste” is a subset of “solid waste,” which is defined to include “any discarded material” (including some recycled materials), except those specifically excepted. 40 C.F.R. §261.2; 6 N.Y.C.R.R. §371.1(c)(1)

[citations are to federal and corresponding New York regulations]. Note that liquid and gaseous materials can be included within the definition of “solid” waste. Specific exceptions include “domestic sewage,” “any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly owned treatment works for treatment,” “industrial wastewater discharges that are surface water point source discharges subject to permits,” “irrigation return flows,” and “radioactive materials, which are source, special nuclear, or by-product material.” 40 C.F.R. §261.4(a); 6 N.Y.C.R.R. §371.1(e)(1).

A “hazardous waste” is a “solid waste” which is either specifically listed on the list of hazardous wastes set forth at 40 C.F.R. Part 261, Subpart D; 6 N.Y.C.R.R. §371.4, or which displays at least one of the following four characteristics:

- (1) ignitability
- (2) reactivity
- (3) corrosivity
- (4) toxicity

40 C.F.R. §261.3(a); 6 N.Y.C.R.R. §§371.1(d)(1), 371.3. The regulations set forth the specific criteria for determining each of the four characteristics. Toxicity is determined by the Toxicity Characteristic Leaching Procedure (“TCLP”) method, which simulates the degree to which chemicals would leach out in a landfill. 40 C.F.R. §261.24; 6 N.Y.C.R.R. §371.3(e).

Generally, while a characteristic hazardous waste remains classified as hazardous until it no longer exhibits a hazardous characteristic, a listed hazardous waste remains classified as hazardous until it is delisted (including all wastes “derived” from the listed waste), even if it no longer exhibits hazardous characteristics. 40 C.F.R. §261.3(d)(1,2); 6 N.Y.C.R.R.

§371.1(d)(3,4). Under the “mixture rule,” any mixture of a listed hazardous and solid waste is generally considered hazardous, so that the entire mixture must be handled as a hazardous waste, 40 C.F.R. §261.3(a)(2)(iv); 6 N.Y.C.R.R. §371.1(d)(1)(d), but a mixture of a solid waste and a characteristic hazardous waste is only hazardous if it exhibits a hazardous characteristic, although in some cases mixing may be deemed a type of treatment subject to permitting. 40 C.F.R. §261.3(d)(1); 6 N.Y.C.R.R. §371.1(d)(1)(c). There are exceptions to these rules, including an exception for certain “hazardous debris.” 40 C.F.R. §261.3(f)); 6 N.Y.C.R.R. §371.1(d)(5).

Further, certain solid wastes are not regulated as hazardous even if they are listed or display hazardous characteristics, including “household waste” from “residential sources,” and certain agricultural wastes used as fertilizers. 40 C.F.R. §261.4(b)(1,2); 6 N.Y.C.R.R. §371.1(e)(2). Wastes in totally enclosed process systems, and samples, may also be exempt. 40 C.F.R. §261.4(c); 6 N.Y.C.R.R. §371.1(e)(3,4). Facilities collecting household hazardous waste may be subject to special requirements. *See* 6 N.Y.C.R.R. Subpart 373-4. The list of hazardous wastes can be amended from time to time, 40 C.F.R. §261.11; 6 N.Y.C.R.R. §371.2(b), and a waste from a particular facility may be delisted. 40 C.F.R. §26.22; 6 N.Y.C.R.R. §370.3(c).

B. Regulatory Standards

A generator is the person “whose act or process produces hazardous waste... or whose act first causes a hazardous waste to become subject to regulation.” 40 C.F.R. §260.10; 6 N.Y.C.R.R. §370.2(b)(78). Pursuant to RCRA §3002, and ECL §27-0907, generators are subject to numerous requirements specified by regulation.

A generator is responsible for determining whether or not his waste is hazardous, which

may require a waste analysis. 40 C.F.R. §262.11; 6 N.Y.C.R.R. §372.2(a)(2). He or she must obtain an EPA identification number. 40 C.F.R. §262.12; 6 N.Y.C.R.R. §372.2(a)(3). Before offering wastes for transportation off-site, generators must ensure that the wastes and the transporter meet all U.S. Department of Transportation requirements for packaging, labeling, marking and placarding. 40 C.F.R. §262.30-33; 6 N.Y.C.R.R. §372.2(a)(4,5,6,7). Biennial reports and recordkeeping are also required. 40 C.F.R. §262.41; *see also* 6 N.Y.C.R.R. §372.2(c) (annual reporting).

As a general rule, a generator may only keep hazardous wastes on site in excess of 1,000 kilograms for 90 days, or else it becomes a “storage facility,” although there are exceptions for up to 55 gallons kept “at or near any point of generation.” 40 C.F.R. §262.34(c)(1); 6 N.Y.C.R.R. §372.2(a)(8). Nonetheless, all “accumulators” (generators who store less than 90 days) must meet certain requirements of hazardous waste storage facilities. 40 C.F.R. §262.34(a)(4); 6 N.Y.C.R.R. §373-1.1(d)(iii).

All off-site shipments of hazardous wastes must be accompanied by a multi-copy manifest form, which is used to track the shipment to ensure that it reaches its destination. 40 C.F.R. §§262.20-23; 6 N.Y.C.R.R. §372.1(b). Small quantity generators and accumulators who generate less than 1,000 kilograms per month of hazardous waste, or store less than 1,000 kg. at a time, are subject to less stringent requirements. *See* 40 C.F.R. §262.34(d,e,f); 6 N.Y.C.R.R. §§372.1(e)(1), 373-1.1(d)(1).

However, certain “conditionally exempt small quantity generators,” who generate less than 100 kg. per month, are subject to even less stringent regulations, although additional requirements apply if they and accumulate more than 1,000 kg. at one time. 40 C.F.R.

§261.5(a); 6 N.Y.C.R.R. §371.1(f). Under New York regulations, conditionally exempt facilities that collect their waste must meet the requirements for household hazardous waste collection centers. *See* 6 N.Y.C.R.R. Subpart 373-4. Further, certain recyclable materials are subject to relaxed requirements. 40 C.F.R. §261.5(c)(3); 6 N.Y.C.R.R. §371.1(g).

A hazardous product that can still be used for its intended purpose is not a “waste” is not a hazardous waste, and is not governed by the RCRA program. However, if it is spilled or leaked, it becomes a hazardous waste, and under the mixture rule both it and the media it is spilled or leaked may become a hazardous waste, and if so the person who spills or digs it up becomes a generator subject to RCRA regulations.

A transporter is a “person engaged in the offsite transportation of hazardous waste by air, water, highway or water.” 40 C.F.R. §262.10; 6 N.Y.C.R.R. §370.2(b)(184). Except for certain “small quantity transporters,” all transporters are subject to regulatory requirements under RCRA §3003, and in New York Title 3 of ECL Article 27, and ECL §27-0909. In New York, transporters must obtain permits from DEC, and meet standards set forth at 6 N.Y.C.R.R. Part 364. They are also responsible for complying with the manifest system. 6 N.Y.C.R.R. §372.1(b).

TSDFs include facilities such as hazardous waste landfills, incinerators, surface impoundments, and storage facilities. TSDFs are subject to extremely comprehensive regulations. *See* RCRA §§3004, 3005, 42 U.S.C. §§6924, 6925; ECL §27-0913. All TSDFs must obtain permits (from DEC in New York), and must also meet extensive requirements set forth at 40 C.F.R. Part 264 (6 N.Y.C.R.R. Part 373 in New York) including standards related to (1) waste analyses, (2) security, (3) inspection, (4) personnel training, (5) maintenance, (6)

contingency planning and emergency procedures, (7) manifesting, (8) recordkeeping and reporting, (9) groundwater monitoring, (10) closure and post-closure, and (11) financial responsibility. Some of these requirements, including standards for preparedness and prevention, contingency plans and emergency procedures apply to generators who are large quantity accumulators of greater than 1,000 kg., pursuant to 40 C.F.R. §262.34(a)(4) and 6 N.Y.C.R.R. §373-1.1(d)(iii)(c)(5).

Under federal law, the land disposal of many hazardous wastes is prohibited, RCRA §3004(d), 42 U.S.C. §6924(d), and regulations implement these prohibitions. *See* 40 C.F.R. Part 268; 6 N.Y.C.R.R. Part 376. Further, TSDFs may be required to clean up continuing releases of solid or hazardous wastes, RCRA §3004(u), 42 U.S.C. §6924(u), and take corrective actions beyond their facility boundaries. RCRA §3004(v), 42 U.S.C. §6924(v). Note that while some TSDFs operated under “interim status” at the beginning of the RCRA program, and were governed by 40 C.F.R. Part 265 or in New York 6 N.Y.C.R.R. Subpart 373-3, all TSDFs should have attained “final status” by now, and are governed by 40 C.F.R. Part 264 or in New York by 6 N.Y.C.R.R. Subpart 373-2.

Special regulations govern certain hazardous waste recycling activities, 40 C.F.R. Part 266, 6 N.Y.C.R.R. Subpart 374-1, used oil, 40 C.F.R. Part 273, 6 N.Y.C.R.R. Subpart 374-2, “universal wastes” including batteries, pesticides, thermostats, and lamps, 40 C.F.R. Part 273, 6 N.Y.C.R.R. Subpart 374-3, and in many states mercury and dental amalgam. 6 N.Y.C.R.R. Subpart 374-4.

C. Enforcement

Strict enforcement procedures apply to violations of hazardous waste rules under federal

law. Administrative and civil penalties can result in fines of up to \$25,000 per day, RCRA §3008(a,g), 42 U.S.C. §6928(a,f), while criminal violations can result in fines of up to \$50,000 per day of violation and jail terms of up to five years. §3008(d), 42 U.S.C. §6928(d). Similar provisions apply under New York State law. *See* ECL §§71-2705; 71-2721.

In addition, under RCRA §7003, 42 U.S.C. §6973, “upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment,” EPA may bring suit in federal district court, against any person who has contributed to the endangerment, including any past or present generator, transporter or TSDF owner or operator. This provision gives EPA authority that goes beyond requiring regulatory compliance, and allows it to force remedial action in case of “imminent hazards.” EPA also has broad powers to inspect and sample facilities that handle hazardous wastes. RCRA §3007, 42 U.S.C. §6927.

RCRA provides for citizen suits against any person “in violation of” RCRA, as well as the EPA Administrator if he fails to perform a non-discretionary act. RCRA §7002(a), 42 U.S.C. §6972(a). Further, like the EPA is authorized under §7003, 42 U.S.C. §6973, a citizen can bring a citizen's suit to abate “an imminent and substantial endangerment to health or the environment” caused by solid or hazardous waste handled by past or present generators, transporters or TSDF owners or operators. §7002(a)(1)(B), 42 U.S.C. §6972(a)(1)(B). Action under this provision requires a 90-day notice, and is barred if certain cleanup or enforcement actions have been undertaken by EPA or the state. §7002(b)(2), 42 U.S.C. §6972(b)(2).

Petroleum-contaminated soil is “solid waste” to which this provision applies if it causes a “substantial endangerment.” *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *Craig Lyle*

Partnership v. Land O'Lakes, Inc., No. 4-93-88 (D. Minn. Feb. 22, 1995). A landowner can sue past owners and tenants for contamination under this citizen's suit provision. *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000). The Supreme Court has ruled that the RCRA citizen's suit provision cannot be used to recover past costs of a spill that was cleaned up, but only abatement of continued contamination. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251 (1996); *see also Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995). However, there is no statute of limitations to bar such a claim. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251 (1996).

D. Hazardous Waste Emergency Preparedness

All hazardous waste treatment, storage and disposal facilities are subject to standards established by RCRA regulations relating to Preparedness and Prevention, 40 C.F.R. Part 264, Subpart C; 6 N.Y.C.R.R. §373-2.3, and Contingency Plans and Emergency Procedures, 40 C.F.R. Part 264, Subpart D; 6 N.Y.C.R.R. §373-2.4. Furthermore, essentially identical requirements under 40 C.F.R. Part 265, Subparts C and D; 6 N.Y.C.R.R. §§373-3.3, 373-3.4, apply to all generators who are large quantity accumulators of greater than 1,000 kg. of hazardous wastes, pursuant to 40 C.F.R. §262.34(a)(4); 6 N.Y.C.R.R. §373-1.1(d)(1)(iii)(c)(5). Accordingly, these requirements apply to many large facilities.

The Preparedness and Prevention regulations, Subpart C, mandate the following for hazardous waste facilities: design and operation so as to “minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release,” 40 C.F.R. §264.31; 6 N.Y.C.R.R. §373-2.3(b); equipment, including fire extinguisher and control equipment, spill control equipment, and decontamination equipment, and sufficient water or foam, 40 C.F.R. §264.32; 6

N.Y.C.R.R. §373-2.3(c); maintenance and testing of equipment, 40 C.F.R. §264.33; 6 N.Y.C.R.R. §373-2.3(d); access to communications or alarm systems, 40 C.F.R. §264.34; 6 N.Y.C.R.R. §373-2.3(e); adequate aisle space, 40 C.F.R. §264.35; 6 N.Y.C.R.R. §373-2.3(f); and advance arrangements with local emergency authorities, 40 C.F.R. §264.37; 6 N.Y.C.R.R. §373-2.3(g).

Furthermore, the Contingency Plan and Emergency Procedures regulations, Subpart D, require the preparation, circulation and amendment of a contingency plan (which may be combined with a spill prevention, control and counter measures (“SPCC”) plan, as required by the Clean Water Act), 40 C.F.R. §264.51-264.54; 6 N.Y.C.R.R. §373-2.4(c)(2); designation of an emergency coordinator, 40 C.F.R. §264.55; 6 N.Y.C.R.R. §373-2.3(f); and specified emergency procedures, including spill reporting requirements discussed later, 40 C.F.R. §264.56; 6 N.Y.C.R.R. §373-2.3(g).