

RCRA Waste Listings Apply Retroactively to Wastes that were Generated and Disposed of Prior to the Effective Date of RCRA

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McCoy's RCRA Review article below has an explanation of the issue. Most notably, it references two Federal Register Notices in which EPA discussed the retroactivity issue (I included these two references in the notes associated with page 5 of my [October 24 webinar PowerPoint \[newmoa.org\]](#)).

- [53 FR 17586 \[archive.epa.gov\]](#) - LDR Third Third Proposed Rule, May 17, 1988 (relevant excerpt attached). See in particular section c., columns I - II, where EPA states the following:

"First, hazardous waste listings are retroactive-that is, once a particular material is identified as a hazardous waste, all of that material, no matter when disposed, is a listed hazardous waste (albeit, not subject to Subtitle C regulations if in an inactive unit, and not subject to the land ban if disposed of before the ban effective date and not removed or exhumed thereafter)."

- [53 FR 31147-8 \[archive.epa.gov\]](#) - LDR Third Third Final Rule, August 17, 1988 (relevant excerpt attached). See in particular section a. column III, where EPA states the following:

"Retroactivity of Waste Listings. A few commenters disputed the Agency's reading that hazardous waste listings are retroactive; that is, all wastes meeting the listing description are hazardous regardless of when they were disposed. EPA believes this point to be nearly self-evident: a waste either does or does not match a listing description. The time at which a waste was disposed does not affect what that waste is. Spent solvent still bottoms disposed of in 1979 (before Agency action listing these wastes as hazardous) are as much spent solvent still bottoms as those disposed in 1981 (after the listing took effect)."

...

"EPA believes therefore that the hazardous waste listings can be retroactive. Thus, wastes derived from treating, storing, or disposing of these wastes likewise are hazardous, as are mixtures of these wastes and other solid wastes. For land disposal restrictions purposes, this means that these residues could become subject to the land disposal restrictions for the listed waste from which they derive if they are managed actively after the effective date of the land disposal prohibition for the underlying waste."

Each of these texts go into further details on the retroactivity issue, but the above passages make it clear that the RCRA hazardous waste listings are retroactive. An important distinction that is not so clear from these passages, is exactly what the “retroactivity” of waste listings means. More specifically, it means that any applicable waste listings apply to a pre-RCRA waste at the point that the waste is actively managed (and therefore generated). However, it doesn’t mean that the RCRA regulations apply before such a waste is actively managed/generated. Rather, a pre-RCRA waste that meets a waste listing is not a hazardous waste and is not subject to RCRA regulation at all times prior to the point when it is first actively managed/generated.

The “Contained-In Policy” wouldn’t really make much sense – or be of much use – if the waste listings weren’t retroactive. Much (if not most) of the listed contamination that states encounter during cleanup projects is pre-RCRA. If waste listings weren’t retroactive, then there wouldn’t be any need to do a “contained-in determination” on pre-RCRA wastes.

Who Makes Contained-in Determinations in Unauthorized States?

EPA’s stance on the implementation of the Contained-In Policy has evolved over time. See below for EPA references regarding the Contained-In policy, including who is authorized to make contained-in determinations and how. EPA specifically addressed the issue of who can make contained-in determinations in unauthorized states in the 10/15/1992 RCRA Online document listed below. More specifically, EPA said such a determination would have to be made by the unauthorized state’s Regional Administrator.

- [RCRA Online Document #11393](#), 1/24/1989. Contained-in determinations on contaminated groundwater may be made by EPA Regions on a case-by-case basis.
- [RCRA Online Document #11434](#), 6/19/1989. Authorized states may also make the type of contained-in determinations discussed in the 1/24/1989 EPA memo.
- [RCRA Online Document #11593](#), 3/26/1991. The Contained-In Policy applies to all environmental media, not just groundwater. Contained-in determinations should be made using a risk-based approach.
- [RCRA Online Document #13568](#), 10/15/1992. The Contained-In Policy is based on site-specific and contaminant-specific health-based levels. The discretion to make contained-in determinations is “available to the State Administrator in an authorized State, or otherwise is vested in the EPA Regional Administrator.”
- [RCRA Online Document #11948](#), 9/15/1995. EPA Regions and authorized states can make contained-in determinations. A state need only be authorized for the part of the base program under which the waste of concern is identified as

hazardous. Authorized states and EPA Regions may use any format or mechanism to document Contained-in determinations, including official agency correspondence, orders, and RCRA permits.

- [HWIR Media Proposed Rule](#), 4/29/1996. See page 18795, in which EPA states that "... the Agency has taken the position that EPA or the State agency authorized to administer the "base" RCRA regulations may determine whether media contain listed wastes. Decisions that media no longer contain listed hazardous wastes (or 'contained-in' decisions) have typically been made on a case-by-case basis, according to the risks posed by the contaminated media."
- [RCRA Online Document #14291](#), 10/14/1998. See pages 8-11, which includes an in-depth description of the Contained-In Policy. "Approval of EPA or an authorized state is required" for a contained-in determination.

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McCoy & Associates Compliance Corner

In the United States, hazardous wastes are subject to regulations mandated by the Resource Conservation and Recovery Act (RCRA). Every month on this page we provide clear, in-depth guidance on a different aspect of the RCRA regulations. The information presented here is taken from [McCoy's RCRA Unraveled](#), 2013 Edition and is copyrighted by McCoy and Associates, Inc.

Retroactivity of Listings and "Active Management" Under RCRA

Do hazardous waste listings and/or characteristics apply to wastes today that were legally disposed before the listings and/or characteristics went into effect? If we disposed some waste in the 1970s that now meets a listing description or exhibits a characteristic, is that disposal site a hazardous waste landfill? Do we have to go back today and excavate that waste and manage it as hazardous? In other words, is RCRA retroactive?

According to EPA, hazardous waste listings and characteristics do apply retroactively to wastes disposed prior to the effective date of the listings and characteristics. The agency first stated its position as follows: "once a particular waste is listed, all wastes meeting that description are hazardous wastes *no matter when disposed*." [Emphasis added.] [August 17, 1988; 53 *FR* 31147; see also May 17, 1988; 53 *FR* 17586] As such, wastes that were not hazardous at the time of disposal, but are subsequently listed or identified as hazardous wastes, become hazardous when the new listing or characteristic goes into effect. For example, spent solvents disposed in 1977 may meet the same listing description as spent solvents disposed in 2012. Having said that,

such previously disposed waste *is not subject* to hazardous waste management regulations unless and until it is “actively managed.”

Wastes only regulated if actively managed

EPA’s retroactive application of new listings or characteristics does not mean that all newly listed or identified wastes must be removed from their historical disposal site for proper treatment. RCRA does not require such retroactive waste management; if no regulatory program (e.g., the RCRA corrective action program) is making you clean up the previously disposed waste, RCRA regulations do not apply to it. Nor does EPA impose any retroactive penalties for prior disposal of the waste, since it was legally disposed at that time. The RCRA regulations kick in only when the wastes are actively managed. Consequently, compliance with the RCRA Subtitle C regulations is not required at the disposal site (whether it is still operating or not) unless the previously disposed wastes are actively managed. [March 8, 1990; 55 *FR* 8762–3]

EPA has defined “active management” as “physically disturbing the accumulated wastes within a management unit or disposing additional hazardous wastes into existing waste management units containing previously disposed wastes.” [September 1, 1989; 54 *FR* 36597, August 18, 1992; 57 *FR* 37298] The agency noted that “disturbing” a waste includes removing, excavating, mixing with other wastes, or other onsite treatment (including ex situ treatment). [[RO 11954](#), [12995](#), [13057](#)]

Thus, cleanups involving removal of wastes or contaminated media from a site (e.g., excavating solids or pumping ground water) are deemed to be active management. In these situations, all wastes that meet a listing description (including environmental media that “contain” listed wastes) or that exhibit a characteristic must be managed as hazardous wastes, even if they were disposed before the applicable listing or characteristic effective date. Furthermore, any wastes derived from the treatment, storage, or disposal of those wastes and mixtures of those wastes with other solid wastes are regulated as hazardous via application of the derived-from and mixture rules. Finally, all such wastes that are hazardous because they are being actively managed are subject to the LDR program. [August 17, 1988; 53 *FR* 31148]

The second part of the active management definition notes that continued use of an existing unit, after the effective date of an applicable hazardous waste listing or identification, for treatment, storage, or disposal of the newly listed or identified waste (or any other hazardous waste) will subject the unit and its contents to RCRA Subtitle C regulation. Conversely, if only nonhazardous waste is added to a waste management unit in which wastes were previously disposed before they were hazardous, these activities would not constitute active management. Additional retroactivity and active management examples are explored in Case Study 1.

Exception for plant construction activities

During excavation of soil as part of a plant construction activity, contaminated soil is sometimes unearthed. If the soil is contaminated with a listed hazardous waste or if it exhibits a characteristic, the soil is a hazardous waste when excavated. This has caused considerable concern since, in many cases (e.g., when a trench is being dug to lay a pipeline or conduit), the dirt is simply piled up next to the trench before it is put back in the hole. Does that make the hazardous soil subject to generator standards, which would also make the piles of dirt Subtitle C waste piles subject to Part 264/265, Subpart L standards?

EPA has addressed this issue in guidance by stating that, as long as the hazardous dirt remains in the area of contamination (i.e., the contaminated soil is not moved to an uncontaminated area of the plant or shipped offsite) and is subsequently put back in the ground from which it was excavated, such operations do not

produce a hazardous waste or subject it to hazardous waste regulation. Therefore, it would not have to be counted, the piles are not regulated waste piles, and the dirt is not subject to land disposal standards. [RO 11671] Although this guidance did not specifically say that the hazardous soil was never actively managed, the agency noted in EPA/530/K-05/011 (available at <http://www.epa.gov/wastes/inforesources/pubs/training/gen05.pdf>) that “excavation of contaminated soil during routine construction operations, such as pipeline installation, may not be considered active management if the soil is redeposited into the same excavated area. Site-specific situations should be discussed with the implementing agency.” Thus, EPA has decided to give people conducting construction operations a break from managing contaminated soil as hazardous if the soil is returned to the trench. Note that a number of states have decided not to accept this federal guidance as part of their state program, so use this with caution.

Leachate derived from previously disposed wastes

The derived-from rule states that residues derived from the treatment, storage, or disposal of a listed hazardous waste remain listed. [§261.3(c)(2)(i)] Based on this rule, hazardous waste listings apply to leachate derived from the disposal of listed hazardous wastes. This holds true for leachate derived from wastes disposed *before* an applicable listing effective date, even if the landfill ceases disposal of the waste when it becomes hazardous. If the leachate is actively managed, it is subject to hazardous waste regulation. [May 17, 1988; 53 *FR* 17586] The point of generation of the hazardous waste is when the leachate is first collected or otherwise actively managed. [August 6, 1998; 63 *FR* 42191] This interpretation was upheld by the U.S. Court of Appeals for the District of Columbia in 1989 (*Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526).

Although leachate resulting from the previous disposal of wastes that today meet a listing description is hazardous when actively managed, EPA noted that such active management of the leachate does *not*, by itself, subject landfills holding such wastes to RCRA hazardous waste regulation. Collection of hazardous leachate from otherwise inactive units does not activate the unit in terms of Subtitle C management. [August 17, 1988; 53 *FR* 31149, August 6, 1998; 63 *FR* 42191]

In many situations, active management of leachate is exempt from RCRA Subtitle C regulation because the leachate is managed under the CWA. The leachate is either discharged to a sewer line running to a publicly owned treatment works (POTW) or to a navigable water of the United States under an NPDES permit. [Such wastes are excluded from RCRA regulation at the point of discharge under §§261.4(a)(1) and 261.4(a)(2), respectively.] Management of leachate in wastewater treatment tanks prior to discharge under the CWA is also exempt from RCRA regulation under the wastewater treatment unit exemption of §§264.1(g)(6) and 265.1(c)(10).

Wastes in surface impoundments

Wastes (particularly sludges) can remain in surface impoundments for a long time. Similar to the situation for landfills discussed above, wastes that were disposed in the impoundments before they were listed or identified as hazardous wastes are hazardous today, but they do not become subject to RCRA regulation unless the wastes are actively managed. The regulatory status of the wastes and impoundments depends on several factors, as discussed in EPA preamble language and correspondence. [September 27, 1990; 55 *FR* 39410, November 2, 1990; 55 *FR* 46383, RO 11826, 13510] Five different scenarios are envisioned for wastes that were deposited or generated in an impoundment *prior* to the effective date of the listing or identification:

1. If the wastes are removed from the unit before the effective date, the wastes and the impoundment are not subject to hazardous waste management (as long as the unit does not receive or generate any hazardous waste after the effective date).
2. If the wastes remain in the unit (which is considered the final disposal site for the wastes) after the effective date, and the unit does not receive or generate any hazardous waste after the effective date, the hazardous wastes in the impoundment are not being actively managed. Therefore, neither the wastes themselves nor the impoundment become subject to RCRA Subtitle C requirements.
3. If the wastes remain in the unit (which is *not* considered the final disposal site for the wastes) after the effective date, and the unit does not receive or generate any hazardous waste after the effective date, the hazardous wastes in the impoundment are being stored (i.e., actively managed). Therefore, the wastes themselves and the impoundment become subject to RCRA Subtitle C requirements on the effective date. This scenario is based on the facility removing some or all of the waste from the unit on a *periodic* basis on or after the effective date.
4. If the wastes are removed from the unit after the effective date in a one-time removal as part of a closure, the wastes are subject to hazardous waste management (i.e., they are being actively managed), but the impoundment is not a Subtitle C unit (as long as the unit does not receive or generate any hazardous waste after the effective date). EPA does not consider one-time removal of waste from a unit on or after the effective date, in and of itself, to make the impoundment a storage unit subject to Subtitle C.
5. If the wastes are scoured from the unit after the effective date (due to nonhazardous wastewater influent) and the unit's effluent is therefore listed or exhibits a characteristic, the unit generating the hazardous wastewater and any surface impoundment receiving that hazardous effluent would be subject to Subtitle C requirements.

Corrective action and CERCLA provisions still apply

As mentioned above, if units contain listed or characteristic wastes but are not being used for active waste management after the listing or identification effective date, they would not be subject to regulation under Part 264 or 265. However, inactive units that are located at facilities otherwise subject to Subtitle C interim status or permitting requirements are solid waste management units (SWMUs) subject to corrective active requirements under RCRA Section 3004(u) or 3008(h). In addition, the CERCLA cleanup authorities may also apply. [September 27, 1990; 55 *FR* 39410]

[Previous Compliance Corner](#) (Introduction to Solid Wastes)

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This document addresses problems of a general nature related to the federal RCRA regulations. Persons evaluating specific circumstances dealing with the RCRA regulations should review state and local laws and regulations, which may be more stringent than federal requirements. In addition, the assistance of a qualified professional should be enlisted to address any site-specific circumstances.

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