

RCRA 101: An Introductory Guide to the Resource Conservation and Recovery Act for the Young Lawyer

By Ivan L. London

Congress enacted the Resource Conservation and Recovery Act (RCRA or the Act) in 1976 to regulate solid waste, and later amended RCRA to additionally regulate “from the cradle to the grave” those forms of solid waste identified as “hazardous waste.” While RCRA is too complex to be captured in a short introductory essay, every young environmental lawyer should know a few of the basic principles.

RCRA, 42 U.S.C. § 6901 *et seq.*, gives the Environmental Protection Agency (EPA) – either primarily or through the states – the authority to regulate three things:

1. Nonhazardous solid waste (Subtitle D);
2. Hazardous waste, which EPA regulates “from the cradle to the grave” – including generation, transportation, treatment, and storage (Subtitle C); and
3. Environmental problems that could result from underground storage tanks (USTs) storing petroleum and other hazardous substances (Subtitle I).

RCRA directs EPA to prevent the releases of hazardous wastes and nonhazardous solid wastes into the environment by controlling and tracking the waste from the point of generation to the point of disposal or storage. EPA has promulgated regulations, or rulemakings, that translate the general statutory mandate of RCRA into a set of requirements for the Agency and the regulated community at 40 C.F.R. Parts 260 to 268, 270 to 273, and 279 to 282. Also, EPA publishes guidance and policy documents. EPA’s RCRA guidance and policy resources, which are an important source of RCRA information, can be found at <http://www.epa.gov/wastes/laws-regs/rcraguidance.htm>.

As a young lawyer, you should first figure out whose rules apply to your RCRA analysis. RCRA provides for state involvement in EPA’s regulatory programs. While EPA has primary authority to enforce RCRA, EPA may authorize states to carry out the provisions of the Act so long as their regulatory schemes do not limit a party’s ability to comply with the federal statutes and are at least as stringent as the federal requirements. EPA maintains a website that provides useful information regarding the status of every state’s authorization to take on the primary responsibility of implementing RCRA in lieu of EPA. <http://www.epa.gov/waste/laws-regs/state/index.htm>. For the sake of parsimony this essay will focus on the federal requirements, but be aware that these might only comprise a part of your RCRA workload.

Once you have determined the applicable set of laws and regulations, you next must answer the threshold question: “Am I dealing with a solid waste?” In practice, the definitional hurdles to answering that question can be complex. The regulations define “Solid waste” effectively as “any discarded material.” And then the regulations go on to define “discarded material” in turn as any material – including a liquid – that is “abandoned,” “recycled,” or “inherently wastelike.” 40 C.F.R. § 261.2(a). So, yes, “solid waste” can be a liquid.

If you conclude that you are dealing with solid waste, you must then ask whether your waste is hazardous (regulated under Subtitle C) or nonhazardous (regulated under Subtitle D). You can break the inquiry down into a multi-part analysis:

1. Does the facility generate a material that is designated on a list of hazardous wastes compiled by EPA or an authorized state? [40 C.F.R. §§ 261.30-261.35]
2. Does the facility generate a material that fits any specified test characteristics – is it ignitable, corrosive, reactive, or toxic? [40 C.F.R. §§ 261.20-261.24]
3. Does the facility treat, store, or dispose of a material “derived from” a hazardous waste? [40 C.F.R. § 261.3]
4. Does the facility generate, treat, store, or dispose of a material that fits into the regulatory “mixture” definitions? [40 C.F.R. §§ 260.22(b), 261.3(a)(2)]
5. Is there an applicable regulatory exclusion? [40 C.F.R. §§ 260.22, 261.4, 261.38-261.41]

You can only answer these questions by closely parsing 40 C.F.R. Parts 260 and 261, those parts’ accompanying appendices, the related case law, and EPA and state environmental agency policy and guidance documents. Remember, authorized states may implement standards that are more rigorous than federal standards. So a material that is not “hazardous” according to EPA may nevertheless be “hazardous” according to the applicable state program.

The multi-part query above focuses on “facilities” and not on “parties.” Do not be misled. Regulators will consider anyone who violates RCRA to be a “responsible party.” Nevertheless, regulators focus on whether a *facility* is a source of waste (*i.e.*, a generator or transporter) or a recipient of waste (*i.e.*, a treater, storer, or disposer). Once you have identified what the facility in question does, and whether that activity involves hazardous or nonhazardous waste, then you can analyze the specific regulatory requirements for that facility. Generally, all facilities must do the following in conjunction with fulfilling their permitting requirements—

- a. Register with EPA to obtain a “facility i.d. number”;
- b. Comply with labeling, storing, and packaging requirements;
- c. Comply with waste handling requirements;
- d. Report waste shipments;
- e. Keep copies of manifests, reports, and waste analyses.

You can find the requirements for the different types of facilities in the following portions of the Code of Federal Regulations:

1. **Generators** – 40 C.F.R. Part 262, the term “generator” is defined in 40 C.F.R. § 260.10. *See also* 42 U.S.C. § 6922. Check whether the generator is exempt or a “small quantity generator.” 42 U.S.C. § 6921(d); 40 C.F.R. § 262.44.
2. **Transporters** – 40 C.F.R. Part 263, the term “transporter” is defined in 40 C.F.R. § 260.10. *See also* 42 U.S.C. § 6923.
3. **Treaters/Storers/Disposers (TSDFs – the “F” is for “Facility”)** – 40 C.F.R. Parts 264 and 265, the terms “treatment,” “storage,” “disposal,” and “disposal facility” are defined in 40 C.F.R. § 260.10. *See also* 42 U.S.C. § 6924. Note that the Act and its accompanying regulations treat “existing” TSDFs differently than “new” TSDFs depending on whether they existed prior to 1980. *See e.g.*, 42 U.S.C. § 6925(e); 40 C.F.R. Part 264; 40 C.F.R. Part 265.

Even if a facility does not manage hazardous waste, it still might come within the purview of RCRA Subtitle D regarding nonhazardous solid waste. 42 U.S.C. §§ 6941-6949a. The Act divides nonhazardous wastes into municipal (think garbage and landfills) and industrial wastes.

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Subtitle C and Subtitle D differ with respect to the determination of primary regulatory authority. Whereas under Subtitle C EPA has primary responsibility for regulating hazardous wastes until it authorizes a state program, Congress clearly intended to give authority to regulate nonhazardous solid wastes to the states. So if you are dealing with a nonhazardous solid waste, proceed immediately to the applicable state environmental agency.

There is more. Subtitle I, 42 U.S.C. §§ 6991-6991m, provides another group that you may have to concern yourself with: underground storage tanks (USTs). The Act defines a UST as a tank that has at least 10% of its volume beneath the surface of the ground. 42 U.S.C. § 6991(10). The Act also identifies several exceptions, notably including septic tanks and pipelines. *Id.* Be clear, if the UST stores hazardous wastes, then it is still regulated under RCRA Subtitle C. If, however, the UST stores hazardous substances or petroleum, then it is regulated under RCRA Subtitle I. The federal regulations concerning USTs are contained in 40 C.F.R. Parts 280 and 281, and 40 C.F.R. §§ 282.50-282.105. The list of hazardous substances can be found in 40 C.F.R. § 302.4. As with the rest of RCRA discussed above, the applicable laws and regulations may fall under a state authorization in lieu of the federal program.

Now (finally) we take on the good stuff: liability and enforcement. Violations of RCRA may trigger enforcement by the federal government, 42 U.S.C. § 6928, an authorized state, 42 U.S.C. § 6926, or a citizen acting as “private attorney general,” 42 U.S.C. § 6972. Rather than lay out all of the relevant statutory, regulatory, and case law, this essay will focus on common issues bound to turn up in the liability and enforcement context:

1. Notice – RCRA citizen’s suit notice provisions in 42 U.S.C. § 6972 are jurisdictional, and a case will be kicked out if they are not followed. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).
2. Standing – In the citizen suit context, evidence of violation of any statute or permit, or of probable injury due to known contamination on adjacent property will likely be sufficient. *Interfaith Cmty. Org. v. Honeywell Int’l Inc.*, 399 F.3d 248 (3d Cir. 2005). A plaintiff can predicate RCRA liability on “imminent and substantial endangerment to health or environment.” 42 U.S.C. § 6972(a)(1)(B). In the regulatory context, the applicable regulatory entity can require corrective action via an “administrative order” on the finding that, for example, a hazardous waste has been released. *See, e.g.*, 42 U.S.C. § 6928(h)(1).
3. Liability – RCRA imposes strict liability. *Gilroy Canning Co. v. Cal. Cannery & Growers*, 15 F. Supp. 2d 943 (N.D. Cal. 1998). Any “person” that violates the act may be held strictly liable, including individuals, corporations, municipalities and even the federal government. 42 U.S.C. § 6903(15). Importantly, under the strict liability concept, a generator, for example, can be liable for RCRA violations by third-party transporters, disposers, etc. even if the generator has no knowledge of the violations. *United States v. Wasserson*, 418 F.3d 225 (3d Cir. 2005). And in that context, individuals can be held criminally liable. *Id.*
4. Relief – RCRA provides for injunctive relief, civil penalties, and criminal liability (for “knowing” violations). 42 U.S.C. §§ 9628, 9672.

Lastly, RCRA gives EPA and authorized states broad power to inspect regulated facilities and request information submissions to ensure compliance. *See, e.g.*, 42 U.S.C. § 6927. Failure to comply constitutes a violation of RCRA and subjects the violator to liability for the penalties and relief mentioned above. *United States v. Charles George Trucking Co.*, 624 F. Supp. 1185 (D. Mass. 1986). EPA or an authorized state may further redress RCRA violations by issuing administrative orders compelling compliance, monitoring and testing, and corrective action. 42 U.S.C. §§ 6928, 6934. Alternatively, the regulatory body may sue for injunctive relief and penalties, or to enforce an administrative order. *Id.*

RCRA can be discouraging. Congress and the regulators have crafted very complex definitions and broad assignments of liability to effectuate the “cradle to the grave” concept. But take heart. RCRA constantly evolves in scope, complexity, and relevance to the modern practice of law. So if you can understand the principles described above, you can have busy environmental practice.

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