

# U.S. EPA AMENDS THE HAZARDOUS WASTE GENERATOR IMPROVEMENTS RULE

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The generation of hazardous waste is regulated by the United States Environmental Protection Agency (U.S. EPA) under the Resource Conservation and Recovery Act (RCRA). On November 28, 2016, the U.S. EPA finalized revisions to the RCRA hazardous waste generator regulatory program.

The final rule, known as the Hazardous Waste Generator Improvements Rule (GIR), includes over 60 changes to the hazardous waste generator regulations and is the culmination of a comprehensive review of the regulations that began in 2004. The revisions reorganize the structure of the regulatory program and address certain gaps in the existing regulatory structure. Additionally, the revisions were intended by the U.S. EPA to make the regulations easier to understand and provide greater flexibility for generators.

## Amendments to the Generator Regulations

One of the U.S. EPA's goals with the GIR was to reorganize the generator regulations to make them more user-friendly. To accomplish this, the U.S. EPA moved all of the RCRA generator provisions into one section – 40 C.F.R. Part 262 – and made conforming changes to citations elsewhere in RCRA.

The GIR also includes several substantive changes to the requirements applicable to hazardous waste generators. As one example, large quantity generators (LQGs) are now required to notify the U.S. EPA or their respective States when they close the facility. The U.S. EPA believes that the notification requirement will allow implementing agencies to confirm that LQGs have complied with closure performance standards. LQGs with waste accumulation units that fail to clean close will be required to close as a landfill. Additionally, under the GIR, LQG contingency plans must include a “quick reference guide” with the information most critical for emergency responders.

Beginning in 2021, small quantity generators (SQGs) will be required to re-notify

every four years, instead of the one initial notification previously required. State agencies will have more up-to-date information regarding SQGs that change ownership, go out of business, or change regulatory category.

The GIR revisions impose new marking and labeling requirements for SQGs, LQGs and transporters, including the identification of hazards associated with hazardous wastes that are accumulated in containers, tanks, drip pads, and containment buildings. Hazards may be indicated using several established methods, e.g., Department of Transportation (DOT) labeling/placarding, Occupational Safety and Health Administration (OSHA) hazard statement

EPA means by “generator knowledge” as it relates to the determination of whether a listed or characteristic hazardous waste has been generated. Hazardous waste counting is also addressed in the GIR and the regulations clarify that a generator can only be in one category during a calendar month.

The GIR replaces the “conditionally exempt small quantity generator” (CESQG) category with a “very small quantity generator” (VSQG) category for facilities generating less than 100 kg of non-acute hazardous waste and/or 1 kg or less of acute hazardous waste per month. Under the GIR, VSQGs are allowed to send hazardous waste to a LQG under the “control” of the same company for consolidation. Moreover,

AS THE FINAL RULE EXPLAINS, “[T]HE PRIMARY LEGAL CONSEQUENCE OF NOT COMPLYING WITH THE CONDITION FOR EXEMPTION IS THAT THE GENERATOR WHO ACCUMULATES WASTE ON SITE CAN BE CHARGED WITH OPERATING A NON-EXEMPT STORAGE FACILITY,” AND IS “POTENTIALLY IN VIOLATION OF MANY STORAGE PERMIT OPERATIONS REQUIREMENTS...”

or pictogram, National Fire Protection Association (NFPA) chemical hazard label, or applicable RCRA hazardous waste characteristic.

The GIR also clarifies the regulations governing hazardous waste determinations by codifying a long-standing U.S. EPA interpretation that hazardous waste determinations must be made at the point of generation and prior to any dilution, mixing, alteration, or change in properties of the waste. (The U.S. EPA considered requiring documentation of non-hazardous waste determinations, but did not include this requirement in the GIR, although this is recommended in the final rule as a best management practice.) The GIR provides additional explanation as to what the U.S.

under certain conditions, VSQGs and SQGs are now allowed to maintain their existing regulatory category when they generate additional amounts of hazardous waste as a result of a planned or unplanned “episodic” event. The GIR imposes notification and recordkeeping requirements with these new changes to the hazardous waste generator rules. The consolidation and episodic generation rules will potentially allow companies to reduce recordkeeping and reporting requirements, negotiate better terms for waste disposal, and utilize the episodic generation rule to schedule maintenance, cleaning, and other operational activities to avoid the requirements applicable to a higher generator classification.

The GIR defines “independent require-

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ment” and “condition for exemption,” and codifies the U.S. EPA policy that a generator that does not comply with a condition for exemption will be considered a non-exempt storage facility. As the final rule explains, “[t]he primary legal consequence of not complying with the condition for exemption is that the generator who accumulates waste on site can be charged with operating a non-exempt storage facility,” and is “potentially in violation of many storage permit and operations requirements. . . .”

### Challenges to the GIR

Several industry groups challenged the GIR by filing a petition for review in the Court of Appeals for the D.C. Circuit on February 24, 2017. One of the main issues raised in the petition was the potential for generators to be in violation of numerous storage permit requirements and other requirements as a result of a single violation of a “condition for exemption.” A briefing schedule was posted on April 25, 2017, and final briefs on the issues were scheduled to be due on September 8, 2017. On May 22, 2017, the U.S. EPA filed a joint unopposed motion to hold the case in abeyance pending discussions between the parties. The latest status report filed by the parties on November 27, 2017 stated that the parties are still engaged in discussions and believe

that further discussions may resolve or narrow the issues in the case. The parties requested that the case continue to be held in abeyance.

### Effective Date of the Regulations

For states without an authorized hazardous waste program (Iowa and Alaska), the GIR went into effect on May 30, 2017. Authorized states, including Illinois and Missouri, will be required to adopt the provisions of the GIR that are more stringent than the current RCRA generator regulations in order to retain their authorized status. Pursuant to 40 C.F.R. § 271.21(e)(2) (ii), authorized States are required to adopt the more stringent provisions of the GIR by July 1, 2018 (or July 1, 2019 if a statutory change is required).

The above-described provisions of the GIR regarding VSQG consolidation and episodic generation are less stringent than the current RCRA generator rules and States can elect, but are not required, to adopt these provisions. Because states have discretion to adopt the VSQG consolidation and episodic generation provisions and other provisions of the GIR that are neither more nor less stringent, there is likely to be considerable interest on the part of regulated industries and non-governmental organizations in the State rulemaking proceed-

ings involving the GIR.

The Illinois Pollution Control Board’s (Board) consolidated rulemaking docket encompassing the GIR is In the Matter of RCRA Subtitle D (Municipal Solid Waste Landfill) and Subtitle C Updates, R 17-14 and R 17-15. On October 19, 2017, the Board issued an order extending the deadline for completing the rulemaking to June 1, 2018 due to delays in developing a proposed rule and the “considerable effort” required to incorporate the GIR and other amendments into the Illinois rules. The Board’s order also includes a schedule for completion of the rulemaking, under which the proposed amendments will be published in February 2018 with a public comment period that will end on April 9, 2018.

According to the U.S. EPA, the revisions in the GIR may affect up to 676,890 industrial entities that generate hazardous waste. While the GIR was intended by the U.S. EPA to increase flexibility and clarify certain issues, the GIR also imposes additional requirements and increases the burden imposed on hazardous waste generators. Hazardous waste generators should become familiar with the revised generator provisions in the GIR and the actions being taken in the ongoing Illinois rulemaking proceedings. ♦

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