

For audio participation, please dial: 1.866.835.8609; Passcode 1442288



Environmental Law Update

WEB CONFERENCE SERIES

Strategies for Mitigating Environmental Enforcement Risk

October 21, 2010
11:30 a.m. – 12:30 p.m. Central



©2009 Foley & Lardner LLP • Attorney Advertisement • Prior results do not guarantee a similar outcome • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500 • 08.4454c



Program Moderator

2



- **Linda E. Benfield**
Partner
Chair, Environmental
Regulation Practice
Group
Foley & Lardner LLP
414.297.5825
lbenfield@foley.com



©2009 Foley & Lardner LLP



Program Speaker

3



- **Steven E. Chester**
Of Counsel
Foley & Lardner LLP
313.234.7146
schester@foley.com



©2009 Foley & Lardner LLP



Program Speaker

4



- **Thomas K. Maurer**
Partner
Foley & Lardner LLP
407.244.3242
tmaurer@foley.com



©2009 Foley & Lardner LLP



Program Speaker

5



- **Mark A. Thimke**
Partner
Foley & Lardner LLP
414.297.5832
mthimke@foley.com



©2009 Foley & Lardner LLP



Housekeeping

6

- Call **866.493.2825** for technology assistance
- Dial ***0** (star/zero) for audio assistance
- Ample time for live Q & A will be allotted at the end of the formal presentation, or questions can be entered via the Q&A tab located on your menu bar at the top of your screen. We will address all questions at the end of the program.
- We encourage you to maximize the PowerPoint to full screen usage:
 - Hit F5 on your keyboard; or
 - Select “View” from the toolbar menu and click “Full Screen”
- To print a copy of this presentation:
 - Click on the printer icon in the lower right-hand corner
 - Convert the presentation to PDF and print as usual
- Foley will apply for CLE credit after the Web conference. If you did not supply your CLE information upon registration, please e-mail it to jbartz@foley.com



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

Steven E. Chester



EPA Enforcement Priorities

- Fiscal Year 2011 – 2015 EPA Strategic Plan
- Enforcement Objective:
 - “Pursue vigorous civil and criminal enforcement that targets the most serious water, air, and chemical hazards in communities. Assure strong, consistent, and effective enforcement of federal environmental laws nationwide.”





EPA Enforcement Priorities

9

- “Taking Action on Climate Change and Improving Air Quality”
 - Reduce air pollution from large sources:
 - Coal-fired power plants
 - Cement, acid and glass sectors
 - OECA also targeting large refineries and large emitters of SO₂, NO_x and PM



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

10

- “Protecting America’s Waters”
 - Revamping enforcement/working with states:
 - Increase enforcement actions in waters not meeting water quality standards
 - Get raw sewage out of water (CSOs, SSOs)
 - Prevent animal waste pollution (CAFOs)
 - Reduce stormwater runoff (MS4s)



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

11

- “Cleaning Up Communities and Advancing Sustainable Development”
 - Require responsible parties to conduct cleanups
 - New actions at Superfund sites
 - Consent Decree enforcement actions
 - OECA has targeted mineral processing operations (90+ facilities on Superfund NPL)



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

12

- “Ensuring the Safety of Chemicals and Preventing Pollution”
 - Reduce exposures to chemicals and pesticides:
 - OECA has targeted facilities subject to MACT standards, with a specific focus on:
 - Excess emissions from failing to comply with leak detection and repair requirements, and restrictions on flaring
 - Excess emissions during start-up, shutdown and malfunction events



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

13

- Criminal Enforcement
 - In response to criticism, EPA to increase criminal investigators to beyond 200, and increase number of criminal investigations
 - Focus of investigations will be all media and:
 - Serious harm or injury
 - Hazardous/toxic releases
 - Ongoing/repetitive or multiple releases
 - Serious documented exposure to pollutants
 - Violators with a history of noncompliance or prior criminal conviction



©2009 Foley & Lardner LLP



EPA Enforcement Priorities

14

- Strategic Measures
 - Over 5 years or by 2015:
 - Conduct 105,000 inspections (FY 2005-09 baseline: 21,000)
 - Initiate 19,500 civil judicial/administrative cases (FY 2005-09 baseline: 3,900)
 - Increase % criminal case filed to 45% (FY 2006-10 baseline: 36%)
 - Reduce, treat or eliminate millions of pounds of air, water, hazardous waste pollutants



©2009 Foley & Lardner LLP



Before the Inspection

Thomas K. Maurer



Before the Inspection

- Be sure you are in compliance with all permits, laws and regulations (consider internal audit).
- Have all documents created by your attorney in a separate file or file drawer (locked or clearly marked that the contents are privileged, attorney/client documents not subject to inspection). This does not apply to documents prepared by an attorney which have been filed with an agency or court.
- Have your attorney's name and telephone number easily accessible.
- Implement a facility plan to keep the above information and your Inspection Plan current.





Inspection Plans

17

- Primary and alternate contacts at the facility
- Identified locations where pertinent records are stored
- Procedures for notifying corporate environmental staff and attorneys
- Identification of locations in the facility where environmental monitoring is conducted

©2009 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Inspection Plans (cont.)

18

- Location of inspection-related equipment (cameras, sample bottles, video recorders)
- Health and safety procedures for inspectors
- Trade secret protection (camera or videotaping)

©2009 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



The Inspection

Thomas K. Maurer



Types of Inspections

- Announced
 - Routine
 - Inspectors may be familiar regulators
- Surprise
- Investigations
 - Warrant
 - Without Warrant





Meeting the Inspector

21

- A designated contact person should be assigned to each inspector and accompany the inspector wherever the inspector goes
- Check credentials (if person is not known)
- Determine scope of inspection
 - Equipment/processes to be viewed
 - Records to be checked
 - Whether photographs taken
 - Whether samples to be taken
 - Whether videotaping will occur



©2009 Foley & Lardner LLP



Unplanned Inspections & Potential Delays/Search Warrants

22

- Contact Corporate Environmental and Legal
 - Consider whether company counsel and/or outside consultants should be present for any part of the inspection or discussions
 - Jointly determine if requesting a search warrant or delay is appropriate
- Potential Reasons for delay:
 - Obtain Legal support or Corporate Environmental support for inspection (e.g., assistance with special sampling procedures or techniques)
 - An outside consultant has expertise that will assist the inspector in evaluating the facility
 - There are other pending enforcement actions
 - Extenuating Circumstances (rare)



©2009 Foley & Lardner LLP



Request Delay?

23

- Can some aspects of the inspection and/or the document review begin while awaiting arrival of:
 - Legal support
 - Corporate Environmental support for inspection (for example, assistance with special sampling procedures or techniques)
 - Consultant participation



©2009 Foley & Lardner LLP



Pre-Inspection Discussions

24

- Reach agreements on the following with the inspector before starting the inspection:
 - Duplicate sampling (try to obtain split samples as opposed to sequential samples)
 - Trade secret protection
 - Whether an exit interview will be conducted
 - Areas of facility to be inspected
 - Records to be inspected
 - Photographs/videotaping
 - Health and safety procedures
 - Obtaining copy of inspection report



©2009 Foley & Lardner LLP



Pre-Inspection Discussions

25

- Review health and safety procedures. Make sure inspector has or is provided with necessary equipment
- Keep notes of pre-inspection discussion so as to document agreements reached with inspector



©2009 Foley & Lardner LLP



The Inspection

26

- Attitude – Be cooperative and nice
 - No need for opinions of inspections, the inspector, the agency, environmental laws, global warming, politics, and so on
 - Inspectors as valuable allies in what happens next
- Notes and record keeping
- Multi-day inspections
 - Daily internal pre and post inspection meetings



©2009 Foley & Lardner LLP



The Inspection

27

- Do not volunteer information
- Only go to locations requested by inspector
- Limit inspector's general contact/interviews with company employees
- Take duplicate samples.
- Take duplicate pictures.
- Keep duplicates of documents provided and of records reviewed
- Fix problems immediately
 - Labeling
 - Storage



©2009 Foley & Lardner LLP



The Inspection

28

- Statements made to inspector
 - Be truthful. False statements to an inspector are subject to criminal sanction.
 - Only answer the question. Do not volunteer information.
 - Do not speculate. If need to obtain information, arrange to do so.
 - Do not agree with inspector that alleged noncompliance is a violation.
 - Be prepared to stop answering and seek legal assistance if questions are aggressive.
- Sampling
 - Make sure quality assurance/quality control procedures are followed.
 - Note any discrepancies in quality assurance/quality control during sampling.
 - Consider videoing procedure.



©2009 Foley & Lardner LLP



The Inspection

29

- Photographs
 - Photographs should be taken from same location and same angle as inspector.
 - Determine if trade secret information (process information) is captured by photograph.
- Document the inspection
 - Locations/equipment inspected.
 - Questions asked/answered.
 - Statements of inspector reflecting noncompliance
- Follow-up items to be answered
 - Consult counsel and/or consultants to answer questions that were not answered during inspection



©2009 Foley & Lardner LLP



Post-Inspection

30

- Exit interview with inspector
 - Identify problems issues
 - Fix problems that can be fixed
- Prepare a post-inspection report that documents all aspects of the inspection.
 - Who, what, where, when, etc.
 - Submit to Corporate and counsel



©2009 Foley & Lardner LLP



Post-Inspection

Mark A. Thimke



Post-Inspection: Dealing With the Aftermath

- Immediate tasks
- Resolving the issues
- Potential innovative steps/alternative settlement





The Immediate Tasks: Understanding What Just Happened

33

- **Preserve the record**
 - Avoid the post-inspection “let down”
 - Collect and organize records
 - Conduct “debriefs” of those people involved with inspection team
 - Follow through with any duplicate samples; retain all lab, chain-of-custody documents
 - Catalog follow-up commitments made to inspectors and document follow through
- **Assess/maintain “document hold” – paper and electronic; including electronic VM**
- **For federal inspections – remember Sarbanes-Oxley requirements on destruction of documents**



©2009 Foley & Lardner LLP

FOLEY & LARDNER LLP



The Immediate Tasks: Understanding What Just Happened

34

- **Non-compliance uncovered during inspection**
 - Triage approach: What can be readily fixed versus what requires longer term capital intensive work
 - Address low-hanging “fruit”
 - Document what is done/when; report to inspection team
- **Liability Assessment**
 - Determine potential exposure for future decision-making; but recognize disclosure implications
 - Attorney-client assessment: essential
 - Attorney-client -- means work done and legal advice to a client
 - Not just a label or header on report
 - May want to retain consultant to assist – make sure part of attorney team
- **Tools for assessment**
 - Strong factual base: What happened/when -- a key part of assessment
 - EPA penalty policies helpful but need to apply carefully and use experience and judgment
 - Capital and annual operation costs of potential fixes become important for penalty



©2009 Foley & Lardner LLP

FOLEY & LARDNER LLP



Resolving the Issues

- **Government follow-up**
 - Follow-up information requests
 - Typical after major inspection; EPA and many states have broad authority to obtain information
 - Treat as interrogatories
 - Time to answer can be short
 - For major enforcement matters; be prepared for time intensive work
 - Many times government treats as continuing obligation to update
- **Disclosure issues**
 - Inspections/liability assessment may trigger disclosure issues
 - Loan covenants
 - Indemnity notices – may raise issues over who mandates primary defense



Resolving the Issues

- **Notice of enforcement action/finding**
 - Federal system: Notice of violation or administrative complaint
 - State systems vary: Some states stepped approach; others administrative complaint or lawsuit
- **Enforcement conference**
 - Government view: Facility's opportunity to explain/settle
 - Facility view – government to explain position
 - Strategically decide before going to meeting -- purpose for enforcement conference
 - Settlement; or
 - Defense and learn from government



Potential “Innovative” Steps

- **“Quick” settlement**
 - General description -- settle potential enforcement action without waiting for enforcement process
 - Situations where may be useful
 - Potential transaction/desire to “fix” costs
 - “Opportunity” due to agency fiscal year end “statistics”
 - “Friendly” administration that may change
 - Air permitting – non-attainment restrictions on new construction associated with non-compliance
- **Other considerations**
 - Indemnity involved; may not allow for quick settlement without consent
 - Claims against other parties; may create issues
 - Possible insurance implications; is it a claim?
- **If pursuing, proactive approach**
 - Initial settlement discussions shortly after inspection
 - Housework done with respect to settlement package
 - Not norm; so facility needs to “drive” the process



Alternative Settlements

- **Supplemental Environmental Projects (SEPs)**
 - SEPs available for a long-time
 - However, can be difficult to achieve and many times SEP negotiations not successful
 - State enforcement attorney attitudes vary with respect to SEPs
- **Lessons with SEP based settlements**
 - Raise early in settlement process
 - Be prepared for more transaction costs
 - Develop “nexus” between project and violations
 - Understand tax issues early; potential disparity between IRS and EPA
 - SEP credit – not one for one against penalty
 - Evaluate SEP through-out settlement process – value of SEP versus transaction costs to achieve





Questions & Answers



Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week
http://www.foley.com/news/event_detail.aspx?eventid=3460
- CLE questions? Contact Jennifer Bartz at jbartz@foley.com
- We welcome your feedback. Please take a few moments before you leave the Web conference today to provide us with your feedback:
<http://www.zoomerang.com/Survey/WEB22BCSVW6DUH>