



NEW ADMINISTRATION READINESS CHECK-UP: COMPLIANCE INSPECTIONS

As with much else this year, the 2020 presidential election was unprecedented. Although a clear picture of the results started to take shape by the early morning hours of November 4th, it was not until Saturday, November 7th when the race was called by major news organizations. A flood of prognostication and speculation as to the impact of the election results on environmental policy and regulation followed shortly thereafter. As is usually the case when there is a transition from a Republican administration to a Democratic one, the focus of the regulated community has centered around the likelihood of more and increasingly stringent environmental regulation.

A lot has already been written about anticipated changes in areas such as climate change policy, process safety, and enforcement. I will have some things to say on these topics in the future; however, I would like to focus initially on some of the more practical implications of the upcoming transfer of power. To that end, this is the first in a series of short articles about actions that can be taken to prepare for the upcoming transition. This article focuses on preparing for the likelihood of an increase in environmental enforcement activity at the federal level.

One of the main areas of emphasis for the Biden Administration will be to increase EPA enforcement activity, including enforcement inspections. Most environmental enforcement activity typically takes place at the state level, regardless of which party occupies the White House. However, there has been a particularly significant decline in the level of EPA enforcement activity during the Trump Administration. To take just one example, the number of inspections conducted by EPA during FY2018 was the lowest since EPA began tracking such information in 1994.¹

The new administration intends to reverse this trend. Of course, this does not mean that a knock on the door will be coming on January 21st. However, EPA enforcement inspections will become more likely to occur, particularly for facilities in industries that may be viewed as pollution-intensive or that are located in communities with significant environmental concerns. Since enforcement inspections conducted by EPA tend to differ from typical routine state-level inspections in certain key respects, some planning and preparation is important.

The most significant difference is that an enforcement inspection by EPA usually involves more inspectors. Whereas a typical routine state-level enforcement inspection is often

¹ Leif Frederickson, *EPA Initiated Fewer Civil Cases in 2018 Than It Has in Over 35 Years*, Environmental Data & Governance Initiative, Feb. 14, 2019 - <https://envirodatagov.org/epa-initiated-fewer-civil-cases-in-2018-than-it-has-in-over-35-years-and-other-red-flags-of-weak-enforcement/>



conducted by just one or two inspectors, an inspection led by EPA often involve as many as ten inspectors or more. Managing such an inspection can be challenging. More personnel and resources are needed to: (i) ensure (to the extent possible) proper safety training of agency personnel; (ii) explain the facility's processes; (iii) escort agency personnel through the facility (and prevent any agency personnel from straying off unescorted); (iv) respond to requests for documents in an organized and coordinated fashion; (v) manage and monitor the collection of samples by agency personnel; (vi) ensure the collection of split samples by the facility; and (vii) conduct productive opening, closing, and periodic update conferences.

In anticipation of the possibility of an EPA enforcement inspection at some point over the next several years, facilities should review, and if necessary, revise their inspection response plans to include contingencies for inspections involving more inspectors than usual. To the extent necessary, such plans should expand the scope of personnel with roles and responsibilities for such inspections. Likely candidates for these roles would be personnel from operations or occupational safety and health departments. These candidates should be trained as necessary to manage the activities described in the preceding paragraph.

In addition, since inspections by EPA typically involve higher-stakes enforcement issues, periodic training exercises to ensure a smooth and robust response may be useful. These exercises need not be elaborate. Even periodic desktop exercises can help prevent "foot-faults" such as failure to produce records for inspectors in a timely manner.

This may seem like a lot of effort for a contingency that may never come to fruition. However, a regulatory inspection involving six, eight, or ten inspectors (if not more) can create quite a lot of disruption and can ultimately lead to undesirable outcomes if not properly managed. Thus, at least for facilities in industries or communities that are at higher risk of becoming the focus of federal-level inspections over the next several years, some level of preparation is probably worth the time spent. In addition, such preparation can improve the response to a routine state-level inspection, which in turn will likely lead to better outcomes.

The next topic in this series will be the new administration's impact on compliance auditing.

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