

**Comments of
The Utility Solid Waste Activities Group on
Used Drum Management and Reconditioning ANPRM**

88 Fed. Reg. 54537 (August 11, 2023)

**submitted to
The United States
Environmental Protection Agency
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INTRODUCTION

The Utility Solid Waste Activities Group (“USWAG”)¹ submits these comments to the United States Environmental Protection Agency (“EPA” or “Agency”) in response to its advanced notice of proposed rulemaking for used drum management and reconditioning (“ANPRM”).² In this ANPRM, EPA seeks input “on what further Agency action, regulatory or otherwise, is needed to prevent future damage to human health and the environment from all entities involved in the used container lifecycle.”³ These actions could potentially supplement or replace the existing regulatory scheme that has been in place for decades, including the empty container rule that is codified at 40 CFR § 261.7.⁴

As explained by EPA, the ANPRM was published in response to the Agency’s September 2022 Drum Reconditioner Damage Case Report (“Drum Report” or “Report”),⁵ which, among other things, documented damage case incidents at used drum reconditioning facilities. However, as detailed in these comments, nothing in the Drum Report supports the notion that the existing RCRA regulations, including the empty container rule, are not protective of human health and the environment. Therefore, the Report does not provide the requisite record evidence for EPA to propose changes to EPA’s current regulatory regime for the management of empty containers.

Indeed, as discussed below, elimination of the empty container rule and/or the imposition of additional regulatory conditions on the management of empty containers would do little to address EPA’s

¹ USWAG is an association of over one hundred and thirty utilities, utility operating companies, energy companies, and trade associations representing electric companies, utilities and cooperatives.

² Used Drum Management and Reconditioning Advance Notice of Proposed Rulemaking, 88 Fed. Reg. 54537 (August 11, 2023) (“ANPRM”).

³ *Id.* at 54539.

⁴ The RCRA “empty” container provision exempts the residual amounts of hazardous waste remaining in empty containers from hazardous waste regulation, provided that (1) all of the waste that can be removed using practices commonly employed across industry (e.g., pouring, pumping, and aspirating) has been removed and (2) no more than a marginal amount (e.g., one inch or a small designated percentage) remains on the bottom of the container. Containers that do not meet these criteria would not meet the definition of “empty” under RCRA.

⁵ EPA, OFFICE OF RESOURCE CONSERVATION AND RECOVERY, Drum Reconditioner Damage Case Report, EPA 530-R-22-003 (September 2022) (“Drum Report” or “Report”), https://www.epa.gov/system/files/documents/2022-09/Drum_Reconditioner_Report_Final_Sept_2022_508.pdf.

concerns with the damage case incidents identified in the Drum Report. Instead, these regulatory changes would only threaten to undermine the significant and important environmental benefits of reconditioning RCRA empty containers for reuse as opposed to disposal. The bottom line is that empty drums managed in accordance with the empty container rule are *not* the source of the damage incidents identified in the Report. Rather, as discussed below, a preferred and more effective option to address the issues identified in the Report is for EPA to pursue the practical and effective non-regulatory options identified in the ANPRM, such as an increased focus by EPA on compliance training and guidance, to better ensure compliance with the empty container rule.

COMMENTS

I. The Drum Report does not provide the requisite record evidence to warrant additional rulemaking.

Nothing in the Drum Report can be used to scrutinize the protectiveness of the existing empty container rule, and it certainly does not provide the record evidence to support a proposed rulemaking to alter the existing regulatory regime or to impose additional regulatory controls on generators of empty drums. The Report itself acknowledges that “[i]ndividual emptied drums with a small amount of hazardous waste residue at the bottom that meet the definition of empty container . . . generally pose little risk during accumulation and transport” and that “[f]acilitating the collection and transport of emptied drums is beneficial because it helps ensure that the containers are reconditioned or recycled, and not abandoned.”⁶ Recognizing that RCRA empty drums pose little risk and that facilitating the reconditioning and/or recycling of these empty drums is environmentally important, EPA should be taking steps to further promote these environmentally sound management practices, rather than suggesting regulatory changes that could upend them.

⁶ *Id.* at 10.

A close examination of the Drum Report underscores that regulatory changes are not warranted. As an initial point, *none* of the damage cases identified in the Report point to the empty container provision as the source of the problem. To the extent the management of a container is involved or alleged to be involved (as discussed below, there are other causes of the damage incidents), the containers in question *do not meet* the empty container provision. In other words, the incidents cited in the Report associated with the management of containers arise from entities that have failed to comply with the empty container provision, and not with the empty container rule itself. Changing a rule that is fully protective of human health and the environment and that is not the cause of EPA's concern makes no sense.

Further, many of the damage cases referenced in the Report reflect past practices and, in addition, many do not implicate drums as the root cause of the damage incident. For example, EPA focuses on the fact that the Drum Report identified at least one reported damage case in 86 of the 181 drum reconditioning facilities identified by the EPA.⁷ However, some of the facilities identified by EPA have since ceased operations. In fact, 59 of the 86 damages cases that occurred since 1981 took place at facilities that have since closed.⁸ This "evidence" is no more than outdated information and does not amount to the level of record evidence that would support changes to EPA's existing regulatory regime for RCRA empty containers.

It is also important to note that the Report defined a "damage case" to include a wide variety of situations, many of which are completely unrelated to the effectiveness of the current regulatory scheme. The Drum Report defines a "damage case" to include "a documented incident where hazardous constituents have migrated from or contaminated a facility where they have or could have caused damage to human health or the environment; where there is documented evidence of fires, explosions, employee injuries, etc.; and/or where there has been an administrative ruling or court decision with an explicit finding of specific

⁷ *Id.* at 6.

⁸ *Id.* at Appendix B.

damage to human health or the environment.”⁹ Therefore, several of the 86 damage reports identified by the EPA were caused by scenarios that could have occurred regardless of whether a used drum was involved. For example, the Report notes a damage report at the Apex Drum Company in Los Angeles, California.¹⁰ There, an employee was injured when walking around industrial bulk containers near the tote flush pump and inadvertently stepping into an unguarded opening. Other damage reports, such as the one that occurred at Chief Supply/Greenway Environmental, resulted after fires occurred at reconditioning facilities.¹¹ While the companies were in the business of reconditioning and disposing of industrial containers, these particular incidents were not the result of ineffective regulations and certainly cannot be used as evidence that the current regulations do not protect human health and the environment. Simply because incidents happened at drum reconditioning facilities does not mean that the incidents occurred *because of* ineffective regulations. These damage cases do not show that the current regulations are ineffective – they merely show that, as with any regulation, there has been some non-compliance in the past that purportedly has been the source of some of the damage cases in the Report.

II. Adding additional regulations will not increase compliance.

Because the existing empty container rule itself is protective of human health and the environment and not the root cause of the damage cases in the Report, none of the potential regulatory changes to the empty container regulatory regime suggested in the ANPRM are worth pursuing. Indeed, some of the possible regulatory changes would be counter-productive by, among other things, undermining the used drum reconditioning market and causing more used drums to be disposed of as opposed to being reconditioned and reused or recycled. Further, as opposed to increasing regulatory compliance, any regulatory changes would only exacerbate non-compliance among the small segment of the regulated community that is not meeting the current regulations, while doing nothing to address the concerns

⁹ *Id.* at 6.

¹⁰ *Id.* at 36.

¹¹ *Id.* at 63.

identified in the Drum Report. To highlight these points, we review below certain regulatory changes suggested in the ANPRM and explain why they are not worth pursuing.

A. Reduce the “one-inch” regulatory limit;¹² require rinsing for all containers;¹³ and add structural integrity condition.¹⁴

The notion of reducing the “one-inch” regulatory limit within the RCRA empty provision is both unnecessary and counter-productive. Again, compliance with the “one-inch” empty container criterion is *not* the source of *any* of the alleged damage cases in the Report. Rather, the alleged concern appears to stem from a small number of entities that send *non*-RCRA empty containers to reconditioning facilities. There is nothing to suggest that the small universe of entities that do not adhere to the current one-inch requirement in 40 CFR § 261.7 will comply with a new, stricter requirement. Put simply, lowering the residue threshold will not address the underlying compliance issue; instead, it will only exacerbate non-compliance within the regulated community. Rather, as discussed below, an increased emphasis on compliance training and outreach by EPA is the logical answer, not further regulatory controls.

The same reasoning applies to EPA’s suggestion of requiring the rinsing of empty containers before they would be considered RCRA empty. Requiring rinsing as a condition of the empty container provision would require the large universe of empty drum generators, as compared to the much smaller universe of used drum reconditioners, to install complex rinsing facilities and begin managing rinsate, an expensive and perhaps impractical undertaking for many very small and small quantity generators, as well as non-waste generators who are not currently subject to any element of EPA’s hazardous waste generator regulatory regime. A “rinsing” condition would only threaten the continued viability of the drum reconditioning market and would cause some empty drum generators to simply dispose of used drums as opposed to sending them to reconditioners for reuse and/or recycling.

¹² ANPRM at 54542.

¹³ *Id.*

¹⁴ *Id.* at 54543.

All of the above reasons also apply to EPA's suggestion of requiring empty drums to meet certain structural integrity requirements prior to shipment to a drum reconditioner. Here too, the problem is not the existing rule, but rather adherence to the rule.

- B. Add/strengthen regulatory requirements for used drum generators to ensure all waste has been removed from containers using commonly employed practices prior to being sent to reconditioners, such as SOPs for drum emptying, certification of empty drums, and employee training.¹⁵

As EPA has acknowledged in the Drum Report, “[i]ndividual emptied drums with a small amount of hazardous waste residue at the bottom that meet the definition of empty container . . . generally pose little risk during accumulation and transport.”¹⁶ Therefore, it is unnecessary to require the removal of *all* residue from the used drums in order for the regulation to be protective of human health and the environment. Additionally, given some of the practical difficulties that likely would arise in ensuring that *all* waste is removed, adding this requirement would likely result in many generators foregoing the “empty container” option altogether and deciding to dispose of used drums, as opposed to pursuing the environmentally beneficial option of drum reconditioning.

- C. Add regulatory language further clarifying “commonly employed practices” and distinguishing between pourable and non-pourable wastes.¹⁷

USWAG believes that adding “regulatory language” further clarifying what constitutes “commonly employed practices” to empty wastes from a container or distinguishing between “pourable or non-pourable wastes” would only unnecessarily limit use of the empty container provision and cause more regulatory non-compliance. First, attempting to “codify” into the code of federal regulations what constitutes a “commonly employed practice” for emptying wastes from a container will undoubtedly be underinclusive and would result in generators foregoing otherwise fully effective “emptying” measures and abandoning current efforts to comply with the empty container rule. Worse, if the concept of what constitutes “commonly employed practices” for emptying wastes is memorialized in regulatory text, there will

¹⁵ Id. at 54542.

¹⁶ Drum Report at 10.

¹⁷ ANPRM at 54542.

undoubtedly be an increase in regulatory non-compliance stemming from confusion regarding what effective “commonly employed practices” fall within this new regulatory criterion. The same reasoning applies to attempting to codify what constitutes pourable versus non-pourable wastes. If EPA believes such clarification would be useful for the regulated community, it would be more appropriate to provide this information through a guidance document rather than through the formal rulemaking process.

D. Add tracking¹⁸ and/or Recording & Drum Labeling¹⁹ Requirement for Used Drum Generators.

Finally, EPA floats the concept of requiring empty container generators to adhere to a number of hazardous waste manifest-like conditions and waste characterization requirements. These would include having empty container generators keep records of and “track” shipments to used drum reconditions and perhaps even include labeling or other documentation on the empty drum to “convey” the hazard posed by the drum residue – i.e., the less than one inch of waste remaining in the empty drum.

As an initial point, EPA has already concluded – and nothing in the Drum Report finds otherwise – that the small amount of residue in an empty drum under 40 C.F.R. 261.7 does *not* pose a threat to human health and the environment.²⁰ Therefore, requiring used drum generators to convey on a label or other documentation the “hazards” posed by the residues in an empty drum is at odds with EPA’s previous and undisputed conclusion that such residues do *not* pose a hazard – certainly not the type of hazard warranting the imposition of a hazard notification requirement on empty drum generators. The same logic applies with respect to subjecting empty drum generators to record keeping and tracking requirements. These conditions are strikingly similar to the tracking and record keeping requirements applicable to fully regulated hazardous waste. The record simply does not support subjecting empty drum generators to these requirements.

¹⁸ *Id.* at 54543.

¹⁹ *Id.* at 54542-43.

²⁰ Drum Report at 10.

USWAG also notes that the marking and labeling requirements of the Hazardous Materials Regulations (“HMR”), enforced by the Pipeline and Hazardous Materials Safety Administration,²¹ remain applicable even to “empty packaging containing only the residue of a hazardous material.” See 49 C.F.R. 173.29(a). These requirements can only be avoided if the packaging meets certain stringent conditions, including sufficiently cleaning the packaging of all residue and refilling it with a material that is not hazardous.²² These HMR labeling and marking requirements already effectively serve to communicate potential hazards to downstream recipients. Thus, the existence of other regulatory requirements for these empty containers further undercuts the need for any changes to the existing RCRA regulatory regime.

III. EPA should focus on devoting additional resources toward compliance training.

Given that regulatory amendments are not warranted for the proper management of empty containers, to the extent EPA seeks to take action to address the purported issues identified in the Drum Report, particularly the shipping of non-RCRA empty containers to drum reconditioners, the Agency should implement non-regulatory actions. These measures should include increased compliance training, and, as EPA identified, the development of Standard Operating Procedures (“SOPs”) to help achieve better regulatory compliance among generators, transporters, and drum reconditioners.

The reality is that both generators and the reconditioning industry already have significant incentives for (1) generators to fully comply with the empty container provision at 40 C.F.R. § 261.7, and (2) drum reconditioners to accept only RCRA compliant empty containers. For example, a facility that inadvertently transports a non-RCRA empty container off-site risks enforcement for a number of regulatory infractions involving the off-site shipment of a hazardous waste. For drum reconditioners, facilities are incentivized to only accept RCRA empty containers, as mishandling non-RCRA empty containers also raises RCRA enforcement concerns. Given the substantial incentives that already exist, and the fact that the

²¹ See 49 C.F.R. Part 172, Subparts D & E).

²² See *id.* at 173.29(b).

current regulations are sufficient to protect human health and the environment, there is no need to add additional regulations; doing so would be an overreaction to what is a compliance issue that can more easily—and more efficiently—be addressed through non-regulatory actions such as increased compliance training and the development of SOPs. Indeed, USWAG is confident that an EPA education initiative focusing on empty drum generators would substantially reduce, if not obviate, the need for any other regulatory or non-regulatory action.

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USWAG appreciates the opportunity to submit these comments on this ANPRM. If you have questions regarding the issues raised in the comments, please contact USWAG Executive Director Daniel Chartier (202-508-5645) or USWAG counsel Douglas Green (202-344-4483) or Emma Bunin (202-344-4623) at Venable LLP.