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Enforcement

Regulatory Policy

Unlike other types of regulatory actions, in which the parties can take a scorched-earth approach because they will never have to deal with each other again, environmental regulation is different. Thus, it is extremely important to try to prevent any escalation and build a baseline of trust.

Tips for Keeping Environmental Enforcement Actions Civil: Maintaining Good Relations With Regulators

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One of the more obvious and general suggestions for avoiding regulatory problems, and one that is commonly ignored, is to prioritize, establish and maintain good working relationships with regulators and inspectors.

Ideally, this attitude would be easy to achieve, well-received and mutually reciprocated. Occasionally, this balance does occur when the agency adopts a customer service model or philosophy. However, even in those adversarial situations in which confrontation and suspicion abound, and arises from the actions and attitudes of the regulators, it is the company that must diligently strive to solve the problems, strengthen the relationship and improve communications.

Even though this scenario may appear unfair at first glance, the company must always remember who loses when these problems are left unaddressed, regardless of which side initiated the regulatory action or dispute.

Every company that is heavily regulated, or which even has a single environmental permit, is in a repeat relationship with the regulators. Accordingly, the following tips were derived by “reverse-engineering” actual environmental crimes cases and identifying the key factors that prompted the regulators to make the referrals that triggered the costly and stressful environmental criminal investigations.

Tip 1: Maintain Respect, or at Least Its Appearance.

Every company employee and representative should strive to be respectful toward inspectors. These individuals may in fact have limited technical competence and may be viewed as nit-picky bureaucrats. However, conveying a disrespectful attitude and spawning a bad relationship can escalate and come back to haunt your company—not the inspector.

Joint investigations by local, state and federal agencies are commonplace. The federal agencies often rely

upon inspectors to determine who the bad actors are within each industry sector because these individuals are on the front line of environmental enforcement. It is wise to think twice before doing anything that might invite the wrath of a scorned inspector and causing a referral to be made to criminal investigators.

Perhaps a more productive approach is for a company to view and treat these inspectors as it would difficult, but valuable customers. Just as key customers bring in substantial revenue, mistreated regulatory inspectors have the potential to drain large sums of money and impose many other additional costs. Just as a business can't operate without loyal but difficult customers, a business can be seriously or irreparably harmed by an inspector with a grudge.

In short, inspectors should be handled with care and minor disputes should be put in their proper perspective.

Tip 2: Demonstrate Objective Good Faith.

Every regulated company should strive to convey good-faith compliance efforts and demonstrate this attitude through proper file maintenance and concrete actions. Mere intentions or future plans will not be sufficient.

Every company claims to care about environmental compliance. Regulators will probably only respond favorably to those actions which are actually taken.

The critical test is not whether your company thinks that it is a good corporate citizen, but whether an objective reviewer of your regulatory files would reach that conclusion.

Remember, someday these files may have to speak for themselves if they are reviewed by a prosecutor or even a jury. In addition, for better or worse, these files often remain in place long after a particular inspector's tenure with the agency. Depending on the content and attitude reflected in these files, they can either serve as the company's protective shield or the government's spear.

The ultimate goal is to build up a high level of trust over time and to convince the regulators that your company has made the necessary staffing and resource commitments to be able to self-regulate. As previously noted, governmental perceptions are often the reality in the regulatory context.

Tip 3: Assume an Active Role in Developing Permit Terms.

A company's technical team should assume an active role in reviewing all terms, conditions and provisions of any proposed or renewed environmental permits. No permit term should be blindly accepted if there is a good chance that the company won't be able to maintain consistent compliance. As a result, the company must remain vigilant in screening permits to avoid setting itself up for guaranteed future noncompliance, bad-actor status, regulatory fines, notices of violations and enforcement headaches.

Tip 4: Avoid the Appearance of Bad Housekeeping.

One factor that is certain to invite increased regulatory scrutiny of any facility is the appearance of bad housekeeping. Even though such conditions may not actually constitute an environmental violation, they often raise broader concerns and invite speculation about more serious and systematic problems.

In other words, the regulators may fairly assume that a company that does not care enough to take the effort

to maintain a good image may also be cutting corners in other, more significant areas.

In short, bad housekeeping is likely to generate complaints from neighbors, environmental groups and customers, which often leads to heightened scrutiny and aggressive inspections from regulators.

Tip 5: Address Employee Complaints or Concerns.

A large percentage of environmental criminal investigations are triggered by whistle-blowing calls from current or former employees. Some of these governmental informants are legitimate, while others are extremely biased and have an axe to grind against the company.

Recognizing that it is better to hear bad news early and keep it in-house, one way to monitor these potential concerns and problems before they get referred to the government is to create a confidential process or mechanism which invites, addresses and incorporates employee concerns and complaints. The company must keep careful track of the responses and must strive to address as many of the concerns as it can.

If the employees perceive that their employer is at least willing to listen to complaints, this reduces the level of animosity that often fuels the decision to call the government.

Another advantage of such a process is that it can be used to undermine the credibility of those disgruntled employees who simply rushed to the government without even giving the company an opportunity to address, and possibly correct, the underlying problem.

Lastly, but perhaps most importantly, the simple fact that the company has been willing to set up this channel for complaints speaks volumes about the commitment of the company to try to do the right thing. Creating such a process, like other self-governing measures, is inconsistent with a company that is a bad actor.

Tip 6: Maintain Continuity With Agency Inspectors.

Companies should designate one person, or two at most, to serve as the primary contact to regularly meet and communicate with inspectors and the agencies, as well as receive and centralize all regulatory correspondence. These individuals should possess the necessary qualifications, including high intelligence, familiarity with company operations, excellent social and communication skills, and a high level of interest in this position.

This job must combine the qualities of public relations, customer service and sales. This position is an extremely vital component to maintaining good relationships with the agency. The right person can make tremendous contributions, while the wrong person can be disastrous. These contact people should also be adequately trained and instructed as to the importance of their responsibilities.

This company official also should be tasked with the responsibility of meeting with agency representatives on a regular basis to informally canvass them regarding current or upcoming regulatory priorities, unresolved problems and possible suggestions as to how the company might be able to improve. This level of genuine concern should go a long way in helping to establish credibility with the agency.

In addition, this contact person should also take detailed notes on each agency encounter and inspection, including the comments made and any observations of the inspectors' attitudes. Over time, these notes will record and plot such changes in attitude that may serve as

one means of predicting the likelihood of a more aggressive enforcement effort in the future.

Tip 7: Monitor Inspections.

It is highly recommended that every company designate at least two individuals to accompany inspectors during regulatory tours of the plant or facility. During inspections, these representatives should avoid unnecessary confrontation. If the inspector questions the presence of two representatives, they should explain that it is company policy based on the company's desire to discover any problems that may exist and to work with regulators and assist them in receiving the necessary information. These individuals should take careful and detailed notes of the inspection, usually immediately afterward.

Tip 8: Request Post-Inspection Debriefings.

Company representatives should routinely request a brief meeting at the conclusion of any inspection to determine any concerns the inspector might have. If no concerns are mentioned, this should be duly noted as well. Over time, the company's files will not only contain important substantive information but will also reflect a sound process implemented by a responsible company.

If necessary, these files will be readily admissible at trial as business records and will serve to bolster the credibility of the company. The inspectors should also be asked if they would kindly provide the company with a copy of any written report.

Once again, the importance of keeping detailed notes that record exactly what was communicated by the inspector during this meeting cannot be overemphasized. These notes should be incorporated into a detailed memo to the file.

Tip 9: Record All Environmental Compliance Expenditures.

Companies should make every effort to accommodate reasonable requests for corrective actions, especially if they are not too costly. In addition, detailed records should be maintained of all the requests; what was done in response; the total amount of money, time and resources spent on each task; and the dates on which the requested tasks were completed.

Records should also be kept that plot out the expenditures from year to year, with an estimate of what percentage of the company's "bottom line" is spent on environmental compliance. This type of environmental accounting may go far toward demonstrating good-faith. The goal should be to strive to maintain these records in a similar fashion as tax or insurance records.

While the failure to keep accurate records of environmental expenditures is not a punishable offense, the presence of these records can be extremely persuasive in defending a company and its commitment to environmental protection. Too many companies simply fail to accurately itemize and keep track of these expenditures because they fail to see the utility or purpose.

Tip 10: Don't Ignore Problems, Try to Resolve Them.

Company representatives should always follow-up and follow-through when presented with regulatory requests, or when problems are discovered and communicated. Many times, individuals may sincerely believe the request is unnecessary, unreasonable or too costly, or that the problem is trivial.

In the presence of such requests, company representatives must not overreact and must avoid taking the matter personally. Efforts must be taken to ensure that such conflicts do not escalate. In addition, all perceived attacks upon the individual inspector should be avoided. Such attacks usually only serve to invite unwelcome and repeated counterattacks by the regulators that may last for years.

At the time the requests or demands are made, if necessary, representatives should express their disagreement or even disappointment, as well as the need for company officials to review the findings before deciding how to proceed.

Also, if certain run-ins do occur with regulators, company representatives should seek to reopen communications at the earliest appropriate time, even if this means risking another uncomfortable disagreement.

Silence is not always golden. Facing the prospect of additional tense discussions is far better than being completely unaware of the potentially hidden dangers which may be masked by silence.

Tip 11: Pick Your Fights.

After company representatives have carefully and logically analyzed the available options, perhaps with the advice from experienced environmental counsel, they may conclude that they simply cannot comply with the regulatory request for a variety of legitimate reasons. But this decision should be the result of an objective and informed evaluation of the factual and legal basis for the regulatory request, as well as the direct and indirect consequences surrounding a petition or challenge.

In short, some disputes are worth fighting, but some are not. If the company decides not to comply with the request, the next recommended step is usually not to take formal action, but rather to establish an ongoing dialogue. One possible approach might be to write to the inspector, with a "cc" copy to his direct supervisor, requesting a meeting to revisit the problem and address some of your company's concerns.

In general, it is advisable to avoid cutting the inspector out of the loop and instantly rushing to his supervisor. Going over the inspector's head can be ineffective, counterproductive and is likely to lead to negative consequences.

First, the supervisor will usually start by consulting the inspector to get his or her story. Second, the inspector may feel embarrassed or disrespected, and may want to retaliate. Third, your inspector is a repeat player and is likely to return for future inspections more frequently and with much more enthusiasm.

On the other hand, if your response letter is placed in their files and simply ignored, you will have managed to put the ball back in their court. If no action occurs, it will be more difficult in the future for the agency to accuse you of bad faith. Companies should recognize that this approach does not require them to completely cave-in to every regulatory request.

However, even if formal actions are eventually taken, at least the company will have demonstrated a prior willingness to try to work it out. For those requests or demands that will inevitably be imposed, try to seek a workable solution that allows implementation over a period of time.

This is another area in which the company's past good will with the regulators should pay off. In short,

regulatory problems rarely just go away, and the files and correspondence will remain intact. Borrowing from the principle of compound interest, the longer the problems remain unaddressed, the larger your company's bad faith debt will have accrued.

Tip 12: Self-Monitor Your Regulatory Files Periodically.

Every company should conduct periodic reviews of its own regulatory files, at least on a semi-annual basis. This should include a thorough review of the files maintained on its own premises, as well as a careful monitoring of the agency's files that pertain to its facility.

These public files can be a wealth of information and a valuable source for discovering potential problems that may have never been brought to the company's attention. This review may also reveal important discrepancies or inaccuracies that can be quickly corrected, clarified or resolved. Also, these monitoring efforts should be noted in your policies as further proof of your company's good faith.

Lastly, these files are often the first source of information that a federal agency or prosecutor will request and review in deciding whether to initiate an investigation or to go forward with a prosecution. You and your company will not be given an opportunity to influence this decision. Therefore, the regulatory correspondence and records have to speak for you.

In short, these files may serve as a silent umpire that may be consulted without any notice. For example, silence and inaction in the face of outstanding agency requests or notices of violations can be definitive proof that the company and the recipient of the notice knew about the problem or alleged violations.

In criminal terms, this documentation goes a long way toward satisfying the government's burden of proving that the violations were knowingly committed. In addition, these unaddressed notices or requests are likely to be viewed as evidence of bad faith, irresponsible management, or simply a low-level institutional concern for environmental compliance.

Tip 13: Benchmark Practices and Lead Industry Class.

One fact regulators and prosecutors can never ignore is how the compliance record, practices and overall attitude of a particular company compares with other members of an industry. Accordingly, companies

should benchmark and monitor their competitors with regard to the types of pollution control equipment, budgetary and personnel allocations to environmental compliance and overall compliance record. In addition, companies should continually strive to learn from their competitor's success stories as well as their shortcomings.

No company should underestimate the advantages and enforcement protection associated with being perceived by the regulators as being the best in the industry. In short, companies should strive to be at the top 10 percent of their industry and should compile the objective benchmarks to support this finding.

Closing Thoughts.

Overly aggressive and costly environmental enforcement actions, both civil and criminal, are often sparked by referrals from regulators. Accordingly, one way to reduce these enforcement risks is to maintain good relations with civil regulators by consistently building up good will over time.

By following these tips, companies can go beyond mere rhetoric or empty claims and clearly show a strong commitment to environmental compliance.

In dealing with all phases of law enforcement, success comes from favorably influencing the broad discretion of regulators and prosecutors. If regulators perceive you as taking care of your own operations, there is no need for them to turn on the enforcement machine or teach you a lesson.

Take it from a former environmental prosecutor, who often had to make the final enforcement decision—demonstrating true self-governance is the best form of insurance any company can buy.

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