Prepare for a Post-Pandemic World by Reviewing and Improving Your Company's Inspection Procedures

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Shutdown and stay-at-home orders brought on by the pandemic caused the level of inspections by state and federal environmental agencies to plummet. For the past 2½ months, absent emergency conditions, inspections ground to a halt due to agencies working remotely in order to protect employees and slow the incident rate of the virus. Over the same time, industries across the country were closed, operating in shutdown mode, or working at substantially reduced production rates, with many employees working remotely, part-time, or even furloughed due to the orders or changing financial conditions.

As industries reopen or ramp up production, and begin a phased return to the office, the same process is occurring at state and federal environmental protection agencies. This will lead to a surge in delayed compliance inspections, most likely with new guidelines for the inspectors' safety. As that process unfolds, now is a good time for the environmental staff (ES) and legal counsel (LC) to review, revise, and improve the company's procedures to be followed during compliance inspections.

To that end, on March 2, 2020, just a week or so before most orders were issued, U.S. EPA published a new rule, 40 CFR Part 31, to codify its civil inspection procedures. This action complied with President Trump's October 2019 Executive Order 13892, entitled *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, which, among other things, required agencies to publish a rule with their administrative inspection procedures.

While not as comprehensive as we recommend, the new rule is a good starting point for reviewing the company's procedures and, if there are no written procedures, hopefully provides an incentive to draft them. In summary, U.S. EPA codified the following inspection procedures, which are now required for all of its programs (with mandatory or discretionary procedures denoted in italics), which should be part of the company's written internal inspection procedures:

- An inspector *should* generally conduct inspections during normal working hours and, where possible, for previously announced inspections, take reasonable steps to coordinate a schedule with the company for areas to be inspected;
- An inspector *must* carry a valid and current ID or credential, present it upon arrival, announce the authority and purpose for the inspection, seek consent from the company for entry, and, if entry is denied, state that a warrant may be sought;
- An inspector *may* sign a visitor's log, but *may not* sign a document indicating that the inspector (a) waives a potential claim for an injury that might occur during the inspection, or (b) agrees to limit the use of information obtained during the inspection, unless a confidential business information (CBI) claim has been asserted by the company;
- Before the inspection begins, the inspector *must* provide an opening conference to the company's representatives where practicable, during which: (a) the inspector *must* (i) state the objectives of the inspection, (ii) provide the Small Business Resources and CBI forms, and (iii) state whether sampling will be performed, with an offer to obtain splits or duplicates for any samples; and (b) the inspector *may* (i) request a copy of documents, (ii) request to interview employees, (iii) request an overview of plant operations or a site map, (iv) confirm access to specific locations inside the plant, or (v) request identification of any safety or health hazards;
- If a CBI claim is asserted at any time during the inspection, the inspector *must* process the claim in accordance with the procedures in 40 CFR Part 2, Subpart B, and treat the applicable information as CBI subject to verification or refutation at a later date;
- The inspector *must* inspect the areas, units, sources, and processes "relevant to the scope" of the inspection;

- The inspector *may* conduct interviews of employees or contractors "working in the area(s) of interest," and *should* document names, titles, and dates of all interviews;
- The inspector *must* review records relevant to the scope of the inspection, *may* request records before, during, or after the inspection, and *may* provide a list of copies of records obtained from the company;
- The inspector *must* offer a closing conference to the company where practicable, during which the inspector (a) *must* discuss any outstanding questions or missing documents and the process for following up on the inspection, and (b) *may* (i) discuss next steps, (ii) discuss if/how the company will be contacted regarding the results of the inspection, (iii) identify the agency contact for further communication, and (iv) summarize "areas of concern" found during the inspection; and
- After the inspection, the inspector *must* share an inspection report with the company, which *may* be as simple as an email message, a form or checklist, or a more elaborate letter or document.

These 10 procedures, while somewhat intuitive, have not always been followed. Thus, the codification of U.S. EPA's inspection procedures provides greater protection for companies, promotes consistency amongst inspectors, and may improve cooperation and working relationships between the Agency and the regulated community. While not binding on state agencies, it would be surprising if many do not follow suit, either by codifying their own rule or drafting a policy for their inspectors.

While these procedures provide a reasonable "template" for the company's internal inspection procedures, here are three additional procedures we strongly recommend be reviewed in light of the pandemic:

- **Lines of Communication and Delegation of Responsibilities**

All written programs should identify clear, up-to-date, lines of communication between the ES and the LC, with a summary of delegated responsibilities, starting from (1) the response to a call or email announcing an upcoming inspection or the inspector showing up unannounced; (2) deciding whether to consent to the inspection; (3) attending the opening/closing conference; (4) guiding the inspector though the plant; (5) handling requests for documents, data or interviews; (6) asserting CBI claims; (7) following up after the inspection, etc. Handing the myriad of issues that can arise before, during, or after an inspection without written internal procedures is unwise and a potential foundation for later problems.

Due to potential reductions in the ES or LC ranks caused by the pandemic, or to increases in personnel deciding on a short or long-term basis to work remotely, the odds are high that many programs need to be updated in terms of their lines of communication and delegated responsibilities, with back-up personnel added to reflect the changing conditions.

- **Consent for the Inspection**

Notwithstanding permits and rules that frequently state that inspectors have the right to enter the plant to perform an inspection, such provisions do not override the protections of the Fourth Amendment. Nevertheless, inspectors implementing a "facially neutral," administrative civil enforcement scheme have the right to inspect, and if denied entry, can obtain an administrative warrant. If there is probable cause to believe that a criminal violation has occurred, or is occurring, the inspector can obtain a judicial warrant.

While the pandemic has not changed these two basic schemes, it created a backlog of "routine" inspections. With so many industries working the past few months at substantially reduced production/staffing levels, and many agencies providing relaxed compliance obligations or "force majeure" protections for pandemic-related noncompliance, the number of "focused" inspections will also jump significantly over the next several months. For industries that have been shut down and are just beginning to reopen, the potential for noncompliance caused by malfunctions or exceedances during the startup of processes is also likely to lead to additional inspections.

These pandemic-related conditions make it even much more important that the company's inspection procedures spell out the steps for the ES to: (1) determine as soon as possible the purpose and scope of a planned or unannounced inspection (e.g., routine, focused, joint, multi-media, or even criminal) and (2) involve LC from the outset in the decision making process before a decision is made by the company to (a) consent to the inspection without limitation, (b) consent with limitations agreed to by the inspector, (c) consent with internal limitations or safeguards put in place by the company, or, in that rare case, (d) deny consent to the inspection.

- **Workplace Safety Rules/Procedures**

Inspectors have always been required to follow the company's environmental, health and safety guidelines during an inspection. However, due to the pandemic, the inspection procedures need to be reviewed and revised to add reference to the applicable OSHA and CDC guidelines that have been issued or revised in the last three months. In addition, it will be that much more important in a post-pandemic world for the company to require the inspector to sign a form indicating his or her agreement to follow these requirements during the inspection.

While not directly impacted by the pandemic, U.S. EPA's new inspection rule raises other important "do's and don'ts" that we recommend to all companies, a few of which are highlighted here.

- **Producing Copies of Documents or Electronic Data**

While the new rule codifies an inspector's right to request records or data during the inspection, for several reasons it is almost never advisable to make records or data available for review or copying during an inspection. First, there is the risk of inadvertent production of CBI or privileged communications, potentially waiving these protections, or the inadvertent production of records not requested that could cause the scope or duration of the inspection to increase, or lead to a follow-up inspection. Second, there is the risk that, in the harried process of an inspection, the scope of documents or data provided for the inspector will not be accurately documented, reducing the ability of the ES or LC to determine afterwards any undisclosed issues relating to the inspection. These risks make it unwise for the ES to make such decisions *ad hoc* at a time when their focus needs to be solely on the inspection in order to protect the company's interests.

To minimize these risks, the company's procedures should state that the response to all requests for records or data during the inspection, or at the conclusion thereof, is to inform the inspector that LC requires that a list of requests be submitted and, once LC completes its review for any potential CBI or privileged materials, a copy of the records or data will be produced promptly. This delay also allows the company to respond to any potential compliance issues or misunderstandings in an email or cover letter accompanying the records or data, and allows time to select a format to produce electronically-stored data that has no risk of corrupting the company's electronic equipment or software.

- **Interviews during the Inspection**

While the new rule codifies the inspector's discretion to request interviews, it is within the company's discretion whether to allow them. In addition, unlike an OSHA inspector, U.S. EPA's inspectors do not have the right to conduct interviews of employees without a company representative being present. While neither Agency has the right to conduct interviews during work hours, most companies tend to allow such interviews if the interview is short, does not disrupt work responsibilities, and is limited to a series of Q&A related to a particular process or piece of equipment that is relevant to the scope of the inspection.

The company's procedures should state that no interviews are permitted without an ES representative being present. This recommendation is not about controlling the scope of an employee's responses, but rather (1) avoiding distractions that might jeopardize an employee's safety or cause a problem with a production process, (2) ensuring against a misunderstood, incomplete, or inaccurate question or answer, and (3) providing additional information helpful to a full understanding of the issue.

- **Conducting the Inspection and the Doctrine of "Plain View"**

While the company's procedures should state that during the opening conference the inspector must be asked to identify the scope and purpose of the inspection, no matter how narrow the stated scope and purpose, an inspector has the right to expand it to address potential compliance issues in "plain view" during the inspection. Consequently, if the sole purpose of the inspection is, for example, to take samples at a manhole leading to the local sewer, the procedures should specify that the inspector is to be guided directly to the manhole, not guided on a tour of the plant before heading to the manhole.

In a similar vein, the company's procedures should specify that a member of the ES (or another company representative) must accompany the inspector during all parts of the inspection. If multiple inspectors are involved without prior notice, and an insufficient number of staff from the company's inspection team are available (which is very possible in light of pandemic-related staffing reductions), the procedures should specify that the inspectors must stay together, or the inspection will have to be postponed until sufficient staff are available.

- **Sampling**

While the new rule specifies that inspectors must offer the company the opportunity to take split samples or collect duplicate samples, that does not mean that the inspector will be bringing extra sampling containers for this purpose. Therefore, for all planned or previously announced inspections, the inspector should be asked at the time of the notice whether sampling is planned and, if so, the location(s) and scope of the planned sampling and parameters to be sampled. This will enable the company to: (1) put its lab on notice, including whether expedited analyses will be needed; (2) ensure that the proper sampling equipment (e.g. containers, jars, preservatives, etc.) is present for the company to take any desired split or duplicate samples, and that the required preservation steps/holding times are known and followed; (3) ensure that any portable or handheld samplers are charged and calibrated; and (4) if needed, put its outside environmental consultant on alert so that it is prepared to give advice on soil or groundwater sampling, or to assist in such sampling.

While some of these steps may not possible during an unannounced inspection, once sampling is indicated during the opening conference, the company should be afforded reasonable time in which to take some or most of these steps. Otherwise, the new rule's requirement for inspectors to "provide an opportunity" for split or duplicate samples to be taken is arguably not met.

These steps need to be included in the company's written procedures. Because permits specify the location(s) where compliance samples are to be taken, the inspection procedures should also specify the location(s) for compliance samples, and all members of the ES need to be sufficiently informed to be able to take the inspector to the correct location. Otherwise, the company is at risk of sampling results being obtained that are not representative of compliance conditions.

- **Following up to the Inspection**

The new rule's requirement for inspectors to offer a closing conference is an important protection for the company. While it specifies that the inspector must discuss any "outstanding questions," it also makes clear that this does not require a summary of potential noncompliance issues identified during the inspection. Unfortunately, too often an inspection ends with the company believing it just received a "clean bill of health," only to be surprised by a notice of violation letter a few weeks later.

Consequently, the company's procedures should specify that the inspector is to be asked during the closing conference to identify all known or potential violations found. The company should follow up with an email or letter to the inspector (perhaps one that includes any requested records or data), thanking him or her for the inspection, and memorializing the inspector's statement at the closing that (1) no violations were found, or (2) if the opposite, identifying the compliance issue and providing information to clarify a misunderstanding or indicating steps taken, or to be taken, to eliminate the compliance issue.

Many things are changing as we move into a post-pandemic world. The "new norm" is still being defined. But, for industry, it will include a resumption of state and federal environmental inspection programs, most likely with facemasks and "social distancing" integrated into each inspection. To get ready, the company needs to review its internal inspection procedures, focusing on sections likely to have been impacted by pandemic-related reductions in production or staffing, and perhaps addressing other recommendations discussed above. Our recommendations focus on the new rule and impacts created by the pandemic. There are other components that can make the internal inspection procedures even more effective in protecting the company's interests. If you have questions about U.S. EPA's new rule, would like to discuss other components that we recommend for internal inspection procedures, or would like assistance with reviewing or revising the company's procedures, please contact Steve Haughey, Bill Hayes or another member of the firm's Environmental Practice Group.