

Surviving PADEP and USEPA Environmental Inspections

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This white paper describes a combined legal/technical approach to help companies minimize potential liabilities that can result from environmental inspections. This approach has been followed successfully by the authors and their clients at many industrial manufacturing facilities. The need for an organized response to enforcement efforts remains a high priority for facilities in light of the changing enforcement priority designations by the Pennsylvania Department of Environmental Protection (“PADEP”) and the U.S. Environmental Protection Agency (“USEPA”) and the potential severity of civil and/or criminal enforcement actions that can be initiated based on findings resulting from environmental inspections.

In order to survive a PADEP and/or USEPA inspection, facilities must: be prepared in advance of the inspection; fully participate in the inspection in a courteous, organized manner; and promptly follow up on the inspection results. Success largely depends on what facilities do during all three phases of the inspection process, not just during the on-site inspection phase itself. The magnitude of any proposed civil penalties can be greatly reduced by following the three-phased approach described in detail below and by applying as much effort, and in many cases more effort, into preparing for the inspection and on following up after an inspection as facilities do during the on-site inspection itself.

Facilities are best prepared to survive an inspection if it is assumed that an inspection could occur at any time. In order to limit potential exposure arising from an environmental inspection, it is prudent to put a proactive plan in place today. Such a plan should include actions taken well in advance of receiving notification of an upcoming inspection, as well as actions to be taken during and immediately following the inspection.

Pre-Inspection Phase

A well-designed program to minimize exposure should focus on completing four major tasks prior to an environmental inspection. The ability of a facility to perform each of these tasks and thereby maximize its defensive strategy will depend on whether the pre-inspection preparation program is initiated in advance of being notified by the PADEP and/or USEPA that an environmental inspection will be conducted at the facility.

Identification of Environmental Noncompliance Problems

The first basic step in preparing to minimize enforcement exposure is to identify environmental noncompliance problems well in advance of an on-site inspection. Conducting a comprehensive, facility-wide audit or a series of process-specific or media-specific (e.g., air, water, or waste) audits is usually the best way to obtain this necessary information. These audits can be performed by a facility’s own environmental staff, consultants, and/or environmental attorneys. It is strongly recommended that in-house or outside environmental counsel be a part of any audit team. Unlike consultants, environmental attorneys can render legal opinions on compliance status and protect those opinions from discovery. Although PADEP and/or USEPA inspectors may inquire whether a facility conducts environmental audits, to our knowledge, inspectors have never demanded audit information and/or reports after being informed that an audit was conducted under the attorney-client privilege. If audit program transparency is a concern for your company, a privilege can always be waived upon, or any time after, issuance of the audit findings.

Evaluation of Whether to Use Audit Policies

Once noncompliance issues have been identified through the audit process, the facility should then take the second step by evaluating whether it will take advantage of one or more applicable federal or state audit policies. USEPA's Audit Policy has been in effect since January 22, 1996. The Policy provides incentives for companies to follow the Policy by eliminating or substantially reducing the "gravity" component of civil penalties, provided the violations are quickly reported and corrected. However, in order to qualify for a 100 percent "gravity" component reduction, the following nine conditions must be satisfied:

- 1) The violation was discovered through environmental auditing or due diligence (e.g., systematic procedure or practice);
- 2) The violation was voluntarily discovered (e.g., not through required testing or under the terms of an enforcement order);
- 3) The violation was disclosed within twenty-one days of discovery;
- 4) The discovery and disclosure did not coincide with a governmental or third party action;
- 5) The violation will be corrected within sixty days of discovery, if possible;
- 6) Mechanisms are implemented to prevent recurrence (e.g., new procedures or work instructions);
- 7) Similar or closely related repeat violations have not occurred at the facility within three years and on a more company-wide basis within five years;
- 8) The nature of the violation is not specifically excluded from the scope of the Audit Policy (e.g., the violation did not cause serious actual harm or imminent and substantial endangerment); and
- 9) The facility cooperated with the USEPA.

If the first condition is not satisfied, but conditions 2 through 9 are (or will be) satisfied, the facility will qualify for a "gravity" component reduction of up to 75 percent. Aside from reduced penalties, an additional benefit of disclosure under the USEPA Audit Policy is that companies taking advantage of the Policy typically are not charged with environmental crimes because they voluntarily disclose noncompliance and cooperate in the investigation and prosecution of responsible entities and/or culpable individuals.

In evaluating whether to take advantage of the USEPA's Audit Policy, the facility should, at a minimum:

- Calculate the range of the potential "gravity" component of the penalty using the USEPA's Civil Penalty Policies;
- Estimate the range of compliance costs associated with outstanding areas of noncompliance;
- Calculate the potential economic benefit component of the penalty using the USEPA's BEN Model;
- Assess any potential for criminal enforcement;
- Assess the facility's ability to correct the noncompliance issues in the short term;
- Consider local and state exposure; and
- Evaluate potential public reaction.

The process of developing this information and analyzing the advantages and disadvantages of using any audit policy should be conducted with environmental counsel familiar with both the policies and the related civil penalty policies. This process is a key point in developing a low exposure path. Any failure to recognize potential weaknesses in a facility's case and develop potential defenses at this stage can have serious economic consequences.

On December 9, 2015, the USEPA announced the launch of eDisclosure (see 80 Fed. Reg. 76476). This electronic self-disclosure system is mandatory (except for new owner disclosures) and allows for a more rapid resolution of Audit Policy notifications. eDisclosure is managed through the USEPA's Central Data Exchange ("CDX") system. Disclosures fall within two (2) categories:

- Category 1: Violations of the Emergency Planning and Community Right-To-Know Act ("EPCRA") that meet all: Audit Policy conditions; and Small Business Compliance Policy conditions. Category 1 disclosures do not include chemical release reporting or EPCRA violations with significant economic benefit.

- Category 2: All non-EPCRA violations; EPCRA violations where compliance can only be certified with Audit Policy Conditions 2 through 9; and EPCRA and Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) violations excluded from Category 1.

For more information on eDisclosure, see the USEPA “eDisclosure User’s Guide”, EPA 300-B-15-004, December 2015.

PADEP has a similar audit policy in place. This policy is available on the internet at <http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7932&DocName=012-0840-001.pdf>.

Development and Implementation of a Compliance Strategy

The third pre-inspection step consists of developing a strategy to prioritize and address compliance issues and evaluate alternative compliance programs. In the context of developing its compliance strategy, the facility must carefully evaluate alternative, low cost compliance programs in preparation for minimizing the magnitude of any “economic benefit” penalty calculations in subsequent enforcement action settlement negotiations. Also, the selected compliance programs should be implemented in a timely manner to minimize “economic benefit” calculations and to maximize the opportunity for the identified issues to be resolved prior to any environmental inspection if an audit policy is not followed and used.

Preparation of Employees for Environmental Inspections

The fourth pre-inspection step involves the preparation of facility employees for the inspection process. For example, employees should be educated about inspections and advised of the potential consequences. As part of this process, specific plant personnel should be selected and prepared for being interviewed by the inspectors. Sometimes the employee with the most environmental-related institutional knowledge may not be the ideal candidate for dealing directly with environmental inspectors. There is an art to being cooperative without providing the environmental inspectors with a tailored roadmap to enforcement. In addition, facility inspection teams should be identified to coordinate the inspection process and to accompany PADEP and/or USEPA inspectors throughout the facility.

As part of the pre-inspection effort, it makes sense to develop a program for preparing plant personnel for environmental inspections, including one-on-one interviews with PADEP and/or USEPA inspectors. In general, such a program should address: specific steps that should be taken by selected plant personnel prior to the inspection; the proper attitude that must be maintained when dealing with environmental inspectors; and technical, legal and common sense examples designed to prepare plant personnel for the interview and plant investigation phases of the inspection.

Inspection Phase

The opening meeting between the PADEP and/or USEPA inspectors and facility personnel is the appropriate time to reemphasize specific points agreed to during any pre-inspection communications with the inspectors and to establish specific ground rules for the inspection team during its on-site review of the facility. At a minimum, the following topics should be discussed with all of the agency inspectors and the facility’s inspection personnel in attendance:

- Define the specific purpose(s) of the inspection;
- Identify the specific areas of the facility to be reviewed;
- Establish the maximum number of agency inspection teams in the office and/or touring the facility at any given time;
- Ascertain the number of on-site days and the on-site hours anticipated;
- Identify sampling events and timing;
- Establish procedures for the approval and management of photographs;
- Set the procedure for requesting and conducting interviews;

- Define the process for requesting and turning over documents;
- Review rules of the office; and
- Request a summary of daily findings and requests for documentation, and discuss the anticipated schedule(s) for the subsequent inspection day(s).

Based upon our experience in implementing these ground rules with environmental inspectors and in monitoring the inspection phase of the process, the following practical tips should be noted:

- At a minimum, if possible the facility should provide the inspectors with a dedicated conference room. Conference rooms adjacent to the facility's main reception area are ideal for use in environmental inspections. Restrooms should be located adjacent to the conference room.
- The facility should ensure that all facility and company-specific literature, including all environmental documentation not yet approved for dissemination to the inspectors, is not located on conference room bookshelves or tables.
- The inspectors should be instructed not to leave the conference room while they are onsite unless they are: going to the restroom; notifying a pre-designated facility representative (e.g., receptionist) that they are ready to meet with facility inspection team members; or accompanied by at least one member of the facility's inspection team.
- The facility inspection team members should be instructed not to take any inspector into an office or to log on a computer to search for requested information with an inspector present. We have found that environmental inspectors often take such opportunities to review materials in facility offices prior to internal screening and approval and are likely to discover the existence of databases that were not specifically requested and/or generated for agency review.
- Typically, inspectors will request to be at the facility between 8 a.m. and 5 p.m. with a one-hour lunch break. Therefore, the facility inspection team should plan to be at the facility between 7 a.m. and 6 p.m., at a minimum, each inspection day.
- In light of facility escort availability and safety considerations, attempt to get the inspectors to agree to have a minimum number of inspection teams (no more than two or three teams) touring the facility at the same time. However, we are aware that at complex manufacturing facilities there have been up to four inspection teams in the field at one time during more comprehensive multimedia inspections.
- During on-site field inspections, it is imperative that each inspection team be accompanied by knowledgeable facility representatives. To the extent possible, facility representatives should be selected for participation on particular inspection teams based on their media-specific knowledge. At least one facility representative on each team should keep detailed field notes of the inspection, including summaries of conversations that raise specific environmental issues and the nature of the questions asked by the inspectors.
- If sampling will be conducted, the facility should ensure it has sufficient sample collection supplies available so that split samples can be collected, labeled, and properly maintained for analysis. In addition, individuals familiar with sampling methods should accompany the inspectors and take detailed field notes and/or video the sampling events.
- In an effort to ensure that photographs are not taken of proprietary processes, request the inspectors to obtain approval from one of the facility's representatives prior to taking each photograph. As a safeguard against proprietary processes being photographed, request PADEP and/or USEPA to provide the facility with a copy of all photographs before they are made a part of the inspection report.
- After the inspectors have interviewed the facility's environmental staff, sometimes they request to speak with the operators and maintenance managers responsible for certain facility processes. Specifically for safety reasons and more generally to ensure that the inspectors are addressing individuals with responsibility for the area being reviewed, the inspectors should agree to refrain from randomly interviewing plant employees while they are working. Interviews should be prearranged at least one-half day in advance (preferably more than one day in advance) and conducted in the dedicated conference room.

- At the conclusion of each day of the inspection, request that the environmental inspectors provide the facility with a summary of daily findings and requests for documentation made during that inspection day. A summary of daily requests for documentation affords the PADEP and/or USEPA inspection team and the facility's inspection team an opportunity to hear collectively the type of items that are being requested and to identify any duplication of such requests or any other specific concerns.
- Regarding requested documentation, all documents to be copied for (or provided for review by) the inspectors should be reviewed to ensure the documents are responsive to the specific document request and do not contain privileged and confidential information. Provided each document is not privileged or confidential and is responsive to the inspector's request, it should be recorded on a documentation log retained by the facility prior to being provided to the inspectors. We have found that environmental inspections are less time consuming overall and easier for your facility if all readily available, requested documentation is provided to the inspectors while they are at the facility. As a rule of thumb, documentation retrieved for the inspectors' review should not be withheld for more than one-half day after it has been reviewed for relevancy and for protection under the attorney-client privilege or a similar privilege and, if not protected, logged in.
- Identify any privileged documents and do not provide them to the inspectors unless the company makes a decision to waive any applicable privilege(s).
- Identify any documents that contain confidential business information ("CBI") that the company would want to protect from disclosure to the public. Properly indicate that you are claiming the documents as CBI and ensure they are marked as "Confidential Business Information" upon presentation of the documents to the agency. See 40 CFR Part 2.
- Inspectors should be asked to provide their schedule for the following inspection day(s). Knowing the agenda for upcoming inspection days will enable the facility to better prepare the areas to be inspected and the key personnel within those areas. It also enables the facility to advise the inspectors of any planned operational shutdowns that may impact their planned review schedule.
- We have found it is in the facility's best interest to correct and/or address as many of the noncompliance issues as possible while the inspectors are still onsite. Inspectors have been persuaded to take additional time (time they could use to raise additional issues and/or find other violations) to re-inspect and confirm that the facility has taken responsive action.
- After the PADEP and/or USEPA inspectors have left the facility each day, the facility should hold daily debriefings with facility management and facility representatives involved in the inspection(s) during that business day. Daily debriefings should include communication of all issues raised by the inspectors and a discussion of possible time frames for correcting any noncompliance issues. In addition, the facility representatives assigned the task of keeping detailed notes should draft a memorandum to in-house counsel or other retained outside environmental counsel and submit both the memorandum and all field notes to legal counsel.
- At the conclusion of the inspection, the environmental inspectors should be asked to provide the facility with their initial findings. Again, it is imperative for facility representatives to take detailed notes of the inspectors' findings.
- Ask the inspectors when the inspection team plans to produce a draft report.
- During the exit interview, one of the environmental representatives at the facility should be identified to the inspectors as the sole facility contact for additional information. All facility representatives must know that direct calls from individual inspectors must be referred to the facility contact.

Post-Inspection Phase

A facility's ability to influence agency inspectors does not end with the on-site visit. Effective post-inspection actions include:

- Fulfilling outstanding documentation requests;
- Providing written clarification of legal and factual issues; and
- Documenting corrected deficiencies, in a timely manner.

We suggest that all outstanding documentation be provided well in advance of the draft report deadline cited by the environmental inspectors. By providing the inspectors with all outstanding documentation well in advance of this deadline, the facility has a better chance of influencing the tone of the final report and thereby potentially avoiding or minimizing the severity of an enforcement action. In addition, the facility should provide written clarification of factual and legal issues raised during the inspection. Often inspectors misconstrue facts and/or draw incorrect legal conclusions during the inspection. If the facility can provide the inspectors with persuasive written clarification of factual and legal issues prior to the draft report deadline, it is possible that such issues will not be included in the final report.

Further, the facility should provide written documentation of all corrected deficiencies. Deficiencies that were corrected or otherwise addressed during the inspection, regardless of whether the corrective actions were re-inspected by the inspectors, should be summarized for the record. In appropriate cases, photographs should be taken of the corrected deficiencies and provided with the written documentation. Regarding deficiencies that were corrected after the inspection, the facility should provide the inspectors with a detailed written discussion of all actions taken and any supporting documentation (e.g., records, photographs). All such submittals should be drafted or, at a minimum, reviewed by legal counsel to ensure the facility does not waive any rights or arguments or make any admissions against its interests. Finally, the lead environmental inspector should be contacted periodically to confirm the receipt of outstanding documentation and check on the status of the written inspection report. Request that the agency provide you with an opportunity to review and comment on the draft inspection report. While the agency may deny such a request, it is often beneficial to both the agency and company to ensure the accuracy of factual information included in the report. It is unlikely that the agency will agree to change any legal conclusions regarding compliance at this point but may agree to correct factual errors that the company raises.

Although it may take some time, inspection results ultimately show up on the PADEP and/or USEPA electronic databases (e.g., Envirofacts, ECHO). Check the relevant electronic databases regularly to see if new entries appear for your facility and are accurate. Communicate all inaccuracies with the appropriate environmental regulatory agency and request the correction of the inaccurate information on the electronic database(s). Environmental regulatory agencies rarely change previously entered database information unless specific inaccuracies are brought to their attention.

If the facility receives a Notice of Violation (“NOV”) as a result of a PADEP and/or USEPA inspection, review the NOV thoroughly. Respond to any additional information requests in the NOV in a timely manner. Also, fully respond to each of the allegations set forth in the NOV. If specific alleged violations have been corrected, provide information on when and how corrections were made. If the facility disagrees with specific alleged violations, clearly indicate the factual and legal reasons for such disagreement. Even if the facility agrees to make changes or corrections requested by PADEP and/or USEPA, if the facility believes it is not required by law to do so, clearly state in the NOV response that the facility is being cooperative but does not believe such actions are required by the applicable law(s) and/or regulation(s).

For more serious violations with more complicated remedies, PADEP and/or USEPA typically initiate an enforcement action and impose a deadline to reach a resolution. Settlement negotiations can continue after the enforcement action is commenced. However, the facility must be aware of any appeal rights and ensure that any deadlines for filing an appeal are not missed. Some companies may be reluctant to file an appeal for fear that an appeal will cause a more strained relationship between the facility and the environmental inspectors. Although this may be a valid concern, in order to preserve a strong negotiating position, often an appeal must be filed. Careful review with your environmental legal counsel is recommended under these circumstances.

Conclusion

Facilities in the Commonwealth have been and will continue to be subject to environmental enforcement initiatives. In light of the trend toward more comprehensive multimedia environmental inspections and resultant enforcement actions, it is very beneficial to implement a strategic plan to minimize the potential exposure that can flow from all environmental inspections. Based on our experience of employing the three-phased approach outlined above, we believe that routine environmental inspections can go more smoothly and exposure can be reduced significantly, particularly in the case of multimedia enforcement-driven inspections. However, to maximize these potential savings, facilities must make a commitment to develop and implement an effective, proactive strategy prior to receiving a call from a PADEP and/or USEPA inspection team announcing their imminent arrival at your facility.

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