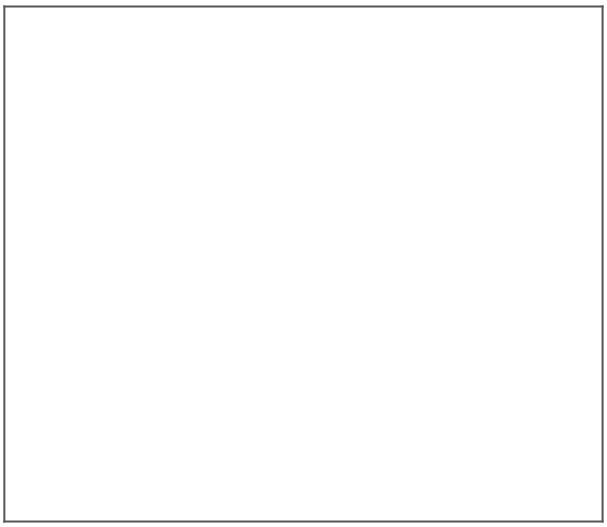
When the Regulators Come Calling

published 12/14/2010

Natural resource businesses exist in a world of government regulation. Whether under occupational health and safety, resource management, environmental stewardship or taxation, laws permit government to carry out inspections and investigations to ensure compliance. Regulated businesses need to be in a position to demonstrate to the regulators that there has been full compliance. Where there may have been a slip, the only defence that may be available is proving that the business has exercised due diligence by doing everything reasonably possible to comply with the law. A big part of avoiding charges and successfully defending prosecutions involves having a plan and knowing how to respond to regulators when they conduct their inspections and investigations.



Inspection vs. Investigation

There is a difference between inspections and investigations. Most regulatory schemes give government representatives very broad inspection powers to verify proper, careful and safe business practices. Inspections can be done without a warrant. Some statutes limit inspections to ordinary business hours. Inspectors will ordinarily have a right to enter a place of business (usually personal residences are excluded), carry out inspections, conduct tests, inspect documents and interview employees. Most statutes impose a duty to cooperate with the inspectors and make it an offence to interfere with inspectors.

Once it becomes clear that charges may be laid and the relationship is becoming adversarial, the matter can transform into an investigation. Under most statutes, a warrant is required in order to continue a legal search and seize documents under an investigation.

How to Prepare

At least one employee on each shift should be properly trained and designated as the person to deal with the regulator. He or she should be familiar with:

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- the company's duties during an inspection or investigation (such as the duty to cooperate with the inspector);
- company policies (such as the protocol for preparing and sending incident reports);
- how to preserve evidence;
- how to identify privileged documents and claim confidentiality;
- how and when to contact legal counsel.

Dealing with Questions

The designated employee also needs to know how to respond to questions from the regulator:

- Only answer based on your personal knowledge;
- Don't guess and don't repeat hearsay. Its o.k. to say, "I don't know" when that is the truth;
- Do not volunteer information. Only answer the questions that are asked. If a statement is requested during an investigation, the employee has a right to remain silent and have counsel present.

The Company should have an internal form used to track inspections and investigations as they occur. All documents that inspectors are likely to want to refer to should be kept up-to-date, available and in a convenient location (eg, training manuals, safety policies, sampling logs, etc.).

When the Regulator Arrives

When the regulator does arrive, especially in the course of an investigation, take the following steps:

1. Get the names, titles, etc. from each of the regulators and ask them to explain the purpose of the inspection or investigation. Record this information;
2. Although inspectors and investigators can request immediate entry, try to ensure that they are accompanied by the designated employee and, if necessary, their own legal counsel;
3. Get a copy of any warrant;
4. Have the designated employee follow the regulator, take detailed notes of everything said and done and, where the regulator takes samples, take duplicate samples;
5. Give only factual information, not opinions or speculation, and only if requested;
6. Ask for a receipt for anything that has been seized, including documents, exhibits and samples. If the regulator refuses, keep your own list. Ask to make copies of any documents;
7. Follow your internal company policies and protocols for inspections or investigations.

Closing

Much more can be said about how to protect privileged communications with legal counsel and how to respond when it appears that individual employees, as well as the company, may be charged with an offence; but for now, designating a responsible employee, providing

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proper training and following the points set out above will put your business in the best position for dealing with a visit by the regulator.

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