



Hazardous Waste Determinations: What You Need to Know to Comply

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EPA issued its *Hazardous Waste Generator Improvements Rule* in November of 2016 to, among other things, add greater flexibility in how hazardous waste is managed. But the rule also tightened up certain requirements, most notably how hazardous waste determinations must be made and documented. The changes come on the heels of an estimated 20 to 30 percent non-compliance rate for this essential first step. Successfully navigating the waste management process hinges on accurately determining whether the waste is hazardous. This article reviews the requirements of the 2016 rule and how they apply to your business.

Eliminating any lingering doubts, the rule clarifies existing requirements by stating that a generator's waste determination must be accurate. It is not enough to simply make a determination and proceed down the waste management path -- accuracy is essential. To aid generators in making an accurate determination, the rule mandates that the waste determination be made at the point of generation, before any dilution, mixing, or alteration occurs. But the duty to make an accurate determination does not end there; the rule also requires a new waste determination during management of the waste if there is reason to believe the properties of the waste may have changed. Thus, it is critical for generators to understand the chemical properties of their wastes and how they might change through exposure to the environment or other factors. If non-hazardous waste has the ability to become hazardous waste under certain circumstances, generators must make a determination again if those circumstances occur.

The rule retains the ability of the generator to use "knowledge of the waste" to determine whether a solid waste meets one of the descriptions of listed hazardous waste or exhibits a characteristic of hazardous waste, i.e., ignitability, corrosivity, reactivity, or toxicity. As guidance, the rule provides examples of acceptable knowledge for making these determinations, including knowledge of waste origin, composition, the process producing the waste, feedstock, and other reliable and relevant information. The examples listed are merely illustrative and are not exhaustive. If available knowledge yields inconclusive or inadequate results, the generator is then required to test the waste for hazardous characteristics.

?Acceptable knowledge? is a flexible concept that affords generators considerable latitude, but it is not without limits. Needless to say, EPA does not view guessing as an acceptable practice. Generators must base their determination on relevant and reliable information and be able to present that information in a logical, organized way. Although generators have expressed concern that regulators will view knowledge-based determinations to be less accurate than testing, EPA has indicated that it expects most hazardous characteristic determinations will be made using generator knowledge. EPA says it expects testing to be limited to circumstances where it is necessary to resolve any uncertainty.

Critical to the hazardous waste determination process are the recordkeeping requirements. While recordkeeping itself is not a new obligation, the rule expands upon what types of information generators must maintain to document their hazardous waste determinations. Documents to be retained include, but are not limited to, the results of any tests, sampling, waste analyses, or other determinations; records documenting the tests, sampling, and analytical methods to demonstrate their reliability; records consulted to determine the process generating the waste, the composition of the waste, and the properties of the waste; and records explaining the knowledge basis for the generator?s determination. This last requirement is key. If a generator makes a determination without conducting a test, it must still document and keep records of the basis for its knowledge-based determination. These records must be maintained for three years from the date the waste was sent to on-site or off-site storage, treatment, or disposal facilities. The rule does not require generators to keep records of non-hazardous waste determinations. However, some state programs impose more stringent standards requiring records of both hazardous and non-hazardous determinations, and EPA suggests maintaining records of non-hazardous determinations as a best management practice.

Lastly, if waste is determined to be hazardous, generators must identify all applicable EPA hazardous waste codes and mark all containers with the applicable codes before shipping the waste off-site.

While the rule became effective on May 30, 2017 in states without an EPA-authorized hazardous waste management program, most states are authorized by EPA to run their own hazardous waste management program. In those states, the rule was required to be adopted into the state program by July 1, 2018 or July 1, 2019, depending on the state?s regulatory process. You should consult your state?s program to determine whether these requirements now apply to you. Regardless, implementing these procedures now can help ensure your compliance and save you from making a big mistake.

40 C.F.R. § 262.11; *Hazardous Waste Generator Improvements Rule*, 81 Fed. Reg. 85748-85755 (Nov. 18, 2016).

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