

# MANIFESTLY DIFFERENT

Date: 10 July 2018

## **U.S. Environment, Land and Natural Resources Alert**

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U.S. Environmental Protection Agency's ("EPA") Final Rule on User Fees for Electronic Hazardous Waste Manifest Systems, published on January 3, 2018 (83 Fed. Reg. 420) and effective June 30 ("User Fee Rule"), imposes new obligations on companies which receive non-hazardous industrial waste or industrial byproducts required by states to be transported using EPA's Uniform Hazardous Waste Manifest ("Uniform Manifest"). These companies will be required to obtain an EPA identification ("ID") number, submit copies of the manifests to EPA and pay the manifest fees. Many of these companies are engaged in some form of recycling or reuse and do not necessarily manage waste, let alone hazardous waste. As a result, they may not be aware of these additional responsibilities and may not be prepared as the Rule now becomes effective.

Since 1980, the hazardous waste manifest requirement has been a key component of the Resource Conservation and Recovery Act's (42 USC 6901 et seq. "RCRA") mandate to track wastes "from cradle to grave" to ensure proper management at all points on the journey. Generators prepare a manifest when they identify a waste for shipment, and the transporter and ultimate disposal facility all sign off on the same document. Since 1982, EPA required the use of its Uniform Manifest which is now an easily recognizable multi-page form. Manifests are maintained by each of the parties to the shipment and the disposal facility files a biennial report regarding all shipments.

The manifest has always been on paper but since 2001 U.S. EPA has sought to create a paperless manifest system. In 2012, Congress amended RCRA to add the Hazardous Waste Electronic Manifest Establishment Act (P.L. 112-195) ("Act") to authorize the use of electronic manifests, to authorize EPA to create an electronic tracking system and to charge fees to pay for the system. EPA has adopted a series of regulations to implement this process which were mostly completed with the User Fee Rule. EPA will start implementing the e-manifest program after its effective date on June 30, although there is likely to be continuing uncertainty as EPA works through the inevitable glitches of a new electronic program.

For companies that routinely manage hazardous waste, the transition is likely to be annoying but not painful. Generators and transporters will need to obtain the necessary equipment to create and read the e-manifest. The bulk of the burden is likely to fall on the treatment storage and disposal ("TSD") facilities at the end point of the process. The companies will need to transmit the e-manifest to EPA and, more importantly, pay the e-manifest fees billed by EPA. Because TSD facilities are already highly regulated, this burden simply gets added to their many other requirements.

The User Fee Rule, however, also applies to a class of companies which do not manage hazardous waste, and these are the companies likely to have the most significant problems. These companies are included in this process because some states require generators and transporters of different categories of typically industrial waste and secondary materials to use the Uniform Manifests to transport the material even though it is not

hazardous and may not be waste. The facilities receiving these materials are not necessarily part of a waste management system and may be recyclers or other facilities reusing these materials. These facilities may not be regulated by the state requiring the manifests and may not even be located in that state. As a result, these receiving facilities were not previously regulated with respect to the management of these materials.

Despite their lack of involvement in the system, the User Fee Rule will impose the same obligations on these facilities regarding manifests as on TSD facilities. EPA determined that all Uniform Manifests should be included in the e-manifest system whether or not they were used for RCRA wastes. Based on the broad definition of "user" in the Act, EPA determined that the requirements should apply to entities which are required to use the Uniform Manifest under state law. In addition, the Act specifically required recipients in states which did not require non-hazardous waste manifests to comply with the manifests requirements of the state in which the generator was located.

Facilities which receive non-hazardous waste or other material accompanied by a Uniform Manifest now must submit copies of those manifests, either through the e-manifest system or electronically if they receive paper. While the Act appeared to allow users to opt out by using paper, the User Fee Rule still imposes the reporting and fee requirements on receiving facilities whether or not the generator used a paper Uniform Manifest.

In addition, receiving facilities must also pay user fees which EPA will calculate and bill them for after it evaluates the manifests received. As a result, non-compliance will not involve an easily remedied "paperwork" violation but will also involve recovery of unpaid fees. As a result, receiving facilities will need to evaluate their pricing and contracts in order to include the cost of the fee payment.

Finally, in order to participate in the system, facilities will also have to obtain an EPA ID number which will show up on the EPA RCRA data base. This may have implications in transactional settings involving financing or company sales.

In short, these rules will extend the RCRA manifest system to, and impose financial obligations on, a whole class of materials handling facilities which have not previously been involved and do not have much experience with it. The fee component will add urgency to enforcement that would not normally be present for this type of program. As a result, these facilities will need to quickly get up to speed on the e-manifest program and its implications.

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