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COMMENTS OF THE RETAIL ASSOCIATIONS IN RESPONSE TO EPA'S PROPOSAL TO "IMPROVE" THE REQUIREMENTS FOR HAZARDOUS WASTE GENERATORS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

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1. Introduction

The Retail Industry Leaders Association ("RILA"), the Food Marketing Institute ("FMI"), the National Association of Chain Drug Stores ("NACDS"), the National Retail Federation ("NRF"), the National Grocers Association ("NGA"), and their members (collectively, the "Retail Associations") are pleased to submit these comments in response to the proposal of the U.S. Environmental Protection Agency ("EPA" or the "Agency") to overhaul and "improve" the requirements for hazardous waste generators under the Resource Conservation and Recovery Act ("RCRA"). *See* 80 Fed. Reg. 57,918 (September 25, 2015).

The Retail Associations are also submitting, under separate cover, comments on EPA's companion proposal to establish new rules for managing pharmaceutical hazardous wastes under RCRA. *See* 80 Fed. Reg. 58,014 (September 25, 2015). Since pharmaceutical wastes are among the many types of hazardous wastes that may be generated by some retailers, the issues raised by that proposal are, in some instances, intertwined with the issues raised under the proposal on hazardous waste generators. This is especially true to the extent that the pharmaceutical waste proposal covers not only prescription pharmaceutical wastes (which would only be generated by pharmacies), but also over-the-counter products such as cough medicines, vitamins, e-cigarettes, and hand sanitizers (which might be generated by a much wider range of retailers). We therefore urge EPA to consider our comments on both rulemakings together.

Section 2 below provides a general summary of our comments. Section 3 provides background on the Retail Associations and their interest in this rulemaking. Section 4 highlights EPA's legal obligation to ensure that any final rule addresses the unique circumstances of the retail sector, especially given the fact that retailers are the single largest group of hazardous waste generators covered by the proposal – perhaps the majority (although the amount of hazardous wastes they generate are almost negligible in comparison to the amounts generated by other industries). Section 5 sets forth our detailed comments on various aspects of the proposal, and a brief conclusion is provided in Section 6.

The Retail Associations appreciate this opportunity to submit comments on the generator rulemaking. We would welcome the opportunity to provide additional input to EPA, and to answer any questions the Agency may have with respect to the points made in these comments.

2. Summary of Comments

Retail stores are in every community and offer a wide range of products that American consumers use in their daily lives. Retailers and suppliers move these products safely through vast distribution networks around the country before they arrive on store shelves. Nearly all of these products are sold to consumers, and are either consumed or used by consumers and disposed of without additional regulations. Only a small percentage remains unsold because, for example, suppliers launch new marketing programs or change formulations, the products have exceeded their "best by" date, or they have been recalled by the supplier. Similarly, a small percentage of products is returned to a store by a consumer for any number of reasons. Some of these unsold and returned products may be considered "hazardous waste" subject to RCRA regulations.

Subjecting unsold and returned products to full RCRA regulation runs counter to RCRA's mandate of resource conservation and EPA's objectives for sustainable materials management, while offering virtually no additional environmental benefit and depleting scarce hazardous waste landfills. We believe it is possible to make regulatory and non-regulatory changes to the RCRA program to facilitate protection of the environment and human health in the retail sector while also encouraging reuse, recycling and the management of materials in a more sustainable fashion.

However, EPA's proposed rule on hazardous waste generator requirements does not adequately address the unique challenges that RCRA poses to the retail sector. The Agency has recognized these retailer-specific challenges, for example in the Notice of Data Availability ("NODA") that EPA issued in 2014 on the applicability of RCRA to the retail industry. *See* 79 Fed. Reg. 8926 (February 14, 2014). EPA has also indicated that the current proposal is a key part of its efforts to address these issues. *See, e.g.*, 80 Fed. Reg. at 57,919. Unfortunately, while a few portions of the proposed rule would offer a small measure of regulatory relief to a small number of retailers, other portions of the proposal would actually increase significantly the regulatory burdens on virtually the entire retail industry. The net effect would be to exacerbate the problems that the RCRA program poses to retailers.

EPA may not lawfully move forward with its proposal to amend the rules for hazardous waste generators, unless and until it addresses the special situation of the retail industry. Although retailers account for less than 0.1% of the hazardous wastes generated, they represent the single largest group of hazardous waste generators covered by the proposal – quite possibly more than half. Nevertheless, the proposal is clearly focused on other generators (*e.g.*, manufacturers) whose operations and wastes are materially different, giving short shrift to the unique issues faced by the retail industry. A rule that fails to address the special issues of the biggest segment of the regulated community cannot be sustained.

Stated another way, EPA's proposal, first and foremost, significantly impacts retailers, even though the retail sector was little more than an afterthought in development of the proposal. The Agency must now consider each aspect of the proposal through the lens of the retail community. As discussed below, few, if any, aspects of the proposal would survive such scrutiny. Our main comments on EPA's proposal can be summarized as follows:

- ***Recordkeeping for Non-Hazardous Waste Determinations*** **(Section 5.1 below).** EPA has no legal authority (and has unlawfully failed to cite any authority) for its proposal to require generators to keep records of their non-hazardous wastes, specifically their determinations that the wastes are non-hazardous. This proposal is also impermissibly vague, inasmuch as it fails to specify when such records would be required. Although EPA has claimed that the costs of this proposal would be "minimal," the costs to the retail industry alone could very well be in the hundreds of millions of dollars in the first year alone. Such costs cannot be justified by what would at best be a marginal additional assurance that 0.1% of the wastes being generated in the country are being properly characterized. EPA should either abandon this proposal, or exempt the retail sector from it.

- ***Hazardous Waste Determinations and Recordkeeping*** **(Section 5.2 below).** EPA's proposal to require hazardous waste determinations to be "accurate" is unnecessary, impermissibly vague, and potentially environmentally counterproductive (to the extent that it would discourage generators from being conservative in classifying their wastes). The proposed requirements for recordkeeping by large quantity generators ("LQGs") and small quantity generators of between 100 and 1000 kg/month of hazardous wastes ("SQGs") are also problematic. For example, the proposed mandatory elements of a waste determination record are unnecessary, unclear, and probably unworkable for the retail sector (given the limited information that retailers have about the products in their inventories). The proposed requirement that the records "comprise the generator's knowledge" is awkward and unclear, but might violate the due process rights of generators by limiting their ability to come forward with other evidence in the event of government inspection or enforcement. Requiring a new record whenever a waste "may have changed" would effectively force generators into a state of perpetual record writing. Extending the recordkeeping requirements by applying them to conditionally exempt small quantity generators ("CESQGs") (proposed to be re-designated as very small quantity generators or "VSQGs" in the present rulemaking), or by requiring records to be kept until facility closure, cannot be justified.

- ***Effects of Generator Noncompliance*** **(Section 5.3 below).** EPA's proposal to classify generators as illegal hazardous waste treatment, storage, or disposal facilities ("TSDFs") in the event of even minor lapses in compliance with generator requirements would unlawfully erase the fundamental statutory distinction between generators and TSDFs, and would be barred by the constitutional prohibition on "grossly disproportionate"

penalties for noncompliance. EPA has failed to provide adequate notice of and a meaningful opportunity to comment on the implications this proposal, and has arbitrarily designated certain generator violations as triggers for TSDF status without any underlying justification or rationale.

- ***Definition of LQG for Generators of Acutely Hazardous Wastes*** **(Section 5.4 below).** EPA's proposal to reclassify VSQGs and SQGs as LQGs when they generate more than 1 kg/month of acutely hazardous wastes would be a substantial and unwarranted change from existing law. Contrary to the Agency's claims, the proposal would not be a simplification of the rules, much less a cost-free one.

- ***Episodic Generators*** **(Section 5.5 below).** The Retail Associations applaud EPA's effort to address the issues posed by "episodic" generators of hazardous wastes, but believe the Agency's proposal largely misses the mark. By focusing only on episodic "events" that can cause a spike in a store's waste generation rate, EPA has overlooked the natural variability of generation rates in the retail sector. Retailers generate most of their wastes in very small quantities gradually over the course of each month, such that they typically do not know and cannot know if/when they generate unusually large quantities that might bump them into a higher generator category until after the fact, at which point they could "retroactively" be deemed in noncompliance with the requirements for that higher category. To address this problem, the Agency should allow retailers to determine their generator status based on their average generation rates over time. The proposed rules for unplanned episodic events should also be modified to make them consistent with the long-standing exemption for immediate response activities, and to enable the wastes from such unplanned events to be managed prior to notification of EPA (and approval from the Agency, in the case of a second unplanned event).

- ***Consolidation of CESQG/VSQG Wastes*** **(Section 5.6 below).** EPA has mischaracterized existing law, by claiming that CESQG wastes must be sent *directly* to a facility with a hazardous waste permit or similar authorization, without first being consolidated at another facility. Moreover, the Agency's proposal to provide relief from the supposed prohibition on consolidation would offer little, if any, value, because the conditions imposed and the costs involved would be so onerous. By limiting consolidation in some cases, and prohibiting it in others, EPA's proposal would effectively encourage CESQGs to send their wastes to landfills, instead of pursuing potential reuse or recycling options, which would be environmentally counterproductive. EPA should simply clarify that consolidation is already allowed under existing law without condition, or, if it feels some conditions should be imposed, the Agency should modify the proposed conditions substantially (*e.g.*, by allowing consolidation at third-party facilities, rather than just at facilities under common ownership with the CESQG sites).

- ***Waiver from the 50-Foot Buffer Zone Requirement*** **(Section 5.7 below).** The Retail Associations support EPA's proposal to provide flexibility under the 50-foot buffer zone requirement for ignitable and reactive wastes at LQG facilities, but believe the proposal does not go far enough. The proposed waiver process would be unnecessarily cumbersome, both for the regulated community and for the fire departments that would have to issue the waivers. This is especially true for retail sites, given the small quantities of hazardous wastes handled onsite and the fact that most of those wastes are compositionally identical to the much larger quantities of saleable products that are stored and/or shelved without regard to a buffer zone requirement. We urge the Agency to issue an exemption from the buffer zone requirement for retail stores.

- ***Contingency Planning*** **(Section 5.8 below).** EPA's proposal to require LQGs and SQGs to enter into arrangements with first responders would unlawfully place the generators at risk of enforcement for things beyond their control, namely the willingness and ability of the first responders to enter into such arrangements. The Agency's proposal to require an executive summary for contingency plans is also unwarranted, especially for retailers, given the limited nature of their hazardous waste activities. In light of the frequent turnover of retail personnel, EPA should allow retailers to satisfy requirements for information about emergency coordinators without identifying them by name.

- ***Satellite Accumulation*** **(Section 5.9 below).** EPA's attempt to clarify the areas that may qualify as satellite accumulation areas actually introduces new uncertainties and poses particular challenges for the retail sector. The Agency should correct this situation, taking into account the provisions of the immediate response exemption, and should not require training of employees in satellite accumulation areas.

- ***Periodic Re-Notification*** **(Section 5.10.1 below).** Although the Retail Associations appreciate EPA's desire to have more current information on the universe of hazardous waste generators, in light of the large size and dynamic nature of the retail sector, we urge the Agency to limit the periodic re-notification requirement for retailers, and to provide a streamlined process for large retail chains (*e.g.*, allowing a consolidated update that identifies only key changes).

- ***Container Labeling*** **(Section 5.10.2 below).** EPA's proposal to require detailed markings and labels on accumulation containers is unworkable for the retail industry, where such containers generally hold only small quantities of a variety of products, typically in the original product packagings. The Agency should allow retailers to mark/label containers more generically (as under the existing RCRA rules).

- ***Closure of Accumulation Areas*** **(Section 5.10.3 below).** EPA's proposed rules for closure of generator accumulation areas should not apply to areas holding small quantities of hazardous wastes, such as those in the retail sector. EPA itself has

acknowledged that these closure requirements are unwarranted for small areas, and has long exempted SQG accumulation areas storing less than 6000 kg. The Agency should issue a similar exemption for retailers and/or LQG facilities storing less than 6000 kg.

- ***Prohibition on Liquid Hazardous Wastes in Landfills*** **(Section 5.10.4 below).** Although EPA claims that its proposed prohibition on bulk or non-containerized liquid hazardous wastes in landfills – whether or not sorbents have been added – does not change long-standing regulatory requirements, it in fact represents a major change with respect to CESQG liquid hazardous wastes that have been treated with sorbents to the point that free liquids are no longer present. Because the Agency has indicated that it is not intending to change existing requirements in this regard, and has not offered any reason for a change, it cannot move forward with this aspect of its proposal.

3. The Retail Associations and Their Interest in This Rulemaking

The Retail Associations represent a broad cross section of the retail sector in the United States, including large and small companies, from chains with more than a thousand stores nationwide to regional companies with a handful of stores. Each of the individual associations is described briefly below:

- RILA is an organization of the world's most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than $1.5 trillion in annual sales and operate more than 100,000 stores, manufacturing facilities, and distribution centers nationwide. Our member retailers and suppliers have facilities in all 50 states and the District of Columbia, as well as internationally, and employ millions of workers domestically and worldwide.

- FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains, and mixed retail stores.

- NACDS represents traditional drug stores and supermarkets and mass merchants with pharmacies. Chains operate more than 40,000 pharmacies, and NACDS' chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ more than 3.8 million individuals, including 175,000 pharmacists. They fill over 2.7 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient

health and healthcare affordability. NACDS members also include more than 800 supplier partners and nearly 40 international members representing 13 countries.

- NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's "This is Retail" campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

- NGA is the national trade association representing the retail and wholesale supermarkets that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating a variety of formats. The independent supermarket sector is accountable for close to one percent of the nation's overall economy and is responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. NGA members include retail and wholesale grocers, state grocers associations, as well as manufacturers and service suppliers.

Each of the individual associations and their members have a clear and strong interest in this rulemaking. Indeed, EPA, in its economic analysis for the proposal, specifically identified several retail sectors as being among the affected industries. *See* EPA, "Economic Assessment of the Potential Costs, Benefits, and Other Impacts of the Improvement to the Hazardous Waste Generator Regulatory Program, As Proposed" (June 2015) (hereinafter referred to as the "Economic Assessment"), Exhibit 2-6 (listing, among the affected industries, general merchandise stores, personal care stores, garden supply dealers, motor vehicle parts stores, food and beverage stores, and electronics/appliance stores).

The main way that retail establishments may become hazardous waste generators subject to the proposed rule is through their handling of common consumer products that are either returned by customers or are unsold due to various reasons (*e.g.*, damage, defect, recall, obsolescence, expiration, seasonal product changes, or removal from shelves due to failure to "sell through" at an acceptable rate). Most of these unsold and returned items are not wastes, because they are suitable for re-shelving, liquidation sale through a secondary market, donation to individuals or non-profit organizations, repair or refurbishment, or shipment to a manufacturer or its agent for credit. In some instances, however, the unsold and returned products do become wastes, and depending upon their composition and properties, may be hazardous wastes. As a result, many retail establishments become generators of "hazardous wastes," although these "hazardous wastes" are simply consumer products that are unsaleable for one reason or another.

The vast majority of retail establishments that become hazardous waste generators qualify as CESQGs, and therefore are subject only to minimal RCRA requirements. However, many retail establishments generate modestly larger quantities of hazardous wastes, at least on occasion, such that they are regulated as SQGs. In addition, a significant number of retail establishments qualify, at least on an episodic basis, as LQGs – although in the vast number of cases we believe these facilities would qualify as CESQGs but for a glitch in the regulations that improperly classifies discarded nicotine gum, lozenges, and similar products as "acutely hazardous" wastes, for which a facility can be pushed into the LQG category if it generates only 1 kg/month. (The Retail Associations are separately submitting comments on the nicotine issue in the context of EPA's companion proposed rule on hazardous waste pharmaceuticals. *See* 80 Fed. Reg. at 58,014.) Indeed, as discussed in Section 4.1 below, retailers are the single largest group of hazardous waste generators potentially regulated under the proposal, and may well represent over half of the affected entities (although the amount of hazardous wastes they generate represents an almost negligible percentage of the total hazardous waste generation in the country).

Although the main way that retailers may become hazardous waste generators is through their handling of unsold/returned products, as discussed above, and we focus on this mechanism in these comments, we note that retailers may also generate hazardous wastes in other ways, such as during construction or renovation, maintenance of the physical plant of the retail buildings, operation of truck fleets, support services for customers, company administration, etc. In light of all these potential mechanisms for generating hazardous wastes, the Retail Associations, their members, and the retail sector more broadly, have a strong interest in the current rulemaking.

4. The Legal Requirement for EPA to Ensure that Any Final Rule Reflects the Unique Issues of Retailers, Who Represent a Significant Portion of Hazardous Waste Generators

It is a fundamental principle of administrative law that an agency cannot finalize a rule of general applicability if it fails to address the unique challenges the rule would pose to a significant portion of the regulated community that the agency is aware of or that has been brought to the agency's attention. *See, e.g.*, *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has … entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency"). In the present case, the retail sector is not only a significant portion of the regulated community, but the single largest group of regulated entities – quite possibly the majority (although the quantity of wastes that they generate is almost negligible in comparison to the quantity generated by others). Moreover, retailers are materially different from the generators that EPA focused on in developing its proposal (*e.g.*, the manufacturing industry), such that significant portions of the proposal are inappropriate for retailers. As a result, EPA is legally obligated to perform a top-to-bottom review of the proposal, to ensure that any final rule adequately addresses the issues of the retail sector.

4.1 Retailers Are the Largest Group of Regulated Hazardous Waste Generators, and May Well Represent the Majority

In order to estimate the percentage of regulated hazardous waste generators that are in the retail industry, we utilized the Biennial Report ("BR") database available on EPA's website at http://www2.epa.gov/enviro/br-search. We first searched the data for the latest reporting year (2013) to identify all the generators with North American Industry Classification System ("NAICS") codes corresponding to the retail industry (*i.e.*, codes starting with 44 or 45, although we excluded a few codes for sectors that seemed unlikely to generate significant quantities of hazardous wastes). We also narrowed the field to those generators identified as LQGs, since only LQGs are required to submit biennial reports, making information about other generator categories unreliable. Based on this methodology, we found that a total of 5159 retail facilities reported as being LQGs in 2013.

To determine the total number of LQGs in all industries, we had to use a different methodology. First, we noted that the total number of LQGs reported in the National Biennial RCRA Hazardous Waste Reports has been almost constant for many years. The figures since 2003 are as follows: 15,584 (for 2003), 14,984 (for 2005), 14,549 (for 2007), 14,710 (for 2009), and 14,262 (for 2011). *See* http://www3.epa.gov/epawaste/inforesources/data/biennialreport/ (providing links to the national reports). If we were to use a figure in this range (say, the 2011 total of 14,262) as the total LQG population in 2013, retailers might represent 36% of all LQGs (because 5159/14,262 = 0.36).

However, our understanding is that there was a significant increase in the LQG population in 2013, as retailers became much more aware that they might be subject to RCRA regulation (primarily due to a series of major hazardous waste enforcement actions against retailers in California, as well as a 2010 EPA letter asserting that nicotine patches, gums, and lozenges qualify as acutely hazardous wastes under RCRA). To improve the estimate of the 2013 total of LQGs, we first determined the total number of retail facilities that reported as LQGs in 2011, using the same methodology as described above for 2013. That figure was 1037. We subtracted this number from the total number of reported LQGs for 2011, to arrive at the number of non-retail LQGs in 2011 (*i.e.*, 14,262 – 1037 = 13,225). It seems reasonable to assume that this number of non-retail LQGs remained essentially the same in 2013, given that the total LQG count has been constant for so long, and we are not aware of any reason that the number of non-retail generators would have significantly changed in 2013. Thus, we could add this figure to the number of retail LQGs developed above (5159), to get a total 2013 LQG population of 18,384 (13,225 + 5159). Based on this figure, retailers would have represented 28% of all LQGs (because 5159/18,384 = 0.28).

In sum, based on our analysis, retailers represented approximately 28% of all hazardous waste generators who reported as LQGs in 2013. As substantial as this percentage is, it almost

certainly understates to a substantial degree the proportion of regulated hazardous waste generators that are in the retail sector. As an initial matter, some members of the Retail Associations have indicated that they *operate* all of their stores as LQGs, due to uncertainties about if/when they might exceed the LQG limits, but only *report* as LQGs for those stores that ultimately actually exceed the LQG limits. This factor alone could increase the number of LQG retail facilities by several thousand. Moreover, the awareness of RCRA requirements in the retail industry has increased significantly in the last two years, so it can be expected that in the upcoming biennial reporting cycle for 2015, the number of retail facilities reporting as LQGs will jump, with a concomitant increase in the percentage of LQGs that are in the retail industry.

For purposes of comparing the number of LQGs in retail versus other individual industries, we reviewed the data in EPA's Economic Assessment on the number of LQGs in each industry (based on the 2011 biennial reports). *See* Economic Assessment, Exhibit 2-6. The largest number of LQGs in any individual industry (based on a 3-digit NAICS code) was 2197 for the chemical manufacturing industry (NAICS code 325) – which is less than half the number of retail LQG facilities, as discussed above (*i.e.*, 5159). Indeed, even when we combined the figures for the entire manufacturing sector (NAICS codes 31-33) – which covers manufacturers of such disparate products as aircraft, food, chemicals, furniture, clothing, steel, computers, and paper – the total was only modestly higher than the number for retail (*i.e.*, 8257).

Clearly, even with very conservative assumptions, retailers represent the single largest group of regulated hazardous waste generators. If we are correct that the actual number of LQG retail facilities is much higher than estimated above, it seems possible – even likely – that retailers represent over half of all LQGs, and by extension probably over half of the entire regulated generator universe.

4.2 Retailers Account for a Negligible Percentage of the Hazardous Wastes Being Generated in the Country

Although, as discussed above, retailers collectively represent the largest group of hazardous waste generators (perhaps the majority), that does not translate into a large proportion of the quantity of hazardous wastes being generated. On the contrary, retailers represent only a negligible percentage of the total amount of hazardous wastes generated in the U.S.

In order to determine the amount of hazardous wastes generated by retailers, we started with data in EPA's Economic Assessment on the amount of hazardous wastes generated by LQGs in various sectors of the economy (based on 2011 biennial reports). *See* Economic Assessment, Exhibit 2-6. We added the hazardous waste generation amounts for all of the retail sectors (*i.e.*, all sectors with NAICS codes starting with 44 or 45) to arrive at a total figure of 2864 tons. For all industries, the total LQG generation was 34,522,000 tons. Thus, the retail LQGs accounted for only 0.008% of the total (since 2864/34,522,000 = 0.00008).

This percentage may be low, because, as noted above, the 2011 biennial reporting data significantly understated the number of retail LQGs. To adjust the numbers, we first determined the average hazardous waste generation rate at each LQG retailer facility, based on the 2011 data. As noted above, there were 1037 retail facilities that reported as LQGs in 2011. Since the total amount of hazardous wastes that they generated was 2864 tons, the average generation rate was 2.76 tons (*i.e.*, 2864/1037 = 2.76). Multiplying this amount by the number of retail LQGs estimated above for 2013 (*i.e.*, 5159), the total amount of hazardous wastes generated by these facilities was 14,239 tons. This represents approximately 0.04% of the total (since 14,239/34,522,000 = 0.0004). While the actual number of retail LQGs, and thus the amount of hazardous wastes from such facilities, may be significantly higher (as discussed above), it seems almost certain that retailers collectively account for less than 1/10th of one percent (*i.e.*, <0.1%) of all the hazardous wastes generated by the LQG universe.

One additional point is worth mentioning about these data. As noted above, the average hazardous waste generation rate for an LQG retailer can be estimated at 2.76 tons per year. This equates to 2760 kg/year, or 230 kg/month. However, the threshold for an LQG is 1000 kg/month for non-acutely hazardous wastes. This suggests that in the vast majority of cases, retailers that qualify as LQGs are not, in fact, exceeding the LQG limit for non-acutely hazardous wastes on a regular basis. Rather, they must either be exceeding that limit on an "episodic" basis only, or be exceeding the 1 kg/month limit for acutely hazardous wastes (primarily from low-concentration nicotine products).

4.3 The Hazardous Waste Generator Rules Present Unique Challenges to Retailers

The RCRA hazardous waste regulations, including both the existing regulations and EPA's current proposal, are not well suited for – and pose unique challenges to – the retail sector, because they were designed with a completely different type of generator in mind, namely manufacturing facilities. Retail facilities are fundamentally different from manufacturing facilities, in ways that render the RCRA rules wholly inappropriate for the retail sector. Among the key differences are the following:

- ***Extremely large number and variety of wastes.*** Retail facilities typically generate vastly more types of wastes than facilities in other industries, even though the total quantities are almost negligible in comparison. EPA has estimated that LQGs on average generate only 9 to 30 individual waste streams at a time (split roughly evenly between hazardous and non-hazardous waste streams), only 1 to 4 of which change each year. *See* Economic Assessment at 3-9 (also estimating lower numbers for SQGs). However, as discussed in Section 5.1.4 below, since minute amounts of each individual product marketed by a retailer may become a waste, retail generators can generally be expected to generate 10,000 to 25,000 discrete waste streams, with thousands of these streams changing each

year. The dramatically higher number of waste streams complicates tremendously the classification and management of retail wastes at individual stores.

- ***Limited knowledge of waste composition and characteristics.*** Retailers buy, distribute, and sell products. Unlike manufacturers, they do not have specialized knowledge of those products' ingredients or properties that would enable them to make accurate hazardous waste determinations. Indeed, in many instances, information about the composition of products is proprietary to the manufacturer, so that retailers do not have and cannot obtain access to such information. As a result, the retailers have no choice but to base their waste determinations on information provided by the manufacturers (or third parties who are able to get information about the products from the manufacturers under strict confidentiality agreements). Retailers cannot and should not be held to the same waste determination standards as manufacturers, who can be expected to have detailed knowledge of their raw materials, processes, products, and wastes.

- ***Similarity of wastes to consumer products stocked on shelves, sold to customers, and used/discarded by households.*** Manufacturing wastes (*e.g.*, sludges and by-products) are commonly in a form that is not readily recognizable or understandable to the public, employees in the manufacturing sites, third parties involved in management of the wastes (*e.g.*, transporters and offsite TSDFs), or government inspectors. In contrast, most retail wastes are simply discarded forms of the same consumer products that the retailers place on their shelves and sell to customers, and that the customers take home, use, and ultimately discard when they are no longer useful. Because the retail wastes are so familiar, there is not the same need for markings, warnings, and employee training as is required for manufacturing wastes. Moreover, reduced management requirements may be warranted for retail wastes, since the exact same wastes end up in far larger quantities in the household waste stream that is excluded from RCRA regulation. *See* 40 C.F.R. § 261.4(b)(1).

- ***Extremely large number of facilities.*** While the largest manufacturers might have a handful of discrete facility locations, even mid-sized or regional retailers have hundreds of store locations, and the largest retailers have several thousand stores, not to mention distribution facilities. The sheer number of these operations pose a major management challenge, not only for the retailers, but also for regulatory authorities seeking to oversee the operations. Moreover, the costs of compliance are increased by orders of magnitude for retailers, turning what might be an insignificant issue for manufacturers into a crushing burden on retailers. It is also worth noting that if a regulator has an issue with any aspect of the compliance system for a retailer, the potential penalties may be multiplied across all the retailer's stores. In this way, retailers may be at risk for much higher fines than manufacturers, even though the rules were designed for manufacturers rather than retailers.

- ***Geographical diversity.*** Even the largest manufacturers generally have facilities in only a few discrete locations in a small number of states. The largest retailers, however, generally operate throughout all 50 states. The spread-out nature of retail operations poses a significant logistics and management challenge that manufacturers do not have to contend with. Moreover, because it is not practical for a retailer to establish a separate compliance system for each state, retail companies are often forced to establish a nationwide compliance system based on the most stringent rules and interpretations in all of the states.

- ***Complexity in determining when wastes are generated.*** The point at which a waste is generated is usually pretty straightforward to identify in a manufacturing process, for example when used solvents are no longer usable, when by-products are removed from a chemical reactor, when air or water pollution control residuals collect, or when rejects are removed from a manufacturing line. In contrast, it can be far more complicated for a retailer to determine if/when an individual unsold or returned product is a waste. The vast majority of unsold or returned consumer products are not, in fact, wastes because they may be suitable for re-shelving, liquidation sale through a secondary market, donation to individuals or non-profit organizations, repair or refurbishment, or shipment to a manufacturer or its agent for credit. While a small fraction of the items may have to be discarded, the customer service representatives receiving returned goods and the stock clerks removing unsold products from store shelves often will not have the information, knowledge, skills, and/or tools necessary to determine which items are wastes, much less hazardous wastes. Moreover, requiring such determinations to be made at the store level may encourage retailers to over-classify products as solid or hazardous wastes, which would be environmentally counterproductive inasmuch as it would cause potentially useful or recyclable products to be discarded.

- ***Different pattern of waste generation.*** Manufacturers typically generate wastes at a reasonably steady and predictable rate from a well-defined production process that they have control over, with occasional episodic events (*e.g.*, process upsets). Wastes are generated in the retail setting much more unpredictably and often in a way that is not in a retailer's control, such as when individual retail items are returned by customers, are dented or otherwise damaged when they fall off a shelf, etc. As discussed in Section 5.5.1 below, the natural variability in the waste generation rates of retailers means that rules designed to address "episodic events" in manufacturing industries would be of little benefit to retail generators whose waste generation rates occasionally "bump" them into higher generator categories.

- ***High employee turnover.*** Compared to manufacturing jobs, most retail jobs require only limited skills, making them attractive to new entrants into the labor market, persons needing temporary jobs, and others requiring flexibility. These factors, together with the seasonal hiring needs of most retailers, lead to much higher levels of employee turnover

than in other industries. As a result, training programs designed for manufacturing employees are often not practical for retail employees. In addition, waste management requirements assuming a high degree of knowledge among all employees simply do not work for employees in a retail store.

- ***Integration into the community.*** While manufacturing facilities are commonly located in areas separated from population centers (*e.g.*, residential areas), retail facilities are necessarily integrated into the community, since that's where the retail customers are. In urban settings, especially, retailers must coexist in close quarters with other business enterprises and households. The close proximity (and generally small footprint of retail facilities) makes some of the rules that were developed with manufacturing facilities in mind (*e.g.*, the 50-foot buffer zone requirement for ignitable or reactive wastes) impractical for retailers.

When it finalizes the current proposal, EPA must consider these differences between retail and manufacturing generators. Each aspect of the proposal should be viewed through the lens of the retail sector to make sure it is appropriate for retail generators of hazardous wastes. As discussed in detail below, we believe that many aspects of the proposal, when viewed in this manner, come up short.

5. Comments on Specific Aspects of the Proposed Rule

5.1 Proposed Recordkeeping for Non-Hazardous Waste Determinations

5.1.1 EPA Lacks Legal Authority to Require Recordkeeping for Non-Hazardous Wastes

EPA has no legal authority to require persons who generate non-hazardous wastes to keep records of such wastes, including the basis for their determinations that the wastes are non-hazardous. The Agency claims in the proposed rule that the regulations are proposed "under the authority" of certain provisions of RCRA Subtitle C. *See* 80 Fed. Reg. at 57,919. However, Subtitle C authorizes EPA to promulgate regulations applicable only to generators of *hazardous* wastes, transporters of *hazardous* wastes, and owners/operators of *hazardous* waste treatment, storage, and disposal facilities. Of particular relevance here, RCRA § 3002(a)(1) directs EPA to promulgate "standards[ ] applicable to generators of *hazardous* waste identified or listed under [Subtitle C]" including "recordkeeping practices that accurately identify the quantities of such *hazardous* waste generated, the constituents thereof … and the disposition of such wastes." *See* 42 U.S.C. § 6922(a)(1) (emphasis added). Nowhere does Subtitle C authorize EPA to require recordkeeping for non-hazardous wastes.

Since the beginning of the Subtitle C regulatory program in 1980, the rules have always reflected and respected this limitation on the Agency's legal authority. The relevant rule states that "[a]

generator must keep records of any test results, waste analyses, or other determinations made in accordance with § 262.11." *See* 40 C.F.R. § 262.40(c). Importantly, the term "generator" is defined for these purposes as "any person, by site, whose act or process produces *hazardous* waste." *See* 40 C.F.R. § 260.10 (emphasis added). Thus, this requirement does not apply to persons who produce non-hazardous wastes. Moreover, the referenced provision on hazardous waste determinations applies only to "person[s] who generate[ ] a solid waste, as defined in 40 CFR 261.2." *See* 40 C.F.R. § 262.11. The regulations explicitly state that the definition of solid waste in Section 261.2 "applies only to wastes that are also *hazardous*." *See* 40 C.F.R. § 261.1(b)(1) (emphasis added). Accordingly, only hazardous waste generators are persons who generate a solid waste "as defined in 40 CFR 261.2" and therefore subject to the requirements of Section 262.11. Because Section 262.40(c) requires records only for "determinations made in accordance with § 262.11," once again that requirement applies only to generators of *hazardous* wastes.

It is no accident that the existing rules are limited in this way. EPA simply does not have the authority to require recordkeeping for non-hazardous waste determinations. While the Agency in 1978 did propose to require records for such determinations, that proposed requirement was clearly left out of the final 1980 rule. *See* 43 Fed. Reg. 58,946, 58,955 (December 18, 1978) (proposal); 45 Fed. Reg. 12,724, 12,734 (February 26, 1980) (final rule). EPA now claims that the final regulatory language "could be interpreted to mean either that a generator was required to keep records or that a generator was not required to keep records of solid wastes that were not hazardous wastes." *See* 80 Fed. Reg. at 57,943. As discussed above, however, there is no ambiguity in the final rule. Indeed, at the time EPA issued the final rule, it explicitly acknowledged that the rule only required "generators to keep records of the determinations that a waste is a *hazardous* waste." *See* 45 Fed. Reg. at 12,730 (emphasis added). The Agency underscored this fact a decade later, when it stated that "[i]f a waste is determined to be hazardous, the generator must keep records establishing the basis for that determination … however, [this requirement does not] appl[y] to solid waste generators who do not generate hazardous wastes." *See* 55 Fed. Reg. 11,798, 11,829 (March 29, 1990).

In sum, EPA has no legal authority to require recordkeeping for determinations that solid wastes are non-hazardous. The Agency has recognized this fact since the start of the RCRA Subtitle C regulatory program, and limited its regulations accordingly. EPA's current attempt to impose requirements that are not authorized by statute is unlawful and must be abandoned.

5.1.2 EPA's Proposal Is Deficient under the Administrative Procedure Act Because It Fails to Reference Legal Authority for Requiring Recordkeeping for Non-Hazardous Waste Determinations

As noted above, EPA lacks legal authority under RCRA Subtitle C to require recordkeeping for non-hazardous waste determinations. We also do not believe the Agency has any other legal authority for such a requirement. If, nonetheless, EPA believes it has legal authority, it would

still be precluded from finalizing the current proposal, because it fails to meet fundamental requirements of the Administrative Procedure Act ("APA").

Section 553(b)(2) of the APA requires that a notice of proposed rulemaking must include a "reference to the legal authority under which the rule is proposed." *See* 5 U.S.C. § 553(b)(2). EPA purports to provide such a reference on the second page of the preamble to the proposal. *See* 80 Fed. Reg. at 57,919. However, it cites only to certain provisions of Subtitle C. Thus, the Agency cannot rely on any possible authorities that may exist outside RCRA. In addition, if EPA somehow believes that the referenced provisions provide adequate legal authority, it must explain how it believes such provisions do so, in order to provide the public a meaningful opportunity to comment. The Agency cannot proceed with the proposed requirement based on its current proposal.

5.1.3 The Proposed Recordkeeping Requirement for Non-Hazardous Waste Determinations Is Impermissibly Vague

EPA has stated that, under the proposed rule, "documentation will not be required for entities that do not generate a solid waste, as defined by § 261.2." *See* 80 Fed. Reg. at 57,943; *see also id*. at 57,992 (proposed to be codified at 40 C.F.R. § 262.11) ("A person who generates a solid waste, as defined in 40 CFR 261.2, must make an accurate determination of whether that waste is a hazardous waste"). As noted above, however, the regulations explicitly state that the definition of solid waste in Section 261.2 "applies only to wastes that are also *hazardous*." *See* 40 C.F.R. § 261.1(b)(1) (emphasis added). Thus, it would appear that the proposed documentation requirement would apply only to hazardous wastes. However, this seems inconsistent with EPA's stated goal of requiring "generators … to keep records and documentation of their waste determinations, including determinations that a solid waste is not hazardous." *See* 80 Fed. Reg. at 57,943.

In short, EPA's proposal to require documentation for non-hazardous waste determinations is vague and confusing. Perhaps the Agency means to require documentation of non-hazardous waste determinations for some category of material other than "solid waste as defined by § 261.2." However, we have no way of knowing what that other category might be. In the absence of a clear statement of what EPA means to cover, we have no way of commenting meaningfully. Inasmuch as we and the rest of the public have not been provided adequate notice of the Agency's intent and an opportunity to comment on it, EPA's proposal is deficient as a matter of law under the APA and cannot be finalized.

5.1.4 EPA Has Severely Understated the Economic Impacts of Its Proposal to Require Records for Non-Hazardous Waste Determinations

EPA claims that the costs of its proposal to require LQGs and SQGs to keep records of their non-hazardous waste determinations would be "minimal." *See, e.g.*, 80 Fed. Reg. at 57,942 and

57,944. However, this assertion is based on unrealistic assumptions. The actual costs for the retail sector alone would be overwhelming.

There are three main elements that go into an estimate of the costs: (1) the number of affected entities, (2) the number of determinations that each affected entity must record, and (3) the cost of preparing and maintaining each record. Each element is discussed separately below, focused only on the retail sector:

- ***Number of Affected Entities***

  The proposed recordkeeping requirement would apply to both LQGs and SQGs. (EPA has also requested comments on applying the requirement to CESQGs, but we do not address such generators here.) As discussed in Section 4.1 above, there are at least 5159 retail LQG facilities (based on 2013 biennial reporting data). EPA in 2014 estimated the number of retail SQGs as 16,774. *See* 79 Fed. Reg. 8926, 8932 (February 14, 2014). However, this number is almost certainly too low, since the Agency at the same time estimated the number of retail LQGs as only 1893 (compared to the 5159 retail LQGs in the 2013 BR database). One way to develop a better estimate of the number of retail SQGs is to use the 2014 ratio of retail SQGs to retail LQGs, which was 8.9 (since 16,774/1893 = 8.9). Applying this ratio to the more accurate number of retail LQGs, the number of retail SQGs would be 45,915 (*i.e.*, 8.9 x 5159).

  Based on this analysis, the total number of retail LQGs and SQGs together would be between 21,933 (using EPA's 2014 estimate of the retail SQG number) and 51,074 (based on the 2014 ratio, as discussed above). Importantly, however, a large proportion of these facilities are presumably part of retail chains that might be able to prepare and maintain the records for the determinations centrally. This would mean that the number of affected entities would be significantly lower than the number of affected facilities.

  Affected retail entities would include any chain with at least one store qualifying as an LQG or SQG, as well as any independent store qualifying as such. To estimate the number of such entities, we have assumed that there is only one affected entity for every 100 retail LQGs or SQGs. While it is true that a few large entities (*e.g.*, some nationwide chains) have more than 100 LQG and SQG facilities, there are far more entities that have significantly fewer LQG and SQG facilities (*e.g.*, independent stores, local or regional chains, and even many national chains). For this reason, we think the assumption of only one affected entity for every 100 LQGs and SQGs is very conservative. Indeed, as one indication of how conservative this assumption is, we note that EPA recently estimated (based on 2007 Census data) that the ratio of retail facilities to retail firms (entities) is less than 1.5 to 1. *See* 79 Fed. Reg. at 8932. Nevertheless, based on the 100 to 1 assumption, the number of affected retail entities would be approximately in the range of 220 to 510.

EPA, in its analysis, tries to reduce the number of affected facilities (by a factor of about 2) by claiming that "17 states already require documentation and recordkeeping of a solid waste that is not a hazardous waste," such that the Agency's proposed requirement would have no effect in those states. *See* 80 Fed. Reg. at 57,943. For example, EPA says that "several states mentioned that they interpret the term 'other determinations' at § 262.40(c) to mean determinations that a solid waste is not a hazardous waste." *Id*. However, as discussed in Section 5.1.1 above, there is no plausible way to "interpret" the existing regulations to require documentation and recordkeeping for non-hazardous wastes. So, even in these states, EPA's proposal would constitute a major new regulatory requirement. In the Agency's Economic Assessment, EPA also asserts that eight other states "indirectly require documentation of negative determinations," meaning that they "require facilities to provide documentation for questionable waste that is claimed to be non-hazardous waste." *See* Economic Assessment at 3-6. However, an "indirect" requirement is no requirement at all. EPA cannot reasonably claim that because some states require individual generators to come forward with information in the rare instances where the states question a non-hazardous waste determination, there is no cost to a requirement that all generators in such states prepare and keep records of non-hazardous waste determinations for all of their wastes. In any event, even if EPA could reduce the number of affected retail facilities in this way, that would likely not significantly change the number of affected retail entities, since any large retail chain with LQGs or SQGs in the states that EPA claims would not be affected, would likely also have facilities in states that clearly would be affected.

In light of the above, we estimate that the number of affected retail entities would be between 220 and 510, recognizing that this estimate is probably very conservative.

- ***Number of Determinations Per Affected Entity***

EPA estimates that LQGs generate only 4 to 13 non-hazardous waste streams, and that only 1 to 4 of those waste streams are new or significantly changed each year. *See* Economic Assessment at 3-9. For SQGs, the Agency estimates only 3 to 6 non-hazardous waste streams, of which only 1 to 2 are new or significantly changed each year. *Id*. We question whether these estimates are realistic for any LQGs or SQGs. In any event, in the retail context, these figures are low by several orders of magnitude.

Retail stores invariably sell very large numbers of individual products, known as Stock Keeping Units or "SKUs." Although the vast majority of these products will be sold through to customers (or, if unsold, will be sold in secondary/liquidation markets, donated, or otherwise used beneficially), retailers must be prepared to characterize all of the SKUs in circumstances where the products may become wastes (*e.g.*, through spills, damage, expiration, recall, returns, etc.) – especially given the expansive view that some

regulatory/enforcement authorities have about when unsold or returned products qualify as wastes. Thus, under the proposed rule, each retailer may have to prepare and keep records of non-hazardous waste determinations for all of the SKUs in its inventory. Moreover, a substantial percentage of the SKUs change each year, due to factors such as reformulation/redesign, discontinuation, new items, replacement of products that are not selling well, seasonal items, etc. Thus, each retailer may have to prepare new records each year for a large part of its inventory.

In order to develop estimates of the number of records that would be required, the Retail Associations conducted an informal survey of their members. Fully 90% of the responding companies reported that their stores generally stock over 10,000 SKUs. Over 70% reported that they stock at least 25,000 SKUs, and many reported much higher numbers (even in excess of 100,000). For current purposes, we conservatively assume that an "average" retail inventory is in the range of 10,000 to 25,000 SKUs. In the survey, approximately half of the respondents stated that 10-25% of their SKUs change each year (with about equal numbers reporting higher and lower percentages). Thus, we estimate that each affected retail entity will have to make and record between 1,000 and 6,250 additional waste determinations each year (based on 10% of 10,000, and 25% of 25,000, respectively).

In the preamble to the proposal, EPA attempts to downplay the number of records that might be required, claiming that "[t[he focus of this provision is on solid wastes that have the potential to be hazardous wastes" and that "the Agency 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." *See* 80 Fed. Reg. at 57,944. However, the proposed rule is not, in fact, limited to solid wastes with the potential to be hazardous, and does not have any exclusions for specific waste categories. Moreover, even if the rule did have such limitations, it is doubtful whether they would provide any meaningful relief. An exemption for wastes that "clearly have no potential to be hazardous" would almost certainly lead to disputes over which wastes are "clearly" non-hazardous (such that recordkeeping would not be required), as opposed to just "probably" or "possibly" non-hazardous (such that recordkeeping would be required). Generators would be taking a significant risk if they took the position that any wastes were clearly non-hazardous and thus did not require records.

Exemptions for particular categories of wastes might be more helpful. However, the categories identified in the preamble highlight the problem with this approach. "Food wastes" is a category that might be interpreted to cover a number of products that could be viewed as potential hazardous wastes when discarded, such as some aerosol products (*e.g.*, spray cooking oils, dessert toppings, and cheeses), food supplements (*e.g.*, vitamins with selenium), and soda or other beverage concentrates. "Restroom wastes" might include waste deodorizers, hand sanitizers, and mouth washes that might be deemed

hazardous (as well as possibly regular hand soap in states, such as California, that use an aquatic toxicity test to classify wastes as hazardous). We are not suggesting that any of these products would, in fact, be hazardous wastes when discarded, and would support these exemptions in the event that EPA were to proceed with its proposal for categorical exemptions. However, we mention these products to highlight the inherent difficulty in trying to limit the scope of the proposed recordkeeping requirement for non-hazardous waste determinations. We also note that it is unclear to what extent categorical exemptions of this type would ultimately change the number of waste determination records required (depending upon the nature of each store and its product mix).

Finally, EPA may be thinking that retailers could keep records for broad categories of products, rather than each individual SKU. However, it is questionable whether this approach would provide meaningful relief. Retailers seeking to keep records based on categories would presumably have to take extra steps to review their inventories and develop suitable categories, define the limits of each category, identify the SKUs within each category, make the determination for each category, and document that determination – including why the determination is appropriate for *all* items in the category. The task would be complicated significantly by the fact that similar products coming from different suppliers might in some cases need to be characterized differently. Many, if not most or all, retailers might reasonably conclude that it would be less risky and more cost effective to keep records on each SKU.

In light of the above, we estimate that each affected retail entity would have to prepare 10,000 to 25,000 waste determination records initially, and then 1,000 to 6,250 records each year after that.

- ***Cost Per Record of Determination***

EPA estimates the costs of preparing and maintaining a record of each "negative hazardous waste determination" at only $12.17, based on 0.25 hours (15 minutes) of a technician's time, 6 minutes of a filing clerk's time, and a few cents for photocopying. *See* Economic Assessment at 3-7. This estimate, which was reportedly obtained by consulting with a single state regulatory official (rather than anyone who has actually tried to prepare and maintain such a record), seems to be a gross underestimate, especially given the long and confusing laundry list of information and documents that EPA has proposed must be included in the record (as discussed in Section 5.2.3 below), which likely were not envisioned by the regulatory official providing EPA with the cost estimate. For retailers, the costs are likely to be particularly high, given that they stock such a large array of products, they do not have the large technical staffs that manufacturers might be expected to have, they are not generally involved in producing the products and thus have only limited information about the composition of the products they sell. We believe that, at least for retailers, the cost of documenting each

non-hazardous waste determination would almost certainly be in excess of $100 – perhaps substantially far in excess of that amount.

EPA downplays the costs even further by annualizing the costs over 20 years using a 7% real discount rate. *See, e.g.*, Economic Assessment at 3-10. The effect is particularly pronounced with respect to the initial costs of preparing records for all of a generator's non-hazardous waste streams, since the costs are artificially spread out over 20 years and the later-year costs are discounted heavily. The net effect is to reduce the first-year costs by a factor of about 10. *Id*. ("One-time costs represent a first-year cost of $47.67 ($4.29 on an annualized basis) per LQG … and $36.50 ($3.22 on an annualized basis) per SQG"). However, the assumed 7% real discount rate is absurdly high, given that 10-year Treasury notes have been yielding in the range of 2.5% or below for years – before adjusting for inflation, which would put the real rate close to zero. Moreover, spreading the costs over 20 years is unrealistic – especially for the retail sector – since the life-time of a non-hazardous waste determination in the retail sector is much shorter (due to product turnover and change, as discussed above) and retailers operate on small margins such that they cannot ignore the full brunt of the first-year costs.

In light of the fact that there may be differing views about whether and, if so, how, costs should be annualized, we focus here only on the actual costs. We assume that the costs will fall between EPA's estimate of about $12 and our own estimate (probably still low) of $100 per determination record.

Using the estimates derived above, the low-end cost estimates for the retail sector under the proposed requirement for records of non-hazardous waste determinations would be $26.4 million in the first year, and $2.64 million per year after that (based on 220 affected entities, 10,000 initial records per entity, 1000 records annually thereafter per entity, and $12 per record). The high-end estimates would be $1,375 million (or $1.375 billion) in the first year, and $344 million per year after that (based on 550 entities, 25,000 initial records per entity, 6250 records annually thereafter per entity, and $100 per record). Far from being "minimal" costs, as claimed by EPA, the costs to the retail sector alone would be potentially devastating.

5.1.5 Retailers Should Be Exempted from Any Final Requirement to Keep Records on Non-Hazardous Waste Determinations

If EPA, despite the arguments above, decides to move forward with its proposal to require generators to keep records of their non-hazardous waste determinations, it should exempt the retail sector from that requirement. As discussed above, the burden on the retail sector would be overwhelming, primarily because retailers – unlike other generators – may have thousands of different, individual "waste streams" because of the large numbers and varieties of consumer products that retailers carry (even though each "waste stream" might only have a few unsold or returned items in it for any given year), and these "waste streams" may change significantly from

year to year. Thus, the total amount of waste generated by the retail sector is almost negligible in comparison to the wastes generated by other industries -- probably less than 0.1% of the total, as discussed in Section 4.2 above.

As a policy matter, it simply makes no sense to impose such extreme costs on the retail sector, just to provide some marginal additional assurance that less than 0.1% of the wastes being generated in the country are being properly characterized. To prevent such a misallocation of resources, EPA should exempt retailers from any final requirement to keep records on non-hazardous waste determinations.

5.2 Proposed Modification of Hazardous Waste Determination and Recordkeeping Requirements

5.2.1 EPA's Proposed Requirement of "Accuracy" Is Unnecessary, Impermissibly Vague, and Potentially Environmentally Counterproductive

EPA has proposed to require that generator determinations of whether a waste is hazardous or non-hazardous must be "accurate." *See* 80 Fed. Reg. at 57,992 (proposed to be codified at 40 C.F.R. § 262.11). The purpose of this requirement, according to the Agency, is "to emphasize and make clear" that these determinations must be accurate. *Id*. at 57,945.

This proposal is utterly unnecessary. EPA cannot possibly think that the existing rules are ambiguous about whether it is acceptable to misclassify a hazardous waste as non-hazardous, or that there is any lack of awareness of this fact in the regulated community. A generator who misclassifies a waste in this manner and handles the waste accordingly will necessarily be in noncompliance with a host of regulatory requirements, such as those related to hazardous waste labeling/marking, storage, personnel training, contingency planning, manifesting, and recordkeeping. (Under EPA's theory (see Section 5.3 below) that virtually any noncompliance turns generators into TSDFs, the generator would also be in violation of the RCRA permitting requirement and associated requirements, such as financial responsibility.) As EPA has long acknowledged, such "liability for incorrect determinations" is an obvious and powerful incentive for generators to make sure they are not misclassifying hazardous wastes as non-hazardous. *See, e.g.*, 55 Fed. Reg. at 11,830. The proposed "accuracy" requirement would, at most, enable EPA to pile one more allegation of noncompliance on top of countless others, against a generator making such a misclassification. It is difficult to imagine that this would meaningfully increase the incentive not to make this type of error.

Moreover, the proposed requirement is not as simple and innocuous as it may at first appear. The proposed rule does not define "accurate," which could create significant problems. Arguably, a waste determination would not be accurate if it results in a non-hazardous waste being classified as hazardous, or if it results in a hazardous waste being assigned an extra

hazardous waste code that does not actually apply. In the preamble to the proposal, EPA seems not to be concerned about the first type of over-classification, saying "[t]he generator is always free to manage its [non-hazardous] solid waste as a hazardous waste if it so desires." *See* 80 Fed. Reg. at 57,945. However, the Agency says that the second type of over-classification "does not satisfy the requirement to make an accurate waste determination." *Id*. These statements seem inconsistent, given that over-classification of a non-hazardous waste as a hazardous waste necessarily requires assignment of one or more hazardous waste codes that do not actually apply.

Furthermore, it is unclear why either type of over-classification should be a concern to EPA, since both would presumably result in the wastes being handled in a more protective manner. Indeed, in several other contexts – including the companion proposal on hazardous waste pharmaceuticals – EPA actively encourages generators to handle non-hazardous wastes in accordance with the requirements for hazardous wastes. *See, e.g.*, 80 Fed. Reg. at 58,029 ("a healthcare facility may choose to manage its … non-hazardous waste pharmaceuticals as hazardous wastes under this [proposal]"); 60 Fed. Reg. 25,492, 25,513 (May 11, 1995) (noting that one of the benefits of the universal waste rule is that it "eliminated [the need for] identifying, documenting, and keeping separate regulated and unregulated waste," and "encourag[ing] persons to manage both regulated waste and unregulated waste in the same collection systems … [a]s long as all commingled waste is managed in a system that meets the requirements of the universal waste regulations"). The proposed requirement for accuracy could prevent such practices, with significant adverse effects on the environment.

5.2.2 EPA Should Allow Retailers to Make and Record Hazardous Waste Determinations Based on Information Provided by Product Manufacturers or Third-Party Services with Access to Proprietary Manufacturer Data

In its discussion of the proposed "accuracy" requirement, EPA acknowledges that "[g]enerators often rely on a third party … to help them make a hazardous waste determination," but cautions that in these cases "the generator should still apply its due diligence to ensure a solid waste is not a hazardous waste, and if a hazardous waste, that it is characterized accurately." *See* 80 Fed. Reg. at 57,945. While this requirement of additional due diligence may make sense in the context of manufacturers who generate solid wastes, it places an impossible burden on retailers whose unsold or returned products may in some cases qualify as solid wastes.

Retailers commonly carry tens of thousands of products, and they have only limited information about such products, in part because some of the relevant information is proprietary. As a result, if the information provided to a retailer by the manufacturer (or by a third-party service that has access to proprietary information that the retailer is not privy to) does not include any indication that a product is hazardous, or indicates that it is hazardous only under certain waste codes, there is no further due diligence that the retailer can reasonably be expected to conduct. Moreover, in these instances, the retailers will not be able to assemble a full dossier on each waste, as EPA

envisions under its proposal, except for the information provided by the manufacturer (or third-party service).

We ask EPA to explicitly allow retailers to make and record hazardous waste determinations in these ways, so that it is clear that they do not have to engage in additional due diligence for tens of thousands of products without the information/tools that would be necessary for such due diligence.

5.2.3 The Proposed Mandatory Elements of a Hazardous or Non-Hazardous Waste Determination Record Are Unclear, Unnecessary, and Unworkable in the Retail Industry

The proposed rule includes a long laundry list of items that "must" be included in each record of a hazardous or non-hazardous waste determination. *See* 80 Fed. Reg. at 57,993 (proposed to be codified at 40 C.F.R. § 262.11(e)). These items are inappropriate and unwarranted, especially in the context of the retail sector, as discussed below:

- ***"Records that identify a material as a solid waste, as defined by 40 CFR 261.2" and "records supporting [the] solid .. waste determination"*** – As an initial matter, it is unclear why such a record is necessary. If a facility is classifying a material as a waste, there should be no need to explain or document the basis for such classification. Moreover, it is unclear what such a record would consist of. Information about the facility where the material is sent might be sufficient, for example, if that facility is a landfill or incinerator. However, if the receiving facility is a waste-to-energy facility, reclamation facility, or other recycling facility, would it also be necessary to include additional information about the material and the recycling process to demonstrate that the material is not excluded from the definition of solid waste? And, what happens if a single material may be sent to different facilities? Would the generator need records addressing each receiving facility and update the records whenever a new facility is used or an old facility is no longer used?

  The proposal does not appear to require records to support determinations that particular materials are *not* solid wastes, but just in case EPA is contemplating such a requirement, we note that the Agency would not have any legal authority to require recordkeeping for non-wastes (just as it does not have authority to require recordkeeping for non-hazardous wastes, as discussed above), and that the scope of any such requirement would virtually be infinite. EPA apparently does intend that records would be required to support determinations that non-hazardous materials are solid wastes. However, as discussed above, there is no regulatory definition of solid waste for non-hazardous materials, so such a requirement would be meaningless.

- ***"Records consulted in order to determine the process by which the waste was generated"*** – This proposed requirement is baffling. Generators of wastes necessarily are closely involved in the waste generation process, and do not need to "consult" records to determine how the wastes are generated. So, it is unclear what records this requirement would mandate. Perhaps EPA means to require records so that inspectors and enforcement personnel can understand the waste generation process. However, this would require development of an entirely new record that the generator does not need to make its own hazardous or non-hazardous waste determination, thereby increasing substantially the costs of the records.

  This requirement is particularly confusing in the context of retailers. The "process" by which products may become wastes are extremely varied, potentially including damage, expiration, obsolescence, defect, recall, and other situations. It is unclear what records a retailer might "consult" or otherwise provide to explain the generation process (except perhaps in the case of a recall, where a recall notice might suffice). Moreover, because there are so many ways that a product might become a waste, would a retailer have to keep records of each "process" for each SKU, and update the records each time a product becomes a waste for a different reason (*e.g.*, if a recall notice is issued)?

- ***"Results of any tests, sampling, or waste analyses; [and] records documenting the tests, sampling, and analytical methods used and demonstrating the validity and relevance of such tests"*** -- Retailers will rarely, if ever, be sampling and testing any products that may become solid wastes. Given how many products they normally carry, such sampling and testing would be an impossible burden. Retailers may, however, rely in whole or in part on testing performed by manufacturers or others. In such instances, the retailers will generally not have access to records of the type specified under this requirement. EPA should clarify that if the generator does not have access to this type of information and/or did not review or rely upon such information in making its hazardous (or non-hazardous) waste determination, the information need not be included in the record.

- ***"The composition of the waste, and the properties of the waste"*** – The proposed requirement to include in the record the "composition" and "properties" of the waste is extremely ambiguous. Retailers generally only have limited information about the composition and properties of any products that may become wastes, based on such things as product labels and Safety Data Sheets, where available. While manufacturers and others may have more detailed information about the composition and properties of the products, retailers will generally not have access to such information, in part because much of that information may be proprietary. EPA should clarify that generators need only include in their records information about composition and properties that they have access to and that they reviewed and relied upon in making their hazardous (or non-hazardous) waste determinations.

- "***The knowledge basis for the generator's determination"*** – As noted above, retailers necessarily generally base their hazardous waste determinations on the limited information they are able to obtain from manufacturers (*e.g.*, Safety Data Sheets) or on judgments made by third parties using proprietary product information that they are able to obtain from manufacturers under strict confidentiality agreements (and using the third parties' proprietary methods for evaluating such information). It is essential that such manufacturer-supplied information and/or the bottom-line conclusions of the third-parties be sufficient to serve as the "knowledge" basis for retailer waste determinations.

While we understand EPA's desire to provide additional guidance on what should be in hazardous waste determination records, the rigid and highly prescriptive approach taken in the proposal is simply not workable. This is especially true to the extent that the Agency appears to have based its proposal on traditional generators in manufacturing industries, without considering the special circumstances of the retail sector, as discussed above.

5.2.4 The Proposed Requirement that the Record "Comprise the Generator's Knowledge" Is Linguistically Awkward, Impermissibly Vague, and Potentially Inconsistent with Due Process

Under the proposed regulatory text, the records of hazardous and non-hazardous waste determinations must "comprise the generator's knowledge of the waste." *See* 80 Fed. Reg. at 57,993 (to be codified at 40 C.F.R. § 261.11(e)). We frankly are unsure what purpose this phrase serves or what it is intended to mean. The rest of the proposed regulatory language, which specifies what must be in the record and that it must support the generator's determination, would appear to be sufficient for EPA's purposes. The Agency presumably intends the additional language to have some meaning, but what that meaning might be is difficult to divine.

Our concern is that EPA may be intending to require that the records include the entirety of the generator's knowledge of the waste, such that the generator would be precluded during an inspection or an enforcement action from presenting any additional information about the waste from outside the record to demonstrate that the waste is non-hazardous. If this is what the Agency means, we believe it would violate the Due Process Clause of the U.S. Constitution, by denying generators the means to defend themselves. Such a provision would also encourage and effectively dictate that generators stuff their records with every imaginable piece of information about their wastes, so as to ensure that such information could be called upon if needed in the future. This would make the already onerous recordkeeping requirement virtually untenable.

Finally, in the event that EPA intends the "comprise" language to be interpreted in this way, the Agency has "hidden the ball" in its proposal, thereby failing to provide the public adequate notice and opportunity to comment, as required under the APA. Thus, this language should be deleted in any final rule.

5.2.5 The Proposed Requirement for a New Record Whenever a Waste "May Have Changed" Would Be Unworkable, Inasmuch as It Would Mandate Perpetual Development of Records

EPA has proposed to require that each waste be subjected to a repeat hazardous 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." *See* 80 Fed. Reg. at 57,992 (proposed to be codified at 40 C.F.R. § 262.11(a)). Since the Agency is also proposing to require a record for every determination, the combined effect would apparently be to require a record whenever a waste "has, or may have, changed."

Such a rule would be wholly unworkable. Arguably, a waste "may have changed" at almost any moment, both when something happens to it (even something minor, such as shaking or opening of a container) and when nothing happens to it (due to things such as settling, exposure to sunlight, gradual degradation, or spontaneous chemical changes). This is especially true, given that the proposal refers to any potential change in properties, whether such changes may be material to classification of the waste or not. Ordinarily, generators might be expected to make routine judgments about which, if any, of these moments might warrant a new determination of hazardousness or non-hazardousness. However, under the recordkeeping requirement, any time that the generator thinks about whether the waste "may have changed," it would be obligated to prepare a new record of the determination. In fact, a new record would be required even when the generator doesn't think about it, whenever the waste "may have changed" (which, as noted above, could be always). The generator would be forced into a perpetual state of record writing. EPA clearly cannot proceed down this path.

5.2.6 Requiring Records to Be Maintained Until Facility Closure Would Be of No Value and Would Present an Impossible Burden on Retailers

In the preamble to the proposed rule, EPA requests comment on "requiring SQGs and LQGs to maintain records of their waste determinations until the generator closes its site, rather than for at least three years from the date that the waste was last sent to on-site or off-site treatment, storage, and disposal." *See* 80 Fed. Reg. at 57,945. The Agency suggests that such extended recordkeeping would be useful "to support and respond to any questions an inspector may have about a particular waste determination – even if is more than three years from when it was … generated." *Id*. However, it is difficult to understand why an inspector would be asking about a hazardous waste determination for a waste that has not been generated or managed at the site for over three years. Even if a misclassification were found at that point, there would generally be nothing that the inspector could do about it, in light of statutes of limitation on any potential enforcement claims. In addition, any conceivable environmental harm from such an old misclassification could probably not be remedied. Indeed, this is why EPA originally established a three-year record retention rule. *See* 45 Fed. Reg. 12,724, 12,730 (February 26, 1980)

(responding to "comments … suggest[ing] various lengths of record retention, varying from a year to 25 years," by saying that "three years … provides a sufficient period for the Agency's enforcement and implementation purposes"). For this reason, there appears to be no reason to require records of hazardous waste determinations to be kept until facility closure.

Even if the extended retention period could be justified for some generators, it should not be applied to the retail industry. As discussed in Section 5.1.4 above, retail stores commonly handle tens of thousands of SKUs, a substantial percentage of which change from year to year. Keeping records on every SKU that was ever held in inventory for the entire life of a store – which in many instances may stretch out over several decades – is simply impossible. Indeed, this would likely be true even if EPA were to limit this document retention requirement to *hazardous* waste determinations. While only a portion of the SKUs sold by a store are likely to be hazardous, for some retailers the percentage could be quite high. Even where the hazardous percentage is only moderate (*e.g.*, 10%), keeping records for the entire life of a store would be problematic. Most retailers find the current three-year requirement challenging enough.

5.2.7 Expansion of the Recordkeeping Requirement for Hazardous and Non-Hazardous Waste Determinations to CESQGs Cannot Be Justified

In the preamble to the proposed rule, EPA asks for comment on "potentially requiring CESQGs to maintain documentation of their hazardous waste determinations, including their non-hazardous waste determinations." *See* 80 Fed. Reg. at 57,945. As an initial matter, the comments above about why it would be unlawful and inappropriate to require LQGs and SQGs to prepare and maintain records of their non-hazardous waste determinations apply with equal force in the context of CESQGs. Similarly, the comments above regarding the problems with EPA's proposed changes to the hazardous waste determination and recordkeeping requirements apply equally for CESQGs.

The expansion of these proposals to CESQGs, however, would be even more unwarranted, given the extremely high costs of doing so, and the marginal potential for any environmental benefit. EPA has estimated that the number of retail CESQG facilities is about 30% higher than the number of retail SQGs. One might thus reasonably expect that the costs of recordkeeping for the retail CESQGs might be on the same order as costs for the retail SQGs. As discussed above, such costs are exorbitant. And, in the case of CESQGs, the benefits are likely to be far lower, since CESQGs, by definition, generate much smaller quantities of hazardous wastes. Indeed, EPA has estimated that SQGs generate 1.54 to 2.6 tons annually on average, while CESQGs generate 0.2 to 0.31 tons per year on average. *See* Economic Assessment at 2-24, Exhibit 2-11. Thus, recordkeeping for CESQGs would provide additional information on proper waste classifications for a much smaller amount of wastes than recordkeeping for SQGs. Given that the costs of SQG recordkeeping cannot be justified by the small benefit (as discussed above), the similar costs of CESQG recordkeeping clearly cannot be justified for much smaller benefits.

5.3 Proposal to Classify Generators as Illegal Hazardous Waste TSDFs in the Event of Even Minor Lapses in Compliance with Generator Requirements

5.3.1 EPA's Proposal Is Unlawful, Inasmuch as It Would Erase the Fundamental Statutory Distinction Between Generators and TSDFs

EPA acknowledges in the preamble to the proposed rule 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." *See* 80 Fed. Reg. at 57,922. Yet, that is essentially what the proposed rule would do, not only blurring the line between generators and TSDFs, but effectively erasing the line entirely.

Even the most robust generator compliance program cannot guarantee 100% compliance 100% of the time. It is virtually inevitable that, at least on rare occasions, generators will find themselves in minor noncompliance with one of the countless generator requirements identified under the proposal as a condition for exemption, such as by losing a training record for a former employee, failing to immediately update a contingency plan when a piece of emergency equipment is replaced, failing to include one of several applicable waste codes on a hazardous waste container, or conducting a required inspection a day late. However, according to EPA, "[s]hould a … generator fail to meet *all* the conditions for an exemption, it would not only be subject to having to obtain a permit under [40 CFR] part 270 but also to the requirements [for TSDFs] in part 264 or 265." *See* 80 Fed. Reg. at 57,922 (emphasis added); *see also id*. at 57,992 (proposed to be codified at 40 C.F.R. § 262.10(g)(2)) ("Noncompliance with a condition for exemption in this part results in failure to obtain, or to maintain, such exemption. Failure to obtain or maintain the exemption results in a violation of … requirements in 40 CFR part 124, 262 through 268, or 270"). Clearly, this is a recipe for converting all generators into TSDFs, in direct contravention of what EPA itself acknowledges was Congress's intent. Inasmuch as EPA's proposal contravenes the authorizing statute, it is unlawful.

5.3.2 EPA's Proposal Is Arbitrary, Inasmuch There Is No Apparent Reason Why Certain Requirements Are Structured as "Conditions for Exemption" Triggering Reclassification of Generators as TSDFs in the Event of Noncompliance

In the proposal, EPA takes great pains to designate and structure certain generator requirements as "independent requirements" and others as "conditions for exemption." Nowhere, however, does the Agency even attempt to offer an explanation of why particular requirements are being placed into each category. We have been unable to discern any possible rationale.

Virtually all of the requirements could have been expressed in either way. In the absence of any basis for lumping most of the requirements into the more onerous "conditions for exemption"

category, as EPA has done, the Agency's proposal is simply arbitrary. To the extent that EPA may believe it has some basis for its proposed approach, it has failed to provide the public adequate notice of or opportunity to comment on that approach. Thus, the proposal is deficient under the APA.

EPA may seek to argue that it doesn't need to have a basis (or to explain the basis) for how it has structured the generator requirements, on the ground that the existing requirements in 40 C.F.R. § 262.34 are already structured as conditions for exemption. However, the current rules specify that only one particular type of noncompliance – exceedance of the time or quantity limits for accumulation – is capable of turning a generator into a TSDF. *See* 40 C.F.R. § 262.34(b) ("A generator of 1,000 kilograms or greater of hazardous waste in a calendar month … who accumulates hazardous waste … for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 CFR parts 264, 265, and 267 and the permit requirements of 40 CFR part 270") and § 262.34(f) (similar language for "[a] generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6000 kg or accumulates hazardous waste for more than 180 days (or for more than 270 days [in some cases])"). This language would be superfluous if noncompliance with <u>any</u> of the generator requirements turned a generator into a TSDF. So, the regulations cannot be read in this way. Indeed, as far as we are aware, EPA has never alleged that a generator is subject to permitting for noncompliance when the generator was accumulating wastes within applicable time and/or quantity limits. Moreover, even if EPA could somehow justify its lack of rationale for designating and structuring requirements from existing Section 262.34 as conditions for exemption, that justification would not extend to the new generator requirements being proposed for the first time, much less to existing requirements outside of Section 262.34 that EPA is proposing to now designate and structure as conditions for exemption. *See, e.g.*, 80 Fed. Reg. at 57,997 (proposed to be codified at 40 C.F.R. § 262.16(b)(7)) (requiring SQGs to comply with land disposal restrictions requirements in Part 268) and 57,801 (proposed to be codified at 40 C.F.R. § 262.17(a)(9)) (same requirement for LQGs).

5.3.3 EPA's Proposal Is Deficient under the APA Because It Fails to Provide Adequate Notice of and Opportunity to Comment on the Potentially Severe Implications of Reclassifying Generators as TSDFs

As noted above, EPA states in the preamble that "[s]hould a … generator fail to meet all the conditions for an exemption, it would not only be subject to having to obtain a permit under [40 C.F.R.] part 270 but also to the requirements [for TSDFs] in part 264 or 265." *See* 80 Fed. Reg. at 57,922. However, the Agency fails to address fundamental questions about what this means, leaving the regulated community in the dark as to what is actually being proposed. We highlight below a few of the relevant questions for a "minimally noncompliant generator," meaning a generator in noncompliance with one minor condition for exemption (*e.g.*, by losing a training record for a former employee, failing to immediately update a contingency plan when a piece of

emergency equipment is replaced, failing to include one of several applicable waste codes on a hazardous waste container, or conducting a required inspection a day late).

- ***Would the minimally noncompliant generator be subject to penalties for completely unrelated TSDF requirements that would not ordinarily apply to generators (e.g., requirements for a closure plan and financial responsibility) or to the relevant class of generators (e.g., contingency plan requirements in the case of a VSQG or SQG)?*** EPA seems to think the answer would be "yes," given its statement that these generators would be "subject to … the requirements in part 264 and 265." *See* 80 Fed. Reg. at 57,922. However, it seems inappropriate and excessive to impose penalties based on rules wholly unrelated to the generator's noncompliance.

- ***Would the minimally noncompliant generator need to apply for and obtain a permit as a TSDF?*** Once again, EPA appears to think the answer would be "yes," given its statement that these generators "would … be subject to having to obtain a permit under part 270." *Id*. However, it seems inappropriate and excessive to require a generator to go through the long and costly process of obtaining a TSDF permit based on a one-time minor noncompliance. We also question whether EPA or the states would have the resources to process permit applications from every noncompliant generator.

- ***Would the minimally noncompliant generator have to cease handling (and therefore generating) hazardous wastes until it obtained a permit?*** We cannot discern EPA's position on this issue. The Agency states that a noncompliant generator "becom[es] the operator of a nonexempt storage facility," and ordinarily such a facility would not be able to handle hazardous wastes without a permit (unless it were to qualify for interim status, which a noncompliant generator likely would not be able to do). On the other hand, if the noncompliant generator corrected its prior noncompliance, perhaps it could manage wastes in accordance with a conditional exemption, notwithstanding that it may have a permit application pending for the accumulation/storage unit.

- ***Would the minimally noncompliant generator be subject to facility-wide cleanup requirements under the RCRA corrective action program?*** EPA has long asserted that its corrective action authority under RCRA Section 3008(h) applies to "facilities that accepted hazardous waste … but never formally qualified for interim status [or obtained a permit]." *See* Letter from J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, EPA, to Richard C. Fortuna, Hazardous Waste Treatment Council (January 31, 1986) (RCRA Online #12550) (Exhibit 1); *see also* RCRA Hotline Report (April 1986) (RCRA Online #12598) (Exhibit 2) ("Section 3008(h) … authority extends to include those facilities that should have had interim status, but failed to notify EPA under [RCRA] Section 3010 or failed to submit a Part A [permit[application"). Accordingly, since EPA asserts that minimally noncompliant generators are "subject to having to obtain a permit," it would appear that these generators would also be subject to

corrective action under Section 3008(h) (and under Section 3004(u) if/when they obtain a permit). A facility-wide cleanup obligation potentially costing millions of dollars seems an excessively high cost to pay for a one-time minor noncompliance with the generator rules.

- ***Would the minimally noncompliant generator be subject to penalties for completely unrelated TSDF requirements even long after the generator corrected the original noncompliance?*** At one point in the preamble to the proposed rule, EPA says, somewhat reassuringly, that TSDF requirements apply to a noncompliant generator "for the same time that the generator is out of compliance with the conditions for exemption." *See* 80 Fed. Reg. at 57,922. This suggests that once a generator comes back into compliance with the conditions for exemption, the TSDF requirements will no longer apply. However, there is nothing in the regulations that clearly specifies such a time limitation to the applicability of the TSDF standards. In fact, the TSDF regulations in 40 C.F.R. Part 265 start out by saying that "the standards of this part … apply to owners and operators of facilities … who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file Part A of the permit application as required." *See* 40 C.F.R. § 265.1(b). While some of the TSDF requirements might not be relevant, EPA could potentially claim, for example, that the generator's accumulation unit must be closed in accordance with the TSDF standards in Part 265, Subpart G, if the generator ever lost its conditional exemption for that unit even momentarily. However, we have no way of knowing if this is what the Agency intends.

Clearly, EPA's statement that even minimally noncompliant generators become TSDFs raises more questions than it answers. These questions go to the heart of what the Agency is proposing, since some answers could have overwhelming consequences for the regulated community. By not mentioning, much less answering these fundamental questions, EPA has failed to provide the public adequate notice and a meaningful opportunity to comment, as required under the APA.

5.3.4 To the Extent that EPA's Proposed Rule Would Authorize Penalties and Other Consequences that Are Grossly Disproportionate to Alleged Violations, It Would Be Unconstitutional

As discussed above, there is considerable uncertainty about what EPA's proposal actually means. However, if the answers to almost any of the questions highlighted above are "yes," the implications for the regulated community may be staggering. As just one example, under the proposal, if a VSQG generating just a few pounds of non-acutely hazardous wastes each month complied with all the conditions for exemption for sending the wastes to a related LQG for consolidation, but on one occasion failed to include one of the relevant waste codes on the container label, it might become subject to hundreds of thousands or millions of dollars in penalties for noncompliance with a host of unrelated TSDF requirements that ordinarily do not

apply to VSQGs or in some instances any category of generators (*e.g.*, notification of EPA, obtaining an EPA ID number, contingency planning, personnel training, manifesting, maintaining a closure plan and financial assurances, inspecting storage areas, etc.). It might also have to follow all of these requirements *permanently*, apply for and obtain a TSDF permit, stop handling hazardous wastes until the permit is issued, and perform a site-wide cleanup costing millions of dollars.

Such consequences for a minor noncompliance would be inappropriate, unfair, and bad public policy. They would also be unlawful under the Due Process and Excessive Fines Clauses of the U.S. Constitution. *See* U.S. Constitution, Amendments 5, 8, and 14. The U.S. Supreme Court has stated that a penalty violates these provisions if it is "grossly disproportionate to the gravity of a defendant's offense." *See U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998). There can be little doubt that the penalties and other consequences outlined above would be viewed as grossly disproportionate to the offense of not including one of the applicable waste codes on a label on a single occasion. Indeed, in the cited case, the Supreme Court found that it was grossly disproportionate to require a person to forfeit $357,144 that he failed to declare in accordance with a law requiring reporting when taking more than $10,000 out of the country. In comparison to the penalties and other consequences potentially triggered here for a one-time minor error in labeling, the forfeiture in that case seems the height of reasonableness.

EPA may argue that, in practice, it would use its prosecutorial discretion to ensure that the penalties are proportional to the noncompliance, for example by seeking penalties only for the TSDF requirements that correspond to the conditions for exemption with which the generator failed to comply. However, nowhere in the proposal does the Agency make such a point. On the contrary, EPA states that a noncompliant generator "*cannot* be penalized for not complying with a condition for … exemption" but rather "becomes subject to *full* regulation." *See* 80 Fed. Reg. at 57,934 (emphases added).

Even if the Agency were somehow to commit now to use its prosecutorial discretion in the future to ensure proportionality, it could not bind the discretion of state officials, who are the front line enforcers of the RCRA program. Moreover, citizen groups could bring actions under RCRA Section 7002 to enforce the (proposed) rules as written, without considering whether the penalties being sought are proportional to the alleged noncompliance or not. Even in the absence of such inappropriate enforcement activities, the mere possibility of penalties that bear no relation to potential noncompliance would have immediate and serious adverse consequences by, for example, discouraging investment in ventures that are likely to generate even small quantities of hazardous wastes, making landlords reluctant to rent to such ventures, and increasing insurance rates for these ventures.

EPA can – and should – avoid all of these harsh and unconstitutional results by maintaining the Agency's long-standing approach that minor noncompliance does not turn generators into TSDFs, consistent with Congress's clear intent to distinguish between the two types of entities.

5.4 Changes to Definitions of Generator Categories

EPA has proposed subtle but significant changes to the definitions of the categories of hazardous waste generators (*i.e.*, LQGs, SQGs, and CESQGs/VSQGs). Under the existing regulations, the generator categories are determined exclusively by the *total* amount of hazardous wastes generated in a calendar month. *See, e.g.*, 40 C.F.R. § 261.5(a) ("a generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous wastes in that month"). However, if a facility generates in a calendar month (or accumulates at any time) more than 1 kg of acutely hazardous waste or more than 100 kg of waste from cleanup of a spill of acutely hazardous waste, such acutely hazardous wastes become subject to "full regulation," meaning the regulations applicable to LQGs. *See* 40 C.F.R. §§ 261.5(e) and (f)(2). Importantly, the generator's other hazardous wastes remain subject to the requirements corresponding to the generator's basic category (*i.e.*, CESQG, SQG or LQG).

Under the proposed rule, any generator that generates more than 1 kg of acutely hazardous wastes in a calendar month (or more than 100 kg of waste from cleanup of a spill of acutely hazardous waste in a calendar month) would be classified as an LQG, regardless of the total amount of hazardous wastes it generates. Whereas under the existing rules, a person who generates less than 100 kg/month of total hazardous wastes but more than 1 kg/month of acutely hazardous wastes would only have to manage his/her acutely hazardous wastes pursuant to the LQG rules, under the proposed rule the person would have to manage all of his/her hazardous wastes – including the non-acutely hazardous wastes – pursuant to the LQG rules.

The Retail Associations strongly object to this change in the definition of the generator categories. As discussed below, none of EPA's justifications for the change are sufficient. In the absence of any legitimate rationale, the Agency cannot move forward with its proposal.

5.4.1 EPA Is Mistaken When It Claims that the Change Will Ensure All of a Generator's Wastes Will Be Subject to the Same Level of Regulation

EPA claims that the proposal will ensure that "a generator can only have one generator category in a calendar month." *See, e.g.*, 80 Fed. Reg. at 57,928. Of course, even under the existing rules, a generator can only have one generator category each month, although the acutely hazardous wastes generated by a CESQG or SQG may be subject to LQG requirements (if such wastes exceed the relevant thresholds). What EPA appears to be mean is that the rule will ensure that all of a generator's wastes will be subject to the same level of regulation. However, this is not true. Even under EPA's proposal, if a VSQG at any time *accumulates* more than 1 kg of acutely hazardous wastes (or 100 kg of waste from cleanup of a spill of acutely hazardous waste), that acutely hazardous waste would become subject to full regulation (meaning the LQG requirements), even though the rest of the VSQG's wastes would be subject only to VSQG requirements. *See* 80 Fed. Reg. 57,994 (proposed to be codified at 40 C.F.R. § 262.14(a)(3)(i)).

EPA nowhere explains why it's important to impose a uniform level of regulation on a generator of less than 100 kg/month of total hazardous wastes when it *generates* more than 1 kg/month of acutely hazardous wastes, but not when the same generator *accumulates* more than 1 kg of acutely hazardous wastes.

5.4.2 EPA Is Mistaken When It Claims that There Are No Significant Benefits to Generators in Handling Some Wastes as SQG or VSQG Wastes When Others Must Be Handled as LQG Wastes

EPA claims that a generator "would not gain a significant economic advantage by having more than one generator category." *See* 80 Fed. Reg. at 57,928. The Agency bases this assertion on the ground that "many of the regulations for LQGs are site-wide, such as submitting the biennial report, developing a contingency plan, and conducting training, and therefore a [SQG or VSQG generating more than 1 kg/month of acutely hazardous waste] would still have to comply with these conditions." *Id.*

EPA's rationale rings hollow. Elsewhere in the proposal, the Agency explicitly acknowledges that at least one of these requirements – the contingency planning requirement – is *not* "site-wide." In particular, the Agency states as follows:

> [T]he RCRA preparedness and emergency procedures regulations … do not apply to the entire generator site. … [I]n order to comply with [such] requirements … LQGs only need to address those tanks, containers, drip pads, and containment buildings that accumulate hazardous wastes and are subject to the 90-day generator accumulation provision. As an example, … when developing a contingency plan, LQGs would only need to include [their] 90-day accumulation units.

See 80 Fed. Reg. at 57,957. For a SQG or CESQG that generates more than 1 kg/month of acutely hazardous wastes, the only 90-day accumulation unit would be the unit that handles the acutely hazardous wastes. So, the contingency plan would only have to cover that unit, not any other units used for handling non-acutely hazardous wastes. The same would be true for the training requirement. For a SQG or CESQG that generates more than 1 kg/month of acutely hazardous waste, only those employees involved in managing the acutely hazardous wastes would be subject to the LQG training requirements. However, under EPA's proposal, such a generator would have to comply with the LQG contingency plan and training requirements for *all* of its hazardous wastes. This distinction is a significant issue for the retail sector, especially with respect to training, since a store may employ hundreds of people, most of whom may handle unsold and returned products at the customer service desk or in the back room, and a significant percentage of whom may not be long-term employees (*e.g.*, seasonal employees).

Moreover, EPA's proposal would affect the time frame within which these generators would be required to send their non-acutely hazardous wastes off-site. As the Agency notes in the proposal, under the current rules, "the generator would have 90 days to send the acute hazardous waste off site, but would have 180 days for the non-acute hazardous waste." *See* 80 Fed. Reg. at 57,928. Actually, the time frame would be even longer if the generator is an SQG and has to ship the wastes more than 200 miles (270 days), or is a CESQG (indefinitely unless and until the total amount accumulated onsite exceeds 1000 kg). Although some generators might elect to ship their non-acutely hazardous wastes together with their acutely hazardous wastes (before the 90-day time period for the acutely hazardous wastes expires), there are many circumstances in which it would make little sense to do so (*e.g.*, if the non-acutely hazardous wastes will be sent to a different facility than the acutely hazardous wastes).

In short, EPA's claim that CESQGs and SQGs that generate more than 1 kg/month of acutely hazardous wastes have nothing to gain from handling their non-acutely hazardous wastes as CESQG or SQG wastes is without foundation.

5.4.3 Any EPA Regions or States Implementing the Rules by Requiring CESQGs and SQGs that Generate More Than 1 Kg/Month of Acutely Hazardous Wastes to Manage Their Non-Acutely Hazardous Wastes as LQG Wastes Are Acting Unlawfully

EPA states that "many EPA Regions and states" have "implemented" the RCRA requirements by requiring CESQGs and SQGs that generate more than 1 kg/month of acutely hazardous wastes to handle their non-acutely hazardous wastes as LQG wastes. The Agency, however, has not cited any examples. And, in any event, if they are doing so (under the federal rules or state rules that track the federal rule), they are acting in a manner that is inconsistent with the clear meaning of the regulations. EPA cannot reasonably claim that the proposed rule would not have a significant effect.

5.5 Proposed Alternative Standards for Episodic Generators

The Retail Associations appreciate EPA's efforts to address the issues associated with "episodic" generators of hazardous wastes. However, we are concerned that the Agency's proposal falls short in several respects. As discussed below, in order to address the natural variability in waste generation rates in the retail sector, the Agency should allow retailers to determine their generator status based on average generation rates over time. For unplanned episodic events, the proposal should also be changed to make it consistent with the long-standing exemption for immediate response activities, and to enable wastes from such events to be managed prior to notification of EPA.

5.5.1 EPA's Proposal Does Not Address the Natural Variability of Hazardous Waste Generation Rates in the Retail Sector

EPA's proposal on episodic generators is focused on episodic "events" that may cause a generator on an infrequent basis to generate significantly more hazardous wastes than it does through its normal business operations. Such events (planned and unplanned) can and do happen occasionally in the retail sector, as discussed further below. However, the main reason that retailers may change generator categories is unrelated to specific events. Instead, there is a natural variability in the amount of hazardous wastes generated through the normal business operations of retailers that is the most important cause of changing generator status. EPA's proposal misses the mark because it is focused on episodic events, rather than such natural variability.

In order to understand the natural variability in waste generation rates in the retail sector, it is first important to realize that a large proportion of the wastes are generated in very small quantities on a frequent basis, as individual retail items are returned by customers, or they are dented or otherwise damaged when they fall off a shelf, etc. Retailers generally have a good sense of the overall amount of such wastes they typically generate in these ways, but the actual amounts accumulate slowly over the course of each month, and may occasionally exceed typical levels by significant amounts. In these cases, there is no sudden "event" that may bump the store into a different generator category. Rather, it is the slow and steady accumulation of individual items over the course of a month that may cause a generator threshold to be exceeded. Retailers generally will not know exactly when/if they have crossed such a threshold until after the fact (*e.g.*, later in the month, at the end of the month, or even later when the wastes are sent offsite), at which point they may be deemed to have been in noncompliance. Indeed, even if they were able to know the precise moment when they crossed a threshold, they could be deemed in noncompliance for all of the wastes that they generated earlier in the month. This situation is altogether different from the situation of manufacturers, who generate wastes at a reasonably steady and predictable rate from a well-defined production process that they have control over, with occasional episodic events of the sort addressed by EPA's proposal (*e.g.*, process upsets).

In the absence of a clearly identifiable "episodic event," it is questionable if/how the proposed rule would provide any regulatory relief. Because the proposal does not address the natural variability of generation rates from normal operations in the retail sector, retailers who typically have generation rates that would place them in the VSQG or SQG category would, as a practical matter, be stuck with two unattractive options: (1) operate *full time* as LQGs (in order to be compliant if the LQG thresholds are ever exceeded), or (2) if the retailer is reasonably confident that it will always be in the VSQG or SQG category, it can operate consistent with such status – taking on the risk that it may be wrong at some point. Indeed, because the proposed rule would heighten the stakes of making a mistake (by reclassifying generators as TSDFs in the event of any noncompliance, as discussed in Section 5.3 above), it would push retailers toward the first option, *i.e.*, operating as an LQG, regardless of whether they are likely to actually generate hazardous wastes in quantities that would place them in that category.

5.5.2 EPA Should Allow Retailers (If Not Others) to Determine Their Generator Status Based on an Average of Their Waste Generation Rates Over Time

In light of the inherent variability of waste generation rates from normal retail operations, a different approach than the one proposed by EPA is required to address the main "episodic" generator issue for the retail sector. The Retail Associations believe that the best approach, if not the only approach, is to allow each retailer to determine its generator category based on an average of its waste generation rate over some period of time. For example, a retailer might be allowed to determine its category each April based on the average monthly generation rate over the prior calendar year, and then maintain that status until the next April. This approach would provide retailers certainty at the outset of each 12-month period (starting in April) about what rules they will be subject to during that entire period, give them ample time (from January to April) to modify their compliance programs if their status changes, and minimize the number of status changes to something that would be more practical. It would also protect human health and the environment, inasmuch as it would continue to ensure that retail generators are generally subject to the requirements appropriate for their waste generation rates.

It is our understanding that EPA is reluctant to pursue an averaging approach, due to concerns that it may be precluded by the 1984 statutory provision that originally directed the Agency to issue requirements for "hazardous waste generated by a generator in a total quantity of hazardous waste greater than one hundred kilograms but less than one thousand kilograms during a calendar month." *See* RCRA § 3001(d)(1), 42 U.S.C. § 6921(d)(1). Significantly, however, when EPA responded to the Congressional mandate in 1986, it never suggested that the statute tied the Agency's hands in such a way. While EPA did reject the use of an averaging approach, it did so purely on practical grounds. *See* 51 Fed. Reg. 10,146, 10,154 (March 24, 1986). Moreover, EPA read the statutory provision flexibly in the same rulemaking when it excluded various hazardous wastes from counting toward the 100 and 1000 kg/month thresholds, even though the text of the provision refers to the "*total* quantity of hazardous waste (emphasis added)." *Id*. at 10,174 (codified at 40 C.F.R. § 261.5(d)). Given that the Agency interpreted the statutory provision flexibly and did not see a legal obstacle to an averaging approach – right after the relevant statutory provision was adopted – there is no basis to believe such an obstacle exists today. (We also note that the 1984 statutory amendments explicitly stated that they did not "affect, modify, or render invalid" the rules for acutely hazardous wastes, and therefore do not in any way support a conclusion that the quantity of acutely hazardous wastes cannot be averaged over time. *See* RCRA § 3001(d)(7)(B), 42 U.S.C. § 6921(d)(7)(B).)

In fact, we believe an averaging approach is required to effectuate Congress's intent. As discussed above, given the unique way that wastes are generated in the normal course of retail operations, it is impractical to determine the applicable requirements based on the amounts of hazardous wastes generated during each individual calendar month. Such an approach would push retailers toward operating as LQGs, even if they rarely, if ever, achieve that status. That

would render the special provisions that Congress mandated for SQGs a nullity, at least in the retail industry. Given that retailers probably represent the single largest group of generators, as discussed above, such a result would be unlawful.

5.5.3 EPA's Proposed Notification Requirements for Unplanned Episodic Events Are Unworkable

Although the main reason that retailers may change generator status from month to month is due to the natural variability in their waste generation rates as a result of normal operations, retail facilities do occasionally experience "episodic events" along the lines of what EPA has focused on in its proposed rule – catastrophic or major events that significantly disrupt a facility's normal operations (*e.g.*, fires, floods, earthquakes, or a vehicle crashing through the front window of a store). While the Retail Associations appreciate the Agency's efforts to address these types of situations, and are generally in favor of the broad outlines of the proposal, we are concerned that it falls short in several respects. We focus here on certain problems with the proposal as it relates to unplanned events.

Under the proposed rule, for the first unplanned event in a calendar year, a VSQG or SQG would have to notify EPA "within 24 hours … or as soon as possible." *See* 80 Fed. Reg. at 58,005 (proposed to be codified at 40 C.F.R. §§ 262.232(a)(2) and (b)(2)). Although the "as soon as possible" language is helpful, we are concerned that the "24 hour" reference may set unreasonable expectations of how quickly a generator could notify the Agency. Many, if not most, unplanned events that could result in a sudden significant increase in waste generation are catastrophic or other major events that significantly disrupt a facility's normal operations (*e.g.*, a flood, tornado, earthquake, or major accident). At such times, the focus of attention is necessarily on addressing any immediate hazards, stabilizing the situation, and undertaking the cleanup. Requiring immediate notification unrelated to these vital tasks would be an unnecessary, and potentially dangerous, distraction. This is especially true to the extent that the facility, as specified in the proposal, would have to fill out a particular EPA form, including a variety of information that might not be readily available. Moreover, under the proposal, if the generator failed to notify EPA in a timely fashion, with every data element specified, it might be classified as a TSDF. In order to ensure against such a harsh result, facilities might be encouraged to prioritize the notification over other more critical activities. The 24-hour timeframe is also unreasonable to the extent that most large retailers would place their corporate compliance departments in charge of these notifications, and the news of an unplanned episodic event might not reach the corporate headquarters within such a short period.

The proposed notification requirement for an additional episodic event is even more unworkable. Although the proposed regulatory text does not actually specify when such notice would have to be given, 80 Fed. Reg. 58,006 (proposed to be codified at 40 C.F.R. § 262.233), the preamble states that the notice would have to come "within 24 hours after an unplanned event." *Id.* at

57,976. If this becomes a firm 24-hour requirement, the timing issues discussed above for notification of the first event would be even more acute.

Even assuming EPA allowed notification "as soon as possible" (as for the first episodic event), the second notification for an unplanned event would effectively be meaningless. Specifically, the proposed rule explicitly states, in its current form, that "[t]he generator cannot manage the hazardous waste generated from an additional episodic event under [the special episodic generator rules] until written approval by EPA … has been received." *Id*. at 58,006 (proposed to be codified at 40 C.F.R. § 262.233(c)); *see also id*. at 57,976 ("The generator may not manage hazardous waste for an additional episodic event until written approval by EPA (or the authorized state) has been received"). Of course, a generator would be providing its notification for the additional episodic event after the event had started (assuming it was unplanned, e.g. a "midnight dumping" event). So, the generator would be managing the waste prior to filing its notification, and before receiving approval from EPA or the state. For this reason, the generator with an additional episodic event that was unplanned would necessarily be in violation of the rules, and would therefore be reclassified as a TSDF (under EPA's view, discussed above, that generators in noncompliance with the rules qualify as TSDFs). In effect, the option to have an additional episodic event without triggering escalation to a higher-regulated category is meaningless, at least in the case of an unplanned additional event, because it would not be possible for the entity to fulfill the proposed conditions precedent.

5.5.4 The Proposed Rules for Management of Wastes from Unplanned Episodic Events Are Inconsistent with the Long-Standing Exemption for Immediate Response Activities

Under the proposed rule, VSQGs and SQGs experiencing episodic events – including unplanned episodic events – would have to manage the resulting wastes in accordance with certain requirements for accumulation (*e.g.*, various standards for containers and tanks). *See* 80 Fed. Reg. at 58,005-06 (proposed to be codified at 40 C.F.R. §§ 262.232(a)(4) and (b)(4)). However, these requirements are at odds with the long-standing RCRA exemption from permitting and associated standards (*e.g.*, tank and container standards) for "treatment or containment activities during the immediate response to … (A) A discharge of a hazardous waste; (B) An imminent and substantial threat of a discharge of hazardous waste; [or] (C) A discharge of a material which, when discharged, becomes a hazardous waste." *See* 40 C.F.R. §§ 264.1(g)(8), 265.1(c)(11)(i), and 270.1(c)(3)(i).

Most, if not all, unplanned episodic events (*e.g.*, accidental damage to products, natural disasters, or product recalls) are the types of events covered by the immediate response exemption. EPA established this exemption "in recognition of the fact that in emergency situations, where immediate response in the form of treatment or storage is necessary to protect human health and the environment, there may be no time available to comply with the regulatory standards or to obtain [a] permit from EPA." *See* 48 Fed. Reg. 2508, 2509 (January 19, 1983). The proposed

rule, however, would apparently close its eyes to this fact and effectively repeal the immediate response exemption without ever mentioning it.

It is possible that EPA believes the proposal and the existing exemption can be reconciled, perhaps by saying that a generator could initially rely on the immediate response exemption (without complying with any tank or container standards, including marking and labeling), but would at some point have to start complying with the rules governing episodic generation (including the tank and container standards). However, this is not how the proposed rule is structured. Instead, it requires compliance with the tank and containers standards from the beginning of the episodic event. Failure to do so would subject the generator to full permitting requirements, exactly what the immediate response exemption was designed to prevent. Moreover, subjecting a generator to tank and container requirements at some unspecified point in the middle of an unplanned episodic event would be a recipe for confusion and misunderstanding. To ensure they are in compliance, generators might simply assume that they have to comply with the tank and container standards from the beginning – again, a result in conflict with the very purpose of the immediate response exemption.

In order to avoid these adverse results, EPA should revise the proposed rule by specifying that the labeling, marking, and operating requirements for tanks and containers do not apply to hazardous wastes generated during an unplanned episodic event.

5.6 Proposed Provisions for Consolidation of CESQG/VSQG Wastes at LQG Sites

EPA has mischaracterized existing law, by claiming that CESQG wastes must be sent *directly* to a facility with a hazardous waste permit or similar authorization, without first being consolidated at another facility. Moreover, the Agency's proposal to provide relief from the supposed prohibition on consolidation would be so stringent that it would offer little, if any, value, and would be environmentally counterproductive, because it would effectively encourage landfilling instead of reuse and recycling options. EPA should simply clarify that consolidation is already allowed under existing law without condition, or, if it feels that some conditions should be imposed, the Agency should modify the proposed conditions substantially (*e.g.*, by allowing consolidation at third-party facilities, rather than just at facilities under common ownership with the CESQG sites).

5.6.1 EPA Is Mistaken When It Asserts that Existing Rules Prohibit Consolidation of CESQG Wastes at Facilities Without Hazardous Waste Storage Permits or Similar Authorization

In the preamble to the proposed rule, EPA asserts that "[t]he existing CESQG regulations do not allow a generator to send its hazardous waste off site to another generator, unless the receiving generator has a storage permit or is otherwise one of the types of facilities cited [in the rule]."

See 80 Fed. Reg. at 57,930. This statement completely mischaracterizes existing law, setting the Agency down a path of imposing new requirements under the guise of providing regulatory relief.

The current rules state only that CESQGs must "ensure delivery" of their wastes to a treatment, storage, or disposal facility that meets certain criteria (*e.g.*, a facility that is permitted as a hazardous waste facility, authorized to manage solid waste (subject to certain conditions), or engaged in recycling). *See* 40 C.F.R. § 261.5(g)(3). Under a straightforward reading of this rule, an intermediate location would be allowed as long as the CESQG "ensured" that the waste was ultimately "delivered" to one of the specified locations.

EPA in the past implicitly acknowledged the reasonableness of this interpretation, although it has declined to take a definitive position on whether CESQG wastes can be "taken to an intermediate location not identified [in the CESQG rule] for purposes such as consolidation and storage prior to delivery to its final destination." See Letter from Michael Shapiro, Director, Office of Solid Waste, EPA, to Peter J. Wojdyla, Pima County (AZ) Risk Management (May 1, 1996) (RCRA Online #14031) (Exhibit 3), *available online at* http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/FA009554BD71040F8525670F006C2A5B/$file/14031.pdf. The Agency now, however, takes it as a given that CESQG waste cannot be consolidated at LQG or other facilities not specifically identified in the CESQG rule.

Inasmuch as EPA has failed to acknowledge, much less justify, its change in position on this issue, the Agency's proposal is fundamentally flawed. It effectively denies the regulated community notice of and opportunity to comment meaningfully on the proposed regulatory change. Indeed, it purports to provide regulatory relief, when it actually is doing the opposite.

EPA should remedy the problem by clarifying that the CESQG rule means what it says: CESQG wastes can be consolidated at any intermediate location, as long as the CESQG ensures ultimate delivery to a properly authorized facility.

5.6.2 EPA Improperly Concludes that the Proposed Consolidation Provision Would Be Attractive to Generators and Would Provide Substantial Cost Savings

Since CESQG wastes can be consolidated under the existing regulations without conditions, EPA's proposal to impose new requirements for consolidation at related LQG sites (and its implicit proposal to ban consolidation at other sites) clearly will result in substantial costs. The Agency's assertion that the proposal provides net savings simply has no basis.

Moreover, even if one were to assume that consolidation has somehow been prohibited up to now, EPA's economic analysis dramatically understates the costs and overstates the purported

benefits of the proposal. As an initial matter, the Agency obscures the total costs by splitting them up and discussing them in completely separate parts of its economic analysis. *See* Economic Assessment at 3-34 to 3-40 (costs to CESQGs of labelling wastes and transporting them to an LQG, and costs to LQGs of notification, recordkeeping, and reporting); and at 4-5 to 4-13 (costs to LQGs of transporting and disposing CESQG wastes). Moreover, EPA nowhere brings together all the costs and purported savings that would be experienced by a single entity that might be considering consolidating CESQG wastes under the proposed rule. As discussed below, when the costs and "savings" are viewed in this way, few companies would be expected to utilize this purported regulatory relief, and the benefits that EPA claims exist would evaporate.

According to EPA's own figures (which we believe understate the true costs and overstate the true benefits for retailers), the annualized costs to an LQG of serving as a consolidation point for CESQG wastes are between $1520 and $2684 (combining the costs specified in Exhibit 3-13 of the Economic Assessment and the "negative savings" in Exhibit 4-4). The net savings to an individual CESQG for sending its wastes to an LQG for consolidation are between $297 and $354 (combining the savings in Exhibit 4-4 with the costs in Exhibit 3-13). It would make no economic sense for a company to consolidate wastes from only 4 CESQG facilities, since the savings would at most be $1416 (4 x $354), which is below the low-end LQG costs of $1520. Indeed, it might not make economic sense to consolidate wastes from 9 CESQG facilities, since the savings could be as low as $2673 (9 x $297), which is below the high-end LQG costs of $2684.

So, for consolidation to be even barely attractive, a company would have to consolidate wastes from at least 5, and perhaps as many as 10, CESQG facilities. However, EPA has based its LQG cost estimates on the assumption that "each eligible LQG [will] receive hazardous waste from [only] four to six CESQGs." *See* Economic Assessment at 3-38. At that level, it is doubtful that almost any company would engage in consolidation. While in other places, the Agency seems to suggest that it was assuming each LQG would receive wastes from between 6 and 9 CESQG facilities (*see, e.g., id.* at 3-36), even at that level, consolidation would at best be marginally attractive to some subset of potentially eligible companies. Indeed, EPA indicates that in its "high-end scenario," in which it claims that 22,411 CESQGs would be participating (*see, e.g., id.*, at 3-39), the net benefits nationwide would be $173,000, or $7.72 per CESQG (*i.e.*, 173,000/22,411). *Id*. at 5-3. It is hard to imagine that companies will be lining up to participate in a complex regulatory scheme with so little to offer (if the estimates can even be believed).

This conclusion is consistent with feedback that the Retail Associations have obtained from their member-companies. The companies have expressed considerable doubt about whether they would consolidate CESQG wastes under the proposed provision. Many have pointed out, in particular, the costs associated with shipping the wastes from the CESQG facilities to the LQG facilities. EPA's most favorable estimates are based in part on the assumption that "large organizations would rely on an existing fleet of hazmat trucks to transport waste from a CESQG to an LQG," such that the costs of such transport would be zero. *Id*. at 3-37. However, retail

facilities rarely, if ever, have such hazmat fleets. Consequently, it should not be surprising that the proposed rule on consolidation, as currently written, is of little or no value to most retailers.

5.6.3 EPA's Proposal on Consolidation Would Be Environmentally Counterproductive

Not only are the purported cost savings under EPA's proposal minimal at best, but the proposal would also have adverse consequences for the environment. As discussed above, the proposal would discourage companies from consolidating their CESQG wastes at their own LQG facilities. In addition, as discussed below, the proposal would prohibit companies from consolidating such CESQG wastes at their own SQG facilities or sending the wastes to third-party facilities for consolidation (unless those facilities have a hazardous waste permit or similar authorization). With these options effectively foreclosed, the companies would have little choice but to send the wastes directly to a landfill facility with a hazardous waste permit or similar authorization. The result would be significant reductions in reuse or recycling of the materials, in direct conflict with the resource conservation and recovery goals of RCRA. In addition, even in those instances where the materials might be discarded anyway, the inability to consolidate the materials before disposal may result in less efficient transport of the materials, which would result in more fuel usage and higher greenhouse gas emissions.

5.6.4 Substantial Changes to the Proposal Would Be Necessary to Ensure that Consolidation Remains a Viable Option

To the extent that some retailers might be interested in consolidating CESQG wastes, the Retail Associations believe that EPA has overloaded its proposal with so many burdensome requirements that it would unnecessarily discourage companies from doing so. Among the more problematic provisions of the proposal are the following:

- ***The proposal limits consolidation to LQG facilities that are under control of the same person as the CESQG facilities.*** However, CESQG facilities generally have limited resources and rely on third-party vendors to assist them in handling their wastes. Moreover, most LQGs – especially in the retail sector – are not in the hazardous waste business, and will generally be loath to take on substantial new RCRA regulatory responsibilities in order to be able to accept hazardous wastes from associated CESQGs (especially when the net savings, if any, are likely to be vanishingly small, as discussed above). For these reasons, limiting the proposal to related companies rules out what are likely to be the most attractive consolidation scenarios. EPA's reasons for the limitation are: (1) that it "takes advantage of strong incentives to ensure the hazardous waste is safely managed," (2) that related LQGs are "likely to be familiar with the type of hazardous waste generated by the CESQG," and (3) that it would simplify "questions regarding liability and responsibility for [the] hazardous waste." *See* 80 Fed. Reg. at 57,931. However, CESQGs typically turn to third-party vendors precisely because they

are knowledgeable about waste characterization and experienced in handling wastes properly. In the retail sector, especially, the wastes are not so exotic that a third-party vendor would be unfamiliar with the wastes and/or have less knowledge than a related LQG facility. We therefore urge EPA to state clearly in the final rule that CESQG wastes may be consolidated at LQGs that are not under the same control as the CESQGs, at least for the retail sector. Moreover, such consolidation should be allowed without the need for Agency approval, or else there will likely be endless delays that would undermine any potential benefit.

- ***The proposal would not allow CESQG wastes to be consolidated at SQG facilities.*** As discussed above, under the existing rules, CESQG wastes can be consolidated without restriction. However, EPA's proposal would not allow shipments from CESQG facilities to SQG facilities. The Agency nowhere explains the reason for this new proposed limitation. While it is true that SQG facilities are subject to somewhat fewer requirements than LQG facilities, the SQG requirements are presumably protective of human health and the environment for specific quantities of hazardous wastes that are generated onsite (*e.g.*, an accumulation of less than 6000 kg of total hazardous wastes and less than 1 kg of acutely hazardous wastes). *See* 40 C.F.R. §§ 262.34(d)(1) and 261.5(e)(1). The same requirements should also be protective for comparable quantities that are generated in part offsite. Although, as discussed below, the Retail Associations do not believe that all the requirements for consolidation (*e.g.*, the marking and labeling requirements for CESQG facilities, and the notification, recordkeeping, and reporting requirements for receiving facilities) are necessary, if EPA feels otherwise, it could impose the same or similar requirements for consolidation of CESQG wastes at SQG facilities.

- ***The proposal would require the CESQGs to comply with detailed marking and labeling requirements "in order to communicate the contents of the containers to facility personnel that can then safely manage the hazardous waste in compliance with the LQG regulations."*** *See* 80 Fed. Reg. at 57,931. However, these marking and labeling requirements would not apply to CESQG wastes sent directly to one of the facilities enumerated in the CESQG rule (*e.g.*, permitted hazardous waste facilities, solid waste facilities authorized to receive CESQG wastes, or recycling facilities). EPA nowhere explains why the marking and labeling is necessary when the CESQG wastes are sent to an LQG facility, but not when they are sent to one of these other facilities. Moreover, one of the main reasons that a company might want to consolidate CESQG wastes is that the receiving facility would have the knowledge and experience to properly handle the wastes. This is especially true in the retail industry, where a consolidation facility (whether under control of the same company or not) would generally have more resources than individual CESQG stores and more knowledge about the proper management of individual retail items. Accordingly, the consolidation facilities would generally not be dependent on marking and labeling by the originating CESQG facilities.

To the extent that the consolidation facilities thought such marking and labeling was important, they could always require the CESQGs to provide it (either through company policy, if the consolidation facility is under common control, or through contracts, if the consolidation facility is owned/operated by a third party). EPA has simply not provided any convincing rationale for a regulatory marking/labeling requirement.

- ***The proposal would require the receiving LQG facility to comply with detailed and burdensome notification, recordkeeping, and reporting requirements.*** However, other facilities receiving wastes directly from CESQGs (*e.g.*, recycling facilities and solid waste facilities authorized to receive CESQG wastes) would not be subject to these types of requirements. EPA has offered no reason for requiring LQG facilities to satisfy these requirements, when other facilities would not. This is especially true to the extent that the proposal would require notification prior to consolidation, reporting after consolidation, and recordkeeping in the middle.

- ***The proposed rule incorrectly suggests that states can impose additional regulatory requirements on wastes shipped through their territory.*** EPA claims that, under the proposed rule, "if a CESQG wants to transfer its waste through states that have not adopted the proposed provision, these transit states may … impose state requirements on the shipment while it is being transported through the state." *See* 80 Fed. Reg. at 57,932. However, any such requirements imposed by the transit state would be preempted under the Hazardous Materials Transportation Act ("HMTA"). *See* RCRA § 3003(b), 42 U.S.C. § 6923(b) (providing that RCRA regulations must be consistent with the HMTA); Letter from Michael Shapiro, Director, Office of Solid Waste, EPA, to Richard J. Barlow, Chair, Northeast Waste Management Officials' Association (June 11, 1996) (RCRA Online #14135) (Exhibit 4) ("strong preemption authorities are quite foreign to RCRA, but they are introduced into the transporter area by the statutory directive in RCRA to maintain consistency with the DOT framework"). The HMTA provides that state rules relating to certain subjects such as packaging, marking, labeling, and documenting materials during transport are preempted if they are "not substantively the same" as the corresponding federal requirements. *See* 49 U.S.C. § 5125(b)(1).

  Other state rules relating to transport are also preempted if they are an "obstacle" to the goals of the Act, including ensuring uniformity of transport requirements to promote transportation safety. *See* 49 U.S.C. § 5125(a)(2). EPA itself has long acknowledged the limitations of states in this area, stating for example that federal law "prohibit[s] States from requiring … manifests or other information to accompany waste shipments" if federal law does not include such a requirement. *See* 49 Fed. Reg. 10,490, 10,492 (March 20, 1984) (stating also that states may not "interfere with the actual shipment of waste"); *see also* Letter from Betsy Devlin, Director, Materials Recovery and Waste Management Division, EPA, to Thomas M. Tuori (April 11, 2014) (RCRA Online #14841) (Exhibit 5) ("For situations where the shipment is simply transiting a state with

> more stringent requirements than the federal program for [the relevant] materials, we believe the state's requirements would not likely apply to transit only activity"). It is unclear why the Agency in its proposal would misstate the applicable law in a way that would so severely undercut the proposed consolidation rule. If EPA moves forward with its proposal, it should clarify that transit states cannot impose requirements on CESQG wastes merely passing through their territory for consolidation at an LQG facility.

In light of the above, if EPA moves forward with the proposal imposing new conditions on transfers of CESQG wastes to consolidation facilities, the Agency should change the conditions substantially. As discussed above, our preferred option would be for EPA to clarify that the existing regulations already allow CESQG wastes to be consolidated at any intermediate location, as long as the CESQG ensures ultimate delivery to a properly authorized facility.

5.7 Waiver from 50-Foot Buffer Zone Requirement for LQG Ignitable and Reactive Wastes

EPA has proposed to allow LQGs to apply for a site-specific written waiver from their local fire departments from the existing requirement to store containers of ignitable or reactive wastes at least 50 feet from the facility property boundary. *See* 80 Fed. Reg. at 37,999 (proposed to be codified at 40 C.F.R. § 262.17(a)(1)(vi)(A)). The Retail Associations generally support this proposal, but believe it does not go far enough. As discussed below, we believe EPA should issue an exemption from the buffer zone requirement for retail facilities.

5.7.1 Flexibility under the Buffer Zone Requirement Is Necessary and Appropriate

As EPA notes in the preamble to the proposal, "there are some cases where it may not be physically possible to meet [the 50-foot buffer zone] standard, particularly if the width of the site is 100 feet or less." *See* 80 Fed. Reg. 57,979. This issue is likely of little significance to most manufacturing facilities, but can be a major problem for retail facilities, particularly in urban areas. Even if a retail facility is greater than 50 feet wide, the only place more than 50 feet from the property line in all directions may be in the middle of the store or other customer-accessible locations, which is obviously not the optimal place to store hazardous wastes.

Moreover, rigid application of the 50-foot buffer zone requirement is not necessary to protect human health and the environment. As EPA notes, there are other – often better – ways to provide such protection that can be determined by qualified professionals such as local fire departments, based on the specific wastes, site conditions, and other factors.

5.7.2 There Is No Need to Place Limits on the Waiver Provision

EPA requests comment on whether it should place conditions on the waiver provision, such as a limit on the amount of ignitable or reactive wastes being accumulated or a requirement that the facility has certain technical controls (*e.g.*, fire suppression devices or fire-resistant walls). *See* 80 Fed. Reg. at 57,979. The Retail Associations oppose any such conditions on the ground that they would be unnecessary. The local fire departments granting the waivers would be performing site-specific evaluations and would have the information and expertise necessary to determine what limitations, if any, are required for each site. Conditions that may be essential at one site may be unnecessary or even inappropriate at another. Dictating conditions in the regulations would undermine the very purpose of allowing fire departments to make informed judgments about what may be required.

5.7.3 EPA Should Issue an Exemption from the Buffer Zone Requirement for Retail Facilities

Although the Retail Associations generally support the waiver provision proposed by EPA, the Agency should go further and exempt retail facilities from the buffer zone requirement. Given the large number of retail stores in the country, local fire departments (particularly in urban areas) may be inundated with requests for waivers. These requests may not just be a one-time occurrence either, to the extent that retailers change their product offerings, rearrange their back rooms, or move in and out of specific locations.

Moreover, the buffer zone requirement makes little sense in the retail context. Most of the unsold/returned products that might be considered wastes will be in the same form and packaging as they were when they entered the store and were placed on the shelves for sale to consumers. As long as these items remain products, they would generally be allowed within 50 feet of the property boundary. So it's not immediately obvious why they should not also be allowed within 50 feet of the property boundary once they become wastes (especially because they would still be subject to the general requirements for hazardous waste storage).

Although some products might be damaged or spilled, such that they would no longer be in the same form and packaging as the consumer products, the amounts are likely to be small – much smaller than the 6000 kg (approximately 30 drums) that an SQG could accumulate without becoming subject to the 50-foot buffer zone requirement. This is especially true since the stores that might have problems with the 50-foot buffer zone requirement would generally not have room for 30 drums of damaged/spilled products (and would probably not even carry 30 drums worth of ignitable/reactive products). In addition, it's worth noting that the stores could and probably would handle their damaged/spilled products pursuant to the immediate response exemption, which would not implicate the 50-foot buffer zone requirement. *See* 40 C.F.R. §§ 264.1(g)(8), 265.1(c)(11)(i), and 270.1(c)(3)(i).

In light of the above, the 50-foot buffer zone requirement does not appear to provide any meaningful environmental benefits in the context of the retail sector. Requiring local fire

departments to go through the process of considering and granting large numbers of waivers would merely elevate form over substance. We therefore urge EPA to include an express exemption for retail stores from the buffer zone requirement.

5.8 Proposed Changes to Contingency Planning and Related Requirements

5.8.1 EPA's Proposed Requirement that LQGs and SQGs Enter into and Document Arrangements with First Responders Would Unlawfully Place Generators at Risk of Enforcement for the Failure of Others to Act

EPA has proposed to require LQGs and SQGs not only to attempt to make arrangements with first responders, as under the existing regulations, but actually to enter into such arrangements. The Agency's sole rationale for this change is a generalized reference to "the importance of emergency preparedness and planning." *See* 80 Fed. Reg. at 57,958. Of course, no one disputes the importance of being prepared for emergencies. However, there were reasons that EPA established the current requirement as it did, requiring generators only to attempt to make arrangements. In the current proposal, the Agency doesn't mention these reasons, much less explain why they no longer apply or have been superseded.

In the background document for the original rule, EPA noted that "[s]everal commenters pointed out that facility owners and operators may offer to make arrangements to coordinate emergency services with local authorities, but they cannot require local authorities to enter into such arrangements." *See* EPA, "Background Document: Standards for Preparedness and Prevention (40 CFR 264,265, Subpart C) and Standards for Contingency Plan and Emergency Procedures (40 CFR 264, 265, Subpart D)" (April 1980) (Exhibit 6) at 34 (emphases in the original). In response, the Agency stated that it "did not intend nor mean to imply that local authorities were required to enter into agreements against their will. … The Agency does intend that facility owners and operators attempt to enter into agreements with local authorities … and describe those arrangements, where successfully made and agreed in the contingency plan." *Id.* (emphases in the original). The preamble to the final rule elaborated (for facilities requiring contingency plans), saying that "[t]he Agency believes that most local authorities are responsible and competent, and that they rarely will reject facility plans or relegate them to obscure files. Nevertheless, if they do refuse to accept a facility's plan, the facility owner or operator will have complied with the rule if he can document … that he submitted a contingency plan to local authorities." *See* 45 Fed. Reg. 33,154, 33,185 (May 19, 1980).

In short, EPA required only that facilities *attempt* to make arrangements, in recognition of the facts that (a) the facilities have no control over the cooperativeness of the first responders, (b) EPA has no authority to require the first responders to cooperate, and (c) most first responders can be expected to cooperate anyway. These facts remain as true today as they were in 1980. Indeed, EPA acknowledges in the preamble to the current proposal that the front-line Local

Emergency Planning Committees ("LEPCs") may not respond to overtures from generators to enter into arrangements. *See, e.g.*, 80 Fed. Reg. at 57,958 (explaining that the proposal would "require and SQG or an LQG to enter into arrangements with its LEPC unless there is no LEPC, the LEPC does not respond, or the LEPC determines that it is not the appropriate organization to make arrangements with").

EPA has offered no reason why, despite these facts, it is now necessary and appropriate to require generators to do something that they have no power to do (*i.e.*, obtain agreements from first responders who are not willing or able to enter into agreements). As the Agency recognized in 1980, it cannot lawfully impose such a requirement. Not only is the Agency now proposing to reverse itself and unlawfully subject generators to penalties for things beyond their control, but it is also doubling down and suggesting that if the generators fail to do the impossible, they will be reclassified as TSDFs requiring a hazardous waste permit. EPA cannot move forward with such a proposal.

5.8.2 EPA's Proposal to Require an Executive Summary for Contingency Plans Is Unwarranted, At Least in the Retail Sector

EPA has proposed to require new LQGs to prepare and submit an executive summary of their contingency plan to first responders. *See* 80 Fed. Reg. at 58,008 (proposed to be codified at 40 C.F.R. § 262.262(b)). The Agency also requests comments on extending this requirement to all LQGs, and even to SQGs. *See id*. at 57,960. Whatever the merits might be for an executive summary in other industries, the Retail Associations believe there is no need for such a summary in the retail sector.

EPA states that the reason for an executive summary is that "the length of the … plans prevents first responders from being able to fully review a facility's contingency plan when responding to an emergency." *See* 80 Fed. Reg. at 57,959. This might be true for a large, complex manufacturing site with wastes, equipment, and processes that are not commonly and readily understood. However, first responders are unlikely to be unfamiliar with retail stores or the materials they contain. The contingency plans for retail stores are not so overwhelming in length or complexity that they cannot be readily understood.

The summary that EPA is proposing would, at least for retail facilities, likely rival the contingency plan itself in length. Requiring a separate summary document would not serve any purpose, and would create an unwarranted paperwork burden in contravention of the Paperwork Reduction Act.

EPA's suggestion that SQGs might also need to prepare and submit contingency plan summaries is even more inappropriate. In light of the fact that the RCRA regulations do not require SQGs to have a contingency plan in the first instance, it makes little sense to require them to have a summary of the contingency plan that is not required. Although these facilities may have

contingency plans due to other legal requirements outside RCRA, if there is a perceived need for such plans to have an executive summary, that issue is more properly addressed in the context of the other regulatory programs. EPA should rely on these other programs to ensure that executive summaries are available to the extent they may be necessary and useful to first responders.

5.8.3 EPA Should Allow Retailers, If Not Others, to Satisfy Requirements for Information About Emergency Coordinators Without Identifying Them By Name

Under the proposal, LQGs would generally have to include in their contingency plans "names and emergency telephone numbers of all persons qualified to act as emergency coordinator … and this list must be kept up to date." *See* 80 Fed. Reg. at 58,008 (proposed to be codified at 40 C.F.R. § 262.261(d)). For SQGs, this same information would have to be posted next to telephones or in areas directly involved in the generation and accumulation of hazardous waste. *Id*. at 57,998 (proposed to be codified at 40 C.F.R. § 262.16(b)(9)(ii)(A)).

EPA is proposing flexibility for LQGs in limited circumstances. Specifically, "[i]n situations where the generator site has an emergency coordinator continuously on duty because it operates 24 hours per day, every day of the year, the plan may list the staffed positions (*i.e.*, operations manager, shift coordinator, shift operations supervisor) as well as an emergency telephone number that can be guaranteed to be answered at all times." *Id*. at 58,008 (proposed to be codified at 40 C.F.R. § 262.261(d)). However, this flexibility would not apply to SQGs (with respect to the information postings, as opposed to the contingency plan), and would not apply to LQGs that do not operate 24/7/365.

The Retail Associations support the flexibility that EPA has proposed, but believe it should be extended to SQGs and should not depend upon whether a generator site operates 24/7/365. The critical requirement is that persons using an LQG contingency plan or seeking to respond to an incident at an SQG site be able to reach the emergency coordinator at all times. Having the name of the coordinator is not essential, if he or she can readily be identified by a job title. EPA apparently recognizes this for LQG sites operating 24/7/365. However, the same logic should apply to SQGs and LQGs that don't operate 24/7/365.

This issue is of particular concern to the retail sector because emergency coordinators at retail stores may be changed with much higher frequency than at facilities in other industries. For LQGs, each change requires an amendment to the contingency plan which must then be sent to first responders, which may be inundated with constant amendments from all of the LQG retail facilities within their jurisdictions. For SQGs, each change requires switching out signs or other changes to any postings. These requirements create an unwarranted burden that does not promote human health or protect the environment. Accordingly, EPA should extend its proposed flexibility for LQGs operating 24/7/365 to all LQGs and SQGs.

5.9 Proposed Provisions Relating to Satellite Accumulation Areas

5.9.1 EPA's "Clarifications" of the Scope of the Satellite Accumulation Provision Are Confusing and Problematic for the Retail Sector

The satellite accumulation provisions, both under the existing rules and the proposed rules, apply to "containers at or near any point of generation where wastes initially accumulate which is under the control of the operator of the process generating the waste." *See* 40 C.F.R. § 262.34(c)(1); 80 Fed. Reg. at 57,995 (proposed to be codified at 40 C.F.R. § 262.15(a)). In the preamble to the proposal, EPA provides examples of circumstances that render a process "under the control of the operator" for purposes of this provision, purportedly to make the rules clearer. However, the examples actually seem to signal a dramatic substantive shift in the meaning of the rules.

Specifically, all of the examples provided by the Agency involve containers in cabinets, areas, rooms, or buildings under lock and key (or their equivalent, such as an access card). If EPA is envisioning that this level of control is required, there is considerable uncertainty about what it means. For example, if the outside doors to a large building are locked, would there have to be locks limiting access to individual areas or rooms within the building? Depending on what EPA has in mind, we think it might be inconsistent with the understanding of the regulated community (including not only retailers, but also manufacturers).

EPA's "clarification" is especially problematic for retailers, since stores are necessarily open to the public, with back rooms that are marked as off-limits to customers but that in many instances are not locked. Does that mean that retailers with unlocked back rooms cannot have satellite accumulation containers, unless they are in locked cabinets? And, if the back room is locked, do different areas of the back room have to be separately locked (if locked cabinets are not used)? Again, depending upon how EPA interprets the provision, it could severely – and inappropriately – limit the eligibility of retailers for the satellite accumulation rules.

Finally, EPA should clarify the "at or near the point of generation" language in the retail context. For most, if not all, of the products that are damaged, spilled, recalled, expired, unsold for other reasons, or returned by customers, we believe that <u>if</u> they are generated as wastes in the store, that does not happen until they are taken to the back of the store. The reason is that as long as the materials are in the "front" of the store (*i.e.*, on the consumer-accessible shopping floor), they are not subject to regulation by virtue of the immediate response exemption. *See* 40 C.F.R. §§ 264.1(g)(8), 265.1(c)(11)(i), and 270.1(c)(3)(i). Under the regulations, a waste is "generated" either when it is produced or when it first becomes subject to regulation. *See* 40 C.F.R. § 260.10. Thus, even if the materials could be deemed wastes in the front of the store, they are not generated (*i.e.*, they do not become subject to regulation) until they are brought to the back of the store and the immediate response is over. A container in the back room would therefore be "at

or near the point of generation," and could qualify as a satellite accumulation area for the unsold or returned products.

5.9.2 Requiring Training for Employees in Satellite Accumulation Areas Would Be Unnecessary and Constitute an Unlawful Intrusion into Normal Business Operations

EPA requests comments on whether staff working in satellite accumulation areas should be required to undergo hazardous waste training. *See* 80 Fed. Reg. at 57,963-64. The Agency claims that "such personnel have a similar need to know the risks associated with hazardous wastes as personnel working in central accumulation areas." *Id*. However, this ignores the reasons why EPA originally excluded these employees from training requirements and has maintained this exclusion for over 30 years.

When EPA established the satellite accumulation rule in 1984, it decided not to require training for employees in these areas on the ground that "only limited quantities are allowed to accumulate" and "these [training] requirements were intended for centralized, higher volume accumulations of waste." *See* 49 Fed. Reg. 49,568, 49,570 (December 20, 1984). Personnel training in satellite areas, which by definition handle only very small quantities of hazardous waste, is no more necessary today than in 1984. We also note that Congress clearly intended that RCRA not interfere with manufacturing processes (or their equivalent in the retail sector, which is the normal handling of consumer products). However, satellite areas, by definition, are at or near the points of waste generation, and are integral to operations that Congress said should not be interfered with. *See*, *e.g.*, 80 Fed. Reg. at 57,922 ("it was clear in the legislative history of RCRA that Congress did not want to interfere with [manufacturing or] commerce").

Even if training for personnel in satellite accumulation areas could be justified for other industries, it cannot be justified for the retail sector. In retail stores, not only do the satellite areas contain only small amounts of wastes, but those wastes are the same materials that the employees unloaded from boxes and stocked onto shelves as products. The wastes are also identical to the materials that the employees – and the general public – would encounter if the products became wastes at home. Because the wastes at retail facilities are not exotic things that retail employees would have no familiarity with, and would be present only in very small quantities in satellite areas, the employees operating in these areas should not require specialized hazardous waste training.

5.10 Miscellaneous Proposed Provisions

5.10.1. EPA Should Ensure that Any Periodic Re-Notification Requirement for SQGs and LQGs Is Not Unduly Burdensome

EPA has proposed to require SQGs and LQGs to re-notify EPA of their hazardous waste activities every two years. *See* 80 Fed. Reg. at 58,002 (proposed to be codified at 40 C.F.R. § 262.18(d)). However, the Agency also requests comments on other potential approaches to periodic re-notification, such as re-notification every four years or only when certain changes occur. *See id*. at 57,947-48.

The Retail Associations understand EPA's desire for more up-to-date information on the universe of regulated generators. However, we are concerned that the options being considered by the Agency may unnecessarily burden the retail sector without providing any proportionate benefit. Periodic re-notification poses a particular challenge to retailers, since some retail companies have hundreds or even thousands of stores. Under the existing regulations, the status of these facilities may change with considerable frequency. While EPA's proposal with respect to episodic generators may help address this issue to some degree, as discussed in Section 5.5 above, the proposal does not get to the core reason for the frequency with which the status of a retail facility may change. Accordingly, we recommend that EPA require re-notification once every four years and allow companies with a large number of facilities to provide updated information in a consolidated format that only identifies key changes, such as facilities that have closed or changed generator status.

5.10.2 EPA's Proposal to Require Detailed Marking/Labeling of Hazardous Waste Containers Is Unnecessary and Unworkable in the Retail Sector

EPA has proposed to require hazardous waste generators to mark and label their containers not only with the words "Hazardous Waste," as under the existing regulations, but also with (a) words that identify the contents of the container, (b) an indication of the hazards of the contents, and, in some cases, (c) the applicable EPA hazardous waste codes. *See generally* 80 Fed. Reg. at 57,948-50. While these requirements might make sense in the context of a manufacturing facility, they are unnecessary and unworkable in the retail setting.

At retail facilities, waste containers generally contain very small quantities of a variety of products, typically in the original product packagings. For example, a 55-gallon drum could contain as many as 300 distinct items, or even more. Unless generic markings/labels are allowed (as under current law), retailers might have to mark each container with numerous waste descriptors and warnings. Multiple markings/labels of this sort would not provide any meaningful information to employees, transporters, downstream handlers, or government inspectors – especially since the packagings on the products inside the containers would likely give them any additional information they might need. A requirement for detailed markings/labels on the containers would only serve to create substantial new burdens on retailers, and potential new opportunities for minor technical noncompliance that could cause stores to be reclassified as TSDFs (as discussed in Section 5.3 above).

In this regard, it is instructive to note that U.S. Department of Transportation allows containers of mixed products of the sort generally handled by retailers to be marked simply as "consumer commodities" (or "waste consumer commodities," if the materials are RCRA hazardous wastes subject to manifesting). *See, e.g.*, 49 C.F.R. §§ 173.150 – 173.155 (allowing certain limited quantity packages of hazardous materials to be designated as consumer commodities), and 173.156 (providing for reduced marking and other requirements when consumer commodities are transported from a retail outlet to a disposal facility). EPA should similarly allow retailers to use generic markings to indicate the contents and hazards of their wastes (although we question whether this really adds anything to the existing requirement to mark the containers with the words "Hazardous Waste"). Indeed, the Agency should take this approach even if it requires other generators to provide more specificity, perhaps by exempting retail facilities from the new enhanced marking/labeling requirements.

5.10.3 EPA's Proposed Rules for Closure of Generator Accumulation Areas Should Not Apply to Areas Holding Small Quantities of Hazardous Wastes, Especially in the Retail Sector

EPA has proposed a number of new requirements for closure of accumulation units at LQG sites. *See generally*, 80 Fed . Reg. at 57,953-56. For example, the proposal would require LQGs to clean close their container storage areas or close as a landfill if clean closure cannot be achieved. *Id.* at 58,000-01 (proposed to be codified at 40 C.F.R. § 262.17(a)(8)). It would also require LQGs to notify EPA at least 30 days prior to closure, and no later than 90 days after closure of all container or other storage areas. *Id*. EPA also requests comment on whether LQGs should be required to certify clean closure (or failure to clean close), and whether SQGs should be required to notify EPA within 60 days after closure.

The Retail Associations have several concerns with EPA's proposal regarding closure, as discussed below:

- The requirements for clean closure or closure as a landfill should not apply to areas handling only small quantities of hazardous waste. EPA, in fact, seems to recognize this fact in the proposal. For example, the Agency justifies the new requirement by focusing on the risks posed by improper closure at facilities that "generate a sufficient quantity of hazardous waste to require the use of a large number of containers each day." *See* 80 Fed. Reg. at 57,955 (also contrasting this situation with "LQGs [that] generate relatively small quantities of hazardous waste and therefore may not need many containers to accumulate their hazardous wastes"). Moreover, EPA states that there is no need for a comparable requirement for SQGs, since "SQGs … have a waste accumulation quantity limitation of 6,000 kilograms." *Id*. If the proposed requirement to clean close or close as a landfill is not necessary for SQGs storing less than 6,000 kg of hazardous waste, it should also not be necessary for LQGs storing such quantities. In the retail sector, it is difficult to imagine any scenario where such large quantities would be stored

(corresponding approximately to 30 barrels). EPA should therefore establish an exemption from this requirement for retail facilities and/or facilities storing only small quantities of hazardous wastes (*e.g.*, less than 6000 kg).

- To the extent that closure of small container accumulation units does not warrant detailed closure standards, as discussed above, such units also should not be subject to any closure notification requirements that may be established. EPA claims that there may be some "potential benefit" to notification in such circumstances, but any such benefit is outweighed by the burden on the generator community and on the federal or state officials who might be inundated with notifications for small accumulation areas that they may not have known or cared about anyway and that likely posed little risk.

- EPA's proposal to require notification before and/or after closure of an accumulation unit (as opposed to an entire site) raises complex questions about what would constitute such closure. For example, if a generator sent all the wastes in its accumulation area offsite and did not generate any more hazardous wastes for several months, would that constitute closure requiring notification (and, if so, when)? If a generator were to move its accumulation area from one side of a room to the other, would that constitute closure of one area and opening up of a new area? The Agency has not addressed these issues, making it hard now to comment in a meaningful way, and even harder to comply if the proposal is finalized as is.

- EPA's proposal to require advance notification of closure is problematic in several respects. As noted above, it may not always be clear what constitutes closure or when it occurs. Even when closure is obviously taking place (*e.g.*, when an entire site is closed), generators may not always know 30 days in advance that closure will happen. Particularly in the retail sector, advance notification may also create problems from the perspective of employee and community relations.

- The proposed requirements to notify before and/or after closure of accumulation areas would pose a substantial logistical challenge to companies with hundreds or even thousands of facilities, as is the case for many large retail chains.

- Certification of clean closure (or failure to clean close) may be a particular challenge for generators operating on leased properties, especially to the extent that it might require certification about site conditions that the generator has no knowledge of or control over. This is a particular issue in the retail sector, since many retail locations are on leased premises within multi-tenant properties, such as a mall or shopping center.

In light of the above, the Retail Associations urge EPA to either abandon its proposals regarding closure of generator accumulation areas, or substantially modify the proposals to address the issues discussed above.

5.10.4 EPA's Proposed Prohibition on Placement of Bulk or Non-Containerized CESQG Liquid Hazardous Wastes in Landfills, Even After Sorbents Have Been Added, Is Inconsistent With Existing Law and Cannot Be Justified

EPA has proposed a prohibition on "placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids (whether or not sorbents have been added) in any landfill." *See* 80 Fed. Reg. at 57,995 (proposed to be codified 40 C.F.R. § 262.14(d)) (for CESQGs) and 57,002 (proposed to be codified 40 C.F.R. § 262.35) (for SQGs and LQGs). The Agency claims that "[t]his is not a new requirement." *Id*. at 57,971 (indicating that the proposed requirement is a "reflection of existing regulations found at § 258.28 for municipal solid waste landfills (MSWLFs), and §§ 264.314 and 265.314 for permitted and interim status hazardous waste landfills"). However, as discussed below, this requirement would, in fact, be new, at least with respect to CESQGs. Because EPA has not explained why it is necessary to depart from the current rules, its proposal cannot be finalized.

EPA is correct that the current regulations prohibit "placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids (whether or not sorbents have been added) in any landfill." *See* 40 C.F.R. §§ 264.314(a) and 265.314(a). However, this prohibition does not apply to CESQG wastes. *See* 40 C.F.R. § 261.5(b) ("a conditionally exempt small quantity generator's wastes are not subject to regulation under parts 262 through 268"). The only other provision that the Agency cites as support is Section 258.28. However, while that section prohibits placement of "bulk or noncontainerized liquid waste" in municipal solid waste landfills, it does not include the parenthetical regarding liquids to which sorbents have been added. *See* 40 C.F.R. § 258.28(a). This was not an oversight. On the contrary, when EPA issued this rule, it explicitly stated that it "wishes to clarify that although liquid materials … are banned, they can be solidified prior to their disposal in MSWLFs. Possible solidification methods include the addition of sorbent materials." *See* 56 Fed. Reg. 50,978, 51,055 (October 9, 1991); *see also* Letter from Bruce R. Weddle, Acting Director, Office of Solid Waste, EPA, to Jim Adamoli, President, Tascon, Inc. (November 17, 1993) (RCRA Online #11798) (Exhibit 7) (noting that the rules "do[ ] not in any way prohibit or restrict the use of sorbents … to address wastes or products being sent to a non-hazardous waste landfill").

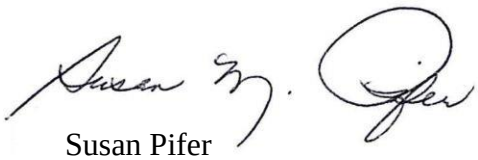
In light of the above, the current rules do not prohibit the placement into a landfill of CESQG liquid hazardous wastes (*e.g.*, small spills at CESQG retail facilities), as long as they have been treated with sorbents or other materials to the point where they no longer contain free liquids. Since EPA has indicated that it is not seeking to change the existing rules in this regard, and has not offered any reason for any change, it cannot go forward with this proposal.

6. Conclusion

For the reasons discussed above, the Retail Associations urge EPA to reconsider many aspects of the proposed rule, taking into account the unique issues that the proposal raises for the largest group of affected entities, namely the retail sector. While we believe some portions of the proposed rule are unlawful or otherwise inappropriate, and therefore cannot and/or should not be finalized, other portions, with modest adjustments, can be a significant move forward in EPA's stated goal of improving the hazardous waste generator regulations under RCRA.

Once again, we appreciate this opportunity to provide our comments on this proposed rulemaking. We would welcome the opportunity to provide additional input and/or to answer any questions the Agency may have with respect to the points made above.

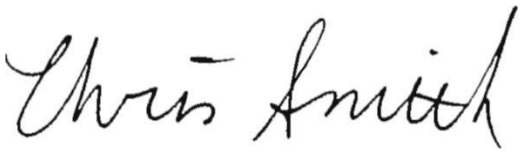
Sincerely,



Susan Pifer
Vice President, Compliance
Retail Industry Leaders Association



Stephanie K. Barnes
Regulatory Counsel
Food Marketing Institute



Christopher R. Smith
Director, Federal Public Policy
National Association of Chain Drug Stores



Jonathan Gold
Vice President, Customs and Supply Chain
National Retail Federation



Greg Ferrara
Vice President, Public Affairs
National Grocers Association

EXHIBITS

COMMENTS OF THE RETAIL ASSOCIATIONS IN RESPONSE TO EPA'S PROPOSAL TO "IMPROVE" THE REQUIREMENTS FOR HAZARDOUS WASTE GENERATORS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

DOCKET ID NO. EPA-HQ-RCRA-2012-0121

December 2015

EXHIBIT 1

Mr. Richard C. Fortuna
Hazardous Waste Treatment Council
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Fortuna:

I am pleased to respond to your letter of December 30, 1985, in which you posed several questions regarding the Environmental Protection Agency's current policy approach to implementing the new RCRA corrective action authorities provided by the Hazardous and Solid Waste Amendments of 1984 (HSWA). The following are our responses to the specific questions which you raised in your letter.

Q: Can a facility terminate interim status simply by withdrawing its Part A application?

A: A facility cannot simply withdraw its Part A application with the intention of terminating interim status and thereby absolve itself of any future RCRA responsibilities. As provided by 40 CFR 270.73, interim status is terminated when (a) final administrative disposition of a permit application is made; or (b) interim status is terminated as provided in §270.10(e)(5). Termination of interim status must take place according to the procedures specified in 40 CFR Part 124. Thus, a facility such as the one mentioned in your letter cannot terminate its interim status by simply withdrawing its Part A application. Interim status will additionally be terminated if a facility failed to certify under the Loss of Interim Status provisions of HSWA, and may be terminated pursuant to an enforcement order. In any case, however, the termination of interim status does not terminate the facility's obligation to comply with interim status requirements, including groundwater monitoring and closure, permitting requirements or corrective action requirements.

Q: Are all land disposal units that received hazardous wastes after July 26, 1982, subject to the §3004 corrective action requirements, even if such a unit is closing? What if such units did not take hazardous wastes, but are releasing hazardous constituents?

A: Yes, all land disposal units that accepted hazardous

waste after July 26, 1982, are potentially subject to RCRA corrective action authorities. First, EPA would consider all such units to fall within the scope of its authority to issue corrective action orders to interim status facilities under Section 3008(h). EPA believes that Section 3008(h) applies not only to facilities operating under interim status, but also to all facilities that terminate interim status and facilities that accepted hazardous waste after November 1980, but never formally qualified for interim status. In addition, 40 CFR §270.1(c) currently requires units that receive hazardous waste after January 26, 1983, to obtain either operating permits or post-closure permits. These permits will require corrective action under 40 CFR 264.100 and Section 3004(u). Also, new Section 3005(i) requires all units receiving hazardous waste after July 26, 1982, to meet the requirements of Subpart F to 40 CFR Part 264. This includes requirements for corrective action for releases to groundwater under 40 CFR §264.100. To implement this requirement, EPA is in the process of amending §270.1(c) to extend permit applicability to units that received hazardous waste after July 26, 1982. These permits will also require corrective action under 40 CFR 264.100 and Section 3004(u). A land-based unit that does not receive hazardous waste, but releases hazardous constituents may fall under these corrective action requirements. We will assume for the purposes of answering your question that the unit accepted solid waste and is a solid waste management unit. All releases of hazardous constituents from solid waste units located within the boundaries of a facility that contains any hazardous waste unit subject to the Section 3008(h) interim status order authority or subject to permit requirements will fall within the scope of the new corrective action requirements. Section 3008(h) allows EPA to order cleanup of releases from solid waste units at facilities within the scope of the interim status corrective action authority; Section 3004(u) requires cleanup at facilities that obtain permits.

Q: When is a facility or unit that undertakes closure subject to corrective action for continuing releases, and under which authorities: §3005(c) post-closure permits, §3004(u), §3008(h), or §3005(i)? Under what circumstances would different or dual authorities be used at the same facility? Which units would be subject to post-closure permits, and which units subject to other corrective action mechanisms?

A: As explained above, if a closing unit has caused a release requiring corrective action, that corrective action can be required through either a post-closure

permit (using the authority of §264.100 or §264.101, depending on the type of unit and the type of corrective action required), or through an enforcement order. (We are assuming that, by referring to closure, you are describing a facility that has at least one unit that accepted hazardous waste.) Section 3005(i) of RCRA does not of itself provide a separate mechanism for corrective action; rather, it simply establishes the applicability of Part 264 standards to regulated units.

The exact mechanism(s) which will be used to require corrective action will depend on the specifics of the situation at the facility. The scope of the corrective action authorities under §3008(h) and §3004(u) are similar. Regions and States are in the process of preparing plans for environmentally significant facilities to determine which authority, or combination of permitting and enforcement authorities, may be appropriate and yield most effective environmental results. An example of a situation where a mix of authorities might be used to implement corrective action could be a facility where a serious release situation is known to exist, but where a permit for the operating units at the facility will not be issued for a substantial period of time. A §3008(h) enforcement order could be issued to compel the owner/operator to begin the necessary investigations and/or implement required corrective actions, while the permit is being prepared. When the permit is issued, the remaining corrective action activities would be conducted under the permit.

As explained in the previous response, the facilities currently subject to post-closure permits include all of those facilities that had an operational land disposal unit as of January 26, 1983. If a facility is subject to a post-closure permit, all solid waste management units at that facility are covered by that permit.

Q: What monitoring requirements are or will be imposed at such facilities to determine the nature and scope of the required corrective action?

A: Regulated units which close under interim status are subject to the applicable ground water monitoring requirements of Subpart F of Part 265. The adequacy of existing ground water monitoring systems will be evaluated as part of the closure process, and if necessary, will be required to be upgraded. If ground-water contamination is detected, the owner/operator is required under §265.93 to make an assessment of the nature and extent of contamination. In addition, the units are subject to other authorities, including post-

closure permits and orders under Sections 3013 and 3008. Upon issuance of a post-closure permit, the applicable requirements for ground water monitoring, including compliance monitoring and corrective action, must be complied with. As indicated by the preamble of the final codification rule, the Agency will generally look to the protection standards of Subpart F for clean up levels for releases to ground water at solid waste management units. EPA is developing technical guidances for investigations at solid waste management units.

Q: Would units that stored or managed fuels deemed to be hazardous under State law also be considered solid waste management units? Under what circumstances, if any, would such units not be solid waste management units?

A: The question of whether or not a unit which stores or manages a fuel would be classified as a solid waste management unit depends, in part, on whether or not that fuel is considered to be a solid waste under Part 261 RCRA regulations. If the fuel is a solid waste, the unit would be a solid waste management unit.

Q: How does EPA Headquarters plan to interact with the States and EPA Regional Offices to ensure that closures of interim status facilities address the corrective action requirement?

A: The Office of Solid Waste and Emergency Response currently is examining a number of issues relating to closing RCRA facilities and integration of corrective action at those facilities. We expect to be issuing guidance to the Regions and States addressing the specific issues which you have raised, and others, in the future.

Please let me know if you have any questions.

Sincerely,

J. Winston Porter
Assistant Administrator

EXHIBIT 2

9502.1986(07a)

RCRA/SUPERFUND HOTLINE MONTHLY SUMMARY

APRIL 86

1. Corrective Action Orders Under §3008(h)

The owner/operator of a surface impoundment has managed hazardous wastes in the impoundment without interim status or a RCRA permit. A release of hazardous wastes from the impoundment has contaminated surrounding soil and groundwater. Upon discovery of this improper management and resultant contamination, the EPA intends to issue a corrective action order under Section 3008(h) of RCRA. Given that the owner/operator never an interim status, can the corrective action order be issued?

Section 3008(h) authorizes the EPA Administrator to issue corrective action orders to address releases of hazardous wastes into the environment from facilities authorized to operate under Section 3005(e). This authority extends to include those facilities that should have had interim status, but failed to notify EPA under Section 3010 of RCRA or failed to submit a Part A application. Accordingly, the corrective action order can be and should be issued to ensure prompt and thorough clean-up on the site. (Please see the December 16, 1985 memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, entitled "Interpretation of Section 3008(h) of the Solid Waste Disposal Act").

Source: Virginia Steiner (202) 475-9329
Research: Jim Ginley

EXHIBIT 3

PPC 9451.1996(06)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

May 1, 1996

Peter J. Wojdyla
Pima County Risk Management
32 N Stone, 3rd floor
Tucson, AZ 85701

Dear Mr. Wojdyla:

Thank you for your letter of September 18, 1995 requesting an interpretation of several questions regarding generator requirements and how they may apply to various on-site and off-site scenarios. While we are responding to your questions based on EPA's implementation of federal regulations, please be aware that the State of Arizona is authorized to implement its RCRA program in lieu of the federal regulations and should be consulted regarding the circumstances of a specific location. The state may have regulations that are more stringent than federal regulations, and these state requirements govern operation at these sites.

Below is a summary of the questions you asked followed by our interpretation. For your convenience we have attached copies of documents which relate to the issues you raise.

Question one

Your first question requests clarification of the definition of on-site to determine whether two structures in one complex owned by a single owner are considered separate generators under RCRA. You state in your letter that an office building and a factory are located on a single property and that the office building generates one kilogram of hazardous waste while the factory generates one thousand kilograms of hazardous waste. You ask whether the complex can be considered one generator or two. You also ask for clarification of the terms "installation", "facility", and "individual generation site" as they pertain to the definition of "on-site".

For the purposes of generator notification and obtaining EPA identification numbers, and assuming that the two structures you describe are on-site as defined at 40 CFR 260.10, one identification number is sufficient for the two structures. Also, the wastes generated on the contiguous property would be subject to the requirements for large quantity generators of hazardous wastes (see footnote 1). A manifest however, would have to be completed if waste must be shipped on roads or other right-of-ways to which the public has access.

There is no regulatory definition for the term "by site". However, at 40 CFR 260.10, EPA defines "on-site" as:

...the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross roads intersection, and access is by crossing as opposed to going along, the right of way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

EPA also defines the term "individual generation site" as "...the contiguous site at or on which one or more hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of hazardous wastes but is considered a single or individual generation site if the site or property is contiguous." (40 CFR 260.10) The property you describe would meet the definition of individual generation site if it is contiguous and would be "on-site" for the purposes of manifesting if the two structures were either a) not divided by a public right-of-way, or b) the public right-of-way can be crossed directly without traveling along it.

If the two structures were owned by different people, then under federal regulations one identification number would be needed for each structure even if the regulated activity is taking place on a contiguous piece of property. However, please check with your state for specific guidance on the issuance of identification numbers for the scenarios you provide.

The definition of the terms "installation" and "facility" are not directly relevant to your specific question.

"Installation" is not defined in the RCRA regulations at 40 CFR 260.10. It is only defined within the instructions to the Notification of Regulated Waste Activity Form, (EPA form 8700-12). Since the form is used by all persons requiring an EPA identification number, the term installation is meant to refer in general terms to all users of identification numbers.

"Facility", as defined in 40 CFR 260.10, refers to treatment, storage, and disposal facilities. The term refers, for permitting purposes, to the area where hazardous waste treatment, storage, and disposal activities occur and/or the waste management area that may be made up of one or more waste management units and also defines the area subject to corrective action. Therefore the definition of facility is not of direct relevance in the context of the description you provide since your question does not concern waste management sites subject to permitting requirements, but rather generation sites.

Question two

You state in your letter that Pima County has several different individual generation sites that are divided by roads which are owned by the County. You ask whether consolidation of several locations currently having different identification numbers would be of any significance.

Consolidation of two or more locations having different EPA identification numbers may cause several changes in the notification and manifesting process. For example, a change in the County's regulatory classification as a small or large quantity generator could result from the consolidation of several locations having different identification numbers.

Should the County (the generator) decide to consolidate several locations into one site the following conditions must be met: 1. The County must control the roads and public access must be restricted. If the generator does not control the road, a manifest must be completed for shipments that must travel off-site, (e.g., along a road) to the other property belonging to the generator. 2. At a location where the generator controls the right-of-ways that divide the property and restricts access, a manifest is not required to ship wastes to the different individual generation sites. However, although there is no

specific prohibition in the regulations against a generator maintaining multiple I.D. numbers for an individual generation site, the Agency expects an individual generation site to have only one I.D. number. A state may approve of the use of more than one I.D. number in special cases. 3. The proper state or Regional office must be notified of the change.

Also, please be aware that the Agency has proposed to change the definition of"on-site" to include properties that, although contiguous, are divided by a public right-of way. (See 60 FR 56468, November 8, 1995)

Question three

You ask whether shipments of hazardous wastes between two properties under the same ownership located at opposite corners of an intersection would be considered "on-site".

The Agency has stated in a November 4, 1994, letter from Michael Shapiro to Congressman Tim Johnson, "If the entry and exit between two parts of a campus [at a university] are directly across from each other, or across the junction of two crossroads, they are considered geographically contiguous" and would meet the definition of"on-site". Two properties under the same ownership whose entrances are located cater-cornered to each other would meet the definition of"on-site".

Question four

You ask whether waste from a conditionally exempt small quantity generator could be shipped for centralized handling to a site generating large quantities of wastes without obtaining a permit for storage or treatment of hazardous waste.

The Agency is in the process of reviewing whether waste from a conditionally exempt small quantity generator loses its exemption if taken to an intermediate location not identified at 40 CFR 261.5(g)(3) for purposes such as consolidation and storage prior to delivery to its final destination. We therefore cannot provide an interpretation on this question until a determination has been made.

Question five

You ask to whom must a large quantity generator send waste?

Large quantity generators and small quantity generators shipping waste off-site must prepare a manifest and transport the waste to a facility designated on the manifest in accordance with 40 CFR 262.20(b). EPA defines the term "designated facility" to mean

...a hazardous waste treatment, storage, or disposal facility which (1) has received a permit (or interim status) in accordance with the requirements of parts 270 and 124 of this chapter, (2) has received a permit (or interim status) from a State authorized in accordance with Part 271 of this chapter, or (3) is regulated under section 261.6(c)(2) or Subpart F of part 266 of this chapter, and (4) that has been designated on the manifest by the generator pursuant to section 260.20[sic (262.20)]. If a waste is destined to a facility in an authorized State which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving State to accept such waste.

This definition includes only limited exceptions for facilities other than permitted or interim status TSDFs. Therefore, a large quantity generator or small quantity generator could manifest and transport hazardous waste to facilities other than permitted TSDFs provided that the facility is appropriately designated on the manifest and meets the definition of a "designated facility". (Small quantity generators possessing a reclamation-agreement pursuant to 40 CFR 262.20(e) are exempted from certain manifesting requirements as you mentioned in your letter.)

Question six

You ask whether a permit must be obtained if the owner of several small generation sites would like to utilize a centralized handling operation for packaging, transport, etc., and whether all requirements at Part 263 apply.

If a generator generates waste in quantities over 100 kilograms and ships the waste to a location other than one that is on-site as defined at 40 CFR 260.10, a manifest is required for these shipments, and the regulations at Part 263 apply.

However, waste in transportation (e.g., manifested off-site) may be consolidated at transfer facilities defined at 40 CFR 260.10 as "...any transportation related facility including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous wastes are held during the normal course of transportation".

Under certain specified conditions, the regulations allow transporters to store shipments of hazardous waste at transfer facilities without obtaining a permit or interim status. The regulations state that:

> A transporter who stores manifested shipments of hazardous waste in containers meeting the requirements of section 262.30 at a transfer facility for a period of ten days or less is not subject to regulation under parts 264, 265, 268 and 270 of this chapter with respect to the storage of those wastes (40 CFR 262.12).

If the county designated an area as a transfer facility and met the conditions identified, consolidation would be allowable at that location. In order for the transfer facility to be excluded from permitting requirements, the waste must be stored during the normal course of transportation (e.g., treatment, storage, and disposal facilities designated on the manifest cannot qualify as transfer facilities.) Waste at such transfer facilities may be consolidated into larger units or shipments may be transferred to different vehicles for redirecting or rerouting. (See December 31, 1980 45 FR 86966)

Question seven

The following clarifies how a facility may respond to a location where hazardous wastes have been dumped illegally.

Persons who generate hazardous waste as a result of a discharge may temporarily store those wastes without a permit if they comply with the requirements for 90 day accumulation described on 40 CFR 262.34.

The Agency defines the term "discharge" or hazardous waste discharge" to mean "the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of

hazardous waste into or on any land or water (40 CFR 260.10).

The regulations at 40 CFR 270.1(c)(3) exempt only those management activities performed to provide an immediate response for discharges of hazardous waste from the permitting requirements.

> (I) A person is not required to obtain a RCRA permit for treatment or containment activities taken during immediate response to any of the following situations:
> (A) discharge of a hazardous waste;
> (B) An imminent and substantial threat of a discharge of hazardous waste; A discharge of a material which, when discharged, becomes a hazardous waste.
> (ii) Any person who continues or initiates hazardous waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part for those activities.

Additional provisions exempting immediate response activities are found at 40 CFR 264.1(g)(8) and 265.1(c)(ll). To qualify for the exemption the treatment or containment activity must be for the initial, immediate response to the discharge. Once the immediate threat passes, all applicable RCRA standards apply including the accumulation provisions described at 40 CFR 262.34. EPA explains:

> The exemption concerns only treatment and storage activities; it does not relieve anyone of complying with any requirements for the disposal of hazardous waste. In addition, the exemption applies only during immediate response; all hazardous waste management activities thereafter are fully subject to RCRA regulations (January 19, 1983; 48 FR 2508, 2509).

Additionally, after the initial response has ended, an emergency permit may be available for other emergency activities.

We hope we have clarified the issues you raised. Again, we strongly encourage you to check with the state of Arizona because as an authorized state, Arizona may have regulations or interpretations that differ from, or are more stringent than the federal requirements.

Please direct any questions about the interpretations in this letter to Ann Codrington, of the Generation and Recycling Branch at 202-260-8551.

Sincerely yours,

Michael Shapiro, Director
Office Solid Waste

Enclosures

cc: Bill Hàmele
Ethel DeMarr, Arizona DEQ

1 However, if acute hazardous waste is generated in quantities less than one kilogram, then this waste may be counted and managed separately from non-acute hazardous waste. (See 40 CFR 261.3(e) and (f)). For example, a generator of one kilogram or less of acute hazardous waste and 1000 kilograms of non-acute hazardous waste may manage the acute hazardous waste according to the provisions for conditionally exempt generators while the non-acute hazardous waste would be subject to requirements found at 40 CFR 262.34(d) for small quantity generators.

Attachment

PIMA COUNTY
RISK MANAGEMENT
32 N STONE, 3RD FLOOR
TUCSON, AZ 85701
(602) 740-5295

September 18, 1995

Michael Shapiro
Director, Office of Solid Waste
United States Environmental Protection Agency
401 M Street Southwest
Washington, District of Columbia 20460

Re: Request for Written Interpretations

Dear Mr. Shapiro:

I am the Environmental Loss Control Officer for Pima County Risk Management in Tucson, Arizona. Some of my duties include providing assistance for our various departments in understanding federal regulations. I am in the process of performing a form of "desk audit" in order to assist our operating units to comply with "RCRA" requirements in a consistent manner. I find that some of the definitions and guidance given are subject to interpretation; I need to clarify some of these issues before I attempt to provide direction to some of our operations which get involved with hazardous waste and therefore RCRA compliance. In the past, I have approached the Region for such interpretations, and when I asked for a written response, my questions were forwarded to the "central office". In two cases, the Region and the "central office" provided contradictory responses; for this reason, I am setting forth my questions in writing and asking for a written answer, clarification, interpretation, and/or response to each.

I shall set forth each question or situation for which I am seeking guidance:

1. In 40 CFR 260.10, "Generator means any person, by site,

whose act or process produces hazardous waste ....". What does "by site" mean? EPA Form 8700-12 utilizes the term "Installation" for notification purposes. It has also been suggested that "Facility", as defined in 40 CFR 260.10, can be used to define "Installation" for generator notification purposes in as much as a generator can be expected to store hazardous waste for a time, no matter how short. Reflecting on these various generator location descriptors, I am unsure as to the extent of a generator for regulatory purposes. For example, if a complex, single ownership, has two separate structures, one of which is an office building and the other a factory, and the factory generates one thousand kilograms (1,000 kg) of hazardous waste per calendar month and the office wastes one kilogram (1 kg) of spent flammable toner per month, are there two (2) generators, one of which is conditionally exempt, or just one (1) (with the office waste subject to full large quantity generator regulation)? The term "by site" would seem to suggest there are 2 generators, whereas if the "facility" definition is used, 1 generator. The term "Installation" would appear to be able to cover either interpretation. What if they shared the same structure? Also do the definitions of "On-site" or "Individual generation site" have any application in answering/interpreting the proffered situation?

2. As a political subdivision, Pima County owns many road "rights-of-way" and could, theoretically, conjoin its various locations. Is this of any significance under "RCRA" regulations?

3. If two properties with the same ownership are located "kitty-corner" across an intersection and access can be had at the opposing corners, would they be covered by the term "On-site"?

4. If there are two (2) "generators", one of which is a large quantity generator (LQG) and the other is a "conditionally exempt small quantity generator" (CESQG), which are owned and operated by the same entity but separated geographically, it would appear that the CESQG waste cannot be transported to the other generation site for handling by the LQG (without it being a permitted TSDF) for the purpose of combining it with its own wastes in order to see that it

is appropriately disposed. Is this correct? (As a public entity, the county attempts to keep its hazardous wastes out of local landfills and sèe that it is appropriately disposed or destroyed.)

5. It appears that an LQG must manifest and transport his hazardous waste(s) to nothing other than a permitted TSDF, unless it is being handled "On-site". Is this correct? And, except for contractual reclamation of hazardous waste, it appears that the same is also true of small quantity generators (SQG). Is this also correct?

6. Pima County is a large county and has many operations/facilities located throughout it. In order to transport hazardous wastes to a centralized handling operation for packaging, transport, etc., must that operation acquire a TSDF permit before being utilized? Also, do all the manifesting and transportation requirements apply to moving the wastes to such a location?

7. At present, when there is a "wildcat dump" of what appears to be a hazardous material within our "right-of-way" or on County property, we try to appropriately mitigate the situation; this usually entails the containerization of the contaminant and affected material(s) and transport to one of our maintenance yards for holding until an appropriate disposition can be made. If the material is a hazardous waste, and we are knowledgeable of this fact, can this be done in other than an emergency situation?

Please provlde me with written responses to the above. If guideline or program memoranda exist which can assist in addressing the above, I would be grateful if they could also be provided.

Thank you for your attention and consideration. If you have any questions concerning this letter, please call me at (520) 740-4001.

Very truly yours,

Peter J. Wojdyla, P.E.
Environmental Loss Control Officer

xc: Bob Healey, Director
Chris Straub, Deputy County Attorney
Becky Pearson, Public Works

EXHIBIT 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND

EMERGENCY

RESPONSE

Richard J. Barlow, Chair
Northeast Waste Management Officials' Association (NEWMOA)
129 Portland Street, Suite 601
Boston, MA 02114-2014

Dear Mr. Barlow:

I am pleased to respond to your May 23, 1996 letter, in which you support the State of New York Department of Environmental Conservation rulemaking petition regarding 40 CFR Part 263 relative to the transportation of hazardous waste. I also understand that you have serious concerns about the recent preemption determination by the U.S. Department of Transportation (DOT) which was published on December 6, 1995. (See 60 FR 62527). Specifically, you desire more regulatory oversight than is currently provided by the Resource Conservation and Recovery Act (RCRA) regulations for hazardous waste activities at transfer facilities.

As you know, the recent DOT preemption decision cited in your letter arose from a challenge lodged by the transporter industry against certain New York State regulations pertaining to activities at hazardous waste transfer facilities. Briefly, the State had enacted regulations which, among other things, prohibited certain load mixing activities at transfer facilities, and imposed secondary containment requirements in areas of these facilities reserved for off-vehicle storage. There is no federal counterpart to these state regulations in EPA's Part 263 regulations, and DOT's regulations do not impose similar restrictions. In the decision published in the Federal Register of December 6, 1995, DOT held that each of the challenged State regulations was preempted, because each was inconsistent with the uniform scheme of federal regulation which Congress intended for the control of interstate transportation of hazardous materials.

We are well aware of the long-standing interest of the States in the issues surrounding the regulation of hazardous waste transfer facilities. I also understand that unless and until there are revisions to the federal regulations governing transfer facilities, States which act alone to fill the perceived gaps in the federal RCRA transporter regulations (40 CFR Part 263) are likely to face similar challenges under the strong preemption authorities included by Congress in the 1990 amendments to the Hazardous Materials Transportation act (HMTA).

While I understand the resource issues that States are facing when they are forced to defend the validity of their laws before DOT or the courts, I note that this predicament arises primarily from the manner in which the Congress has allocated responsibility among the federal agencies and the States in the transportation area. The Congress has spoken in fairly unequivocal terms in RCRA 3003(b) that RCRA requirements addressing transporters must be consistent with the HMTA and regulations issued thereunder. The HMTA in turn provides DOT with considerable authority to preempt inconsistent State laws, particularly in certain of the so-called "covered areas" of hazardous materials regulation affected by New York's contested requirements, or, in those instances where inconsistent State laws would pose an obstacle to accomplishing or cat-tying out the HMTA's scheme of regulation. See 49 U.S.C. '5125. These types of strong preemption authorities are quite foreign to RCRA, but they are introduced into the transporter area by the statutory directive in RCRA to maintain consistency with the DOT framework.

On March 1, 1996, the Office of Solid Waste (OSW) stated to Commissioner Zagata of New York that OSW could not at this time commit our scarce federal rulemaking resources to the transfer facility problem without diverting resources from what I believe to be greater priorities for the RCRA program as a whole. This is still true today. However, at such time as our resources and priorities permit, we will revisit the merits of committing resources to resolving the transfer facility concerns. I do, however, appreciate NEWMOA's interest in supporting such a rulemaking.

I would like to be able to respond more positively to your letter at this time, but I know that our state partners understand that in these times, we must allocate our resources and energies judiciously. Thank you for bringing these concerns and suggestions to my attention. We appreciate the efforts of NEWMOA and its state members for their strong support for improving the RCRA program

Sincerely,

Michael Shapiro, Director
Office of Solid Waste

EXHIBIT 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

APR 11 2014

Mr. Thomas M. Tuori
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, New York 14604-2711

Dear Mr. Tuori:

I am responding to your letter of January 21, 2014 to Barnes Johnson where you seek confirmation from EPA on two questions regarding the shipment of materials originating in Mexico, with transit across the United States to a destination facility located in Quebec, Canada where these materials would be reclaimed primarily for their silver content. First, you ask whether intact unused off-spec dental x-ray packs and trimmings from unused dental x-ray packs generated at a Carestream facility in Mexico and destined for reclamation in Canada would be excluded from RCRA regulations in the United States. Second, you seek confirmation on whether such a non-waste determination would dictate the regulatory status of the materials for purposes of import, transit in the United States, and export regardless of whether any states along the route of transit would regulate these materials as hazardous wastes, or regulate these materials more stringently. In particular, you mention in your letter that the transporter of these materials may possibly stop while in transit across the United States at other Carestream facilities (e.g., Windsor, Colorado and Rochester, New York) to consolidate other off-spec dental x-ray packs and trimmings from unused dental x-ray packs generated at these facilities.

First, you are correct that federal RCRA hazardous waste regulations, per 40 CFR 261.2(c)(3) and Table 1 of 40 CFR Part 261, do not regulate the reclamation of off-spec commercial chemical products and characteristic byproducts provided these materials are reclaimed legitimately. Even if Mexico and/or Canada considered these materials hazardous waste, the U.S. does not under the federal regulations. Since these materials are not hazardous wastes under the federal regulations, EPA's hazardous waste import/export requirements would not apply. Therefore, under the federal regulations, if these materials were to solely transit across the United States from Mexico to Canada, they would only need to comply with applicable Department of Transportation requirements. However, please note that there could be a situation where a RCRA authorized state regulates these materials more stringently than the federal program and may impose requirements for these materials.

For situations where the shipment is simply transiting a state with more stringent requirements than the federal program for these materials, we believe the state's requirements would not likely apply to transit only activity. This is because when no activity other than transiting is occurring

there is no activity that is typically regulated (e.g., import, export or any other type of management activity) to trigger the more stringent state requirements. However, should the transporter stop at a facility in a state with more stringent requirements than the federal program to consolidate a shipment of like materials subject to the more stringent state regulations, then the transporter is no longer engaging in transit only activity. As a result of this consolidation activity, then the state's regulations would apply to this additional activity.

For example, should a state view such materials as a shipment of recyclable hazardous materials destined for precious metal recovery rather than a characteristic byproduct being reclaimed, the facility receiving the initial import shipment from Mexico, conducting the consolidation activity, and initiating the consolidated export shipment to Canada would have additional requirements. These would include complying with the authorized state's regulations equivalent to 40 CFR Part 266 Subpart F (Recyclable Materials Utilized for Precious Metal Recovery), the initiation of a hazardous waste manifest upon entry of the original shipment into the United States under the authorized state's regulations equivalent to 40 CFR Part 262 Subpart F (Imports of Hazardous Waste), and complying with all applicable export requirements under the authorized state's regulations equivalent to 40 CFR 262 Subpart E (Exports of Hazardous Waste) prior to exporting the consolidated shipment to Canada.

Therefore, because of the complexity of this issue and possibility of a state's regulations being more stringent than the federal program, we recommend you contact your state environmental agency to definitively determine what regulations, if any, may be applicable to your shipment.

Should you have any further questions, please contact Jim O'Leary of my staff at (703) 308-8827, or oleary.jim@epa.gov.

Yours truly,

Betsy Devlin, Director
Materials Recovery and Waste Management Division

EXHIBIT 6

PB [illegible] 1372

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA, Subtitle C, Section 3004 Standards for Preparedness and Prevention (40 CFR 264, 265 Subpart C); Standards for Contingency Plan and Emergency Procedures (40 CFR 264, 265, Subpart D)

(U.S.) Environmental Protection Agency
Washington, DC

Apr 80

U.S. Department of Commerce
National Technical Information Service
NTIS

PB81-191372

BACKGROUND DOCUMENT

STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES UNDER RCRA, SUBTITLE C, SECTION 3004

Standards for Preparedness and Prevention (40 CFR 264, 265, Subpart C); Standards for Contingency Plan and Emergency Procedures (40 CFR 264, 265, Subpart D)

This document (ms. 1941.7) provides background information and support for EPA's hazardous waste regulations

U.S. ENVIRONMENTAL PROTECTION AGENCY
April 1980

REPRODUCED BY
NATIONAL TECHNICAL
INFORMATION SERVICE
U.S. DEPARTMENT OF COMMERCE
SPRINGFIELD, VA 22161

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I. Introduction

This document supports the final regulations for 40 CFR Part 264, Subpart C - Preparedness and Prevention, and Subpart D - Contingency Plan and Emergency Procedures, promulgated under the authority of Section 3004 of the Resource Conservation and Recovery Act. This document also supports the final interim status standards for similar provisions under 40 CFR Part 265. The interim status standards under Part 265 are, with minor modifications, essentially the same as the Part 264 standards. Differences between the two sets of standards are highlighted in the discussions which follow.

A. Legislative Authority

Section 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§6901 et seq., directs the EPA Administrator to promulgate regulations establishing such standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under Subtitle C, as may be necessary to protect human health and the environment. Section 3004(3) provides that these regulations must include requirements respecting treatment, storage, or disposal of all hazardous waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator. Section 3004(5) requires these regulations to include provisions respecting contingency plans for effective action to minimize unanticipated

10. §264.37 Arrangements with Local Authorities

[Proposed §250.43-3(a)(3)]

Familiarization of Local Authorities. Several commenters pointed out that facility owners or operators may offer to make arrangements to coordinate emergency services with local authorities, but they cannot require local authorities to enter into such arrangements, as the proposed rule implied. Other commenters felt that familiarization of local authorities may not be necessary in many situations, e.g., where the owner or operator can show that the facility has the equipment and personnel necessary to control emergencies. Another commenter suggested that the proposed rule be broadened to include written arrangements with State response agencies.

In the proposed rule, the Agency did not intend nor mean to imply that local authorities were required to enter into agreements against their will. RCRA's Subtitle C controls extend to local authorities only if they generate, transport, treat, store, or dispose of hazardous waste. The Agency does intend that facility owners or operators attempt to enter into agreements with local authorities where this is appropriate, and describe those arrangements, where successfully made and agreed to in the contingency plan. The Agency agrees that State, as well as local, emergency response teams may be called in certain emergencies, and that prior agreements with these State agencies are desirable where appropriate.

Insurance Problems. One commenter claimed that familiarization of local authorities with the plant layout and waste handled at a facility, prior to their actually being called to the facility in an emergency, may create insurance problems, and other difficulties, but did not elaborate on this point.

The Agency doubts that any potential insurance problems are of great magnitude. It is difficult for EPA to imagine how familiarization of local authorities with a hazardous waste management facility could create insurance problems which could not be solved by appropriate arrangements. EPA assumes the insurance industry supports such familiarization actions, and EPA considers them as an important component of protecting the environment and human health outside the facility.

Familiarization is Ineffective. One commenter claimed that familiarization of local authorities is ineffective and useless, because of personnel turnover and higher priority concerns, and recommended that the proposed rule be deleted.

Personnel turnover is a fact of life in any organization but, in EPA's view, this is not sufficient justification to delete the requirement. Further, it is EPA's belief that public awareness of hazardous waste management activities is growing rapidly. Thus, local authorities will be more attentive to these activities in the future, and will give them higher priority.

In consideration of the above comments, the final rule states:

§264.37 Arrangements with local authorities

(a) The owner or operator must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(1) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to and roads inside the facility, and possible evacuation routes;

(2) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(3) Agreements with State emergency response teams, emergency response contractors, and equipment suppliers; and

(4) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(b) Where State or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operating record.

The final interim status standard at §265.37 is identical to the above.

EXHIBIT 7

9551.1993(04)

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

November 17, 1993

Mr. Jim Adamoli
President
Tascon, Inc.
7607 Fairview Drive
Houston, Texas 77041

Dear Mr. Adamoli,

Thank you for your letter dated July 18, 1993, concerning the regulation and safe management of certain types of liquids, and absorbent materials containing these liquids. I apologize for the delay in our response.

You indicated that your company manufactures paper-based sorbents used for stabilizing liquids prior to incineration, and that you were interested in marketing your products to other users. You requested guidance on instructing the users of your products on how to properly disperse of these materials after use. Because of the numerous types of liquids that could potentially end up in a sorbent material, it would be difficult for us to describe in a generic way how a used sorbent would be regulated. Also, the differing ways in which states may be regulating some of these liquids contained in the sorbents is also extremely important (e.g., some states may regulate used oil more stringently than others). Before explaining this issue in more detail, however, I would like to clarify some points you made in your letter concerning the hazardous waste regulations.

Under the federal Resource Conservation and Recovery Act (RCRA) regulations, certain wastes are defined as hazardous waste, while others remain subject to non-hazardous solid-waste regulations. In general, a solid waste (see footnote 1) is defined as hazardous waste if it either 1) is listed as hazardous waste in Title 40 of the Code of Federal Regulations (CFR), Part 261 Subpart D, or 2) exhibits one or more of the hazardous characteristics in

40 CFR Part 261, Subpart C. You stated that liquids such as used motor oil, anti-freeze, and grease are classified as hazardous. This is not always true; under the federal RCRA regulations, these liquids you mentioned are not specifically listed as hazardous wastes, although these materials might exhibit a characteristic of hazardous waste. It is the responsibility of the generators of these wastes to make this determination in accordance with 40 CFR 262.11.

It appears that the wastes that your potential customers will be generating, for which you are seeking guidance on disposal, are actually the used sorbents that have been used to clean up spills or leaks of various liquids. Unless the sorbents are being used to clean up spills of listed hazardous wastes (or chemicals that when spilled become listed hazardous wastes), the used sorbents would only be defined as hazardous waste if they exhibit any of the characteristics of hazardous waste. I have enclosed some materials that describe both listed and characteristic hazardous wastes. Your potential customers should be aware that the EPA has specifically prohibited the placement of bulk and containerized liquid wastes, or wastes containing free liquids (see footnote 2), into a hazardous waste landfill. An EPA rulemaking published on November 18, 1992 (57 Federal Register 54452), prohibits the direct placement into hazardous waste landfills of liquids that have been sorbed with "biodegradable" sorbents (see 40 CFR 264.314(e)). However, this rule does not in any way prohibit or restrict the use of sorbents, organic or otherwise, to address wastes or products being sent to a non-hazardous waste landfill (see discussion below on municipal solid waste landfills); nor does this rule affect the use of sorbents that are not landfilled (e.g., they are burned or incinerated). I have enclosed a copy of this rulemaking, as well as three letters written by EPA that further clarify certain issues regarding this rule. Should you have any questions specific to this rulemaking, you may contact Ken Shuster at (703) 308-8759.

In addition, there are other restrictions on the land disposal of hazardous waste (including hazardous waste/sorbent mixtures), known as the "Land Disposal Restrictions", or LDRs. These restrictions mandate that hazardous wastes be treated prior to land disposal to meet certain criteria, specific to each type of hazardous waste. Such treatment of hazardous waste prior to land disposal is often performed by commercial waste management companies, and may include incineration or stabilization. Potential users of your products should already be familiar with the land

disposal restrictions if they are already generating and disposing of hazardous wastes.

I would also point out that used sorbents that do not meet the definition of hazardous waste still need to be managed in accordance with any applicable federal, State, and local solid waste regulations (e.g., some states may have a category of "special" waste for certain petroleum-contaminated, non-hazardous waste). EPA regulations pertaining to municipal solid waste landfills (40 CFR 258.28) prohibit the disposal of bulk or containerized liquid wastes and wastes containing free liquids (see October 9, l991 Federal Register, 56 FR 51021). I have enclosed a copy of this rule. You should note that these federal regulations regarding sorbed liquids placed into municipal solid waste landfills do not have a biodegradability criteria like that described above for sorbed liquids placed in hazardous waste landfills.

With regard to the disposal of sorbents containing liquids defined as used oil, EPA addressed this issue in the final rule on used oil management standards (September 10, 199, Federal Register, 57 FR 41566), and in a subsequent technical correction (May 3, 1993 Federal Register, 58 FR 26420). I have enclosed copies of these two final rules. Assuming that sorbents containing used oil will not be burned for energy recovery, these sorbents would be subject to the EPA's used oil management standards only if free flowing used oil is visible (see footnote 3). Sorbents containing used oil that will be burned for energy recovery are subject to the used oil regulations regardless of whether or not free-flowing oil is visible per 279.10(c)(2)). Assuming that the sorbents are defined as used oil and will not be burned for energy recovery, EPA presumes that used oil is going to be recycled (even if the generator is planning to dispose of the used oil), until the used oil is actually disposed of on site, or sent off site for disposal (see footnote 4). Prior to being sent off site for disposal, sorbents meeting the definition of used oil, even sorbents exhibiting a characteristic of hazardous waste, would only be subject to the used oil standards. Once disposed of or site or sent off site for disposal, these sorbents would then be regulated under either hazardous or non-hazardous solid waste regulations.

I would like to reiterate that generators of sorbents containing various liquids should be advised to contact their state

solid and hazardous waste agencies, with a description of the material for which they are seeking disposal. State regulators are typically most familiar with the location and acceptance criteria of disposal facilities within their states, as well as with any particular state regulations that may impact the disposal requirements for these types of materials. I have enclosed a listing of state agencies, as well as some other information on solid and hazardous waste that I hope you will find useful. If you have any questions on this information, please contact Ross Elliott of my staff at (202) 260-8551. Thank you for your interest in the safe management of solid and hazardous waste.

Sincerely,
Bruce R. Weddle
Acting Director
Office of Solid Waste

enclosures (13)

1 As you may know, the term "solid" here does not refer to the physical form of the waste., but rather to the universe of garbage, refuse, industrial waste, wastewater, and other wastes regulated by the U.S. EPA.
2 As defined by the Paint Filter Liquids Test, EPA Method 9095.
3 See amended 40 CFR 279.10(c) at 58 FR 26425; see also preamble discussion at 57 FR 41581 and 41585.
4 See 40 CFR 279.10(a); see also preamble discussion of used-oil recycling presumption at 57 FR 41578.