SOCMA
Society of Chemical Manufacturers & Affiliates

December 24, 2015

Environmental Protection Agency
Office of Resource Conservation & Recovery (5304P)
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments on EPA's Proposed Hazardous Waste Generator Improvements Proposed Rule; Docket ID No. EPA-HQ-RCRA-0121

Dear Sir or Madam:

The Society of Chemical Manufacturers and Affiliates (SOCMA) is pleased to submit these comments on the above-referenced proposal.[1]

Since 1921, SOCMA has represented a diverse membership of small, medium and large chemical companies located around the world. Collectively, SOCMA members are key drivers of a successful economy, contributing $24 billion annually to the U.S. GDP. Our members play an indispensable role in the global chemical supply chain by producing intermediates, specialty chemicals and ingredients used to develop a wide range of industrial, commercial and consumer products essential to the well-being and lives of people everywhere. More than 80 percent of SOCMA's U.S.-based manufacturing members are small businesses.

Introduction/Summary

SOCMA believes that the RCRA generator rules could be improved. But the benefits of the improvements offered are far offset by the costs and risks of the many adverse or uncertain changes proposed. EPA should either dramatically scale back the current proposal or simply drop the rulemaking altogether.

In Part I of these comments, we address two broad topics that underlie all of our other comments: (1) the lack of evidence that the current generator rules have led to actual harm to public health or the environment, and (2) EPA's statutory mandate to express RCRA generator requirements as requirements, not conditions of an exemption. In Part II, we discuss provisions that EPA has identified as being beneficial to generators. Finally, in Part III, we explain our concerns with other aspects of the proposal. Wherever relevant, we highlight the impact of the proposal on batch & specialty chemical manufacturers.

[1] 80 FR 18330 (April 6, 2015).

Discussion

I. General Comments

A. EPA Has Given No Indication that the Current Generator Rules Have Led to Harm to Human Health or the Environment

1. Introduction

EPA talks of becoming aware of "ambiguities and gaps" in the hazardous generator regulations" over the last 30 years, "which, if corrected, could make the program more effective in protecting human health and the environment." Additionally, the Agency notes its increasing awareness of "certain inflexibilities" in the generator regulations over that same time period. Thus, EPA notes that is proposing changes to the program "to address these shortcomings." EPA adds that, "while relatively minor on an individual basis," the proposed changes are expected to significantly improve regulatory efficiency and provide further protection of human health and the environment."[2]

But while clarifying ambiguities and gaps, and increasing flexibility, are admirable goals, EPA has failed to offer evidence that the current generator rules have in fact led to harm to human health or the environment.

2. The proposal's costs outweigh its benefits

EPA's own analysis concludes that the costs of the proposal exceed the benefits by up to $5.2 million, with the overwhelming majority of the benefits deriving from voluntary provisions.[3] EPA argues that "the most significant costs under the mandatory provisions of the proposed rule are associated with the marking/labeling requirements." The Agency also points out that the average costs reported (between $80 - $170 for SQGs, for example) "may not be reflective of the actual costs that an individual facility may experience."[4] While EPA is implicitly contending that the costs for an individual facility may very well be less than the average cost, the opposite is obviously just as likely to be true.

In such a situation, E.O. 12866 requires the Agency to show that existing rules are demonstrably allowing harm to human health and the environment to an extent that

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[2] *Economic Assessment of the Potential Costs, Benefits, and Other Impacts of the Improvements to the Hazardous Waste Generator Regulatory Program, As Proposed*, Industrial Economics, Inc. / EPA, June 2015 p. ES-2

[3] *Ibid*, p. ES-19

[4] *Ibid*, p. ES-10

justifies the costs of this new rulemaking, which by EPA's own admission will likely impose more costs than benefits on an already stressed regulated community.[5]

EPA suggests that the net benefits of the proposal are underestimated, noting that "only some categories of benefits are quantifiable… For the majority of benefits, sufficient data are not available to support a detailed quantitative analysis."[6] Hence, EPA also attempts to assess a variety of non-monetized benefits. We would counter that the problem of insufficient data applies to estimating *the costs* of the proposal, as well, perhaps, significantly.

Insufficient data, in fact, underlies some of the most basic features of the proposed rule. The Agency admits, for example, that "there is considerable uncertainty regarding the number of facilities that generate hazardous waste in the United States and its territories." To take one example, in order to estimate the number of CESQGs nationwide, EPA "extrapolates from the limited data collected from several states." An extrapolation from limited data from a relative handful of states does not inspire confidence that the picture being painted of the universe of CESQGs is an accurate one. Similarly, EPA notes that it relies primarily on its BR database (and its RCRAInfo database) to estimate the number of LQGs and SQGs, but adds in a footnote that "[t]here is uncertainty regarding the comprehensiveness of the BR database due to underreporting associated with noncompliance by LQGs. The degree to which LQG facilities may fail to submit BR records to EPA is unknown."[7] One might reasonably question just how reliable cost and benefit estimates are (and particularly, how much they may be underestimating both) if the basic data upon which these estimates are drawn from offers a distorted – and understated – portrayal of the regulated community.

3. EPA hasn't considered the cumulative burdens of its proposal

Finally, it is striking how often the Agency seeks to minimize the costs of various provisions of the proposal. Sprinkled repeatedly throughout the preamble, EPA contends "[t]he Agency does not believe this condition [or requirement] will pose an undue burden" or words to that effect.[8] Or, EPA argues, for one reason or another, "we believe the burden imposed on such facilities should be minimal."[9] While an individual condition or requirement may, in fact, not pose an "undue burden" by itself, as EPA suggests, there is no apparent recognition of the cumulative impact of such conditions and requirements. Such cumulative effects are felt most acutely by

[5] *See* E.O. 12866, ¶ 1(b)(6) (Sept. 30, 1993).
[6] *Costs, Benefits*, p. ES-13
[7] *Ibid*, p. 2-2
[8] For example, see the discussion on labeling and marking of containers for VSQGs (80 Fed. Reg. 57931) or the discussion on the condition for exemption for LQGs on recordkeeping (*id.* at 57932).
[9] See the discussion on requiring biennial reporting for owners or operators of facilities the recycle hazardous waste without storing it (*id.* at 57933).

small and medium-sized businesses. Since more than 80% of SOCMA's members fall in that category, we are particularly sensitive, and vulnerable, to this issue.

EPA's call for requiring documentation of all of one's hazardous waste determinations, including when a solid waste is determined to not be a hazardous waste, epitomizes this seemingly casual dismissal of cost concerns. As discussed in Part III.B.1, we believe that EPA does not have authority under RCRA Subtitle C to regulate materials which are not in fact hazardous waste. Apart from that issue, however, we have also been struck by EPA's language regarding costs: "[W]e believe the benefits to human health and the environment far outweigh the minimal costs of requiring SQGs and LQGs to document hazardous waste determinations, including determinations where the solid waste was found not to be a hazardous waste."[10] What possible benefits can accrue from documenting that something is not hazardous?

The Agency argues that, "for the most part, SQGs and LQGs will make a hazardous waste determination once and will not need to make a new solid waste determination unless something changes in their process, thereby reducing the need to document waste determinations."[11] Clearly, the writers of this section of the preamble are not familiar with specialty batch chemical manufacturing companies, which comprise the bulk of SOCMA's membership. Many of our members generate hundreds of not thousands of waste streams per year, and their product lines often change from month to month, let alone from year to year. The notion of "generat[ing] the same hazardous waste streams from year to year" and thus needing to make a solid waste determination once is far from the reality of batch manufacturers. The very nature of batch manufacturing consists of very frequent changes to their manufacturing processes. In these cases, the burden would most assuredly not be minimal, and would be disproportionately felt by small and medium sized businesses.

To its credit, EPA does recognize "situations where a generator generates many different hazardous waste stream each year," examples which include chemical manufacturers. But then, the Agency argues that, while "chemical manufacturers may generate many different types of hazardous waste, many of them also have sophisticated protocols and testing procedures in place to make a hazardous waste determination. These processes should be sufficient to provide the proposed documentation to verify that the solid waste is or is not a hazardous waste."[12] This statement ignores the costs of having to stop and create, and preserve, unnecessary records that document judgments based on process knowledge. These costs are real for small and medium-sized businesses which are generating hundreds or thousands of waste streams annually.

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[10] *Id.* at 57942
[11] *Id.* at 57943
[12] *Id.* at 57944

4. EPA has not presented evidence warranting a new rulemaking

As previously noted, EPA has not presented damage cases demonstrating that the existing generator standards are causing harm to human health and the environment. The treatment of waste determinations in the proposal is but one example. In addressing the issue, EPA notes that, "[i]f an incorrect hazardous waste determination is made (i.e. a hazardous waste is identified as non-hazardous), there is a strong *possibility* that the waste will not be managed appropriately, *potentially leading to* environmental releases and damage."[13] And, the Agency continues,

> From experience with the waste determination program, the Agency has found that there are a number of situations in which generators may misclassify their wastes. In some cases, generators overlook certain wastes that are unrelated to their production processes, discarding them in the trash without realizing that they have discarded a hazardous waste. In other cases, generators may not understand how the hazardous waste characteristics or listings regulations may apply to the waste.[14]

The Agency also notes that states have identified difficulties that generators have had in making hazardous waste determinations. Thus, EPA concludes, "[t]he importance of generators making an accurate hazardous waste determination cannot be overemphasized."

And yet again, EPA does not cite specific evidence of actual environmental damage resulting from these asserted misidentifications. The failure to make accurate waste determinations, *potentially* leading to the mismanagement of waste and environmental damages, does not, by itself, justify a new regulatory action. This is particularly true when, as previously noted, the estimated costs of the rule outweigh the benefits. For starters, in citing studies which show different non-compliance rates (ranging from 13–38%), EPA really only demonstrates problems with its data collection and enforcement.[15] We would argue that it is difficult to draw sweeping conclusions from data which vary significantly, nor does that data actually reveal specific environmental damage that resulted. In any event, demonstrating that there is a problem with non-compliance with existing hazardous waste determinations at some level is not necessarily justification for creating new regulations. In the case of waste identification, it is a call for more rigorous enforcement of the existing regulations.

EPA notes that it is seeking to improve the understanding of the hazardous waste determination regulations and to clarify the interpretation and application of the regulations in specific circumstances. We would suggest that the Agency could

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[13] *Id*. at 57936 (emphasis added).
[14] *Id*.
[15] *Id*. at 57937

achieve those goals through the issuance of new or updated guidance and concerted outreach to stakeholders, rather than through this new rulemaking.

B. As Required by Statute, EPA Should Express Generator Requirements as Requirements, Not as Conditions of Exemption from TSD Status

The proposal highlights the distinction among the Part 262 requirements between those that are "independent requirements," for violations of which a generator can be penalized, and "conditions for exemption," for violations of which a generator will be treated as an unpermitted hazardous waste storage facility.[16] Indeed, EPA proposes to accentuate this distinction by defining the two terms just quoted.[17] This distinction is unnecessary at best, however, and arguably violates the statute. In the final rule, EPA should eliminate it, and should only establish independent requirements for generators.[18]

The preamble begins its discussion of this issue claiming that, "[w]hen RCRA was enacted in 1976, the law did not explicitly address whether a permit would be required for generators accumulating hazardous wastes."[19] This claim might uncharitably be described as false. To the contrary, the law did – and still does – speak directly to who needs to get permit and who doesn't. Section 6924 ("Standards applicable to owners and operators of treatment, storage and disposal facilities") directs EPA to set standards for such facilities (TSDs) that "shall include, but not be limited to, requirements respecting" seven categories of topics, the last of which is "compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal."[20] By contrast, Section 6922 ("Standards applicable to generators of hazardous waste") directs EPA to set standards for generators that "shall establish requirements respecting" six categories of topics, none of which involves permitting. Not "including, but not limited to," but simply those six topics. Thus, Congress explicitly required permitting for TSDs, but it omitted that requirement for generators, and it did not give EPA discretion to devise new categories of requirements for generators (e.g., permitting) in the same way that it did for TSDs. For generators, Congress explicitly required EPA solely to establish "requirements."

What's more, Section 6925 clearly envisions that the people required to get TSD permits would be applying for them because of their intent to be TSDs. It speaks of individuals owning or operating existing facilities "or *planning to* construct a new

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[16] *Id.* at 57922.
[17] *Id*. at 57922 footnote 8, 57933-34.
[18] Perhaps this is the "novel legal or policy issue[] arising out of legal mandates" that warranted designating this a "significant regulatory action." *See id*. at 57988.
[19] *Id*. at 57922.
[20] 42 U.S.C. § 6924(a)(7).

facility,"[21] and calls for permit applications to include information regarding the wastes "*proposed to* be disposed of, treated, transported, or stored . . . ."[22] It is hard to reconcile this sort of forward-looking, intentional language with the idea that a generator could involuntarily become a TSD every time it violated a condition of an exemption.

Given the plain Congressional distinction just explained, it should not surprise EPA that "it was clear in the legislative history of RCRA that Congress did not want to interfere with commerce and impose permitting requirements on every generator who accumulated hazardous wastes."[23] Indeed, it was clear that Congress did not want to impose permitting requirements on *any* generators of hazardous waste, unless they intend also to treat, store or dispose of it.

EPA has flipped this distinction on its head, however, and essentially takes the view that anyone handling hazardous waste needs a permit unless that person can qualify for an exemption from that default requirement. The preamble speaks of generator status as "an optional exemption from other requirements."[24] It speaks of the conditions it seeks to impose as necessary "only if [a generator] wants the benefits of an exemption from RCRA permitting . . . ."[25]

EPA's approach is contrary to Congressional intent. It also unduly complicates what could be a much simpler set of regulations. And, most important, because of the consequences of involuntarily becoming a TSD, EPA's approach gives it unfair leverage to punish minor violations of the generator rules with disproportionately draconian sanctions. We return to these latter two points throughout these comments.

None of this is necessary. EPA can and should draft and interpret the generator rules as simply imposing requirements on generators, and should avoid expressing those requirements as conditional exemptions from a default requirement to obtain a permit.

II. Actually, Potentially and Assertedly Beneficial Provisions

The RCRA generator rules have been in effect for 35 years, and EPA has been considering potential changes to them for over a decade. Generators, states and EPA understand them well, and substantial changes are not warranted. The proposal does identify several beneficial changes, which SOCMA supports. Several other proposed changes are promising, and could be even more beneficial if EPA were to adjust them as explained below. For some other proposed improvements, however,

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[21] *Id*. § 6925(a) (emphasis added).
[22] *Id*. § 6925(b)(1) (emphasis added).
[23] 80 Fed. Reg. 57922.
[24] *Id.*
[25] *Id*. at 57933-34.

SOCMA members cannot see how they would be useful. We would be happy to talk with EPA about why it thinks they would. We would support changes if they would be beneficial to generators.

A. Consolidation/Rationalization of Rule Provisions

The proposal would make a number of technical changes, such as consolidating all the regulatory provisions applicable to generators in 40 CFR Part 262. These changes would be helpful, especially for people who are new to RCRA. People who deal with RCRA a lot eventually figure these things out, but there is no reason to perpetuate less than optimal regulatory configurations -- which can only serve as traps for the unwary.

SOCMA also supports EPA's proposal to rename conditionally exempt small quantity generators (CESQGs) as very small quantity generators (VSQGs). Doing so would be consistent with the statutory requirement to treat generator requirements as requirements and not conditions of an exemption, as discussed in Part I.B above.

B. Episodic Generation

SOCMA strongly supports EPA's proposal to allow VSQGs and SQGs to exceed the applicable monthly generation limit at least once a year as a result of unplanned events. Batch and specialty facilities are inherently more likely to experience such events than facilities that make a single product continuously:

- Specialty products are made to high standards, and a bad batch is always at least a possibility.

- Sometimes a customer becomes unable to take delivery of a product – or returns a product – that cannot be repackaged or reworked.

- Batch operations can generate a slug of hazardous waste when a stored raw material exceeds its shelf life and needs to be disposed of rather than used in the process.

- Products and raw materials can also go out of specification if the manufacturing process is disrupted due to a power interruption, or become contaminated from flooding or roof leaks.

EPA's proposal would free such facilities from the time and resource-demanding obligation to meet the requirements applicable to the next-higher-level category of generators, when the facility has no intent to remain at that level of regulation.

We believe such exceedences may well occur more than once a year in some cases without being indicative of poor materials or waste management, and without being

indicative that the facility will "likely to be routinely generating greater amounts of hazardous waste." Thus, we support allowing something more like two-three per year. At a minimum, we support EPA's proposal that facilities be able to petition EPA for additional exceedences within a year of such an exceedence occurring. That said, we have some suggestions for limiting the unnecessary aspects of this proposal:

- Facilities should not have to give notice of their exceedence to the local fire department. We agree that notifying EPA is essential "to enable adequate compliance monitoring of the facility with the conditions of the alternative standards."[26] Notification of the fire department is not necessary for this purpose, however – fire departments simply are not going to inspect small generators to ensure that they are temporarily complying with transitory requirements. Fire departments – most of which are volunteer in the United States – simply do not have the time, or have better things to do with their time.

- Facilities should not have to get the unplanned waste amounts offsite within 45 days. It would be most logical for a facility to have to meet the time limits applicable to the category to which it has been bumped up for that month; i.e., 90/180/270 for SQGs and 90 days for LQGs. A generator that temporarily becomes a SQG or LQG is not inherently any less able to manage the extra quantity of waste safely than is a generator that is continuously in the relevant category.

- The preamble says that if a facility has an additional unplanned release, it has 24 hours to notify EPA of that fact.[27] The text of the proposed regulation does not say this, however.[28] EPA should correct the final CFR language to track the preamble.

C. Waiver of 50-Foot Setback Requirement

SOCMA supports EPA's proposal to allow LQGs to apply for a waiver from their local fire departments if they are unable to meet the requirement that LQGs maintain containers of ignitable and reactive wastes at least 15 meters (50 feet) from the site's boundary. Many SOCMA members' facilities are located in urban areas and are unable to meet this requirement without a waiver. (At least one member company has such a waiver now from its state.) The waiver option would also give more flexibility to many other SOCMA members, who can meet the requirement, but only by unnecessarily rearranging their operations.

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[26] *Id.* at 57974.
[27] *Id.* at 57976.
[28] *Id*. at 58006 (proposed § 262.234).

D. Adequacy of DOT HazMat & OSHA HazCom Requirements

SOCMA is glad to see EPA say that its proposals for enhanced labeling of hazardous waste containers and tanks could be satisfied by compliance with DOT or OSHA marking requirements.[29]. Both of these programs have been around for decades and their effectiveness is well understood. It is vastly more efficient and simpler to allow facilities to meet these RCRA requirements by means of DOT and OSHA regulations directed toward the same hazards when the facilities will have to comply with those other requirements in any event.

We are concerned, however, by the preamble's implication that these standards may not be adequate. In particular, we are not aware of any circumstances where the DOT shipping name would be inadequate to identify the contents of a container.[30]

E. Ability for VSQGs to ship wastes to LQGs

SOCMA has discussed this particular proposal at great length with its members, but they have been unable to identify a circumstance where they could benefit from it. Our principal perplexity is where any savings would be realized. A VSQG shipping to an affiliated LQG instead of a commercial TSD would still have to package, label and manifest the waste for shipment, so the proposal would not avoid those costs. (Things might be different if the affiliated LQG was on contiguous property, but that seems a very rare situation.)

Also, as a general best practice, businesses want to minimize handling of wastes to limit potential costs or liabilities being created by mishandling (e.g., containers being dropped or punctured by a forklift). Shipping waste to an LQG just adds an additional handling step. The associated potential risks cut against the potential risk reduction cited in the preamble.

To be clear, SOCMA does not oppose this aspect of the proposal. We just caution EPA against thinking that it will produce any significant savings for the generator community.

III. Problematic Provisions

If all the proposal involved were the provisions discussed above, it would be worthwhile. But the benefit of those provisions is more than offset by many other provisions that are raising very serious concerns across industry. As explained below, some are particularly troublesome for batch and specialty chemical manufacturers.

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[29] *Id*. at 57931, 57949, 57965, 57974, 57978, 57980.
[30] *Id.* at 57931, 57949.

A. "Thermonuclear" Consequences of Violating Conditions

As discussed in Part I.B, EPA has unnecessarily expressed many generator requirements as exemptions from the requirement that TSDs obtain a permit, and the proposal only aggravates that tendency. The result is that, in EPA's view, the most minor violation of the most technical condition converts a generator into a TSD. For example, the failure of a LQG to document that an employee with 25 years of experience at the plant attended an annual review training session could make that facility a TSD. An aisle-space violation at an SQG could have the same effect.

And the consequences of having to comply with permitting requirements are dramatic:

- Preparing a Part B permit application. This can require hiring a consultant and has cost SOCMA members as much as $100,000. The facility then has to wait, often for years, for the state to act on the application.

- Maintaining evidence of financial responsibility. Many SOCMA members are too small to be able to go the corporate guarantee route. These facilities typically have to pay banks for letters of credit that have to be renewed annually. These are also highly costly – and the funds spent on them are completely unproductive.

- Exposure to corrective action. Facilities can be required to remediate not just releases of hazardous waste, but also historical contamination based on releases of "hazardous constituents" from "solid waste management units," a much broader scope of liability.

This "sanction" is way out of proportion to the harms – if any – of violations. For example, a SOCMA member facility was required by the state agency to go through RCRA closure for a drum storage area because a drum of hazardous waste had remained onsite longer than 90 days. The work included cutting through a concrete containment area to look for possible soil contamination (none was found) and then pouring new concrete. It took the state 10 years to approve the closure. And even if a state is inclined to be reasonable, SOCMA members have repeatedly experienced situations – in at least three different states – in which EPA inspectors accompanied state inspectors and pushed them to determine that noncompliance with generator requirements required compliance with permitting requirements. And even if EPA promises to exercise enforcement discretion in reasonable ways, that forbearance is no protection against citizen suit plaintiffs, who can only be forestalled by "diligent prosecution."

The net result is that EPA and states have huge and unfair leverage to settle violations of the generator requirements, leverage that allows them to extract settlements involving far more than the gravity or economic benefit of the violation

would justify. The unfairness of this situation is exacerbated by the fact that, as noted above, the statute did not authorize EPA to impose permitting requirements on generators. The solution, as also noted, is to rewrite the generator rules to express them all as independent requirements, and to avoid expressing any of them as conditions of an exemption.

B. Waste Determination Issues

SOCMA opposes four aspects of the proposal related to making waste determinations. In all four cases, the existing rules are fully adequate. Moreover, the burdens discussed below would – literally – be increased exponentially nationwide by EPA's proposal to impose waste determination obligations on VSQGs. EPA's rationale seems to be that LQGs and SQGs aren't doing a good enough job at the task, so EPA will impose it on between 4-7 times as many entities, all of which are smaller and less able to afford to comply.

1. Requirement to document non-waste determinations

Perhaps the most startling aspect of the waste determination proposals is the requirement that facilities document non-waste determinations.

The first response to this idea is, simply, that EPA does not have the authority to impose it. RCRA Subtitle C applies to solid wastes; i.e., "discarded" materials: "Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away."[31] Materials that are not discarded are not solid wastes. Even materials that are discarded are not subject to Subtitle C unless they also are "hazardous" – i.e., they exhibit a hazardous characteristic or meet a listing description (or are mixed with or derived from a listed hazardous waste).[32] If a solid waste is in fact not hazardous, RCRA Subtitle C gives EPA no jurisdiction over the person generating it. That includes a purported requirement to document non-waste determinations. If a generator's determination is in fact in error and a waste is hazardous, then EPA (and authorized states) has jurisdiction to sanction any noncompliance. But EPA cannot require facilities to document all their waste determinations just so that EPA can go back and second-guess them whenever it wants. It can only require them to document their determinations that a waste was hazardous.[33]

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[31] American Mining Congress v. EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987).
[32] 40 C.F.R. § 261.3.
[33] Relatedly, EPA cannot penalize facilities for treating as hazardous waste something that is not actually hazardous. Again, EPA has no authority under Subtitle C to regulate materials that, by definition, are not hazardous waste. Also, where facilities treat non-hazardous waste as hazardous, they are doing so to be precautionary. For example, if a label falls off a container being shipped to a lab for waste profiling, a company may treat it as hazardous waste until profile comes back.

Secondly, a requirement to document non-waste determinations at some point becomes absurd. The agency insists that it "is not interested in entities that generate solid wastes that clearly have no potential to be hazardous, such as food waste, restroom waste, or paper products."[34] But what about entities that *do* have the potential to generate hazardous wastes – e.g., SOCMA's members? Do they have to document their determinations regarding waste office paper? What if they change paper suppliers?

The proposed requirement would be particularly burdensome for SOCMA members. Our members have *a lot* of waste streams, particularly for their size:

- Company A has one manufacturing plant and 2,000 waste streams.
- Company B makes 7,000 products.
- Company C has 100 different waste streams.

These facilities could face staggering obligations to document non-hazardous waste generation.

SOCMA members also commonly engage in contract manufacturing and, in particular, in toll manufacturing (where the company for which the work is done (the "contractor") supplies and retains ownership of the materials used to make the resulting product). These companies may require the company doing the work (the "manufacturer") to use a contractor-approved waste disposal facility. Such contract manufacturers may work for multiple customers, and in doing so often commingle compatible wastes. A contractor may have no knowledge of what or whose other wastes were mixed with the wastes generated for its account, or where exactly they went. The contractor knows only that the wastes went to a facility that it approved. These sorts of contractual arrangements are common and are environmentally protective. EPA should not upset them by requiring contractors to know, or to have documentation, that they do not now customarily possess.

For all these reasons, EPA should drop the idea of requiring generators to document non-waste determinations.

Doesn't EPA *want* people to err on side of protectiveness? It should not discourage this sort of behavior by raising the potential that it could be illegal. Finally, what is the actual or potential harm in generators treating nonhazardous waste as hazardous? SOCMA submits that there is none.

[34] 80 Fed. Reg. 57944. Moreover, this disclaimer is not repeated in the proposed rule text.

2. Requirement to document process knowledge

The generator rules have historically allowed generators to determine whether a waste exhibits a hazardous characteristic, in lieu of applying a test method, by using the generator's knowledge of the process by which the waste is generated, or of the products, byproducts or waste streams from that process. Obviously, if one conducts a test, one will receive results from that test which one can retain. Process knowledge, however, is almost by definition not written down: it is what the generator knows about the process and its outputs. EPA now proposes to require a generator to retain documents that "comprise the generator's knowledge of the waste and support the generator's determination."

This proposal would increase the number of things upon which EPA can impose penalties, because it could now take enforcement action against generators, even though they have in fact made correct waste determinations, in two new circumstances:

- Where the generator does not have documents to support a process knowledge-based waste determination; or

- Where the generator has documents, but EPA concludes that they are insufficient to support the determination. (EPA is effectively saying that a generator will be precluded, in the case of an inspection or enforcement action, from saying anything about the process beyond whatever it had previously written down.)

It is not obvious to SOCMA what benefit, environmental or otherwise, would flow from this new ability (besides additional revenues to EPA and authorized states). After all, a generator is always on the hook to make a correct waste determination – even if it has documented its process knowledge, those documents are no defense if EPA or a state tests a waste and finds that it does in fact exhibit a hazardous characteristic.

This proposal would be particularly burdensome on generators because it would require them to spend time writing down what they already know – and to write more, rather than less, to avoid accidently omitting any relevant part of their knowledge.

EPA should drop this aspect of the proposal.

3. Requirement to redo waste determinations every time a waste may have changed

SOCMA is troubled by the proposed requirement that generators repeat a waste determination "at any time in the course of its management that it has, or may have,

changed its properties as a result of exposure to the environment or other factors that may change the properties of the waste." Again, generators are already on the hook to have made correct waste determinations at any stage in the management of a hazardous waste. The quoted language would seem to serve no purpose beyond giving EPA a basis for taking enforcement action even though a determination was correct. SOCMA does not oppose EPA and states warning generators of the possibility that hazard characteristics of a waste can change with the passage of time or downstream handling (as discussed at 80 Fed. Reg. 57938-39). But this fact should not be the basis of new enforceable requirements.

4. Requirement to retain documents until closure

SOCMA is also mildly astonished by the proposal that generators retain all records regarding waste determinations at a facility until that facility closes. Some RCRA generator facilities have been in operation since the 19th Century. With any luck, many current facilities will be in successful operation for decades and decades to come. These facilities could be tasked with storing enormous volumes of waste documentation.

There is no reason for a facility to retain generator records that long. As a practical matter, there is little reason to retain waste determination records for any waste after that waste has been treated or destroyed – at that point, it no longer exists and cannot pose any continuing harm. There may be some logic to retaining records for wastes disposed of in landfills or surface impoundments, but the Superfund statute already provides sufficient incentive for a facility to maintain sufficient records to characterize such wastes.

As a practical matter, a "life of the facility" retention requirement may require facilities to store paper records, because it is virtually impossible to ensure that electronic documents will be readable decades later. Had this requirement been in place since 1980, one can imagine facilities maintaining ancient floppy drive machines for the sole purpose of retrieving old records that newer technologies can no longer read. EPA considered and abandoned a "life of the facility" retention requirement in the CROMERRR rulemaking for precisely these kinds of technological obsolescence concerns.

Again, the proposed requirement would be particularly burdensome for SOCMA members, who tend to generate many waste streams and to have small facilities. Waste determination documentation files for such facilities could be voluminous and could take up lots of physical or electronic storage space.

C. Closure Requirements for Storage Areas

EPA has proposed to require LQGs to close container storage areas, drip pads and containment buildings as landfills if the generator cannot, at closure, remove "all contaminated equipment, structures and soil and any remaining hazardous waste

residues." It also proposes that LQGs notify EPA at least 30 days prior to beginning closure and no more than 90 days after completing closure.

SOCMA thinks this proposal is overkill in multiple respects. Principally, it may not be feasible, at an operating facility, to completely remove all contaminated structures or to eliminate all traces of hazardous waste. So long as the areas are not presenting risks to employees, and are not releasing contamination to the environment, SOCMA does not see the need for a higher standard of cleanup. Compliance with landfill requirements – particularly leak detection and groundwater monitoring systems – at an operating facility would be highly disruptive, to say the least. Similarly, a requirement to show financial responsibility for post-closure care for such minor levels of contamination at an operating facility would be a substantial cost and distraction. EPA should focus only situations where remaining contamination poses some realistic harm.

We also question the need to notify EPA before and after closure. Surely overtaxed EPA regional staff have more pressing concerns. It would be reasonable for EPA to require notification if a generator is proposing to close a storage area with some residual contamination.

D. Time to Move Excess Wastes from Satellite Accumulation Areas

EPA has proposed to require SQGs and LQGs who exceed the accumulation limits or satellite accumulations areas to move the excess to a central accumulation area or an interim status or permitted TSD within 3 calendar days. That period of time is too short for small businesses. Batch manufacturing plants by definition do not operate continuously, and may not have environmental regulatory professionals working on weekends. (Indeed, there may only be one such person on a company's staff.) SOCMA members could live with 3 business days.

E. Preparedness, Prevention and Emergency Planning

SOCMA supports the clarification that the preparedness, contingency planning, and emergency procedure requirements for LQGs apply only to those areas of the facility where hazardous waste is generated and accumulated. These requirements are supplemental to the requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Risk Management Program (RMP) rule, and EPA should not extend that duplication any farther than necessary. We also support the proposal to waive these requirements for facilities with their own 24-hour onsite emergency response capabilities.

EPA would require an LQG to attempt to make emergency planning contacts with the LEPC, and if one does not exist, does not respond, or indicates unwillingness to cooperate, to make emergency planning arrangements with the local fire department and other emergency responders. The preamble describes at length the EPCRA requirements for such coordination. The preamble omits to state that many

RCRA generators are also subject to the RMP rule, and have even more detailed coordination obligations under that regulation. States often impose similar requirements. The preamble makes no attempt, however, to discuss why the generator rules should impose coordination requirements in addition to those specified by EPCRA, RMP or states. SOCMA submits that there is no reason for such duplication. At most, the RCRA generator requirements should only require coordination with the LEPC and emergency responders where a facility is not obligated to do so under EPCRA, RMP or some other authority.

SOCMA opposes the proposed requirement that facilities generate summaries of their contingency plans and submit plans and summaries to the LEPC or local responders. In our experience, emergency responders do not want to be tasked with maintaining such materials, including the need to protect confidential business information contained in such documents, and the need to replace old versions with new versions. These challenges are particularly great on fire trucks, which commonly now carry laptop computers with such information. Frankly, most LEPCs and emergency responders are not going to read even summaries of such information unless and until they have to, or in connection with a drill or other exercise.

Many SOCMA members maintain their contingency plans and safety data sheets in lockboxes on site to which local responders have been given keys. Emergency responders are shown the location of these materials and are thus able to familiarize themselves with the facility. In this way, the emergency responders have access to updated, relevant information when they need it. At a minimum, EPA should include an option to comply with information sharing requirements via a lockbox.

IV. Conclusion

SOCMA appreciates this opportunity to provide comments on EPA's proposed changes to its RCRA generator rules. If you have any questions, please contact me at (202) 721-4143 or at mossd@socma.com. Thank you for your consideration.

Sincerely,

Daniel Moss
Director, Government Relations