

# PROVIDING COUNSELING TO ENSURE COMPLIANCE OF ENVIRONMENTAL LAWS AND REGULATIONS

Environmental compliance involves a wide range of corporate environmental programs, which are designed to protect air, water, natural resources, wildlife and public health. Most compliance programs are based on environmental laws intended to address the discharge of pollutants into the environment, the handling, storage and disposal of solid and hazardous wastes, the application of pesticides, preventing air contamination, protecting the quality and availability of clean water, and worker health and safety. A compliance and enforcement program that is effective will bring a broad range of benefits to a business. Compliance creates value by increasing investor confidence and reducing business risks and costs of enforcement, litigation, and penalties.

While companies operating in highly-regulated industries will commonly face a battery of ongoing environmental compliance requirements, others may only run into environmental concerns once a hazardous release has occurred. In either scenario, violations can easily draw the attention of multiple state and federal agencies, and remaining on task often requires a prompt, comprehensive and strategic response to the government's intervention. Our attorneys routinely represent companies in California and other jurisdictions around the country in **regulatory enforcement matters**, communicating with the appropriate authorities on behalf of our clients in order to minimize liability and avoid sanctions that could have ripple effects for current and future projects.

In most cases, responding to a substantiated civil enforcement action means coming into compliance. With broad knowledge of CERCLA, CEQA/NEPA, the Clean Air Act, the Clean Water Act, the Endangered Species Act and other environmental laws and regulations, our attorneys are able to work effectively with the state and federal agencies to reach agreement on the steps our clients need to take in order to remedy violations without unnecessary consequences. When clients get us involved

early – before inspections and investigations lead to civil charges– we are frequently able to negotiate cost-effective solutions that avoid the risk of defending against civil charges at trial.

## **Compliance Monitoring**

Compliance monitoring includes both self-monitoring by the company and governmental inspections and investigations. EPA incentivizes companies to self-disclose noncompliance by providing reductions in the gravity portion of penalties for violations when a company self-reports. Enforcement is intended to compel compliance with the law, and deter noncompliance. To avoid penalties and enforcement, companies typically establish and implement compliance programs and perform self-audits to ensure ongoing compliance. In this way, if and when a regulator conducts an inspection of a facility, the company will have confidence in its compliance. Bick Law has California environmental compliance attorneys who can also provide compliance counseling to ensure companies comply with environmental regulations.

"The most effective way to achieve compliance with the law is to make it easier to comply than to violate. EPA is using new technologies and lessons learned about what drives compliance to reduce pollution and improve results." Cynthia Giles, Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance (OECA).

## **Activities Involved in Compliance Counseling**

### **RCRA**

To assess compliance of a facility with RCRA a company may:-

- Review facility reports or other documents (e.g., review of waste manifests, wastes analysis plans, air emissions standards reporting under Subparts AA, BB and or CC, etc.);
- Review facility records, including underlying testing/sampling plans and data, and monitoring data;
- Review relevant process, emissions, and inventory information;
- Conduct sampling, and monitoring;
- Conduct facility-specific monitoring utilizing advanced monitoring technologies (e.g., ground water monitoring, FLIR infrared cameras, fence line monitors, etc.) to detect and document emissions and record ambient conditions);

- Review facility reports or other documents; and/or
- Review facility records, including underlying testing/sampling plans and data, and monitoring data.

To assess off site data to confirm compliance EPA may:

- Review agency-gathered testing, sampling and monitoring data;
- Review-relevant process, emissions, and inventory information;
- Review facility-specific fence line and ambient monitoring; and/or
- Evaluate responses to formal information requests (e.g., RCRA § 3007 information requests.)

## **The Clean Water Act**

The Clean Water Act (CWA) prohibits anybody from discharging pollutants through a point source into a "water of the United States" unless they have an NPDES permit. Point sources are discrete conveyances such as pipes or man-made ditches. Pollutants include rock, sand, dirt, and agricultural, industrial, municipal waste, and other constituents discharged into waters of the United States. The permit will contain limits on what can be discharge and at what levels. In addition, the permit will set forth monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or human health. There are specific NPDES permits for facilities located on bodies of water for which a total maximum daily load (TMDL) (the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards) has been approved or established by EPA. There are also specific permits for municipalities for stormwater discharges under the Municipal Separate Storm Sewer System National Pollutant Discharge Elimination System (NPDES) Permit, often referred to as the "MS4 Permit." Although the NPDES program is a federal program, it has been delegated to the State of California for implementation through the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards), collectively Water Boards. In California, NPDES permits are also referred to as waste discharge requirements (WDRs) that regulate discharges to waters of the United States.

## **The Clean Air Act**

Similarly, the federal Clean Air Act (CAA) requires attainment of National Ambient Air Quality Standards (NAAQS) for criteria air pollutants (pollutants causing human health impacts due to their release from numerous sources), including: ozone, particulate matter (PM10), carbon monoxide, lead, nitrogen dioxide, and sulfur dioxide. Current attainment deadlines vary by pollutant and by region. The

Clean Air Act requires each state to develop a State Implementation Plan (SIP) to attain the NAAQS by the attainment deadlines. SIPs must be approved by the EPA and must contain sufficient measures to attain NAAQS and meet other requirements. SIP requirements can be enforced against regulated sources by EPA, by the authorized state agency, and by any citizen.

In California, the Lewis Presley Act establishes the responsibilities of the regional air districts. The California Clean Air Act (CCAA) establishes numerous requirements for district plans to attain state ambient air quality standards for criteria air contaminants. Under California state law, every piece of equipment that emits or controls air pollution must have a permit to operate from the local air district and must have a permit to construct before the equipment is constructed. Compliance with the permit to operate is an integral component of a business's environmental compliance program-when air emissions are a consequence of the business's operations. The California Air Toxic Hot Spots Act requires facilities emitting specified quantities of pollutants to conduct risk assessments and control health impacts to neighboring communities.

With respect to mobile emissions, some states are preempted from adopting emission limitations for motor vehicles and certain other mobile sources. California is not preempted by the federal Clean Air Act and has adopted motor vehicle standards, and standards for other mobile sources. Compliance with mobile source requirements is integral to any business that includes transportation, including drive share programs or shipping needs.

## **EPA's On-Site Civil Inspection Procedures Rule-**

Under EPA's on-site Civil Inspection Procedures Rule (effective March 2, 2020), an on-site civil inspection may be conducted by EPA civil inspectors, federal contractors; and senior environmental employment employees conducting inspections on behalf of EPA. The Civil Inspection Procedures Rule is a formalization of policy as set forth in Executive Order 139892, which lays out several objectives for "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication." Said objectives include:

1. A directive to agencies to maintain transparency and fairness with regard to all parties involved in a civil administrative adjudication;
2. The publication of public notice of the enforcing agency's jurisdiction over conduct, including reference to the legal standards governing this conduct;
3. Effort on the part of the federal government to encourage cooperation in enforcement of the civil administrative adjudication;

4. Effort on the part of the federal government to encourage greater private-sector cooperation in enforcement;
5. Effort on the part of the federal government to promote the sharing of information with the private sector; and
6. Effort on the part of the federal government to establish predictable outcomes for the private conduct.

EPA describes various procedures designed to help meet these objectives. Included among the procedures are the mandates that:

1. Inspections must be conducted during a facility's normal work hours;
2. All EPA inspectors must hold valid credentials in order to perform inspections; and
3. Inspectors and facility employees must coordinate the logistics of inspections, including agreeing upon consent to enter and begin an inspection of a facility.

EPA inspectors may request various materials, including "records relevant to the facility inspection," and facility inspectors may take samples "when appropriate."

## **Our Experience in Environmental Compliance Counseling**

Our attorneys provide compliance counseling for all regulatory programs (RCRA, CWA, CAA, RPPC, e-waste, DOT, and OSHA), including the following:

- Complying with regulatory requirements;
- Obtaining permits and variances;
- Negotiating cleanup standards;
- Establishing internal compliance programs;
- Preparing for government inspections; and
- Appearing at hearings in front of Hearing Boards for variances or to appeal abatement orders.

Our California environmental compliance attorneys provide clients with specific guidance for grey areas in the regulation, as well as programmatic recommendations to ensure ongoing compliance and to prevent future costly enforcement actions.

## **Environmental Crisis Management**

Catastrophic events happen. Whether it's a natural disaster, a toxic spill or an unforeseen event, it is important for your company to have a crisis management plan in place to implement in a time of need. Our California compliance lawyers have the understanding and knowledge of the types of environmental crisis scenarios that can occur and can assist with developing, planning and implementing a crisis strategy for various types of catastrophic events. Preparing for such events is imperative and in order to mitigate risk, establishing preventative measures should be the first step to creating a crisis management plan. It is important to establish crisis protocols, safety procedures and best practices prior to any unforeseen event in order for employees to properly implement such plan in an emergency while continuing job responsibilities. From developing training material to emergency response procedures, the regulatory attorneys at Bick Law can assist with all pre-crisis engagements for any kind of environmental crisis. -

It is also important to develop a team that can assist your company not only in creating a crisis plan, but to assist with the immediate and future aftermath of any given event. Bick Law builds a unified response team that meets the demands of any kind of crisis in order to effectively implement emergency procedures and minimize risk exposure during the immediate aftermath of a crisis. We understand that the responsibility of the business operations during a crisis remains a key priority regardless of a catastrophic event. Therefore, our team is prepared to step in at a time in need and assist with assessing the immediate risks and any crisis communication, whether that be with government agencies or the media. Bick Law has the experience, knowledge and bench strength to assist with any potential litigation following a crisis and can also provide compliance counseling to avoid immediate and future risks.— -

The California compliance lawyers at Bick Law LLP help clients anticipate, avoid and prepare for any kind of environmental crisis as well as have the sophistication and expertise to assist clients in the immediate and plan for the future.