

SPOTLIGHT ON HAZARDOUS WASTE LAWS

Retailers subject to increasing — and costly — environmental scrutiny

By Josh M. McMorrow, Tim Wilkins and Matt Haynie

“I’m a retailer, not a hazardous waste producer.” If that’s what you think, you may be wrong.

The fact is that any retailer that sells such everyday items as fertilizer, bug spray, nail polish, bleach or some over-the-counter medications generates hazardous waste. The U.S. Environmental Protection Agency and state governments have recently turned their enforcement eyes 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.

It should come as no surprise that ordinary retailers can be liable under hazardous waste laws. The days are long gone 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.

Waste Not, Want Not

A variety of federal and state laws apply to entities that handle hazardous waste. The most widely applicable of these is 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 Originally enacted by Congress in 1976 (and notably expanded in 1984), RCRA establishes a federal “cradle to grave” system for the management of solid and hazardous waste.

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. Why? Because once a customer brings in a return, that item may already be considered a waste when the retailer receives it 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. A recent Wal-Mart case specifically deals 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 is included on specific EPA lists of hazardous wastes or exhibits certain characteristics deemed to be hazardous — ignitability, corrosivity, reactivity or toxicity. Materials included on the EPA lists or exhibiting those 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.

Compliance

Entities that violate RCRA can face serious consequences. The civil penalties, for example, 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 a retailer fails to perform a proper waste determination and a hazardous waste ends up in the store dumpster, the retailer has likely violated quite a number of requirements, including failure to properly identify, label, package, mark, store, train, plan, manifest and dispose of the waste in question. Eight or 10 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.

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