

# REGFORM

## 2025 Missouri Water Seminar

### All Things Inspections



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# Inspections – Are those a thing?!

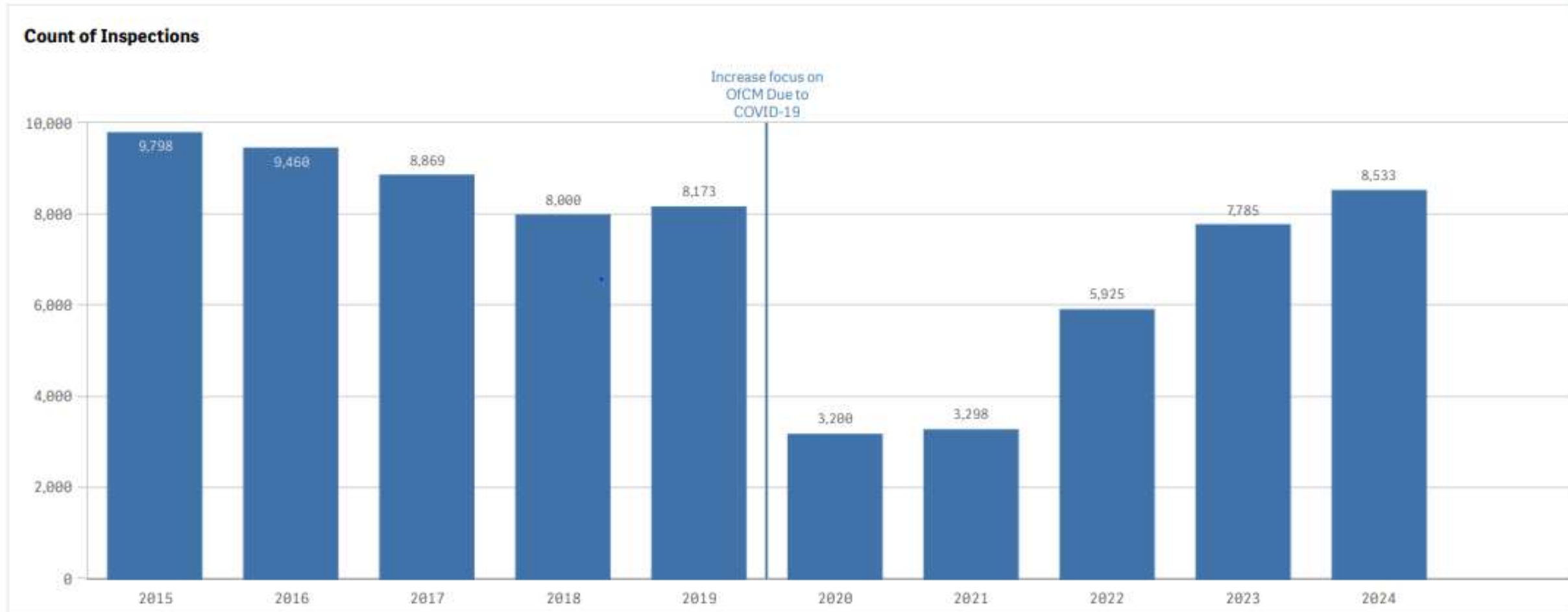
## IN THE LAST FIVE YEARS, REGULATORY OVERSIGHT INCREASED:

- Federal/state agencies have inspection authority
- Companies are required to allow inspections, but can limit time, scope, require warrant/subpoena, etc.

## AGENCY INSPECTION SUMMARY

- EPA FY 2024: 8,500+ total inspections and 4,000 offsite monitoring activities
  - 240 public water system inspections + offsite monitoring of 130 public water systems
  - EPA Region 7 closed 56 cases in FY 2024 (144 total CWA cases closed in Region 7)
- High-profile CWA Section 308 requests
- Missouri DNR inspections

## Federal Inspections Conducted by EPA FY 2015 – FY 2024



**Footnotes:**

1. An inspection is performed on-site at a regulated facility or activity.

# Inspections – Can you do that?!

- 33 U.S.C. 1318
  - Whenever required to carry out the objective of this chapter –
    - Developing or assisting in development of limits or standards
    - Evaluating compliance
    - Compliance with CWA or state program requirements
  - – the Administrator or his authorized representative (or contractor) shall have:
    - A right of entry to, upon, or through any premises in which an effluent source is located or records are maintained AND
    - At reasonable times, access to and copy any records, inspect any monitoring equipment or method, and sample any effluents which the owner or operator of such source is required to sample.
- States can also develop CWA inspection and monitoring programs, which are approved by EPA

# Inspections – But why?!

## VARIOUS TYPES OF INSPECTIONS:

- Can be led by EPA, MDNR or local delegated agency
- Routine annual or semi-annual
- Incident-related
- Post-complaint
- Compliance review-related
- Enforcement or initiative-driven
- Rulemaking development (more likely a Section 308 Request)
- Desk audit

# So ... what can we do?!

## PLANNING FOR AN INSPECTION

- Identify a responsible official for the company who will be contacted when an inspection commences
- Train all personnel who will encounter inspectors
- Consider approach to inspections (cooperation, subpoena, send everyone home, etc.)
- Have necessary materials on-site

# What does that get me?!

- Build credibility for the company
- Avoid exacerbating the matter prompting the inspection
- Company will have proper documents in an auditable and easily accessible format
- Reduce likelihood of misunderstandings
- Reduce risk of follow-up actions
- Build a record for response to inspection reports and enforcement

# **Best Practices for Civil/Administrative Inspections**

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# When the Inspectors Arrive

## SUMMON RESPONSIBLE OFFICIAL AND FACILITY MANAGER

- *No other discussions* with the inspector should occur until the responsible official arrives
- Place inspector in an area out of the way (*conference room* with door closed, as example)

## RESPONSIBLE OFFICIAL SHOULD:

- Inform other needed parties (legal counsel, corporate safety and health) regulatory affairs (who will call legal counsel, if needed)
- Summon Inspection Team – 2 people minimum

# When the Inspector Arrives

## PRE-INSPECTION MEETING

- Request credentials and copy or take a photo
- Request information regarding basis for and *scope* of inspection
- Ask whether sampling will be performed
- Discuss any time/space parameters
- Agree to produce document but ask that all document requests be in writing
- Discuss training and PPE
- Consider needed permitting/access issues

# Company Rights

- Keep inspection limited to statutory scope
- Protect Confidential Business Information
- Splits of all samples (have sample bottles ready)
- Copies of sample analyses
- Review inspection report
- Follow-up if report not received; could be *transmittal error*

# During the Inspection

- Responsible official should lead inspector around facility to specifically requested areas
  - At least one additional employee should attend the walk-around if possible
  - Take direct route to areas of interest
- Take notes, recordings, photographs, video consistent with inspector
  - Keep a record of documents reviewed but not taken by the inspectors
  - Record sampling methods used
- If inspectors identify potential issues, make note and fix or have corrected if possible

# During the Inspection

- Responsible official should attempt to keep inspection as narrow as possible, and within the original scope described by the inspector
- Try to minimize discussions during walk-around (informal interview); do not make any admissions
- Maintain composure; don't be argumentative, and don't speculate; be courteous but firm
- Write down statements by inspectors
- Be aware of confidential business information, including in documents and areas being photographed, and notify the inspectors accordingly

# Employee Interviews

- Inspector may ask to interview employees; immediately notify HR and relevant employees
- **Employees** may but are not required to agree to agency interview

Employees have the right:	Employees should:
To speak to inspector or not, and to end the interview when ready	Tell the truth
To have a representative	Not speculate about things you don't know
Ask the inspector to repeat or rephrase the question if they don't understand (or ask for clarification)	Be careful about leading questions
To request that they not be tape-recorded and/or to decline to sign a statement	If signing a statement, review it for accuracy and request a copy

- **Supervisor-level** employees should not speak to agency without counsel

# Exit Meeting/Closing Conference

- Consider having additional company representatives attend closing
- Ask if inspection is complete; if not, inquire about next steps
  - If documents were requested, ask if they will send them in writing or whether they would prefer to write them out now; agree to deadline
  - Claim confidentiality, if needed
- Ask if any concerns were identified (and provide updates if these items have been corrected)
- Try to get the inspector talking and take diligent notes
- Establish contact persons moving forward (give at least two contacts)

# After the Inspection

- Schedule a debrief with broader group (including legal counsel)
  - Download and preserve photographs and videos
  - Consider contemporaneous Memorandum of Inspection
- Correct noncompliance ASAP and inform agency
- Process samples
- Set a plan for document collection and production, if needed
- Consider requesting follow-up meeting with agency; follow-up communication



# Criminal Investigations

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# The Designated What?!

## CRIMINAL PROVISIONS OF THE CLEAN WATER ACT

- 33 U.S.C. 1319(c)(1) and (2): Negligently or Knowing discharge of pollutants from a point source into a water of the United States without a permit or in violation of a permit
- 33 U.S.C. 1319(b)(5): failure to notify of oil or hazardous substance is discharged in a reportable (harmful) quantity into or upon waters of the United States/upon adjoining shorelines/into the Contiguous Zone
- 33 U.S.C. 1319(c)(1)(A) and (2)(A): Negligently or knowingly operates a source in violation of any effluent standard, prohibition, or applicable pretreatment standard
- 33 U.S.C. 1319(c)(1)(B) and (2)(B): Negligently or knowingly discharges a pollutant or hazardous substance into a POTW in noncompliance with a standard or permit, and which such person knew or reasonably should have known could causes personal injury or property damage and causes the POTW to violate its permit or effluent limitation.
- 33 U.S.C. 1319(c)(3): Knowingly committed CWA offenses and knew at the time that such acts put another person in imminent danger of death or serious bodily injury
- 33 U.S.C. 1319(c)(4): Knowingly makes a material false statement, representation, or certification statement, representation or certification in any document filed or required to be maintained under the CWA
- 33 U.S.C. 1319(c)(4): Knowingly falsifies, tampers with, or renders inaccurate monitoring device or method required to be maintained under CWA

# Significantly Differs from Civil Inspections

## GOVERNMENT ENFORCEMENT TOOLS

Various methods employed by government agents in addition to inspections and administrative subpoenas

- “*Knock and Talk*”
- Civil Investigative Demand
- Grand Jury Subpoena
- Search & Seizure Warrant

# Search & Seizure Warrant

- Usually to seize evidence of criminal activity
  - Documents and records (file cabinets, shred boxes, etc.)
  - Electronic evidence (file servers, hard drives, thumb drives, mobile devices, etc.)
- Can also be accompanied with warrant to arrest a person
- Higher standard (Fourth Amendment)

# When Authorities Arrive

- If no warrant, then no authority to search
- If no warrant, do not consent
- Contact:
  - Point Person
  - Legal Counsel (including Outside Counsel)
- Ask for copy of warrant and review it

# When the Authorities Arrive

Advise the agent(s) that a senior member of staff is on their way and ask them to wait in reception or an empty meeting room

- Ensure that no documentation in any form is available in the room, including hard copy or data on whiteboards
- Agents should be willing to agree provided any delays are minimal
- Agents are not legally obliged to wait and should **NOT** be obstructed if they insist on proceeding

# Rights of Employees

- Employees may be required to remain on premises in some circumstances
- May make sense to send non-essential employees home, if permitted
  - Be careful about obstruction
  - Consult with legal counsel

# Rights of Employees

## AGENTS MIGHT ATTEMPT TO INTERVIEW EMPLOYEES

- Request agents not to attempt to interview employees (coordinate with counsel if needed)
- Inform employees of their rights
  - Right not to answer questions
  - Right to consult with legal counsel

## DO NOT OBSTRUCT

- Presence of legal counsel during interview



# What is the Trump EPA Saying?

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# Trump Administration/Zeldin EPA

- Executive Order, Fighting Overcriminalization in Federal Regulations (May 9, 2025):
  - Criminal enforcement of criminal regulatory offenses is disfavored.
  - Prosecution of criminal regulatory offenses is most appropriate for persons who know or can be presumed to know what is prohibited or required by the regulation and willingly choose not to comply, thereby causing or risking substantial public harm. Prosecutions of criminal regulatory offenses should focus on matters where a putative defendant is alleged to have known his conduct was unlawful.
  - Strict liability offenses are “generally disfavored.” Where enforcement is appropriate, agencies should consider civil rather than criminal enforcement of strict liability regulatory offenses or, if appropriate and consistent with due process and the right to jury trial, administrative enforcement.
  - Agencies promulgating regulations potentially subject to criminal enforcement should explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to those offenses.

# Trump Administration/Zeldin EPA

- Memo, Implementing National Enforcement and Compliance Initiatives Consistently with Executive Orders and Agency Priorities (March 12, 2025)
  - enforcement and compliance assurance actions shall not shut down any stage of energy production (from exploration to distribution) or power generation absent an imminent and substantial threat to human health or an express statutory or regulatory requirement to the contrary. Enforcement and compliance assurance at any facility or activity involved in energy production or power generation shall prioritize addressing violations that threaten human health and safety or risk releases or accidents that would disrupt energy production or power generation
- Press release: EPA announced that it will overhaul OECA to “better address pollution problems that impact American communities by re-aligning enforcement with the law to deliver economic prosperity and ensure compliance with agency regulations.”

# Trump EPA (2020)

- Prior Trump Administration promulgated inspections rule at 40 CFR 31 (repealed in 2021)
  - EPA inspections shall take place at such times and in such places as appropriate.
  - EPA inspectors shall generally explain the nature and purpose of the inspection; offer an opening conference; confirm any safety hazards; and indicate generally the scope of the inspection and the records which they wish to review.
  - At the conclusion of an inspection, EPA inspectors shall offer a closing conference, where practicable, to confer with the facility/site representative and informally advise them of any observations, potential deficiencies and concerns discovered by the inspection, as applicable.
  - During such conference, the facility/site representative shall be afforded an initial opportunity to bring to the attention of the EPA inspector any pertinent information regarding the potential concerns identified.

# Takeaways

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# Takeaways

- Prepare for agency actions *before* an inspection
  - Know the difference between a criminal investigation and a civil/administrative inspection
  - Understand agency authority and intention of the inspection
- Make a Roster
- Have a communication plan to initiate immediately upon notification of an inspection or investigation
- Take inspection seriously
- Document everything
- Follow up on documented items and tell the agency
- Agencies coordinate – be consistent

# Thank You



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