



Environmental Law Update

WEB CONFERENCE SERIES

Knock, Knock – What Companies Need to Know Before, During and After an EPA Inspection

February 19, 2015

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RECENT EPA COMPLIANCE/ENFORCEMENT HISTORY AND INITIATIVES





Compliance/Enforcement Challenge

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- For regulated entities:
 - Reductions in staffing – less oversight
 - Dismantling of corporate environmental groups
 - Reduced compliance assistance from states
 - Movement away from internal audits and controls – ISO 14001 standards
- For U.S. EPA:
 - Shrinking budgets
 - Significant new regulatory programs
 - Increasing complexity of permit programs
 - Increased monitoring



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U.S. EPA 2014 – 2016 Enforcement Initiatives

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- EPA's sets national enforcement initiatives for civil and criminal enforcement:
 - Air – Reducing air pollution from largest sources and cutting HAPs (air toxics) – Utilities, Refineries, Pharmaceuticals, Foundries
 - Hazardous Chemicals – Reducing pollution from mineral processing – Chemical manufacturers
 - Water – Keeping raw sewage and contaminated stormwater out of water and preventing animal waste from contaminating surface waters – CAFOs,
 - Energy Extraction – Fracking, Mining

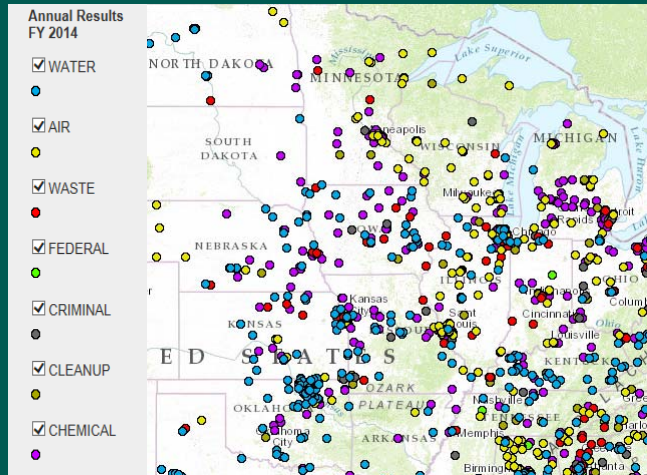


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FY 2014 Enforcement Actions

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Region 5 Enforcement Results FY 2013

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Civil Cases		
	Estimated pollution reduced, treated or eliminated (pounds)	408,440,176
	Estimated hazardous waste treated, minimized, or properly disposed of (pounds)	19,000
	Estimated contaminated water/aquifer to be cleaned up (cubic yards)	590,402
	Estimated contaminated soil/debris to be cleaned up (cubic yards)	4,481,803
Enforcement Activities		
	Case initiations	298
	Case conclusions	310



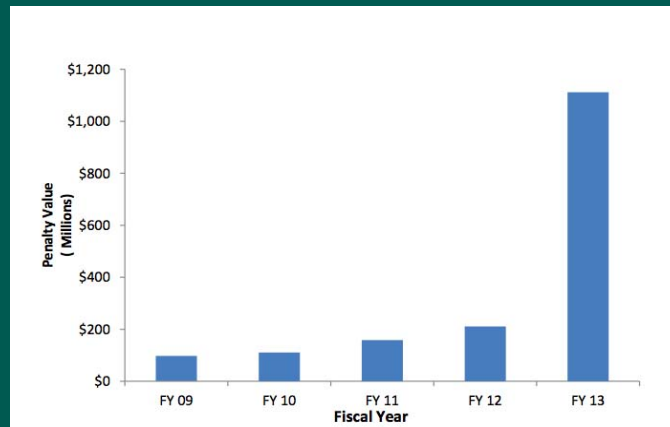
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EPA Administrative and Civil Judicial Penalties

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Assessed FY 2009 – FY 2013



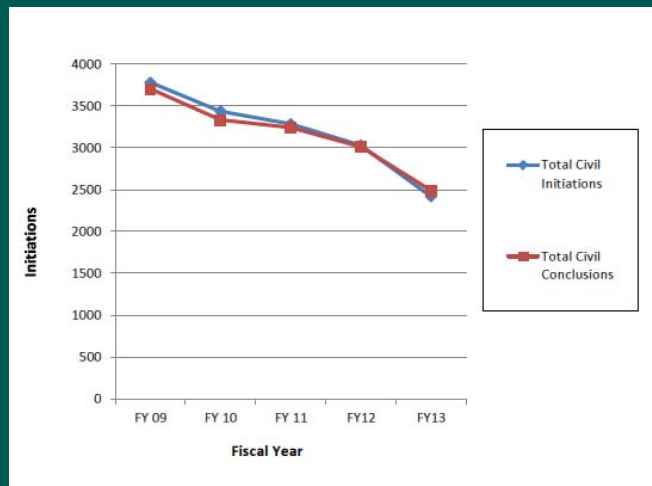
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EPA Administrative and Civil Case Initiations and Conclusions FY 2009-2013

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Criminal Enforcement

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Many cases “gone civilly could easily have gone criminally if we’d had the resources to investigate and prosecute. Sometimes it’s just luck.”

John Lank
Senior Criminal Enforcement Specialist
U.S. EPA-Region IV



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Criminal Enforcement - Emphasis

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- Environmental laws – most are criminalized; “knowing” broadly defined
- Key actions for criminal charges
 - Persistent non-compliance
 - Concealment
 - Manipulation/erroneous reporting of test results



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Criminal Enforcement

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- 2013 – 297 cases opened, 278 defendants charged
- Reduced budgets means focus has been on efficiency – inspections of larger facilities
- Significant criminal cases in FY13 included Executive Recycling and Walmart
- U.S. EPA fugitive list:
<http://www2.epa.gov/enforcement/epa-fugitives#yousef>



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Criminal Enforcement – Individual Versus Corporate

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- U.S. DOJ favors pursuing individuals in criminal matters
- Stacey Mitchell, U.S. DOJ – Chief, Environmental Crimes Unit
 - “I will never trade individual liability for corporate liability. If I can prove something against an individual, I will.”
 - “We’re never going to get corporations to change behavior unless individuals are charged.”
 - Statements to American Bar Association (Apr. 23, 2010)




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WANTED

by the
**U.S. Environmental Protection Agency
CRIMINAL INVESTIGATION DIVISION**

Name:	Chavez-Beltran, Raul
Alias:	
Sex:	Male
Race:	White
Date of Birth:	07/20/1961
Place of Birth:	Saltijo, Coahuila, Mexico
Height:	5'08"
Weight:	180 lbs
Eyes:	Brown
Hair:	Black
Scars/Tattoos:	
TII #:	
NIC #:	W724108332
Last Known Address:	Mexico



Case Summary:

- Chavez-Beltran was charged in the Western District of Texas - El Paso Division.
- Chavez-Beltran's alleged violations include:
 - Resource Conservation and Recovery Act (RCRA)
 - Conspiracy
 - Mail Fraud
- Chavez-Beltran's company is called En-Con Environmental Services, Inc. (illegally transported mercury contaminated soil).
- Chavez-Beltran has been a fugitive living and working in Mexico.

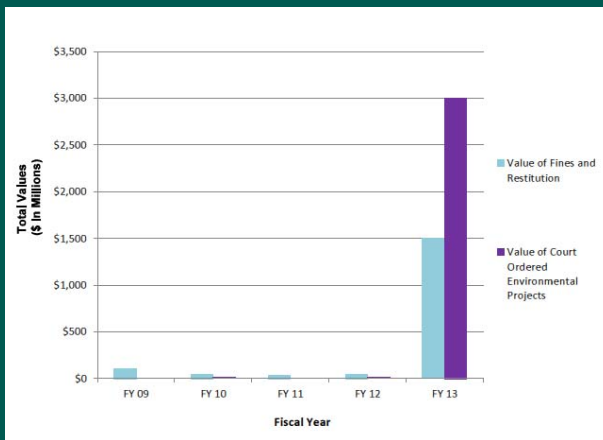
Anyone with information regarding this fugitive should contact the U.S. Environmental Protection Agency, Criminal Investigation Division - Dallas Texas Office at: 1-214-665-6600 or complete the form located at: <http://www.epa.gov/compliance/criminal/fugitives/report-location-form.html>

U.S. EPA/CID Wanted Poster November 1, 2008 www.epa.gov/fugitives



Criminal Enforcement Value of Fines and Restitution and Court Ordered Environmental Projects

FY 2009 – FY 2013





EPA Enforcement Accomplishments in FY 2013

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- EPA's cases resulted in criminal sentences requiring violators to pay more than **\$4.5 billion** in combined fines, restitution and court-ordered environmental projects that benefit communities, and more than **\$1.1 billion** in civil penalties.
- The Deepwater Horizon cases alone resulted in over **\$3.7 billion** going back to benefit the Gulf States and communities impacted by the spill.
- EPA required Walmart to commit to cutting edge hazardous waste handling systems, as well as compliance and training programs that will protect employees and nearby residents. Walmart also paid more than **\$80 million** in fines and penalties for mishandling pesticides and hazardous waste.



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Take Away Trends from Recent Enforcement History

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- With ever shrinking budgets EPA is figuring out how to do more with less
- EPA is looking for bigger bang for their buck – fewer inspections at larger facilities
- Biggest bang in FY 2013 – Criminal cases against large players (Deepwater Horizon and Walmart)



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Initiation of Environmental Investigations/Enforcement

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- Compliance reports – air, water periodic certifications
- Air
 - U.S. EPA wants every permit limit to have compliance method
 - No more limits without actual compliance checks
- Inspections
 - State budget reductions
 - U.S. EPA taking up slack – targeted enforcement inspections
- Complaints – former/current employees; neighbors
- An incident – release, spill or plant/mill problems



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Environmental Justice Initiative

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- EPA targeting enforcement actions to “overburdened communities”
 - “Communities experiencing disproportionate environmental or public health impacts from environmental pollution”
- EJ review incorporated into enforcement decisions and priorities
- EJ a factor in enforcement remedies



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INSPECTIONS: BEFORE, DURING AND AFTER



How are Inspections Initiated?

- Annual inspection
- Following up on a complaint (employee or third party) or an incident (release, permit violation, etc.)
- EPA enforcement initiative category
- Just because





EPA and State Inspections

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- Both Planned and Surprise Inspections
- Scope: single and multi-facility; records and samples; focused or multimedia
- Companies need inspection plan and procedures
- Periodically reviewed and updated
- Shifting assignments and furloughs happen – need to provide coverage for potential inspections



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Before the Inspection – Best Practices

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- Be sure Company is in compliance with all permits, laws and regulations (consider internal audit program).
- Have all documents created by in house or outside counsel 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 the Company's attorney's name and telephone number easily accessible.
- Implement a facility plan to keep the above information and Company Inspection Plan current.



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Inspection Plans

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- 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



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Inspection Plans (cont.)

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



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Inspection Plans (cont.)

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- Procedures for meeting inspectors (see below)
- Conduct during the inspection (see below)
- Post-inspection procedures (see below)



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Meeting the Inspector

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- 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



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Unplanned Inspections & Potential Delays/Search Warrants

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- 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)



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Pre-Inspection Discussions

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- Reach agreements on the following with the inspector before starting the inspection:
 - Duplicate sampling (split 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



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Pre-Inspection Discussions

- 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



During the Inspection

- Treat the inspector like any visitor (cordial and professional)
- Manage the inspection
 - Answer the inspector's questions
 - Only go to locations requested by inspector
 - Limit the company employees that discuss matters with the inspector by finding out what the inspector wants to know and asking the question of a knowledgeable employee
 - Write down and review problems or questions which were identified by the inspector
 - Identify what corrective actions have been or will be taken
 - Start and end each day with a meeting of company personnel who participated in the inspection





Statements Made to Inspector

- Be truthful. False statements to an inspector are subject to criminal sanction.
- Things NOT to do:
 - Do not volunteer information; only answer the question
 - Do not speculate - can arrange to get information
 - Do not whine or complain
 - Do not argue that the "facility has been doing it this way for years and the last inspector never said anything about it"
 - Do not argue that they were unaware that the facility had to comply with environmental regulations
 - Do not make legal admissions (for example, do not agree with inspector that alleged noncompliance is a violation)
 - Do not tell government technical staff or attorneys that paperwork violations are unimportant
- Be prepared to stop answering and seek legal assistance if questions are aggressive.



During the Inspection

- Employee interviews
 - Employees have a choice to cooperate or not
 - May not interfere with work
 - May arrange to occur at time and place convenient to employee
- Request for documents
 - Ask for written request (other than documents to be made available per permit)
 - Review with counsel documents to be provided





During the Inspection

- Sampling
 - Make sure quality assurance/quality control procedures are followed
 - Note any discrepancies in quality assurance/quality control during sampling
 - Take duplicates (preferably splits) of all samples collected and make sure they are properly maintained and inventoried
 - Consider videotaping sample procedures
- Photographs and Videos
 - Take duplicates of all photos or videos taken from same location and same angle as inspector
 - Determine if trade secret information (process information) is captured by photograph



During the Inspection

- Document the inspection
 - Locations/equipment inspected
 - Questions asked/answered
 - Follow-up items to be answered
 - Statements of inspector reflecting noncompliance
 - Sampling procedures
 - Photographs, videotapes taken
 - Trade secret information issues
 - Keep copies of all documents provided
 - Noncompliance by inspector with agreed upon procedures or health and safety requirements





Post Inspection

- Conduct exit interview of inspector if possible. Ask/determine what if any violations were identified by the inspector or if the inspector has any other issues/problems.
- Best practice is to prepare a post-inspection report that documents all aspects of the inspection:
 - People involved
 - Agreements reached with inspector
 - Procedures during inspection
 - Follow-up information
 - Deviation from agreements
 - Location/equipment reviewed
 - Records reviewed
 - Questions/answers
 - Sampling – chain of custody and QA/QC procedures followed, deviations from sampling protocols
 - Photographs and/or videos – location and angle, person taking photographs
 - Exit interview



After the Inspection

- Submit post-inspection report to Corporate Environmental and Legal staff (attorney/client communication). Include test data, dated photographs or videotape.
- Implement corrective action for any noncompliance noted during the inspection.
- The government should be notified in writing by certified mail, return receipt requested, of the changes the facility makes to improve its environmental compliance.





After the Inspection (Cont.)

- Continuously update the government as to the status of each remediation step being taken at the facility.
- Paperwork violations should be corrected as soon as possible, even if the paperwork needs to be prepared from scratch.
- Every document should be dated with the date it was prepared, the name of the person who completed the document and any signature of a corporate official that may be required.
- Once the facility is in compliance with all violations identified by the inspector, the facility should write a letter to the inspector indicating that they have resolved all of the violations and believe the facility is in compliance, unless they are told differently.



Best Practices Considerations

- There are a wide range of potential environmental liabilities (various statutes, criminal and civil, etc.)
- Enforcement at large facilities is on the rise, and the consequences of non-compliance can be severe
- Companies need to proactively address compliance to stay competitive and avoid enforcement consequences
- Prepare, maintain and implement your inspection plan





NEXT GENERATION ENFORCEMENT FROM I-CERTIFY TO I-MONITOR TO I-ENFORCEMENT



Traditional Enforcement Tools

- Resource intensive
 - Targeting facilities
 - Targeting inspection focus – air, water, waste
 - Sifting through data
 - Back and forth with focused information requests (and just as focused responses) – actually pre-litigation discovery
- Tools can be effective, but –
 - U.S. EPA/state budgets reduced
 - Time-consuming to achieve





Next Generation – What Is It?

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- Office of Enforcement and Compliance Assurance (OCEA) effort – re-think compliance
 - www2.epa.gov/compliance/next-generation-compliance-strategic-plan-2014-2017
- Built on 5 interlocking components
 - Design of regulations and permit requirements
 - Use of new emissions detection technology
 - Electronic reporting
 - Transparency
 - Innovative enforcement



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Next Generation – What Is It?

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- Developed in 2012/2013 and incorporated into U.S. EPA's 2014-2017 Strategic Plan
- Environmental Law Institute, “Next Generation Environmental Compliance and Enforcement 2014”
- OCEA – providing assistance to states
- Next Gen Symposium, George Washington Law School (Mar. 26-27, 2015)



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Next Generation – Regulation & Permitting

- Building compliance into rules and permit conditions
- Self-implementing approaches
- Example – auto emission regulation
 - Auto engine manufacturers required to install pollution controls
 - Certify each engine meets requirements
 - “Police” downstream assemblers of engines into vehicles
 - Focus enforcement primarily on manufacturers



Next Generation – Regulation & Permitting

- Proposed rule – energy extraction companies
 - Required to buy and use U.S. EPA certified air pollution equipment
 - Manufacturer reports to U.S. EPA who purchased
 - Compliance check – was certified equipment purchased and installed
 - Electronic data reporting
- Permits – requiring use of U.S. EPA approved CEMS for stack emissions and other electronic monitoring devices





New Emissions Detection Technology

- Significant innovation occurring in monitoring technology
 - Handheld/small devices
 - Detect specific chemicals and emissions
- Movement toward “fence line” monitoring
- HAP rule for refineries illustrates new fence line approach
 - Required fence line monitoring of emissions to control fugitives
 - New regulatory “threshold” action level established
 - Corrective measures necessary if action level exceeded
 - If further exceedances, then corrective action plan to U.S. EPA/state
 - Failure to implement plan – violation
 - Requirements built into permit



New Emissions Detection Technology

- Green Village monitoring – sensors in park facilities to report ambient conditions
- Real time water quality monitoring buoys
- Create real time monitoring – translates into lower emissions
 - New action targets, will set a new “bar” for operators to meet
 - If process variation leading to variations in emissions, need to stay below upper end of variation





Transparency

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- Improved public access – “here to stay,”
McTiernan, ACEL (1/15/2015)
- ECHO webpage revamped
 - More and better data
 - Tracking of enforcement settlements, compliance orders
- More data available; more interest by NGO entities in tracking compliance



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Innovative Enforcement

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- 1/7/2015 directive
 - Enforcement teams “expected to consider ... Next Gen compliance tools in all cases ... and to include them in civil judicial and administrative settlements”
 - Giles, *Use of Next Generation Compliance Tools in Civil Enforcement Settlements* (1/7/2015)



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Innovative Enforcement

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- Advanced monitoring – fence line
 - *U.S. v. BP Whiting* (May 23, 2012)
- Independent third-party verification of compliance with settlement
 - Installation/operation of pollution controls
 - Remediation projects
 - CAFO corrective actions
 - *U.S. v. Roquette America* (Nov. 13, 2012)
- Providing communities with data on compliance with settlement obligations



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Practical Considerations

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- Understand data quality being collected
 - Accuracy of monitors
 - Data recording – what is being measured and reported
 - Data security – internal and governmental
 - Confidentiality of data
- Rulemaking/permits – involvement with Next Gen proposals
 - New “target” level
 - Required Actions
- Know what the public knows – data transparency
- Key – compliance, compliance, compliance



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QUESTIONS & ANSWERS



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Thank You!

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- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week
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- Past Environmental Law Update Web Conference materials available at:
<http://www.foley.com/environmental/?op=events>
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