

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.**

Administrative Order by Consent (ACO)

- **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 stipulations 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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