



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

Date: 11.19.2021

COVERSHEET: EXPLANATION OF CITATION AND/OR TERMINOLOGY CHANGES IN THIS POLICY DOCUMENT

This policy document remains wholly in effect, but some or all of the regulatory citations within it have changed. These changes do not alter the existing regulatory interpretations.

As part of the [2016 Hazardous Waste Generator Improvements Rule](#), many of the regulations that apply to hazardous waste generators were moved to, or reorganized within, title 40 of the Code of Federal Regulations (CFR) part 262. To view a crosswalk between the old and new citations, please visit the [Hazardous Waste Generator Regulations Crosswalk webpage](#).

The Hazardous Waste Generator Improvements Rule also made changes to terms that may be included in this document. The most common term change was replacing “conditionally exempt small quantity generators” (CESQGs) with “very small quantity generators” (VSQGs). In addition, EPA defined the term “central accumulation area” (CAA) to mean a generator’s 90- or 180-day accumulation area for hazardous waste.

A handwritten signature in black ink that reads "Jessica Young". The signature is written in a cursive, flowing style.

Jessica Young
Chief of the Recycling and Generator Branch
Office of Resource Conservation and Recovery

9472.1995(01)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

June 8, 1995

Rosemary Cantwell, Chief
Hazardous Waste Enforcement Section
Office of Enforcement
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46206-6015

Re: Regulatory Assistance

Dear Ms. Cantwell:

The U.S. Environmental Protection Agency (U.S. EPA) is in receipt of the April 11, 1995, letter from Mr. Matthew Klein, of your staff. The letter requested guidance on the legal significance of "comments" in the Code of Federal Regulations (CFR), specifically in 40 CFR 265.176 [329 IAC 3.1-10-1&2]; whether generators who store ignitable or reactive waste in containers must post "No Smoking" signs pursuant to 40 CFR 265.17(a) [329 IAC 3.1-10-1&2]; and whether permitted treatment, storage and disposal (TSD) facilities which employ a facility wide "Tobacco-free" policy are exempt from posting "No Smoking" signs, as required by 40 CFR 264.17(a) [329 IAC 3.1-9-1&2]. The Region's interpretation of the issues raised in Mr. Klein's letter are as follows:

(1) Significance of "comments" in CFR:

Existing case law confirms the status of "comments" and "notes" in a statute as commentary, and not legal requirement, as would be the rule itself. A court may look at comments or notes to help interpret a provision, but the comments or notes are not themselves binding. See *United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989); *Motorola, Inc. v. United States*, 729 F.2d 765 (C.A. Fed. 1984). See also *In re Valentine*, 146 B.R. 945 (Bkrtcy. E.D.Va. 1991); *In re Taylor*, 45 B.R. 643 (Bkrtcy.Pa. 1985); *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F.Supp. 1069 (D.C. Neb. 1976) [latter

RO 14036

cases discussing significance of comments in the Uniform Commercial Code]. Thus, on the basis of existing case law, the Indiana Department of Environmental Management (IDEM) cannot use the comment following 40 CFR 265.176 [329 IAC 3.1-10-1&2] to require a generator to comply with 40 CFR 265.17(a) [329 IAC 3.1-10 1&2], if it would not otherwise be subject to that requirement.

(2) Are generators who store ignitable or reactive waste in containers for less than 90 days subject to 40 CFR 265.17(a)?

Pursuant to 40 CFR 262.34(a)(1)(I) [329 IAC 3.1-7-1&2], a generator may accumulate waste on-site for 90 days or less without a permit or without having interim status provided that the waste is placed in containers and the generator complies with Subpart I of Part 265 [329 IAC 3.1-10-1&2].

Pursuant to 40 CFR 265.176 of Subpart I [329 IAC 3.1-10-1&2], containers holding ignitable or reactive waste must be located at least 50 feet from the facility's property line. A comment in this section directs the reader to additional requirements found at 40 CFR 265.17(a) [329 IAC 3.1-10-1&2].

The applicability of the requirements of 40 CFR Part 265 is found at 40 CFR 265.1(c)(7) [329 IAC 3.1-10-1&2]. Pursuant to this section, the requirements of Part 265 do not apply to generators accumulating waste on-site in compliance with 40 CFR 262.34 [329 IAC 3.1-7-1&2], except to the extent that such requirements are included in 40 CFR 262.34.

Pursuant to 40 CFR 262.34(a)(4) [329 IAC 3.1-7-1&2], a generator who accumulates hazardous waste on site for less than 90 days need not seek a permit or have interim status if it meets several requirements, including compliance with requirements for owners and operators in Subparts C and D in 40 CFR Part 265, with 265.16 (in Subpart B), and with 40 CFR 268.7(a)(4). Note that 40 CFR 265.17 specifically is not mentioned. Thus, 40 CFR 265.17(a) [329 IAC 3.1-10-1&2] is not included as one of the applicable sections for a generator meeting the requirements of 40 CFR 262.34 [329 IAC 3.1-7-1&2].

Can IDEM require a generator to post a sign advising that there should be no ignition sources near combustible material?

According to 40 CFR 265.31 of Subpart C [329 IAC 3.1-10-1&2], with which a generator must comply pursuant to 262.34(a)(4) [329 IAC 3.1-7-1&2], a facility must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned releases of hazardous waste or hazardous waste constituents which could threaten human health or the environment. Region 5 believes that 40 CFR 265.31 [329 IAC 3.1-10-1&2] is broad enough to allow IDEM to request (for example in a compliance order) that a generator post a sign near combustible waste advising that there is "no smoking" or there are "no ignition sources."

(3) Are permitted TSDFs with a "Tobacco-free" policy which store ignitable or reactive waste required to post "No Smoking" signs pursuant to 40 CFR 264.17(a)?

For both permitted and interim status treatment, storage, and disposal facilities ("TSDFs"), 40 CFR 264.17(a) [329 IAC 23.1-9-1&2] and 40 CFR 265.17(a) [329 IAC 3.1-10-1&2], respectively, require that a "No Smoking" sign must be conspicuously placed wherever there is a hazard from ignitable or reactive waste. There is no exemption for a facility with a "Tobacco-free" policy.

The fact that a facility has a "Tobacco-free" environment may not fully address the human and environmental safety concerns stated in the regulation. The text of both these provisions clearly spells out that the purpose of the provision is to prevent the exposure of ignitable wastes to "Open flames, smoking, cutting and welding, hot surfaces, frictional heat, sparks. . . , spontaneous ignition. . . , and radiant heat." 40 CFR 264.17(a) and 40 CFR 265.17(a) specify that when ignitable or reactive waste is being handled, the owner or operator must confine both smoking and open flame to specially designated areas. The regulations absolutely require posting at least a "No Smoking" sign.

Based on the information provided, the facility's argument that posting a "No Smoking" sign would encourage smoking is not viewed by the Region as a valid excuse for failing to comply with 40 CFR 265.17(a). In our view, IDEM is justified in arguing that the facility is free to post a "No Smoking or Ignitable Sources" sign, but the facility must, at a minimum, post a "No Smoking" sign.

We hope that the above comments are responsive to the issues raised in the April 11, 1995, letter. Should you have further questions, please do not hesitate to contact Barbara L. Wester, Assistant Regional Counsel, (312) 353-8514, or Michael Cunningham, RCRA Technical Enforcement Section at (312) 886-4464.

Sincerely yours,

T. Leverett Nelson
Acting Chief,
Solid Waste Emergency Response
Branch

Thad Slaughter
Acting Section Chief
Technical Enforcement
Section 1

cc: Matthew Klein, IDEM