

NEWMOA Hazardous Waste Conference Call September 27, 2016

Topic: Inspections and Oversight at Non-economically Viable Companies that May Have Hazardous Waste/Materials Onsite (these companies may not be in bankruptcy but claim to have no funds to remove hazardous waste).

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Participants: CT DEEP (7 people); Mass DEP (13 people); NH DES (8 people); NJ DEP (4 people); NYS DEC (9 people); VT DEC (3 people); EPA HQ (1 person); NEWMOA (1 person)

Call leader: New Hampshire DES

Note-taker: Connecticut DEEP

Background

NH DES has, and is, dealing with hazardous waste generators that have closed, been sold at auction, or are close to bankruptcy. As NHDES has been approved for flexibility from the 20 percent LQG inspection mandate of EPA, it has been able to put inspection resources into this area during the last few years. NHDES believes it is important to ensure that these sites are properly closed and cleaned-up of any remaining hazardous wastes/materials. NHDES wants to hear from other NEWMOA states and EPA on this topic in terms of the inspection and enforcement "tools" used, regulations in place, guidance materials for generators, and how states has address this issue from an inspection and enforcement perspective, including the questions outlined below.

Note: NEWMOA has held prior calls related to this subject on 11/13/2012 (Managing and Regulating Hazardous Waste Collected from Foreclosed Residential and Commercial Properties), 2/13/07 (Hazardous Waste Generator Closure Requirements), and 12/13/11 (Generator Closure).

Question 1: Has your state conducted on-site inspections of companies that are closing, have been sold at auction, or are failing that may have wastes on site? What is the inspection format?

NHDES has been devoting some inspection resources to this sector. They find these sites through CESQG self-certification submittals and summer intern surveys.

NHDES inspections involve a site inspection with an inventory of the wastes/materials on site. NHDES is able to enter this inspection into RCRAInfo for credit as an “other” evaluation.

Question 2: What enforcement tools has your state used for following up on these types of inspections?

Depending on the circumstances NHDES has followed-up using phone calls/e-mails, monthly inspections, self-reporting of progress by company, informal enforcement action (LOD), Imminent Hazard Order, and Referral to AGO. NHDES has used EPA Emergency Removals Program as well.

Question 3: Does your state provide on-site technical assistance to companies in this situation (i.e., providing guidance without conducting an inspection), and how is that done? Any guidance documents/fact sheets available?

Question 4: Has your state got an interesting inspection/enforcement case that you wish to share/describe?

Question from New York: How does NH DES find these sites? Do they use contacts in other agencies?

NH DES Response: One way is through bankruptcies, which are recorded at the NH Attorney General’s Office. In these cases, DES works through the courts to get the waste removal addressed. A common problem that comes up in these cases is if the property is auctioned to someone else that is not familiar with waste management issues. They find that small companies often go out of business, and waste get abandoned as a result. Often the properties are leased, which becomes its own problem. Many of these businesses are also CESQGs. However, NH DES has a CESQG self-certification program that requires CESQGs to self-certify annually. If NH DES does not receive a self-certification, they follow up on it to see if the company has gone out of business. This process has brought in many cases that they have seen recently.

Question from Connecticut: New Hampshire said it had flexibility to inspect 10 percent of its LQG universe instead of 20 percent per year. What is the rest of the commitment with EPA? Is it all abandoned waste sites, or is there a mix of sites? Also, how did NH get credit from EPA for logging the abandoned waste inspections in RCRAInfo under the category of “other?”

NH DES Response: The other 10 percent is a mix of sites, including universal waste facilities and other categories in addition to abandoned waste sites. Credit was given on a 1-for-1 basis by

EPA. The abandoned waste inspections are not logged in RCRAInfo as “other,” but as traditional inspection categories, such as CEIs, CSEs, etc.

State Responses to NH DES’ Questions

Connecticut

Question 1: DEEP has had several of these cases over the years. The Agency does not have a program in place to proactively look for them. Rather, DEEP usually finds out about them via one or more of the following means:

- Complaints
- Referrals from other parts of DEEP or other state or local officials
- Newspaper and other media reports
- AG’s Office Bankruptcy notices (see below for more on these cases)
- Routine scheduled inspections
- Observations made by field staff (e.g., drive by a known LQG and note that the company is out of business)

When DEEP finds out about one of these sites, they will typically perform an inspection and gather the following information:

- Inventory of wastes and process materials left behind. Typically containers and tanks are numbered and photographed. If needed to characterize the materials, samples are taken.
- Records regarding any operators and property owners associated with the site.
- Information about which owner/operators were responsible for the waste.
- Contact information for any owner/operators.

The inspection may be documented in one of the standard report formats that they use for hazardous waste generator CEIs or CSEs. In other cases, it may be written out in a narrative format (e.g., a memo).

Question 2: When possible, DEEP attempts to get the responsible parties to remove the waste without using enforcement. However, when the responsible parties do not cooperate or violations of hazardous waste requirements are noted that require response under their Enforcement Response Policy, DEEP will utilize a number of enforcement tools in response to these sites. Options include:

- Issue an enforcement action against the responsible party as per their Enforcement Response Policy (e.g., Informal Action, NOV, AO, CO, AG Referral) seeking hazardous waste determinations, removal of waste, etc.
- If the case involves a bankruptcy, DEEP has an ongoing point of contact at the Attorney General’s office that they work with to represent them in the bankruptcy court. Although the Agency has to demonstrate that the waste and/or process materials pose an “imminent and substantial threat,” they have had success with this approach. Also, their contact at the AG’s Office monitors bankruptcy filings for CT companies and will alert them if there is one involving a company that might have been a hazardous waste handler.
- Enforcement approaches in certain special cases:

- If there is new site owner that has “inherited” the material, they have gone after them in the past to remove the material.
 - DEEP has also gone after the landlord for wastes left behind by a former tenant. They believe that in many cases, a landlord can be considered a co-generator of the waste and liable for its removal.
 - They have had a few cases where the town has foreclosed on the property for local property taxes, and they have gone after the town to remove the material. This can be challenging, since towns often lack resources to perform the required removal work, and towns often put up quite a bit of resistance to this kind of approach.
 - If there are criminal aspects to the abandonment or generation of the waste, DEEP will consider a referral to CT’s Chief State’s Attorney or EPA CID for criminal prosecution.
 - If the site is a TSDF, they will look into using the facility’s financial assurance funds, if appropriate, or file a claim under the facilities insurance policy.
 - Fires are another special case. These are typically handled by the Spill Response Division.
 - “Last Resort” options: EPA Removal Action under CERCLA or removal action by their Spill Response Division under state spill statutes. Limitations: CERCLA removal action will only take hazardous waste; Spill Response Division will only remove materials if they are actively leaking/spilling or pose an immediate threat of release.
- Other issues that can hinder inspections and removal of waste:
 - Issues with building safety/structural integrity. DEEP may need to coordinate with local building official or have an evaluation by a structural engineer. In some cases it is necessary to shore an area up to safely remove the waste (InterRoyal mill, Plainfield, CT).
 - Other environmental contaminants may be present and hinder proper investigation and/or removal (e.g., asbestos, PCBs, lead paint).

Question 3: DEEP has a toll-free compliance assistance (“COMPASS”) telephone line that people can call if they have questions about compliance with hazardous waste requirements. They also offer compliance assistance audits, although these have traditionally been for active companies, not companies that have gone out of business. CT DEEP also has a “Self-Policing Policy” that can be used by companies to self-report violations in return for relief from traditional enforcement and penalties. However, this process includes a requirement for the entity that is self-reporting to propose a way to remedy the violations and a schedule by which they would do so. As a result, this might not be a particularly useful tool in cases where waste has been abandoned.

Question 4: DEEP has had many of these cases over the years (too many to mention). If any of the NEWMOA states would like to find out if they have encountered a particular type of situation and how DEEP addressed it, contact Ross Bunnell (860-424-3274 or ross.bunnell@ct.gov).

Question for CT DEEP from New York: Have any states required financial assurance mechanisms (FAMs) for any of these types of facilities (e.g., LQGs)?

Response from Connecticut: Connecticut does not go so far as to require financial assurance, but their regulations are more stringent in that the federal generator closure requirements apply to SQGs as well as LQGs. Also, Connecticut's regulations require both types of generators to comply with the closure timeframes specified in 40 CFR 265.113(a) through (c). Connecticut has also drafted regulations that would require SQGs and LQGs to maintain certain documentation of closure, so that proper closure could be verified during inspections. Also, for CESQGs, DEEP allows them to bring their waste to household hazardous waste collections. This has proven to be a cost effective way from CESQGs to properly manage their wastes.

Response from Massachusetts: MassDEP also allows CESQGs (or, as they call them, VSQGs) to take their waste to HHW collections.

Massachusetts

Question 1: MassDEP does not have a lot of experience with these sites. They do not have a specific program to target them. They have had referrals from fire departments and other agencies, however. When they encounter one of these sites, they write up an inspection report and take photographs. Sometimes samples are taken. MassDEP has a task force that is capable of sampling. Currently DEP has a case where waste was left behind and the company was ordered to remove the waste, but has not done so.

Question 2: MassDEP uses emails, phone calls, or issue an enforcement action such as a Notice of Non-compliance, Order, AG Referral, or seek an EPA Removal Action. The current case referred to above may necessitate an EPA Removal Action. DEP also has a Bureau of Emergency Response and Site Cleanup that can remove waste and put a lien on the property to recover the costs incurred. In order to do this, though, there needs to be an immediate threat or leaking waste.

Question 3: Mass has an Office of Technical Assistance that can provide free, off-site technical assistance without the threat of enforcement.

Question 4: MassDEP had a case with an electroplater that lost some of its major contracts and was in poor financial condition. A sampling inspection was recently performed. DEP is currently meeting with the AG's Office regarding the next steps. The case involves a possible 6-figure penalty. Cleanup of the waste and cost recovery by MA DEP is also a possibility. Massachusetts' waste site cleanup laws have made companies more responsible about removing wastes and other materials when they shut down operations. However, this law is only an effective incentive if the property is going to be sold.

MassDEP also had a case in 2013 involving a small (1-man) electroplating shop that approached them with a self-disclosure identifying the presence of wastes that the company was unable to properly dispose of. The company was an LQG, and the 90-day hazardous waste storage time limit had passed. MassDEP discussed the self-disclosure internally and with EPA Region 1.

They had not seen this kind of self-disclosure before, and were not sure how to handle it. They decided to do a site visit, inventory the waste, and come up with a solution. They negotiated a consent agreement with time deadlines for removal of the hazardous waste. They were able to help the company deal with some of the wastes in other ways. For example, approval was obtained from the local sewer authority to use some sulfuric acid for pre-treatment purposes. Some other wastes turned out to be non-hazardous. However, the company's financial situation did not improve as anticipated, and they have not been able to get rid of the remaining F006 waste. The company is also behind on local property taxes, etc. There may be an interested buyer, which could provide the owner with funds to finish the remaining work.

New Jersey

Question 1: NJ DEP gets notices of bankruptcies, which helps flag possible abandonment sites. New Jersey's generator fee system is also a big help. If they get no response to a request for a generator fee, they will send out an inspector to check on the company. Sites also come in via referrals or complaints. These sites are quite common in New Jersey.

Question 2: NJ DEP has quite a few tools they can use. One is to open their spill fund, which is funded by treble damages assessed against big spill actions. They also make use of EPA Removal Actions. New Jersey also has their ISRA law which requires anyone selling a site to hire a LSRP to do a site investigation and if contamination is found, clean it up. If NJ DEP does a removal action, they thoroughly research any and all responsible parties, and have the ability to go after them for cost recovery. If a company says they cannot pay, NJ DEP will audit their books. In one case a dry cleaner claimed they had no money, and when their books were audited, it was found they had not paid taxes for several years. This resulted in a larger action against the dry cleaner. Like Connecticut, New Jersey DEP considers landlords liable for waste abandoned by a tenant. In one case, a landlord wound up being responsible for \$250,000 worth of waste that a tenant had left behind.

Question 3: NJ DEP offers compliance assistance to companies seeking help with removing wastes, but has no written guidance, per se.

Question 4: NJ DEP had a situation in Atlantic City where 4-5 casinos were closing down. There was lots of waste (e.g., universal waste lamps, etc.) that was left behind at these casinos. NJ DEP did not have much success going after the property owner to remove the waste, since they were selling the properties at a fraction of their market value. So, they put a lien for about \$10,000 on one property.

New York

Questions 1 and 2: NY DEC has similar provision as the other states (not much to add).

Question 3: The State of New York has requirements for companies located on sole source aquifers that require them to go through closure when they shut down. New York also has a "zombie property" law that is currently in the process of being passed in the state legislature that will require cleanup for properties that get abandoned. NYS DEC has been thinking about

whether they need more in the way of tools for these kinds of sites, such as notification of closure. They are looking at an ongoing rulemaking process with respect to this issue. They might also expand the requirements for sites located on sole source aquifers to prevent the abandonment of waste in these areas. NYS DEC recognizes that they do not have the tools to identify these sites before they close down and leave waste behind. If one could know about these sites beforehand, it would provide the chance to inspect them or bring them in to make sure they properly remove everything.

Question 4: NYS DEC had one case where four separate companies that had closed were bought up by a group of four new owners. When confronted about removal of the waste, the new owners threatened to abandon the properties and leave the waste to the creditors to deal with. In this way, they effectively used the waste as leverage to avoid paying their creditors. Ultimately, the feds came after them for nonpayment of taxes, and the wastes were removed under an EPA removal action.

NYS DEC has also had cases in New York's Empire State Enterprise Zone on the border with Canada. This state economic zone is designed to lure in companies from Canada with offers of tax breaks for ten years. Companies come in for the tax breaks, and often leave when the ten years is up. In some cases, waste is left behind.

Vermont

Question 1: VT DEC has generator closure requirements for SQGs and LQGs (not for CESQGs). They also recently added a pre-closure notification requirement, and have had some success with this. Still, they are often made aware of closures via the media. VT DEC does not have a bankruptcy procedure, but thinks it's a good idea and intends to think about it. VT DEC also has generator fees for all generators, but they do not recall whether this process has produced any abandoned waste sites. VT DEC's manifest database helps by allowing them to track shipments and look for significant changes in generation rates.

Question 2: VT DEC deals with these cases by phone or email. Sometimes, they will perform an inspection. In SQG and LQG cases, they will sometimes require the generator to submit a closure plan. VT DEC has not had many cases where they have had to pay for the cleanup of abandoned waste (maybe one?). The enforcement tools that are used include all the usual ones in the regular enforcement toolbox. They have also had EPA Removal Actions. One involved a company that manufactured mace and had a hidden laboratory behind a building wall. EPA pursued a penalty in this case. This case was not so much an inability to pay as an unwillingness to pay.

Question 3: VT DEC offers compliance assistance, which is confidential unless there is an imminent threat to human health and the environment. They have no written guidance on this specific issue.

Question 4: Most cases VT DEC has had with abandoned sites are pretty old. However, see above regarding the case with the company that manufactured mace.

Comments from EPA Headquarters

There is no requirement for financial assurance for generators in the current federal regulations. However, there is an existing “108b” rule, and EPA is looking at different industry sectors to see if financial assurance should be required for more facilities under this rule. The requirement currently applies to facilities such as mines, but LQGs are a possible candidate for addition to the rule. EPA has seen some big removal actions at generator sites over the years, which supports the idea of some kind of measure such as this. EPA has heard that there might be a statutory provision someplace that prohibits imposing financial assurance on LQGs (haven’t found it though). Another option might be a trust fund of some kind for these sites, based on generator fees.