

Waste Cos. Must Note EPA's New Focus On Paper Inspections

By **Justin Savage, Marshall Morales and Nicole Noelliste**

In June, the U.S. Environmental Protection Agency issued an enforcement alert that highlights recent enforcement activities related to its National Compliance Initiative focus on air emissions regulated under the federal Resource Conservation and Recovery Act, or RCRA.

The National Compliance Initiative serves to identify the EPA's leading priorities for national enforcement — and indeed, it is believed that the agency has numeric targets for inspections and investigations for RCRA air emissions compliance requirements.

Facilities that generate, treat, store or dispose of hazardous waste must be aware of these requirements, and the potential enforcement implications of the EPA's initiative. But the agency's enforcement strategies have changed during the COVID-19 pandemic, as have the operations — and air emissions — of many facilities.

The Resource Conservation and Recovery Act

The RCRA authorizes the EPA to regulate the generation, transportation, storage, treatment and disposal of hazardous wastes. The RCRA thus applies to the broad range of industries that generate and manage hazardous waste, such as chemical manufacturing, refining and many others.

The EPA has issued complex rules regulating owner and operators of facilities that manage hazardous waste. These rules define hazardous wastes, and establish how a hazardous waste generator must contain, store and manage its wastes. States have developed their own RCRA hazardous waste programs, and once approved by the EPA, the state rules operate in lieu of federal law.

As directed by Congress, the EPA has also issued air emission standards to monitor and control emissions from facilities that generate, treat, store and dispose of hazardous waste. Found in Part 265 of the EPA's RCRA regulations, these standards include the following:

- Subpart AA: This covers air emissions controls for process vents associated with distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping



Justin Savage



Marshall Morales



Nicole Noelliste

operations that manage hazardous wastes with organic concentrations of at least 10 parts per million by weight.

- Subpart BB: This covers leak detection and repair requirements for equipment in contact with hazardous wastes — such as pumps, compressors, pressure-relief devices, valves and lines — with organic concentrations of at least 10% by weight that are managed in regulated RCRA units. If equipment contacts hazardous waste or its residues fewer than 300 hours per year, or if the equipment is in vacuum service, it is exempt.
- Subpart CC: This covers emission standards for controlling emissions from tanks, containers and surface impoundments that hold hazardous waste, unless exempt — such as if the unit is equipped with air emission controls in compliance with Clean Air Act, or CAA, standards.

The regulations include detailed related requirements to demonstrate compliance, such as labeling, monitoring, inspections and record-keeping. Unlike other RCRA requirements, there are no parallel state rules.

The EPA's Enforcement Alert

The recent enforcement alert details the EPA's ongoing efforts to investigate compliance with RCRA air emission requirements, as well as related CAA requirements. Here are five key aspects of the alert.

Reclassification of CAA Major Sources

Consistent with the agency's withdrawal of the "once in, always in" policy, applicable to Section 112 of the Clean Air Act, a major source that applies an enforceable limit on its potential to emit hazardous air pollutants, and takes measures to bring its hazardous air pollutant emissions below major source thresholds, becomes an area source.

If a facility which was previously exempt from RCRA air requirements through a CAA major source permit is reclassified as an area source, owners or operators should evaluate whether any previously RCRA-exempt units are now required to be covered under its RCRA permit.

The EPA's Approach to RCRA Air Emissions Inspections

In recent years, the EPA has taken a three-pronged approach when inspecting facilities for compliance with RCRA air emission requirements.

- EPA inspectors use photo and flame ionization detectors and Method 21 monitoring to identify any leaks, and forward looking infrared cameras to identify releases to the environment.

- The agency conducts process-based inspections and sampling of waste to determine whether all subject equipment, such as process vents, tanks or containers, is included in the facility's RCRA air program.
- The agency reviews records to determine whether RCRA requirements, such as equipment identification, location, tagging, leak detection monitoring and calibration of instrumentation, are being met.

However, during the COVID-19 pandemic, with fewer in-person inspections, the EPA is conducting paper-based enforcement activities by issuing requests for information under RCRA Section 3007. EPA headquarters and regional offices are operating remotely, so the requests for information reflect the remote working environment, as well as travel and site-access issues.

Frequently Cited Compliance Issues

From 2017 to 2019, the EPA conducted 325 inspections at RCRA facilities categorized as hazardous waste large quantity generators and treatment, storage and disposal facilities subject to the RCRA air emissions rules. As a result of these inspections, the agency pursued enforcement actions alleging violations such as:

- Improper monitoring, including as the use of faulty leak-detection instruments, and performing monitoring incorrectly or inconsistently with regulatory requirements, which specify that regulated entities must actively look for emissions;
- Improper use of exemptions, such as improper application of the 300-hour or in-vacuum service exemptions from the Subpart BB standards, or the failure to maintain necessary records or provide the required reports, even if otherwise exempt; and
- Air emissions releases from pressure relief valves and tank closure devices.

One such enforcement action resulted in a consent decree, *U.S. v. Tradebe Treatment & Recycling Northeast LLC*,^[1] which ordered the defendant to pay a \$525,000 penalty and implement \$900,000 worth of injunctive relief to resolve alleged violations related to tank emissions and failures to properly inspect and monitor covered units.

The Relationship Between RCRA and CAA Emission Standards

CAA Section 112(n)(7) directs the EPA to ensure, to the maximum extent practicable, consistency between certain RCRA and CAA requirements. Likewise, RCRA Section 1006(b)(1) requires that the EPA avoid duplication of CAA requirements, to the maximum extent practicable.

Nonetheless, compliance with related CAA requirements does not necessarily constitute compliance with applicable RCRA regulations. So regulated entities need to ensure their compliance team is fully trained on both CAA and RCRA rules.

Best Practices for Facilities

Although not required by RCRA regulations, the EPA suggests that facilities implement certain best practices in order to implement an effective RCRA air program. Suggestions include:

- Proactively replace aging equipment by identifying and replacing faulty equipment or closure devices. This can include developing lowered internal leak definitions for valves and pumps, implementing a program with frequent monitoring of equipment most likely to leak, or implementing a proactive process for pressure relief valve and tank closure monitoring.
- Implement a Subpart BB equipment program, which summarizes the facility's Subpart BB requirements and useful practices into one document.
- Ensure that equipment claimed to be covered by the Subpart BB 300-hour exemption no longer contains or contacts hazardous waste residue, by appropriately cleaning or flushing and drying the equipment.

Conclusion

The EPA's enforcement alert clarifies its ongoing focus on RCRA air regulation enforcement. Owners and operators of RCRA facilities that have changed their operations during COVID-19 should consider reviewing their RCRA compliance under current conditions. Regulated entities especially should ensure they maintain fully compliant records, as the agency's paper-based inspections through requests for information will focus on those requirements.

Resolving an EPA enforcement action can require a facility to install costly additional control equipment; conduct additional monitoring, record-keeping and reporting; pay a civil penalty; and implement supplemental environmental projects.

Additionally, violations of settlement requirements typically carry stipulated penalties, and may result in additional corrective measures. Incorporating best practices during the development and implementation of a robust RCRA compliance program can help a facility avoid these outcomes.

Justin Savage is a partner, and Marshall Morales and Nicole Noelliste are associates, at Sidley Austin LLP.

Sidley partner Sam Boxerman and associate Joe Zaleski also contributed to this article.

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[1] U.S. v. Tradebe Treatment & Recycling Northeast LLC, No. 3:18-cv-02031 (D. Conn. Feb. 1, 2019).