

PERKINScoie



- **Polly Hampton, Perkins Coie**
- **Jeffrey Hunter, Perkins Coie**
- **Sarah Kronholm, P.E., SLR**

Oregon State Bar – Environmental & Natural Resources Section
2019 Environmental Law: Year in Review

What's New with RCRA?

October 3, 2019

Agenda - All Things RCRA!

- The Not-So-New HazWaste Generator Improvements Rule
- Court Cases You Should Know About!
- Recent Enforcement Actions and Penalties
- Common Audit Findings

COUNSEL TO GREAT COMPANIES

EPA's Updated Hazardous Waste Generator Regulations

Polly Hampton

Final Rule

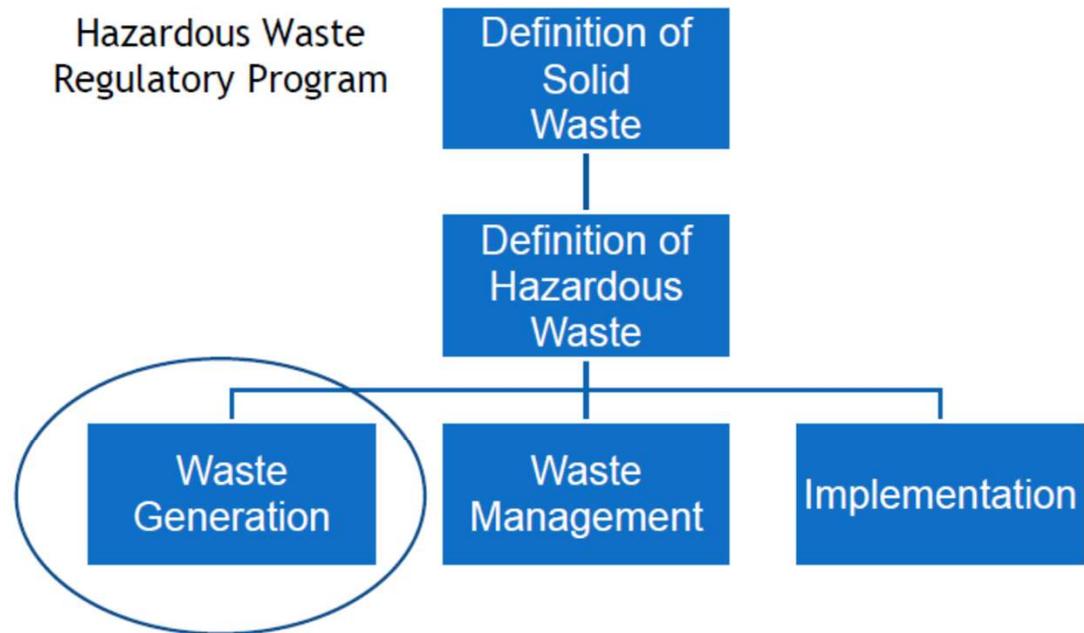
- Federal RCRA regulations only (plus Iowa, Alaska, US territories, and tribal lands)
- Waste generation only (not management or implementation)
- Finalized November 2016 (81 FR 85732)
- Effective May 30, 2017
- First substantial update in 35 years
- More than 60 rule changes; 30 technical changes

Final Rule

Purpose:

- Make the rules easier to understand
- Facilitate better compliance
- Provide greater flexibility in how hazardous waste is managed
- Close gaps in the regulations

Background



Who is Impacted?

- Authorized states required to adopt more stringent provisions no later than July 1, 2019 if state law change is needed
- May opt out of less stringent provisions



Key Rule Changes: Generator Status

“Very small quantity generators” (VSQGs) replaced
“conditionally exempt small quantity generators” (CESQGs)

VSQG	SQG	LQG
220 pounds*	220-2,200 pounds*	2,200 pounds*
Approximately:		
½ drum	½ to 5 drums	> 5 drums
27 gallons	27-275 gallons	> 275 gallons

*Per month, non-acute

Hazardous waste counting:

- Clarified how to determine generator status
- Accumulation limits include acute and non-acute waste and residue, contaminated soil, water and other debris from cleanup of a spill

Generator Universe

Generator Category	Number of Facilities	Total Hazardous Waste Generated (tons)	Percent of Total Hazardous Waste Generated
VSQGs	353,400–591,800	46,000–148,000	<1%
SQGs	49,900–64,300	66,000–141,000	<1%
LQGs	20,800	35.2 million	99%
Total	424,100–676,900	35.3–35.4 million	100%

* Numbers of VSQGs and SQGs are estimates based on Biennial Report (BR) and limited state data. LQG number is derived from 2013 BR.

Key Rule Changes: Reorganized Generator Rules

Provision	Previous Citation	Final Citation
Generator Category Determination	§ 261.5(c)-(e)	§ 262.13
VSQG Provisions	§ 261.5(a), (b), (f)-(g)	§ 262.14
Satellite Accumulation Area Provisions	§ 262.34(c)	§ 262.15
SQG Provisions	§ 262.34(d), (f)	§ 262.16
LQG Provisions	§ 262.34(a), (b), (g)-(i), (m)	§ 262.17
Emergency Planning and Preparedness	Part 265	Part 262, Subpart M

Note: Oregon regulations reference old federal citations.

Key Rule Changes: Waste Determinations

More detail on waste determinations

- Solid and hazardous waste determinations must be “accurate”
- Determinations must be made at the point of generation before any dilution, mixing or other alteration of the waste occurs
- Use of generator knowledge and testing in making determinations

Key Rule Changes: Waste Determinations

More detail on waste determinations

- More robust recordkeeping requirements (LQG and SQG)
 - Waste determinations must be kept for at least 3 years from date of removal to TSD
- No requirement to maintain record of non-hazardous waste determination, but recommended best practice

Comparison of New vs. Old §262.11

New	Old
<p>A person who generates a solid waste, as defined in 40 CFR 261.2, must make an accurate determination as to whether that waste is a hazardous waste</p>	<p>A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:</p>
<p>(a) The hazardous waste determination for each solid waste must be made at the point of waste generation, before any dilution, mixing, or other alteration of the waste occurs, and at any time in the course of its management...that may change the properties of the waste such that the RCRA classification of the waste may change.</p>	
<p>(b) A person must determine whether the solid waste is excluded from regulation under 40 CFR 261.4.</p>	<p>(a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4.</p>
<p>(c) If the waste is not excluded under 40 CFR 261.4, the person must then use knowledge of the waste to determine if the waste meets any of the listing descriptions under subpart D of 40 CFR part 261.</p>	<p>(b) He must then determine if the waste is listed as a hazardous waste in subpart D of 40 CFR part 261.</p>

Key Rule Changes: Episodic Generation

Allows generators to maintain existing category provided they can comply with a streamlined set of requirements

Frequency

- One event per calendar year with ability to petition for second
- If first event is planned, the petition for a second event must be for an unplanned event or vice versa
- Notify EPA or state at least 30 days prior to initiating a planned episodic event or within 72 hours after an unplanned event

Conclude the episodic event within 60 days, including shipping waste offsite

Streamlined requirements for VSQGs

Key Rule Changes: Emergency Preparedness

Revisions to Preparedness, Prevention and Emergency Procedures

- Areas subject include points of generation, SAAs and CAA
- Requires LQGs and SQGs to attempt to make emergency preparedness agreements with local emergency planning committees and document the attempt
- For LQGs, clarifies that online training is allowed
- Requires LQGs to develop and submit an executive summary of their contingency plan to local emergency responders (Quick Reference Guide)

Other Rule Changes

VSQGs may now send hazardous waste to LQGs under control of the same person

SQGs must re-notify EPA/State beginning in 2021 and every 4 years thereafter

Clarification of Biennial Reporting Requirements

- Only LQGs needs to complete and submit reports
- Must report all of the hazardous waste generated for the entire reporting year

Biennial Reporting for Recyclers/Reclaimers

- Owners/operators of facilities that receive and partially reclaim/recycle hazardous wastes without storage prior to recycling

Other Rule Changes

Manifests

- Standardized content and appearance, available from more sources

Marking and labeling

- Minor changes in what is required on labels
- Flexibility on how containers are marked
- LQGs and SQGs must mark containers with waste codes (or associated bar codes) prior to shipment

Central Accumulation Area and Satellite Accumulation Areas

- Clarifications on how to manage

SQGs

- Required to re-notify every 4 years

Additional Resources

EPA includes FAQs and links to trainings on its website:

<https://www.epa.gov/hwgenerators/final-rule-hazardous-waste-generator-improvements>

Webinar Series on the Hazardous Waste Generator Improvements Rule

US EPA
Office of Resource Conservation and Recovery
2019

Additional Resources

- [Frequent questions about implementing the final rule](#)
- [Fact sheet about the final rule](#)
- [Frequent questions about the final rule](#)
- [Where is the final rule in effect?](#)

Trainings

In Depth, Three Part Workshop

- [Presentation Slides for the Workshop](#)

The following links exit the site **EXIT**

Click the "View Archive" button on the following pages to access the recording of each Workshop part:

- [Recording of Part 1](#), which covers the goals and background of the rule, hazardous waste determinations, counting, mixing, and marking and labeling.
- [Recording of Part 2](#), which covers episodic generation, consolidation of VSQG waste and closure for large quantity generators.
- [Recording of Part 3](#), which covers satellite accumulation areas, emergency planning and preparedness, reporting and recordkeeping, and state adoption.

Overview of the Final Rule

- [Recording of the November 30, 2016 webinar about this rule](#)
- [Slides for the November 30, 2016 webinar](#)
- [Slides for the January 9, 2017 webinar](#)

Questions?



Polly Hampton

(503) 727-2165

PHampton@perkinscoie.com

COUNSEL TO GREAT COMPANIES

Court Cases You Should Know About!

Jeff Hunter

What we will cover

- Sham Recycling – Are we finally done?
- Stormwater discharges are subject to RCRA?
- What about PFAS?
- I won, but lost?
- What the heck is an “Imminent and Substantial Endangerment”?
- What happened to the “Diligent Prosecution Bar”?
- Protecting the Condors -- must the Forest Service control hunting in the National Forest?
- I declared bankruptcy. That claim is discharged, right?

American Petroleum Institute v. EPA

862 F.3d 50 (D.C. Cir. 2017), *modified by* 883 F.3d 918 (D.C. March 6, Cir. 2018)

- Challenge to EPA's 2015 RCRA regulation regarding the recycling of hazardous materials
- Recap – EPA's 2015 rule established four “legitimacy” factors to differentiate between legitimate and “sham” recycling:
 - material must provide a useful contribution to recycling process
 - recycling process must produce a valuable product/intermediate
 - material must be managed as a valuable commodity
 - product must be comparable to a legitimate product/intermediate
- D.C. Circuit upheld factor 3 but struck factor 4
- D.C. Circuit also struck “verified recycler” requirement (recycler must have permit or variance) and reinstated the Transfer-Based Exclusion – generator makes “reasonable efforts” to ensure that reclaimer intends to legitimately reclaim the hazardous secondary material

Ecological Rights Foundation v. Pacific Gas & Electric Co.

874 F.3d 1083 (9th Cir. Nov. 2, 2017)

- Intersection between CWA and RCRA
- PG&E operates 31 facilities to drill, cut and store chemically treated telephone poles. No stormwater discharge permit required
- ERF brings suit claiming that stormwater discharges created imminent and substantial endangerment
- Case turns on anti-duplication provision under RCRA:
 - Nothing in RCRA shall be construed to apply to any activity subject to the CWA . . . , except to the extent such application is not inconsistent
- 9th Circuit finds that because CWA did **not require** PG&E to obtain a permit, there was no inconsistency and anti-duplication provision not triggered
- Potential issues: non-regulated stormwater dischargers, facilities that qualify for no-exposure, non-point source dischargers

Tenn. Riverkeeper, Inc. v. 3M Company

234 F. Supp. 3d. 1153 (N.D. Ala. Feb. 10, 2017)

- Imminent and substantial endangerment case regarding perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) associated with authorized discharges from 3M's plant and authorized discharges from two landfills
- Court denied 3M's MTD
- Court found that whether PFOA/PFOS were regulated hazardous wastes under RCRA could not be determined on MTD
- Court found that despite BFI's and 3M's discharge permits, industrial waste water discharges could still be classified as hazardous/solid waste under RCRA. Ignored the anti-duplication provisions of RCRA
- Court found that 3M's Remedial Action Agreement with ADEM did not moot the claims
- Court declined to abstain

Lajim v. GE

Nos. 18-1522 & 18-2880 (7th Cir. March 4, 2019)

- Imminent and substantial endangerment case against GE
- GE operated a manufacturing plant in Illinois from 1949 to 2010. Solvents were released and contaminated the groundwater
- District Court granted summary judgment in favor of plaintiffs on imminent and substantial endangerment claim but denied injunctive relief
- GE had previously entered into a Consent Order with Illinois EPA requiring GE to remediate the contamination
- 7th Circuit held that injunctive relief does not issue as a matter of course upon a finding of liability
- No evidence showing that injunctive relief would provide a remedy over and above what was already required in the Consent Order

Pennenvironment & Sierra Club v. PPG Indus.

No. 12-342 (W.D. Pa. May 22, 2019)

- Ongoing imminent and substantial endangerment case against PPG
- Court had previously found in favor of plaintiffs on liability but not on relief
- In October 2018, PADEP issues a Comprehensive-Site Wide Remedy and PPG moves to dismiss case that injunctive relief would be futile. Court says not so fast
- Because plaintiffs had not yet moved for injunctive relief, PPG had the burden of showing that the Comprehensive-Site Wide Remedy addressed the harm and plaintiffs presented evidence that further injunctive relief could be necessary following implementation of the remedy

Nuclear Watch New Mexico v. United States

No. 1:16-cv-00433 (D.N.M. July 12, 2018)

- Citizen suit case involving the Los Alamos National Laboratory
- Advocacy group files suit against DOE for failure to complete certain actions arising under a 2005 Consent Order with NMED
- After the filing of the suit, DOE enters into a new Consent Order
- Court finds that plaintiff's claims for injunctive and declaratory relief based on the 2005 Consent Order were moot due to the 2016 Consent Order
- Court finds that claims for civil penalties for DOE's failure to complete certain tasks under the 2005 Consent Order were not moot and DOE failed to show that its allegedly wrongful behavior (failure to complete work) would not reasonably be expected to recur

Liebhart v. SPX Corporation

Nos. 18-1918 & 18-2598 (7th Cir. March 6, 2019)

- Imminent and substantial endangerment case
- Homeowners sue following demolition of abandoned factory where transformers containing PCBs were manufactured
- District Court granted summary judgment in favor of defendants based on no finding of existing harm
- 7th Circuit reverses. Court holds that “imminence” does not require an existing harm, “only an ongoing threat of future harm”
- Court also holds that district court set the bar to high on the TSCA claim by requiring plaintiffs to prove concentrations of PCBs above 50 ppm on their property vs. the factory property

Schmucker v. Johnson Controls, Inc.

No. 3:14-CV-1593 (N.D. Ind. Feb. 19, 2019)

- Citizen suit against Johnson Controls alleging both on-going violations and an imminent and substantial endangerment claim
- Court granted summary judgment in favor of Johnson Controls on the alleged violation claim
- Court held that the “mere” existence of contamination does not establish a RCRA violation and Johnson Controls was in compliance with its closure permit
- Court denied summary judgment to both parties on the endangerment claim
- Court found there were disputed facts as to whether the remaining contamination presented an endangerment but rejected the argument that the “mere” presence of contamination automatically presents an endangerment

Miller v. City of Fort Myers

No. 2:18-cv-195 (M.D. Fla. Apr. 1, 2019)

- Citizen suit against City of Fort Myers alleging both on-going violations and an imminent and substantial endangerment claim
- Case concerns the disposal of lime sludge by the City pre-RCRA (1976)
- Residents sue and City moves to dismiss
- Court holds that the continued presence of the sludge is not an on-going violation of RCRA. RCRA did not apply retroactively and Court rejected argument that “disposal” includes the continuing leaching of contaminants into the environment
- Court found the imminent and substantial endangerment claim applies retroactively and plaintiffs had properly plead the claim

City of Imperial Beach v. Int'l Boundary & Water Comm'n, United States Section, No. 18cv457 and Surfrider Found. v. Int'l Boundary & Water Comm'n, United States Section, No. 18cv1621 (S.D. Cal. Dec. 11, 2018)

- Imminent and substantial endangerment case against the USIBWC
- USIBWC is responsible for handling transboundary water issues between US and Mexico including the flow of sewage from Tijuana
- The issue in the case is whether the USIBWC actively “contributed to” the endangerment by the handling, storage, treatment, transportation or disposal of a waste when it installed a series of detention basins and flood control systems
- Court had previously held that the “mere” passive flow of wastewater was not enough but by installing the systems USIBWC could be held liable if their actions changed the character of waste – contaminants becoming more concentrated
- Court also rejected USIBWC’s argument the notice was deficient

City of Evanston v. Northern Illinois Gas Company

No. 16-C-5692 (N.D. Ill. Apr. 9, 2019)

- Imminent and substantial endangerment case regarding alleged contamination from a former manufactured gas plant
- Court denies City's motion for preliminary injunction
- Court found that the City would not succeed on the merits of its RCRA claim because City could not demonstrate that the former plant was the source of the contamination
- Court also found that the City could not demonstrate a "reasonable prospect of a near-term threat of serious potential harm" and rejected the argument that the "mere" presence of chemicals above background levels sufficient to prove an imminent risk of harm
- Court also held that the City could not show irreparable harm (could cleanup and seek recovery under CERCLA)

Kentucky Waterways Alliance v. Kentucky Utilities Co.

905 F.3d 925 (6th Cir. Aug. 2, 2018)

- Citizen suit under RCRA and CWA
- Groundwater contamination from coal ash ponds allegedly discharging to a lake
- After receiving the RCRA 90-day notice letter, Kentucky Energy and Environmental Cabinet issues a NOV and KU enters into an Agreed Order to address any threat or potential threat
- District Court dismisses on grounds that plaintiffs lacked standing – injury not redressable because defendant was already performing actions under Agreed Order
- 6th Circuit reverses
- Agreed Order not enough. Not one of the three types of actions enumerated under § 6972(b)(2)(C) that would preclude citizen suit
- *Burford* abstention not appropriate. Would add a new bar precluding citizen suits

Waste Services of Decatur, LLC v. Decatur County

No. 1:17-cv-01030 (W.D.TN, Mar. 29, 2019)

- Citizen suit against Waste Services Company
- Waste Services Company moves to dismiss the suit on the grounds that the court lacked subject matter jurisdiction because the NOI was deficient
- Waste Services also asked court to stay pending completion of administrative proceedings with the TDEC
- Court found that Decatur County's NOI was sufficient
- Court declined to stay the proceedings under the *Burford* abstention or primary jurisdiction doctrine

Center for Biological Diversity v. U.S. Forest Service

No. 17-15790 (9th Cir. May 30, 2019)

- Citizen suit against the Forest Service
- Plaintiffs alleged that the California Condor and other wildlife species living in Kaibab National Forest ingest lead contamination left in animal carcasses by hunters
- Plaintiffs sought a permanent injunction preventing the Forest Service from “creating or contributing to the creation of an imminent and substantial endangerment to human health or the environment”
- Dismissed at the district court level for lack of jurisdiction (Plaintiffs seeking an advisory opinion)
- 9th Circuit reversed finding a justiciable controversy

Sound Rivers, Inc. v. Taylor (In re: Taylor)

572 B.R. 592 (Bankr. E.D.N.C. 2017)

- Intersection between bankruptcy and RCRA
- Hog Farm – effluent entering creek
- In 2012, environmental groups sue seeking injunctive relief under RCRA
- In 2015, farmer files for Chapter 11 protection
- Issues: (1) standing and (2) whether claim dischargeable
 - Court finds standing
 - Court finds RCRA claim not dischargeable because no right to payment under RCRA

Questions?



Jeffrey L. Hunter
(503) 727-2265
JHunter@perkinscoie.com

RCRA: Recent Enforcement Action and Common Audit Findings

Sarah Kronholm, P.E.
SLR International Corporation
October 3, 2019

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Recent Enforcement Actions

Oregon Violations and Penalties



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Oregon DEQ: Civil Penalties

- Authorized to assess penalties of up to \$25,000 per day per violation
- Calculated using criteria in OAR Chapter 340, Division 12
- Based on:
 - Type of violation
 - Prior and/or repeat violations
 - Prior corrective action
 - Mental state (intentional)
 - Efforts to mitigate
 - Economic benefit or costs avoided

Oregon DEQ: Recent Civil Penalties

- Based on review of 2018-2019 civil penalties for hazardous waste
- Commonly < \$10,000
- \$20,000 - \$60,000 for higher priority and repeat violations
- > \$100,000 – TSDFs

Recent Enforcement Actions

Who: Wood ceiling manufacturing

Where: Springfield

When: August 2019

Penalty: \$9,300

What Happened:

- LQG improperly reporting as SQG
- Waste not properly labeled
- Waste containers not closed
- Not conducting weekly inspections of hazardous waste storage
- Full containers not marked with accumulation start dates

Recent Enforcement Actions

Who: Aviation products manufacturing – laminates and thermoplastics

Where: Harrisburg

When: June 2019

Penalty: \$23,136

What Happened:

- Repeat violations
- Failure to train employees and maintain a complete training plan
- Waste not completely/accurately characterized
- Waste not labeled or marked with accumulation start dates
- Waste containers not closed
- Universal waste not dated

Recent Enforcement Actions

Who: Metal manufacturing

Where: Albany

When: April 2019

Penalty: \$12,300

What Happened:

- Failure to complete waste determinations
- Storing hazardous waste without a permit

Recent Enforcement Actions

Who: Electronics manufacturing

Where: Roseburg

When: April 2019

Fine: \$7,000

What Happened:

- Failure to complete waste determinations
- Improper disposal of hazardous waste
- Failure to label, date, and close containers of hazardous waste

Recent Enforcement Actions

Who: Pharmaceutical manufacturing

Where: Bend

When: October 2018

Fine: \$59,890

What Happened:

- Failure to complete waste determinations
- Shipped hazardous waste without manifests
- Improper disposal
- Failure to report hazardous waste activity
- Improper labeling/marketing at satellite accumulation areas

Common Audit Findings



Common Findings

- Paperwork
 - Waste determinations
 - Training
 - Contingency plans and arrangements with authorities
 - Manifest errors
- In the field
 - Open containers
 - Unlabeled containers
 - Universal waste not closed and/or dated

- More details on following slides

Paperwork Findings: Waste Characterization

- No formal waste determinations completed and saved in the files
- Incomplete waste determinations
 - Only for hazardous waste that has been profiled
 - Supporting data not included
- Outdated waste determinations

- The following waste streams are often not characterized:
 - General trash
 - Vehicle maintenance – spent fluids, old tires, used batteries, oil filters
 - Parts washers – both the fluid and the filters (even if unused solvent is non-hazardous)
 - Contaminated rags and debris
 - Wash water

Paperwork Findings: Training

- Not conducting training annually
- Not completing training for everyone who needs it
- Not training on all topics
 - General awareness
 - Task-specific
 - Is DOT hazardous materials training needed?
- Lacking training documentation
- Lack of training plan or insufficient plan
 - Job titles and name of employee(s)
 - Written job description for each position
 - Written description of type of training and frequency
- Outdated training plan

Paperwork Findings: Contingency Planning

- Incomplete contingency plans
 - List of emergency equipment and capabilities
 - Description of arrangements with local authorities
 - Evacuation plans
- Arrangements not made with local authorities (documented letters) and copies of the plan not provided (and documented as provided)
- Outdated emergency coordinators/responders, maps, facility info

Field Findings: Open Containers

- Containers left in the open position when not in use
- Lids don't fit tightly
- Holes cut into the top of the lids
- Open funnels and/or bungs
- Loose drum rings
- Oil filters or buckets draining for extended time periods

- Often open to interpretation by inspector
- "Closed" = shut tightly enough that contents cannot spill if tipped over and that chemical vapors cannot escape into the air



Field Findings: Unlabeled or Improperly Labeled Containers

- Containers not labeled (so presumed to be hazardous)
- Hazardous waste not marked with the identity of the contents, not marked as hazardous waste, or not marked with the hazards
- Un-punctured aerosol cans not labeled prior to puncturing
- Full containers not dated
- Incorrect language



Field Findings: Universal Waste

- Containers not properly labeled
 - Must be labeled as “Universal Waste” and/or the contents
- Not dated, or other system to ensure kept onsite for < 1 year
 - Should mark with the date waste was first placed in the container
- Open containers
 - Flaps of cardboard boxes left open
 - Lights stacked in a corner
 - Used batteries in an open bucket
- Not managed to prevent breakage/leaks
 - Used lamps in large container and not protected
 - Used car batteries stored outside ready for pickup (not covered or in a container)

Other Common Findings

- Accumulating waste past the allowable timeframe
- “Stockpiling” waste containers without characterizing, labeling, etc.
- Throwing away hazardous waste
- Self-transporting between facilities
- Not tracking waste generation rates/improper generator status
- General housekeeping – clutter on top of containers, debris inside of secondary containment, poor aisle spacing
- Unable to provide documents in reasonable timeframe

Questions?

Sarah Kronholm, P.E.
Principal Engineer, SLR International Corporation
skronholm@slrconsulting.com
(503) 709-7039

