

By Fred Marks

CONTRACTING DISPOSAL OF HAZARDOUS WASTES

Federal and state regulations present challenges that require expertise

Contracting for the disposal of hazardous waste can be a daunting challenge. Hazardous waste can retain its form and characteristics indefinitely and, under certain conditions, migrate from the spot where it was originally placed. Properly managed, hazardous waste poses little or no threat to the environment. Indiscriminately managed, or not managed at all, it can contaminate drinking water, air and soil, and can kill plants, animals and people. The indiscriminate management of hazardous waste is against the law. Violation of the law can lead to stiff penalties, including imprisonment

What is hazardous waste?

Industrial waste comprises an almost boundless variety of substances, some clearly presenting greater environmental hazards than others. Without question, the volume of non-hazardous waste far outweighs that of hazardous waste. Non-hazardous waste, so long as it's not mixed with hazardous waste, poses no insurmountable environmental problem. Most non-hazardous waste such as paper, plastic, glass, wood, metal or other common industrial waste can be disposed of at a local landfill, or incinerated, or recycled. These methods reduce tons of waste into a more manageable form and, in many areas of the country, are used to generate electric power.

So, what is hazardous waste? The short answer is "Whatever the Feds and your State says it is." The longer answer is that in order for a material to be classified as a hazardous waste, it must first be determined to be a solid waste as used by the U.S. Environmental Protection Agency (EPA) in Resource Conservation and Recovery Act (RCRA) regulations. "Solid waste" is for definitional purposes only and does not refer to any specific physical

characteristic of the waste.

In general, a material becomes a waste when its intended use ends and it begins to be accumulated or stored for any subsequent treatment, reclamation or disposal. Generators of the waste must then determine whether it meets the criterion of being hazardous and is subject to EPA regulations.

Treatment may not necessarily render a waste non-hazardous; it may only make it amenable for some other use or eliminate one of several hazardous properties. A non-listed hazardous waste will cease to be hazardous only when it no longer exhibits any of the defined characteristics. The act of including a commercial chemical product or chemical intermediate that is a listed hazardous waste causes an entire waste stream to be considered hazardous.

Hazardous waste regulations

The basic rule of thumb is that the Federal legislation sets guidelines for individual states and the states must satisfy the EPA that they are at least equivalent to the federal program; that they are consistent with the federal



program; and they provide for adequate enforcement. Nothing prohibits a state from establishing standards more stringent than those required by the EPA, and many states have elected to expand the requirements. They are free to alter requirements so long as they ensure that the program is “at least equivalent to” and “consistent with” those promulgated by EPA and adequately enforced.

One of the primary reasons we face hazardous waste problems today is that in the past there was no chain of responsibility for waste management. A typical scenario of the past was that a generator hired a hauler who would routinely pick up the waste, place it on his truck, and depart. The destination of the waste was generally of no concern to the generator. The hauler took the waste to a local landfill (municipal or private), where it was deposited. The contents of the truck were equally of little concern to the hauler and landfill operator. Weight, not content, determined how much the landfill operator charged the hauler.

Now the luxury of the generator operator washing his hands of responsibility once it leaves his facility is a thing of the past. Additionally, under the Comprehensive Environmental Response Compensation and Liability Act

(CERCLA), more commonly known as “Superfund,” designed to clean up the nation’s worst waste sites, if a waste in a dump causing environmental problems is identified as yours, you could be required to pay for part of all of the cleanup of the site. And with the adoption of additional amendments, it is now easier to identify your waste through the “cradle-to-grave” tracking system.

The Cradle-To-Grave Manifest system is designed to ensure that hazardous waste is properly managed from the point of generation to the point of disposal (or destruction through incineration, detoxification or recycling) and all points in-between. The instrument used to accomplish the tracking objective is the Hazardous Waste Manifest.

The manifest is a document that: describes (and always accompanies) the contents of a waste shipment; carries the generator’s name, lists any treatment, storage or disposal facility to which the waste is destined; and lists the name(s) of transporters who handle the waste in transit.

The manifest reinforces the major legal theme in hazardous waste legislation – that the generator is never relieved of responsibility and liability for their waste. Generally, copies of manifests or the information they contain are to be retained by generators for at least three years. Because disposal site operators are also required to maintain records of the types and quantities of waste they receive until the facility closes, it is likely that the manifest or other records describing your waste will be retained for a longer period of time by the facility operator. Generators are also required to ensure that they receive a signed return copy of the manifest indicating delivery to the TSDF (Transfer Storage and Disposal Facility) within 35 days of shipment. Should the disposal facility later become a hazardous waste site requiring response under Superfund, copies of your manifests would probably identify you as a potentially responsible party and trigger Superfund legal action. Additionally, any person who “knowingly omits material information or makes any false material statement or representation” in any manifest or other document required by law can be subject to severe fines and imprisonment.

A central instrument in regulatory efforts is the “command-and-control” method. A regulatory agency “commands” you to undertake certain activities that will produce a desired result. The agency “controls” your behavior by promising certain penalties for incorrect responses to the command. In the case of hazardous waste management, the controlling penalties are stiff because violation of the regulations can be interpreted as endangering human health and the environment.

Choosing a TSDF

No one may treat, store or dispose of a hazardous waste without a RCRA permit. For the generator, this means that any TSDF designated on your manifest must qualify for interim status or have a RCRA permit. It is a violation of the law for any small quantity generator to send hazardous waste to any TSDF that does not have the appropriate permit(s). So, in reality, municipal landfills can no longer

legally accept hazardous waste unless they are permitted.

At some point you will be working with a TSDF. Remember, a TSDF must have an EPA ID number. They must either qualify for interim status or have a current RCRA permit. These are referred to as Subtitle C facilities. They must comply with general facility standards established by the EPA. These include waste analysis, security, inspections, personnel training and other standards designed to ensure against threats to human health or the environment and to ensure the structural integrity of the facility. The facility must have in place plans for emergency preparedness and prevention to reduce the risks of a hazardous waste release, fire or explosion. It must also have in place a contingency plan, files with local police and fire authorities, to minimize dangers caused by releases to air, soil, or water.

It's a good idea to check in advance with other generators (typically other public bodies about the same size as yours with similar waste streams) using a TSDF to ensure that the facility is complying with established manifest-handling requirements. Check with local law enforcement officials for any prior violations by a TSDF owner or operator.

Have someone in your organization check their financial health prior to contracting. A TSDF must meet certain financial responsibility standards to assure sufficient funds for post-closure care and to provide money for compensation of third parties injured by its operation.

The EPA has established comprehensive technical requirements for many aspects of hazardous waste management, including containerized storage, tanks, surface impoundments, waste piles, and treatment, landfills, incinerators, thermal treatment, chemical, physical and biological treatment and underground injection.

Contracting challenges of hazardous waste disposal

Like all other types of specialty contracting, hazardous waste disposal has certain key elements that you need to be aware when you prepare your solicitation documents. A separate Sample and Analysis Contract will assist you in knowing what you are disposing of and allow you structure your contract disposal contract accordingly. Your local EPA District office can assist you in a bidders list of EPA-approved labs. Include sampling reports and analytical data as part of your disposal solicitation (if possible; the more the bidder knows, the better your price will be).

Establish prerequisites for both your Sampling and Disposal Contracts and verify the information provided by the Bidders. Ask for copies of the permits of the TSD's and TSDF's they propose you use. Know violations of your bidders. Require them to send you copies of their violations (most will have them; don't be alarmed at

the number, rather look at the type of violation). You may want to allow some prior violations and revise your opinion after reading others.

Approve Subcontractors. Know who is being used. Know their qualifications. Verify their permits, violations, insurance limits. Get copies of permits and licenses. You need to know where your waste is being sent and if the disposal site is permitted to accept your waste.

Consider using Liquidated Damages in your Contracts. Some waste streams have a time frame associated with them. For PCB's, for example, you have 90 days to dispose.

Include a "New Legislation clause." The Feds and States are constantly changing the requirements for disposal of Hazardous Waste. Use sample language such as: "Enactment of new legislation or changes to existing regulatory requirements which have a significant impact concerning the work to be performed under this contract, either party, upon mutual agreement may terminate this contract due to the enactment without prejudice to either party. Such termination shall take effect ____ days after the due date of the mutual agreement and the sole compensation due the Contractor shall be limited to the compensation earned up to and including the date of termination."

There is generally (always) extra work associated with Hazardous Waste disposal. The composition may change while in transit, or sampling at the disposal site may reveal new information. You will need to allow a contractual method to pay for additional charges associated with the disposal of your waste.

Remember, it's yours forever, unless incinerated.

Structure your bid documents so the Contractor takes title when waste is placed the transporter's truck. That may not be in strict keeping with the applicable law (which may require that the waste is yours forever), but you may be able to argue in court that you took prudent steps to protect your jurisdiction.

Looking for expertise

If you don't have the expertise in your organization to accomplish this specialty type of contracting, find out who can help you or develop your own staff to the point of their expertise. There are consultants available, but be careful. They will give you an opinion, write a long report, and advise you. But the bottom line is that it is your responsibility, your reputation, and your name. Personally, my first call is to the EPA Field Office.

About the author

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