9 Unique Problems Associated with Internal Investigations in Environmental Cases

James Chen and Michele C. Coyle

James Chen is a partner with the Washington, D.C.-based firm of Crowell & Moring, LLP, where he practices environmental and safety regulatory law. The views expressed in this article are entirely his own and do not necessarily represent those of the firm or any of his clients. Michele C. Coyle is Campus Counsel, University of California, Riverside, California. The views she expresses in this article are her personal views and are not to be attributed to the Regents of the University of California.

I. INTRODUCTION

Internal corporate investigations in the environmental area often begin in response to contact by a government agent or agency. Service of a search warrant on company employees is becoming a frequent occurrence, and one that triggers an internal investigation in less than ideal circumstances.

Most companies in these instances are shocked by the appearance of government agents, sometimes in great numbers, executing a search warrant. This is especially disconcerting to many companies, since company managers usually have no idea that there are any environmental problems within the company. Investigators may seize documents or attempt to make unannounced interviews—all of which are likely to take company officers or employees by surprise. Sometimes government agents arrive unannounced at a company with a demand to review and photocopy documents that relate to environmental permits held by the company. In other instances, a company may simply receive a notice of violation or some other type of citation, receipt of which should warn the company it may have problems. In all of these circumstances, the government contacts usually prompt a reactive internal company investigation.

With greater emphasis on corporate accountability, especially in light of legislation like Sarbanes-Oxley, more and more companies are conducting voluntary internal investigations, often called "environmental audits." Larger companies have even begun putting into place policies and procedures for conducting these audits on a routine basis. Because many companies have various government permits, which are necessary to carry on their business, environmental audits are seen as a prudent way to ensure the company is in compliance with its permits. Voluntary environmental audits, however, present problems different in some respects from those encountered in a reactive internal investigation.

This chapter first discusses some of the unique aspects of reactive investigations, particularly those triggered by government action, and provides suggestions in conducting such investigations. The second part of this chapter focuses on voluntary environmental audits. Many companies now conduct voluntary internal investigations. Therefore, the discussion of voluntary, proactive investigations focuses on the advantages and disadvantages of these investigations, some of the unique problems they present, rather than on the nuts and bolts of conducting them.

II. REACTIVE INVESTIGATIONS

Reactive investigations are those triggered by some defining event, such as an industrial accident, chemical release, a pollution incident, or the announcement of a government investigation of the company. This type of investigation is more difficult than the routine internal investigation because the company must deal not only with often complex underlying technical issues, but also with internal and external pressure to resolve the matter quickly, the crisis atmosphere that usually develops within the company, the siege mentality that usually develops relative to those outside the company, and, often, issues of internal company politics and career preservation. In short, the company must cope with a technical problem and, simultaneously, the collateral issues flowing from the ramifications of the incident.

A. *Search Warrants*

One of the most difficult types of reactive investigations for a company to respond to is that triggered by the execution of an administrative or criminal search warrant at the company. Unfortunately, search warrants are commonly used by investigators in the environmental area. In the environmental context, investigators tend to believe that search warants are essential and more beneficial than subpoenas. Environmental investigators can be expected to take samples during the execution of a search warrant, as well as to seize all documents relating to environmental procedures before evidence can be altered or destroyed.

Environmental search warrants are often executed by a SWAT team of numerous law enforcement officers. Some of these officers are dressed in "moonsuits" and take samples during the search. Other officers are assigned to go through all the company's documents and confiscate everything that is reasonably responsive to the search warrant, which is typically very broad in scope. And some officers will attempt to segregate employees into offices and interview them in an isolated and intimidating atmosphere. These tactics can have an intimidating and overwhelming effect on management and other personnel present at the time the warrant is executed. Obviously, the manner in which the company deals with a search warrant is part of, and will be essential to, the subsequent internal investigation that will immediately follow.

A few simple steps can minimize disruption and potential harm of the search and enhance any subsequent internal investigation.[1] All companies should designate a senior person to serve as the contact with government

1. Attached as Appendix A is a short checklist of things to do in response to a search warrant.

investigators. If law enforcement agents appear on the premises and announce their intention to execute a search warrant, the pre-designated person should talk to the officers, identify which agent is heading the search warrant or subpeona, and read it carefully. Normally, valid objections during the course of a search warrant arise only if the agents go beyond the scope of the warrant. Otherwise, the company must cooperate with the search or risk possible allegations of obstruction of justice.

The responsible corporate official should always ask the agents executing the warrant if they could either return after business hours to avoid disrupting the business or at least wait until its attorney arrives. Not surprisingly, the agents may object to the delay. For this reason, it is important that the predesignated senior employee be familiar with counsel experienced with search warrant and criminal matters, so the company can contact its outside counsel immediately. The presence of an experienced lawyer will protect against inadvertent waivers of constitutional rights and procedural protections. The company should advise the lawyer of all details of the warrant, including the regulatory agencies involved, the areas to be searched under the provisions of the warrant, and the types of evidence to be seized.

If the agents insist on proceeding with the search warrant, the company representative should inform them that, due to the disruption, conducting business will be impossible and therefore employees will be sent home. The agents may object, but a search warrant for documents and tangible evidence should not authorize the detainment of employees at the company beyond the brief time necessary to secure the premises and conduct the search.[2] An exception may exist for employees with material knowledge of the subject of the search warrant. In that case, certain employees may be required to remain available to agents.

If members of the news media are present, politely and firmly ask them to leave. Do not engage in any behavior that would make a bad impression, such as ducking, hiding, blocking cameras, or using force to move them. Portrayal of this conduct in newspapers or on television could prejudice prospective jurors and harm the company's reputation in the community.

Do not consent to a warrantless search or to a search beyond the scope of the warrant. Even though the company may have nothing to hide, there is

2. *See e.g.,* Michigan v. Summers, 452 U.S. 692, 702-03 (1981); Daniel v. Taylor, 808 F.2d 1401, 1403-05 (11th Cir. 1986); United States v. Rowe, 694 F. Supp. 1420, 1423-25 (N.D. Cal. 1988); United States v. Stevens, 543 F. Supp. 929, 942-43 (N.D. Ill. 1982) (distinguishing the detaining of individuals pursuant to a search warrant for contraband as opposed to a search warrant for documents and evidence).

little gained by giving government investigators carte blanche to rummage through company records in an attempt to conjure up damaging evidence. The terms of a search warrant must clearly outline the scope of the search permitted. Any search beyond the scope of the warrant is not authorized and may be inadmissible in a subsequent court proceeding.

Likewise, because search warrants are often executed in a circus atmosphere, which can terrify company employees, interviews conducted under intimidating circumstances can lead to inaccurate statements that must be clarified at a later date. Accordingly, it is prudent to advise employees that they do not have to talk to the investigators, that it is entirely their decision to talk to anyone, and that if they choose to speak with investigators, the company will make counsel available prior to the interview if they so desire. Do not, however, instruct the employees not to cooperate. This could lead to allegations of obstruction of justice. In other words, companies should advise employees that they do not have to talk to investigating officers unless they so choose, but the company should not develop a policy or make statements prohibiting employees from talking to the investigators. In addition, any written statements made by investigators about representations made by employees during interviews should be reviewed and signed off upon by the employee in order to ensure accuracy. A copy of any such statements should be retained by the company.

The company should monitor the search to ensure that it is proceeding within the proper scope. If the investigators insist on interviewing employees on company premises during the execution of the search warrant, the company should object to interviews being conducted on company time and company premises, at least until the employees can be advised of their rights with regard to the interviews and counsel can be provided. A representative of the company should follow the investigators and note carefully what the investigators take. The company will receive at the end of the search a detailed receipt of the property seized, but the receipt can be confusing and not particularly helpful. Therefore, a detailed list of seized documents prepared by a company employee is normally more helpful in conducting a subsequent internal investigation.

The company representative also should observe whether any physical items are seized and whether any soil or other samples are taken. If the agents take samples, the company should request "split" samples right away. Certain chemicals must be tested within limited time periods to ensure the validity of the results. Also, if photographs or videotapes are taken, the company will want copies. If employees are interviewed, someone should list all employees interviewed so the company can follow up in its own investigation.

The company also should make arrangements with the investigators to obtain copies of all seized documents as quickly as possible. During the subsequent internal investigation, the company will want to know precisely what the investigators have in their possession. It is also essential to get an environmental consultant involved quickly. Indeed, in addition to the company's attorney, it is desirable to get the consultant to the premises during the course of the search warrant, if possible. The consultant can then observe the agents taking samples and the manner in which they are taken. Of course, one of the most serious problems for the investigating agency is the failure of the agents during the seizure of evidence to follow required procedures for the taking of samples. Improper sampling as well as improper testing of those samples may result in fatal flaws to the investigator's case.[3]

Finally, a search warrant should cause a company to believe it may have serious problems. A search warrant is obtained by going to a court with an affidavit showing sufficient cause to permit the court to sign off on the search warrant. It is a serious matter for investigators and should be treated accordingly by the company. Consequently, as soon as the officers leave the premises, the company should begin its own internal investigation. If the suggestions above have been followed, the internal investigation should run smoothly regarding the circumstances or incidents at issue.

B. *Agency Demands to Review and Photocopy Documents*

Often an agency that has an ongoing regulatory inspection function at a company will arrive and demand to view and photocopy documents pursuant to a permit or other license issued to the company. This procedure can also cause confusion. Although it is not as confrontational as the execution of a search warrant, a government demand for documents provides the requesting agency with just as much information in terms of volume and detail as a wide-ranging search warrant. Unless such inspections are a condition of the permit or license, agency demands for documents should serve as a high-level warning that the company may have environmental problems. Presumably, the regulatory agency is there to review and photocopy documents in the civil context, not as part of a criminal investigation. A criminal investigation requires a search warrant.[4]

---

3. *See e.g.,* People v. Mobil Oil Corp., 143 Cal. App. 3d 261 (1983).

4. *See, e.g.,* United States v Utedit, 238 F.3d 882, 886-87 (7th Cir. 2001); People v. Todd Shipyards Corp., 192 Cal. App. 3d Supp. 20, 238 Cal. Rptr. 761 (1987); Los Angeles Chem. Co. v. Superior Ct., 226 Cal. App. 3d 703, 276 Cal. Rptr. 647 (1990) (interpreting federal search and seizure law).

In response to a demand to review and photocopy documents, the company should read the request carefully. Again, it is advisable to consult experienced counsel. The company representative should be present at all times to observe what is being reviewed and photocopied. The company representative should take notes of what occurs during the regulatory agents' visit, and should request copies of all documents the regulatory agency photocopies. The prudent company will perceive this investigation to be a very serious matter and will conduct an ensuing investigation of its own.

C. *Notices of Violations*

A notice of violation, citation, or other document indicating a problem with the facility may be served on any of a range of employees from upper management to a lower-level employee. Companies should set up in-house procedures that ensure a notice of violation or similar document (e.g., "show-cause" letter, notice of warning, intent to inspect, civil administrative complaint, or demand for penalty) is reported immediately to appropriate management.

In the past, companies have often allowed lower-level employees to handle these notices with the agencies, only to find themselves later embroiled in civil or criminal litigation with the agency. The notice or citation should state on its face the problem perceived by the agency. However, the absence of a criminal warning on the citation itself does not mean the investigation will not someday turn into a criminal enforcement action. In a time of increasing public pressure for environmental compliance and of increased use of the government's criminal enforcement power, these notices should be treated seriously by the company—both because of the immediate administrative problems and because of the potential civil or criminal enforcement actions. Usually, an attorney and/or consultant should be called in immediately and an internal investigation should begin.

D. *Conducting a Reactive Internal Investigation*

One of the most unique aspects of conducting an internal investigation in the environmental area is the importance of an expert or consultant. Technical issues, such as the improper taking or testing of samples, can be critically fatal to the prosecutor's criminal case. Even in a civil dispute with a regulatory agency, technical problems with data can often force the regulatory agency to reach a more beneficial settlement in favor of the company. Finally, an outside consultant brings to the investigation the benefit of a fresh perspective and the objectivity of being independent of the company. Therefore, it is

a tremendous advantage for the company to have an experienced engineer or specific consultant on its team.[5]

The company's outside counsel and the consultant should execute a written agreement as soon as possible. Oftentimes, attorneys specializing in environmental law have worked in such attorney/consultant relationships in the past and may be able to advise companies as to appropriate consultants they may wish to approach. By having the attorney and consultant enter into a written agreement, the company establishes that the consultant is an agent of, works with, and reports to the lawyer. This procedure protects the consultant's work on attorney-client privilege and work product theories.[6]

The consultant can also serve an essential role during the interviews of company employees due to the importance of technical issues in these cases. The consultant may attend some of the employees' interviews with the lawyer to help explore and clarify these critical issues.

Many of the aspects of an internal environmental corporate investigation—interviewing employees, preparing interview memoranda, advising employees of their rights, and reporting to management—are conducted in much the same manner as described above and in other chapters of this book. One significant difference, however, may be the speed at which it is often necessary to conduct an internal environmental investigation. This is partly due to concerns that the company could be hit quickly with a parallel administrative proceeding where both a civil and criminal investigation and/or prosecution is conducted simultaneously.

Although the EPA generally does not favor parallel proceedings, at the state level they are very common. For example, when a company is served with a warrant or notice of violation regarding effluent to the sewer, a criminal investigation typically has already been or soon will be referred to a prosecutor, who could take several months to prepare a case and determine if criminal prosecution is appropriate. On the other hand, if there is a problem with effluent to the sewer line, the agency that has issued a sewer permit to the company probably will order the company to appear in the near future at

5. Although investigators and regulatory agencies are steadily improving in their technical expertise, it should be noted that very few of the regulatory or investigative agents are engineers or Ph.Ds.

6. This "privilege" aspect of an internal investigation is discussed in detail in Chapter 2 of this book and therefore will not be belabored here.

a hearing to show why the sewer line should not be severed. If the sewer line is severed, it could put the company out of business. Thus, the company is caught in an unpleasant squeeze between trying to keep the sewer line open and avoiding admissions that might damage the defense of a subsequent criminal case. Therefore, reactive internal investigations should be conducted soon after government action such as service of a search warrant or a notice of violation so that strategic decisions can be made as quickly as possible.

III. VOLUNTARY ENVIRONMENTAL INTERNAL INVESTIGATIONS

Voluntary environmental internal investigations typically are performed for one of two reasons: (1) to ascertain the status of the company's compliance with the environmental statutes and regulations to which the company is subject, and/or (2) to investigate conditions existing on property or at a facility the company contemplates selling or acquiring. The latter is part and parcel of environmental due diligence investigations undertaken by both parties to a real estate transaction or corporate rearrangement, and can be more fully addressed in a treatise focusing on these transactions. Therefore, the following material focuses on compliance audits.

A. *Reasons for Environmental Compliance Audits*

The need for environmental compliance audits is triggered by the fact that many companies and industries are regulated by environmental laws to varying degrees. At minimum, many companies have permits or licenses that are provided by one or more agencies and that are necessary to conduct business. These permits not only authorize the agencies to visit and inspect the company periodically, but also to prepare and submit reports and other technical documents to the agencies. In this growing arena of required permits and documentation, many companies now deem it prudent to conduct internal environmental audits to ensure compliance with all the regulatory requirements.

Internal audits of environmental documentation are becoming more critical as regulatory agencies and prosecutorial offices proceed against companies failing to maintain required documentation. Many permit violations are now misdemeanors carrying strict liability. Others are simply civil violations, which carry no criminal penalties per se, but can cost the company significantly in the form of civil penalties. For example, many of the core federal environmental statutes allow for penalties of up to $33,500 per violation, after

adjusting for inflation, with each incident constituting a separate violation.[7] The result can be penalties into the millions, if not billions, of dollars. In this atmosphere, the regulated community has ever-greater incentives to routinely conduct their own audits.

In addition to audits of environmental permits and documentation, other factors encourage companies to conduct voluntary internal investigations. Audits can be conducted facility-by-facility and building-by-building to survey all environmental issues. Internal audits can review the company's discharge, storage, and disposal practices, and can examine disposal equipment, printouts, and other technical aspects of the facility to ensure that there are no hidden equipment or operational deficiencies. Also, audits can look at the potential exposure of employees to harmful substances and reveal whether all proper safeguards are in place and that required disclosures are being made to employees. Companies should not underestimate the OSHA implications of operations subject to environmental regulation, especially now that OSHA matters are being enforced in their own right.[8]

Environmental audits can also be beneficial in discovering and deterring possible criminal prosecutions based on illegal disposals by rogue employees. For example, in large companies, one department may be in charge of all incoming materials; a different department may be in charge of manifesting hazardous waste and hauling it off. If a rogue employee is illegally disposing of hazardous waste, the company may be caught in a situation where the left hand does not know what the right hand is doing. In other words, no one will realize that, given the materials coming into the company and the manufacturing process, much more hazardous waste should be manifested and sent to a permitted treatment, storage, or disposal facility. An environmental audit looking at the big picture will likely discover this problem.

B. *Importance of Periodic Audits by Outside Consultants*

Although most routine audits are conducted by the company's own staff, periodic audits conducted by independent technical experts or consultants

7. *See, e.g.,* the Clean Air Act, 42 U.S.C. § 7413(d)(1); the Clean Water Act, 33 U.S.C. § 1319(d); the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(g); the Toxic Substances Control Act, 42 U.S.C. § 2615(a).

8. For example, the district attorney for the County of Los Angeles, California, has a department titled Environmental Crimes MHA Division.

together with lawyers should be considered by companies. The consultant can identify the areas of vulnerability for the company, such as whether the focus should be on air issues, discharges to sewers or waterways, underground tanks, asbestos, or a host of other potential concerts. This work, however, should be done under a lawyer's supervision, and for the purpose of providing legal advice to the company, to attempt to protect the work from disclosure absent a state audit privilege statute.

C. *Problems Posed by Audits*

Environmental audits should not be conducted cavalierly. At first blush, it seems that an environmental audit is always desirable; however, there are serious problems that can be presented by an internal investigation. For example, what if the environmental audit discovers unknown problems on the premises? Many cases of spills require immediate reporting. If an audit uncovers a recent spill that was not reported to management, it would open the door to problems with regulatory agencies. An audit might also discover a historic problem that did not trigger immediate reporting requirements. Nevertheless, a historic problem would have to be reported at a sale of the property. If the discovered contamination in any way affects groundwater, the company might have to advise a regulatory agency. Once the regulatory agency is advised of a problem, costly preliminary sampling, reports, and subsequently expensive remediation could be required. Although these concerns do not commend an avoidance of auditing, the company should be aware of ramifications that might flow from the result of the audit, and be committed to taking corrective measures if problems are discovered.

Another serious concern presented by an environmental audit is the possible necessity to disclose the findings at a subsequent date. For example, if the company ends up in civil or criminal litigation over environmental issues, the opposing party probably will serve a document request or subpoena *duces tecum* demanding any and all environmental audits conducted by the company. While the company will attempt to protect these documents under various arguments of privilege, including any statutory privilege under state law, a voluntary environmental audit may be more difficult to protect than a consultant's investigation pursuant to a reactive internal company investigation. It is very difficult to persuade a court that a voluntary environmental audit was done in anticipation of litigation and is therefore work product. With regard to attorney-client privilege, it is also difficult to protect pure facts contained in an audit report. The company should therefore realize at the outset that a voluntary environmental audit does not have absolute protection from disclosure.

As a final thought, it should be noted that the Department of Justice continues to evaluate the issue of how to exercise prosecutorial discretion when the violator company has conducted an environmental audit or has disclosed the violations to the government. In short, an environmental audit is perceived by the Department of Justice as an important mitigating factor in favor of the company, especially if all necessary corrective action recommended by the audit has been implemented by the company.[9]

D. *Electronic Records*

Records maintained on electronic media such as disks, hard drives, flash drives, or similar devices used to store company information pose a particular problem to companies. As this new technology evolves and more and more companies utilize these convenient, space-saving methods of information storage, new legal issues are being raised about the ability of government agencies and other regulatory bodies to seize such information. In particular, the prevalence of the use of electronic mail or instant messaging between company employees and contractors is creating a whole new spectrum of records and information potentially subject to government seizure. In fact, courts have taken the view that e-mail and IM messages sent and received on company e-mail systems may be considered "business records" and as such, subject to discovery and production in an investigation or during litigation.[10] As a result, companies must be sure to establish strict policies regarding the use of e-mail and employ comprehensive electronic records management (ERM) systems. Such strategies must recognize that not only must ERM systems address the maintenance, storage, and disposal of electronic records, but also deviations from such practices, as sloppy ERM heightens the risk for civil or criminal liability for improper destruction of records.

E. *Audit Privilege Law*

In order to address some of the uncertainties related to auditing, more then twenty states have enacted environmental audit privilege or immunity laws.[11] Most state laws provide a privilege for an environmental audit report

9. *See, e.g.,* June 3, 1991 Memorandum of U.S. Dept. of Justice from Richard B. Stewart, Asst. Attorney General, to all U.S. Attorneys.

10. *See, e.g.,* Andersen v. United States, 544 U.S. 696 (2005).

11. At this time, the following states have enacted such laws: Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming.

under certain circumstances, and usually require any environmental violation to be corrected in order for the privilege to apply. In addition, many state laws also provide qualified penalty immunity for voluntary disclosures of violations discovered during an environmental audit. These laws significantly limit the risk of performing environmental audits and then disclosing violations to the regulatory agency. However, as each state's law has different requirements and different benefits, companies should carefully review the state laws to which they are subject in order to best determine how such laws may benefit the company.

Companies also should be careful when using state privilege and immunity laws, since EPA believes it is not bound by these laws and it is possible that a violation that is voluntarily disclosed under a state law may still be subject to enforcement actions by EPA. Companies may also want to consider using EPA's audit policy when disclosing violations of environmental laws, although the policy does not provide a privilege for audit reports and provides limited penalty immunity.[12]

IV. CONCLUSION

In a quickly changing world, all companies that have any exposure to environmental issues should be keenly aware of the increasing role of regulatory agencies and prosecutorial offices in environmental compliance. Companies should have procedures in place to react quickly to any aggressive move by an agency, such as a search warrant, demand to review documents, or notices of violation. The company's quick response to initial indications of environmental problems will greatly enhance a subsequent internal investigation. To avoid environmental problems with regulatory agencies and prosecutorial offices, companies are turning more and more to internal environmental audits. Although there are positive and worthwhile reasons to conduct environmental audits and, indeed, companies should be encouraged to do so, certain areas of concern may arise from unfavorable findings in an environmental audit. Nevertheless, as criminal and civil prosecution by regulatory agencies increases and private-party litigation over contamination escalates, prophylactic environmental audits will undoubtedly increase in importance.

12. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, (Apr. 11, 2000).

APPENDIX A

U.S. Environmental Protection Agency Inspector Tip List

The U.S. Environmental Protection Agency (EPA) has broad authority to conduct inspections, but that authority varies somewhat statute by statute. Inspections may be routine, based on a tip by an employee or a competitor, or part of an enforcement initiative. EPA may conduct unannounced "surprise" inspections, but most inspections are announced in advance to facilitate scheduling.

Pre-Inspection Preparation. There are a number of steps a facility can take before the inspector arrives to help ensure that the inspection goes smoothly. Indeed, these steps should be taken even before the inspector calls to schedule a visit of the facility:

- **Designate a Point Person.** The facility should designate an employee familiar with environmental matters as well as facility operations (e.g., the environmental manager) as the "Point Person" to accompany the inspector around the facility. It is generally best to identify two Point Persons, in case one is absent or EPA sends more than one inspector to the facility. The names of the Point Persons should be put on a list and given to personnel at reception areas and security gates. The Point Persons should receive some training by counsel regarding appropriate procedures for handling EPA inspections.
- **Establish Procedures for Inspections.** Let employees know what to do when an inspector arrives, whom to notify, and under what conditions the inspector should be provided access to documents and property. This includes advising the Point Person of the circumstances under which the facility will require EPA to obtain a warrant before inspecting the facility. (Warrantless administrative inspections have been upheld by the courts where certain conditions are met.) Facility employees should be instructed to be courteous and truthful, but not to speculate in response to an inspector's questions. Some facilities include written procedures for handling EPA inspections in their environmental training programs.
- **Consider Whether Counsel Should Be Present.** Unless counsel is readily available, most facilities do not ask counsel to be present for

announced, routine environmental inspections. However, it is generally advisable for counsel to be present where (a) the inspection is non-routine or unannounced, (b) an EPA or state enforcement action is already threatened or pending, or (c) there are indications that EPA is investigating allegations of criminal activity. Even where it has been decided that counsel need not be present, counsel should always be forewarned of an impending inspection so that arrangements can be made to contact counsel by telephone in case questions arise as to the scope of the inspection and access to company records or employees.

- **Pump the Inspector for Information.** When the inspector calls to schedule the inspection, find out as much as possible about the inspection, including: (a) the statutory authority under which the inspection will be conducted; (b) the portions of the facility that will be inspected; (c) how long the inspection will last; (d) what prompted the inspection; (e) whether the inspection is part of a new enforcement initiative; (f) how many inspectors will be coming; and (g) whether the inspector intends to collect samples. Document the discussion, perhaps with a confirming letter to the inspector.
- **Review Recordkeeping.** Recordkeeping violations are a favorite target of EPA inspectors. At a minimum, relevant employees should refresh their recollections as to where key documents (hazardous waste manifests, spill contingency plans, permits) are kept, and be sure records are maintained in an orderly fashion. Good recordkeeping makes a very positive impression on an inspector. On the other hand, fumbling around for key documents will raise suspicions that the facility does not take environmental requirements seriously.

Prior to the inspection is also a good time to determine which of the facility's records will be off limits to inspectors (such as attorney-client correspondence or environmental audits) and which will be made available to inspectors but claimed as "confidential business information" (CBI) (e.g., trade secrets). These materials should be segregated and properly labeled prior to the inspection.

- **Take Corrective Actions.** Be sure that items noted in previous inspections have been corrected. If time permits, consult the relevant EPA inspection manual to determine areas of likely interest. Do a quick compliance check and fix what you can. Clean up messy operations, even if they are not violations.

- **Define Scope of Physical Access.** Decide which areas, if any, may be off limits to the EPA inspector due to safety or other requirements. Be sure to follow food safety and worker health and safety requirements (goggles, hard hats) where applicable.
- **Notify Employees.** Inform employees of the impending inspection and remind them of facility procedures for inspections.

During the Inspection. Once the inspector arrives, the inspector should be met by the Point Person. The Point Person should check the inspector's credentials, review any warrants, and be sure that the warrant is limited to the agreed-upon scope. This is also the time to review and confirm any previously agreed-upon procedures. If possible, the Point Person should attempt to establish an order for the inspection, explain the facility's operations, and identify any trade secret concerns.

During the inspection:

- **Do as the Inspector Does.** The Point Person should accompany the inspector at all times. If the inspector takes notes or photos, the Point Person should as well. If the inspector wants a copy of certain records, make one for the facility as well. If the inspector takes a sample, the facility should seek to obtain a split sample. Also, the Point Person should obtain receipts for any samples or original documents taken.
- **Cooperate, but Don't Speculate.** Federal law prohibits knowingly and willfully falsifying or concealing material facts from, or making false or fraudulent statements of material facts to, the United States. Accordingly, it is important to answer the inspector's questions truthfully. The Point Person should promise to get back to the inspector when the answer to the inspector's question is not known, and then do so in a timely matter. To the extent possible, the Point Person should seek to limit the inspector's questioning of other facility employees.
- **Identify the Inspector.** Make sure all employees know that the inspector is an EPA employee evaluating the facility's environmental compliance (not "the EPA person"—which could mean an in-house environmental expert). If the inspector wants to formally interview specific individuals, legal counsel should be notified immediately.
- **Claim CBI If Applicable.** If EPA copies records that contain trade secrets, make sure that the facility notifies EPA that it is claiming the

records as CBI. Failure to claim CBI at this point may waive the facility's claim.

- **Request an Exit Conference.** Although most inspectors will ultimately send an inspection report to the inspected facility, this may take many months, by which time the Point Person's recollection of the inspection may be unclear. Accordingly, the Point Person should request an exit interview and learn as much as possible about the inspector's findings in the interview. Sometimes it is possible to get the inspector to share his or her completed inspection checklist at the exit interview. Discuss the inspector's conclusions and make sure that they are not based on inadequate information or a misunderstanding.

Post Inspection Follow-up. Following the inspection:

- Correct whatever violations or potential violations you can, as quickly as possible. This not only demonstrates a cooperative attitude to EPA, but cuts off additional "per day" penalties.
- If additional information was promised to the inspector, provide it as promptly as possible.
- Have the Point Person prepare a memorandum summarizing the inspection and the exit conference. Appropriate facility management should be informed of the results of the inspection. If possible violations were noted, counsel should be contacted to evaluate proper next steps.
- Obtain the inspection report, either from the inspector directly or by requesting it through the Freedom of Information Act. Notify the Agency of any errors in the report, promptly and in writing.