# RESOURCE CONSERVATION AND RECOVERY ACT BASICS

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# Resource Conservation and Recovery Act (RCRA) Basics

## I. History, Policy and Purpose of the Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., establishes a cradle-to-grave program regulating the management and disposal of hazardous wastes. The RCRA regulatory program, directed by the U.S. Environmental Protection Agency (EPA) and implemented by state environmental agencies, including the Minnesota Pollution Control Agency (MPCA), imposes significant regulatory obligations on regulated parties. RCRA and its state counterparts provide for civil, criminal and administrative sanctions for noncompliance.

Public and congressional concern about the mishandling of hazardous waste began with the Love Canal episode in New York State. The federal Superfund law was passed to address past disposal problems. RCRA was enacted to prevent future unpermitted disposal and to ensure safe handling of hazardous waste.

The RCRA regulatory program identifies a broad universe of waste materials that are characterized as "hazardous wastes." Generators, transporters and facilities that treat and store and dispose of hazardous wastes are subject to the regulatory requirements. In cases where there have been releases to the environment, RCRA also imposes corrective action cleanup requirements. Unlike the federal Superfund statute, which focuses on cleaning up past waste disposal at abandoned sites, RCRA addresses the on-going management of hazardous wastes at manufacturing plants and other facilities.

RCRA was originally enacted in 1976 as amendments to the Solid Waste Disposal Act (SWDA). Pub. L. No. 94-580, 90 Stat. 2395. In 1980, the EPA published its first RCRA regulations for the regulation of hazardous wastes. See 45 Fed. Reg. 12,722, 33,066 (1980). The initial RCRA regulations have been amended on numerous occasions and now are found in over 1,000 pages of the Code of Federal Regulations.

In 1984 the U.S. Congress amended RCRA extensively with the Hazardous Solid Waste Amendments of 1984 (HSWA) Pub. L. No. 98-616, 98 Stat. 3221. HSWA authorized the regulation of underground tanks, the cleanup of contaminated areas of industrial sites not covered in the original RCRA enactment and increased restrictions on the disposal of wastes on land.

On November 28, 2016, EPA finalized a rule making significant changes to the hazardous waste generator regulations. 81 FR 85732. The goal of changes was to modify and reorganize the regulations to improve clarity by eliminating ambiguities, inconsistencies and gaps and to provide greater flexibility in how hazardous waste is managed.

Congress determined that RCRA could be most effectively implemented though a federal state partnership. Although some states are not fully authorized to implement RCRA, today RCRA is largely being implemented at the state level. Minnesota is a RCRA authorized state. The EPA has reserved the right to overfile enforcement actions

even when an authorized state has taken enforcement action against a regulated party. In Minnesota, in addition to the MPCA, the metropolitan counties also play a role with the regulation of businesses that generate hazardous waste.

## II. Definition of Hazardous Waste

The first step in determining whether a waste is subject to RCRA and the hazardous waste regulatory scheme is to determine whether the waste is a "solid waste." Under RCRA, solid waste is any garbage, refuse, sludge or other discarded material, including solid, liquid, or gaseous material that is contained. 42 U.S.C. § 6903 (27). Although it is clear that a solid waste need not be "solid" as the term is commonly understood, it is less clear when a waste is considered "discarded." There has been considerable debate to the extent which secondary materials that are reused or recycled are covered under the RCRA regulatory scheme. In 1985 the EPA published a detailed rule and regulatory preamble explaining its definition of solid waste. See 50 Fed. Reg. 641 (1985). The definition includes secondary materials that are incinerated for energy recovery and disposed of on the ground. 40 C.F.R. §§ 261.2, 261.4. The definitions in RCRA including fine distinctions among certain types of materials (sludges, by-products) and types of activities (reclamation, reuse and disposal) must be reviewed with great care. See also Am. Mining Cong. v. EPA, 824 F.2d 1177, (D.C. Cir. 1987) and 907 F.2d 1179 (D.C. Cir. 1999) Am. Petroleum Inst. v. EPA, 906 F.2d 729 (D.C. Cir. 1990).

Under RCRA, there are two principal exclusions from the definition of solid waste. The first exclusion is for industrial wastewater discharges subject to the federal Clean Water Act permit program, namely mixtures of industrial wastes and domestic sewage that pass through a sewer system to a publicly owned treatment works. 40 C.F.R. § 261.4 (a)(l). The second exemption covers certain recycled materials, such as secondary materials that are returned to the original process and reused. 40 C.F.R. §§ 261.2 (3), 261.4 (a)(8).

Once a waste is determined to be a "solid waste", the next consideration becomes whether that waste material is "hazardous." There are essentially two ways that a waste can be characterized as "hazardous": (1) the waste exhibits one of four characteristics (ignitibility, corrosivity, reactivity, or toxicity), or (2) the waste is specifically listed by the EPA as "hazardous" in the codified federal regulations. 42 U.S.C. § 6921(b). The EPA has

Implemented this provision of the RCRA statute by promulgating four tests for what are termed characteristic wastes. 40 C.F.R. §§ 261.21-24. The toxicity characteristic, probably the most frequently referred to, subjects a waste to a procedure (the Toxicity Characteristic Leaching Procedure) that is intended to simulate the leaching that would occur if the waste material were placed at a municipal landfill. See 55 Fed. Reg. 11,798 (1990).

The EPA has also listed several hundred hazardous wastes in three categories: those from nonspecified sources (F-listed wastes), those from specific industrial processes (K-listed wastes), and commercial chemical products and pesticides when discarded or spilled

(P and U wastes). 40 C.F.R. §§ 261.31-33.

Certain types of wastes, including household wastes and agricultural wastes used for fertilizers, are exempt from regulation. 40 C.F.R. § 261.4 (b)(1), (2). Congress also exempted mining and certain other wastes pending further study by the EPA. 42 U.S.C. § 6921 (b)(2), (3). The agency has decided not to regulate oil and gas industry exploration and production wastes and mineral extraction and beneficiation and certain mineral processing under RCRA Subtitle C. See 53 Fed. Reg. 25,446 (1988), 51 Fed. Reg. 24,496 (1986).

Wastes currently listed by the EPA as hazardous may be removed by requesting "delisting," which is accomplished through a federal rulemaking proceeding. 42 U.S.C. § 6921(f), 40 C.F.R. §§ 260.20, 260.22.

Given the complexity of the regulatory scheme, one should not be surprised to find many traps for the unwary. EPA's rules can ensnare a regulated party who may find themselves subject to the mixture and derived from rules. As is noted above, waste that is not listed is hazardous only if its properties fall under one of the four characteristics. However, under the EPA's mixture rule, any solid waste that is mixed with a listed hazardous waste remains a hazardous waste no matter what is done to treat it or to reduce its concentration. 40 C.F.R. §261.3(a)(2)(iv). EPA's rules also provide that any waste resulting from the treatment, storage or disposal of any listed waste is a hazardous waste. See 45 Fed. Reg. 33,096 (1980). Although these rules were invalidated on procedural grounds in Shell Oil Company v. EPA, 950 F.2d 741 (D.C. Cir. 1991), they were reinstated with further rulemaking. 66 Fed. Reg. 50,532 (2001).

## III. Obligations of Hazardous Waste Generators

Businesses whose processes generate hazardous waste, referred to as generators, have numerous responsibilities under the RCRA regulatory scheme. The regulations contained in 40 C.F.R. Part 262 describe the responsibilities of generators of hazardous waste.

Generators of hazardous waste must notify the EPA of the initiation of their hazardous waste activities. Generators must obtain an EPA identification number that is assigned to their physical location. Generators must comply with specific hazardous waste storage requirements. Containers of hazardous waste must be properly labeled. Containers that are stored outside must be stored on an impermeable surface that is curbed and protected from the elements. Proper containers for shipment of hazardous waste are required pursuant to Department of Transportation requirements. 40 C.F.R. §§ 262.30 - .33.

Generators must use a manifest (shipping paper) to track hazardous waste shipments from the point of generation (generator's place of operations) to a permitted facility that is designated to accept the hazardous waste shipment. 40 C.F.R. §§ 262.20 - .23. Generators are required to maintain records and submit biennial reports that summarize their waste generation activities including a description of the quantities and types of waste that were produced.

The RCRA regulations provide a "small generator" exemption to reduce the regulatory burden on small businesses or facilities handing small quantities of hazardous waste. 40 U.S.C. § 6921(d). Generators that produce no more than 100 kilograms (approximately 220 pounds) of hazardous waste per month are exempt from most of the RCRA requirements for generators. 40 C.F.R. § 262.14. Generators producing less than 1,000 kilograms (approximately 2,200 pounds) of hazardous waste per month may accumulate hazardous wastes on site for 180 days and are eligible for certain exemptions, but these parties must comply with most of the requirements that applied to hazardous waste generators. 40 C.F.R. §§ 262.14, 262.44.

A significant change included in the 2016 revisions to the waste generator regulations is that "very small quantity generators" (formerly labeled in the regulations as "conditionally exempt small quantity generators") are now able to send hazardous waste without a manifest to an offsite "large quantity generator" so long as both facilities are under the control of the same person. 40 C.F.R. §§ 262.14(a)(5)(viii), 262.17(f). The revised regulations also allow small and very small quantity generators to maintain their generator category in the event of certain planned or unplanned episodic events. 40 C.F.R. §§ 262.16(f), 262.232.

A cornerstone of the RCRA "cradle to grave" regulatory system is that a generator's hazardous wastes must ultimately be received and managed at permitted treatment, storage and disposal facilities. Generators may accumulate hazardous waste on site (at the generator's location) for a 90 day period without being subject to all the requirements that apply to hazardous waste treatment, storage and disposal facilities. To avoid onerous permitting requirements, generators must comply with specific requirements, namely, that they store their hazardous waste in tanks or containers that meet RCRA standards, that they clearly label the waste as hazardous, and that they note the date when accumulation of waste begins on the label placed on the surface of the storage container.

Another important provision that applies to generators of hazardous waste permits the "satellite" accumulation of 55 gallons or less of any hazardous waste at or near the point of generation of that material within the generator's operation. Satellite accumulation may take place at points in a manufacturing process where small amounts of waste are generated. Once the 55-gallon storage limit is reached, the generator must move the hazardous waste to the 90-day temporary accumulation area. 40 C.F.R. § 262.15-.17.

Generators are also expected to develop programs to minimize the generation of hazardous waste. 42 U.S.C. § 6922(b). The EPA has actively encouraged companies to engage in source reduction and recycling in order to minimize the volume and types of wastes that are generated. The EPA asks companies to report on their efforts to reduce wastes in their biennial reports.

## IV. Transport of Hazardous Wastes

The transportation of hazardous wastes from a generator's facility to a permanent treatment, storage or disposal facility, is governed by EPA regulations as well as by the U.S. Department of Transportation (DOT) regulations. 42 U.S.C. § 6922(a). Transporters must comply with the EPA regulations found in 40 C.F.R. Part 263, which require that they obtain EPA identification numbers, use proper containers, and implement the hazardous waste manifest system by insuring that the manifest accompanies the waste to its next point of delivery. 40 C.F.R. § 263.20. In addition, transporters of hazardous waste are required to retain records for a period of three years.

A transporter is exempt from the RCRA with respect to the requirements for storage of hazardous waste, providing that the waste is properly packaged and the storage does not exceed 10 days. 40 C.F.R. § 263.12.

Transportation of hazardous wastes on site (i.e., movement of wastes within a single facility location) at an industrial facility is exempt from RCRA's standards for transporters. 40 C.F.R. § 263.10(b). Regulations define the scope of the site for purposes of this exemption. They include contiguous properties divided by public or private rights of way.

If a discharge of hazardous wastes occurs during transport, the shipper must notify the EPA's National Response Center and must take appropriate action to protect human health and the environment, including cleanup of the discharge. 40 C.F.R. § 263.30-31. Notification may also be required to appropriate state and local authorities under other laws.

Transporters are extensively regulated by the DOT under the Hazardous Materials Transportation Act (HTMA). 49 U.S.C. § 1801 et seq. The DOT regulations applicable to transportation of hazardous wastes are contained in 49 C.F.R. Part 171.

## V. Treatment, Storage and Disposal

All facilities that treat, store or disposal of hazardous waste must obtain a hazardous waste permit, unless the operations are otherwise exempt from the permitting requirements. 42 U.S.C. § 6925. Congress granted "interim status" to facilities that were operating when EPA's regulations took effect in 1980 provided that the facilities notified the EPA of their activities and complied with the applicable EPA standards. 42 U.S.C. § 6925(e).

RCRA allows the EPA to delegate its permitting and enforcement responsibility to the states. More than 40 states, including Minnesota, have such authority. 42 U.S.C. § 6926(b). Because the EPA has reserved authority to enforce RCRA requirements, and because many new requirements have not been incorporated into state RCRA programs, the EPA retains much authority in this area.

Treatment, storage and disposal (TSD) facilities are subject to several types of operating and design standards: general facility standards, closure and post closure care standards and unit- specific standards. 42 U.S.C. § 6925(a). These standards are contained in 40 C.F.R. Part 264 (for permitted facilities) and Part 265 (for interim status facilities). The general standards require that each TSD facility obtain an identification number, obtain or conduct waste analyses, implement security measures, schedule regular inspections and provide for personnel training. 40 C.F.R. § 265.11-16. The TSD facility must also take special precautions in handling ignitable, reactive and otherwise incompatible waste and may not locate the facilities in floodplains or near seismic faults. 40 C.F.R. § 265.17-.18. TSD facilities must implement preparedness and prevention measures to minimize non-sudden releases and these facilities must comply with various record-keeping requirements. Finally, land disposal units must implement a groundwater-monitoring program, which various depending on whether the facility is under interim status or is permitted. 40 C.F.R. §§ 265.90-91. If groundwater protection levels are exceeded, corrective action may be required under RCRA. 40 C.F.R. § 264.100.

RCRA's closure, post-closure and financial responsibility regulations are intended to secure a TSD facility so that it does not pose a significant threat of a release. Each facility must have a written closure plan that identifies how each unit will be closed to satisfy EPA standards, including procedures for removing contaminated soil, cleaning equipment and performing necessary sampling and analysis. 40 C.F.R. §§ 264.112, 265.112. Land disposal facilities must develop post closure care plans where hazardous wastes or constituents are left in place after closure. 40 C.F.R. §§ 264.110(b), 265.110(b). The plans must provide for continued groundwater monitoring and maintenance of the integrity of any cap or cover over the facility for a period of up to 30 years. 40 C.F.R. §§ 264.117, 265.117.

The financial assurance regulations require that each TSD facility demonstrate financial ability to meet closure and post closure obligations as well as potential third-party liability. 40 C.F.R. Parts 264, 265, subp. H. The rules allow TSD facilities several means to demonstrate financial ability, including self-insurance, insurance policies, surety bonds and parent company guaranties. 40 C.F.R. §§ 264.143-145,265.143-145. Self-insurance is generally the preferred route.

In addition to the general requirements discussed above, the EPA has established specific standards for containers, tanks, land disposal facilities, miscellaneous units, incinerators, furnaces and boilers. The standards are generally quite complex and detailed. The standards for permitted container storage areas require containment systems, timely removal of spills, and removal of wastes upon closure. 40 C.F.R. § 264.175. Similarly, permitted tanks systems used to manage hazardous wastes must have secondary containment systems and leak detection. 40 C.F.R. §§ 264.191-.196, 265.191-196. The rules contain detailed design requirements, rules governing maintenance and operation and rules governing closure. 40 C.F.R. §§ 264.193-.194, 264.197.

The EPA requires that hazardous waste incinerators demonstrate an ability to meet a destruction efficiency of 99.99% of the principal organic hazardous constituent identified in the permit. Incinerators must also achieve standards for other parameters,

such as carbon monoxide and fugitive emissions, and are subject to inspection and maintenance requirements. 40 C.F.R. §§ 264.343-347. Boilers and industrial furnaces that burn hazardous waste are regulated separately. 42 U.S.C. § 6924(q)(l); 40 C.F.R. § 266.100. In addition, there are certain exemptions for boilers and furnaces used for specific purposes such as smelting furnaces and small quantity burners.

HSWA directed the EPA to develop regulations establishing technical design standards (minimum technology requirements) for land disposal units. 42 U.S.C. §§ 6924(o), 6925(j). Landfills generally must have double liners, a leachate collection system and groundwater monitoring. 40 C.F.R. §§ 264.301, 265.301. Bulk or free-liquid containing wastes may not be placed in a landfill. After closure, the owner or operator must conduct post-closure care for a period time specified in the permit. Surface impoundments, including lagoons and ponds, are also subject to detailed regulations. 40 C.F.R. §§ 264.220, 266.220. The regulations require double liners and leachate collection systems. For surface impoundments, groundwater monitoring must also must be conducted.

In the 1984 HSWA legislation, Congress directed that waste not be disposed of on land unless they are treated to meet standards promulgated by the EPA. 42 U.S.C. § 6924(d), (e)(l), (g)(5). This provision is known as the "land ban" because it would prohibit all land disposal if the EPA were to fail to meet the statutory dates for promulgating treatment standards. After treated to the best demonstrated available technology (BDAT) waste can be disposed of in land disposal units meeting applicable requirements. 42 U.S.C. § 6924(M), (o). The BDAT standards have been subject to considerable controversy, with litigation centering on the level of control and the point at which treatment must cease. 55 Fed. Reg. 22,520 (1990). See Chem. Waste Mgmt. v. EPA, 976 F.2d 2 (D.C. Cir. 1992). Congress clarified that land disposal restrictions do not apply to characteristic wastes that are decharacterized before disposal and then managed in certain land-based treatment systems. EPA developed universal treatment standards in 1994. The agency also promulgated rules attempting to minimize disincentives to act or remediation. These rules include treatment variances and alternative standards for contaminated soils.

In 1993, the EPA promulgated rules for corrective action management units (CAMUs) for on-site treatment, storage and disposal of hazardous waste managed for implementing cleanup. EPA later tightened these rules in a manner that limits the utility of CAMUs.

The land disposal standards are subject to several exceptions. EPA has the authority to grant national capacity variances based on a finding that there is insufficient alternative protective treatment, recovery or disposal capacity for the waste. 42 U.S.C. § 6924(h)(2). This provision has been used in numerous cases. EPA may also grant one-year extensions, renewable for another year, of a prohibition effective date. Surface impoundments are subject to special provisions. 42 U.S.C. § 69250)(11). Untreated wastes may be placed in surface impoundment provided that the impoundments meet the technology requirements and sludges are removed within one year. 40 C.F.R. §§ 268.4. Finally wastes may be placed without treatment in a "no

migration" unit, typically an underground injection well based on a showing to EPA that there would be no migration of hazardous constituents. 40 C.F.R. § 268.6. Presumably this is a very high standard.

## VI. Corrective Action

Before the enactment of HSWA, corrective action had fairly limited applicability under RCRA. The EPA had authority under RCRA section 7003 to require persons to take action necessary to address an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973. Although this provision was used in some early RCRA cases to address past contamination and abandoned landfills, its use at such sites was limited once the Superfund statute was enacted by Congress in 1980.

HSWA dramatically changed RCRA in 1984 by adding three new important provisions. Section 3004(u) of RCRA allows EPA to require corrective action for releases from solid waste management units (SWMU) for any persons seeking a RCRA permit after 1984, regardless of when the waste was placed in the unit. 42 U.S.C. § 6924(u). Section 3004(v) authorizes EPA to require corrective action beyond the boundary of a TSD facility where necessary to protect human health and the environment. 42 U.S.C. § 6924(v). In addition, section 3008(h) of RCRA authorizes EPA to require corrective action for interim status facilities. 42 U.S.C. § 6928(h). These provisions collectively have enormous financial and practical implications for patties that are subject to RCRA and may overshadow cleanup obligations under the federal superfund law.

Sections 3004(u) and 3008(h) provide that corrective action requirements apply to facilities that must obtain a RCRA permit or interim status under the RCRA program. Thus, generators, transporters and persons accumulating waste for no more than 90 days are not subject to corrective action requirements. On the other hand, where there is on-going waste management at a TSD facility, EPA has interpreted the statute to require corrective action anywhere within the contiguous plant boundary. United Tech. Corp. v. EPA, 821 F.2d 714 (D.C. Cir. 1987).

## VII. Civil and Criminal Enforcement

RCRA is enforced by the EPA, the U.S. Department of Justice (DOJ), RCRA authorized states, and private citizens. There is a wide range of enforcement options including civil, criminal and administrative sanctions. Since RCRA's enactment, enforcement has generally been on the rise. Over time penalty sanctions, including tough criminal sanctions, have been imposed on a growing number of violators each year. Businesses that have been found to have violated RCRA may also face expensive cleanup obligations. Corporate violators and individuals offenders are routinely required to pay substantial civil or criminal penalties. Individual offenders increasingly face imprisonment under RCRA's tough criminal sanctions provisions.

The current enforcement climate is of particular concern for the tens of thousands of businesses that actively manage hazardous waste in the course of their operations. Most companies find that "perfect compliance" with RCRA while a laudable goal, is practically unattainable.

The RCRA hazardous waste program is built on a foundation of ambiguous regulations, obscure interpretations and unpublished guidance documents. Unfortunately, the distinction between civil and criminal liability has been blurred. Like many EPA statutes, RCRA authorizes criminal sanctions for many violations of environmental standards and regulations. However, RCRA does little to distinguish between violations that are appropriate for criminal prosecution and those that should be handled through a civil or administrative process. Instead these decisions, which carry huge implications for businesses and their owner/operators, are left to the discretion of inspectors and prosecutors. Although Congress has indicated that only "knowing" violations could be punished criminally, in many instances the violator is deemed to "know" that an act is unlawful and is therefore subject to criminal sanctions.

Federal, state and local enforcement officials have targeted companies and individuals involved with the handling of hazardous waste in response to strong public sentiment and political pressure for tougher enforcement. Prosecutors at the federal, state and local level have increasingly targeted individuals rather than corporations for criminal enforcement. Often inspectors who refer cases for prosecution and the prosecutors themselves do not stop to consider whether a particular target has a good overall compliance record or whether the violations at issue resulted in any actual environmental harm. The RCRA regulatory program is complex and maintaining compliance requires the dedication of significant financial resources.

Unfortunately for the parties that must comply with RCRA, aggressive enforcement by the EPA, states, and certain local authorities shows no signs of abating. There are no easy answers. The best and perhaps only defense to a RCRA enforcement is compliance auditing.

### A. RCRA Enforcement Authorities at the EPA.

RCRA enforcement is carried out by the EPA and by the DOJ as well as by state agencies and prosecutors in RCRA authorized states. Companies facing enforcement need to understand how the agencies are organized.

At the EPA and its ten EPA Regional Offices, administrative and civil enforcement is handled by the Office of Regulatory Enforcement, which includes a RCRA Enforcement Division as one of its key components. Criminal enforcement is handled by the Office of Criminal Enforcement. The National Enforcement Investigation Center (NEIC) in Denver, Colorado supports the EPA's enforcement actions by collecting evidence and providing technical assistance.

### B. U.S. Department of Justice.

As a federal agency the EPA lacks the authority to initiate litigation under RCRA. The EPA must refer cases to the DOJ for litigation. Matters involving federal RCRA violations are heard in federal courts. The EPA and the DOJ have entered into a Memorandum of Understanding governing the decision whether to proceed with a RCRA enforcement case referred to the DOJ by the EPA. Within the DOJ, the responsibility for RCRA enforcement is shared between the Environment and Natural Resources Division

(ENRD) at DOJ headquarters in Washington, D.C. and the 95 U.S. Attorney's Offices located around the county. The U.S. Attorney's offices, including the office located in Minneapolis, Minnesota, have increasingly become active in the areas of environmental enforcement, particularly criminal enforcement. Over the past decade many of the federal environmental claims filed by the Minnesota U.S. Attorney's Office involve allegations of RCRA violations.

### C. RCRA Authorized States

Although EPA and DOJ play extremely important roles in RCRA enforcement, the primary enforcement authority for RCRA is with RCRA-authorized states. Most states now administer their own EPA-authorized RCRA programs in whole or in part in lieu of the federal RCRA program. These states have primary enforcement authority for RCRA.

In Minnesota, the Minnesota Pollution Control Agency (MPCA) is charged with implementing the RCRA regulatory program including the permitting of TSD facilities and the initial RCRA enforcement actions. Minn. Stat. § 115.071 provides that the State of Minnesota may file an action in state district court seeking civil penalties of up to $25,000 per day of violation for matters involving hazardous waste. The MPCA has administrative penalty order (APO) authority, found in Minn. Stat. § 116.072, where it may seek penalties of up to $20,000 per inspection for violations relating to hazardous wastes. The MPCA proposes Stipulation Agreements, out of court settlements that include the payment of civil penalties and commitments to undertake. Minn. Stat. § 609.671 contains a series of environmental crimes including knowing endangerment, unlawful abandonment of hazardous waste and unlawful treatment, storage or disposal of hazardous waste. Persons or businesses convicted of these felony level crimes may be subject to a penalty of up to $1,000,000 and be imprisoned for up to ten years.

### D. EPA Overfiling Authority.

EPA retains the right to enforce the states' authorized RCRA programs. Under a Memorandum of Understanding between the EPA and a RCRA-authorized state, the EPA reserves the right to take direct enforcement action if an authorized state is "unwilling or unable" to take "timely and appropriate" enforcement action. Thus, even if the state files an enforcement action, EPA may choose to "overfile" if it believes the state action does not impose an appropriate sanction or if it comes too late. It is important to note that in the overfilling scenario, EPA is enforcing the state's authorized RCRA program that may not be identical to EPA's RCRA rules.

The law on EPA's authority to "overfile" on RCRA violations in authorized states is still developing. In 1999, in Harmon Industries, Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999), the Eighth Circuit held that the EPA may overfile only when: -"(1) EPA has provided notice to the state and the state declines or fails to initiate an action; or (2) EPA withdrawals is authorization of the state's program." The Harmon court held that if a regulated party has formally settled a RCRA enforcement matter with a RCRA authorized state, the EPA is precluded from overfiling. The EPA has taken the position that Harmon

was incorrectly decided. The EPA has resisted efforts to expand the reach of Harmon to other Circuit Courts of Appeal. Generally, other Circuit Courts of Appeal have not followed Harmon and held that the EPA retains both civil and criminal enforcement powers in authorized states. See United States v. Elias, 269 F.3d 1003 (9th Cir. 2001). The "good news" for parties subject to RCRA in Minnesota and the other states that comprise the Eighth Circuit is that Harmon is settled law.

## VIII. Information Gathering

Sections 3007 and 3013 of RCRA authorize the EPA to gather information on facilities that handle hazardous waste. EPA regularly utilizes these tools to develop future enforcement actions.

Section 3007 allows the EPA to request information from any person that generates, transports, stores, treats, disposes or otherwise handles or has handled hazardous waste. EPA does not need to suspect that a violation has occurred before requesting this information. Section 3007 authority is quite broad. EPA may inspect facilities and obtain samples. Information collected through Section 3007 is available to the public subject to only "satisfactory" claims of business confidentiality.

If an owner operator of a facility that manages hazardous waste declines EPA access, the EPA has the authority to seek an ex parte administrative search warrant. Probable cause is required for such a warrant, but the standard is far less rigorous that that applied in criminal matters.

If EPA believes that the presence or release of a hazardous waste to the site "may present a substantial hazard" to human health and the environment, Section 3013 authorizes the EPA to order monitoring, testing and analysis as is "reasonable to ascertain the nature and extend of the hazard." Section 3013 can apply to the present owner/operator or to a previous owner/operator of the facility. If EPA determines that no one can satisfactorily conduct the sampling, EPA may perform the work itself and issue an order seeking reimbursement of its costs requiring reimbursement of its costs. Cost reimbursement is not available where the owner/operator performs the testing required under Section 3013 order.

Failure to comply with either a Section 3007 or 3013 order may result in the imposition of civil penalties or a court order for injunctive relief.

## IX. Civil Enforcement Proceedings

EPA may choose from several different enforcement grounds when it believes a violation of RCRA has occurred. EPA can issue an administrative order or may refer a civil action to DOJ for filing in federal district court.

EPA prefers to handle the vast majority of cases as administrative actions because there is no DOJ involvement and these matters may proceed more swiftly to final resolution.

### A. Administrative Order and Hearings

Section 3008 provides that the EPA may issue an administrative compliance order, revoke or suspend a permit and/or assess penalties of up to $32,500 per day for any violation of RCRA including any state law requirement that is part of an EPA-authorized state RCRA program.

The process typically begins when the regional enforcement attorney issues either a pre- filing notice of an administrative compliant. The pre-filing notice describes the alleged violations and states the proposed penalty amount that EPA intends to seek. The EPA typically offers a narrow window of time to negotiate a settlement. If a settlement cannot be reached, EPA will proceed to file the administrative complaint. The complaint may describe the manner in which the penalty was calculated and inform the alleged violator of a right to request a hearing before an EPA Administrative Law Judge (ALJ).

The administrative enforcement procedures are governed by the EPA's Consolidated Rules of Practice found at Part 22 of Title 40, Code of Federal Regulations. The Part 22 rules govern such matters as answers to the complaint, default judgments, discovery, informal settlement conferences, prehearing conferences, post hearing submissions and appeals. The Consolidated Rules of Practice provide relatively limited opportunities for defendants to obtain discovery or early rulings on key legal issues.

The EPA encourages settlement and usually offers to hold an informal settlement conference at about the same time as the respondent must answer the complaint. Any settlement entered into by regional enforcement staff must be submitted to the Regional Administrator of the EPA for approval. Settlements are typically incorporated into Consent Agreement and Final Orders (CAFOs) that require the payment of a specific amount of civil penalties to resolve the alleged violations and often require the completion of specified compliance measures.

If a settlement cannot be reached, an administrative hearing is held before an ALJ. The ALJ determines whether the EPA has met is burden of proof on liability issues. If the ALJ decides that a civil penalty should be assessed, the penalty is calculated by considering the EPA's worksheets outlining the reasons for the proposed penalty amount and the EPA's RCRA Civil Penalty Policy. The ALJ is not bound by either document.

The only administrative appeal from ALJ's decision is to the Environmental Appeals Board (EAB), which is comprised of three Administrative Law Judges who decide matters by majority vote. Final EAB decisions are reviewable in federal district court in accordance with RCRA and/or the Administrative Procedure Act. The actual amount of civil penalty is reviewable typically only under an abuse of discretion standard.

### B. Civil Judicial Enforcement.

In certain cases with recalcitrant parties or where violations are particularly egregious, the EPA may refer the matter to the DOJ for filing of a civil action in federal

district court.

Cases are filed in the judicial district where the alleged violations occurred. The DOJ may seek equitable relief in the form of a temporary restraining order or for permanent injunctions. Section 3008(g) authorizes the federal district court judge to impose a civil penalty of up to $32,500 per day for each violation. Courts exercise their discretion and have typically relied upon the factors in EPA's RCRA's Civil Penalty Policy or similar sets of factors.

### C. Criminal Enforcement.

Section 3008(d) lists the categories of "knowing" violations that are subject to criminal prosecution under RCRA. The most commonly sited violations are subsections (d)(l) (knowing transportation of hazardous waste to a facility that does not have a permit) and (d)(2) (knowing treatment, storage or disposal of hazardous waste without a permit or in violation of a permit or of interim status requirements). The other listed offenses involve reporting, recording keeping, manifesting waste shipments, exporting hazardous waste and the handling of used oil. The penalties for committing the offenses listed in Section 3008(g) are fines of up to $50,000 per day, imprisonment of up to five years or both.

#### 1. "Persons" Subject to Prosecution.

The term person, as used in Section 3008(d), is defined at Section 1004(15) and includes individuals, firms, corporations, partnerships, states and municipalities. These "persons" may face prosecution as direct actors, as responsible corporate officers, or under a theory of respondeat superior.

Direct actors have been held to include individuals directed committing the violation, directly supervising the act, approving general plans for the act, and implicitly directing the act. Direct actors have ranged from the president and principal stock holder of companies to lower-level employees who may not have known that the facility did not have a permit and were not authorized to obtain one for the facility.

Individual corporate officers have also been liable under the "responsible corporate officer" doctrine. Under this doctrine, a responsible corporate officer can be convicted of willfully or negligently causing a crime based on the willfulness or negligence imputed to him or her from a lower-level employee. EPA is not required to prove that the officer had, in fact, exercised authority over the employees who committed the acts.

Corporations or other organizations can be held indirectly liable under the collective knowledge theory or respondeat superior. A corporation is considered to have acquired the collective knowledge of its employees within the scope of their employment, and is responsible for their illegal acts. In addition, a corporation may be held accountable or the acts of its employees committed within the scope of their employment. Corporations are attractive criminal targets for prosecutors because of

their assets (ability to pay) and their lack of protection from self-incrimination under the Fifth Amendment.

### 2. What Conduct Constitutes a "Knowing" Violation.

Congress did not define the term "knowing" in Section 3008(d). Courts interpreting the term have applied a fairly broad definition.

Under Section 3008(d)(l) courts have readily upheld convictions for "knowing" transporting hazardous waste to a facility without a permit. The EPA has been required only to prove the defendant knew the facility receiving the hazardous waste did not have a permit. The "knowing" element can be proved either circumstantially or by showing a willful failure to determine permit status of the receiving facility. Most importantly, the

EPA has not been required to prove that the defendant knew the material in questions was classified as a "waste" under RCRA or knew the material in question was classified as "hazardous" under RCRA.

The scienter element under Section 3008(d)(2) which relates to treatment, storage or disposal without a permit, is ambiguous. The majority rule is that the defendant need not "know" legal status of the waste, so long as the defendant knew the waste was potentially harmful. Several courts found this approach held that the defendant need not "know" that the facility did not have a permit to treat, store or to disposal of hazardous waste.

Section 3008(e) creates a series of enhanced "knowing endangerment" offenses. The maximum penalty for an individual is a $250,000 fine and 15 years imprisonment. For an organization, the maximum penalty is $1,000,000.

## X. Citizen Suits

Under Section 7002 of RCRA citizens may initiate suit in response to alleged violations. The number of citizens suits filed under RCRA has not approached the number of cases filed under the Clean Water Act. Nevertheless the federal cause of action provided by Section 7002, with its explicit attorney fee shifting provision remains attractive to potential plaintiffs.

Section 7002(a)(l)(A) authorizes suits against any person, including the federal government, for violations of solid hazardous waste regulations and permits. A citizen suit can also be maintained under Section 7002(a)(l)(B) against past and present waste handlers for an ''imminent and substantial endangerment." Plaintiffs must provide notice before commencing actions - except for a violation of hazardous waste regulations - and such actions will be precluded by ongoing "diligent prosecution" by the EPA or a RCRA authorized state. Citizen suit relief includes civil penalties and injunctions.

The citizen suit provisions in RCRA are broader than those found in other environmental statutes. First, actions can be maintained to abate imminent and substantial

endangerment, as well as to abate violations of regulations and permits. Second, civil penalties can be recovered. Third, there is no lengthy notice period before filing for violations of hazardous waste regulations.

On the other hand, the RCRA citizen suit provisions are narrower than those found in other environmental statutes in that they cannot be used to challenge siting and permitting decisions. Moreover, the practical evidentiary burdens facing the plaintiff are greater under RCRA because the regulatory program is so much more complex.

## XI. Conclusion

Congress gave the EPA, DOJ, RCRA authorized states and private citizens an array of powerful tools to use in enforcing RCRA. These tools are being used with an increasing frequency and severity. Courts have enhanced the enforcement potential with rulings favorable to EPA on the very limited degree of "knowledge" needed for criminal conviction under RCRA. Therefore, nearly any violation of the RCRA regulatory scheme can now be successfully prosecuted as a criminal offense regardless of its environmental significance.

The potential for criminal sanctions has clearly caught the attention of corporate America. The current enforcement climate makes it imperative for companies - large or small - that handle hazardous waste to be very attentive to their RCRA compliance status and to consider conducting compliance audits to avoid any potential violations.

Appendix A

Common Hazardous Wastes

- Used batteries
- Spent plating and cyanide wastes
- Acids and bases
- Ignitable wastes
- Ink sludge containing chromium and lead
- Dry cleaning filtration residues
- Heavy metal and inorganics
- Pesticides
- Reactives
- Wood preserving agents
- Solvents
- Contaminated shop towels and reusable absorbents
- Volatile organic compounds
- Used oil

Appendix B

Typical Hazardous Waste Generated by Small Businesses

| Type of Business | How Generated | Typical Wastes |
|---|---|---|
| Drycleaning and Laundry Plants | Commercial drycleaning processes | Still residues from solvent distillation, spent filter cartridges, cooked power residue, spent solvents, unused perchloroethylene |
| Furniture/Wood Manufacturing and Refinishing | Wood cleaning and wax removal, refinishing/stripping, staining, painting, finishing, brush cleaning and spray brush cleaning | Ignitable wastes, toxic wastes, solvent wastes, print wastes |
| Construction | Paint preparation and painting, carpentry and floor work, other specialty contracting activities, heavy construction wrecking and demolition, vehicle and equipment maintenance for construction activities | Ignitable wastes, toxic wastes, solvent wastes, paint wastes, used oil, acids/bases |
| Laboratories | Diagnostic and other laboratory testing | Spent solvents, unused reagents, reaction productions, testing samples, contaminated materials |
| Vehicle Maintenance | Degreasing, rust removal, paint preparation, spray booth, spray guns, brush cleaning, paint removal, tank cleanout, installing lead-acid batteries, oil and fluid replacement | Acids/bases, solvents, ignitable wastes, toxic wastes, paint wastes, batteries, used oil, unused cleaning chemicals |
| Painting and Allied Industries | Plate preparation, stencil preparation for screen printing, photoprocessing printing, cleanup | Acids/bases, heavy metal wastes, solvents, toxic wastes, ink, unused chemicals |

| | | |
|---|---|---|
| Euipment Repair | Degreasing, equipment cleaning, rust removal, paint preparation, painting, paint removal, spray booth, spray guns, and brush cleaning | Acids/bases, toxic wastes, ignitable wastes, print wastes, solvents |
| Pesticide End-Users/ Application Services | Pesticide application and cleanup | Used/unused pesticides, solvent wastes, ignitable wastes, contaminated soil (from spills), contaminated rinsewater, empty containers |
| Educational and Vocational Shops | Automobile engine and body repair, metalworking, graphic mis-plate preparation, woodworking | Ignitable wastes, solvent wastes, acids/bases, paint wastes |
| Photo Processing | Processing and developing negatives/prints, stabilization system cleaning | Acid regenerants, cleaners, ignitable wastes, silver |
| Leather Manufacturing | Hair removal, bating, soaking, tanning, buffing, and dyeing | Acids/bases, ignitable wastes, toxic wastes, solvent wastes, unused chemicals |

# APPENDIX C

## Resource Conservation and Recovery Act (RCRA) Websites

**U.S. Environmental Protection Agency (EPA) Websites/Resources**

RCRA Online http://www.epa.gov/rcraonline

RCRA Law and Regulations https://www.epa.gov/rcra

RCRA Focus: Industry Specific Information https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-regulations#haz

RCRA Orientation Manual https://www.epa.gov/hwgenerators/resource-conservation-and-recovery-act-rcra-orientation-manual

RCRA Frequently Asked Questions http://www.ehso.com/Hazwaste/hazwasteFAQs.htm

RCRA Civil Penalty Policy https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy

Supplemental Environmental Project Civil Penalty Mitigation
https://www.epa.gov/enforcement/supplemental-environmental projects-seps

EPA Audit Policies http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html

**Minnesota Pollution Control Agency (MPCA) Websites/Resources**

Hazardous Waste Publications and Compliance Resources
https://www.pca.state.mn.us/waste/hazardous-waste-documents-and-forms

Hazardous Waste Generator License Application Database
http://www.pca.state.mn.us/waste/hazardousReport.cfm
https://rsp.pca.state.mn.us/dep/DEP_RSP/hlp/page/hw_license_help.html

Hazardous Waste Manifests https://www.pca.state.mn.us/waste/hazardous-waste-manifests

Biennial Hazardous Waste Report http://www.pca.state.mn.us/waste/brs.html
https://www.pca.state.mn.us/waste/biennial-hazardous-waste-report

RCRA Corrective Action in Minnesota http://www.pca.state.mn.us/cleanup/rcra.html
https://www.pca.state.mn.us/waste/resource-conservation-and-recovery-act-rcra-corrective-action

MPCA Quarterly Summary of Enforcement Actions
hhttps://www.pca.state.mn.us/regulations/quarterly-summary-enforcement-actions