

**NEWMOA Hazardous Waste Conference Call
February 25, 2014**

Topic: Big Supermarkets & Box Stores as Large Quantity Generators (LQGs)

Disclaimer

NEWMOA organizes regular conference calls or webinars so its members, EPA Headquarters, and EPA Regions 1 and 2 can share information and discuss issues associated with the implementation of the Resource Conservation and Recovery Act (RCRA), compliance assistance, enforcement, and other topics. Members of the group prepare draft notes of the calls for use by those members that were unable to participate and for future reference by the participants. These notes are intended to capture general information and comments provided by the participants and are not a transcript of the call. NEWMOA provides the participants on the calls with an opportunity to review drafts of the notes prior to posting them on the members' only area of the hazardous waste page on the NEWMOA website. NEWMOA staff makes all recommended corrections to the notes prior to posting.

Any comments expressed by participants should not be considered legal opinions or official EPA or State positions on a particular rule, site-specific matter, or any other matters. Participants' comments do not constitute official agency decisions and are not binding on EPA or the States. For exact interpretations of a State's or EPA's RCRA regulations, rules, and policies, NEWMOA recommends that readers of these notes contact the appropriate hazardous waste program in the State's environmental agency or EPA Headquarters or EPA Regional RCRA staff.

Participants: CT DEEP (8 people); ME DEP (1 person); Mass DEP (5 people); NH DES (9 people); NJ DEP (2 people); NYS DEC (16 people); RI DEM (2 people); VT DEC (3 people); EPA Region 2 (3 people); EPA HQs (2 people); NEWMOA (1 person)

NYS DEC was the call leader.

NYS DEC prepared background information and a *Federal Register* Notice of Data Availability (NODA) issued on February 14, 2014 on large retail facilities as hazardous waste generators. EPA has stated that it plans to work with the retailers to "resolve unique RCRA challenges" to that industry.

According to NY, no discussion of this topic would be complete without touching upon the 2013 Walmart consent order. It demonstrates EPA's position. The consent order, called a consent agreement and final order (CAFO) included the stores and return center in New York State. NYS DEC was intentionally not pursuing RCRA violations for non-pharmaceutical items. Under the consent order, if the NEWMOA states were to develop a position on returned items that is less stringent than the Walmart CAFO, the big-box in the states stores could be vulnerable to action by EPA. Anything less stringent than the Walmart CAFO would likely give a false sense of security for the big box stores because

they might reasonably conclude that if they comply with what the state's requirements then EPA will not take any separate action against them.

Walmart was fined \$1 million for some FIFRA violations, and \$6MM for RCRA violations. The RCRA violations were almost all related to the Walmart stores managing hazardous items returned by the stores to their returned goods centers as non-hazardous waste.

The main litmus test in the Order appears on page 21 at paragraph 91, where EPA says "This program will address Consumer Product items sent to the Return Centers in quantities greater than 1,000 items (by Walmart Item ID number), on an annual and nationwide basis. If this program identifies Consumer Product(s) managed as a hazardous waste more than 85 percent of the time at all Return Centers in the previous calendar year and Walmart has not identified an alternative method of management for those products, then those products will be managed as hazardous wastes at the Retail Facilities pursuant to this CAFO only."

Basically, if the Return Centers subsequently manages an item as hazardous waste less than 85 percent of the time, the store does not need to manage it as hazardous waste and can just send it back to the return center. Pharmaceuticals do not appear to be excluded or written up separately in the CAFO, so this appears to be applicable for pharmaceuticals.

The CAFO talks in terms of the 85 percent threshold being unique to just the CAFO, but it's not clear how EPA could allow 85 percent for one big box store and not another.

A totally separate approach is to see if an item is actually a hazardous waste (HW). For example, unused e-cigarettes might not be P075 because they arguably contain more than one active ingredient. The same could apply to nicotine gum.

NY stated that many items being sent back are goods returned from households, and arguably those qualify for the household hazardous waste (HHW) exclusion, especially since EPA's RO# 14833 dated September 26, 2012 was issued. At one time, EPA verbally backpedaled from its 'mini-blind' letter RO# 11958, but 14833 makes it reasonably clear that the mini-blinds position may be EPA current policy.

Connecticut

- CT has old cases against Walmart and Home Depot
- The Home Depot case is mostly about fertilizers in ripped bags getting into storm drains
- CT has conducted inspections at several LOWE's stores and a few COSTCO stores
- On November 27, 2012 CT sent a notice of violation (NOV) to Rite Aid Connecticut, Inc. for failure to notify; this was the result of manifest initiative because they listed themselves as Conditionally Exempt Small Quantity Generators (CESQGs), but were shipping large quantity generator (LQG) amounts of P-listed waste

- A significant number of Rite Aid stores have now notified as LQGs
- Worked with Target; inspected stores in three locations – Waterford, Windsor, and Stamford – minor violations at the stores in Waterford in Windsor (i.e., contingency plans and manifests). The store in Stamford was found to have extensive violations, such as failure to make waste determinations for pharmaceuticals and some returns, no waste profiles or manifests, many violations associated with inspection program, emergency personnel and training, and offering HW to non-permitted transporter
- CT views returns as waste and not a product, unless it is resold
- Do not consider returns to be HHW and subject to the household exclusion; the retail facility is taking returns for business purposes and not to collect HHW
- CT has received a large number of notifications – 60 – 80 Rite Aids; 20 for Target, 140 CVS (1/2 SQGs and 1/2 LQGs); this is having a big impact on the LQG universe
- There are no big box stores on the current inspection schedule
- CT has been examining the training plans at facilities when they notify as a LQG
- Spoke with head of environmental affairs at Target and discussed impact of nicotine gum on generator status; have seen problems with compliance documentation
- CT has not visited any Walgreens stores; there is a Walgreens distribution center in CT

Maine

- Formal action a number of years ago against two Walmart stores; they were dumping hazardous waste in woods behind facility and a putting silver fixer down the drain
- Issued notice of violation against Rite Aid for improper management of photo fixer
- No action taken regarding pharmaceuticals
- Notifications: mostly as SQGs and CESQGs - 24 CVS (only 2 as LQG), 84 Rite Aid; 1 Walgreen; 12 Home Depot, 5 Targets, 28 Walmart, 13 Lowes
- Look at reverse distribution of expired pharmaceuticals and products as hazardous waste; subject to hazardous waste determinations and should be segregated and shipped as HW; has same position as CT on customer returns on HHW exclusion
- Similar views on nicotine gum; subject to HW; follows EPA memo on nicotine gum
- They have not conducted an inspections at Hannaford stores for pharmaceutical waste

Massachusetts

- Have had many retail stores notify, including Target and CVS
- 64 CVS facilities notified as LQGs remainder are SQGs
- 7 Target stores have notified as LQGs
- Walmart, Walgreens, and supermarkets have notified as SQGs or Very Small Quantity Generators (VSQGs)

- Had some notifications from Kmart
- Have targeted LQGS for inspections; must inspect within five years of notifying the past w/ big box enforced against Walmart for waste oil
- Have not inspected Home Depot or Lowes
- In the past, did find waste oil violations at a Walmart
- Reverse distribution of nicotine gum would allow, 1994 EPA memo
- Do not consider returned items to be HHW

New Hampshire

- 379 big box stores – 75 notified as SQGs; 8 notified as LQGs; others are CESQGs; includes CVS, BJs, Home Depot, Petco, Traget, Walmart, Walgreens, and others
- Inspected two Walmart stores, found broken lamps and dumping fuel additive cleaner down drain
- Have held HW training course for big box stores
- Conducted compliance assistance visit to CVS
- If returns cannot be sold, must be managed as hazardous waste

New Jersey

- Regulates medical waste and have inspected many facilities, including CVS, Walgreens, ShopRite, Rite Aid and others; conducted dual inspections for RCRA and medical waste management; found many RCRA violations
- For example, CVS told them the silver fixer was being recovered but it was not
- All facilities have registered, most as LQGs; 275 CVS stores have registered as LQGs
- For P-wastes, the weight of the waste is critical not the container in quantifying HW; facilities can fall under LQG limits if they use the weight of the material and not the container; same with Coumadin / Warfarin
- NJ is proponent for reverse distribution because the material is a commercial chemical product; would prefer to sell at the store as a product as opposed to taking the material back and repackaging it (for example fertilizer in a ripped bag)
- Materials returned do not qualify as HHW; once it is returned cannot tell if was generated by a household or a contractor/commercial customer – no way you can prove it was HHW
- Easier to inspect a reverse distribution facility than many stores

New York

- Noted the difference between chemically active and medically active ingredients; for nicotine gum, flavorings may qualify for the former; under RCRA the chemically-active ingredients apply

Rhode Island

- Conducted inspections at “big box stores” including Home Depot and Walmart
- Found issues with HW determination and training, which were resolved at Home Depot and eventually Walmart

- Inspections at CVS found numerous problems with waste handling, secondary containment, start date accumulation, labeling, and others; working with them trying to see if they can justify reverse distribution
- Rite Aide said they did not generate HW but now has notified; also working with them on reverse distribution
- Told Walgreens does not generate HW; non-responsive to requests
- 30 LQG notifications from CVS, 20 from Rite Aid
- Reverse distribution is being evaluated; trying to confirm pharmaceuticals going to reverse distribution centers and it is difficult to document
- Nicotine gum is considered P-listed waste; interested in ongoing discussions

Vermont

- Vermont has undertaken very little activity at big box stores
- Vermont did conduct a “Common Measure Project” inspection at a Home Depot and found few minor violations
- Vermont’s Agency of Agriculture, Food & Markets (AAFM) has statutory authority over pesticides and (“economic poisons”) and is responsible for implementing Vermont’s HW regulations as they apply to pesticidal wastes; AAFM has inspected at least one Walmart store in response to a complaint about returned pesticides being stored outside and potentially resulting in contaminated storm water finding its way to storm drains
- The DEC portion of Vermont’s HW Program is planning to coordinate joint HW inspections with AAFM
- Vermont has not experienced an increase in LQG notifications by large chain pharmacies (e.g., CVS) due to pharmaceutical wastes (e.g., P-listed wastes)
- ~85 big box stores/chain pharmacies have notified in Vermont: Rite-Aid (40 Conditionally Exempt Generators); Kinney (11 CEGs); Shaws (19 CEGs); Lowes (2 CEGs); Costco (1 CEG); K-Mart (2 CEGs); Walmart (4 SQGs, 1 CEG); Home Depot (4 SQGs); CVS (1 LQG, 1 SQG, and 2 CEGs); there are no Targets in VT
- Waiting on resolution of a few issues before focusing on sector; besides coordinating with AAFM, Vermont has a new paint product stewardship program that becomes active on May 1, 2014; also waiting to see what comes of EPA’s rulemaking on pharmaceutical wastes – perhaps EPA HQ representatives on call can address?
- Vermont views “returns” as subject to HW determination unless resold; typically a return is associated with a refund by the store; as such, returned waste material is owned by the store and the household exemption is therefore not tied to the material

EPA Headquarters (HQs)

- Noted current projection of proposed pharmaceutical waste rule publication is August 2014, but should look out for next status update for changes to this schedule
- Pharmaceutical rule should help solve some of the problem with P-listed pharmaceuticals

- Active ingredient approach needs to be examined
- On the issue of whether returns can be classified as HHW, discourage use of “mini-blinds” memo because this was applicable to a very specific situation; was not intended as broad policy because they were doing collections on specific products under particular circumstance; generally consider returns to be waste stream of the store and not HHW
- Not taken a position on e-cigarettes, many types; in learning mode
- Biennial Report should have interesting data on new LQG notifications by retailers; counts may double
- More reverse distribution centers are accepting nicotine which helps retailers

EPA Region 2

- Seeing significant increases in LQG notifications
- Different class of generators; need to address with a different approach from traditional RCRA manufacturing universe.
- How do warehouses handle returns and who is the generator?

State Comments on Federal Register NODA

The group discussed how state and / or NEWMOA should approach commenting on the recent NODA. Comments are due April 15. NY shared the following comments on the NODA in an email prior to the call as follows:

Comment 1: On p. 8,934 (2nd col) the preamble discussion appears to overlook the fact LQGs or SQGs having only satellite areas are not subject to the training requirements given under the 90-day and 180-day requirements. We need to comment that (1) such LQGs and SQGs are in fact not subject to those 90/180-day requirements (because they don't have 90/180-day areas), and (2) using just satellite areas is a promising way for retailers to avoid the training requirements that the preamble says are problematic due to seasonal workers, transient workers, etc.

Comment 2: The preamble discusses "customer returns" (p. 8,933, 2nd col, and elsewhere), implying there that those customer returns automatically count as the store's generated hazardous wastes. We should comment that EPA's recent 9/26/12 memo (RO# 14833) strongly suggests that such returns -- when from a household -- instead qualify for the HHW exclusion (Quoting from this 9/26/12 guidance: "Pharmaceuticals that are unwanted (e.g., expired or unused) by consumers (households) are not regulated as hazardous wastes...Thus, household pharmaceutical wastes -- like other household hazardous wastes -- are not subject to the federal RCRA hazardous waste regulations, even when collected at a take-back event or program"). This would be completely consistent with EPA's older "mini-blind" letter (RO# 11958) [which EPA several months ago verbally backed away from during a RIN call, but then subsequently issued the above-mentioned 9/26/12 memo).

Comment 3: The preamble mentions (on p. 8,929 2nd col & p. 8,934 3rd col) the aerosol can issue [which, for lack of a better name, is sometimes called the "can of beans" issue, i.e., you can force a sealed can of Campbell's Pork and Beans to explode if you heat it enough on a stove; but it is doubtful that EPA would identify such a waste as D003]. NYSDEC has written a 1992 letter saying that the an aerosol can itself is not yet a waste because it still performs its intended task of keeping the contents from spilling, and so it is only the contents of the can that constitutes the waste to be characterized, and hence the portion that ruptures from the heating action was not part of that waste at the time of the explosion. The 1992 NYSDEC letter concluded that the aerosol can and contents therefore would not be D003 hazardous waste. In the February 2014 preamble, EPA does not say one way or the other whether they feel the aerosol can would automatically be D003 if it ruptured when heated up, so to make sure EPA is aware of their past determinations, our comment should include mention of early EPA guidance RO# 13027 saying a rupturing aerosol can would be D003, but that later EPA guidances RO# 11806 and RO# 11782 backpedaled quite a bit.

NYSDEC and NJ DEP plan to send comment letters to EPA on the NODA. CT DEEP is also considering this. RI and, MA have not had time to consider it. This is not a focus for ME, VT, and NH.

The group decided to share draft copies of state comment letters by mid-March and try to schedule a call to see if there is interest in developing a NEWMOA letter. Terri will send out an email the week of March 17th to see how states want to respond to the NODA at that time.

The following information was shared by participants after the conference call.

Mass DEP reported that in 2004, Mass DEP's Western Regional Office (WERO) did an initiative on big box stores and both Lowe's (2 stores) and Home depot (2 stores) were higher level enforcement (HLE) cases.

Mass DEP Some time ago DEP reviewed the issue of whether puncturing and draining of aerosol cans containing hazardous materials by generators at the site of generation would be considered treatment. As described in a Jim Paterson email dated December 05, 2005 the DEP has determined that the puncturing and draining of aerosol cans by generators is not regulated treatment but rather the process of emptying containers provided: vented vapors from the process are captured by an air quality control device, such as a carbon canister and any solid /liquid residues and the spent carbon canister are managed as hazardous waste provided they are listed hazardous waste and/or exhibit a characteristic of hazardous waste. When these conditions are met, and the cans are or become "RCRA -empty", the cans may be disposed / recycled as an unregulated scrap metal.

Mass DEP offered the following advice on aerosol can puncturing in response to a proposal from a company labeled "SK" regarding its proposal to puncture and drain aerosol containers at its facilities. The DEP would include this activity within the

provisions of each SK facility license and would provide conditions that address this activity as it does for any activity related to the management of hazardous waste at these facilities. DEP would approve of the puncturing and draining of aerosol cans at SK facilities provided the following conditions are met:

- 1. SK must first obtain approval from the Board of Health (BOH) and the fire chief (presuming some of the aerosols are ignitable) for this activity.*
- 2. SK must utilize equipment designed specifically for puncturing and draining aerosol cans which includes vapor collection technology sufficient to capture any aerosol vapors generated during the puncture/drain process.*
- 3. SK would be limited to receive in aerosol cans only hazardous waste it is authorized to receive under its existing license.*
- 4. SK must manage all residuals as hazardous waste if those residuals are listed or characteristic hazardous waste.*
- 5. SK would have to amend all applicable sections of its facility license to reflect this new activity.*
- 6. The proposed activity would be subject to a Class I license modification with prior approval.*

Rhode Island *comments on the NYSDEC's comments (above) on the NODA:*

- Comment 1: Rhode Island concurs with the position that a generator, LQG or SQG, that is able to manage its hazardous waste in satellite accumulation areas only would not be subject to the training requirements or other requirements that apply to 90/180 day accumulation areas*
- Comment 2: Rhode Island's regulations currently require commercial entities (i.e., those that do not meet the definition of a household) to manage all HW received or derived from a household generator as fully regulated HW; thus customer returns would become subject to full regulation upon receipt at the retail store or other commercial location*
- Comment 3: Rhode Island takes the position that an aerosol can more closely resembles a container than a D003 reactive HW and is currently working on a policy to address the management of spent aerosol cans at generator facilities. The concept is predicated on the belief that the can contains the hazardous material product and propellant and that once the HW is removed from the can it meets the empty container rule (i.e., reduced to regular atmospheric pressure).*

Finally, Rhode Island will review the NODA and share comments for use with the three States that are considering submitting formal letters. Given current workloads and efforts to implement a recently adopted HWR update it is not likely that RI will prepare a separate letter on this.

New York *shared the following:*

- The EPA-HQs guidance that defines "active ingredient:"*

[http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/AC3830A99E037E5F8525670F006BDB69/\\$file/11350.pdf](http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/AC3830A99E037E5F8525670F006BDB69/$file/11350.pdf). The following link indicates that this document is regarded as "Official OSW Policy": <http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/ac3830a99e037e5f8525670f006bdb69!OpenDocument>]

- EPA defines "sole active ingredient" as "the active ingredient [that] is the only chemically active component for the function of the product."

The "function of the product" for nicotine gum is to help the user stop smoking, and not only the nicotine that's present but also flavorings and sweeteners assist with that function. (This is evidenced by the fact that many people use ordinary chewing gum to help them stop smoking.)

Proof that sweeteners can be an active ingredient is the product saccharin, which (until a few years ago) was listed in 40 CFR 261 as commercial chemical product U202. (The P and U listings only apply when the chemical is the sole active ingredient, so clearly saccharin must be capable of functioning as an active ingredient; otherwise there would have been no point in listing saccharin in 261.33's U-list.)

The measure of whether a substance is medically active is separate and distinct from the measure of whether a substance is chemically active, so the former should not be used alone when making P & U characterizations. Product packaging often lists "active ingredients", but those are invariably the medically active ingredients present in the product, and therefore should not be considered as determinative of what qualifies as an active ingredient for purposes of 261.33 characterizations. (Just because the nicotine gum is a "delivery device" for nicotine does not automatically mean that it cannot also be a delivery device for other active ingredients as well.)

NYSDEC currently falls in line with EPA and so nevertheless requires that unused waste nicotine gum be managed as P075 due to the 2010 Charlotte Smith letter (RO# 14833), but the Agency has been urging EPA to reconsider that determination (most recently in the context of characterizing the emerging waste stream of e-cigarette components, which is very similar to nicotine gum from a regulatory viewpoint).