

NEWMOA Hazardous Waste Conference Call September 23, 2014

Topic: Generators that are in foreclosure or bankruptcy or closing for another reason, addressing sites that do not have a closure plan or financial assurance

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Participants: CT DEEP (6 people); CT AG (1 person); Mass DEP (4 people); NH DES (5 people); NJ DEP (4 people); NYS DEC (4 people); VT DEC (3 people); EPA HQs (2 people); NEWMOA (1 person)

Call leader: New Hampshire DES

Background

NHDES has been dealing with hazardous waste generators that have closed or are in bankruptcy, which poses unique challenges to ensure that the site is properly closed and cleaned up of any remaining hazardous waste. Other NEWMOA states have reported that they are dealing with the same issue. NHDES wants to hear from other NEWMOA states and EPA on this topic in terms of regulations in place, guidance materials for generators, and how states have dealt with this issue from an inspection and enforcement perspective, including the questions listed below.

Note: NEWMOA has held prior calls related to this subject on 2/13/07 (hazardous waste generator closure requirements), and on 12/13/11 (generator closure).

Situation/Problem

Hazardous waste generators that close are not typically inspected by NHDES, due primarily to the number of sites that close, and the inspection staff's priority to inspect active generators. Over the last 3 years, NHDES has a list of over 100 generators that have closed. The problem is

that there have been sites that have closed, or are in bankruptcy, that have left hazardous waste on site that is not being managed properly.

Question 1: Explain what the process is available in your state to become informed of generators that are closing?

NH – DES requires generators to notify the Agency within seven days of ceasing hazardous waste activities at a particular site. Generators submit a Declassification Request Form to do this certifying that all hazardous waste has been removed (Env-Hw 504.02(f)). Once NHDES receives this form, the site is put into “inactive” or “declassified” status in the state database indicating that the site no longer generates hazardous waste. As these forms are not submitted to the compliance program directly, and a general lack of knowledge by generators of this requirement, DES primarily learns of sites that are closing in other ways, such as CESQG self-certification submittals and summer intern surveys. Some sites need some sort of inspection/follow-up.

CT – There is no regulatory requirement to notify of bankruptcy or closure. There are various ways that DEEP finds out. The Attorney General’s (AG) Office notifies them about bankruptcies and foreclosures (in place since 1994; DEEP sends out a notice throughout their programs to see if any programs have an interest). They then schedule inspections. They also find out through biennial reports and through some notification forms sent to RCRA and other media. They hear through rumors as well. They have a more difficult time learning about foreclosures.

MA – DEP gets a letter or call from the company; regulations requires a notification of change of status. State also charges annual HW compliance fees and sends out invoices. They investigate further if there is no response to the DEP invoices.

NYS – DEC hears about general closures through the same means as other states, including word of mouth, news media, and facilities contact them. Inspectors discover site is closed when they go to the site to conduct an inspection. LQGs are inspected every three years. Data might be correlated to Annual Report information. If site is closed, inspector tries to contact new owner, and get on-site if possible.

Generators located over a sole source aquifer storing liquid hazardous waste in quantities greater than 185 gallons are required to notify the Department and meet the closure plan requirements of DEC’s regulations, which are similar to EPA’s Interim Status facility closure requirements. Sole source aquifers are in the counties of Kings (Brooklyn), Queens, Nassau, and Suffolk, as well as certain areas around Schenectady and Binghamton. Region 3 DEC (Hudson Valley area). Plan must be submitted to the Department at least 45 days prior to the date on which the owner or operator expects to begin final closure of a facility with only tanks, container storage, or incinerator units. Financial assurance is not required. DEC staff check NYS Department of Labor WARN notices, which are notices that employees are required to file when there will be large lay-offs or plant closings. (Post call information – this is a federal requirement, “Worker Adjustment and Retraining Notice Act.” NYS’s notice threshold is lower. NYS notices are at: <http://labor.ny.gov/app/warn/>).

VT – For small and large quantity generators, must submit a pre-closure notification form 90 days prior to closure. This requirement is not well known. May find out if annual fee invoice is returned or the generator sends it back. Brownfields program has close connections with Commerce and Community Development and is aware of closures through that connection. DEC is thinking about how to get the word out. Also require notification for change of status. The new SQG self-certification program will include elements on the checklist addressing generator closure.

EPA HQs – In process of proposing generator rule that will include closure requirements. LQG notification requirement (picked up from VT and CT) will be to notify 90 days prior to closing generator area or facility. Certify 180 days after closure. If there is a one-step notification, when should it be? LQGs have to clean close containers, but what if they can't clean close – need to fill the gap. EPA conducted an investigation of Superfund sites and found many situations where generators walked away and left the government with the work to clean-up the site and pay the costs. Currently, it is tough for generators to find the closure regulations in the EPA regulations. The re-organization of the generator regulations should enable the information to be in a dedicated section so they are more easily found and understood.

Question 2: How does your state regulate generator closure? And does your state have any more stringent rules than what is found at 40 CFR 265.111/265.114?

NH – DES requires generators to meet the closure performance standards of 40 CFR 265.111 and 265.114 for the disposal and decontamination of equipment, structures, and soils (Env-Hw 506.02(b)). In addition, DES requires that generators continue to manage their hazardous waste when they cease operations in accordance with all applicable hazardous waste rules. Failure to continue such management shall be deemed disposal of the waste (Env-Hw 506.03).

CT – LQGs and SQGs are subject to the federal closure requirements – 40 CFR 265.111 and 265.114, as well as 265.113(a) – (c). DEEP is concerned about the timing of the closure and is considering making some clarifications to address this. Must have a closure plan but not subject to DEEP approval, but inspectors will review them during inspections. Guidance on-line about CT's expectations.

MA – Not more stringent.

NY – LQG closure performance standard is similar to EPA's, except for generators of liquid hazardous waste over sole-source aquifers.

VT – Mainly more stringent in pre-closure notification form, applies to LQGs and SQGs. DEC is considering the consequences if a generator does not submit their plan. DEC has discretion in terms of their response and has handled this on a case-by-case basis in response to the risks posed at the site.

Question 3: Does your state have, or has it considered, implementing closure plan and financial assurance requirements for generators?

NH – DES does not require closure plans or financial assurance for generators.

CT – No. Considering this possibility in revised regulations, but would not require that the plan be submitted for approval, and no financial assurance. There are a large number of companies and it would be difficult to administer.

MA – No

NY – No

VT – No, have not considered this as a matter of course.

EPA HQs – LQGs who cannot clean close would be subject to a financial assurance component that replicates current rules for landfills. EPA HQs did a Superfund study and found that a lot of generators walked away from their post-closure HW cleanup. EPA has considered the possibility of creating a generator trust fund but could not establish this because it would require a statutory change.

Question 4: Does your state inspect generator sites that have been closed or are in bankruptcy? Describe an interesting inspection of this sort.

NH – DES has not typically inspected generators that have notified that they are closing or are in bankruptcy, although in the past two years, due in part to the LQG flexibility that was approved in NH, several of these sites have been inspected. These inspections have shown a need to consider inspecting sites that are closing to ensure that the hazardous waste on site is handled appropriately and in compliance with the Hazardous Waste Rules.

CT – DEEP has an on-going case that came in through the AG. DEEP conducted an inspection of a facility that was closing, did an inventory and accounting of what types of materials are on site, and found 30,000 gallons of liquids. The actual amount of HW was small, compared with total amount of chemicals, including those in the process. Company went quickly from active to letting its employees go. DEEP has been concerned that the chemicals would be abandoned. Issued administrative order to require the company to hire a consultant; develop facility closure plan (how to shut down all operations), and develop specific HW closure plan. The company did eventually get rid of the chemicals, but didn't pay all of the bills. City auctioned property off for back taxes. Order was to old owner, so it's been a complicated case. Most of chemicals were removed from the site. There are some remaining issues. Significant amounts of liquids in the wastewater treatment unit (WWTU) remained. Discharge permit did not have financial assurance or closure plan, and company had to dispose of a large volume of wastes from there, including plating wastes. Options for maneuvering in bankruptcy come up quickly, so AG Office and DEEP have to become involved very quickly. The facility cannot walk away if imminent and identifiable risk potential, can force spending on alleviating the risk even if not full closure. A recent example is the Creative Recycling bankruptcy. The site has a warehouse full of e-waste in leased space; unclear whether it has value, so there might be some financial interest.

Question 5: What type of enforcement actions has your state issued in regards to generators not closing their site properly, specifically in regards to sites closed already and bankrupt)?

NH – DES has issued formal enforcement actions that have involved referrals to the NH AGs Office.

CT AG – Within the confines of the bankruptcy, consult with lawyers. Whether or not State gets money back has to do with imminent environmental threat versus a pre-disposition debt. If the threat can be established, the State can be part of the group of debtors to be paid through the bankruptcy process first. If not, will be grouped with other debtors in a lower priority category.

MA – Similar

NY – Similar

VT – Same variety of tools; do not know that they use formal enforcement.

Question 6: For any clean-ups of hazardous waste at closed/bankrupt generator sites, does your state pursue cost recovery?

NH – DES has no experience. Penalty action against closed companies; not sure who the target would be, who has realized the economic benefit is difficult to explain.

CT DEEP – In a lot of cases, firms walking away, and state has to pick up the costs.

NYS (Region 3) – In one case, DEC could not identify previous responsible party. They have wondered about using a lien in this situation. The town will not take control because of fear of cleanup costs.

In CT, if emergency spill funds spent, State can put a “super-lien” on the property. CT DEEP has pursued their avenues for cost recovery following CERCLA removal orders. EPA has been willing to remove RCRA hazardous (only).

VT – Has a cost recovery tool but not often used. Brownfield Program sometimes threatens to pursue cost recovery, which motivates generator to clean it up themselves.

CT – AG monitors bankruptcy and informs DEEP. Federal court system has a system called PACER where users can look at filings. State AGs probably all have ability to monitor this system.

Question 7: Have you any recommendation on how to best address the issue of generators not closing their site properly, such as outreach, guidance documents, or working with other parties.

NH – DES uses its HW coordinator training program to inform LQGs and SQGs about requirements; have added a component on closure requirements.

VT – DEC is launching SQG self-certification program. This is probably the biggest concern. Closure a checklist item. Trying to make in-roads through brownfields.

CT – There are two different scenarios. Under a proper closure, they have guidance documents about closure expectations. If in bankruptcy or no participants, different set of concerns and standards. TSDf closure guidance; new closure management guidance on website about closure at well-managed storage areas. Will share links through NEWMOA.

NH – No general guidance, but letters to companies that are case-specific about the expectations.

NYS – Case-specific guidance when asked.