

Environmental Enforcement Trends in the Obama Administration Today

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Obama Administration Enforcement Themes


- Tougher
- Get to Penalties Quicker
- Transparency/Publicity
- Penalties are higher
- Criminal Charges
- Environmental justice

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EPA National Enforcement Initiatives (OECA)


- Every three years
- "Priorities" vs. "Initiatives"
- Public process
- Published on website
- FY 2011 – 13
- FY 2014 - 16



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EPA National Enforcement Initiatives, FY 2014 - 16


- Keeping raw sewage and contaminated stormwater out of our waters
- Cutting animal waste to protect surface and ground waters
- Reducing widespread air pollution from the largest sources, especially the coal-fired utility, cement, glass, and acid sectors



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EPA National Enforcement Initiatives, FY 2014 – 16, cont'd

- Cutting toxic air pollution that affects communities' health
- Assuring energy extraction sector compliance with environmental laws
- Reducing pollution from mineral processing operations



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Other EPA Enforcement Initiatives

- Chemical management: Prevention Matters!
- Risk Management Plans
- Environmental releases
- RCRA: Hazardous waste management
- Financial responsibility
- Tribal concerns

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Resource Conservation and Recovery Act: Hazardous Waste

- Tougher RCRA Inspections and Enforcement
- Former focus: Mostly manufacturers
- Hazardous Waste Determinations
 - Waste vs. Product
 - Laboratories
 - Warehouses
 - Retail
 - Manufacturing support centers
 - Older Products; Off-Spec Products, Materials
 - Recycled Materials; Reusable Materials

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RCRA Hazardous Waste: Top 10 Violations

10. Failure to update notifications of haz waste activity
9. Failure to report haz waste activity and pay fees
8. Universal waste: Batteries, lamps, etc.
7. Used oil
6. Satellite accumulation
5. Inadequate LQG contingency plans
4. Marking and labeling
3. Open containers
2. Training, records of training
1. Failure to determine: Haz Waste



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RCRA Compliance Pitfalls

- Big-box stores
- Retail stores
- Warehouses
- Distribution centers
- Laboratories
- Usable, reusable materials




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As an Example: Warehouse Dynamics

- Storage of large volume of chemicals and products
- Difficulties in keeping on top of products and chemicals that are changing constantly
- Obsolete and slow-moving products

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Warehouse Dynamics

- Historically lower risk operations than industrial sites or manufacturing
- Less staff than traditional manufacturing
- Knowledge base
- Operated by third-party vendors, contractors, subcontractors
- Segregated locations from company EHS professional

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Warehouse Dynamics

- Ripe for confusion – different and complex regulatory regimes, lists, thresholds
- EPA
 - RCRA – “hazardous wastes”
 - CERCLA – “hazardous substances”
 - EPCRA – “extremely hazardous substances” “toxic chemicals” and “hazardous chemicals”
- DOT – “hazardous materials” / “dangerous goods”
- OSHA – “hazardous chemicals”

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Is it Product or is it Waste?

- Returned products
- Damaged products
- Obsolete products
- Off-spec products
- Past shelf-life
- Spills / releases
 - (forklift damage, overturned pallets)



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Warehouse Management and Handling of Hazardous Wastes

- Generator Status
 - Infrequent / Periodic Generation
- Container Storage Areas
- Containers
- Labeling
- Manifesting, Transportation, and Disposal

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RCRA Listed Wastes

- Discarded commercial chemical products, off-spec, container residues, and spill residues
- P-Listed: pharmaceutical residues in pill bottles, vials, blister packs, and wrappers
- U-Listed: pharmaceutical waste
- F-Listed: Spent solvents and solvent contaminated rags

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RCRA Corrosive Wastes (D002)

- Characteristic – Corrosive
- Bleach
- Chlorine cleaners and disinfectants
- Oven cleaners
- Degreasing agents



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RCRA Ignitable Wastes (D001)

- Characteristic – Flash point
- Aerosol cans
- Household goods and consumer products
- Bathroom and kitchen cleaners
- Furniture polish
- Carpet cleaners



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Pharmaceutical Waste as Hazardous Waste


- EPA I.G. Report 2012 “widespread noncompliance in the healthcare industry”
- P-Listed: coumadin® (warfarin), nicotine patches
- U-Listed: lindane (lice/scabies treatment)
- Characteristic: (D009 toxic) mercury in vaccines



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And Don't Forget...


- Used Fluorescent Lamps
- Forklift batteries (and other batteries)
- Used oil
- Used hydraulic fluids
- Rags and towels with solvent (cleaning / housekeeping)
- Cleaning agents and degreasing solvents



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Warehouse, Retail Chemical Management Clean Air Act Issues

- Refrigerant leak detection and repair for ozone depleting substances
 - Sept. 2013 - Safeway, Inc. - \$4.7 Million
- Anhydrous ammonia (refrigerant)
- Asbestos – Demolition and renovation activities



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Warehouse, Retail Management and Handling of Hazardous Wastes

- Considerations and Best Practices
 - Contracting
 - Operating Procedures and Protocols
 - Training
 - Auditing and Compliance Evaluations
 - "Household" hazardous waste protocols

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Enforcement – Warehouses

- Cargo Largo (Independence, MO)
- UPS (Lenexa, KS)
- ChemCentral (KC, MO)



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National Retail and Consumer Product Enforcement

- Wal-Mart – 2013
 - \$82 Million criminal and civil penalties
 - Separate enforcement by California (2010) and Missouri (2012)
- Target (2011)
- CVS (2012)
- Costco (2012)

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Enforcement: Large Air emitters


- Climate change
- Coal EGUs, glass, refineries
- Modifications, reconstruction w/o PSD or NSR permits



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EPA Enforcement Trends 112(r)


- More onsite inspections
- Higher penalties
- Compliance orders (inspections and mechanical integrity – good engineering practices)
- General Duty Clause 112(r)(1) enforcement



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EPA Enforcement Trends 112(r) – What’s Causing the Shift

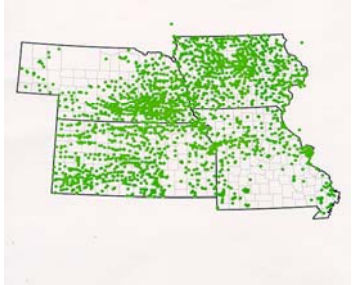
- Enforcement in past - did the company file?
- EPA/OIG Report Feb. 2009 Recommendations
 - Implement additional management controls to identify facilities that have not yet filed RMPs;
 - Target higher-priority facilities for inspections.
- More news attention to chemical accidents and industrial releases and explosions



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Ubiquitous: RMP Facilities

- Fertilizer facilities (ammonia)
- Drinking water facilities (chlorine)
- Commercial refrigeration facilities (ammonia)
- Refineries, chemical plants



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EPA Enforcement Trends 112(r)

- Region 7 Administrative Cases 2007 – 2010
 - 2007 – 22 Cases
 - Highest Penalty - \$9,550
 - 2008 – 20 Cases
 - Highest Penalty - \$46,000 (includes SEP)
 - 2009 – 19 Cases
 - Highest Penalty - \$50,778
 - 2010 – 14 cases (through end of September 2010)
 - Highest Penalty - \$79,367 (and a separate case had combined penalty and SEP of \$137,790)
- Region 7 Judicial Cases
 - 2007 – Waldbaum – 112(r) and CWA violations, \$133,000 for 112(r) violations
 - 2009 – Frontier Refining – 112(r)(7) RMP violations - \$358,051 penalty, \$180,000 SEP (rapid deployment kits)

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RMP Criminal Enforcement

- Hershey Creamery Co. (M.D. Pa. Nov. 2008)
 - Failure to develop risk management programs at two facilities
 - Guilty plea to felony CAA violation and \$100,000 fine
- MFA, Inc. (E.D. Mo. Oct. 2007)
 - Employee injured while loading anhydrous ammonia from bulk tank to nurse tank;
 - Negligent failure to inspect, detect wear, replace valve
 - Guilty plea to negligent release provisions of CAA, resulting in \$100,000 fine and \$600,000 in required safety upgrades

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RMP Enforcement

- Tyson Foods – EPA Region 7
 - April 2013
 - \$4.2 Million Settlement – Anhydrous Ammonia used as a refrigerant

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Chemical Storage and Management

- Emergency Planning Notification
- Release Reporting Notification
- Hazardous Chemical Storage
- Toxic Release Inventory (TRI)

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DOT HazMat and FAA Transportation

- HazMat
 - “Dangerous Goods”
 - Consumer Commodity ORM-D
 - Lithium Batteries
- FAA Enforcement
 - K-Mart (2010)
 - Nail polish and aerosol sun block
 - \$140,000 penalty sought by FAA

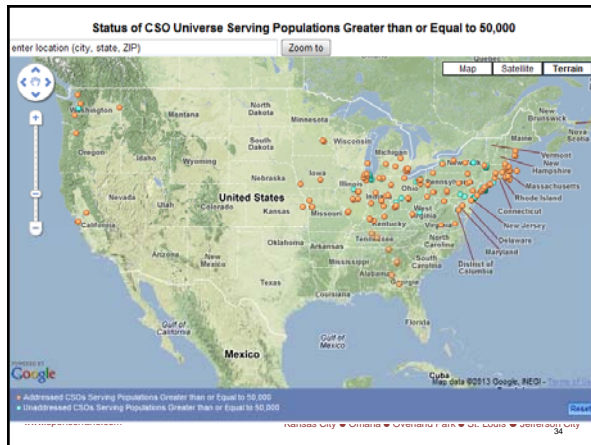


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CSO Enforcement


- According to EPA, approximately 772 communities have combined sewer systems, but only 201 have wet weather overflows, primarily east of the Mississippi and the Pacific NW.
- EPA lists nine municipal CSO consent decrees since 7/19/11 on its wet weather enforcement website (<http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html>), not including St. Louis (4/12) and Scranton PA (12/12).

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Stormwater Regulation

- Three categories of regulated stormwater discharges
 - Municipal
 - Industrial
 - Construction
- CWA Permit Required
 - Discharge
 - Point Source
 - Pollutant
 - Navigable Waters



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Stormwater Enforcement: Construction—Home, Retail

- Some recent civil stormwater construction cases
 - Toll Brothers (6/12) – 23 states, 40 sites, \$741k penalty.
 - Ryland Group (10/11) – 14 states, 22 sites, \$625k penalty.
 - Each settlement includes the same types of company-wide sediment and stormwater control requirements.
 - The Links of Columbia (8/11) – construction company and limited partner associate pay \$430k penalty post-construction for stormwater violations at 9 hole golf course and 64 unit apartment development.

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Stormwater Enforcement – Road Construction

- Kansas DOT – July 2013 – 3 Construction Sites - \$477,500 Penalty
 - Compliance Requirements including:
 - Statewide Stormwater Compliance Manager;
 - Identifying an Area Engineer for every project;
 - Selecting an Environmental Inspector for every site; and
 - Performing third-party oversight inspections at environmentally sensitive areas in Kansas, which require a consultant or KDOT inspector not affiliated with the project to conduct additional inspections.
- Private Contractor for Oregon DOT - \$735,000 Penalty

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Stormwater “Flow” – A Pollutant?

- *Virginia DOT et al. v. EPA*, E.D.Va.(1.3.13)
- Facts: EPA established TMDL designed to control flow as a proxy for controlling sediment
- Court: EPA cannot regulate stormwater “flow” as a surrogate for sediment control
 - Although sediment is a pollutant, flow is not
 - “EPA’s authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants.”

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“Navigable Waters” and “Waters of the United States”

- Draft guidance in April 2011
- EPA and ACOE finalized guidance in Feb. 2012, pending interagency review at OMB
- Final expected in 2013 – may cover intermittent and ephemeral streams and wetlands not currently covered



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Stormwater – Numeric Effluent Limitations?

- *Wisc. Builders Assn. v. EPA*, 7th Cir.
- Facts: In 2009, EPA issued first-time numeric “turbidity” limits in Construction General Permit to control sediment
- Settlement – 12.21.2012
 - EPA to withdraw numeric turbidity limit
- EPA to issue revised proposed rule by 4.15.13 and final rule by 2.28.14

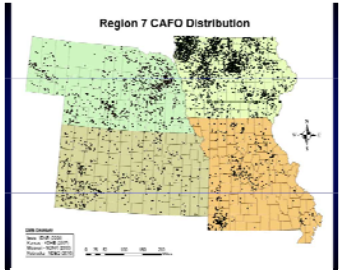
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Additional Stormwater Resources

- “Stormwater Runs Through It” – Stormwater as the New Epicenter of Clean Water Act Regulatory Disputes
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=240
- EPA Cannot Regulate Stormwater Flow Rate as a “Surrogate” for Sediment Runoff, According to Federal Court
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=257
- Road Construction Contractor to Pay \$735,000 Fine for Stormwater Discharges
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=267

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CAFOs in EPA Region 7



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AFOs?

- *Fowler v. EPA*, Case No. 09-cv-5 D.D.C.
- April 30, 2013, deadline under settlement agreement
- More facilities will be captured by the regulations
 - Smaller sized animal feeding operations to be targeted?
 - Response to *National Pork Producers v. EPA*, 635 F.3d 738 (5th Cir. 2011) – EPA cannot regulate CAFOs that only have potential to discharge – ACTUAL discharge of pollutants required
- More stringent permitting requirements for manure land application

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UFOs?

- EPA Region 7 CAFO Inspections – Aerial Surveillance
- Congressional allegations of “military-style” use of “drones”



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Worth a Thousand Words?



EPA's photo evidence of lagoon release to creek

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Criminal Prosecution

- The line between civil enforcement and criminal prosecution is blurry and getting blurrier.
 - CWA Section 309 (c)(1) (33 U.S.C. §1319 (c)(1)) makes it is a misdemeanor to “negligently violate” a laundry list of statutory sections but does not use “gross” or “willful” to color that negligence as is true elsewhere in the Act. Thus a plain language statutory construction argument controls -- Congress uses or leaves out words intentionally.
 - See *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert denied *Hanousek v. United States*, 585 U.S. 860 (2000); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012) (per curiam).

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Criminal Prosecution

- In *United States v. Maury*, No. 09-2305, 2012 WL 4343775 (3d Cir. Sept. 17, 2012), the court held that *simple negligence* would support a misdemeanor conviction under the CWA at a New Jersey pipe foundry. This plus other felony convictions sends 4 managers to jail, costs the company \$8M in fines and puts it on 4 years' probation.
- Why criminal and not civil enforcement? Multiple, multi-media violations (CWA, CAA, OSHA); fatal and non-fatal worker injuries; late-night and weekend illegal discharges; and repeatedly falsifying records and lying to inspectors.
- DON'T MISLEAD THE REGULATORS!

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Criminal Prosecution

- Other recent criminal CWA cases:
 - *Deepwater Horizon* Gulf Oil Spill – guilty plea, \$4B in fines and penalties but not just for CWA violations.
 - Freedman Farms and William B. Freedman -- NC hog CAFO discharged into wetlands, \$1.5M fines and restitution, 60 months' probation, 12 months in prison.
 - Patrick Dooley -- Seattle businessman (Bargains, Inc.) told teenager to dump bleach and acid products into toilet creating chlorine gas, will spend 33 months in prison.
 - 2007 *M/V Cosco Busan* collision with the San Francisco/Oakland Bay Bridge – guilty pleas by pilot and operator produce 10 month prison sentence, \$10M in fines and restitution, plus later civil settlement for \$44.4M.

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Criminal Enforcement, cont'd

- Greenleaf LLC (Missouri)
 - Redistribution of pesticides and herbicides: FIFRA
- HPI (Missouri)
 - Chemical and pesticide manufacturer: RCRA, CWA, FIFRA
 - Individual criminal plea and Corporate criminal plea



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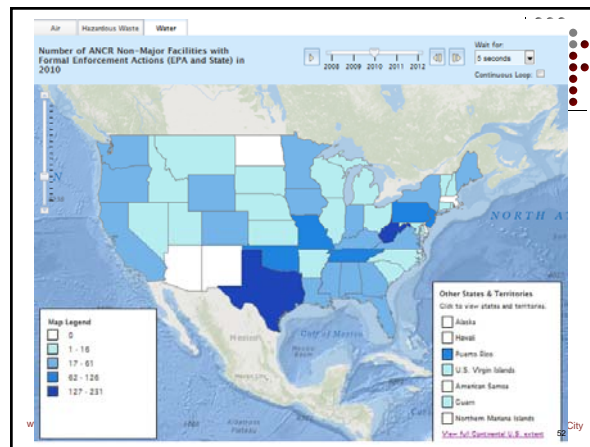
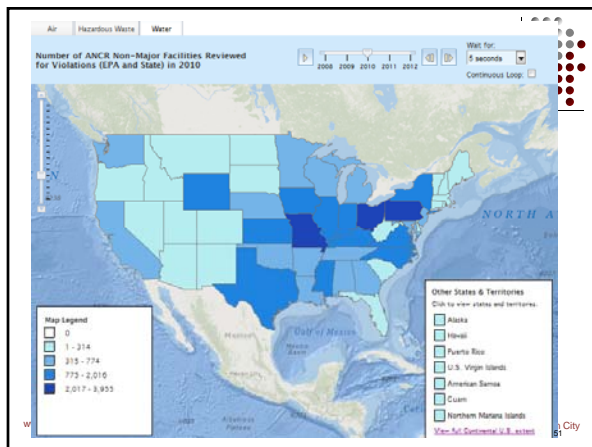
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Focus on Transparency

- On February 7, EPA released a new *State Enforcement Performance Information and Comparative Map* tool as part of ECHO called the "State Dashboard."
- http://www.epa-echo.gov/echo/stateperformance/comparative_maps.htm
- This interactive map can be set to show air, water or hazardous waste compliance and enforcement at federal and/or state-specific levels.

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Electronic Reporting and Tools

- Electronic DMRs
- Electronic TRI Reporting – NEW!
- EPA Enforcement "Watch List"

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Additional Enforcement Resources

- EPA's Transparency Initiatives Aimed to Expose Violators – The Best of Disinfectants or a Scarlet Letter?
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=280
- Electronic DMRs for Missouri NPDES Permits
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=360
- Has EPA Stopped Using Its Voluntary Self-Disclosure Policy?
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=260

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Creative Settlement Opportunities

- Supplemental Environmental Projects



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Preparing Facilities and Clients for a New Enforcement Regime

- Penalties Higher Than Ever Before
- EPA Pressure on States
- Multimedia emphasis
- New methods: Mining data to develop targets; aerial inspections
- Environmental Audits
- EPA's Environmental Audit Guidance and Its Limitations
- Attorney-Client Privilege Issues and Related Matters

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How to Respond to Agency Inspections – Pre-Inspection

- Policies and Procedures
 - First Points of Contact
 - Escort Procedures
 - Training
- EHS File Review
 - Privileged Documents
 - Outdated contacts and training files
- Environmental Auditing: Changing philosophies

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How to Respond to Agency Inspections – During Inspection

- Opening Conference
- Considerations for Escorts
- Employee Interviews
- Closing Conference

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How to Respond to Agency Inspection – Post-Inspection

- Immediate Steps
 - Corrective action
 - Involve counsel early
 - Assert legal defenses; Defend against NOV
- Long-term Steps
 - Work with counsel to prevent issuance of enforcement action and/or negotiate settlement
 - Improve procedures and training
 - Avoid repeat violations

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Questions?



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