

# What to Do When the Inspector Knocks:

Understanding Your Rights and Obligations During an Agency Inspection

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# Government Authority for Environmental Inspections

Most of the major federal environmental statutes (and corollary state statutes) contain provisions granting EPA and/or state environmental agencies authority to conduct inspections:

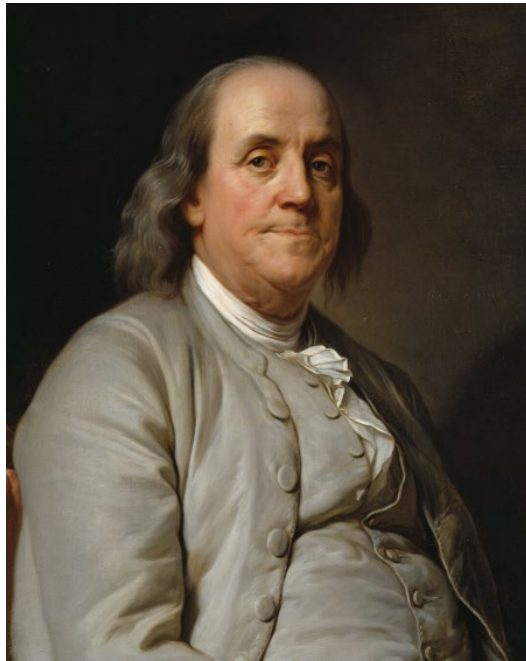
- Clean Air Act (CAA) - allows agency to enter a facility to inspect for compliance, take samples and review records that the facility is required to keep. [42 U.S.C. § 7414(a)(2)]
- Clean Water Act (CWA) - allows agency to enter a facility to inspect for compliance, take samples and review records that the facility is required to keep. [33 U.S.C. § 1318(a)]
- Resource Conservation and Recovery Act (RCRA) - allows agency to enter a facility to inspect for compliance and take samples of waste materials [42 U.S.C. § 6927(a)]
- Toxic Substances Control Act (TSCA) – allows agency to inspect any facility at which chemicals are manufactured, processed or stored to review records and determine compliance TSCA. [15 U.S.C. § 2610(a)–(b)]
- Other federal and state statutes also grant agencies authority to perform inspections.

# Does a regulated entity have to provide access?

- Unless the inspector has a warrant, you can refuse to allow them access to your facility or certain areas of it.
  - Requiring a warrant for entry is generally not advisable except in unusual circumstances (*e.g.*, continuing agency harassment) or in the event that the agency is conducting a criminal investigation.
  - Failure to provide access can potentially cause the agency to pursue enforcement (or seek fines or penalties for failure to allow an inspection to occur).

# Preparing for an Inspection

*“An ounce of prevention is worth a pound of cure.”*



# Preparing for an Inspection

1. Designate a team of individuals within each facility with responsibility for handling inspections. Inspection team should:
  - Be familiar with previous inspections
  - Know applicable statutes, regulations, etc.
  - Be familiar with legal and technical resources
  - Be familiar with records, especially location
2. If possible, designate a primary contact person or inspection team leader who will head the inspection team, meet with inspectors, follow-up after inspection, and act as a liaison with management and counsel.

# Preparing for an Inspection

3. Instruct employees to notify the inspection team and a company representative (e.g., appropriate executive, plant manager, in-house counsel). Ask employees to direct all inquiries to the inspection team leader or, if not available, to the inspection team.
4. Review records that are subject to inspection and store records that are not typically subject to inspection (e.g., privileged communications, environmental audit reports, internal memorandum, etc.) in separate files and locations.
5. Develop and implement a document retention policy. Review applicable statutes to determine how long records must be retained.

# When an Inspection Occurs...

1. Take a deep breath and gather your thoughts before meeting with the inspector. While inspections can be traumatic for regulated entities, agency officials conduct inspections on an almost daily basis.
2. Locate inspection team leader or, if not available, another member of the inspection team.
3. Team leader should determine whether/when to consult with legal counsel or management.

# When an Inspection Occurs...

4. Determine if the inspector has a warrant. Carefully review any warrants to determine the scope of the warrant. If the inspector presents a warrant call your attorney. Provide only the information subject to the warrant.
5. If inspection occurs outside of normal business/office hours, ask the inspector to return the next business day so that the appropriate personnel can provide requested information.
6. Request an opening conference with the inspector to discuss the inspection.



# At the Opening Conference

- **Be polite and professional, but do not offer information that is not requested or make admissions**
- Determine the purpose of inspection
- Determine the procedures for inspection
- Determine the inspector's area of expertise
- Obtain all relevant documents
- Determine who will conduct inspection
- Determine if copies of records will be requested
- Decide how to protect and/or keep copies of seized information

# During the Inspection

1. Only provide the inspector with the information requested. Do not volunteer additional information or make any admissions. Do not assume that a “friendly” inspector is trying to assist you.
2. Do not provide a “grand tour” of the facility in question. Take the inspector only to those areas of the facility that are at issue.
3. Demand that the inspector abide by health and safety requirements.
4. Do not answer questions that you do not know the answer to. Offer to review files and provide information subsequent to the inspection if necessary to answer a question.
5. At the end of the inspection ask for a closing conference to debrief the inspector.

# At the Closing Conference

- Ask for preliminary findings/violations
- Opportunity to correct the record
- Avoid admissions (do not try to make excuses)

# After the Inspection

- Obtain inspection report
- Request confidential treatment of records
- Confer with management and/or counsel
- Correct any violations
- Consider conducting an internal investigation
- Consider disciplinary action

**How and why do agencies target specific facilities for inspection?**

# Selection of Facilities for Inspections

- From our experience, inspection selection criteria can include:
  - Facility's history of regulatory compliance
  - Contentious relationship with agency
  - Overall corporate reputation
  - Exterior appearance of facility
  - Location of facility
  - Community opposition/citizen complaints
  - Whistleblowers/disgruntled employee complaints/unions
  - Industry or region selected for increased scrutiny
  - Permits or licenses

# Selection of Facilities for Inspections

- EGLE is required to use a “**fair and equitable sampling process to select person whose operations or facilities will be inspected**” pursuant to the Natural Resources and Environmental Protection Act (NREPA) at MCL 324.1505 (1).
- EGLE is not required to utilize a “fair and equitable sampling process to select facilities for inspection” only if:
  - The inspection is performed “in response to a complaint from a third party.”
  - The department has “**evidence**” that a violation has occurred.
  - EGLE is performing an inspection “to determine whether violations identified in a previous inspection have been corrected.”
  - An inspection is required for the issuance of a permit.
  - The inspection is otherwise required under state or federal law.

# Additional EGLE Inspection Requirements

NREPA imposes obligations upon EGLE when conducting inspections:

- Before conducting an inspection under this act, “the department shall provide the person whose operation or facility will be inspected with both of the following (*MCL 324.1505(4)*):
  - An explanation of the person's rights and responsibilities with respect to the inspection.
  - The reasons for conducting the inspection.
- After conducting an inspection under this act, the department “shall give the person whose operation or facility was inspected an opportunity to provide comments to the department on the quality of the inspection and the professionalism of the inspector.” (*MCL 324.1505(5)*).



# Notice and Opportunity to Confer

Pursuant to NREPA, before initiating a civil enforcement action against a regulated entity EGLE is required to:

1. provide a written list of each specific provision of statute, rule, or permit that the person is alleged to have violated and a statement of the facts constituting the violation. See (MCL 324.1511(1)(a));
2. extend an offer to meet to discuss the potential civil enforcement action and potential resolution of the issue. If the person agrees to meet with the department, the department shall not initiate a civil enforcement action until after the meeting is held, unless the meeting is not held within a reasonable time of not less than 60 days. See (MCL 324.1511(1)(b));

# Criminal Investigations

- Criminal investigations are less common; however, regulatory agencies do refer violations for criminal prosecution in some instances.
- County prosecutors can elect to pursue prosecution of criminal violations of environmental statutes occurring within their jurisdictions.
- EPA published its “Strategic Civil-Criminal Enforcement Policy” on April 17, 2024. That policy requires additional collaboration between EPA’s civil and criminal enforcement programs, which will include initial screenings to evaluate the potential for criminal enforcement.
  - The obvious intent of this policy is to institutionalize a routine evaluation of potential criminal claims that might be related to civil enforcement. I would expect this policy to lead to more frequent criminal investigation and enforcement.

# Criminal Investigations

- If an agency or law enforcement official arrives at a facility and announces a criminal investigation, the facility should call legal counsel immediately and ask the inspector to wait until counsel arrives at the scene.
- If the official does not have a search warrant, the facility should deny access and tell the official he must obtain a warrant.
- If the inspector already has a criminal warrant and refuses to wait for legal counsel to arrive, the facility should allow the inspector to conduct the search.

# Criminal Investigations

- Once the criminal investigation begins, the inspection team leader should follow the inspector during the search and make note of all places searched, evidence gathered and all items seized.
- A facility is not required to consent to a search of any areas beyond those allowed by the warrant (so review the warrant carefully to understand the scope of the search).
- Company representatives have a constitutional right to remain silent and should consult with counsel before answering any questions from a criminal investigator.
- Criminal prosecutions may be brought against companies as well as individuals and any information legally obtained by a criminal investigator can be used against either individual managers or the company.

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