EPA FINALIZES HAZARDOUS WASTE GENERATOR IMPROVEMENTS RULE

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EPA published its final Hazardous Waste Generator Improvements Rule ("HWGIR" or "Rule") on November 28, 2016, in the Federal Register (81 Fed. Reg. 85732–85829). This long-awaited Rule makes over 60 changes to the existing Resource Conservation and Recovery Act ("RCRA") generator rules (most notably to 40 CFR Parts 261 and 262). Many of the revisions are significant and potentially applicable to every industry that generates hazardous waste.

The Rule's effective date is May 30, 2017, but the new standards will not be effective in states that are authorized to administer the RCRA Program until adopted by those states. Authorized states are only required to adopt provisions in the Rule that are more stringent than prior EPA standards. These more stringent standards are identified in the preamble to the HWGIR. Less stringent and neutral provisions in the HWGIR may or may not ever be adopted by any particular authorized state. It is important to note that implementation of the Rule could also be affected by court challenges or actions by Congress and the president.

Due to its breadth, only some of the more significant provisions in the HWGIR are discussed here. Generators of hazardous waste are advised to evaluate this major rulemaking carefully in connection with their hazardous waste management practices. Internal audits or broad-based waste management policy reviews may be warranted in light of the changes, in order to assure ongoing compliance with hazardous waste management requirements.

SIGNIFICANT REORGANIZATION

The HWGIR includes major reorganization intended to make the rules more user-friendly, largely by consolidating them into one place. While EPA recognized this may cause initial confusion among those familiar with the existing organization, the reorganization met with extensive support in the regulated community and the implementing states. Most notably:

Provision	Existing Citation	New Citation
Definitions of Generator Categories	§§ 260.10, 261.5, and 262.34	§ 260.10
Generator Category Determination	§ 261.5 (c), (d), and (h)–(j)	§ 262.13
VSQG Exemption Provisions (formerly CESQG)	§ 261.5 (b), (f), and (g)	§ 262.14

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Satellite Accumulation Area Provisions	§ 261.34 (c)	§ 262.15
SQG Provisions	§ 262.34 (d)–(f)	§ 262.16
LQG Provisions	§ 262.34(a), (b), (g)-(i), (m)	§ 262.17

The preamble to the Rule provides more specific tables identifying the various reorganization changes as to definitions and general standards, each generator category, and satellite accumulation areas.

DEFINITION ADOPTIONS/CHANGES

Despite the many years of use of the terms "Conditionally Exempt Small Quantity Generator" ("CESQG"), "Small Quantity Generator" ("SQG"), and "Large Quantity Generator" ("LQG"), the existing rule did not include a codified, specific definition for a CESQG or a LQG, and the definition for SQG was woefully outdated. The HWGIR codifies definitions based on the monthly generation volume of all categories of hazardous waste — *acute, non-acute, and residues from acute waste spill cleanup*. This amounts to a major change for companies that may have been managing their acute (certain listed hazardous wastes) and non-acute waste separately, and thus, operating in more than one generator category. It also renames CESQG to now be called "Very Small Quantity Generator" ("VSQG").

REVISIONS AND CLARIFICATIONS TO STANDARDS

Determining Generator Category

The Rule includes a new section to address how a generator makes a generator category determination. It adds some specific steps regarding how to calculate waste to determine generator category, as well as addresses how mixing waste impacts generator status. The prior rule language was limited to certain lists identifying what material must be included in counting waste, but did not address these other counting considerations.

Satellite Accumulation Changes for SQGs and LQGs

Satellite Accumulation Areas ("SAAs") assist generators that generate and accumulate small amounts of hazardous waste in different areas of their facilities before moving the waste to a central accumulation area or an appropriate disposal facility. The HWGIR includes various regulatory changes, which are set forth in § 262.15 and include:

- Requiring SQGs and LQGs to comply with special requirements for incompatible wastes;
- Providing limited exceptions to keeping containers closed at all times in SAAs;
- Clarifying what is meant by "three days" triggering compliance to "three consecutive calendar days";
- Providing a maximum weight for the accumulation of acute hazardous waste in containers at SAAs, such that acute hazardous wastes that are liquids have a maximum volume of 1 quart and acute hazardous wastes that are solids have a maximum mass of 1 kg;

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- Modifying language for when the maximum volume or weight is exceeded; and
- Adding language to clarify that the preparedness, prevention, and emergency response procedures for SQGs and LQGs extend to any SAAs on site.

Episodic Events and Generator Status

One of the more interesting and potentially beneficial changes for industry (and retail generators) is EPA's recognition that there are times when VSQGs and SQGs generate an atypical amount of hazardous waste for a calendar month that would elevate them to a larger generator category, and thus additional regulatory requirements. This could be a planned event (such as a demolition project, tank cleanout, or equipment maintenance) or an unplanned event (such as a process upset, product recall, or act of nature). The HWGIR allows a VSQG or SQG to have one episodic event per year (with an opportunity to petition for a second) and still maintain its existing generator category by not requiring the hazardous waste generated during the episodic event to be counted in monthly totals, provided certain specified conditions are met. These conditions include notification and labeling requirements and waste management standards for tanks and containers where episodic waste is accumulated.

Independent Requirements vs. Conditions for Exemption

The HWGIR clarifies the regulatory framework for what EPA refers to as "independent requirements" and "conditions for exemption." Independent requirements are requirements that any generator must meet (regardless of whether the generator accumulates waste), such as making hazardous waste determinations. Conditions for exemption are conditional requirements that generators accumulating wastes must satisfy only if seeking an exemption from permitting (or interim status) and other requirements. One example of a condition for exemption is that a LQG may only accumulate hazardous waste for up to 90 days without a permit or interim status. A key difference between the two categories is the implication of failing to meet the requirement or condition. A violation of an independent requirement is simply a violation of a regulatory requirement that is subject to enforcement. A generator that fails to satisfy a condition for exemption, however, can lose its exemption and be subject to numerous additional requirements applicable to operating a storage facility (and violations for failing to meet those requirements).

Other Notable Revisions and Issues

- Consolidation of VSQG Waste at LQGs: In an effort to provide flexibility, the HWGIR allows VSQGs to send and consolidate hazardous waste at a LQG facility that is under the control of the same person, as long as the VSQG and LQG comply with required conditions.
- Non-hazardous Waste Determination: EPA is not requiring SQGs and LQGs to keep records of their non-hazardous waste determinations, as initially proposed. EPA recommended maintaining such records as a best management practice, acknowledged that some states require it, and cautioned that inspectors have the authority to require a generator to perform a hazardous waste determination.
- Generator Knowledge: EPA provided additional clarity and guidance on the use of generator knowledge for making hazardous waste determinations, and it provided non-inclusive lists of the types of information that EPA views as "acceptable knowledge."

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- Point of Generation: The HWGIR incorporates the long-standing position from prior rule preambles and correspondence that hazardous waste determinations must be made at the "point of waste generation" (though the Rule also requires re-evaluation in the event of factors that may change the waste's properties and result in a change to the classification of the waste). EPA explains that the point of generation is when the material first becomes a solid waste and before any "dilution, mixing, or other alteration of the waste occurs." The HWGIR preamble recognized this requirement's burden on the retail sector and noted that efforts to address retail hazardous waste issues are "on-going."

CONCLUSION

Hazardous waste generators in all sectors would be well-served to carefully review existing waste management practices and policies, and consider conducting internal waste management audits in light of the HWGIR. It may take generators some time to become familiar with the reorganization of the regulations and to ensure that different and more stringent requirements are incorporated into waste management practices and training programs. An early review of the HWGIR may also help generators identify and plan for opportunities to take advantage of new provisions that, according to EPA, offer greater flexibility for more efficient waste management. Generators doing business in authorized states should also closely watch the state environmental agencies for new state rules that respond to the HWGIR, continue evaluating how differing state rules could impact compliance strategies for generators operating in multiple states, and consider creating or joining an industry task force to stay up to date with regulatory changes and to work with states as they promulgate new rules.

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