



## ENVIRONMENT IN THE COURTROOM

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# Anatomy of a Compliance Regime: Recapitulation and Alternative Lessons from the United States

JONATHAN LEO

## Introduction

The modern US 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 US 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 the EPA to the states, which in turn can or must develop corresponding statutory and regulatory regimes to assist the EPA’s achievement of national standards by enforcing compliance within their own borders.<sup>1</sup> One of the central enforcement mechanisms of the federal and authorized state programs is the regulatory agency’s issuance of an operating permit 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.<sup>2</sup> These sections authorizing a right of entry and inspection also include a “catch-all” clause stipulating that the “[the business] shall provide such other information as the administrator may reasonably require,”<sup>3</sup> which is understood to permit consensual employee interviews.

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, including a request to sample or test air emissions and/or discharges to water and soil;<sup>4</sup>
- 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 (DOJ) 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 DOJ against corporations and individuals where violations of law are “knowing,” “negligent,” or “willful.”<sup>5</sup>

States with federally authorized environmental compliance and enforcement programs have similar ranges of information-gathering powers and administrative, civil, and criminal enforcement authorities.<sup>6</sup>

## THE CALIFORNIA INVESTIGATIVE SUBPOENA

In California, regulatory agencies and their prosecuting attorneys have an additional statutory investigative tool that 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 the sworn testimony of corporate witnesses as part of an investigative inquiry *in the absence of any formal proceeding or lawsuit*.<sup>7</sup> 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.<sup>8</sup> 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 three-part test described above.<sup>9</sup> If any constitutional objections based on the Fourth Amendment’s proscription of unreasonable searches and seizures or the Fifth Amendment’s privilege 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 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.<sup>10</sup> (For examples of successful uses of the Investigative Subpoena, see Appendix A, *infra*, for chart of “California Multi-Jurisdictional/

Multi-Facility Civil Environmental Settlements (January 1, 2009 through August 2014),” embedded in Schmall and Endemann paper, at fn. 9.)

### **THE COSTS OF NON-COMPLIANCE AND THE INCENTIVES 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 the 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 DOJ, 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.<sup>11</sup>

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, corrective action orders may require the repair or replacement of inefficient process and/or pollution-control equipment that has caused or contributed to spills or releases of pollutants whose concentration levels exceed state and/or federal standards, and they can require installation of more stringent leak or spill-detection systems. Every corrective action order imposes a compliance schedule for completion of each of its elements and typically provides that the issuing and enforcing agency may impose penalties for the respondent's failure to meet specified deadlines.

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 both in performing the required corrective actions and 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 is, therefore, 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 practices that EPA, the DOJ, and many state attorney generals and environmental agencies have come to expect from the regulated community.

### **Internal Corporate Environmental Compliance Management Programs and the EPA's Audit Policy**

The 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 root in certain sectors of the regulatory community. A Price-Waterhouse study in 1995 found that more than 90 percent of businesses operating in such heavily regulated industries as petroleum refining and chemical manufacturing had already adopted some form of regular self-auditing procedures.<sup>12</sup>

In 1995, the EPA issued its first final Audit Policy,<sup>13</sup> supplemented 13 months later by its “Audit Policy Interpretive Guidance,”<sup>14</sup> a 40-page document that, for the first time, articulated the EPA’s commitment to providing limited enforcement leniency to businesses that 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.<sup>15</sup>

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) the 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;<sup>16</sup> (2) gravity-based penalties will be reduced by 75 percent 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, the EPA “will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities;”<sup>17</sup> and (4) the 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.

Of the nine Audit Policy conditions that must be fulfilled in order for the EPA to agree to the waiver of all gravity-based penalties for self-disclosing entities, the five most important are: (1) the “systematic discovery” of the violation, (2) the identification of the violation “voluntarily” and not by some government-required procedure, (3) disclosure to the EPA within 21 days after discovery, (4) correction of the violation followed by certification of correction to all appropriate agencies within 60 days, and (5) 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.<sup>18</sup>

Also, the EPA remains adamantly opposed to legislation in certain states that creates a statutory privilege for environmental audits and also provides immunity from certain kinds of enforcement against companies that meet the law’s audit requirements. In the words of the 2000 Audit Policy, “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.”<sup>19</sup>

Businesses with internal environmental compliance management programs, whether or not through an ISO-14001-certified environmental management system,<sup>20</sup> benefit from institutionalizing a strategy for voluntary disclosure and prompt corrective action of environmental violations. They recognize both the importance of, 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 percent reduction in the likelihood of being inspected, compared to facilities that failed to take advantage of the EPA Audit Policy.<sup>21</sup>

On September 9, 2015, the DOJ dramatically increased the incentives for corporations to establish and diligently maintain an internal environmental compliance management program that incorporates an effective self-audit component. On that date, Deputy US Attorney General Sally Yates issued a memorandum titled “Individual Accountability for Corporate Wrongdoing” (Yates Memo). The Yates 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 DOJ] to identify [and pursue] culpable individuals at all levels in corporate cases.”<sup>22</sup> Even attorneys who regard the Yates Memo as primarily a restatement of existing practice consider the fact of its issuance as highly significant.<sup>23</sup>

## **The Yates Memo and the US Attorneys' Manual**

The Yates Memo amends provisions of the “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*.<sup>24</sup> 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.<sup>25</sup>



The *USAM* advises federal prosecutors, during the conduct of an investigation, to consider ten factors 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 they are also found in the EPA's Audit Policy. They are: (1) the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (*USAM* 9-28.500); (2) the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (*USAM* 9-28.600); (3) the corporation's willingness to cooperate in the investigation of its agents (*USAM* 9-28.700); (4) the existence and effectiveness of the corporation's pre-existing compliance program (*USAM* 9-28.800); (5) the corporation's timely and voluntary disclosure of wrongdoing (*USAM* 9-28.900); and (6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible (i.e. culpable) management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (*USAM* 9-28.1000).

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 the DOJ to pursue individual civil and criminal corporate wrongdoing in accordance with six guidelines:

- (1) To be eligible for any cooperation credit under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the DOJ 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 be 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.<sup>26</sup>

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,”<sup>27</sup> and it further states that “prosecutors should not ask for such waivers and are directed not to do so.”<sup>28</sup> “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).”<sup>29</sup>

When Donald Trump was inaugurated as the 45th President of the United States, Sally Yates became the Acting Attorney General. Ten days later, on January 20, 2018, President Trump fired Ms. Yates for “insubordination,” following her instruction to the DOJ not to enforce or defend Trump’s Executive Order 13769, temporarily banning the admission of refugees and barring all travel from seven Muslim-majority countries. Her replacement, and the current Deputy Attorney General, Rod Rosenstein, has not publicly indicated any intention to reverse the DOJ’s corporate enforcement policies as set out in the Yates Memo and its revisions to the US Attorneys’ Manual.

## **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 the criminal and civil enforcement of federal environmental laws in the United States in at least the following contexts: (1) the strategies and tactics employed by corporations and their employees in preparing for

and responding to environmental regulatory inspections; (2) the corporation's preparation for employee interviews in internal and regulatory agency investigations, including whether and when to provide employees with independent counsel; (3) the relations between the corporation and its employees; and (4) the extent of government scrutiny of corporate assertions of attorney-client privilege used to justify the refusal to produce requested information.<sup>30</sup>

## 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 percent involve enforcement attorneys. Most inspections are unannounced because agency staff, not surprisingly, 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 allow 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 about possible violations of laws and regulations outside the jurisdiction of the referring agencies; citizen complaints; follow-ups on earlier inspections and information request letters; and annual or biennial program effectiveness assessments.<sup>31</sup>

Warrantless facility inspections, whether by the 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 potential safety issues on site.<sup>32</sup> During the opening conference, inspectors will also identify particular facility records they want to inspect and/or copy before they leave. (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.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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 agency’s final inspection report, the facility needs to understand and respond to the particulars of every identified deficiency (whether communicated orally or in writing) so that, when the final report is issued, the facility’s responses and comments will demonstrate how quickly and effectively it took necessary corrective action.

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 pickups 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.<sup>36</sup>

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, or if the business really *does* have something to hide, then it is advisable for outside counsel to be present.<sup>37</sup> Before that “moment of truth” ever occurs, in-house

and outside counsel need to have removed as many attorney-client privileged and attorney work product documents as possible from facility files, 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 particularly 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 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.<sup>38</sup>

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 time or 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.<sup>39</sup> 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, if and 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<sup>40</sup>**

Every regulated business should establish policies for responding to governmental agency inspections and investigations. These policies should address the role of in-house counsel in advising and preparing employees for interviews by, and interactions with, government agency personnel. Whether or not it is required by formal corporate policy, in-house counsel should also develop checklists or guidelines that clearly instruct employees what they should do and whom within the company they should notify when inspectors appear at the company gate or office door to inspect with or without a warrant.

In-house counsel must ensure employees understand that, while they have the right to refuse to be interviewed by government investigators, the company asks that they agree to be interviewed, and that they answer all questions truthfully and without speculating or providing any information not requested. In-house counsel should also tell employees that they have the right, but not the obligation, to speak with in-house counsel before the interview takes place, 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 in-house counsel or, if appropriate, their own independent counsel.

In addition to, and separate from, the advice that in-house counsel should give to all employees as described in the preceding paragraph, and whether in-house counsel plans to interview an employee pursuant to an internal corporate investigation or audit or, instead, intends to advise the employee of his or her rights in connection with an interview to be conducted by a government agency investigator, in-house counsel must provide every employee with a particular advisement or warning required by the Supreme Court's decision in the *Upjohn* case.<sup>41</sup> The traditional *Upjohn* warning includes the following elements: in-house counsel represents the company and does not represent the employee individually or personally; the interview, if internal, is being conducted to gather information to provide legal advice to the company for business purposes; all communications between in-house counsel and the employee are protected by the attorney-client privilege, but that privilege is held by the company alone and not by 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.<sup>42</sup>

The scope of the *Upjohn* warning is greater when in-house counsel is interviewing the employee pursuant to an internal investigation than it is when in-house counsel is advising a corporate employee about his or her rights in a potential interview by a government investigator as part of a facility inspection or a broader external investigation. This is because, in the context of the internal corporate investigation, in-house counsel must not only make sure that the employee knows and understands that in-house counsel (or an outside corporate counsel acting with the approval and knowledge of in-house counsel) represents the corporation and not the employee but must also determine whether the employee's and the corporation's interests are so actually or potentially adverse that counsel should further affirmatively warn the employee that he or she should be represented by his or her own, independent counsel and *not* by the corporation's counsel.

Although not required by law or judicial decision, it is advisable for corporate counsel to at least make contemporaneous notes of the extent and content of each *Upjohn* warning given, if not also 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.<sup>43</sup>

In the wake of the Yates Memo and the DOJ's new policy to focus on individual culpability from the inception of all criminal and civil investigations (see discussion above), the interests of the corporation and its individual employees are likely to conflict earlier and more often. This increased tension arguably renders the traditional, "bare bones" *Upjohn* warning inadequate, and, as noted above, may require a more forceful warning that the corporation's and the employee's interests may or actually do conflict, and that the employee is advised to consult independent counsel in order to protect his or her interests.

It bears repeating that, if in-house or outside corporate counsel knows that a particular employee may have personal knowledge of, or have been involved in, corporate wrongdoing related to an anticipated or ongoing investigation, counsel should seriously giving an *Upjohn* warning to such an employee that explicitly states that the employee's and the corporation's interests are adverse in certain respects and, therefore, the employee's interests can only

be represented by his or her own independent counsel. The corporation will likely have to bear the cost of paying for personal counsel for such employees.

Effectively, the recent changes in DOJ enforcement policy with respect to corporate civil and criminal investigations incentivize each of the corporation and its employees to “give up” the other to government investigators at the earliest opportunity in order to protect their own interests: the corporation, because its chance for *any* cooperation credit to mitigate a penalty or fine imposed after a final judgment of civil liability or even a criminal conviction depends on its prompt disclosure of the identity of employees who were involved in or bore some responsibility for the misconduct being investigated; and the employees, because the earlier they inform the government about their knowledge of the corporation’s misconduct, the greater the likelihood both that they will get “whistleblower protection” from being fired or otherwise discriminated against by their corporate employer and that their early cooperation will mitigate any penalty they might otherwise receive if they are ultimately found personally liable for the misconduct.

For employees, the consequences of failure or refusal to cooperate with reasonable internal investigations (whether conducted by in-house or outside counsel or both) can be dramatic, as illustrated by a recent decision from the Second Circuit Court of Appeals. In *Gilman v Marsh & McLennan Cos.* (*Gilman*),<sup>44</sup> the New York State attorney general indicted the corporate employer for allegedly fraudulent business practices and antitrust violations, based on the identification of two employees of Marsh & McLennan Cos. (Marsh) as co-conspirators in a “bid-rigging” scheme with AIG, another insurance company. Marsh expanded its pre-existing internal investigation to focus on those two employees, Gilman and McNenney (who were also officers of the corporation), and suspended them both, with pay, pending the outcome of that internal investigation. Even though Marsh requested that Gilman and McNenney sit for interviews with the company’s outside counsel, and warned that they would be fired if they refused, both employees refused to cooperate, and Marsh fired them. When they sued Marsh for wrongful termination, both the trial and the appellate courts ruled against them. The Second Circuit held that the corporation was entitled to seek information from its own employees about suspicions of on-the-job criminal conduct; could take measures to protect its standing with investors, clients, employees and regulators; and had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company. Additionally, the Second Circuit held that the employees had a duty to their corporate employer to disclose infor-



mation they had about the attorney general's allegations. Because the Second Circuit held that Gilman and McNenney had been terminated "for cause," they lost their entitlement to all unvested stock benefits and severance pay.<sup>45</sup>

In the *Gilman* case above, the two corporate officers who were fired "for cause" for refusing to cooperate with the corporation's internal investigation had been earlier identified as "co-conspirators" in a bid-rigging scheme with AIG, so their leverage with either their employer or the New York State attorney general was virtually non-existent. Most corporate employees who learn about corporate misconduct *do* have a choice of either speaking out or remaining silent. For those who choose to speak out, most federal environmental statutes have "whistleblower" provisions that protect employees from being discharged or discriminated against for assisting the enforcement of environmental laws.<sup>46</sup>

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, although the *USAM* recognizes that "a wide range of commentators and members of the American legal community and criminal justice system have asserted that [the DOJ's] policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection."<sup>47</sup>

The DOJ's policy 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. The corporation must quickly identify, evaluate, and act on the earliest indications of potential civil or criminal liability, such as the receipt of any kind of government subpoena, request for information, notice of violation, or notice to comply; efforts by government agents to speak to employees or executives; reports or allegations of corporate wrongdoing by employees who may become whistleblowers; and any information revealed through such internal and regulatory compliance functions as auditing, "ordinary course" reports, and mandatory reporting obligations. 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 more varied the advice provided to companies by their in-house counsel, the greater the chance that the line between business and legal advice can become blurred and otherwise attorney-client privileged communications

can become discoverable. When, for example, in-house counsel provides advice to the corporation about its environmental compliance history, and suggests recommendations for changes in compliance policies and/or procedures, there is likely to be some discussion of the costs and benefits associated with those recommendations. (Where in-house counsel is also an officer of the corporation, such as a Vice-President for Environmental Affairs, the blurring of distinctions between business and legal advice can be even more common.) To the extent possible, in-house counsel should avoid talking about the business aspects of corporate environmental compliance when the primary purpose of the advice concerns the details of particular environmental investigations and inspections, and should avoid discussing the details of particular environmental investigations and inspections when the primary purpose of the advice concerns the business aspects of the corporation's environmental compliance history, policies, and procedures. This distinction is likely to be as awkward to achieve in practice as it is to articulate in principle.

Corporations with robust internal environmental compliance management systems are more likely to recognize the kinds of facts and circumstances 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 employee culpability without waiving critically important privileges and protections.<sup>48</sup>

## NOTES

- 1 In some cases, such as the *Clean Air Act* (42 USC § 7410), states are required to enact EPA-approved plans to implement, maintain, and enforce the 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 that seeks to administer and enforce a "hazardous waste program" must obtain the EPA's approval for one that 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)*, 42 USC §§ 9604(e)(2), (3); *Clean Air Act*, 42 USC § 7414(a); RCRA, 42 USC § 6927(a).
- 3 *Clean Water Act*, 33 USC § 1318(a)(A)(5).
- 4 The CERCLA § 104(e) information request letter requires an initial response but also creates a continuing obligation to supplement the questions with fresh answers as situations at the facility change over time. Failure to respond, a response in bad faith, or a misrepresentation

of information creates civil liability. Examples of emissions-and-discharge sampling and testing request letters can be found in the *Clean Air Act*, the *Clean Water Act*, and *RCRA*.

- 5 *Clean Air Act*, 42 USC § 7413; *Clean Water Act*, 33 USC § 1319; *RCRA*, 42 USC § 6928; *Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)*, 42 USC § 11045; *Surface Mining Control and Reclamation Act (SMCRA)*, 30 USC §§ 1268, 1271; *Safe Drinking Water Act*, 42 USC § 300h-2.
- 6 If a business is facing civil or criminal litigation based on non-compliance that is actionable under both federal and state law, its counsel should determine whether the enforcing agency will consider a settlement that resolves the business's liability under both federal and state law for any charges that 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.
- 7 *California Government Code*, §§ 11180–11191 (1921, as amended 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.

- 9 See *supra* note 7.
- 10 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).
- 11 See David M Uhlmann, “Prosecutorial Discretion and Environmental Crime” (August 2015) 45 Env 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 that is “knowing,” “negligent,” “intentional,” and “wilful,” while in other cases (*CERCLA* or Superfund, for example) the statute provides 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 judgment of prosecutors. The scope of prosecutorial discretion assumes a particularly critical role in environmental cases, because so much conduct potentially falls within the criminal provisions of the environmental laws.
- 12 See Lawrence Culleen & Thomas Glazer, "Let's Make A Deal: Twenty Years of EPA's Audit Policy" (Winter 2016) 30 *Nat Resources & Env* 3.
  - 13 "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 *Federal Register* 66706 (22 December 1995).
  - 14 "Audit Policy Interpretive Guidance," 15 January 1997, online: <<http://www.epa.gov/sites/production/files/documents/audpolintepgui-mem.pdf>>.
  - 15 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: <<https://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>>.
  - 16 "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." The 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 15 at 19620.
  - 17 *Ibid.* The 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 the EPA may not recommend criminal prosecution for disclosing entities, it recognizes that "ultimate prosecutorial discretion resides with the U.S. Department of Justice."
  - 18 Effective 1 August 2008, the 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: <<https://www.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners>>.
  - 19 *Audit Policy*, *supra* note 15 at 19623.
  - 20 See online: <<https://www.epa.gov/ems>>. The most commonly used environmental management system (EMS) is the one developed by the International Organization for Standardization for its ISO 14001 standard, first established in 1996.
  - 21 Culleen & Glazer, *supra* note 12 at 6.
  - 22 Deputy US Attorney General Sally Yates, *Memorandum re Individual Accountability for Corporate Wrongdoing*, 9 September 2015 [Yates Memo], online: <<https://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.
  - 23 Jonathan Segal & Daniel Walworth (Duane Morris LLP), *Individual Accountability and Investigations*, 20 November 2015 webinar.
  - 24 See online: <<https://www.justice.gov/usam/united-states-attorneys-manual>>.

- United States Attorneys' Manual (USAM)*, at Title 9, ch 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").
- 25 *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.
- 26 Yates Memo, *supra* note 22 at 3 (fn omitted; emphasis in original).
- 27 *USAM* at 9-28.720.
- 28 *Ibid* at 9-28.710.
- 29 Yates Memo, *supra* note 22 at 3. On a subsequent occasion, Yates elaborated: "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 Laundering Conference, Washington, DC, 16 November 2015, online: <<http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-o>>.
- 30 Only parts of these situations can be examined here. 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 is beyond the scope of this chapter.
- 31 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].
- 32 Not only do criminal investigations typically dispense with opening conferences, but investigators may appear, present credentials, enter the facility, and proceed with 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.
- 33 Knock, Knock, *supra* note 31. Under RCRA, EPA is required to provide split samples if requested and to promptly disclose all analytical results: RCRA s 3007(a), at 42 USC § 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.
- 34 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.
- 35 See, 18 USC § 1501 *et seq* (ch 73, "Obstruction of Justice").
- 36 "Knock, Knock," *supra*, note 31, remarks of Deborah Schmall, Partner, Paul Hastings LLP.

37 In these situations, facility personnel are strongly advised to 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 whether to advise the inspectors that the facility refuses to consent to their entry and their interviewing of employees unless corporate counsel 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.

38 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 their 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.

39 Galli & Goldberg, *supra* note 32 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.

40 The limited scope of this chapter allows only the most abbreviated discussion of a small portion of the relevant legal issues associated with the conduct of governmental agency inspections, internal corporate investigations (including employee interviews), and the application of the attorney-client privilege to those investigations. The discussion of those issues presented here is not and cannot (and, therefore, is not intended to) be comprehensive or dispositive for any given set of facts.

41 *Upjohn Co v United States*, 449 US 383 (1981). This decision affirmed the application of the attorney-client privilege to communications between a company’s in-house counsel and the company’s upper-echelon employees in an internal investigation context, and then expanded its applicability in such internal investigations to cover communications made to in-house counsel not only by upper-echelon employees responsible for directing the company’s response to legal advice but also to middle- and lower-level employees “whose actions within the scope of their employment can embroil the corporation in serious legal difficulties.” While *Upjohn* involved an investigation conducted jointly by in-house and outside counsel, the DC 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 alone directly conducts the employee interview.

- 42 See generally Galli & Goldberg, *supra*, note 32.
- 43 See *United States v Ruehle*, 583 F 3d 600 (9th Cir 2009).
- 44 Docket No 15-0603 (2d Cir, 16 June 2016)
- 45 Because the underlying investigation and prosecution were instigated by the New York State Attorney General's Office and because the Second Circuit determined that Delaware law governed the interpretation of Marsh's employment contracts with Gilman and McNeeney, no US federal law enforcement statutes, regulations, or guidelines were involved in this particular case.
- 46 See, e.g.: the *Clean Air Act*, 42 USC § 7622(a); the *Comprehensive Environmental Response, Compensation, and Liability Act* (Superfund or *CERCLA*),

42 USC § 9610(a); the *Clean Water Act*, 33 USC § 1367(a)); the *Solid Waste Disposal Act (RCRA)*, 42 USC § 6971(a); the *Surface Mining Control and Reclamation Act (SMCRA)*, 30 USC § 1293(a); the *Toxic Substances Control Act (TSCA)*, 15 USC § 2622(a); and the *Pipeline Safety Improvement Act*, 49 USC § 60129(a). These provisions are by no means identical, and some of them provide fewer whistleblower protections than others.

47 *USAM* at 9.28-710 (Attorney-Client and Work Product Protections), quoting *Upjohn Co v United States*, *supra* note 41 at 389.

48 See Segal & Walworth, *supra*, note 23; Galli & Goldberg, *supra*, note 32; and Craig Galli, "A Compliance Crisis Is a Terrible Thing to Waste: Counsel's Role to Enhance Corporate Culture" (Winter 2015) 30 *Nat Resources & Env* 3.

