After the Regulatory Inspection – Navigating the Enforcement Process

By:

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Letter of Violation/Notice of Violation

- You survived the inspection – but not exactly with flying colors:
- Identify alleged violations
- Recite authority
- Timing (always inconvenient)
  - The easiest stuff has already been addressed—before the NOV is received—RIGHT?
- How many violations? Length of time? Surprises?
- Invite discussion/negotiations to “resolve” the matter
- Time for response
  - Seek extension for substantive response, if needed
Initial response

- Strategic Decision Point
  - Negotiate or Fight

- Begin with the end in mind
  - Habit #1
Potential Reasons to fight

- Essential factual error
- Jurisdiction/authority: Challenge to agency overreach
- Conduct authorized by permit/court order
- You have no choice: Bet the company
- Your lawyer’s kid wants to go to Stanford
Reasons to Negotiate

- Avoid delay and cost of litigation
- Future relationship with regulators
- Company reputation/brand
- Unresolved violations may delay needed air permit/modifications/approvals
- Unpredictable consequences if you lose that fight
- Compliance enforcement is simply a cost of doing business
- Typically concluded by administrative order
Do We Need An Outside Consultant?

- While many companies have experienced EH&S capability in-house, there are times when it’s helpful to have an outside consultant:
  - Objectivity: Fresh eyes, fresh questions
  - Internal resources already committed elsewhere
  - Conflict of interest/defensiveness of plant personnel, management, compliance staff

- Retaining consultant through legal counsel (privileged communications?)
Do We Need Outside Environmental Counsel?

- Maybe—case by case
- Penalty range – number of violations alleged
- Past enforcement history/repeat violations
- Discovered/suspected culpability (falsified/fudged records?)
- Potential willful conduct/potential criminal charges
- In-house counsel availability and comfort with enforcement scheme (e.g., RCRA, CAA, etc.)
Outside Environmental Counsel: Attorney-Client Privilege

- Attorney/client privilege can shield your preliminary evaluations.

- If you are a public agency, consider FOIA. Your internal preliminary assessments are subject to FOIA. Exemptions for privileged material. Attorney/client privilege can shield the preliminaries until you can evaluate.

- Some courts distinguish between in-house counsel acting as “legal advisor” to the company (privileged) vs. “business advisor” (no privilege). Courts have rejected a claim of attorney-client privilege for technical report prepared by third-party consultant hired by company, even though company’s general counsel had ordered the report. Safer course: First retain experienced outside environmental counsel (closely coordinate with in-house counsel), who can then retain the technical team.
Decide which terms to negotiate:

- Facts/Findings – Insist on Accuracy
- Applicable Requirements
  - Permits/regulations/standards
- Compliance Plans
  - Goals and milestones (schedule)
  - Costs
- Penalty
- Stipulated Penalties
- ACO Term and Termination
Negotiating the ACO

- Don’t argue about the boilerplate
- Retain your credibility
- Carefully confirm/correct compliance dates (length of violation) and details for each violation alleged
  - In calculating penalties, details matter, and they add up:
    - Normal operations vs. upset conditions
    - Failure to test/monitor vs. incorrect or late test vs. failure to document the test
    - Failure to report vs. late report/mistake in report
    - Failure to train vs. failure to properly document training
    - Unpermitted equipment vs. violating permit limit, etc.
Negotiating the ACO: Get the Facts Right

- Some allegations might be simply wrong—errant assumptions
  - e.g., batch processes vs. continuous feed (errant assumptions, invalid comparisons)
- Understanding the details might require talking to the operators, not just EH&S and management
- You might find that incorrect facts have been reported/assumed
- Correct the record as soon as you discover error, etc.
- Chrome plater
  - Alleged recordkeeping violations regarding foam blanket fume suppressants
  - Young management (2nd generation) unaware of any compliance effort by second shift (bleak outlook)
  - But old timers in shop kept handwritten notes in a notebook up on a shelf—good enough to demonstrate substantial compliance
- Gravel crusher operation (000 Source)
  - Company cited for unpermitted piece of equipment (large conveyor)
  - Management mystified—had not purchased new equipment
  - Speculated that recently deceased site manager must have traded smaller conveyors for a bigger one (high drop, etc.)
  - Talked to operators at the pit
    - Smaller (permitted) device broke down. In off season, it was welded together with another (permitted device) and fabricated into one larger piece
    - Freshly painted, etc.
  - Already permitted; EPA dropped the matter
Compliance Plan

- Agreed schedule with enforceable steps back to compliance
  - Promises
  - Milestones

- What solutions are going to take some time?

- Capital investment/budget cycle/design/new equipment/permit/ training
Beyond Compliance: Opportunities?

- Replace equipment or materials to enhance efficiency/reduce environmental footprint
- Outsource a process
- Persuade management that investment is warranted now
- Improve prospects for future compliance of company
Negotiating the ACO: Penalty Calculations/Negotiations

- Penalty policies vary by media/agency

- Air – EPA Stationary Source Civil Penalty Policy (major sources)
  - Detailed/prescriptive and supplemented by other guidance (asbestos/112R)

- Daily penalties per violation until resolved and documented
  - Settlement/order/revised permit (enforceable limits)

- Penalties can be prohibitive

- Eliminate economic benefit of non-compliance
  - Level playing field

- Reflect seriousness of violation
  - Environmental harm/risk
  - Paperwork violations taken very seriously: threat to the regulatory framework

- Size of violator

- Adjustments
  - Cooperation
  - Ability to pay
  - Other
 Negotiating the ACO: Stipulated Penalties

- “Automatic” penalty for breach of any enforceable commitment in the ACO

- Negotiable points
  - Variable (tiered) amounts per violation/per day
    - Which stip apply to which violations?
  - Tied to specific violations and to specific requirements in the ACO (compliance plan steps or SEP)
  - Proportional/reasonable?

- Do not agree to terms that you cannot reliably perform

- If a future violation occurs: negotiate to reduce the stip (even though its “automatic” and “stipulated”)
Negotiating the ACO: Supplemental Environmental Projects

- Capital investment
- Benefit to environment
- Not required for compliance (goes above and beyond)
- Offset against penalty amount
- Likely to involve greater total expense than just paying penalty, but $$ reduces the penalty amount
- Can you improve prospects for future compliance at company?
- SEPs are favored generally
SEP Examples

- Traditional SEPs/old school
  - Provide new safety equipment to local fire department
  - Paid for publication of Michigan Air Use Permit Technical Manual
  - Greenhouse gas reduction project/electric fleet

- Non-Traditional SEPs
  - Replace offending parts cleaner (degreaser) with detergent based parts cleaner
  - Upgrade and automate boiler fuel feed systems, etc., to improve combustion efficiency, etc.
  - Eliminate hazardous materials and replace with non-toxic materials/systems
Finalizing the ACO

- Public notice of ACO
- ACO resolves non-compliance pending completion of compliance plan
- Agency press release
- Calendar to terminate the ACO when it is completed
QUESTIONS?

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