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ELECTRONIC DELIVERY

May 15, 2018

U.S. Environmental Protection Agency
Office of Land and Emergency Management (5304P)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Increasing Recycling: Adding Aerosol Cans to the Universal Waste Regulations, 83 Fed. Reg. 11,654 (Mar. 16, 2018); Docket No. EPA-HQ-OLEM-2017-0463

Dear Sir or Madam:

The Associated General Contractors of America (AGC) supports the U.S. Environmental Protection Agency's (EPA) proposal to expand the universal waste regulations to include non-empty aerosol cans. As explained below, this proposal is likely to be of greatest benefit to Large Quantity Generators and Small Quantity Generators. Recognizing that many construction sites fall under the Very Small Quantity Generator (VSQG) category, AGC urges EPA to clearly state in final rule text that VSQGs may choose to manage their hazardous waste aerosol cans in accordance with either the VSQG regulations or as a universal waste. AGC, its local chapters and members understand the importance of protecting our environment while advancing economic development. As a nationwide trade association, AGC partners formally and informally with the agency to find environmental solutions to complicated regulatory concerns, streamline operations to find program efficiencies and improve permitting as well as compliance, and to promote stewardship. To this end, AGC is a member of EPA's Smart Sectors program, and appreciates its goals of smart and sensible policies and streamlined operations. AGC also closely works with EPA program offices on waste issues ranging from beneficial use, recycling, to remediation. Initiatives such as the proposal at issue have the potential to improve efficiencies and streamline business operations, without sacrificing environmental protections.¹

AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of chapters in all 50 states, the District of Columbia and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most

¹ See Executive Order (EO) 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," which calls upon federal agencies to "streamline and expedite...environmental reviews and approvals for all infrastructure projects;" see also EO 13777, "Enforcing the Regulatory Reform Agenda," which established a federal policy "to alleviate unnecessary regulatory burdens" on the American people.

of the nation's public and private infrastructure.² The construction industry (residential and nonresidential) comprises a high number of small businesses. Ninety-three percent have fewer than 20 employees. The agency's proposal would be especially helpful for small businesses in construction.

As further explained below, the proposed rule would benefit the construction industry and the environment in several ways. It would help construction firms maintain a lower-tier generator category (e.g., from large to small, or from small to very small, or from very small to exempt from regulation), by allowing contractors to manage hazardous waste aerosol cans as universal waste on individual construction sites. In this regard, the proposal would provide a streamlined hazardous waste management system for aerosol cans. In addition, the proposal also would reduce employee exposure to the potential hazards associated with puncturing aerosol cans, like those containing flammable and other hazardous substances. Furthermore, the proposed rule revisions would facilitate recycling of the metal used to make the cans. These combined actions would save at least \$3 million per year in regulatory costs, according to EPA.

To ensure the above-referenced benefits and cost savings are fully realized, in this letter, AGC also points to several provisions in the proposal that warrant further clarification.

Finally, AGC urges EPA to expand the applicability of several key provisions of the proposed universal waste rules, to broaden the positive impacts of regulating aerosol cans as universal waste.

Generator Category Downsized

Under the proposed rule, a generator's hazardous aerosol cans could be disposed of as universal waste if they are discarded but not empty (i.e., cans that have not yet been punctured and emptied of remaining propellant and product). This proposed change would allow generators to designate all such aerosol cans as universal waste and streamline the aerosol can waste management processes (see below).

Notably, because aerosol cans are often the only hazardous waste stream produced on a construction site, classifying them as universal waste could change a company's "generator category" and maybe even exempt it from the Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous waste requirements at 40 C.F.R. § 261.4(b)(1). A change in category may equate to less administrative overhead, training and overall program management costs. Universal wastes do not need to be counted toward a hazardous waste generator's inventory for determining whether the generator is classified as a Very Small Quantity Generator (VSQG), Small Quantity Generator, or Large Quantity Generator.

² AGC members are regularly engaged in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

Streamlined Management

EPA's proposed rule would build on existing universal waste requirements³ for common industrial wastes like batteries, lamps, mercury-containing equipment, and certain pesticides. It would streamline the regulation of nonempty hazardous waste aerosol cans (currently managed under RCRA Subtitle C, generally because of their ignitability, and subject to stringent rules on handling transport and disposal⁴) by adding them to the existing federal list of materials that can be managed under the universal waste management system. In general, materials managed as universal waste can be stored for one year or longer, and do not require a manifest when shipped, provided they are properly labeled, packaged, and stored. Waste "generators" still must meet the universal waste marking and labeling, employee training, release response, and other requirements found in 40 C.F.R. § 273. These rules apply to both small quantity and large quantity⁵ handlers of universal waste.

Many larger construction sites generate batteries and light bulbs that currently are being managed as universal waste. To this end, these companies already have staging areas, labeling, and training in place for universal waste. If aerosol cans are treated as universal waste, they would be added to this current waste stream and managed according to current practices and procedures. This would likely simplify handling and disposal for contractors and save firms money (e.g., no manifest required for transport).

"Authorized" states would choose whether or not to adopt the new universal waste rules into their state programs. Note that according to [EPA's Web site](#), some states already classify aerosol cans as universal waste.

Puncturing, Draining Aerosol Cans

For some construction firms, the process of puncturing and draining their aerosol cans has proven to be a straightforward way to promote recycling of scrap metal and to reduce the burden and expense of hazardous waste handling associated with the additional weight of the container.⁶ EPA acknowledges in

³ See generally 40 C.F.R. § 273 and EPA's Website at <https://www.epa.gov/hw/universal-waste>.

⁴ Currently, EPA regulates nonempty aerosol cans as RCRA hazardous wastes in the same manner as other hazardous wastes; that is, hazardous waste aerosol cans are generally subject to the same requirements as drums of hazardous waste, including limitations on accumulation time and volume, manifesting, disposal requirements, employee training, and response to releases. More specifically, aerosol cans are regulated if a hazardous waste determination per 40 C.F.R. § 262.11 reveals that the propellant in a can is a characteristic hazardous waste for Ignitability or Reactivity, or perhaps a can contain P- or U- listed chemicals that have been identified as "RCRA listed wastes."

⁵ Large quantity universal waste handlers—facilities that accumulate 5,000 kilograms or more of universal wastes total at any one time—are also responsible for notifying EPA and tracking universal waste shipments per 40 C.F.R. § 273.39.

⁶ [EPA530-R-98-005f](#) - Exemption for Scrap Metal Destined for Recycling Applies at Point of Generation. Under EPA's "Scrap Metal Exemption" at Section 261.6(a)(3)(ii), when aerosol cans are managed as "recyclable materials" they are exempt from full regulation as a hazardous waste under Subtitle C of RCRA at the point of generation. Some companies have invested in can puncturing equipment to meet EPA's scrap metal exemption and/or render aerosol

the proposal that puncturing and draining of hazardous aerosol cans is currently exempt from RCRA regulation if performed as part of a recycling process. AGC is aware of the dangers associated with aerosol can puncturing; for example, proper care must be taken to ensure flammable propellants do not ignite, the cans' contents are not released to the environment, and incompatible wastes (drained contents) are not mixed. Proper training is a necessary and important management practice.

By expanding the universal waste regulations to include nonempty aerosol cans, the proposal likely would reduce the practice of puncturing and draining aerosol cans at individual sites that produce the hazardous waste – due to this item no longer being subject to hazardous waste management rules and potential cost savings. And given that the proposal would impose new, special requirements for puncturing by “handlers” of universal waste aerosol cans,⁷ the predominance of the puncturing and draining practice likely would shift to facilities that are collecting larger quantities of aerosol cans. However, the ultimate application of these new puncturing requirements is somewhat confusing because the federal universal waste rules define “handlers” as people who generate the waste *as well as* people who receive the universal waste from generators or other handlers. It would appear that EPA intends to place the onus of segregation and disposal on the latter, who should have the resources, mechanisms, and safeguards in place to undertake these activities in a way that is protective of workers, the public and the environment. AGC supports this laudable goal.

AGC sees EPA's proposal as allowing generators to take advantage of streamlined hazardous waste management standards, under the universal waste regulations, for nonempty aerosol cans (but see AGC's recommendation below for expanding the application of the rule). Contractors may choose to dispose of their nonempty aerosol cans in their entirety – without puncturing – because they would no longer be subject to hazardous waste rules and possible cost savings (but see AGC's request that EPA allow VSQGs to decide how they want to manage this waste stream). Universal waste handlers would be well suited to set up operations to puncture aerosol cans, collect the cans' residual contents and filters out volatile organic compound emissions so aerosol cans can then be recycled as scrap metal.

If the proposal is finalized, the existing universal waste requirements that are applicable to Small Quantity and Large Quantity Handlers of universal waste also would be applicable to handlers of discarded aerosol cans.

Recycling Encouraged

AGC members report that most of their current waste handlers can take their universal waste. In many cases, even local landfills and transshipment facilities are set up to accept universal waste and provide the appropriate certificates for disposal. But AGC asks EPA to be mindful that construction firms working in

cans “RCRA-empty” per 40 C.F.R. § 261.7; the cans (not the “drained contents”) are considered exempt from the hazardous waste rules.

⁷ At minimum, EPA is proposing that the written procedure address the operation and maintenance of the unit including its proper assembly; segregation of incompatible wastes; and proper waste management practices.

remote areas may have limited or no universal waste management options, as discussed elsewhere in this letter.

Because the universal waste rule allows universal waste to be consolidated into a larger shipment for transport to a destination facility, under the proposed addition to the rule, it would be more economical to send hazardous waste aerosol cans to recycling for recovery of metal values, rather than sending them for disposal, EPA says.

Clarification Needed

Very Small Quantity Generators (VSQGs) – Companies that generate a very small amount of waste and are not otherwise designated as a small or large quantity generator of hazardous waste under their state’s regulations, would most likely qualify for EPA’s streamlined standards for VSQGs. As EPA notes in the *Federal Register* notice: “Under 40 CFR 262.14, very small quantity generators (VSQGs), defined as facilities that generate less than or equal to 100 kilograms of hazardous waste in a calendar month, are not subject to the RCRA subtitle C hazardous waste management standards, provided they send their waste to a municipal solid waste landfill or non-municipal nonhazardous waste facility approved by the state for the management of VSQG wastes and meet other conditions.” It is unclear under the proposal whether a VSQG would have the option of handling its aerosol can universal waste under the universal waste regulations or the VSQG regulations. AGC urges EPA to clearly state in final rule text (not just the preamble, as noted below) that VSQGs may choose to manage their hazardous waste aerosol cans either way, in accordance with current law. This is critical because many construction sites fall under the VSQG category and may be located in remote areas with limited or no universal waste management options.

Generator Opt-out – One additional issue not mentioned by EPA is whether *all* generators of hazardous aerosol can wastes would have the option of continuing to manage them as “regular” (non-universal) hazardous wastes, in which case the puncturing and draining operations would presumably continue to be exempt from regulation (although other more stringent generator requirements would apply, for example, with respect to labeling and storage). The *Federal Register* notice provides limited direction on this, stating: “[U]nder the universal waste rule, households and VSQGs may choose to manage their hazardous waste aerosol cans in accordance with either the VSQG regulations under 40 C.F.R. 261.5 or as a universal waste under part 273 (40 C.F.R. 273.8(a)(2)). It should be noted, however, that 40 C.F.R. 273.8(b) would continue to apply. Under this provision, if household or VSQG wastes are mixed with universal waste subject to the requirements of 40 C.F.R. part 273 (i.e., universal waste that is not generated by households or VSQGs), the commingled waste must be handled as universal waste in accordance with part 273.”

Empty, Punctured Aerosol Cans – Per proposed §§ 273.13(e)(3)(v) and 273.33(e)(3)(v), the universal waste “handler” would be required to conduct a hazardous waste determination on the *emptied aerosol cans*. But these empty cans themselves would not be hazardous under current law if they are destined for recycling (see above). Specifically, the scrap metal recycling exemption at § 261.6(a)(3)(ii) exempts the scrap metal from §§ 262-270, including the hazardous waste determination of § 262.11. Therefore, the proposed hazardous waste determination requirement for emptied aerosol cans is contradictory to current

regulation (and guidance). AGC urges EPA to clearly state in the final rule that a hazardous waste determination is NOT needed for the scrap metal being managed under the Scrap Metal Exemption.

Notably, in the preamble of the proposed rule, EPA only discussed making a hazardous waste determination for the contents removed from the aerosol cans, not the emptied cans themselves. It would appear that the agency made an inadvertent mistake when it proposed requiring a hazardous waste determination for the emptied aerosol cans that are destined for recycling.

Exclusion of Aerosol Cans with Evidence of Leakage/Damage – The proposal would exclude from the scope of the universal waste rule any aerosol cans that “show evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions.” However, this language seems too ambiguous, for example in the case of a can of spray paint that shows evidence of prior spraying (e.g., dried spots or dribbles of paint) or potentially even any can that is dented or missing an actuator button.

Expanded Application

AGC supports the U.S. Chamber of Commerce’s recommendation that EPA create a single regulatory structure for aerosol cans that allows non-hazardous, non-intact, and intact aerosol cans to be managed as universal waste. Although the proposal is an improvement over the current requirements by potentially reducing the regulatory burden specific to intact hazardous waste cans, the benefits of the rules could be greatly enhanced by allowing all aerosol cans – non-hazardous, intact, and non-intact cans – to be managed together.

Conclusion

The streamlined universal waste classification will reduce the compliance burden on generators (particularly large and small) while providing an effective framework to ensure proper management and encourage recycling. For the reasons outlined above (see “Clarification Needed” section), EPA must clearly state in final rule text that VSQGs may choose to manage their hazardous waste aerosol cans in accordance with either the VSQG regulations or as a universal waste, in accordance with applicable law. AGC appreciates EPA’s consideration of these comments and urges EPA to clarify the items reference above and to increase the breadth of aerosol cans that may be managed as universal waste. If you have questions regarding these comments, please contact me at pilconisl@agc.org or (703) 837-5332.

Respectfully,



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