FOLEY
FOLEY & LARDNER LLP

ATTORNEYS AT LAW
777 EAST WISCONSIN AVENUE
MILWAUKEE, WI 53202-5306
414.271.2400 TEL
414.297.4900 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
414.297.5825
lbenfield@foley.com EMAIL

CLIENT/MATTER NUMBER
110874-0103

April 11, 2018

Via E-Mail

Ms. Susan Bodine
Assistant Administrator
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
William Jefferson Clinton Building
Mail Code: 2201A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Container Life Cycle Management LLC

Dear Ms. Bodine:

We appreciate the opportunity to meet with you on April 16, 2018 with our client, Container Life Cycle Management LLC ("CLCM") and representatives of their trade association, the Reusable Industrial Packaging Association ("RIPA"). We are submitting this letter in advance of our meeting to provide you with an overview of the issues we hope to discuss.

In brief, we would like to discuss the extent to which Region V's enforcement action against CLCM rests on a novel interpretation of the "RCRA-empty" rule as it applies to the reconditioning of industrial containers. Region V's interpretation conflicts with the plain language of the regulations and more than 35 years of agency and industry practice. CLCM and RIPA believe the Region's position that CLCM, and by extension every other reconditioner, transports, stores and treats hazardous waste, is wholly unsupported by the regulatory language. Region V's proffered interpretation thus constitutes an improper effort to change the regulatory landscape without the required notice and comment rulemaking. Moreover, Region V's interpretation, if applied broadly, could substantially curtail the environmentally beneficial practice of reconditioning industrial containers. Finally, although not required by regulation, CLCM has proposed a resolution of the pending enforcement matter that addresses one issue not explicitly addressed in the rule – how to manage containers that do not meet the RCRA-empty standard. We believe CLCM's proposal presents a responsible and sound basis to address any concerns the Region may have related to such practices.

EXECUTIVE SUMMARY

In 1982, EPA determined that residual materials in containers that had been emptied would not be regulated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et. seq. The "empty container" rule has been consistently applied by EPA to, and followed by, the industrial container reconditioning industry and their suppliers for more than 35 years. This industry cleans, reconditions and reintroduces into commerce, millions of industrial containers each year. Region V's attempt to fundamentally reinterpret this rule in current enforcement proceedings will upend three decades of regulatory policy and will effectively eliminate the RCRA-empty rule.

Before sending used industrial containers to CLCM, the company sending those containers (the "Supplier") is required to certify that all such containers meet the RCRA regulatory definition of empty. The Suppliers load the trailers with empty containers, and when containers are unloaded by CLCM at its location, CLCM has its first opportunity to evaluate the containers to confirm whether they are RCRA empty. CLCM's terms and conditions are clear that containers are not accepted, and title does not transfer, until after inspection. Non-empty containers and their contents are rejected by CLCM and held temporarily prior to return to Suppliers for continued use as product; non-empty containers are not accepted by, and title never passes to, CLCM. Empty containers are cleaned, reconditioned and sold back into commerce or scrapped and recycled if not useable.

Region V is advocating four novel interpretations of the RCRA regulations in an effort to support its enforcement action against CLCM, in contravention of the plain language of the regulations and the Agency's longstanding interpretation of the regulations. Region V argues that:

- the transport of non-empty containers mistakenly loaded onto trailers (and the return of such containers to Suppliers containing "product") is the transportation of hazardous waste;
- temporarily holding those non-empty containers at CLCM's location prior to retrieval on behalf of Suppliers is the storage of hazardous waste;
- a RCRA-empty container that met the regulatory requirements at the Supplier's facility when it was shipped is transformed into a non-empty container if any residue becomes pourable from the container after it reaches CLCM; and
- the washing and burn-off processes employed to remove residue from containers is the treatment of hazardous waste if *any* residue remains in a RCRA-empty container.

The Region's position would require CLCM, and other reconditioners, to transport all empty containers as hazardous waste, and immediately obtain permits to operate as hazardous waste treatment, storage and disposal facilities, with all the attendant regulatory burdens and costs associated with those permitting programs. EPA chose not to so regulate reconditioners, more than 35 years ago when it adopted the empty-container rule. Region V's enforcement action upends that considered

position, adopted after notice and comment rulemaking, and thereby renders the empty-container rule meaningless, relegating it to the status of a theoretical exemption from regulation that, in fact, could never be realized.

Having heard the Region's concerns, CLCM remains interested in a sensible resolution that does not undermine the rule itself. Thus, we have proposed a resolution of the CLCM enforcement matter to Region V that will enhance the control of air emissions at two CLCM reconditioning locations, and impose a "Non-Empty Container Management Plan" at all three of the Wisconsin CLCM locations. Such a resolution would serve the Agency's interests in helping to illustrate sound practices for those in the industry to emulate. We understand that representatives of RIPA are also committed to participating in a process that could promote, in cooperation with the Agency, such an industry-wide solution that exceeds the requirements of existing regulations. Thus, a resolution along the lines that CLCM has proposed would respect the regulations that exist, be fair to CLCM and also serve the Agency's overall interests in promoting sound environmental practices while also not crippling the existing industry.

REGION V'S ENFORCEMENT POSITION IS AN IMPROPER ATTEMPT TO CHANGE A REGULATORY PROGRAM WITHOUT APPROPRIATE NOTICE AND COMMENT RULEMAKING

I. THE RCRA-EMPTY RULE

In 1980, EPA solicited comment on whether the Agency should regulate the removal of residue from used industrial containers. After considering the comments received, the Agency rejected proposals to regulate the residue in containers that formerly held regulated substances. The final RCRA regulations adopted by the Agency in 1982 established the "empty container rule," codifying the concept that a container with residual material that has been emptied "using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating," is empty for purposes of the regulations and the remaining residual material "is not subject to regulation" under RCRA.[1] This rule recognizes the reality that some residual contents may remain in a container, much like a small amount of soda that remains in a can, no matter how many times one tries to pour out the remaining drink. The RCRA statutory language states that one of its purposes is to "promote the protection of health and the environment and to conserve valuable material and energy resources by … encouraging … materials recovery, [and] properly conducted recycling and reuse…"[2] To further this purpose, in 1980 EPA evaluated the role of drum reconditioners as recyclers and concluded that drum reconditioners need not be permitted under RCRA and that reconditioners fulfill one of the objectives of RCRA as recyclers.[3]

These regulations have guided manufacturing and industrial practices in the United States and created the business and regulatory framework for reconditioners for over thirty-five years. CLCM and other reconditioners in the United States provide a critical, valuable service allowing the sustainable reuse of millions of containers each year. Subjecting the industry to the burdensome regulatory requirements Region V advocates is not supported by the regulations, would provide no meaningful environmental improvements, and would promote practices such as landfilling that would be a net environmental detriment. Ensuring the continued viability of the industry is vital, given that the industrial packaging reconditioning industry annually reconditions and returns to commerce nearly 28 million steel drums, 4 million poly drums, and over 3 million intermediate bulk containers (large plastic square containers secured in a steel cage attached to a pallet, also known as "totes"). Nobody will be served if it becomes economically prohibitive to perform this service and a substantial portion of the containers currently processed are instead taken out of commerce and disposed of in landfills or similar fashion.

---

[1] 40 C.F.R. §261.7(a), (b)(1).

[2] 42 U.S.C. §6902(a)(6).

[3] U.S. Environmental Protection Agency, Document No. 24401-41 (Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA, Subtitle C, Section 3004: General Comments on Storage) (Dec. 30, 1980) at p.38.

II. REGION V'S ENFORCEMENT POSITION

From our discussions with Region V, we believe that the Region's "theory of violation" depends on four interpretations of RCRA, each of which would be a significant departure from the existing regulations, agency interpretation, and industry practice.[4]

A. Transportation of Non RCRA-Empty Containers

Suppliers provide used containers to CLCM and the Suppliers have the obligation under RCRA to properly manage their various waste and recycling streams. Under DOT regulations, the Supplier is the "offeror" and also has the obligation to properly characterize and label materials they are placing into the trailers for transport.[5] It is also the Suppliers' responsibility to ensure that the DOT placarding and shipping document requirements are met.[6]

As described above, the Suppliers that send containers to CLCM certify that all the containers are "RCRA Empty." A copy of the certification language is enclosed at Attachment 1. However, on occasion a manufacturer inadvertently ships a non-empty container to CLCM. In 2017, less than 1% of the containers received at CLCM's three Wisconsin operations were non-empty. In all instances, the non-empty containers were retrieved by or on behalf of the original Suppliers. These containers are segregated and labeled when they are identified, the Suppliers are contacted to retrieve or accept the containers, and the Suppliers may be charged an additional fee for the improperly directed container. CLCM's view is that the contents of such container, given all these circumstances, is still "product," even if the return to the Supplier is required to be in accordance with DOT transportation requirements for hazardous materials.[7]

Region V, on the other hand, currently contends that non-empty containers that are inadvertently loaded onto trailers by a Supplier irrevocably become "waste" at the moment they are placed in the trailer. The Region asserts that these containers are "waste" because "[t]he vendor has no reasonable expectation again to receive that container and its contents and, therefore, that container and its contents are discarded by being abandoned within the meaning of [RCRA]."[8]

---

[4] Region V has also asserted that additional Clean Air Act requirements apply to the CLCM locations based on the conclusion that the operations are regulated under RCRA. Although this letter does not directly address those allegations, the resolution of the RCRA issues as presented here will also resolve those allegations.

[5] 49 C.F.R. §§171.8; 173.1(b); 172.400(a).

[6] 49 C.F.R. §§172.200(a); 172.500(a).

[7] 49 U.S.C. §5103.

[8] Notice of Violation dated November 27, 2017 issued to Greif, Inc. and Container Life Cycle Management, LLC (d/b/a Mid-America Steel Drum)("RCRA NOV") at p.2.

This is fundamentally not true. Notwithstanding that someone thought the container was empty when it was loaded into a trailer, the Supplier signed a document acknowledging that all the containers are RCRA empty, that it will continue to own an inadvertently loaded non-empty container, the container will be returned, and that it will be assessed a fee for mistaken shipments. Moreover, the record demonstrates that all such non-empty containers are *in fact* returned to the Supplier. This is required by CLCM and is the industry's protocol. When returned, the materials in the container have economic value to the Supplier. Thus, such inadvertently shipped non-empty containers are not "abandoned" and they are not waste.

The Region's interpretation would create vast economic and environmentally unsound consequences. If, as the Region asserts, product in containers irrevocably becomes "hazardous waste" at the moment it is mistakenly placed in a trailer, then the Suppliers have potential civil and criminal liability under RCRA for: (1) the improper labeling, shipment, transportation and storage of hazardous waste as the misdirected product containers are sent to the reconditioners, (2) the improper shipment of hazardous waste to a non-permitted facility because the reconditioners are not authorized to treat and dispose of hazardous waste, and (3) the improper re-transportation of hazardous waste as the Suppliers retrieve the materials. And most extraordinarily of all, the Suppliers cannot actually use the valuable raw material in their operations after they have retrieved a non-empty container, because the Supplier would be improperly "treating" hazardous waste without a permit. Consequently, the only lawful disposition for thousands of dollars of pure product drums or totes that were simply inadvertently misdirected and retrieved, is the costly and entirely unnecessary disposal of the material as "hazardous waste."

In particular, under Region V's novel theory, all trailers intended and used to carry empty containers to reconditioners would have to be prophylactically licensed as hazardous waste transport vehicles to protect against the infrequent but potential possibility that one load, at some point, will contain a misdirected non-empty container. Moreover, all such trailers would need to deliver their contents to facilities permitted as hazardous waste treatment and disposal facilities to, again, guard against the infrequent, but potential possibility that one load, at some point, will contain a misdirected non-empty container. Such an approach to the empty container rule is not necessary to fill any regulatory "gap" in enforcement. If a Supplier inadvertently ships a product drum or tote to a reconditioner, and then has to retrieve that container, there are appropriate and significant enforcement consequences that can be imposed by DOT.[9]

Region V's assertion that a reconditioner is transformed into a "hazardous waste transporter" by merely transporting a Supplier's misdirected product, which in all instances is returned to the Supplier as agreed upon and expected, is based on an unsupportable conclusion that these containers are "abandoned." That is not correct, and the Region's illogical interpretation would have significant and costly implications for both manufacturers and reconditioners, and would render the empty-container rule meaningless.

---

[9] *See, e.g.*, 49 C.F.R. Part 107, Subpart D, Appendix A.

B. Storage of Non RCRA-Empty Containers

When CLCM unloads trailers at its locations, that is the first opportunity CLCM has to inspect the containers. Any containers that do not meet the definition of "RCRA empty" are labeled, segregated and held temporarily until they are retrieved by, or on behalf of the Supplier (who retains ownership). Under Region V's strained conclusion that the containers are "abandoned," they are therefore waste and potentially "hazardous waste." Region V has alleged that the temporary holding of non RCRA-empty containers at CLCM's locations is therefore the unpermitted "storage of hazardous waste."[10]

For all the reasons noted above, this is an incorrect interpretation of the definition of "waste" under RCRA, is factually inaccurate since the owners of the containers always get those specific containers back, and it creates unsound environmental and costly economic consequences.

C. Once a Supplier Empties a Container in Accordance With the RCRA-Empty Rule, That Designation Does Not Change During Reconditioning

Compliance with the RCRA-empty rule occurs at the Supplier's facility. Under RCRA, if a Supplier has emptied a container, and "[a]ll wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping and aspirating, *and* … [n]o more than 2.5 centimeters (one inch) of residue remain on the bottom of the container,"[11] the container is empty for purposes of RCRA and any residual contents are not regulated under RCRA.

Two points are notable here. First, in promulgating the RCRA-empty rule, the Agency anticipated that some residual material might remain in the container. During the rulemaking, the Agency noted,

> One commenter asked for clarification of when a drum is "empty," noting that there is always a residue in drums, even when they are completely drained. The Agency recognizes this fact, and is using the words "empty" and "emptied" in the practical, rather than the absolute, sense. Larger containers, such as drums, are usually aspirated or pumped out. This leaves a small residue on the bottom. This should never be more than one inch and, in most cases, is substantially less.[12]

---

[10] RCRA NOV at pp.3-4.

[11] 40 C.F.R. §261.7(b)(1) (emphasis in original).

[12] U.S. Environmental Protection Agency, Document No. 24401-41 (Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA, Subtitle C, Section 3004: General Comments on Storage) (Dec. 30, 1980), at pp.39-40.

At a Supplier's manufacturing facility, product is removed from industrial containers in various ways – often by pumping the product as EPA anticipated. This method leaves residue in the container that the Supplier is not equipped to remove – they may not have the mechanical equipment, flexibility in the manufacturing process, or safety protocols to invert and slowly drain a container, for example.[13] Indeed, even if a Supplier had the processes to invert and drain every container, small amounts of residual material will always remain in a drum or tote. And that is expressly permitted under the rule that EPA adopted. EPA could have adopted an alternative rule along the lines of the "California Drip Dry" standard which provides that "a container is empty when there is no longer a continuous stream of material coming from the opening when the container *is held in any orientation.*"[14] EPA chose not to do so.

Second, the federal RCRA-empty standard does not require a generator to employ any method that is not "commonly employed," even if it is possible. In our discussions with Region V, it appears that the Region asserts that a container that meets the RCRA-empty standard at a Supplier's facility is no longer empty at a reconditioning location, if a reconditioner can make it "pourable." But that is not the standard stated in the regulations. For example, "pourable" residue may remain in a container "aspirated or pumped out." The container is nevertheless considered empty under EPA regulations if aspiration is the "commonly employed [method] to remove materials from that type of container … *and* … [n]o more than 2.5 centimeters (one inch) of residue remain on the bottom of the container.[15] Residue that is not removable by the Supplier could be rendered "pourable" at a later point. One of the CLCM locations has a large industrial "can opener" that entirely slices off the steel tops of otherwise closed drums that have two small "bung holes" on the top. Jostling or temperature changes during transport or proximity to the furnace may also affect the residuals. Regardless of cause, the point remains the same under the rule – if a Supplier creates an empty container that meets the regulatory definition at their industrial facility and upon acceptance by the reconditioner as empty, that designation must remain with the container as it is processed by the reconditioner. The fact that a drop of material might drip or "pour" from the container when a reconditioner inverts the container in the midst of the reconditioning process cannot suddenly make a RCRA-empty container, "non-empty."

D. The Processes of Washing and Burning Containers, Which are Inherent in the Reconditioning Industry, are Not the Treatment of Hazardous Waste

Consistent with industry-wide practices, CLCM washes empty containers, or moves the containers through a furnace, in order to remove residual material. In this enforcement action, Region V

[13] EPA guidance reiterates that the user's commonly employed methods should be employed, including valves at the bottom of railroad tank cars (Letter from John H. Skinner, Office of Solid Waste to Karl J. Klepitsch, Jr., Waste Management Branch, dated November 28, 1984)(RCRA Online 11048).

[14] California Department of Toxic Substances Control, Fact Sheet: Managing Empty Containers, dated February 2009, at p.2 (Containers That Held Pourable Materials)(emphasis added).

[15] 40 C.F.R. §261.7(b)(1)(emphasis in original).

asserts that if any residue is removed during the reconditioning process even from an indisputably RCRA-empty container, the federal empty container rule no longer applies; CLCM must make a new waste determination at the instant the molecules of material are removed from the container.[16] The Region's novel position is that the mere act of cleaning residue from a container, which is as inherent in the reconditioning process today as it was in 1980, constitutes the treatment of hazardous waste.[17] This position is entirely inconsistent with the RCRA rulemaking history and with the Agency's prior interpretations, and if sustained, will render the RCRA-empty rule meaningless.

EPA's regulations provide that "[a]ny hazardous waste remaining in either: an empty container; or an inner liner removed from an empty container … is not subject to" RCRA regulation.[18] Significantly, before finalizing this regulation, EPA solicited comment on whether it should regulate the removal of residue from used industrial containers.[19] The Agency considered adding the words "until it is removed from the container" to the end of 40 C.F.R. §261.7(a) so that the exemption from RCRA would only apply to such residue until the moment it is removed from the container.[20] While this is the way Region V would like to read the current regulations, the language was not and has not been added to the regulation. In 1982, the Agency recognized that the removal of such residue was ancillary to the reconditioning process, and that requiring such residue to be managed as hazardous waste would impose substantial burdens on industry and potentially end the environmentally beneficial practice of reusing containers.[21] Instead, the Agency chose the wiser course, choosing only to regulate the new waste that results from the reconditioning process – the new wastes that are spent washwater, or furnace ash.[22] And indeed, CLCM properly characterizes the spent washwater and furnace ash that is generated at its locations.[23]

---

[16] RCRA NOV at p.4.

[17] RCRA NOV at p.5.

[18] 40 C.F.R. §261.7(a).

[19] *Hazardous Waste Management System: General Hazardous Waste Management System; Identification and Listing of Hazardous Waste*, 45 Fed. Reg. 78524, 78526-27 (Nov. 25, 1980).

[20] *Id.* at 78526-27.

[21] *See Hazardous Waste Management System; Identification and Listing of Hazardous Waste*, 47 Fed. Reg. 36092, 36096 (Aug. 18, 1982).

[22] *Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures ("Headworks Exemptions")*, 70 Fed. Reg. 57769, 57779 (Oct. 4, 2005).

[23] Courts and numerous EPA guidance materials confirm that if the manner of removal or subsequent management of residue removed from a RCRA-empty container generates a new hazardous waste, then that new waste is subject to regulation under RCRA, but is not subject to RCRA based on the original contents. *See, e.g., K.P. McNamara Nw., Inc. v. Dep't of Ecology*, 173 Wn. App. 104 (Wash. Ct. App. 2013) (rinse water from the washing of the RCRA-empty containers must be appropriately characterized and managed); *Letter to Casey Coles from Robert Springer, EPA Director Office of Solid Waste*, dated April 12, 2004 (RCRA Online 14708) (confirming that where a rinsing agent includes a solvent that would be hazardous waste when discarded (which is not the case for the CLCM locations), the resulting rinsate may be hazardous not

In direct contradiction of the RCRA regulations, the Region claims that "[w]hen and where residue is removed from an 'empty' container is a new point of waste generation requiring a waste determination."[24] According to the Region, it is no longer necessary that the removal or subsequent management of the residue generates a new hazardous waste before the full suite of RCRA regulations apply.

That position is all the more remarkable, and indefensible, given that the Agency has also already opined on the RCRA status of drum furnaces and the process of reconditioning. In 1986 the Agency responded to the direct question: "whether burning of the residue in empty drums constitutes incineration (treatment) as defined in the RCRA regulations." EPA unequivocally stated that,

> The regulations, at 40 CFR 261.7(a)(1), clearly state that "[a]ny hazardous waste remaining in … an empty container … is not subject to regulation under …RCA [sic]." Since the residue is not regulated, its management does not constitute hazardous waste management. In your referenced example, the burning of residue by a drum recycler would not be considered incineration of hazardous waste and would not require a permit.[25]

The Agency has reaffirmed this position as recently as the 2011 revisions to Part 60, Subpart CCCC which define a "burn-off oven" as: "any rack reclamation unit, part reclamation unit, or drum reclamation unit. A burn-off oven is not an incinerator, waste-burning kiln, an energy recovery unit or a small, remote incinerator under this subpart."[26]

The Region's enforcement position in this matter inexplicably flies in the face of the regulatory history, the language of the regulations, and the Agency's own decades-settled pronouncements.

---

because of the material that was removed from the container, but because of the nature of the rinsing agent); *see also* 70 Fed. Reg. at 57779; *Letter from Marcia Williams, Director of Solid Waste to Daniel R. Cookey, Mobile Tank Care Services,* dated December 12, 1985 (RCRA Online 125122); *Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to. Richard G. Stoll, Freedman, Levy, Kroll, and Simonds,* dated April 10, 1990 (RCRA Online 11504); *Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to Cynthia V. Bailey Executive Director Department of Waste Management,* dated June 5, 1989 (RCRA Online 11431). However, nothing in any of these documents supports the position that the waste determination must be made at the instant residue from an empty container is removed from the container and before it contacts the washwater or is burned.

[24] RCRA NOV at p.4.

[25] Letter to Dale D. Parker, Ph.D. from Alan S. Corson, Branch Chief, Studies and Methods Branch, dated Jan. 7, 1986 (RCRA Online 12535).

[26] 40 C.F.R. §60.2265; *see also Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Proposed Amendments; Non-Hazardous Secondary Materials That Are Solid Waste,* 76 Fed. Reg. 80452, 80460 (Dec. 23, 2011).

III. REGION V'S NOVEL INTERPRETATION HAS SUBSTANTIAL NEGATIVE IMPLICATIONS FOR INDUSTRY AND THE ENVIRONMENT

RIPA summarized in its February 2018 letter to Administrator Pruitt the substantial negative effects that Region V's proffered interpretation would have on industry and the environment.[27] As noted in the letter to Administrator Pruitt, RIPA estimates that the cost for reconditioners using drum furnaces to obtain hazardous waste treatment, storage and disposal facility permits would necessitate $4 million in initial permitting and upgrade costs, and annual compliance costs of $700,000 per location. Reconditioners with wash operations similarly would incur over $2 million in initial permitting and upgrade costs, with annual compliance costs exceeding $500,000 per location. These costs would overwhelm the reconditioning industry, where the annual revenues of approximately half of the industry are less than $6 million.[28] Those costs would be passed along to industrial companies that may opt to dispose of used containers and simply procure competing new containers, a practice which will recklessly fill landfills and voraciously consume additional raw materials. In addition, in a recent study done for RIPA to estimate the overall costs to its suppliers, it was determined the impact would exceed $1 billion per year.[29]

All of these impacts will be imposed on industry in the United States without any demonstrated need for the new regulatory program, without any demonstrated environmental harm the Agency is attempting to address, and without following proper legal procedures for the implementation of new, industry-altering environmental rules.

IV. CLCM'S PROPOSED RESOLUTION OF THIS MATTER COULD SERVE AS A NATIONAL MODEL FOR THE RECONDITIONING INDUSTRY

CLCM has proposed a resolution of this matter that includes the implementation of a "Non-Empty Container Management Plan," and has provided a draft of the plan to the Region. This plan exceeds the regulatory requirements under RCRA, imposes time limits on the storage of non-empty containers, would require CLCM to report to the state environmental agency Suppliers who fail to retrieve containers within an allotted time period, and would define the company's processes for non-empty drum segregation, storage, labeling and inspection.[30]

---

[27] Letter from Paul Rankin, President of RIPA, to Scott Pruitt, EPA Administrator, dated February 1, 2018 (Attachment 2) at pp.3-4.

[28] *Id.*

[29] The Economic Impact of Requiring Industrial Packaging Reconditioning Companies to Become Hazardous Waste Treatment, Storage and Disposal Facilities: Capital Policy Analytics (Draft, January 2018).

[30] CLCM's proposed plan is also consistent with the requirements that Ohio EPA has already imposed on the industry's largest company, Industrial Container Services. *See In the Matter of Industrial Container Services—OH, LLC, Director's Final Findings and Orders,* Ohio Environmental Protection Agency, dated September 28, 2015.

FOLEY

FOLEY & LARDNER LLP

CLCM and RIPA welcome the opportunity to discuss how these measures could provide the framework for a national, industry-wide compliance program to be pursued in cooperation with the Agency as part of OECA's "compliance assurance" mission, paralleling its "enforcement mission." We look forward to our upcoming meeting and are available to discuss any questions you may have about this information.

Sincerely,

Linda E. Benfield

Attachments

cc w/attachments: Ole Rosgaard
Gary R. Martz, Esq.
Paul Rankin
Richard Schweitzer, Esq.
Ronald J. Tenpas, Esq.
Duke K. McCall, III, Esq.
Jeffrey Cahn, Esq.
Erik H. Olson, Esq.

Attachment 1

Recycling for a cleaner America

Drum Pickup

Mid-America Steel Drum

An EarthMinded Company
Factory and Office - 8570 S. Chicago Rd.
Oak Creek, WI 53154
Phone: 414.762.1114 Fax: 414.762.1623

Pickup Number:
Date:
Est. Quantity:
Trailer:
Driver:

Delivery/Pick Up

Bill To

***** Title to Containers does not pass to MASD until Containers are unloaded and verified. *****
All Containers MUST be RCRA Empty

All Non-RCRA Empty Containers will be Rejected and will be subject to a $75 Processing Fee.

EMPTY DRUM CERTIFICATION

I hereby certify that these drums are "empty" as that term is defined in the national Enviromental Protection Agency regulations, 40 CFR 261.7*, and that they have been properly prepared for transportation under the regulations of the U.S. Department of Transportation, 49 CFR 173.29. *.*

* with regard to most regulated residues, EPA's 40 CFR 261.7 says: "A container ... is empty if:

(i) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating, and

(ii) No more than 2.5 centimeters (one inch) of residue remain on the bottom of the container ..."

EPA has explained this rule, saying that "one inch of waste material is an overriding constraint and may remain in an empty container only if it cannot be removed by normal means. The rationale for this provisions that there are certain tars and other extremely viscous materials that will remain in the container even after the container is emptied by normal means." For residues of products specifically listed by name in 40 CFR 261.33(e), EPA says the container is empty only "if the container ... has been triple-rinsed using a solvent capable of removing" the product, or has been cleaned by another method shown to achieve equivalent removal.

** DOT's 49 CFR 173.29 says that all openings on the empty container must be closed, and that all markings and labels must be in place as if the drum were full of its original contents. A DOT shipping paper is not required for transportation of a drum for reconditioning via contract or private motor carrier. DOT placarding is not required for vehicles carrying empty containers.

*** Title to containers does not pass to MASD until containers are unloaded and verified.

Customer Signature _____

SUBJECT TO COUNT

Driver Signature _____

Trailer No. _____

CLCM-RCRA-Q3(d)-000004

Attachment 2

51 Monroe Street
Suite 812
Rockville, Maryland 20850
TEL (301) 577-3786 / FAX (301) 577-6476
www.reusablepackaging.org

February 1, 2018

The Honorable Scott Pruitt, Administrator
United States Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Re: EPA Enforcement Initiative Affecting the Reusable Industrial Packaging Industry

Dear Administrator Pruitt:
I write on behalf of the Reusable Industrial Packaging Association (RIPA), the North American trade association for more than 60 companies that recondition reusable industrial containers at 110 locations across the United States. I want to bring to your attention a recent U.S. Environmental Protection Agency enforcement initiative that, through a novel interpretation of RCRA regulations that conflicts with both the plain language of the regulations and more than 35 years of Agency and industry practice, threatens to render the reconditioning and reuse of industrial containers in the United States economically infeasible. Such *de facto* regulatory amendment through enforcement is antithetical to the concept of notice and comment rulemaking. It also is unnecessary because the existing regulations are more than adequate to protect the environment and have been doing so since 1982.

If allowed to proceed, EPA's enforcement initiative not only threatens to end the environmentally beneficial practice of reconditioning and reusing industrial containers, it also will dramatically increase the costs of doing business for a broad range of industries that reuse industrial containers to control costs and reduce environmental impacts.

Below is a summary of the reconditioning industry, the regulatory framework EPA established more than 35 years ago, EPA's new enforcement initiative, and the negative effect this abrupt change will have on the reconditioning industry, companies that use reconditioned containers, and the environment. I welcome the opportunity to meet with you and your staff to provide additional information.

Overview of the Reconditioning Industry

The reusable industrial packaging industry reconditions used industrial containers such as steel drums, plastic drums, and composite intermediate bulk containers ("IBCs") to allow for their reuse by industries as diverse as chemical manufacturing and automobile production. Although the details of the reconditioning processes vary slightly depending on the type and condition of the container, as well as its end use, RIPA's member companies collect used industrial containers, wash or heat treat the empty containers to remove any residue, repair or replace any damaged parts, and perform leakproofness testing to certify the safety of the containers before returning them to use. These operations are

performed under strict environmental, health, and safety regulations at the federal, state, and local levels.

Collectively, the industry reconditions more than 25 million steel drums, 3 million plastic drums, and 3 million IBCs each year. These reconditioned containers are then resold to industrial users, instead of being inappropriately managed or discarded in landfills. Reusing these industrial containers not only avoids clogging landfills, it also significantly reduces energy consumption and air emissions arising from the manufacture of new containers.[1] Containers no longer fit for reuse are cleaned and prepared for scrap processing.

EPA's Regulatory Framework

In 1980, EPA considered whether it should regulate the removal of residue from empty industrial containers, in particular the removal of residue from containers that previously held a regulated substance. EPA concluded it was not necessary to do so. The Agency recognized that the removal of such residue was ancillary to the reconditioning process, and that requiring such residue to be managed as hazardous waste would impose substantial burdens on industry and potentially end the environmentally beneficial practice of reusing containers.

Specifically, EPA concluded that requiring such residue to be managed as a hazardous waste was not necessary to protect human health or the environment. Significantly, before reaching this conclusion, EPA solicited comment on whether it should regulate the removal of residue from used industrial containers. *See* 45 FR 78,524, 78,526-27 (Nov. 25, 1980). After considering the comments received, EPA rejected proposals to regulate the residue in containers that formerly held regulated substances. 47 FR 36,092, 36,096 (Aug. 18, 1982). The final RCRA regulations that EPA promulgated instead adopt the "empty container rule," which provides that a container with one inch or less of residue is deemed empty and "is not subject to regulation." 40 CFR 261.7(a)(1).

This does not mean that the reconditioning industry is free from regulation. It is not. Depending on the nature of the operations of a particular facility, it can be subject to regulation under the Clean Air Act, the Clean Water Act, or other applicable laws. Indeed, if the operations of a reconditioning facility generate a "new waste," that waste is managed in accordance with all applicable RCRA regulations, as appropriate. *See* 70 FR 57769, 57779 (Oct. 4, 2005).

EPA Region V's Enforcement Initiative

Notwithstanding this history and the clear language of the regulations, EPA Region V recently initiated enforcement action against a RIPA member based on a novel, unprecedented interpretation of the regulations that renders the empty container rule—and the notice and comment proceedings that preceded it—meaningless. According to EPA Region V, if during the reconditioning process any residue is removed from an empty container that formerly contained a regulated substance, the empty container rule no longer applies; the mere act of cleaning the residue from a container, which is inherent in the reconditioning process today and was inherent in the reconditioning process in 1980, constitutes the treatment of a hazardous waste. It is no longer necessary, in EPA Region V's view, that "the removal or subsequent management of the residue generates a ***new*** hazardous waste" before the full range of RCRA regulations apply. 70 FR at 57,779 (emphasis added). Such an approach is patently at odds with the empty container rule that EPA promulgated. EPA understood in 1982 when it

[1] Life Cycle Assessment of Newly Manufactured and Reconditioned Industrial Packaging; Ernst & Young Accountants LLP; Revised edition: October 2015. Life Cycle Inventory of Single-Trip and Multi-Trip Steel Drum Systems in the U.S., Europe, and Japan; Franklin Associates; January 1999.

EPA-R5-2019-002198_00000101

promulgated the empty container rule that residues would be removed from empty containers, and yet chose not to regulate the practice under RCRA. If EPA wishes to revisit its 1982 decision, the proper vehicle for doing so is the notice and comment rulemaking process.

In practical terms, EPA Region V's attempt to read the empty container rule out of the regulations means that reconditioning facilities, many of which have operated under EPA oversight for more than 35 years without being permitted as hazardous waste treatment and disposal facilities, must now be regulated as such. EPA Region V's interpretation directly contradicts the regulatory position that EPA adopted more than 35 years ago when it promulgated the empty container rule. EPA recognized then that it was not necessary or appropriate to require any nominal residue remaining in empty containers to be treated as hazardous waste. As long as the used industrial containers are "RCRA empty," the removal of any residue is ancillary to, and not the purpose of, the reconditioning process. When new waste is generated during the reconditioning process it is tested for hazardous waste characteristics if necessary and, if hazardous, is disposed of pursuant to RCRA regulations. EPA Region V's enforcement initiative upends this carefully considered and commonsense regulatory scheme, without notice, without any opportunity for comment, and without any demonstrated need for a new approach.

As if that were not enough, EPA Region V further has asserted that if a customer of a reconditioning facility inadvertently sends a non-empty ("heavy") container of a regulated substance (such as a virgin solvent) to the reconditioning facility, the customer's action subjects the reconditioning facility to regulation as a "hazardous waste storage facility." In EPA Region V's view, the "heavy" container and its contents must be treated as "discarded" hazardous "waste," even if the customer did not intend to discard the product, the customer expects and desires its return (because it is valuable to the customer), *and the container is in fact returned to the customer*. According to Region V, a reconditioning facility, by merely receiving and temporarily holding the product until it can be returned to the customer, is transformed into a "hazardous waste storage facility." EPA Region V's enforcement stance makes no sense and is unnecessary.

The reconditioning industry has longstanding practices in place to address the inadvertent shipment of a "heavy" container to a reconditioning facility.[2] The reconditioning industry requires its customers to sign an "empty container certificate," stating that all containers in the shipment meet EPA's emptiness standard. If a "heavy" container is inadvertently shipped, the "heavy" container is labeled as rejected and quarantined from other containers. The customer is promptly notified of its error and directed to make arrangements to retrieve the container as soon as possible. The return shipment is managed in accordance with applicable DOT regulations. Federal and state regulators have examined this practice on at least two prior occasions and found it sufficient as long as the containers are removed within a specified period of time.[3]

The Effect on Industry and the Environment

The cost for reconditioning companies to take steps now to comply with RCRA's regulations for hazardous waste treatment, storage, and disposal facilities, as Region V's enforcement initiative would require, would be substantial. For operations involving the heat treatment of containers it will involve $4 million in initial permitting and upgrade costs, with annual compliance costs of $700,000 per

---

[2] In 1986, RIPA launched a national campaign, "Responsible Container Management," to educate drum fillers and emptiers about the life-cycle of these containers. The program included an entire section on proper empty container management practices, including an explanation of the federal empty container rule. The program was presented to hundreds of companies throughout the U.S. In addition, an article was published in the leading national magazine for the chemical industry, "Chemical Week" ("Drum residue: A $1 billion inch,") that described in detail the empty container rule and steps being taken by the reconditioning industry to ensure emptiers' comply with it.

[3] *See* In re Industrial Container Services, Dkt No. RCRA-04-2008-4019(b).

facility.[4] Reconditioning facilities that engage in washing operations likely would be required to spend over $2 million in initial permitting and upgrade costs, with annual compliance costs exceeding $500,000 per facility.[5] The annual revenues of approximately half of the reconditioning companies in the United States are less than $6 million. Many companies are unlikely to survive the cost of the added regulatory burden.

The reconditioning companies that do survive would be forced, in order to comply with EPA Region V's novel interpretation of the regulations, to become hazardous waste treatment, storage, and disposal facilities. The additional management and regulatory costs of doing so are estimated to exceed $1 billion per year. Reconditioning companies would have no choice but to pass along these costs to their customers, likely rendering the reuse of used industrial containers economically infeasible since reconditioned containers are sold in competition with new containers of the same type. Disposal of used containers in landfills and the need to manufacture new, single-use containers would not only impose a significant added cost on U.S. companies, it would come at a significant added cost to the environment. More than 30 million additional containers would be added to landfills each year and more than 2 billion pounds of air emissions would be generated each year in the production of new industrial containers.[6]

* * * *

Simply put, EPA's existing regulatory framework for reconditioning used industrial containers is more than adequate to protect human health and the environment. If individual reconditioning companies are not meeting their regulatory obligations, EPA has a broad range of enforcement options to choose from. But EPA abandons its mission of "fairly" enforcing our nation's environmental laws when it takes enforcement actions that conflict with the plain language of the regulations and more than 35 years of Agency and industry practice.

We ask for your help in ensuring that EPA sticks to its mission and continues to apply its long-held and sensible interpretation of its "RCRA empty" container regulations. We look forward to meeting with you or others at the Agency if it would be helpful in understanding the legally ill-founded nature of this action as well as the significant economic burdens it will impose.

Sincerely,

Paul Rankin, President

cc: The Honorable Susan Bodine, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance
The Honorable Matthew Leopold, General Counsel, EPA Office of the General Counsel
Barry Breen, Principal Deputy Assistant Administrator, EPA Office of Land and Emergency Management
Cathy Stepp, Regional Administrator, EPA Region 5

---

[4] The Economic Impact of Requiring Industrial Packaging Reconditioning Companies to Become Hazardous Waste Treatment, Storage and Disposal Facilities; Capitol Policy Analytics; Draft: January 2018.
[5] *Id.*
[6] Life Cycle Assessment of Newly Manufactured and Reconditioned Industrial Packaging; Ernst & Young Accountants LLP

EPA-R5-2019-002198_00000101