

## **PROTECTING YOUR RIGHTS IN ENVIRONMENTAL INSPECTIONS AND INVESTIGATIONS**

By: Joseph Quandt\*

The United States Environmental Protection Agency has recently announced that all of its enforcement initiatives saw double digit increases, both in the number of civil and criminal enforcement cases, as well as fines and penalties collected under those initiatives.

A tool frequently utilized by the EPA and state agencies involves the use of unannounced inspections and warrants for searches to detect environmental violations. Unless you are prepared for such an inspection or warrant, the results of this type of initiative could be disastrous to your company. The following are some tips for safeguarding and preventing unnecessary fines and penalties.

### **The best defense is a good offense.**

The best way to prepare for an inspection is to establish inspection procedures at your company. Develop a policy which includes contact persons, facility management, attorneys and other key personnel. Security personnel should be advised in any inspection to alert facility management and the company's legal staff when inspectors arrive. A facility manager should request, and make copies of, any inspector's identification and verifications of the inspection. The facility manager or his/her designee should ask under what authority the inspection is being conducted.

Frequently, inspectors may utilize veiled threats or intimidation to gain access to a facility by consent. If an inspector cannot provide specific evidence of their regulatory or jurisdictional authority, you should respectfully decline them access to the facility. If the inspectors produce an administrative warrant or other court order, you should request that the inspectors wait to conduct their inspection until legal counsel can be present.

While you are waiting for your attorney, take note of any limitations in the warrant, such as places to be searched, items to be seized, and the length of time or any other limitations which the warrant or order might have. Be sure to voice your objections to any search or seizure which is beyond the scope of the warrant or order. Remember that your demeanor should be courteous and responsive, but you should not volunteer information or consent to do anything beyond what the inspection authorization or warrant provides. Waiving your rights to any search or seizure will preclude you from attacking the validity of the search at a later date.

### **Confidential Information**

Make sure any confidential information which the inspector wishes to inspect and make copies of is marked "confidential" or "trade secret – confidential". Generally, any information discovered during an inspection may later become public information which is capable of being disclosed under the Freedom of Information Act. There are exceptions under the Freedom of Information Act for trade secrets and other confidential documentation. Inspectors should not be

given access to any documentation which is attorney-client privileged or part of an attorney-client work product.

If inspectors wish to have access to areas that have specific safety concerns, facility management should provide a short safety training class and protective equipment prior to inspecting those areas. If inspectors wish to interview employees or other company officials, you may instruct the employee that the employee has the right to request an attorney prior to and/or during an interview.

### **After the inspection.**

Immediately following the inspection, you should ask for copies or duplicate samples of any information seized during the inspection. Try to assure that you have a camera or video equipment to tape or document the inspection. If the inspectors take pictures, ask for copies. After the inspectors leave, it would be wise to conduct a post-inspection meeting to debrief all personnel interviewed, the nature of the questions asked, and the areas searched. The inspectors should make an inventory list of any documents copied or items seized and be sure that you get a signed copy and that the inventory list is complete and accurate.

To conclude, facility inspections are here to stay. Knowing your rights during such an inspection can make the difference between financial disaster and a mere inconvenience.

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