UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Increasing Recycling: Adding Aerosol Cans to the Universal Waste Regulations	)	**Docket No. EPA-HQ-OLEM-2017-0463**
83 Fed. Reg. 11,654 (Mar. 16, 2018)	)	*Via regulations.gov* May 15, 2018

California Communities Against Toxics ("CCAT") submits these comments on the above-captioned U.S. Environmental Protection Agency ("EPA" or "the agency") proposed rulemaking for the addition of hazardous waste aerosol cans to the universal waste program under the Resource Conservation and Recovery Act ("RCRA"). CCAT appreciates the agency's interest in addressing existing problems and risks posed by the current management of hazardous waste aerosol cans. However, excusing hazardous waste facilities from important Subtitle C requirements is not the answer. EPA's proposal fails to comport with RCRA, and its mandate to regulate hazardous wastes "as necessary protect human health and the environment."

I. Background

As EPA explains, aerosol cans are used widely for various products, like "paints, solvents, pesticides, food, and personal care products, and many others." 83 Fed. Reg. 11656 (noting that 3.82 billion aerosol cans were filled in the U.S. in 2015). These cans are hazardous wastes when discarded because they are ignitable or their contents contain a listed hazardous waste or exhibit a hazardous waste characteristic. *Id*. Aerosol cans may contain a wide variety of chemicals and toxic substances, including but not limited to, "[e]thers, including ethyl ether, chlorinated compounds, pesticides, herbicides, freons, foamers, corrosive cleaners, and unknowns." *Id*. at 11661.

The mismanagement of hazardous waste aerosol cans presents serious risks to nearby communities, facility workers, and emergency responders. For example, EPA notes that the cans could burst, causing their chemical contents to rapidly vaporize and be forcefully released. An overheated can could result in: the contents catching fire as they are released "creating a rapidly burning vapor 'fireball," the upper part of the can becoming a projectile, or the can fragmenting such that metal shards are released. *Id*.

Under the current regulatory system, the management of hazardous waste aerosol cans is generally subject to the full scope of RCRA's Subtitle C cradle-to-grave requirements. In response to a request by certain groups in the retail industry, EPA now proposes to add hazardous waste aerosol cans to its "universal wastes" regulatory system, which is less stringent than the current full Subtitle C program. *Id*. at 11657 (explaining that in response to a 2014 notice of data availability for the retail sector, approximately 35% of commenters "specifically suggested that discarded aerosol cans be managed as universal waste"). EPA describes the universal waste ("UW") regulatory system, set forth at 40 C.F.R. § 273, as "a set of alternative hazardous waste management standards that operate in lieu of regulation under 40 CFR parts 260 through 272 for specified hazardous wastes." *Id*. Under the proposed UW regulation, existing

exemptions continue to apply and generators, transporters, and others managing the aerosol cans are subject to weaker standards than would otherwise be required under the Subtitle C program.

If finalized, this action "would affect persons who generate, transport, treat, recycle, or dispose of hazardous waste aerosol cans…unless those persons are households or very small quantity generators (VSQGs)." 83 Fed. Reg. at 11655. In particular, EPA expects the proposal to affect over 18,000 industrial facilities, mostly retail and manufacturing. *Id*. (explaining that retail accounts for 65% of the affected large quantity generators (LQGs) universe and manufacturing accounts for 20% of the affected LQG universe). EPA claims that this proposal "simplifies handling and disposal of the [hazardous waste aerosol cans] for generators" and is "expected to facilitate environmentally sound recycling of the metal used to make the cans." *Id*. at 11658. The agency "believes that adding aerosol cans to the universal waste rule would make collection and transportation of this waste to an appropriate facility easier, and therefore, will help facilitate recycling and reduce the amount of aerosol cans disposed of in municipal landfills" and other non-hazardous waste sites. *Id*.

II. EPA's Proposal is Inconsistent with RCRA.

First, RCRA requires EPA to regulate the management of hazardous wastes, including hazardous waste aerosol cans, "as necessary to protect human health and the environment." *See, e.g.*, 42 U.S.C. § 6902 (a)(4) (explaining that RCRA "assur[es] that hazardous waste management practices are conducted in a manner which protects human health and the environment."); 42 U.S.C. § 6922 (requiring EPA to set standards for generators of hazardous wastes that "as may be necessary to protect to human health and the environment."); 42 U.S.C. § 6923 (same for transporters of hazardous wastes); 42 U.S.C. § 6924 (same for owners and operators of hazardous waste treatment, storage, and disposal facilities).

EPA's proposal is not premised on RCRA's plain mandate to set standards that are necessary to protect human health and the environment. Instead, it is based on the eight-factor test set forth in 40 C.F.R. § 273.81, which applies to petitions made by "any person seeking to add a hazardous or category of hazardous waste" to the UW stream. Under this provision, EPA determines whether to grant or deny a person's petition using the factors in 40 C.F.R. § 273.81. "EPA's decision will be based on the weight of the evidence showing that regulation under 40 CFR part 273 "is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the hazardous waste program." 40 C.F.R. § 273.81(c). In this proposal, EPA states that "not every factor must be met for a waste to be appropriately regulated under the universal waste system," but "consideration of all the factors should result in a conclusion that regulating a particular hazardous waste under part 273 will improve waste management." *Id*. at 11658. One of the eight factors EPA considers under this test is whether

> "[t]he risk posed by the waste or category of waste during accumulation and transport is relatively low compared to other hazardous wastes, and specific management standards proposed or referenced by the petitioner (e.g., waste management requirements appropriate to be added to 40 C.F.R. 273.13, 273.33, and 273.52; and/or applicable Department of Transportation requirements) would

be protective of human health and the environment during accumulation and transport"

40 C.F.R. § 273.81(e). This UW test is not consistent with EPA's duty under RCRA to protect human health and the environment. The consideration of this crucial requirement as just one of many factors that considers protectiveness in a limited way and that EPA suggests need not be met does not comport with the plain terms of the statute and is unreasonable.

Furthermore, EPA's proposed UW standards unlawfully exempt generators and transporters of hazardous waste aerosol cans from important requirements, like recordkeeping, reporting, and the manifest system, that are expressly mandated by RCRA and that EPA has deemed necessary to protect human health and the environment. For example, 42 U.S.C. § 6922(a)(1) requires EPA to promulgate standards applicable to generators of hazardous waste that establish requirements for "recordkeeping practices that accurately identify the quantities of hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes." That section also explicitly requires reporting and "the use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at treatment, storage, or disposal facilities…for which a permit has been issued as provided in this subchapter…". 42 U.S.C. §6922(a)(5)(6); *see also* 40 C.F.R. part 262. Similarly, RCRA requires EPA to set hazardous waste transporter standards that "include but need not be limited to requirements" ensuring "compliance with the manifest system." 42 U.S.C. §6923(a)(4); *see also* 40 C.F.R. part 263.

The proposal also unlawfully allows unpermitted "handlers" to receive hazardous waste aerosol cans, store them for one year, puncture and drain them, and then send them to other handlers or destination sites. 83 Fed. Reg. 11661, 11657 (explaining that "handlers include both facilities that generate universal waste and facilities that receive universal waste from other universal waste handlers, accumulate waste and then send the universal waste to another handler, a destination facility or a foreign destination."). In addition, handlers will be able to drain and puncture their own cans without a RCRA permit. RCRA requires these facilities engaged in these practices (storage, treatment, and disposal) to be classified as hazardous waste facilities and be subject to the specific treatment, storage, and disposal requirements set forth in RCRA and established by EPA, including the requirement to have a hazardous waste permit. *See* 42 U.S.C. § § 6924 and 6925; *see also* 40 C.F.R. part 265. EPA cannot, and should not, create a new, unpermitted class of hazardous waste facilities. EPA claims that the proposed standards for handlers will protect human health and the environment, but as discussed below that assertion is unsupported, especially considering that unpermitted handlers will not have the expertise to safely puncture and drain the aerosol cans and manage the varied and unknown chemical contents, and will not be subject to the full set of oversight requirements set forth in Subtitle C. It should go without saying that calling hazardous waste generators, transporters, and treatment, storage, and disposal facilities "handlers" or "universal waste" facilities does not excuse EPA from setting the standards required by RCRA.

EPA has already established cradle-to-grave regulations for hazardous waste management pursuant to RCRA's mandate to set protective standards for facilities manage hazardous wastes. *See generally* 40 C.F.R. parts 260-272. To the extent EPA believes that any of those regulations

are not necessary to protect human health and the environment from the potential risks posed by the management of hazardous waste aerosol cans, the agency must make that demonstration. As explained below, EPA has failed to do so in this rulemaking.

Second, EPA's finding that its proposal is protective of human health and the environment during accumulation and transport is arbitrary and capricious. 83 Fed. Reg. 11658. It is largely based on the assumption that toxic contents of the cans will not be released. EPA has not adequately assessed the full range of potential human health and the environmental risks posed by managing hazardous waste aerosol cans and their vastly diverse and "unknown" contents (83 Fed. Reg. at 11661) under the less stringent UW system. Without this information, EPA simply cannot show that this proposal is protective of human health and the environment as required by RCRA.

Instead of properly considering the risks associated with this proposal, EPA presents general, unsupported statements in an effort to satisfy factor 5 of the UW test. For example, EPA cursorily states that as long as the cans remain intact, "EPA expects that hazardous waste aerosol cans would present a lower risk as compared to other types of hazardous waste that are not contained as-generated under normal management conditions." 83 Fed. Reg. 11658. EPA offers no support for its assumption that the cans will in fact remain intact when handlers are accumulating more of them for longer periods and transporting them without compliance with all of RCRA's requirements. EPA's statement does not at all account for the risks presented by the proposed puncturing and draining of the cans, and the resulting released contents. EPA has not addressed whether and what risks could be posed by the leakage or spillage of hazardous waste aerosol cans, the incomplete or improper puncturing and draining of those cans, the mixing of their contents, or unused/intact cans that are expired or are recalled by the manufacturer. Assessing these and other potential risks is especially important given the broad application of this proposal to so many varied products containing different and unknown types of chemicals, which will necessarily pose different types of risks to communities, site workers, emergency responders, and the environment. In any event, the fact that the hazardous waste cans present "a lower risk as compared to other types of hazardous waste that are not contained" does not mean that the risk associated with hazardous waste aerosol cans is itself low or that the proposed standards are sufficient to protect human health and the environment against that risk.

EPA further states that the "ignitability risk posed during accumulation and transport is addressed by" standards set by DOT, OSHA, and local fire codes. But EPA offers no explanation as to how those other standards satisfy RCRA's requirement to protect human health and the environment, which as noted above, requires hazardous waste facilities to comply with specific requirements that are absent from this proposal, including the manifest system requirement.

EPA goes on to explain that the proposed standards for aerosol cans that are punctured and drained at the handler "would address the ignitability risk, and help prevent releases, and thus EPA believes that the risks posed by the activities proposed are addressed by the universal waste designation." 83 Fed. Reg. 11659. EPA does not even know the full array of toxic chemicals that could be in the hazardous waste aerosol cans and the risks they pose when released, so it cannot reasonably determine whether the weaker UW management requirements it proposes will sufficiently address those risks. EPA cannot only assume that unpermitted handlers puncturing and draining those cans will do so safely. EPA also fails to adequately address the potential problems posed by the puncturing and draining devices on which it relies. For example, EPA

neglects to account for key EPA findings for one such machine currently in use, the Katec Aerosolv® System[1], and only cursorily summarizes some of the findings made by EPA's now defunct Environmental Technology Verification Program. EPA states that that machine "was effective in processing at least 187 cans before breakthrough of volatile chemicals occurred," 83 Fed. Reg. 11661, but does not address the fact that the carbon filter allowed the emissions breakthrough or discuss the risks posed by those emissions. Further, the machine's Colorimetric Indicator, used to monitor carbon filter breakthrough, "did not work as claimed and did not effectively monitor the carbon filter for breakthrough."[2] Given these problems, EPA should have assessed safer alternatives to this practice. Assessing these issues and identifying safe puncturing and draining procedures should not simply be left to the handlers, particularly because they are not required to have Subtitle C permits under EPA's proposal. Indeed, these complexities provide further support for prohibiting handlers to puncture and drain hazardous waste cans, and requiring any facilities engaged in that practice to do so in accordance with a Subtitle C treatment, storage, and disposal permit required by RCRA.

EPA's proposal exempts handlers and transporters of hazardous waste aerosol cans from the crucial land disposal (LDR) requirements for testing, tracking, and recordkeeping. 83 Fed. Reg. 11662. EPA's basis for this exemption seems to be simply that the existing universal waste handlers and transporters are exempt from these requirements. This explanation is not sufficient; EPA must demonstrate why the LDR exemption is appropriate for these particular hazardous wastes, which as EPA notes can include any number of different chemicals, and why compliance with the LDR requirements is not necessary to protect human health and the environment.

III. EPA Has Not Established that its Proposal Will Improve Management of Hazardous Aerosol Cans.

Throughout the proposal, EPA claims that expects regulating hazardous aerosol cans as UW will increase recycling or Subtitle C disposal of hazardous waste aerosol cans that would otherwise be sent to non-hazardous waste landfills and incinerators. EPA's assumption is again unsupported and arbitrary. Under the current regulatory system only VSQGs (and households) may send their hazardous waste aerosol cans to the non-hazardous waste sites, including landfills and incinerators. This continues to be the case under EPA's proposal. Indeed, the proposal expressly exempts VSQGs from managing their hazardous waste cans as UW. As EPA acknowledges in its Regulatory Impact Analysis, "VSQGs are therefore likely to continue operating as VSQGs in the post-rule environment." ES-2. EPA states that it will encourage VSQGs to voluntarily participate in the UW program, but that hardly means they *will* participate and that this proposal will increase recycling of hazardous wastes aerosol cans that are currently being sent to non-hazardous waste sites.

If EPA truly aims to reduce the number of hazardous waste aerosol cans entering the non-hazardous waste stream, as it should, the agency must require VSQGs to manage their wastes in accordance with the cradle-to-grave requirements. At the very least, EPA must require VSQGs to

[1] *See* EPA and California Department of Toxic Substances Control, ETV Joint Verification Statement (Dec. 1999), https://archive.epa.gov/nrmrl/archive-etv/web/pdf/06_vs_katec.pdf.

[2] *See also* Minnesota Pollution Control Agency, https://www.pca.state.mn.us/sites/default/files/w-hw4-00.pdf. (noting that "[c]harcoal and activated carbon filters attached to many commercial puncturing devices do not effectively capture hazardous waste propellants or gases for proper disposal or on their own protect your employees or the environment.")

participate in this proposed program (as California requires). Failing to do so is arbitrary and capricious in light of EPA's claim that this proposal will divert wastes going to non-hazardous waste sites. To the extent EPA is suggesting that SQGs and LQGs are unlawfully sending their hazardous waste aerosol cans to non-hazardous waste sites, EPA should enforce the current Subtitle C program against the violators, assist them with compliance, and close existing regulatory loopholes, including recycling exemptions, that allow for such hazardous waste mismanagement in the first place, not weaken the protective standards required by RCRA and necessary for the safe handling of those wastes.

Furthermore, EPA's claims that the proposed regulation will improve hazardous waste management are at odds with cases involving problems with existing state UW programs for hazardous waste aerosol cans. For example, California added hazardous waste aerosol cans to its UW program in 2001,[3] but mismanagement of aerosol cans has continued. *See, e.g., California v. Walgreen Co.*, 2012 WL 12903342 (Cal. Super.) (Stipulation for Entry of Final Judgment and Permanent Injunction) (over 600 California Walgreens stores alleged to have unlawfully compacted, transported, and disposed of hazardous waste, including universal waste aerosol cans); *California v. Target Corp.*, 2011 WL 807383 (Cal. Super. 2011) (Final Judgment and Permanent Injunction on Consent) (over 150 California Target stores and regional distribution centers alleged to have unlawfully compacted, transported, and disposed of hazardous waste, including a shipment of 2,250 pounds of hazardous waste aerosol cans to a regional food bank, which was not authorized to receive hazardous or universal waste).[4] EPA must identify and closely evaluate these and any other cases of mismanagement that have occurred under existing state universal waste programs.

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For all of these reasons, EPA should not proceed with its proposal to move hazardous waste aerosol cans to the universal waste program, and instead should work to ensure compliance with Subtitle C's protective cradle-to-grave requirements.

Respectfully on behalf of California Communities Against Toxics,

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[3] ENVIRONMENTAL PROTECTION—HAZARDOUS SUBSTANCES AND WASTES—AEROSOL CANS, 2001 Cal. Legis. Serv. Ch. 450 (S.B. 1158) (WEST).
[4] Complaint available at http://ag.ca.gov/cms_attachments/press/pdfs/n1753_targetcomplaint.pdf.