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## ENFORCEMENT

### Environmental Inspections

Potentially affected facilities should take some basic steps to prepare for environmental inspections by federal, state or local authorities, Lawrence Falbe, a partner in the Chicago office of the national law firm of Quarles & Brady LLP, notes below. This includes preparing an inspection policy and conducting mock inspections. Company officials should be polite and respectful to inspectors, but not necessarily deferential, he advises.

### Surviving and Thriving Through Environmental Inspections

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*This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.*

**E**nvironmental inspections by regulatory authorities may occur at any time at any facility subject to environmental rules and regulations as a result of operations conducted at the facility<sup>1</sup>. Because environmental regulatory inspections may become the basis for civil or criminal enforcement actions or other claims against your company or client's company, a systematic and coordinated approach to preparing for and re-

<sup>1</sup> This article provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this article. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

sponding to an environmental inspection is critical for the smooth operation of any facility.

Inspections may be performed for any number of reasons under various statutory and regulatory authorities, and they do not necessarily require a search warrant or administrative order. For example, if the facility has any kind of environmental permit (e.g., air emissions, water discharges, hazardous waste generation, etc.), the terms of some permits call for periodic inspections (e.g., annually, every five years, etc.). If an inspection has been performed for any reason in the past, often a follow-up inspection may be performed to ascertain whether previously identified violations or issues have been corrected. Complaints regarding the operation of the facility, either from neighbors or disgruntled current/former employees (whistleblowers), can also prompt an inspection. An incident in which a release of hazardous materials to the environment occurs and is reported (especially one in which injuries occurred or the release escaped off-property) is also likely to prompt an inspection.

Environmental inspections may be performed by the federal environmental authorities (U.S. Environmental Protection Agency), the state environmental authority where the facility is located or even local authorities (fire department, local publicly owned water treatment works, etc.). At the federal level, environmental concerns also may be identified as part of an OSHA inspection. A 1991 Memorandum of Understanding (MOU) between OSHA and U.S. EPA provides that inspectors from either agency will refer potential violations of EPA and OSHA regulations to each other for subsequent follow-up.

While a brief article cannot cover every detail inherent in preparing for an inspection and is not a substitute for legal advice specific to your facility, the checklist below (in conjunction with consulting experienced environmental counsel) can help in preparing an Inspection Policy to cover what should happen when inspectors knock on the door.

## A. Arrival at the Facility

When inspection officials arrive at the entrance to the facility, the security guard and/or receptionist should immediately contact the highest-level manager available, typically the Plant Manager or the Environmental Health and Safety (EH&S) Supervisor, to inform him or her of the visit.

- Managers should escort the officials to a conference room; be pleasant and respectful; ask them the purpose of the visit, and what areas of the facility they wish to inspect.

- Request business cards and identification from the officials. Ascertain which regulatory agency or agencies they represent (e.g., U.S. EPA, OSHA, etc.) and contact the respective regulatory agencies to confirm the identities of the inspectors (this has become commonplace due to terrorism concerns and the ease of falsifying official-looking credentials).

- Ask the officials to specify the authority on which they are relying to be given access to the facility. If the inspection is in relation to a specific permit, ask for that permit to be identified, and then review the terms of that permit to confirm such authority. Request a copy of any specific orders or other authority (e.g., search war-

rants) under which the inspection is being conducted. Note that most environmental inspectors will have administrative authority as explained above and may not have any specific authorizing documents, but in such case should state the basis for their authority (e.g., under the terms of a specific permit, under an environmental statute or regulation, etc.).

- Ask the officials to wait while the manager contacts outside legal counsel.

- Tell the officials that you wish to:

- (i) have legal counsel speak with them by phone initially after stating or presenting the legal authority for conducting the inspection (current contact information for internal and/or external legal counsel should be inserted into the Inspection Policy to facilitate quick communication), and

- (ii) if a search warrant has been presented (usually the sign of a very serious concern), politely request time to contact legal counsel and have counsel present when they commence their search pursuant to the search warrant (note that if a search warrant is presented, the inspecting officials may not agree—and are not legally obligated—to wait until legal counsel can arrive).

- Do not admit citizen or environmental groups, reporters or any individuals not associated with the regulatory authority.

- Be polite and respectful (but not necessarily deferential) to the officials.

## B. Conduct an Opening Conference

- Unless advised otherwise by legal counsel, before giving access to operational areas of the facility, invite the officials to sit down in a conference room and provide you with an overview of what is being requested in terms of the scope of the inspection (the Opening Conference).

- If the scope of the inspection seems overly broad, or appears irrelevant to the stated purposes of the inspection, ask to discuss/negotiate those issues with the officials. If an agreement cannot be reached, contact legal counsel for advice, especially before refusing access in whole or in part.

- During the Opening Conference, provide a proper safety briefing that covers the areas of the requested inspection, and provide any needed personal protective equipment.

## C. Escort Officials on the Inspection

- You have the right to accompany the officials at all times. Identify the in-house team that will accompany the inspectors (preferably, this should be done in advance as a contingency covered in the facility's environmental compliance program); at minimum, this should include the EH&S Supervisor.

- Answer any questions by the officials only based on specific knowledge, and keep answers brief and to the point. You are not required to guess or speculate if you do not know the answer to the question. You can offer to provide such information as a follow-up if that seems appropriate.

■ Generally, inspectors will not seek to take soil, air or effluent samples or perform other invasive sampling at the facility without advance notice; if such a request is made, notify legal counsel immediately, as this is often an indicator of a serious concern of the regulating authority. Note that the terms of a search warrant (if applicable) may entitle the officials to take such samples as well as relevant paper or electronic documents or other items specified in the search warrant.

■ Officials will often request to see contingency plans, sampling logs, or other documents and records required under specific environmental statutes, regulations or permit conditions, such as Spill Prevention Control and Countermeasure Plans (SPCC Plans), Material Safety Data Sheets (MSDSs), “Tier II Reports” or other documentation. Prior to the inspection, proper care should be taken to maintain such records separately (and ensure that they are not intermingled with non-related documents and/or sensitive documents that contain confidential business information or attorney communications) and in accordance with any statutory or other legal requirements (for example, MSDSs must always be available to employees for review). Access to such records should be given to the officials at the time of the request. If a request appears to be irrelevant to the stated purposes of the inspection, overly burdensome or otherwise inappropriate, contact legal counsel for advice.

■ Take notes during the inspection of what areas are inspected, comments made by the inspectors, and any questions asked. *Keep your notes factual and non-conclusory*, as any notes not taken by attorneys may be obtained later by the inspecting authority if an enforcement action ensues.

■ If the officials take photographs, take your own photographs if possible as well, and the same applies to any requested samples of materials. If copies of documents are requested, make a specific duplicate set of whatever is given to the officials (the same goes for electronic versions of documents).

■ Provide only documents that are requested. If documents are requested that appear to be beyond the scope of the inspection, contact legal counsel for guidance. If any documents might be subject to trade secret protection or otherwise may constitute confidential business information, ask for such protections from the inspectors and contact legal counsel.

## D. Conduct a Closing Conference

■ At the conclusion of the inspection (Closing Conference), ask the officials for their anticipated next steps (e.g., will a letter be issued, are there specific issues that will be requested to be corrected?). If any serious compliance issues have been identified (whether or not the inspector indicates that an NOV (Notice of Violation) will be issued), do not admit any fault or liability, but ask for the officials’ position on what is required to achieve compliance. Consult with upper management and legal counsel after the inspection to evaluate the position taken by the officials and determine an appropriate response.

■ After the officials have departed the facility, notify legal counsel and upper management of the pertinent details of the inspection if they were not present, even if no compliance concerns are identified. As noted above, keep in mind that any internal communications not from attorneys may be obtained later by the inspecting authority.

## E. FAQ’s

**1. Will I get advance notice of the inspection?** Sometimes. It depends greatly on the reason for the inspection and the specific authority under which the inspection is being conducted. Routine inspections intended to ensure compliance with an environmental permit are often scheduled in advance to make the inspection go more smoothly both for the inspectors and the facility. On the other hand, inspections intended to respond to a complaint or a suspected violation of law are often done without advance notice (especially where a search warrant has been issued).

**2. Can we refuse to admit the inspectors?** Possibly, but such action is almost always unwise. Most inspections will be performed under some clear legal authority such as the terms of a permit (which might be revoked if access is not provided), or statutory enforcement authority given to the regulating agency under law. Most such authority is very broad (and does not require a search warrant or other such legal authority issuing from a judge) and it is very difficult to completely bar access to a facility from a determined regulatory agency. Depending on the specific authority invoked, civil monetary penalties or even criminal penalties may be assessed for failure to admit inspectors. At the very least, trying to thwart access to a facility by inspectors is likely to raise their ire. Consequently, such resistance may result in adverse consequences when matters of regulatory discretion are involved and may also give inspectors the sense that the facility “has something to hide,” which will increase the level of scrutiny applied to the facility when they finally gain admittance.

**3. Can inspectors seize or demand copies of paper or electronic documents?** Yes, depending on the nature of the inspection and the authority under which the inspection is being conducted.

**4. Can inspectors talk to my employees? Does management have a right to be present during such questioning?** Yes, inspectors usually have the authority to speak to facility employees. If an inspector asks to speak to an employee without management present, contact legal counsel for guidance.

**5. How do I prepare for an inspection?** Always assume an inspection may occur at any time. Consistently practice good environmental housekeeping and don’t assume that things can be corrected just before (or after) inspectors arrive. Engage in periodic (typically annual) internal environmental compliance audits (which may be performed by third-party consultants if needed, often with the assistance of legal counsel) to try to identify issues before the inspectors do, and conduct mock inspections to train your response team. Prepare an Inspection Policy to ensure a proper and consistent response by facility personnel.