



## **New York Environmental Regulator Announces New Hazardous Waste Enforcement Initiative Against Supermarkets, Retail Pharmacies and Similar Establishments**

In a move that will have a substantial impact on future obligations of supermarkets, drug stores and “big box” retailers in New York State, the New York Department of Environmental Conservation (DEC) recently announced that it would begin to require strict compliance with the hazardous waste management components of the Resource Conservation and Recovery Act (RCRA). At a recent stakeholder meeting held in Albany, the Director of DEC’s Division of Environmental Remediation announced that the agency would begin enforcing regulations related to hazardous wastes, both listed and characteristic, against supermarkets and pharmacy chains. It is unclear whether DEC is acting on its own initiative or under a directive from EPA. This appears to be similar to an enforcement initiative in California, which has resulted in many “big box” retailers, supermarkets and pharmacy chains being subjected to multi-million dollar enforcement actions.

Regardless of the reason, the announcement signals a new enforcement initiative directed at hazardous waste management at non-industrial sites such as supermarkets, retail pharmacies and other places that sell certain pharmaceutical and cleaning products that are removed from shelves or returned by customers and ultimately disposed. Indeed, DEC specifically identified items such as nail polish remover, paint thinner and household cleaning products that contain bleach as the types of waste products that the agency will prioritize. DEC also indicated that it would seek to ensure that all businesses are in compliance with RCRA within the coming year. We are monitoring the initiative closely and anticipate that DEC will issue more formal guidance on this enforcement initiative in the coming months.

Many products frequently sold at supermarkets and pharmacies likely meet the definitions of hazardous wastes outlined above. Typical examples include:

- > Household cleaning products that contain bleach;
- > Light bulbs and batteries;
- > Paint, varnish and paint thinner;
- > Nail polish remover, nicotine patches, spot remover; and
- > Products that contain aerosols.

Any retailer that disposes of these products in large quantities, whether due to spoilage, defects or returns must follow hazardous waste disposal requirements or face an enforcement action. A particularly challenging issue is when DEC will conclude when returned, defective or expired products have been “discarded” and thus a “waste” (and potentially a hazardous waste). These requirements may apply even when the retail store is simply returning unused products to the manufacturer, depending on how the “reverse distribution” process is structured. U.S. EPA has recognized that the management of hazardous waste in the retail sector poses different challenges than in industrial settings, and has sought public input on the possibility of revising the waste regulations to take these differences into account. See, e.g., 79 Fed. Reg. 8026, (Feb. 4, 2014).

DEC has indicated that it will be providing retailers with notice as to their deficiencies and guidance for how to comply with existing law and regulation. At this point, however, DEC has yet to issue any guidance regarding specific measures that would be adequate to ensure that retailers are in compliance with applicable RCRA hazardous waste requirements. Based on enforcement initiatives in other states, we believe that it is likely that DEC will require implementation of formal programs for identifying hazardous waste streams, segregating such waste during storage and limiting storage time, requiring the completion of hazardous waste manifests and the proper and timely disposal of the waste.

Additionally, at the Nov. 10 meeting, DEC management emphasized the availability of the [Commissioner Policy 59/Environmental Audit Incentive Policy](#) as a possible means for companies to voluntarily come into compliance. Under this recently-adopted policy, regulated entities are advised to identify violations of state environmental laws regulations, self-report those violations to DEC and then cooperate with DEC to develop a solution. Whether undertaken by third parties or a facility employee, audits undertaken in accordance with the policy are intended to “assess operations and processes to determine compliance.” Regulated entities are required to report identified violations within 30 calendar days of discovery and must “expeditiously” correct them. In exchange for self-reporting, regulated entities are potentially eligible for reduced or zero penalty consent orders, cost sharing or even priority in applying for state programs relating to waste management and minimization. This program is available at the DEC’s discretion and not usually available to entities with a recent history of non-compliance or who were uncooperative in remedying past violations.

In advance of DEC’s proposed enforcement actions, it would be prudent for retailers to refine or, if necessary, establish compliance mechanisms, identify which products could be classified as hazardous under the standards outline above, and ensure that an adequate storage and disposal program is in place. Further, DEC’s recently minted audit policy may present an opportunity to address existing areas of non-compliance with the New York regulator in a cooperative manner that would minimize potential penalties.

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