

Robinson+Cole

Protecting Your Bottom Line through Anticipating Regulatory & Enforcement Change

CHRISTOPHER FOSTER & EMILEE MOONEY SCOTT
MARCH 23, 2017

Who We Are

- **Michael Wirvin** is the managing partner of the firm's Boston Office, a member of the firm's managing committee, a partner in the firm's Business Section, and a primary member of the Business Transactions Group. His practice includes the representation of domestic and international clients in transactions involving mergers, asset and stock acquisitions, private placements, public offerings, commercial secured financings, joint ventures, and other financial transactions.
- **Chris Foster** is a partner in the firm's Boston office. He heads the firm's Environmental Group in the Boston office, where his practice focuses primarily in the areas of transactional and regulatory environmental compliance, environmental permitting, land use issues, and environmental litigation. Chris is counsel to MCTA and a member of MCTA's board.
- **Emilee Mooney Scott** is an associate in the firm's Environmental + Utilities Group. She regularly assists clients in energy and environmental matters through drafting transactional documents, performing legal research, and drafting motions, pleadings and memoranda in litigation and other contested matters.

This program provides general information only and **does not** constitute legal advice. No attorney-client relationship has been created. If legal advice or other expert assistance is required, please contact one of the presenters.

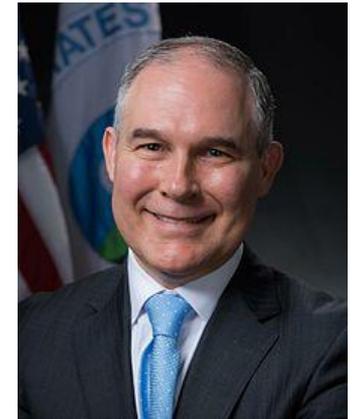
Robinson+Cole

Surveying the Landscape: Regulators and Your Bottom Line



Key Players – Federal

- Environmental Protection Agency: Scott Pruitt
 - former Oklahoma AG
- Department of Energy: Rick Perry
 - former Governor of Texas
- Department of Labor: Alex Acosta (pending confirmation)
 - former member NLRB, Asst. AG for Civil Rights, federal prosecutor



Emerging Issues – Federal

- Shifting EPA Priorities
 - Regulatory Pause
 - Budget Reductions
- TSCA Reform
- Nanomaterials
- Methylene Chloride
- Breaking news

Key Players – State

- **Attorney General: Maura Healey**
 - Exxon/climate change investigation
 - (617) 727-2200
- **EEA Secretary: Matt Beaton**
 - former environmental engineer/sustainability consultant
 - (617) 626-1000
 - env.internet@state.ma.us
- **EEA Undersecretary: Ned Bartlett**
 - former environmental lawyer
- **DEP Commissioner: Martin Suuberg**
 - Long career in public service.
 - (617) 292-5975
 - Martin.Suuberg@State.MA.US



Federal and State Action: Shifting Landscape

- EPA level of enforcement effort is uncertain.
 - State level of motivation remains high, resources may not keep pace
- EPA's budget likely to be cut significantly
 - State budget may also be cut significantly because of limited federal funds
- NGOs may step in – extremely motivated and better funded than ever

NGOs Raising Profile and Resources

- Many environmental statutes have citizen suit provisions
- Expect opposition if regulations are relaxed



Join the Fight
Protect Our Planet from Trump

Donate Now →



[About](#) [Store](#) [Near You](#) [Member Center](#) [En Español](#) [Ways to Give](#)

Search



EXPLORE, ENJOY, AND PROTECT THE PLANET

Massachusetts-Specific Requirements

- **Toxics Use Reduction Act (TURA)**
 - Requires evaluation of toxic use, program fee
- **Global Warming Solutions Act (GWSA)**
 - Requires reductions from all sectors of the economy to reach a target of a 25% reduction of Greenhouse Gas (GHG) emissions by 2020 and an 80% reduction by 2050
- **Other**
 - Hoisting
 - [Let's discuss]

Robinson+Cole

Protecting the Bottom Line: Information Management and Audits



**“THE BEST WAY TO PREDICT
YOUR FUTURE IS TO CREATE IT”**

Attorney/Client or Work-Product Privileges

- Copying an attorney or using a “privileged” stamp is not enough
- Must relate to legal advice
- In-house counsel and their “primary purpose”
- Data / facts vs. Discussions / thoughts / strategy
- Keep in mind the roles of relevant parties:
 - Client
 - Attorney
 - Other advisors
 - Affiliated entities
 - Third parties

Attorney-Client Privilege – Critical Questions

- Who engaged consultant?
- When was consultant engaged?
- For what purpose was consultant engaged?
- Did consultant interpret confidential information from client, or separately gather and analyze independent data?

REMEMBER – ACP evaluation (purpose must be to assist with legal advice) is separate and distinct from work product doctrine evaluation (must be in anticipation of litigation)

Why Perform Audits?

- The most common reason: Search for knowledge
- With knowledge, improvements can be made, opportunities secured, and risks or exposures managed
- Other reasons
 - Consistent with industry or company best management practices (e.g. Responsible Care)
 - Transactional due diligence – buy/sell/lease/joint venture/finance
 - Preparation for or response to agency inspections
 - Response to employee or third party complaints
 - Required by law, permit, judgment, settlement, consent
 - EPA/OSHA/State Agency – Audit Policy Incentives
 - DOJ – Self-disclosure Considerations

Self-Policing Policies: EPA and MassDEP

- Substance of both programs substantially the same
 - Basic benefits
 - Eligibility criteria
- Not identical
 - EPA eDisclosure system
 - Two categories of violation for automatic treatment

Basic Benefits

- **Gravity-based penalty waived or reduced 75%**
 - Policy is waive gravity-based penalties but collect economic benefit
- **No criminal recommendations**
 - Except in cases of egregious or bad-faith behavior
 - Only applicable to disclosing entities, not to individuals
- **No routine request for audit reports**

If Using Outside Consultants, Consider:

- Scope of retention
 - Standard Practice (ASTM E2107)
- Control/ownership of information
- Insurance
- Reinforce lines of communication
- Reinforce communication/documentation protocol
- Exculpatory language and limitations on liability

Some Common Audit Pitfalls

- Use of “bad words” / admissions (“spill” ... “release” ... “violation”)
- Failure to recognize potential triggers for additional action
- Not preserving confidentiality through the use of a control group and process
- Lack of preparation for reporting obligations
- Failure to understand and utilize agency protections

Some More Common Audit Pitfalls

- Creation of a potential “smoking gun” in the form of an audit report
- Not recognizing the “spectrum” of compliance options that may be available
- Appearing to benefit economically from noncompliance
- Failure to adequately prepare for an audit

Responding to Audit Findings

- **Identify Corrective Measures:**
 - Evaluate options (including second opinions)
 - Implement as appropriate
 - Remain aware of deadlines
 - Document completion and costs
- **Continue to Fine-Tune Audit Procedures**
 - Documentation/communications protocols
 - Team members (participation and performance)
 - Training
 - Lessons learned

To disclose or not to disclose?

- What have you “discovered”?
- Driver: “prompt disclosure” deadline
 - Deadline runs from “discovery” ... discovery of what?
 - Beware: EPA emphasizes this includes possible non-compliance
 - Practical problems from such an approach

Closing Thoughts on Audits

- Understand value of and corporate preference for managing or protecting sensitive information
- Understand legal and policy triggers for further involving corporate EHS and legal counsel
- Involve corporate EHS, consultants, and lawyers early, starting with the pre-audit planning process
- Get documentation in order
- Understand what you're getting into and how you'll get out of it before you start
- Establish, maintain and continue to refine the control process
- Take advantage of agency protections and a job well done

Robinson+Cole

Holding the Line: Inspections and Enforcement



Are You Ready for the (Surprise) Inspection

- This is not an oxymoron!
- How can you anticipate a “surprise” inspection?
 - Have others in the industry been inspected?
 - Are there emphasis programs targeting the industry or process?
 - Has there been a high-profile accident in the industry or another company facility?
 - Is there a particularly difficult employee issue that may result in a complaint?
- If you are ready for a surprise inspection, a noticed inspection will be that much easier to manage

Are You Ready for the (Surprise) Inspection

- Do you have an inspection protocol?
- Who will be the inspection team? Who gets notified?
 - EHS, Legal, Others? Backup?
 - Different team members for different media?
 - Know the roles and responsibilities
- Know where records and documentation are
 - Written programs, permits, registrations, monitoring records, training records, MSDSs
- Know where a camera is

Inspection Best Practices

- Implement inspection plan, e.g.
 - Response starts in waiting area
 - Manager or alternate to pickup and return inspector to waiting area
 - Contact other EHS managers and Legal
- Allowing entry and inspection
 - Granting access without, or beyond scope of, warrant may authorize further entry/search
 - Consider implications of not giving consent
 - Postponement only buys time

Inspection Best Practices

- Briefing on safety plans and procedures (may include some “training”)
- Maintain chaperone/host at all times
- Split samples
- Limits and notice requirements for photographs?
- Duplicate or track records taken or copied
- Document inspection activities and conversations (just the facts)
- Address small items during inspection (if appropriate, without admitting violation)

Inspection Best Practices

- **Exit interview**
 - Request copy of inspection report
 - Reasonable questions to ask
 - Any findings? violations?
 - Opportunity to address?
 - Agency person(s) to contact for follow-up?
 - Stick to the plan

Following the Inspection

- Does inspection plan or protocol include “post-inspection”?
- Debrief
 - Gather team, include legal, talk through issues
 - Avoid email chatter and speculation or legal conclusions
- Identify “quick fixes”
 - Evidence of good faith
 - Be mindful of documentation to avoid “admissions”
 - Implement and document implementation

Following the Inspection

- Inform management according to protocol
 - Recommend draft, legal memo describing inspection and findings
 - State facts, not conclusions
 - E.g., “the drum was not labeled”, rather than “the drum was not in compliance with labeling requirements”
- Share experiences and findings with other businesses
 - Learn from experiences – what is agency focusing on?
 - Be mindful of how and what information is shared
 - Facts, not conclusions as to compliance
 - OSHA – repeats are across the company (5 years)

Enforcement Overview

- How Agencies Learn of Violations
 - Observations During Inspection
 - Self-Disclosures
 - Whistleblowers
 - Industry-Wide Investigations
 - Agency Referrals (OSHA ↔ EPA)

Enforcement Overview – Initiation

- Warning/Notice of Violation – Precursor to Enforcement Action
 - Civil Administrative Action
 - Civil Judicial Action
- Search Warrant – Precursor to Criminal Investigation and Potential Prosecution

Enforcement Overview – Administrative Actions

- **Administrative Order/Compliance Order**
 - Handled within Agency
 - Following Agency Procedures
 - Less Formal but Higher Bar to Due Process
- **Review of Final Decision - Appeal to Court**
- **Resolve through Consent Agreement/Final Order**

Enforcement Overview – Judicial Action

- Civil Complaint (Failure to Comply with Order?)
 - Brought by Attorney General or Department of Justice
 - Formal Procedures (Discovery and Motion Practice)
- Review of Final Decision – Appeal to Appellate Court
- Resolve through Consent Decree
 - Lodged with Court
 - Public Comment

Resolving Enforcement Actions

- Statutes and Agency Procedures Promote Settlement
- Why Settle?
 - The Math: Statutory Penalty Provisions are Onerous
 - The Likelihood of Success: Strict Liability Scheme
 - The Expense: Transactional Costs (Experts)
 - The Reputational Injury: Few Defendants are “Innocent”
- Why Fight?
 - Unreasonable/Overreaching Government Adversary
 - Access to Unbiased Third-Party Adjudicator
 - Making the Agency Prove its Case

Enforcement Take-Aways – Company-Wide Considerations

- Compliance history is public information
- Agencies are coordinating compliance and enforcement efforts
 - Companies and facilities should as well
- The easy or cheap resolution may not be the best resolution
- Government contracting bar?

Thank You
Questions?



Contact Information

Christopher Foster, cfoster@rc.com, 617-557-5908

Emilee Mooney Scott, escott@rc.com, 860-275-8362

About the Firm

- **Robinson+Cole** is an AmLaw 200 business law firm honored to serve and grow with our clients since 1845. We offer a wide range of legal and government relations services, including our LandLaw Section practices: [Environmental + Utilities](#), [Land Use](#), [Real Estate](#) and [Construction](#).
- **Clients First** – We develop legal strategies tailored for your company by understanding your business, risk tolerance, and budget. We staff efficiently, respond to inquiries wherever we are, manage costs, and seek ways to use technology to the best advantage. Robinson+Cole seeks out opportunities to add value through our use of alternative fee arrangements, legal project management tools, and educational programs including legal blogs, articles and roundtables.
- **Global Reach** – Robinson+Cole supports our clients' interests spanning the country and globe from our offices in six states and our robust relationships, including our memberships in the ADVOC, SCG Legal and U.S. Law Firm Group networks of international and national law firms.
- **Engaged People** – We enjoy active and lead roles in bar and trade associations, civic matters, and community service organizations. With support from our Pro Bono and Diversity committees, Robinson+Cole is a leader among firms in providing pro bono representation and promoting diversity and tolerance.
- For more information about Robinson+Cole, please visit www.rc.com