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# Ten Commandments of RCRA Compliance

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Gatekeeper Regulatory Roundup  
March 23, 2018

The logo for Barton Day Law, PLLC (BDL) is located in the bottom left corner. It consists of the letters "BDL" in a white, serif font, centered within a dark blue rectangular box. Above and below the letters are thin, horizontal green lines. Below the box, the website address "bartondaylaw.com" is written in a white, sans-serif font.

**BDL**

bartondaylaw.com

**Barton Day**

Law Offices of Barton Day, PLLC

Office: (602) 795-2800

Cell: (602) 284-3450

[bd@bartondaylaw.com](mailto:bd@bartondaylaw.com)

# 1. Know your priorities

- Strive for perfection
  - Full compliance is not discretionary
  - Knowing non-compliance is criminal (and the bar for “knowing” is *extremely* low)
- But prioritize
  - Bullet-proof business-critical issues
  - Avoid “big bang” issues
  - Have no fish in your barrel

# Business-Critical Issues

- Identify any compliance issues that are central to business operations
  - Necessary process or waste management activities
  - For which there are no practical compliance alternatives
- And rule out compliance issues that could shut down key operations
  - Confirm compliance
  - Resolve any uncertainties

# “Big Bang” Issues

- Other high-stakes regulatory compliance issues
  - Failure to identify hazardous waste as such
  - Improper hazardous waste management
- Issues raising credible non-regulatory concerns
  - Actual health or safety concerns
  - Actual adverse environmental impacts
  - Business risks or potential liability

# Fish In Your Barrel

- Repeat violations
  - You know if you've had issues
  - You know agencies are going to look
  - Repeated failure raise the stakes
- The usual suspects
  - You know (or can learn) what inspectors are likely to look for
  - You know where obvious violations are most likely to occur

## 2. Don't miss waste generation

- Recognize every waste generated and every point where waste is generated
- Consider both location and timing
- Point of generation is critical
  - Waste determinations must be made for waste *as generated* (before any treatment or commingling)
  - For hazardous waste, management requirements apply from the point of generation forward
- **Miss this and you miss everything**

# Key Principles

- Secondary material is generally waste “generated” when:
  - It is removed from a product storage or process unit in which it is produced or
  - It is produced in a waste management unit
- Special circumstances:
  - Unused product
  - Spilled product
  - “Continued use”

# Recycling

- Material that is being recycled generally requires the same kind of assessment as waste being discarded
  - Material being recycled *is waste unless an exclusion applies*
  - And the applicability of recycling exclusions generally turns on the same kind of information needed to make waste determinations
- Beware: agencies often characterize production or maintenance activities as “recycling”

# 3. Make reliable waste determinations

- You need to make determinations for all wastes (including non-hazardous wastes)
- You need to document your waste determinations
- **You have to get the right answers**
  - Hazardous waste is regulated whether you know it's hazardous or not
  - Requirements can be different depending on the waste codes (and treatability groups) involved
  - Good faith is not a defense

# Common Problems

- Wrong point of generation
- Generator knowledge that isn't
- Over-reliance on SDSs
- Misunderstanding of listings
- Errors in waste code bookkeeping

## 4. Be permitted or be exempt

- You must have a viable theory of compliance from the point of generation forward
  - Every unit/activity must be permitted or exempt
  - From generation to end point (*e.g.*, CWA discharge, off-site shipment, waste rendered non-hazardous)
- Choose your exemptions wisely
  - Understand the requirements and limitations of each exemption
  - Understand the impacts on generator status

# 5. Focus on who has to comply

- Compliance typically requires appropriate performance from non-environmental staff
  - Training is required and compliance must be enforced
  - **But make the required tasks as easy as possible and explain why they are necessary**
- *Anyone* can cause a violation, so *everyone* needs at least some level of instruction
- Be as responsive and constructive as possible when issues arise

## 6. Manage change

- The only consistent rule is that the rules keep changing
- Changes in recycling or waste management practices can alter the applicable requirements
- Changes in raw materials, processes, or products can change waste streams and characteristics
- Changes in personnel or responsibilities create opportunities for dropped balls (training, plans, compliance tasks)

# 7. Get out and look around

- Look for anything unexpected
  - Unusual activity
  - Anything out of place (e.g., stray containers)
- Look at potential issue areas
  - Boneyards
  - Dumpsters
  - Dry wells, sewers, ditches, *etc.*
- Storage areas (including product and material storage areas)

## 8. Review your own files

- Make sure your documentation is complete and current (paperwork violations are fish in your barrel)
- Organize your files with inspections in mind
  - Include all required documentation
  - Keep any privileged and confidential documentation separate, to avoid inadvertent disclosure
- Ensure that files are readily accessible

# 9. Have your story straight

- Make sure you have documentation outlining your position on core compliance issues, including the basis for:
  - Your waste determinations
  - Claimed recycling exclusions, and
  - Claimed unit exemptions
- This helps ensure that practice is consistent with theory, and
- That you can provide prompt and cogent responses to compliance inquiries

# 10. Resolve compliance concerns

- Resolve ambiguous issues
  - Agency knowledge plus inaction does not equal agency approval
  - Unresolved issues give agencies ammunition that can be used against you *at the worst possible time*
- Address internal compliance concerns
  - Lingering issues can raise unnecessary concerns
  - And can make noncompliance look “knowing”

# Allegations of noncompliance

- Defend the defensible, but consider whether reasonable accommodations would be appropriate to resolve agency concerns
- In cases of clear noncompliance:
  - Don't make legal admissions
  - Don't make stupid arguments
  - Don't wait to be told to comply
  - Don't wait to be told *how to comply*
  - Fix both the problem and the cause

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[bartondaylaw.com](http://bartondaylaw.com)

## BARTON DAY

President

Barton Day Law, LLP

10645 N. Tatum Blvd., Ste 200-508

Phoenix, AZ 85028

Phone: 6002.795.2800

Mobile: 602.284.3450

[bd@bartondaylaw.com](mailto:bd@bartondaylaw.com)

- Barton Day is a lawyer, based primarily in Washington D.C. and Phoenix, Arizona, who has been assisting businesses and business organizations with environmental, energy, and other regulatory matters for over 30 years. Throughout his career, he has had extensive experience helping his clients to shape the regulations and regulatory policies affecting their business interests. He has frequently worked with **Federal, state, and local agencies** to obtain agency guidance or interpretations resolving potential regulatory disputes, eliminating regulatory ambiguities, and establishing effective “safe harbors” for compliance, and has represented clients in numerous traditional and non-traditional rulemaking proceedings as well as in litigation challenging agency rules. Bar Admission: Arizona & District of Columbia
- He has also assisted clients in matters involving environmental reviews under the **National Environmental Policy Act** (NEPA), and with permitting, permit appeal, compliance, and enforcement matters under a wide range of Federal, state, and local regulatory programs addressing issues such as solid and hazardous waste management, recycling, wastewater discharges, air emissions, environmental remediation, worker safety, hazardous materials transportation, pipeline safety, and energy efficiency. He has particularly extensive experience with Federal and state hazardous waste regulatory programs implementing the **Resource Conservation and Recovery Act** (RCRA) and Federal and state **Underground Injection Control** (UIC) programs implementing the **Safe Drinking Water Act**. Ranked in Chambers USA: America’s Leading Lawyers for Business, Environment (including water rights), 2007-2014.