

Preparing for a Regulatory Inspection

By Douglas A. Henderson, Margaret C. Campbell, Hollister A. Hill, and Randy Brogdon

It's two o'clock on a Friday afternoon, and Environmental Protection Agency (EPA) representatives show up at one of your power plants. EPA wants to inspect the facility, review monitoring data, and interview employees, apparently in response to a notice to sue from a disgruntled former employee, who alleges violations of the Clean Air Act and other environmental laws. EPA also seeks information on carbon emissions, coal ash disposal practices, and past Securities and Exchange Commission (SEC) disclosures.

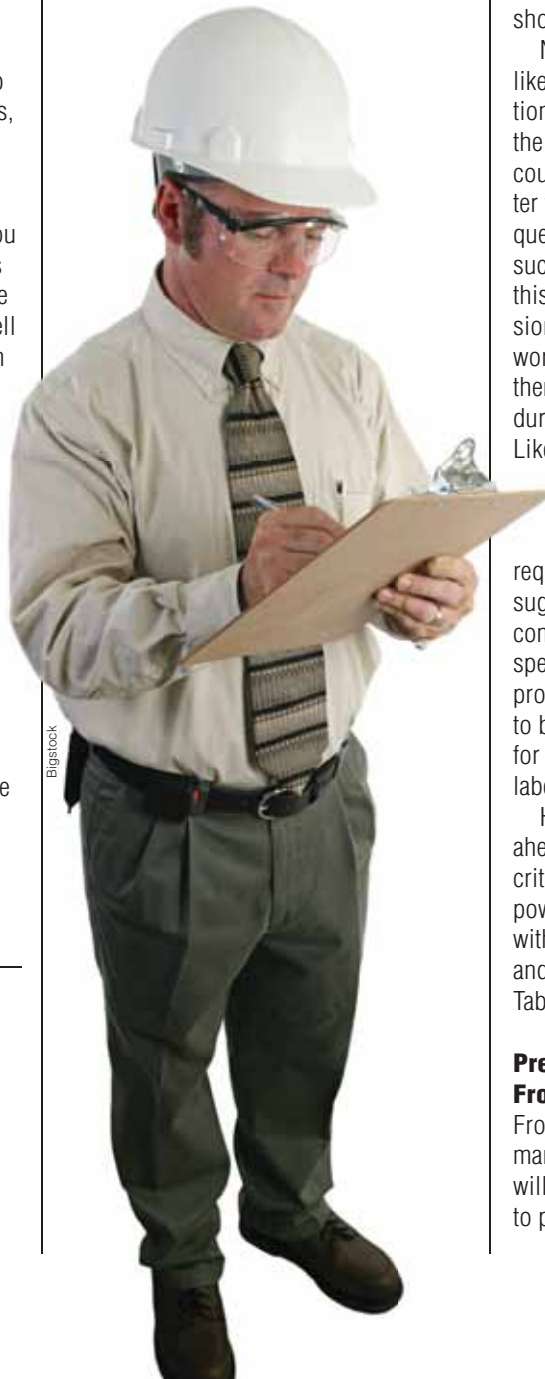
What does your company do? Do you give EPA full access to your documents and allow employee interviews because you have nothing to hide? Or do you tell the inspector that you cannot permit an inspection unless a member of your general counsel's office is present? Like many things, the best approach is often somewhere in between.

Advance Preparation

The most important step a company can take to get ready for an inspection is to prepare ahead of time. Athletes do not wait until the day of a race to prepare—and companies should take the same approach to EPA inspections. Before an inspection occurs, a facility should have its response team in place, training should be completed, procedures developed and implemented, and documents organized, labeled, vetted, and made ready for inspection ahead of time.

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In our experience, most companies have longstanding, respectful relationships with state and federal regulators and do not intend to be evasive or non-cooperative with inspectors. However, being unprepared can create the wrong



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impression. It also can increase scrutiny and the potential for citation.

An agency request for information is the ultimate red flag for inspections. Sometimes state regulators call ahead, setting a time for the inspection and identifying the scope and issues to be addressed. Other precursors are less obvious. Visible stack or fugitive emissions that prompt complaints or reports from neighbors also can trigger inspections. Employee complaints about environmental or work conditions, especially where environmental or safety allegations are involved, could be triggers. If vendors or suppliers are contacted by regulatory agencies, you should think “inspection.”

Nothing helps to prepare a facility like a mock inspection, conducted under the direction of legal counsel. It is far better to flag the tough questions in advance, such as “when did this continuous emissions monitor stop working,” than to face them for the first time during an inspection. Likewise, if

employees at the plant cannot quickly locate the plant's air quality permit—which is required to be kept on file—that may suggest that the facility is not actually complying with the permit. A mock inspection will help identify if permits, approvals, and other documents required to be maintained on site and available for inspection are well organized, clearly labeled, and easily accessible.

Having an effective program in place ahead of an unannounced inspection is critical to the inspection's success. No power plant operating today should be without a well-thought-out, practical, and well-tested response plan. (See Table 1.)

Preparing the Frontline Responders

From security guards to the plant manager, all facility personnel that will interact with the inspectors need to prepare in advance so that they can

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Courtesy: Centron Security

TABLE 1
AGENCY INSPECTION CHECKLIST

- Has your facility developed a written regulatory inspection protocol?
- Is the inspection contact sheet up-to-date and accurate?
- Do your first-line responders (e.g., security guards) know how to respond to a regulatory inspection?
- Do your support employees (e.g., accountants) know how to respond to a regulatory inspection?
- Do your contractors know how to respond in the event of an inspection?
- Does your facility have complete copies of all of its required permits, forms, and regulatory submissions in one location?
- Does your team understand the role of search warrants?
- Does the inspection procedure include a process to separate or segregate “privileged and confidential” documents from normal facility documents?
- Does your facility have a digital camera, sampling vials, and other equipment to document a regulatory inspection and split samples, if any are taken?
- Has your facility conducted a mock inspection?
- Has your team flagged and corrected any potential problems?

anticipate and effectively respond to inspectors' questions. They should follow a protocol, not speculate, and not joke. Security guards, for example, should be professional and courteous, ask for the inspectors' credentials, and have a standard list of questions to ask any inspector so that they can notify plant management about the purpose and scope of the inspection. At a minimum, they should know whom to call for the next step in the inspection process.

The frontline responders should be able to diagnose the kind of inspection being undertaken. Most facilities are accustomed to periodic compliance inspections by state or local regulators. But federal environmental inspections differ fundamentally from ordinary state and local agency inspections. Targeted federal inspections may be administrative (to inform development of new regulations), civil (as a precursor to an enforcement action), or even criminal. A criminal environmental inspection is a rare event that should be treated with enormous care, and the frontline responders should recognize the nature of the inspection early in the process.

Develop an Inspection Team

Every power plant should have an inspection team with a standard protocol and plan. The team should receive periodic training on

- what the facility can reasonably expect during an inspection;
- the scope of inspectors' authority; and
- the topics typically addressed during an inspection.

Part of the plan will entail immediate notification of proper personnel, including plant management, appropriate corporate management (such as the corporate environmental manager), and legal counsel. Given the fundamental legal implications of a regulatory inspection, the team should contact legal counsel early in the process. And depending on the purpose and scope of the inspection, it may be advisable to ask to delay the start of the inspection until legal counsel can be present.

To avoid confusion, every plant should have an up-to-date contact list for federal regulatory inspections.

The list should include the name and contact information (including home and cell phone numbers) for legal counsel, plant managers, and communications personnel.

In general, it is reasonable to request a pre-inspection conference with the inspectors to understand the inspection's purpose, scope, and nature, and to provide a plant overview and safety briefing. A spokesperson for the team should respond to the inspectors' questions, and another member should keep track of questions, responses, and any questions that require follow-up from the facility. In addition, facility personnel on the inspection team should know what documents generally must be produced during an inspection, where those documents are kept, and importantly, which documents are not required to be produced on the spot.

If plant security has not already done so, the pre-inspection conference should begin with a request to view the inspectors' official agency credentials and copies of business cards that identify each inspector, job title, and affiliation. For example, corporate management and legal counsel will want to

know whether the inspectors are from the EPA regional office or EPA headquarters, whether they are from the enforcement or rule-development branch, and whether they are EPA contractors. At the opening conference, the facility inspection team should treat inspectors like other visitors to the facility and provide basic safety training prior to walking the plant site.

The pre-inspection meeting is an opportunity to determine what prompted the inspection, understand its nature and scope, and agree on the ground rules. An opening conference also provides an opportunity to ask questions,

rant and determine the scope of the permitted search.

The inspection team should understand that a search warrant is a legal document issued by a court to conduct a search, but it is not a magic key to enter any area of an industrial facility or take any documents from the plant. Under the Constitution, a search warrant must be limited in time and space, and it must describe any items to be seized with some particularity. Because a search warrant sets the boundaries for the inspection, careful review is critical.

Most federal environmental laws, however, give agencies the right to conduct inspections without search warrants. Under Section 114 of the Clean Air Act, for example, EPA has the authority to conduct inspections to determine compliance with the

When inspectors monitor or sample waste streams, they must provide a receipt describing the samples.

unfettered access to all data. The inspection rights under the Clean Air Act, for instance, do not give an inspector the right to inspect agreements with industrial hygienists.

If an inspector does not have a search warrant and if a specific environmental statute provides no specific authority for the inspection, the inspection

team should think long and hard before stopping the inspector and demanding a search warrant. Lawyers differ on this issue, but forcing an inspector to secure a search warrant will affect the entire tone of the inspection and likely increase the inspector's interest in the facility. On the other hand, if it is a criminal inspection, a search warrant would better define and limit the scope of the investigation.

A designated facility representative should accompany the inspector and the inspection team at all times. To the extent possible, the representative should keep basic notes and take pictures of anything the inspector photographs. A facility should be prepared to split samples with the agency investigator. But before a facility can split samples and take photos, facilities need to have appropriate sampling vials, cameras, and other materials available ahead of time. And the facility should keep a complete copy of all documents provided to the inspector.

Privileged and Confidential Documents

Every facility needs a process and system to segregate and label privileged and confidential documents. Privileged documents—such as emails and memoranda to and from legal counsel and notes from any meetings with counsel—should be segregated and managed separately. There is no more important task in preparing for an inspection than this.

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set the tone for the inspection, and build trust and understanding.

Search Warrants

Regulatory inspections sometimes are conducted under the authority of a search warrant. When presented with a warrant, the first task is to copy it, and fax or email a copy to legal counsel for review. Then the inspection team, with input from legal counsel as necessary, should carefully review the search war-

act. Inspectors can sample any air emissions for which the facility is regulated, review and copy records required by the act to be maintained on site, and inspect monitoring equipment. This authority also is clearly established in most Title v air quality operating permits.

The Clean Water Act likewise provides EPA with the authority to conduct certain inspections. Inspectors can copy records of effluent limitations, pretreatment, and performance standards. Under the Resource Conservation and Recovery Act, inspectors can monitor or sample waste streams, though they must provide a receipt describing samples. Still, just because a facility has a permit does not mean the agency has



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If the facility team does not understand what materials may be privileged, the inspection may result in significant liability/problems for the facility. The excitement and commotion associated with an inspection is not the time to try to understand whether emails, reports, and other documents are privi-

leged. An environmental manager's email to counsel, requesting advice on potential excess emissions or other compliance issues, should be privileged, assuming it has not been distributed to others outside of the company. If a document like the manager's email to counsel is privileged, it will generally not have to be produced to the regulatory agency, either during the inspection or later on in litigation or trial.

But if a privileged document is disclosed to a third party, including a regulatory inspector during an unannounced visit, the privilege may be lost. Opening up file cabinets that contain privileged materials to an inspector likely would constitute waiver of that privilege. If the inspection process is going too fast to separate out the privileged from non-privileged, it may be wise to note



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**TABLE 2
COMMON REGULATOR
QUESTIONS DURING
INSPECTIONS**

- Who is the manager of the XYZ process? Does that person know about the problems?
- Where is the waste material created at the facility? Is it permitted?
- Who keeps the accounting records? Do they keep records of process changes?
- Who is your waste transporter?
- Have you had any employee or third-party complaints about X?
- Have you made any modifications to your process?
- Have you had any releases? Were they reported?
- Has anyone been fired lately? Why?
- Have any problems with the system been noted?

this on the documents produced to the agency or put them in a separate box, tape it shut, and label it as "privileged and confidential."

Employee Interviews

Investigators often want to interview employees during an inspection. Employees should know that they can speak with investigators if asked, but

As the inspection draws to an end, the team should request a closing conference to discuss the inspection and identify potential noncompliance issues.

they should also know that they can politely decline, if they desire. Employees should recognize that they can simply say that they need to follow their inspection protocol. But members of the internal inspection team should not instruct employees not to talk. And if employees desire separate counsel, the inspection team should be prepared to address this issue in short order.

An inspection is often filled with questions, and answering questions wrongly or artificially can pave the way to prosecution. (See Table 2.) The cardinal rule: If the facility team member doesn't know the answer, that team member should say so. If a key document cannot be located, the team should request that additional time be provided to forward the documents to the agency in the future. No one accompanying the agency inspector should speculate in any way, and humor should be left at home. Team members should not interfere with the search, since that could be interpreted as an obstruction of the inspection process.

As the inspection draws to an end, the team should request a closing conference to discuss the inspection. Depending on the relationship with the inspectors, and depending on the nature of the visit, this may present another opportunity to determine the underlying reason for the inspection, identify any potential noncompliance issues, and determine whether any materials need to be submitted after the fact. And if an agency inspector asks someone on the team to sign a document, read it closely before signing, and consider the long-term legal implications.

Correcting Noncompliance Issues

After an inspection, it is critical to assemble the inspection team and conduct a debriefing, preferably in the presence of legal counsel. The goal is to identify the key findings, discuss the response,



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and set a schedule for completing any unresolved issues and correcting any noncompliance issue noted by the inspector. No emails discussing the findings of the inspection should be sent unless at the request of legal counsel and counsel should be copied on the communication.

From this meeting, the facility may determine that an internal investigation is warranted. Because the findings of this internal investigation may reveal sensitive issues associated with knowledge, prior notice, and violations, all of the findings are essentially legal. If so, this investigation should be conducted only with legal counsel at the helm.

Nothing is more important following an inspection than correcting any identified problems. If a permit could not be located, it should be found. If a drum was uncovered, cover it. If certain monitoring was not being conducted,

conduct and document the monitoring. All too often, a facility will wait until EPA formally notifies it about a problem. That approach is a mistake.

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If EPA follows up on its unannounced inspection, finds a violation, and then learns the violation has not been corrected, that violation is likely to result in a penalty.

After an inspection, it may be advisable to disclose certain violations to the agency. While the legal ramifications related to this issue are complex and far-reaching, the point

is simple. If a serious problem was identified, it may be advisable to provide notice to the agency that the problem has been corrected. The underlying action may warrant a penalty, but correspondence and disclosure with the regulators may blunt the overall impact. In other cases, it may not be advisable to disclose any suspected violations, especially if the agency already identified them. The point is to consider whether it makes sense to disclose given the tenor and findings of the inspection.

In conducting post-investigation meetings, the investigation team should generally avoid discussions of job

Inspection team members and other company employees should retain emails, notes, reports, or other documents related to any issue involved in the inspection.

status in connection with any alleged noncompliance. Sometimes—and it will depend on the facts involved—it may be legally advisable to terminate an employee if the employee was directly responsible for the violations and the violations are severe and egregious. But before this, the team must determine if employee termination—if that is the preferred recommendation—would be permitted under the whistleblower laws. Before any action is taken, the company should consult legal counsel.

After an inspection has occurred, no one associated with the inspection team or company should destroy any emails, notes, reports, or other documents related to any issue involved in the inspection. Nothing will trigger a criminal investigation faster than the intentional destruction of documents, and this could constitute obstruction of justice, depending on the facts involved. As a general rule, the utility should suspend normal record retention guidelines until issues are resolved in full.

There is generally no good reason to publicize the fact that a facility was inspected. But on the off-chance that a reporter inquires, a member of the inspection team (with input from legal counsel and the entire team) should consider drafting media talking points summarizing the inspection and documenting any results. The contents of the talking points can vary as widely as the companies involved. Here preparation is the goal—don't leave it to the press to summarize the inspection.

With today's intense focus on environmental regulation and compliance at electric utilities, all power plants need to be prepared for federal regulatory inspections. Just as athletes train intensively for an event which takes only a few minutes to complete, that same philosophy applies to regulatory inspections—be prepared. ♦