



THE CUBICAL

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Echos of the 90s: **EPA's NECI, Multimedia Inspections, and the Return of Community-Based Enforcement**

Sometimes it's easy to forget how robust EPA's enforcement activity was during the Second Clinton Administration. EPA's enforcement arm during this era focused quite a bit of attention on particular geographical areas that were believed to be unduly burdened by persistent pollution and environmental compliance problems. Back then, this approach was referred to as "community-based enforcement." The Lake Charles area in Louisiana, and the Charleston Neck in South Carolina were among the geographical areas blanketed by teams of EPA inspectors as part of this approach.

Faint echos of this period can be found in the recent National Enforcement and Compliance Initiatives (the "NECI") issued by EPA on August 17th. On regular four-year cycles, EPA establishes the NECI in order to focus on, and address, the most serious and widespread environmental problems facing the country. One of the initiatives identified in the most recently issued NCEI is an effort to reduce levels of air toxics pollution in "overburdened communities." As EPA did with its community-based enforcement program some 25 years ago, this initiative will target facilities "in communities already highly burdened with pollution impacts."

The recent NECI does not provide much detail regarding the types of enforcement tools EPA may use in pursuing its compliance and enforcement aims. However, it's a pretty safe bet that EPA will make considerable use of its tried and tested multimedia inspection approach. The multimedia enforcement inspection started to come into vogue during the Clinton era and emerged as a potent tool for obtaining significant penalties from members of the regulated community. Unlike a traditional air inspection

or hazardous waste inspection, multimedia inspections allow EPA to broaden its focus and compare and contrast emissions and compliance data across different media and compliance programs once it initiates an inspection of a particular facility. A facility that is the subject of a multimedia inspection might initially find itself as a target because of persistent air pollution problems, but wind up paying a seven-figure penalty because of violations of hazardous waste management requirements or NPDES wastewater permit discharge limits.

Multimedia enforcement inspections have yielded tens of millions of dollars in penalties for EPA over the last several decades. To achieve its objectives under the recent NCEI, EPA will likely continue to rely on this particular enforcement tool. The upshot of this is that while facilities in overburdened communities may initially find themselves in EPA's crosshairs because of the Agency's focus on HAPs, they may see their other compliance programs come under the microscope as well. It is entirely possible that some of these facilities may ultimately pay large penalties for violations that have little, if anything, to do with HAP requirements.

Facilities in such overburdened communities should begin to prepare for this possibility now, and make certain that all of their environmental compliance programs are up to par.

EPA's Regulation of HazWaste Containers: *How Empty Is Empty?*

Operators who generate and manage used hazardous waste drums on a regular basis will want to take note of a recent Advance Notice of Proposed Rulemaking ("ANPRM"). In this ANPRM, issued by EPA on August 11th, the Agency stated that it would be soliciting information and comments to assist in the potential development of strategies for ensuring the proper management of used hazardous waste management containers. EPA indicated that it would be considering both regulatory (i.e., rulemakings) and non-regulatory (i.e., issuance of guidance or interpretive statements) options to address this issue.

One of the areas of focus identified in this ANPRM is the emptying of used hazardous waste containers prior to re-use. EPA's current hazardous waste management regulations establish a regulatory definition for when a container that was used to contain regulated hazardous waste is considered to be "empty." Among other requirements, there can be no more than an inch of residue remaining in a hazardous waste container before it is shipped off to a drum re-conditioner or otherwise prepared for some other form of re-use.

In facility jargon, this one inch or less of residue is sometimes referred to as the "boot" or "heel." The idea behind this rule is that it is often impractical or impossible to remove every last drop of material from a drum or similar storage container. As long as a facility operator has taken reasonable steps to ensure that less than inch of residue in the drum remains (and has met all other applicable requirements), the drum will be considered to be empty of any regulated hazardous waste and can thus be re-conditioned or re-used without the need to comply with onerous hazardous waste management regulations.

So then, does EPA's ANPRM mean that "the boot will *get the boot?*" Perhaps not entirely. However, EPA did note that one of the options under consideration is to

change the amount of residual material that can be left behind in order for the container to be considered as "empty." EPA also noted that it may move away from a "one size fits all" approach and take into account material-specific characteristics such as viscosity when determining whether a container is "empty."

It is important to remember that the ANPRM did not formally propose a rulemaking. It will likely be quite some time before generators may be required to modify their hazardous waste drum handling practices. In the meantime, generators who manage re-used and empty hazardous waste drums and other containers on a regular basis would be well-advised to begin preparing now for possible regulatory and/or policy changes in this area in the future.

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