



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

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

May 1, 2020

**MEMORANDUM**

**SUBJECT:** Amendment to the EPA's Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy to Address Generator Storage Violation Cases

**FROM:** Susan Parker Bodine 

**TO:** Regional Counsels  
Regional Enforcement and Compliance Assurance Division Directors

This memorandum transmits a new section of the RCRA Civil Penalty Policy, which addresses penalty calculation and related issues for generator storage violation cases. The addition of this section amends the 2003 Penalty Policy and is added as a new section entitled, "Pleading Violations and Assessing Penalties for Violations of Storage Requirements by Generators." Generator storage violations often implicate the storage exemptions found in 40 C.F.R. Part 262. This new section has been added to discuss appropriate pleading choices and approaches to penalty calculation.

The new section follows clarifications that were made in the 2016 Generator Improvements Rule<sup>1</sup> regarding the legal consequences and enforcement response to noncompliance with the hazardous waste storage requirements at generator facilities. In that Rule, the EPA reiterated the legal consequences of a generator's failure to meet all the conditions included in the hazardous waste storage permit and operating requirements exemption. Building on these clarifications in the Rule, the new section provides additional information on existing practices for weighing case specific facts and circumstances when developing appropriate penalties as part of enforcement actions.

This new section is immediately effective and should be applied with the rest of the RCRA Penalty Policy for applicable cases with penalty assessments.

The complete Penalty Policy, with this new section, can be found at <https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy>. If you have any questions about this addition to the RCRA Penalty Policy, please contact Pete Raack at [raack.pete@epa.gov](mailto:raack.pete@epa.gov) or 202-564-4075.

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<sup>1</sup> 81 Fed. Reg. 85732 (Nov. 28, 2016).

cc: Tom Mariani, Chief, DOJ-EES  
Environmental Appeals Board  
Susan Biro, Chief Administrative Law Judge  
Regional Judicial Officers

Attachment: Amendment to the 2003 RCRA Civil Penalty Policy – new section VI.D. “Pleading and Assessing Penalties for Violations of Storage Requirements by Generators”

## **Amendment to the 2003 RCRA Civil Penalty Policy – new section VI.D. “Pleading and Assessing Penalties for Violations of Storage Requirements by Generators”**

**THIS GOES BEFORE “A. POTENTIAL FOR HARM” ON PAGE 12 OF THE RCRA PENALTY POLICY (2003)**

Section VI. sets forth the considerations that should be evaluated in determining the appropriate severity of each factor that will then be used to calculate the initial gravity penalty component based on the circumstances of a single violation or a set of violations. This Section also provides a matrix to be used to arrive at that initial gravity penalty amount based on the chosen level for each of the factors. Lastly, this Section includes a discussion of how to approach the frequently-arising situation of storage violations that result after a failure to meet conditions for exemption at generator facilities.

**THIS GOES AFTER PAGE 19**

### **D. PLEADING VIOLATIONS AND ASSESSING PENALTIES FOR VIOLATIONS OF STORAGE REQUIREMENTS BY GENERATORS**

#### **1. Introduction**

Many generators of Subtitle C hazardous waste qualify or attempt to qualify for the exemption from the requirement to obtain a hazardous waste permit and the storage facility operating requirements. This exemption is found in 40 CFR Part 262.<sup>1</sup> As a result, RCRA enforcement actions against generators frequently arise when generators fail to meet the conditions for the permit exemption, and the consequent violations of storage facility requirements. This section addresses pleading choices and penalty calculation in this enforcement situation.

#### **2. Generator “Conditions for Exemption”**

The RCRA generator regulations (40 CFR Part 262) provide generators who wish to store hazardous waste and obtain an exemption from the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265, with “conditions for exemption” from those requirements. See 40 CFR §§ 262.14 - 262.17. These conditions for exemption apply only to generators who store hazardous waste at the generating facility. A generator must meet these conditions in order to be exempted from the storage facility permitting and operating requirements.<sup>2</sup> Without this exemption, permit and operating requirements would otherwise apply to generators that choose to store hazardous waste. Similarly, permit and operating requirements would apply to a generator that chooses to engage in disposal or treatment of hazardous waste.

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<sup>1</sup> While this Section refers to the generator exemption generally as a single exemption, it is important to keep in mind that the generator conditional exemptions in Sections 262.14(a), 262.15(a), 262.16(a) and 262.17(a) are exemptions from multiple distinct requirements, for example the requirement to obtain a storage permit found in Section 3005 and 40 CFR Part 270 and the storage facility operating requirements found in 40 CFR Parts 264 and 265.

<sup>2</sup> There is no statutory or regulatory requirement that a generator must obtain an exemption from those requirements. A generator that fails to meet the conditions of exemption, however, is required to comply with the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265.

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As the 2016 Generator Improvements Rule clearly states, and given the optional nature of the conditional exemption, noncompliance with any condition for exemption from the storage facility permit and operating requirements cannot be cited and penalized as a violation of Part 262. *See* 40 CFR § 262.10(g)(2). Rather, noncompliance with one or more conditions for the exemption means that the generator’s storage is not exempt from, and can potentially result in violations of, applicable storage facility permitting and operating requirements in 40 CFR Parts 124, 264 through 267, and 270 and Section 3010 of RCRA.<sup>3</sup>

### **3. Determining Violations to Plead**

EPA retains the discretion to determine appropriate enforcement actions and penalties that are proportionate to the seriousness of the violation(s). Consistent with 40 CFR § 262.10(g)(2), EPA may determine whether and how to take enforcement action stemming from noncompliance with the conditions for exemption. Where generator noncompliance with conditions for exemption results in violation(s) of storage facility permit and operating requirements that merit a penalty, enforcement personnel must determine, on a case-by-case basis, which storage facility requirements to separately plead as violations. The decision as to which violations to plead may have significant impact on the “proportionality” of the overall proposed penalty.

As set out in the bullets below, EPA has broad discretion that is consistent with 40 CFR § 262.10(g) to select the appropriate violation(s) to plead in order to assess a penalty that accurately reflects and is proportionate to the overall seriousness of the violation(s).<sup>4</sup> For example:

- The case team can allege a violation of the corresponding Part 264 or 265 requirement where a condition for exemption has a corresponding requirement in Part 264 or 265. *See* 40 CFR § 262.10(g)(2). Many of the conditions that ensure safe storage at a generator’s exempt storage facility are based on the storage facility operating requirements that serve the same purpose. For example, if a large quantity generator failed to meet the condition found at 40 CFR § 262.17(a)(7) regarding personnel training, the case team could allege a violation of the personnel training requirements found in 40 CFR § 264.16/265.16.
- The case team can allege a violation of Part 264 or 265 operating requirements that does not have a corresponding condition in Part 262, but the violation of which merits a penalty given the circumstances of the case. For example, if the manner in which the facility was storing its waste indicated that the facility was not being diligent enough to minimize the chance for hazardous waste releases, the case team

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<sup>3</sup> *See, e.g., U.S. v. Baytank (Houston) Inc.*, 934 F.2d 599, 607 (5<sup>th</sup> Cir.1991) (government can prove a hazardous waste generator’s criminal violation of the RCRA storage permit requirement “either by showing unpermitted storage for longer than 90 days . . . or by showing unpermitted storage for any period of time in violation of any of the safe storage conditions of 40 C.F.R. Sec.262.34(a) [re-numbered to Sec. 262.17]”).

<sup>4</sup> This includes the discretion to decide which requirements to formally cite as separate violations subject to separate penalties, and which requirements to “compress” within a particular claim or count in the complaint. *See Compression of Penalties for Related Violations*, Section VII.A.2.

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may choose to allege a violation of 40 CFR § 264.31/265.31.

- The case team can allege “storage without a permit” as a violation of the Part 270 storage permit<sup>5</sup> requirement (and/or the statutory prohibition found in RCRA Section 3005(a)). Depending upon the facts of each case, this claim could appropriately be brought in addition to, or in lieu of, alleging a violation of the specific operating requirement(s), with potentially different penalty implications that should be considered when making the pleading decision. It is important to note that cases based on storage violations do not necessarily need to include a formal claim of storage without a permit. However, the pleading documents should include the general or background allegations that failure to meet all the conditions subjected the facility to permitting requirements and should set out the connection between the alleged violations and the requirement to have a permit. The pleading decision should ensure that penalties disproportionate to the violation(s) or insufficient for the violation(s) are avoided.<sup>6</sup>
- The case team can allege a combination of violations from the above options to ensure the enforcement action is representative of the totality and gravity of the circumstances.

### 4. Calculating Penalties for Generator Storage Permit Violations

RCRA section 3008(a)(3) requires that penalties for RCRA violations reflect the “seriousness of the violation.” As already set forth in this Penalty Policy, the seriousness of the violation is measured initially in terms of:

- the potential for harm it poses; and
- its extent of deviation from the applicable requirement(s).

Adjustments are then made to this initial measure, to reflect certain factors that appropriately increase or decrease the penalty. This general approach is appropriate for all generator violations of storage permit and operating requirements. Furthermore, as part of this general approach, it is appropriate to also consider the circumstances and facts related to a generator’s compliance as well as its failure to meet the conditions for the exemption from storage permit requirements when determining the seriousness of such violations.<sup>7</sup>

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<sup>5</sup> References to the “the permit requirement” include the alternative interim status requirement.

<sup>6</sup> A decision to include a claim of failure to have a storage permit against a generator does not necessarily mean that settlement of that case must include a requirement to obtain a storage permit in order to return to compliance. While EPA could require a permit, just as it can require closure of the illegal storage facility, in appropriate cases, the facility may be allowed to operate in compliance with the conditions for exemption rather than be required to apply for a permit.

<sup>7</sup> This is consistent with the clarifications regarding enforcement related to the RCRA generator conditional exemption regulations provided by the 2016 Generator Improvements Rule. *See, e.g.*, the preamble to the revisions of 40 CFR § 262.10(g) at 81 Fed. Reg. 85732, 85800 (Nov. 28, 2016). Moreover, considering the extent of the generator’s compliance with the conditions for exemption in cases alleging the generator’s violation of the storage permit requirement, has been employed in some manner by EPA for many years. One such case is the

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For alleged violations of storage facility operating requirements (found in Parts 264 or 265), the determination of the seriousness of each violation is the same for violations by generators who store hazardous waste as it is for violations by non-generators who store hazardous waste. The potential for harm of the violation is a measure solely of the potential for harm from the violation of the Part 264 or 265 requirement (rather than from not having a permit). Similarly, the extent of deviation is a measure solely of the generator’s deviation from the Part 264 or Part 265 requirement alleged to have been violated. In calculating penalties for violations of storage facility operating requirements, consideration of whether the generator met a few or most of the conditions for exemption is neither relevant nor appropriate.

For alleged violations of Part 270 and RCRA 3005 storage permit requirements, case teams should similarly calculate a penalty based on consideration of both the potential for harm and extent of deviation. However, in calculating penalties for these violations, case teams should consider how many of the conditions for exemption the generator met and the circumstances related to the generator’s noncompliance with the underlying requirement alleged to be violated. Where the generator has met most of the conditions for exemption, the potential for harm element of the penalty evaluation (minor, moderate, or major) should reflect the lower potential for harm from not having a permit as a result of the generator meeting most of the conditions for exemption. This lower potential for harm is based on the presumption that the conditions that the generator met decreased the risk of harm from the storage of waste. Where the generator meets few or none of the conditions, the potential for harm determination should reflect a higher level of potential harm given that the conditions for exemption are designed to ensure safe storage. Similarly, where the generator has met many of the conditions for exemption, the overall “extent of deviation” could be considered low, whereas failure to meet many conditions might be considered a high “extent of deviation.” Substantial adherence to many of the conditions for exemption by a generator represents less deviation from a fully compliant operation than a situation where a generator failed to meet many conditions. However, even where there was no effort made to secure a permit, the case team may conclude that the extent of deviation is low if there was substantial compliance with the operational requirements related to storage of hazardous waste.

Because there are numerous conditions and a variety of ways in which noncompliance could occur for each condition, there is a large range of circumstances that may arise between near full compliance and noncompliance with most or all of the conditions. Consideration of the penalty factors for each set of circumstances does not lend itself to any formulaic application; rather the amount of weight given to a generator’s efforts to adhere to the conditions for exemption and operate under exempt status should be proportional to those efforts and the objective facts that indicate the nature and extent of the generator’s efforts.

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EAB’s decision in In re M.A. Bruder & Sons, Inc., 10 E.A.D. 598 (EAB 2002). This Policy expands upon aspects of the EAB’s penalty approach in Bruder. Whereas the EAB in the Bruder decision considered only whether the generator met the conditions for exemption in determining just the ‘extent of deviation,’ this Policy establishes that both the generator’s adherence to the conditions for exemption and the circumstances related to the generator’s noncompliance should be considered for both factors of the penalty analysis, ‘extent of deviation’ and ‘potential for harm.’

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After both the potential for harm and the extent of deviation have been examined, the case team should determine the most appropriate Section VI.C matrix categories that best represent the potential for harm and extent of deviation based on all of the relevant facts and circumstances that were considered. As with all other penalty calculations under this Policy, any facts and circumstances not fully accounted for in the analyses described immediately above should be used to ‘fine tune’ the penalty chosen from the range provided in the applicable matrix cell.

### 5. Avoiding Duplication of Identical Considerations

In cases where the case team is separately assessing penalties for violations of both Parts 264 or 265 operating requirements and the RCRA Section 3005/Part 270 storage permit requirement, it should not include the same considerations and facts in the determination of the seriousness of the permit violation as those used to support the determination of the seriousness of the alleged Part 264/265 operating violations. This will ensure that each penalty calculation is independently supportable and will avoid ‘double-counting’ issues and duplicative penalties.