

HAZARDS IN STORE:

A Waste Handling Primer for Retailers

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Wal-Mart generates hazardous waste. So does every other retailer or pharmacy in the country that sells everyday items such as fertilizer, bug spray, nail polish, bleach or some over the counter medications. The U.S. Environmental Protection Agency (EPA) and state governments have recently shone the spotlight on retailers' role as hazardous waste generators, hitting these companies with tens of millions of dollars in fines based on violations of state and federal hazardous waste laws. As a result of various civil and criminal cases that culminated in May 2013, Wal-Mart is obligated to pay more than \$110,000,000 in fines and other expenses to resolve violations of the federal Resource Conservation and Recovery Act (RCRA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Clean Water Act (CWA).¹

Surprised that ordinary retailers can be liable under hazardous waste laws? You shouldn't be. Gone are the days when federal and state agencies focused their hazardous waste enforcement efforts on major industrial operators. As recent cases show, retailers of common household goods must also take the steps necessary to comply with these laws or face serious civil and/or criminal consequences. This article discusses those laws as they apply to retailers, including some notable recent enforcement actions, and gives some guidance on what retailers can do to make sure they comply with these complex legal obligations.

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1. ARE YOU SURE THESE LAWS

APPLY TO ME? A variety of federal and state laws apply to entities that handle hazardous waste. This article focuses on the most widely applicable of those laws: RCRA. Originally enacted by Congress in 1976 (and notably expanded in 1984), RCRA establishes a federal "cradle to grave" system for the management of solid and hazardous waste. In short, RCRA and the EPA regulations issued thereunder set out a wide variety of requirements for handling, treating, storing, transporting, and other activities involving waste, including hazardous waste. They may not realize it, but retailers are often subject to many of these obligations.

What do you mean by "hazardous waste"?

"many items in retail stores...meet the RCRA definition of hazardous waste."

There are many items in retail stores that the general public would not immediately recognize as "hazardous" that can still meet the RCRA definition of hazardous waste. One example is hand sanitizer – most sanitizers have a sufficient alcohol content that they would meet the definition of hazardous waste for "ignitability" when discarded. For businesses subject to RCRA regulations because they handle these types of products, wastes derived from these products must be managed properly.

Subtitle C of RCRA, and its enabling regulations, set out a national hazardous waste management program. A threshold for coverage under these requirements is that an activity must involve "hazardous waste." For a substance to be hazardous waste, it must be a **waste** – to greatly oversimplify, something that is intended to be discarded, abandoned,

or recycled, both before and after it is disposed or recycled. The pre-disposal or pre-recycling storage element of the definition can be a special problem for retailers; once a customer brings in a return, that item may already be a waste by the time it is received by the retailer if it is destined for the trash or recycling.

Hazardous wastes include products that can no longer be used for their intended purpose. A product becomes a waste when the decision to discard has been made for a particular item. For years, retailers have put off the decision to discard until an item was transported back to a return center. Historically, retailers have claimed to lack the expertise to make the waste determination at the store level. This would seemingly allow a retailer to avoid making a waste determination, giving them the ability to legally transport the product without complying with RCRA. The recent Wal-Mart case specifically dealt with this practice and makes clear the government's view that the waste determination must be made at the store level for any product that cannot be used for its intended purpose.



Many waste items can be “hazardous wastes” – not just things that require a hazmat suit to handle but any waste that either (i) is included on specific EPA lists of hazardous wastes or (ii) exhibits certain characteristics deemed to be hazardous – ignitability, corrosivity, reactivity, or toxicity.² Materials included on the EPA lists or exhibiting those hazardous attributes cause problems for people or the environment due to their tendency, among other things, to cause fires or eat through storage containers. Common retail products falling into these categories are legion, including many beauty supplies, batteries, light bulbs, household cleaners, pesticides, and paints.

Uh oh. I guess I do handle hazardous waste. What now?

To determine how RCRA applies, the next question is how you are handling the hazardous waste. In the retail context, these rules will apply to persons or companies that “generate,” “transport,” or “treat, store, or dispose” of hazardous waste. Retailers are deemed to be generators of hazardous waste when they (a) dispose of or (b) store prior to disposal or recycling, a hazardous waste that is destined for disposal or recycling (such as a damaged or off-specification product, a customer's return, or a product that otherwise will not be sold). In those circumstances, the retailer must comply with the complex and burdensome RCRA requirements for generators of hazardous waste – packaging, labeling, inspecting, recordkeeping, training, and the like.

A RCRA transporter is, not surprisingly, an entity that is engaged in offsite transportation of hazardous waste. If a retailer takes hazardous waste away from a store to a central warehouse or to a distributor, that retailer must comply with RCRA's additional requirements for transporters of hazardous waste.

For obvious reasons, more expansive regulatory requirements apply to hazardous waste treatment, storage and disposal (TSD) facilities. Retail stores are not typically TSD facilities, which is fortunate because numerous onerous obligations apply to those facilities, including requirements related to training, preparedness, planning, manifests, closure, emissions, permitting, monitoring, and financial assurance. Importantly, however, storing hazardous waste for as little as 90 days can lead to a facility's designation as a TSD. And distribution centers or other facilities that receive hazardous waste from retail stores could well be considered TSDs as they appear to have been in the Wal-Mart case. While this article will not delve into the implications of TSD designation, suffice it to say that retail stores should follow the RCRA generator requirements as necessary to avoid becoming regulated as a storage facility, and retailers should carefully consider how they manage, consolidate, and transport any hazardous wastes, lest they become subject to overwhelming legal and regulatory obligations.



Looks like I'm a transporter or generator. What do I do?

The RCRA regulations spell out a long list of obligations applicable to generators and transporters of hazardous waste. For generators, an initial requirement is determining whether a potentially hazardous waste is legally hazardous – the performance and documentation of a “waste determination” as to each of your waste streams. This involves several steps, including identifying all of a facility’s waste streams, determining whether any of those wastes is exempt from regulation, determining whether EPA has listed any of those materials as hazardous wastes, and, if not listed, determining whether any of those wastes exhibit any of the four characteristics of a hazardous waste. This determination may be done through laboratory testing of the materials or, more typically in a retail context, through review of each product’s Material Safety Data Sheet (MSDS) to determine a product’s flash point, pH, reactivity hazards, or toxic contents. If a retailer handles any waste that is legally hazardous, as a generator they are subject to a number of requirements aimed at ensuring the safe handling of the waste and preventing harm to individuals and the environment. To vastly oversimplify, the waste must be packaged appropriately, labeled as hazardous waste, and marked with the date storage began. Storage areas must be inspected, personnel that will handle the waste must be properly trained, emergency plans must be created, wastes must be shipped to permitted facilities, and documented using specific hazardous waste manifests. Retailers must also maintain documents evidencing every step in this process from cradle to grave – from the waste’s generation and hazardous waste determination through the receipt of a signed return manifest reflecting the waste’s ultimate proper disposal. Transporters face similar obligations and are also subject to extensive regulations under the Hazardous Materials Transportation Act that apply above and beyond the RCRA requirements.



For retail stores that only generate very small quantities of hazardous waste, limited exemptions from some of these requirements can exist – a generator that produces no more than 100 kilograms (220 lbs) of hazardous waste in a calendar month may be deemed a “conditionally-exempt small quantity generator,” but many of the RCRA requirements including identifying and documenting hazardous wastes and their volumes and ensuring authorized disposal nonetheless apply and several states do not even recognize this exemption. Even if some exemptions are available, however, those exemptions can be lost if waste quantities increase periodically, leaving the retailer exposed. And, of course, if spills or exposures to hazardous waste occur, an assertion of “exemption” will not stave off other potential legal claims based on the failure to follow accepted industry practices as reflected in the RCRA regulations.



But what if I don't comply with RCRA? What could happen?

Entities that violate RCRA can face serious consequences. For example, the civil penalties can be significant. Under RCRA, administrative and civil penalties of up to \$37,500 per day are available for each violation of the regulations. Those penalties can add up quickly, especially because the government can often identify multiple violations – if you fail to perform a proper waste determination and a hazardous waste ends up in the store dumpster, you have likely violated quite a number of requirements including, for example, failure to properly identify, label, package, mark, store, train, plan, manifest, and dispose of the waste in question. Eight or ten violations occurring over a period of months or years can result in mind-bogglingly large potential penalties. Importantly, for “knowing violations” of various RCRA requirements, the federal government can also commence a criminal enforcement action, with penalties reaching up to \$50,000 per day of violation, as well as imprisonment for responsible corporate officers and managers and involved employees for up to five years in some circumstances. Even more seriously, where such a violation would knowingly put someone in danger of

death or serious bodily injury, the penalty can reach \$250,000 for an individual or \$1,000,000 for an organization, in addition to imprisonment for up to 15 years.

These financial and penal consequences are in addition to issues like legal and defense costs, damage to reputation, and potential injunctive requirements and oversight. Where these issues arise, public companies can be punished by their shareholders, credit agreements and other financial instruments can be violated, and entities that do business with the federal government can face potential exclusion from those activities. Plus, RCRA violations can be in addition to violations of other federal and state statutes that lead to similar consequences, as well as private party litigation that can be brought by persons claiming to have been harmed.

I'll comply with RCRA. Is that it?

There are many other state and federal laws that address issues similar to RCRA. A few are specifically worth noting. First, states have their own hazardous waste laws, and many of those laws apply to more wastes than RCRA and impose additional requirements beyond RCRA. California's law, as discussed below, has gained particular notoriety with respect to retailers in recent years due to that state's aggressive enforcement activity, but other states also have programs that add to what is required by federal law. At the federal level, the CWA requires persons to obtain specific permits and comply with extensive pollution control obligations and practices before discharging pollutants, FIFRA imposes requirements regarding pesticides and similar substances, and the Emergency Planning Community Right-to-Know Act (EPCRA) requires notification of officials when certain hazardous substances are stored or handled at a location. The Hazardous Materials Transportation Act and U.S. Department of Transportation regulations issued thereunder regulate the shipment, packaging, labeling, and transportation of many materials including hazardous wastes. The Occupational Safety and Health Act also includes hazard communication and other requirements to protect employees involved with the handling of hazardous substances and wastes. In addition to all of these federal requirements, many states have their own laws that in some or even many respects are different than and exceed the applicable federal standards. Retailers need to pay attention to each of these laws, and others, to avoid violations.



2. DO RETAILERS ACTUALLY GET IN TROUBLE UNDER THESE LAWS?

Recent cases show the potentially serious consequences for retailers that violate the hazardous waste laws.

Wal-Mart (2013)

The most recent RCRA enforcement action against a retailer is also the biggest. In May 2013, Wal-Mart entered into a civil settlement and criminal guilty pleas to resolve RCRA, FIFRA, and CWA violations. In total, Wal-Mart has been ordered to pay approximately \$81.6 million in penalties, no small amount for any company, even the world's largest retailer. Wal-Mart is also required to make other payments, including funding community service projects, and undertake other activities, such as opening a retail compliance center, that push their total costs beyond \$110 million. Then there are a number of compliance obligations that Wal-Mart must follow, including following all RCRA generator requirements at all of its stores, even stores that are conditionally exempt, and implementing significant operational changes. Notably, this case was commenced in 2005 and is now just being settled; although not public,



the legal costs associated with defending this matter and negotiating its settlement are thought to be at least as significant as the cost of the fines.

What did Wal-Mart do that led to these serious penalties? A lot of things that smaller retailers may do every day, just on a larger scale. According to EPA, Wal-Mart did not have a program for managing hazardous waste at its stores before 2006 and instead sent all of its damaged and returned items – including damaged aerosol cans, leaking containers of bleach and other liquids considered hazardous waste – to its warehouses. As a result, the company failed to make hazardous waste determinations, failed to prepare hazardous waste manifests, offered hazardous waste to unpermitted TSD facilities, and failed to meet handling, storage, and emergency response requirements. In short, before 2006, Wal-Mart appears to have failed to appreciate that it was handling hazardous waste and failed to take the steps required by RCRA and its implementing regulations.

The other violations, while perhaps less likely for most retailers, show that various issues can arise when retailers are unaware of (or disregard) legal requirements related to waste. For example, Wal-Mart allegedly sent damaged containers of pesticides and other hazardous products to a third-party management company that lacked required FIFRA registrations and had inadequate capacity to properly handle those products. As a result, pesticide labels were detached and altered, and misbranded pesticides were distributed, all in violation of FIFRA. As for the CWA violations, some hazardous wastes (e.g., bleach) were poured into a local sewer system due to inadequate training for hazardous waste management and disposal practices. As these violations show, even the largest, most sophisticated retailers can run afoul of a wide array of requirements.

Other Companies

Wal-Mart may be the biggest, but it is no way the only example of a retailer suffering the consequences of failing to comply with the hazardous waste laws. Notable examples from the first half of 2013 alone include two state civil cases against large retailers. In April 2013, the California and Nevada supermarket chain Save Mart was required to pay a \$2.55 million California state civil penalty based on improper handling of hazardous waste from spills and customer returns. Instead of complying with hazardous waste laws, Save Mart employees reportedly poured these wastes down drains, transported them to unauthorized locations, left them untreated before disposal, and failed to properly label them. Similarly, in January 2013, the national pharmacy chain CVS Pharmacy received a \$300,000 state civil penalty in Connecticut for mismanaging hazardous wastes like photographic processing solutions, non-dispensable pharmaceuticals, and non-saleable consumer goods. In addition to the penalty, CVS was required to pay \$500,000 for various projects and comply with unannounced compliance audits.



Several similar enforcement actions arose in 2012. National pharmacy chains Walgreens and CVS were hit with state hazardous waste violations in California, both involving common household goods such as pesticides, bleach, paint, batteries, and fluorescent light bulbs. Both Walgreens and CVS were ordered to pay fines and costs and fund environmental projects, reaching \$16.6 million for Walgreens (which also included penalties for violations regarding patient records) and \$13.75 million for CVS. Costco, the national big box retailer, similarly incurred \$3.6 million in California state civil penalties, costs, and funding for environmental

projects because it had only implemented a hazardous waste program for large materials, not for smaller items like discarded pharmaceuticals and the cleaning products its store workers used. Finally, in a slightly different type of case, a pawn shop in California and its owner were convicted for criminal RCRA violations because the owner had a junk hauler carry off items containing cyanide and acid. The penalty in that case included \$100,000 for the

company, \$25,000 for the owner, and 108 months of probation for both.

The list of cases from recent years goes on. Since 2007, Target, Macy's, K-Mart, and Home Depot are just some of the retailers that have faced civil fines for violations of RCRA or similar state hazardous waste statutes. These companies failed to properly handle items such as paint, light bulbs, motor oil, aerosols, and bleach. Repeatedly, companies like these failed to implement adequate—or, in some cases, any—programs to ensure that the hazardous waste that they generated was handled in a way that satisfied all of the applicable legal requirements.

3. OKAY, I'M CONVINCED. WHAT PROGRAMS DO I NEED TO PUT IN PLACE?

Once a retailer has decided they generate hazardous wastes, the key to avoiding violations and fines is the development and implementation of a Hazardous Waste Management Program (HWMP). The program at a minimum should include the following elements:

1 waste determination, 2 employee training, 3 spill clean-up, 4 proper packaging, 5 transportation, 6 disposal, and 7 record retention. The program should be written and available to regulators for review during an inspection.

Waste determination is the process where products are evaluated by their chemical composition and characteristics to ascertain if, upon becoming a waste, the product would meet the definition of a hazardous waste. The most reliable source of information to assist with waste determination is a Material Safety Data Sheet (MSDS); these documents are provided by product manufacturers and often contain enough information to make an adequate waste determination.

Employee training is not only a regulatory requirement, it is also the key to managing a compliant and cost-effective program. The training should provide not only an overview of the entire HWMP, but also function-specific training for those handling the hazardous waste. Depending on the jurisdiction, generator status, and job function, this training can take as little as 20 minutes or as long as 4 hours.

Spill clean-up instructions should provide detailed instructions on when and how spills of hazardous products should be managed including direction on the type and use of personal protective equipment required. Additionally, it is critical to have a third-party hazardous materials clean-up firm on retainer for managing larger spills.

There is limited guidance in RCRA for the proper packaging of hazardous wastes before transportation. This is a subject that falls under multiple regulatory umbrellas that can include DOT, OSHA, and Fire and Building Codes. Generally speaking, waste must be packaged in a container compatible with the material, labeled, and stored to prevent accidental mixing of incompatible materials. The area where hazardous wastes are stored should be secure and clearly identified.

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Choosing a qualified firm to transport and dispose of hazardous waste is much more than simply finding the lowest cost service provider. As established through RCRA, the generator of hazardous waste is responsible for the waste from cradle to grave. This means that retaining a compliant, financially secure firm is a must. Besides a review of financials and references, some liability-reducing tactics include hiring firms that do not subcontract their services and auditing each disposal location. Lastly, most environmental services companies are set up to service industrial clients, and there are only a few with significant retail experience. These firms can save time and money by providing a full service solution versus having to develop

a complete program in-house.

Record retention is the last key component to a compliant HWMP. The regulations require all manifests and related documents to be maintained and available to an inspector for three years after a shipment. There are many other details required to build a cost-effective, comprehensive HWMP, including consideration for state environmental regulations, but these seven elements provide the core of a program and a solid basis on which to start.

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¹ It should be noted that Wal-Mart has expended significant amounts of time and capital over the last several years to develop a Hazardous Waste Management Plan and become compliant.

² The federal lists and characteristic standards for hazardous wastes are found in Title 40, Chapter 261 of the Code of Federal Regulations.