XL Insurance

Environmental risk bulletin

Non-owned disposal site due diligence, selection and auditing

A commercial and industrial waste generator's responsibility doesn't end when the properly labeled and manifested containers leave their shipping dock. The company continues to be liable for their wastes as well as any costs associated with future releases of that waste if improperly managed after leaving their facility. This paper discusses the importance of establishing a written due diligence program for selection and on-going use of waste management contractors. It also provides a basic audit template that can be used as a starting point for designing a customized format or database that best suits your due diligence approach.

Non-Owned Disposal Sites (NODS) are generally defined by the pollution insurance industry as permitted and licensed waste management facilities that are not managed, operated, or leased by the customer. AXA XL's Pollution and Remediation Legal Liability (PARLL) policy provides NODS coverage to protect customers should they be named responsible for liability associated with a pollution condition on, at, under, or migrating from the treatment/disposal location.

Companies shipping waste to an off-site NODS can be tagged for investigation, cleanup, and disposal costs by environmental authorities when problems occur during treatment or disposal, even if the company's actions were completely legal at the time. So, it is critical that waste generators establish NODS due diligence and selection protocols in their environmental risk management programs to minimize NODS liability. Unlike most insurance carriers, AXA XL takes this exposure so seriously that additional underwriting evaluation is performed for our customers before scheduling specific NODS onto their policy. Feedback from this process can help our Insureds identify potential problematic NODS sites that need further scrutiny.

Waste generators can suffer even larger liabilities when NODS owners lack financial strength to continue operating and/or must declare bankruptcy without an interested buyer. This solvency exposure can be more difficult to discover during due diligence, particularly for privately owned NODS. When a regulatory agency must step in to investigate and remediate environmental contamination at a NODS, this typically results in a concurrent process to identify generators as potentially responsible parties (PRPs) to pay for allocated expenses. This can result in significant risk for generators as the following case illustrates.

An AXA XL Insured generated and shipped waste to a NODS in New Jersey, which was subsequently placed on the United States Environmental Protection Agency (USEPA) Superfund list when the owners became insolvent. Specifically, the Insured and other affiliated Named Insureds transported approximately 250 drums per month of non-hazardous petroleum impacted industrial solid wastes to the NODS for treatment and disposal over a period of four years. After a pollution release was confirmed at the NODS, the USEPA sent PRP letters to 13 facilities (i.e., generators) for cleanup cost recovery. Additional releases from

Continued ➲

on-site USTs were identified, which also increased the liability for all PRPs. The volume of impacted material requiring removal was budgeted at $1.9 million. This is the kind of unexpected cost that can impact annual earnings or even destroy an entire company! After significant internal investigations and defense expenses, the Insured provided evidence of more limited waste disposal practices at the NODS to dispute the cost allocation. The case remains open and is a prime example of why AXA XL doesn't just provide blanket NODS coverage for all customers without performing additional underwriting due diligence.

Background

In the United States, the Resource Conservation and Recovery Act (RCRA) establishes generator "cradle-to-grave" responsibility for hazardous waste that includes "joint and several liability." This means that if there is ever a future release of pollutants to the environment (e.g., a landfill contaminating groundwater) every generator sending waste to the NODS can be identified as a PRP and may be asked to share cleanup costs, sometimes regardless of the quantity or type of waste contributed. If some parties are unable to pay, or no longer exist, then others named as PRPs must pay more then their fair share.

For example, one of California's largest historic waste disposal facilities was the 538 acre BKK Landfill located in the Los Angeles suburbs. It began operating a hazardous waste landfill in the 1960s and a nonhazardous waste landfill in the 1980s, which shared various engineering controls for methane gas and leachate collection. In the early 2000s, the owner/operator no longer had the financing to maintain the site and the CalEPA Department of Toxic Substances Control (DTSC) issued consent orders to former customers naming over 50 corporations and municipalities as PRPs. They were required to pay for on-going support operations and necessary site remediation. This is just one of thousands of examples where waste generators have been identified by the USEPA or state-regulatory agencies as PRPs at NODS.

Although many permitted and operating sites are undergoing some type of corrective action, the larger and more complex the investigation and remediation, the greater the risk to generators. It is more likely that a NODS will become insolvent and/or declare bankruptcy if the site is undergoing a long, expensive corrective action process. Without financial restructuring or a prospective purchaser for the NODS, waste generators may be pulled in to address both immediate hazards as well as on-going cleanup.

Evaluating different types of NODS

Being identified as a PRP for funding the cleanup of a contaminated waste disposal site is not limited to RCRA Treatment, Storage, and Disposal Facilities (TSDFs). This can extend to other facilities such as municipal waste landfills, construction & demolition landfills, waste incinerators, wastewater treatment facilities, oil recyclers, drum reconditioners, electronic waste sites, and other recycling facilities. Generators of commercial/industrial wastes, regardless of the waste characterization (i.e., hazardous vs. nonhazardous), should have a thorough understanding of where and how their waste streams are managed, as well as the environmental controls that are, or are not, in place at the NODS. However, not all waste types need to be scrutinized in the same manner. Plant trash that is not categorized as a state special waste most likely is disposed at a RCRA Subtitle D landfill and should require less oversight as a generator. There are many common industrial waste streams that may not be classified as hazardous wastes but can still result in NODS liability. This can include a variety of production wastewaters, process wastes (e.g., sludges and dusts from pollution control equipment), used oils, antifreeze, and spent lead-acid batteries. If not managed properly at a NODS, these wastes can result in potential site contamination or a pollution event that results in liability for a generator.

There are many common industrial waste streams that may not be classified as hazardous wastes but can still result in NODS liability.

Certain types of NODS may also pose a greater risk to generators than anticipated, even if operations do not require environmental permits or significant regulatory agency oversight. For example, drum reconditioners generate significant amounts of wastewater from drum cleaning, washing, and burning activities and are frequently cited for wastewater violations. Fires and odors can also be an ongoing hazard at drum reconditioning facilities. Environmental releases and odors can lead to additional third party bodily injury / property damage claims that can threaten the ability of a facility to continue operating.

Scrap metal facilities are another industry that might be perceived as lower risk because most sites are not subject to heavy environmental regulation. Outdoor operations can result in migration of heavy metals such as lead, cadmium, arsenic, and hexavalent chromium from scrap metal storage, as well as petroleum hydrocarbons from vehicle and equipment processing areas. These activities may or may not be subject to stormwater pollution prevention and monitoring programs. This can result in soil and groundwater pollution at NODS sites that generators can become responsible for.

Importance of NODS due diligence

Should the disposal facility experience violations, fines, or be required to respond to an environmental release, regulatory agencies may further investigate the waste types managed and waste generators doing business with the NODS. During such an inquiry, it is important to have comprehensive waste disposal records and be able to demonstrate an acceptable standard of care. This includes establishing that contracted waste haulers and disposal facilities are properly permitted, in compliance, well-managed, and financially responsible. Generators should also know if the NODS maintains a closure/post closure fund and pollution liability insurance for their site.

This knowledge is essential because generators may be held liable when a contracted disposal facility is cited, fined, or named a PRP to a NODS cleanup. Regulators may factor this standard of care into

issuance of violations, fines, and allocation of remediation costs at NODS. Regulators may also ask generators to demonstrate the due diligence employed when selecting and maintaining waste contractors. Other company stakeholders may also ask if, prior to using a disposal facility, whether the NODS was determined to be operating responsibly, financially sound, and in compliance with all appropriate permits and regulations governing the screening, handling, treatment, and disposal of waste.

Documenting due diligence efforts

Due diligence must begin during the NODS selection process and then be updated periodically thereafter. Use of an audit form or database will enhance and standardize due diligence efforts; however, a formal NODS Due Diligence Program should also be created to provide context on how this information will be used. For example, policies should be established to:

- outline the approval process for a new waste vendor
- define what constitutes acceptable or nonacceptable audit findings
- define any special conditions under which NODS can be used (i.e., only certain waste streams)
- determine how a non-approved and approved contractor list will be established and maintained
- describe the frequency of follow-up audits/due diligence
- maintain audit records, contracts, insurance certificates and related NODS documentation
- define who is responsible for the above activities (corporate staff, plant managers, etc.)

For the NODS selected, generators should try to complete an audit form as fully as possible and obtain copies of permits and other information during the due diligence process. After selection, the data on the audit form and related documentation in the file should be periodically updated. As previously noted documentation and strong knowledge of NODS management can help demonstrate a standard of care for regulators, and other stakeholders, and may factor into liability allocations.

The attached audit template is a basic loss prevention tool designed to assist your firm's risk management efforts. Each item on the audit template serves to offer some assurance/protection by helping to establish a solid understanding of the disposal facility's operation. This can help minimize claims or the risk of becoming a PRP for a NODS cleanup.

Using this template

Not all NODS facilities merit the same level of review. The amount of information obtained depends on several factors including types of waste managed, volume of waste managed, and type of facility (e.g., landfill vs. used oil recycler). Also, when screening facilities, some criteria may be more important than others and certain NODS may require more frequent re-evaluation. If a NODS has been subject to violations or other regulatory action, this information may be sufficient to eliminate them from consideration as an approved vendor. Alternatively, conditions may be established limiting the NODS use for certain types of waste streams or requiring more frequent auditing.

The attached audit template is a basic loss prevention tool designed to assist your firm's risk management efforts.

Much of the information on this template can be collected through phone discussions with the facility and regulators. Some can be accessed from the internet or other public resources. Larger NODS may also have an "audit package" available upon request that includes key information. The onsite inspection section is designed to help verify data obtained over the phone and/or guide observations at the NODS during an on-site visit.

Some organizations may find the attached audit format to be insufficient for their documentation needs. This audit template should be considered a "starting point" for a more intensive audit and documentation process tailored to your needs. This may include retaining a third party consulting firm to conduct an independent audit. Regardless of the final audit format or internal/external resources engaged, it should be considered a best practice to consistently utilize the outline and present findings.

35 YEARS Securing the Future of the Environment

Risk engineering information provided by AXA XL's Environmental Team
505 Eagleview Boulevard, Suite 100, Exton, PA 19341
axaxl.com/insurance

6970_06/2022

Non-Owned Disposal Site Audit Template

GENERAL INFORMATION					
Name				Date	
Address					
Owner					
Phone			Email Address		
Type of facility		Date facility opened		Life expectancy	
Facility size		Treatment capacity		Storage capacity	
Facility hours		Number of trucks/tons permitted per day			
Date of first permit			Date of last permit		
Previous land use					

FINANCES/INSURANCE/CLOSURE & POST-CLOSURE COSTS
Review 10K and other publicly available financial reports.
Review insurance policies to ensure adequate pollution liability coverage exists to fund third party claims or site remediation
Review pending financial liabilities and financial strengths
Review written closure plan and ensure adequate funding exists to close treatment units and remediate site

Continued ➲

COMPLIANCE STATUS

1. Review the facility's permit status. Keep on file current copies of your waste disposal contractors' permits.

Permitting authority	Permitted activity	Permit #	Status	Expiration	Copied?

2. Is the facility permitted to accept your waste streams?

3. Are any additional permits pending?

4. What is the facility's waste acceptance protocol?
(e.g., analytical testing, special waste profiling, or monitoring at the gate?)

5. Does the company maintain a list of acceptable waste? Are any of these also not listed on the permits?

6. Does the facility have a Quality Assurance Program with the following:	Present	Date	Copied?
Description of waste management procedures?			
Waste and facility inspection programs?			
Employee training programs?			
Documentation protocols?			

7. Review most recent regulatory inspection reports for recommended corrective actions, Notices of Violation, Consent Orders, nuisance complaints, or enforcement actions.

Type of document & regulatory authority	Complaint or problem	Current status	Date

If the facility provides no inspection information, check with regulatory agencies.

Continued ➲

ENVIRONMENTAL MANAGEMENT AND SYSTEMS		
The potential for liability in the waste disposal industry makes the development of documentation procedures, accurate management and maintenance of environmental records, and designation of a responsible person critical to the waste disposal contractor and its clients.		
8. Name of responsible individual:	Phone:	( )
9. Review record keeping procedures for the following information:		
Role and responsibilities		
Record maintenance schedule or system		
Report submission schedule or system		
Internal inspection schedule and inspection reports		
10. Review responses to regulatory inspections or permit amendments, if any.		

BROKER/TRANSPORTER
11. What criteria are used to select disposal sites?
12. What hauling permits have been obtained by the broker?
13. Is pollution liability insurance coverage adequate and current?
14. Are personnel trained in appropriate manifesting and shipping document preparation, labeling, hazard designations, quantities, and other critical information?

SITE INSPECTIONS
A site inspection should be conducted before signing a waste disposal contract. The site inspection should occur after the risk has been deemed acceptable in the areas of compliance and financial stability. Include interviews of those responsible for waste operations to assess their level of knowledge and competence and to answer some of the questions below.
15. Determine whether the treatment, recycling, or disposal of waste is consistent with permit requirements.
16. Identify the waste management units onsite (UST, AST, surface impoundment, landfill, drums).
17. Estimate the number of waste management units and their capacities in volume or area.

Continued ➲

18. Do waste management units appear to be well-contained from spill, run-off, run-on, etc.
19. Is stored waste appropriately protected from the weather, adequately contained, and accurately labeled?
20. Determine where and how waste is disposed.
21. Assess facility's overall appearance for housekeeping. Does the level of cleanliness appear adequate for the activities at the facility?
22. Review surrounding land use. How close is the nearest water body, residences, or other sensitive receptors?
23. Has the facility conducted any environmental investigations? If so, why and what was found?
24. Does the facility monitor ground water, discharges to POTWs, or other emissions?
OBSERVATIONS:
25. Does the facility appear secure from vandalism?
26. Are any of the following present: ponded water, odors, or emissions?
27. Is there any evidence of waste migration from the facility?

For additional information, you may want to contact a firm that will search regulatory and other databases for a fee.
The following websites are good sources of compliance information on specific locations:

- www.edrnet.com (for profit organization providing regulatory database searches)
- www.epa.gov/echo/ (USEPA's Enforcement & Compliance History Online (ECHO))
- www.scorecard.org (private anti-pollution organization providing regulatory release data)
- www.chwmeg.org (non-profit industry auditing group)