# ANATOMY OF COMPLIANCE REGIME: RECAPITULATION AND ALTERNATIVE LESSONS FROM THE UNITED STATES

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## INTRODUCTION

The modern United States federal pollution control laws enacted in the period from the late 1960s to the early 1980s, are examples of "cooperative federalism," a Constitutional legislative regime in which Congress explicitly authorizes a federal executive branch agency – here, the U.S. Environmental Protection Agency (EPA) – to address the statutorily-determined need to protect public health and safety and the environment from specified dangers by controlling their sources. The federalism is "cooperative" because it relies on supervised delegation by EPA to the states, which in turn can or must develop corresponding statutory and regulatory regimes to assist EPA's achievement of national standards by enforcing compliance within their own borders.[1] One of the central enforcement mechanisms of the federal and authorized state programs is the regulatory agency's issuance of a permit to operate to every business whose activities are covered by the law. The operating permit's conditions include, *inter alia*, compliance with all applicable state laws and regulations as well as facility-specific compliance conditions required by the agency.

### General Regulatory Authority to Inspect and Enforce Environmental Compliance

One of the core elements of these federal and authorized state enforcement programs is the authority of regulatory agency personnel, upon presentation of credentials, to enter a facility at "reasonable times" or "during regular business hours" to conduct a compliance inspection. These inspections can include the examination and copying of any records required to be maintained by the business (including any accidental release and mitigation programs or spill prevention and control programs), the inspection of any pollution control and process equipment, and the sampling of any discharge or emission.[2] These sections authorizing a right of entry and inspection also include a "catch-all" clause providing that the "[the business] shall provide such other information as the administrator may reasonably require,"[3] which is understood to permit consensual employee interviews.

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[1] In some cases, such as the *Clean Air Act* (42 USC § 7410), states are required to enact EPA-approved implementation plans to implement, maintain, and enforce EPA's national primary and secondary ambient air quality standards (NAAQS) for each air quality control region within their borders. In other cases, such as the *Resource Conservation and Recovery Act* (RCRA) (42 USC § 6926), any state which seeks to administer and enforce a "hazardous waste program" must obtain EPA's approval for one which is "substantially equivalent" to the EPA's own permitting and enforcement regime for hazardous waste treatment, storage, and disposal facilities.

[2] *Comprehensive Environmental Response, Compensation and Liability Act of 1980* (CERCLA or Superfund), USC §§ 9604(e)(2)-(3) at 42; *Clean Air Act*, USC § 7414(a) at 42; RCRA, USC § 6927(a) at 42.

[3] *Clean Water Act*, USC § 1318(a)(A)(5) at 33.

After an inspection is concluded, environmental regulatory agencies have a variety of progressively more intrusive enforcement tools to employ in the discharge of their mandate to protect public health and safety and the environment. These include:

- letters sent to facilities by agency program managers requesting specific information about production and waste generation and management processes;[4]
- administrative subpoenas, administrative search warrants, and/or compliance orders to compel facilities to grant access for site inspections, to produce records and present witnesses to testify under oath, and to comply with particular permit or regulatory requirements;
- imminent and substantial endangerment orders designed to immediately abate more serious releases of pollutants or contaminants to the environment;
- civil enforcement lawsuits brought by United States Attorneys for the Department of Justice against corporations and individuals to obtain penalties and injunctive relief to abate ongoing violations of law, including compliance with imminent and substantial endangerment orders; and
- criminal actions, including use of criminal search warrants, brought by United States Attorneys for the Department of Justice against corporations and individuals where violations of law are "knowing" or "negligent" or "willful."[5]

States with federally authorized environmental compliance and enforcement programs have similar ranges of information-gathering powers and administrative, civil, and criminal enforcement provisions.[6]

## The California Investigative Subpoena

In California, regulatory agencies and their prosecuting attorneys have an additional statutory investigative tool which is unmatched in any federal environmental statute. The investigative subpoena (IS) authorizes the "head of a department" (including the State Attorney General and, when investigating Unfair Competition Law violations, county District Attorneys) to inspect and copy records, promulgate interrogatories, and compel

[4] The CERCLA § 104(e) information request letter requires not only an initial response, but creates a continuing obligation to supplement the questions with fresh answers as situations at the facility change over time. Failure to respond or to respond in bad faith or misrepresent information creates civil liability.

[5] *Clean Air Act*, USC § 7413 at 42; *Clean Water Act*, USC § 1319 at 33; RCRA, USC § 6928 at 42; *Emergency Planning and Community Right-to-Know Act of 1986* (EPCRA), USC § 11045 at 42; *Surface Mining Control and Reclamation Act* (SMCRA), USC §§ 1268, 1271 at 30; *Safe Drinking Water Act*, USC § 300h-2 at 42.

[6] If a business is facing civil or criminal litigation based on non-compliance which is actionable under both federal and state law, its counsel should determine whether the enforcing agency will consider a settlement which resolves the business's liability under both federal and state law for any charges which could be brought arising out of the enforcement action's operative facts. This kind of resolution can prevent simultaneous or subsequent duplicative enforcement proceedings and dramatically reduce costs to the business.

the sworn testimony of corporate witnesses as part of an investigative inquiry in the absence of any formal proceeding or lawsuit.[7] Any business association receiving an IS must designate and produce a "person most qualified" (PMQ) to testify regarding the matters on which examination is requested in the IS. While there are procedural requirements for proper service of process and geographical limits on where the PMQ must provide testimony, the statute is silent regarding the right of the PMQ to be represented by counsel during the taking of testimony, and both the Attorney General and District Attorneys have advised respondents in these proceedings that they have no right to obtain copies of either the transcripts of their testimony or the documents shown to them by prosecuting attorneys during questioning. To date, courts have accepted the analogy that the IS is like a grand jury proceeding, in which neither witnesses nor targets (if they waive their constitutional right against self-incrimination) have the right to counsel. If a business believes that the IS compels disclosure of information that is confidential or a trade secret, the PMQ has the burden of producing sufficient evidence to persuade a court that the trade secret's or confidential business information's value to the business outweighs the agency's need for the information.[8] The refusal to respond or provide adequate responses to an IS can only be enforced by an order to show cause, accompanied by an order compelling the respondent to appear at the show cause hearing. The show cause hearing is limited to evaluating the adequacy of the IS by the standards of the 3-prong test described above. If any constitutional objections based on the Fourth Amendment's prohibition of unreasonable searches and seizures or the Fifth Amendment's right against self-incrimination are not raised in the show cause hearing, they will result in a waiver. A respondent who refuses to comply with an order to compel will be subject to contempt, but the order to compel is directly appealable as a final

[7] *California Government Code*, §§ 11180-11191 (1921, as am in 2003). The minimum requirements of an IS for purposes of document production and witness testimony are determined by a three-part test: (1) the investigation must be within the general authority of the issuing department; (2) the information sought by the IS must be "reasonably relevant" to the investigation, although the department is not required to make any showing of good or probable cause; and (3) the information sought must not be too indefinite.

[8] If the company and its PMQ are concerned that the IS calls for production of confidential business information or trade secret data, they *must* assert that claim and withhold production at the earliest opportunity, or they may be held to have waived the right to claim protection from disclosure of such information at a later date. During execution of search warrants, a company must also be prepared to make such a claim or risk waiving the right to its later assertion. In search warrant contexts, however, if the government team executing the warrant is aware that there may be attorney-client privileged, trade secret, and/or confidential business information documents that are otherwise covered by the scope of the warrant, it may ask the magistrate approving the warrant to designate an attorney to accompany the team, personally review all files and documents as to which such privileges or claims are made by the company, copy them, and remove them in a marked and sealed envelope for the court to review in camera at a later, special hearing, where the company will have the opportunity to persuade the court not to order production of the documents to the government.

judgment, and no sanction can be imposed on a respondent for refusing to respond until and unless a court order to do so is upheld on appeal.[9]

## The Costs of Non-Compliance and the Impetus for Internal Corporate Environmental Management Programs

Clearly, regulatory agency personnel can obtain evidence of a business's non-compliance with permit conditions and other regulatory or statutory obligations at *any* stage of their information-gathering process. They are trained to determine the significance of that evidence from their evaluation of a number of variables, including: the seriousness of any actual or threatened environmental or public health endangerment; the degree to which the violation is accidental, negligent, or intentional; the duration of the particular violation; the past compliance history of the business or facility; the degree to which the facility culture, and larger corporate culture of which it is a part, have internalized a regulatory compliance ethic into their business production and management attitudes and practices; and the cooperative or combative attitudes of the facility's staff and management. Accordingly, evidence of relatively non-serious violations discovered during routine regulatory agency inspections may be resolved immediately with a small fine, whereas more serious violations can result in the agency's issuance of an order for administrative penalties, a civil enforcement order, or a referral to the U.S. Department of Justice, the state attorney general, or a county district attorney, for civil and/or criminal prosecution charging the business entity and/or individual employees and officers.

The enforcement sections of the major federal environmental statutes provide less than crystal clarity regarding which kinds of acts and omissions will result in criminal, civil, or administrative proceedings and, in many cases, the same action can be enforced by any one of those three alternatives. The exercise of prosecutorial discretion ultimately determines whether there will be a criminal prosecution, but for businesses and their counsel, this uncertainty only creates anxiety about whether, when, and what kind of enforcement hammer will hit them.[10]

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[9] See generally, Deborah J Schmall & Buck B Endemann, "Investigative Subpoenas Wielded by California Prosecutors" (Paper delivered at the State Bar of California Environmental Law Section Annual Yosemite Conference, 2014).

[10] See David M Uhlmann, "Prosecutorial Discretion and Environmental Crime" (August 2015) 45 Envtl L Rep 10801. In the enforcement sections of the major federal environmental statutes, Congress made only limited distinctions between acts that could result in criminal, civil, or administrative enforcement. The same violation can often give rise to criminal, civil, *or* administrative enforcement. In some cases, the charging language in the enforcement statutes will distinguish between conduct which is "knowing," "negligent," "intentional," and "wilful," while in other cases (CERCLA or Superfund, for example) the statute provide a "strict liability" standard for charging violations, where the mental state or intention of the defendant is irrelevant. Since mental state requirements only preclude criminal enforcement for a small subset of violations, the factor that ultimately determines which environmental violations result in criminal prosecution is the exercise of prosecutorial discretion. The scope of prosecutorial discretion assumes a

Independently enforceable corrective action orders are the "compliance-forcing" components of the administrative, civil, or criminal enforcement proceedings. They can require completion of such corrective actions as remedial investigations, feasibility studies, and remedial action plans, including the installation of groundwater monitoring wells to permit verification of contamination source elimination and containment of contaminant migration. Alternatively, they may order the repair or replacement of inefficient process and/or pollution-control equipment which has caused or contributed to spills or releases of pollutants whose concentration levels exceed state and/or federal standards, accompanied by more stringent leak or spill detection systems. Since businesses have to allocate whatever financial and human resources are necessary to comply with these kinds of corrective action orders without interrupting their daily operations to meet production quotas and revenue projections, they must usually hire a professional environmental engineering and consulting firm with a proven track record in performing the required corrective actions as well as working effectively with the regulatory enforcement agency in charge. In order to maximize their control over the later production or discovery of the consultant's reports and notes, businesses facing these enforcement orders should have special environmental outside counsel hire the consulting firm under a contract which provides that the consulting firm is performing work and generating reports for outside counsel because of actual or anticipated litigation and subject to the attorney-client privilege.

One of the most effective ways for businesses to limit the substantial costs of responding to enforcement orders and litigation over environmental violations is to develop, institutionalize, and regularly fine-tune an internal corporate environmental compliance management program. These kinds of programs will include the kind of internal environmental compliance audit practice that EPA, the Department of Justice, and many state attorney generals and environmental agencies have come to expect from the regulated community.

## INTERNAL CORPORATE ENVIRONMENTAL COMPLIANCE MANAGEMENT PROGRAMS AND EPA'S AUDIT POLICY

US EPA first published an Environmental Auditing Policy Statement in 1986 in an effort to respond to the rapid growth of voluntary environmental audit policies and practices that had already taken place in certain sectors of the regulatory community. A Price-Waterhouse study in 1995 found that more than 90% of businesses operating in such heavily-regulated industries as petroleum refining and chemical manufacturing had already adopted some form of regular self-auditing procedures.[11]

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particularly critical role in environmental cases because so much conduct potentially falls within the criminal provisions of the environmental laws.

[11] See Lawrence Culleen & Thomas Glazer, "Let's Make A Deal: Twenty Years of EPA's Audit Policy" (Winter 2016) 30 Nat Resources & Envt 3.

In 1995, EPA issued its first Final Audit Policy,[12] supplemented 13 months later by its "Audit Policy Interpretive Guidance,"[13] a 40-page document that, for the first time, articulated EPA's commitment to providing limited enforcement leniency to businesses which discovered violations voluntarily, disclosed them promptly, corrected them quickly, and took serious action to prevent recurrences. A new final Audit Policy, which superseded the 1995 Policy, was issued in 2000 and remains in effect, with some modifications, today.[14]

The 2000 EPA Audit Policy encourages self-policing, self-disclosure, and prompt self-correction of environmental violations and, for companies that meet the conditions of the Policy, offers the following four incentives: (1) EPA will not seek any gravity-based penalties for entities that self-disclose and meet all nine Policy conditions, including "systematic discovery," although it retains the discretion to recover the "economic benefit" civil penalty component;[15] (2) Gravity-based penalties will be reduced by75% where the disclosing entity does not detect the violation through systematic discovery, but meets all of the other Policy conditions; (3) When a disclosure that meets the terms and conditions of the Policy results in a criminal investigation, EPA "will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities;"[16] and (4) EPA – in a reaffirmation of its policy since 1986 – will not routinely request copies of audit reports from disclosing entities in order to trigger further enforcement investigations.

There are nine conditions of the Audit Policy that must be fulfilled in order for EPA to agree to the waiver of all gravity-based penalties for self-disclosing entities. The most important of these are: the "systematic discovery" of the violation; the identification of the violation "voluntarily" and not by some government-required procedure; disclosure to

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[12] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", 60 Federal Register 66706 (22 December 1995).

[13] "Audit Policy Interpretive Guidance", 15 January 1997, online: <http://www.epa.gov/sites/production/files/documents/audpolintepgui-mem.pdf>.

[14] See EPA revised final policy re "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", 65 Federal Register 19618-19627 (11 April 2000) [Audit Policy], online: <https://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8954.pdf> and EPA's 2007 Memorandum, "Issuance of Audit Policy: Frequently Asked Questions", online: <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>.

[15] Systematic discovery is defined as "the detection of a potential violation through an environmental audit or a compliance management system that reflects the entity's due diligence in preventing, detecting, and correcting violations." This gravity-based penalty waiver for companies that detect violations by a system of "systematic discovery" reflects EPA's recognition that "environmental auditing and compliance management systems play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations." Audit Policy, *supra* note 14 at 65 FR 19620.

[16] *Ibid*. EPA also notes that this incentive will not be available where "corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance." Also, even though EPA may not recommend criminal prosecution for disclosing entities, it recognizes that "ultimate prosecutorial discretion resides with the U.S. Department of Justice …."

EPA within 21 days after discovery; correction of the violation, and certification of correction to all appropriate agencies, within 60 days; and prevention of any recurrence by making improvements in the entity's environmental management system. Policy benefits are not available for violations that result in serious actual harm to the environment, that may have presented an imminent and substantial endangerment to public health or the environment, or that violate the specific terms of any order, consent agreement, or plea agreement.[17]

Also, EPA remains adamantly opposed to legislation in certain states which creates a statutory privilege for environmental audits and also provides immunity from certain kinds of enforcement against companies which meet the law's audit requirements. "Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards."[18]

Businesses with internal environmental compliance management programs, whether or not through an ISO 14001-certified environmental management system,[19] benefit from institutionalizing a strategy for voluntary disclosure and prompt corrective action of environmental violations. They recognize both the importance and the vigilance required to implement and maintain an internal audit program that has the support of every level of the corporate organization, even in the face of business interruptions, customer dissatisfaction, and the need for new kinds of collaboration among normally independent business units. A 2010 Harvard Business School empirical analysis found that facilities that made voluntary disclosure of violations were able to obtain a 17% reduction in the likelihood of being inspected, compared to facilities that failed to take advantage of the EPA Audit Policy.[20]

On September 9, 2015, the Department of Justice (DOJ) may have dramatically increased the importance of internal corporate environmental compliance management programs. On that date, Deputy U.S. Attorney General Sally Yates issued a Memorandum titled "Individual Accountability for Corporate Wrongdoing" (Yates Memo). The Memo is applicable to all future investigations of corporate wrongdoing as well as to investigations pending as of September 9, 2015, to the extent practicable. Its primary purpose is to "fully leverage the resources [of the Department of Justice] to identify [and pursue]

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[17] Effective 1 August 2008, EPA issued its "Interim Approach to Applying the Audit Policy to New Owners", which, among other things, encourages new owners of existing facilities to disclose otherwise threatening violations discovered during acquisition due diligence by giving the acquiring company nine months from the closing date to disclose the violations and enter into an audit agreement with EPA. See online: <http://www.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners>.

[18] Audit Policy, *supra* note 14 at 65 FR 19623.

[19] See online: <http://www.epa.gov/ems>. The most commonly used EMS is the one developed by the International Organization for Standardization for its ISO 14001 standard, first established in 1996.

[20] Culleen & Glazer, *supra* note 11 at 6.

culpable individuals at all levels in corporate cases."[21] Even attorneys who regard the Yates Memo as primarily a restatement of existing practice, consider the fact of its issuance as highly significant.[22]

## THE YATES EMO AND THE U.S. ATTORNEYS' MANUAL

The Yates Memo's amends the provisions of both the existing Principles of Federal Prosecution of Business Organizations in Title 9 (Criminal) of the *United States Attorneys' Manual* (USAM), as well as the "Compromising and Closing" provisions of Title 4 (Civil) of the USAM.[23] Its primary contribution to the policies governing federal criminal and civil prosecution of business organizations is to withhold the extension of *any* "cooperation credit" as a mitigating factor in cases where DOJ is investigating business organizations for possible indictment or prosecution, *unless* the corporation completely discloses to DOJ all relevant facts about individual misconduct.[24]

The USAM advises federal prosecutors to consider ten factors during the conduct of an investigation, when making the determination whether and what kind of charges to bring, and when negotiating plea, settlement, and other agreements. Six of those ten factors are directly related to the considerations that underlie corporate environmental compliance management programs and that EPA's Audit Policy also emphasizes. They are: the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (USAM 9-28.500); the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (USAM 9-28.600); the corporation's willingness to cooperate in the investigation of its agents (USAM 9-28.700); the existence and effectiveness of the corporation's pre-existing compliance program (USAM 9-28.800); the corporation's timely and voluntary disclosure of wrongdoing (USAM 9-28.900); and the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (USAM 9-28.1000).

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[21] Deputy U.S. Attorney General Sally Yates, *Memorandum re Individual Accountability for Corporate Wrongdoing*, 9 September 2015 [Yates Memo], online: <http://www.justice.gov/dag/file/769036/download>. Its intended scope and application is comprehensive because it is addressed to the Assistant Attorneys General of the Department of Justice's Antitrust, Civil, Criminal, Environment and Natural Resources, National Security, and Tax Divisions, as well as to the Directors of the Federal Bureau of Investigation and the Executive Office for United States Trustees.

[22] Jonathan Segal & Daniel Walworth (Duane Morris LLP), *Individual Accountability and Investigations*, 20 November 2015 webinar.

[23] See online: <http://www.justice.gov/usam/united-states-attorneys-manual>, USAM, at Title 9, Chapter 9-28 (titled "Principles of Federal Prosecution of Business Organizations"), and within Title 4 (Civil) of the USAM, a new s 4-3.100 (titled "Pursuit of Claims Against Individuals").

[24] USAM at 9-28.700. The requirement for "complete disclosure" as a condition to receipt of *any* cooperation credit is more relaxed in the civil enforcement than in the criminal enforcement context.

The employees of every regulated business need to understand that, when agency personnel arrive outside the facility's gate to request access to perform an inspection, those inspectors, their agency managers, the agency's in-house counsel, and the federal law enforcement authorities to whom the agency's in-house counsel may refer violations for civil or criminal prosecution, will each be judging the potential culpability of the business and its employees by reference to those enforcement decision-making factors.

The Yates Memo, and now the USAM as well, directs DOJ to pursue individual civil and criminal corporate wrongdoing by following six guidelines:

1) To be eligible for <u>any</u> cooperation credit under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct.
2) Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5) Corporate cases should not resolved without a clear plan to resolve related individual cases before the statute of limitation expires and declinations as to individuals in such cases must be memorialized.
6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[25]

In its discussion of the general principle of cooperation credit, the USAM states that "a company is not required to waive its attorney-client privilege and attorney work product protection in order satisfy this threshold.[26] The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (e.g. the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation)."[27]

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[25] Yates Memo, *supra* note 21 at 3-7 (footnote omitted; emphasis in original).

[26] USAM at 9-28.720.

[27] "As we all know, legal advice is privileged. Facts are not. If a law firm interviews a corporate employee during an investigation, the notes and memos generated from that interview may be protected, at least in part, by attorney-client privilege or as attorney work product. The corporation need not produce the protected material in order to receive cooperation credit and prosecutors will not request it. But to earn cooperation credit, the corporation does need to produce all relevant facts – including the facts learned through those interviews – unless identical information has already been provided. We will respect the privilege, but we will also expect companies to respect its boundaries and not to wrongly exploit its legitimate purpose by using it to shield non-privileged information from investigators." Remarks of Deputy Attorney General Sally Yates to American Bankers Association and American Bar Association Money

## THE REGULATORY INSPECTION, EMPLOYEE INTERVIEWS, AND ATTORNEY-CLIENT PRIVILEGE ISSUES

The Yates Memo's emphasis on identifying and pursuing culpable individuals in both civil and criminal corporate prosecutions, and the policies it prioritizes to achieve that goal, have potentially dramatic, but as yet untested, consequences for federal criminal and civil enforcement of environmental laws in the United States in at least the following ways: (1) how corporations and their employees prepare for and respond to environmental regulatory inspections; (2) the preparation for employee interviews in internal and regulatory agency investigations, including whether and when to provide employees with independent counsel; (3) the relations between employees and the corporation as well as between executives and the corporation; and (4) enhanced government scrutiny of corporate assertions of attorney-client privilege used to justify the refusal to produce requested information.[28]

### The Regulatory Agency Inspection and the Role of Corporate Counsel

During each of the five years from 2009-2013, the EPA conducted, on average, 20,000 non-CERCLA facility inspections and 200-300 multiple-day, multi-media civil investigations, from which approximately 3,000 civil enforcement cases were filed. The overwhelming majority of all facility inspections involve only one or two civil investigators; less than 1% involve enforcement attorneys. Most inspections are unannounced because agency staff, unsurprisingly, wants to obtain a real-time "snapshot" of how each particular regulated entity operates its business. All inspections, except for those conducted pursuant to a search warrant, require the consent of facility management, even though virtually every regulated facility's operating permit requires it to permit access at "reasonable times" or "during regular business hours" so that regulatory agency staff can evaluate compliance status. The reasons for warrantless (i.e. regular) inspections are several: a routine check on compliance with permit conditions and regulations; a referral from other agencies; citizen complaints; follow-ups on earlier inspections and information request letters; and annual or biennial program effectiveness assessments.[29]

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Laundering Conference, Washington, DC, 16 November 2015, online: <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>.

[28] Only the first and part of the second of these situations can be examined here; the third and fourth situations are beyond the scope of this paper, as is a discussion of when independent counsel should be provided to an employee at the expense of the company and when the company should indemnify the employee.

[29] Jessica Ching-yi Kao, EPA Region IX Regional Counsel, "Knock, Knock, Knocking on Office Doors: A 'How-to Guide' to Responding to Environmental Enforcement Agency Investigations" (Remarks at State Bar of California Environmental Law Section Annual Yosemite Conference Webinar, October 2014) [Knock, Knock].

Warrantless facility inspections, whether by EPA or California environmental regulatory agencies, usually involve two inspectors, who, upon arrival, present their credentials, and request access and to speak with the "person in charge." The inspection begins with the lead inspector conducting an "opening conference," where the inspector explains the purpose and scope of the inspection so that the facility's managers can better assist the inspectors and warn about construction areas or other safety issues on site.[30] During the opening conference, inspectors will also identify particular facility records they want to inspect and/or copy while present. (The company must provide the government with copies and retain all originals for its own records.) Inspectors may take photographs of process and pollution-control equipment, as well as liquid and soil samples at any location on or off the property where it is safe to do so. Normally, inspectors will provide the facility with splits of all physical samples they take, but the facility staff should nonetheless make a specific request for these items.[31]

One or more facility personnel must always accompany the inspectors while they are on the business premises, and some agencies require that facility personnel accompany their inspectors during every part of the inspection, both to "oversee" the inspection and to answer any questions the inspectors may have as and when they arise.[32] Facility personnel must sometimes walk a fine line between ensuring that the inspection stays within its announced scope and does not improperly disrupt or interrupt the facility's business operations, and constraining the inspectors' activities to an extent that could be construed as obstruction of justice.[33] During the "closing conference," the inspectors usually provide an overview of their observations and identify specific deficiencies that need attention. Since everything mentioned during a closing conference (along with much more that is not mentioned) will become part of the final inspection report, the facility needs to understand and respond to the particulars of every identified deficiency so that, when the final report is issued, the facility's response and comments will demonstrate how quickly and efficiently it took necessary corrective action.

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[30] Not only do criminal investigations typically dispense with opening conferences, but investigators may appear, present credentials, enter the facility, and proceed to start inspecting, sampling, seizing and removing evidence, and interviewing employees. See Craig D Galli & Gregory E Goldberg (Holland & Hart LLP), "Methodology and Ethics of Internal Investigations of Environmental Crimes – Domestic and International Considerations" (2015) 61 Rocky Mtn Mineral Law Inst 24-26.

[31] Knock, Knock, *supra* note 29. Under RCRA, EPA is required to provide split samples if requested and to promptly disclose all analytical results (RCRA s 3007(a), 42 USC s 6927(a)). Although neither the *Clean Air Act* nor the *Clean Water Act* requires EPA to provide split samples or analytical results, EPA guidance and general practice recognize these as duties. See EPA, NPDES Compliance Inspection Manual (2004) at 2-17; EPA Multi-Media Investigation Manual (1992) at App M-8.

[32] In the author's experience, this is true for EPA Region IX and for California environmental regulatory agencies. However, individual agency practices can vary as can the practices of the same agency from region to region.

[33] See, 18 USC § 1501 et seq (Chapter 73, "Obstruction of Justice").

An increasing number of high-value-penalty enforcement cases arise from so-called "dumpster dives," where agency inspectors wait just beyond the property line of the target facility to intercept private waste-hauling trucks that have completed pick-ups from the facility, before the facility's waste is commingled with that from later-serviced facilities. It is established federal and California state judicial precedent that neither individuals nor organizations have any legitimate expectation of privacy in the trash they make available for removal by local government or private haulers, so these "dumpster dives" do not violate the Fourth Amendment's proscription on unreasonable searches and seizures.[34]

During the majority of warrantless agency inspections, the presence of corporate counsel (whether in-house or outside) is unnecessary and may also give inspectors the false impression that the business has something to hide. However, in the unusual situation where three or more inspectors are present or if the inspection involves more than one regulatory agency, then it is advisable for outside counsel to be present.[35] Before that "moment of truth" ever occurs, in-house and outside counsel need to remove as many attorney-client privileged and attorney work product documents from facility files as possible, and any privileged information that must be or is kept at the facility must be segregated and properly marked, in order to minimize or eliminate the possibility that a facility employee may unwittingly disclose it. If, under extraordinary circumstances, outside counsel *must*, but cannot, be present during a warrantless inspection (either because he or she is too far away or the inspectors refuse to wait), counsel must consider the pros and cons of informing agency inspectors either directly or through the agency's counsel that – until and unless outside counsel can be physically present – the corporation withholds its consent to any inspection, including the interviewing of any employees.

If the inspection is authorized by a search warrant, particularly a criminal warrant, facility employees or counsel must copy the warrant without delay so that they can familiarize themselves with the scope of inspection and the seizure of documents and objects that the warrant authorizes. Here, the presence of outside counsel is at its most critical, but government investigators are not required by law to wait for corporate counsel before proceeding to execute the warrant. If they refuse to wait, corporate counsel needs to make a record of formally objecting to the execution of the warrant in his or her absence, and also needs to assert attorney-client privilege and attorney work product protection over all

[34] "Knock, Knock," *supra* note 29, remarks of Deborah Schmall, Partner, Paul Hastings LLP.

[35] In these situations, facility personnel must immediately call outside counsel so counsel can try to get to the facility before the inspection begins. Until counsel arrives, the facility employee "in charge" should ask the inspectors if they will wait for the company's outside counsel; if they refuse, then counsel must consider either to advise the inspectors that the facility refuses to consent to their entry and their interviewing of employees unless he or she is present, or to allow the inspection and possible employee interviews to proceed in his or her absence. If the inspection proceeds without corporate counsel's presence, then facility employees need to be even more than normally vigilant in documenting exactly what the inspectors say, what parts of the facility they visit and photograph, and where they take samples.

covered documents and information. To the extent that any such documents are kept at the facility and have been properly marked and segregated, corporate counsel, assisted by facility personnel, can identify them to the investigators in advance.[36]

The ideal arrangement is for outside counsel to be notified immediately of the presence of inspectors with a search warrant, so that counsel can speak directly with them to learn the scope and details of the warrant and obtain their agreement either to delay warrant execution until counsel arrives or, at least, to conduct employee interviews only in the presence of outside counsel at an approved later date. If outside counsel cannot get the investigators to delay the warrant execution until counsel arrives, then counsel must at least try to get the investigators to agree that they will not interview employees unless he or she can be present.[37] Since that may not be possible, outside and in-house corporate counsel need to have earlier informed all facility employees that, under these circumstances, they have the right to request that they be interviewed in the presence of corporate counsel or, where appropriate, their own independent counsel. Most of all, facility employees need to hear from corporate counsel that, whenever they are interviewed by government agency personnel, they need to cooperate fully, tell the truth, and only provide information that is specifically requested.

**Employee Interviews and Attorney-Client Privilege Issues**

Whether or not a company gets notification of an imminent government inspection and has the luxury of hiring special counsel trained in environmental criminal investigations, it must prepare its employees in advance for interviews by government investigators. Corporate counsel must be positive that employees understand that they must cooperate with government investigators who want to interview them, regardless of whether they choose to forego counsel or be represented by counsel during the interview. Certainly, corporate counsel have the right to tell employees that their participation in government

[36] Documents containing trade secrets or confidential business information (CBI) cannot be withheld from seizure pursuant to a warrant or from production during a warrantless inspection. Instead, every single page in any document that contains trade secret data or CBI must be prominently marked with the appropriate identification, or else the company will be held to have waived its right to assert that protection in later proceedings where the government seeks to introduce those documents for evidentiary purposes or to object to the documents' release to the public pursuant to the federal *Freedom of Information Act* or the *California Public Records Act*. Even if the assertion of trade secret or CBI protection is properly asserted, the documents will be taken and the company will have to prove to a judge in a later proceeding that the documents at issue cannot be disclosed without causing real and significant damage to the company's protected commercial interests.

[37] Galli & Goldberg, *supra* note 30 at 24-28. If the warrant execution proceeds in the absence of corporate counsel, then the lead facility employee(s) must be prepared to shadow the inspectors at their every step to verify that their inspection is constrained by the scope of the warrant and, if the employee(s) believe at any point that the inspection exceeds the scope of the warrant, the employee(s) must immediately and with specificity object to the inspectors, ensure the inspectors note their objection, and then permit the inspectors to continue without interference that might be construed as obstruction of justice.

interviews is voluntary, that they have the right to speak with company counsel before the interview takes place if they choose (although that cannot be a requirement of the company), that they have the right to have counsel present with them when the government interview is conducted, and that the counsel who accompanies them can be corporate counsel or, if appropriate, their own independent counsel.

Whether corporate counsel plans to interview an employee pursuant to an internal corporate investigation or audit or "only" intends to advise the employee of his or her rights in connection with an interview to be conducted by a government agency investigator, corporate counsel must provide the employee with an advisement or warning required by the Supreme Court's decision in the *Upjohn* case.[38] The extent of the *Upjohn* warning is greater when corporate counsel is interviewing the employee pursuant to an internal investigation than it is when the government is interviewing the employee pursuant to external investigation. The full *Upjohn* warning includes the following elements: corporate counsel represents the company, not the employee personally; the interview, if internal, is being conducted to gather information to provide legal advice to the company for business purposes; all communications between corporate counsel and the employee are protected by the attorney-client privilege, which belongs solely to the company and not to the employee; the company alone may elect to waive the privilege and disclose some or all of its communication with the employee to third parties (including the government), without notifying the employee in advance; and the employee is requested and expected to maintain all information discussed as confidential.[39]

Although not required by law or judicial decision, it is probably advisable for corporate counsel to memorialize every *Upjohn* warning in writing, rather than to rely on oral communication alone. If the warning is later found to have been inadequate, the consequences can include loss of the privilege, financial exposure to the company, and discipline of corporate counsel.[40]

As noted earlier, both the Yates Memo and the USAM explicitly mention the sacrosanct nature of the attorney-client privilege and attorney work product doctrine, and the USAM quotes the Supreme Court's language to the effect that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby

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[38] *Upjohn Co v United States*, 449 US 383 (1981). This decision applied the attorney-client privilege to communications between a company's counsel and its employees in an internal investigation context. While *Upjohn* involved an investigation by outside counsel, the D.C. Circuit Court of Appeals recently held that the privilege is applicable to an internal investigation where an employee is interviewed by a non-attorney at the direction of in-house counsel. *In re Kellogg, Brown & Root, Inc*, 756 F.3d 754 (DC Cir 2014). Clearly, therefore the privilege will apply when in-house counsel directly conducts the employee interview.

[39] See generally, Galli & Goldberg, *supra* note 30.

[40] See *United States v Ruehle*, 589 F.3d 600 (9th Cir 2009).

promote broader public interests in the observance of law and administration of justice."[41]

The DOJ's policy, as reinvigorated in the Yates Memo, to "identify and pursue culpable individuals at all levels in corporate cases" means that corporations now must become even more alert to the need to take prompt action in response to the acquisition of facts that should reasonably alert them to the possibility of individual employee wrongdoing. If the corporation deliberately or negligently fails to promptly investigate evidence or allegations of non-compliance or legal violations, it can subject itself and its relevant officials to even greater liability. The corporation needs to be alert to initial indications of potential civil or criminal exposure, such as the receipt of any kind of government subpoena or request for information, efforts by government agents to speak to employees or executives, reports or allegations by potential whistleblowers, and any information revealed through such internal and regulatory compliance functions as auditing, "ordinary course" reports, and mandatory reporting obligations. Corporations with robust internal environmental compliance management systems are more likely to recognize the kinds of otherwise routine facts that can form the basis for civil and criminal enforcement. They are also more likely to promptly engage counsel expert in the law and ethics of internal investigations as well as the complexities of environmental laws and regulations to guide them through the intricacies of deciding whether and how to make early disclosure to the government of facts relevant to individual culpability without waiving critically important privileges and protections.[42] The admonition attributed to the late, inimitable Yogi Berra is particularly relevant in the context of this subject matter: "If you don't know where you are going, you might wind up somewhere else."

[41] USAM at 9.28-710 (Attorney-Client and Work Product Protections), quoting *Upjohn Co v United States*, 449 US at 389.

[42] See Segal & Walworth, *supra* note 22; Galli & Goldberg, *supra* note 30; and Craig Galli, "A Compliance Crisis Is a Terrible Things to Waste: Counsel's Role to Enhance Corporate Culture" (Winter 2015) 30 Natural Resources & Environment 3.