

question as to whether the delay was unintentional.

Dated: February 18, 2020.

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 31

[FRL-10005-45-OECA]

RIN 2020-AA53

On-Site Civil Inspection Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating this rule of Agency procedure to fulfill the objectives outlined in the October 9, 2019 Executive Order (E.O.) 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*. This rule describes certain Agency procedures for conducting on-site civil inspections, as contemplated by section 7 of E.O. 13892, *Ensuring Reasonable Administrative Inspections*. This rule applies to on-site civil inspections conducted by federally credentialed EPA civil inspectors, federally credentialed contractors and Senior Environmental Employment (SEE) employees conducting inspections on behalf of EPA.

DATES: This rule is effective March 2, 2020.

FOR FURTHER INFORMATION CONTACT: Chad Carbone (202-564-2523), Office Enforcement and Compliance Assurance (2221A), U.S. Environmental Protection Agency, Washington, DC 20460; telephone number: (202) 564-2523; fax number: (202) 564-0050; email: carbone.chad@epa.gov.

SUPPLEMENTARY INFORMATION: The following outline is provided to assist the reader in locating topics of interest in the rule.

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I. General Information

A. Does this action apply to me?

This rule applies to all federally credentialed EPA civil inspectors, federally credentialed contractors and Senior Environmental Employment (SEE) employees conducting inspections on behalf of EPA. As an internal rule of Agency procedure, the rule does not apply to federally credentialed state and tribal inspectors conducting inspections on EPA's behalf. This rule describes certain important aspects of the Agency's process of conducting on-site civil inspections and does not alter the rights or interests of parties or any person or entity outside the EPA.

B. What action is the Agency taking?

The purpose of this rulemaking is to provide direction to agency personnel on how to conduct EPA on-site civil administrative inspections, as required by section 7 of E.O. 13892, entitled *Ensuring Reasonable Administrative Inspections*, and which states: "Within 120 days of the date of this order, each agency that conducts civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a rule does not already exist. Once published, an agency must conduct inspections of regulated parties in compliance with the rule." This rulemaking addresses the common elements applicable to on-site civil inspections for compliance with all of the environmental laws that EPA implements. The specific activities that may occur during an inspection may vary depending on the facility and the statutory authority upon which the inspection is based. It is also important to note that EPA inspections are only one type of compliance monitoring activity that EPA conducts in order to help evaluate compliance. The primary focus of inspections is on recording observations and gathering information. As such, compliance determinations are an independent process that rely upon a myriad of information and are reviewed by Agency attorneys and management.

C. What is the Agency's authority for taking the action?

EPA's authority to issue this procedural rule is contained in the: Clean Air Act (CAA): 42 U.S.C. 7414, 7525, 7542, 7603, 7621; Clean Water Act (CWA): 33 U.S.C. 1318, 1321, 1364, 1367; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund): 42 U.S.C. 9604, 9606, 9622, Executive Order 12580, section 2(j)(2); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA): 7 U.S.C. 136; Resource Conservation and Recovery Act (RCRA): 42 U.S.C. 6908, 6912, 6927, 6928, 6934, 6971, 6973, 6991, 6992; Safe Drinking Water Act (SDWA): 42 U.S.C. 300; and the Toxic Substances Control Act (TSCA): 15 U.S.C. 2610. EPA is also issuing this rule under its housekeeping authority. Section 301 of Title 5 U.S.C. authorizes an agency head to prescribe regulations governing his or her department and the performance of its business, among other purposes. EPA gained housekeeping authority through the Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970), as recognized by the U.S. Department of Justice Office of Legal Counsel. See "Authority of EPA to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property," 32 O.L.C. 79, 2008 WL 4422366 at *4 (May 28, 2008). As a rule of Agency procedure this rule is exempt from the notice and comment requirements set forth in the Administrative Procedure Act. See 5 U.S.C. 553(b)(A).

II. Background

A. General Overview of On-Site Civil Inspections

Below is a general overview of the process for conducting on-site civil inspections. To ensure greater transparency and clearer direction to its inspectors, the Agency is codifying the major elements of inspections it carries out in its civil enforcement of environmental laws. (This rule does not apply to investigations of environmental crimes.) This overview also provides information regarding additional activities that may occur during the civil inspection process.

1. Timing of Inspections and Facility Notification

EPA inspectors should generally conduct inspections during the facility's normal work hours. However, there may be circumstances which require EPA inspectors to access, monitor, or observe specific operations or activities at other times. Where possible, for announced

inspections, EPA inspectors shall take reasonable steps to work with the facility to agree on a workable schedule for accessing areas for the inspection. EPA inspectors have the authority to conduct, and do conduct, inspections with or without prior notice to a facility.

2. Inspector Qualifications

EPA inspectors must hold a valid credential to perform the inspection. EPA credentials are issued to inspectors that have completed training relevant to the statutory programs under which they will inspect and training for health and safety hazards they may encounter or experience while conducting inspections.

3. Obtaining Consent To Enter

Upon arrival at a facility, EPA inspectors shall present their valid EPA Inspector Credentials to a facility employee, describe the authority and purpose of the inspection, and where possible seek the facilities' consent to enter. Inspectors are required under certain statutes to advise facility personnel that they can deny entry, but EPA may then seek a warrant for entry.

EPA inspectors should not sign a facility release of liability (waiver) or any statement limiting EPA's use of information. However, the EPA inspector can sign a "visitors log sheet," if there are no limitations printed on the sheet. EPA inspectors are not authorized to relinquish their EPA Inspector Credential. EPA inspectors are also not authorized to relinquish their personally identifiable information (*e.g.*, driver's license), except in certain circumstances to obtain Federal Facility security access. Finally, some statutes also require the facility to sign a "Notice of Inspection" form at the time of entry.

4. Opening Conference

The EPA inspector shall request an opening conference with available facility representatives or employees, where practicable. This may not be possible, for example, where facility personnel are not on-site or where the site is geographically isolated, and no facility or staff are located nearby. The opening conference will commence as early as possible upon arrival at the facility, unless there are specific reasons why that is not feasible or conflicts with the inspection objectives. The EPA inspector shall discuss the overall objectives of the inspection and establish him or herself as a spokesperson for EPA during the inspection. EPA inspectors may request access to/copies of facility records and request to interview facility employees, as necessary. EPA inspectors may also

ask facility personnel for an overview of plant operations, potential site-specific health and safety hazards, confirm whether the inspection requires access to specific portions of the facility, and obtain a site map indicating the locations where potentially regulated activities are conducted.

If the facility is a small business, EPA inspectors will offer a Small Business Resources Information Sheet that provides an array of resources to help small businesses understand and comply with federal and state environmental laws. In addition to helping small businesses understand their environmental obligations and improve compliance, these resources may also help such businesses find cost-effective ways to comply through pollution prevention techniques and innovative technologies.

5. Physical Inspection

EPA inspectors shall inspect the areas, units, sources and processes relevant to the scope of the inspection. The inspectors will generally document their observations with photos and notes.

6. Managing Confidential Business Information (CBI)

Pursuant to existing statutory and regulatory requirements, inspectors shall complete appropriate, statute-specific, CBI training before managing CBI. The EPA inspectors shall manage all CBI claims made by a facility during an inspection in accordance with 40 CFR part 2, subpart B.

7. Interview Facility Personnel

EPA inspectors may conduct interviews of facility personnel as appropriate. Interviews may include, but are not limited to, the environmental contacts, process operators, contractors, maintenance personnel, process engineers, control room operators, and other employees working in the area(s) of interest. EPA inspectors should document names and titles of all facility personnel interviewed including the places and dates in which these interviews occurred.

8. Records Review

Once the records requested by the EPA inspector are assembled, the EPA inspector shall review any records relevant to the facility inspection/field investigation. EPA inspectors may request copies of many different types of records (paper, electronically scanned, downloaded or recorded through other digital storage devices), when appropriate, and record copies of

records taken from the facility. An EPA inspector may request records before, during, or after an inspection.

9. Sampling

EPA inspectors may take samples when appropriate. Where applicable and practicable, during the opening conference, the inspector shall offer facility personnel the opportunity to obtain split samples or to collect duplicate samples.

10. Closing Conference

EPA inspectors shall offer a closing conference with available facility employees, as practicable. A closing conference may not be possible where, for example, an inspection is conducted at a geographically isolated portion of the facility and no facility staff are located nearby. If a closing conference is possible and appropriate, EPA inspectors will discuss any outstanding questions or missing documents and the process for follow up. EPA inspectors may also discuss next steps and how the facility will be contacted on the results of the inspection and identify the appropriate point of contact for further communication and coordination. EPA inspectors may also summarize any potential "areas of concern" identified in the inspection.

B. Inspection Report

After an inspection, EPA shall share an inspection report with the facility. The content and format of the report may vary depending on the facility, type of the inspection, and the statutory authority upon which the inspection is based. The inspection report may be a narrative, form, checklist, letter, email message or other type of document.

III. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is exempt from review by the Office of Management and Budget (OMB) because it is limited to agency organization, management or personnel matters.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because it relates to "agency organization, management or personnel."

C. Paperwork Reduction Act (PRA)

This action does not contain any information collection activities and

therefore does not impose an information collection burden under the PRA.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to agency management or personnel, which the EPA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1536, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a “significant energy action” because it is not likely to

have a significant adverse effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action is not subject to Executive Order 12898 (59 Fed 7629, Feb. 16, 1994) because it does not establish an environmental health or safety standard.

L. Congressional Review Act (CRA)

This rule is exempt because it is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 40 CFR Part 31

Environmental protection, On-site civil inspection procedures.

Dated: February 6, 2020.

Andrew R. Wheeler,
Administrator.

■ For the reasons set forth in the preamble, EPA adds 40 CFR part 31, consisting of § 31.1, to subchapter A to read as follows:

PART 31—ON-SITE CIVIL INSPECTION PROCEDURES

Authority: Clean Air Act 42 U.S.C. 7414, 7525, 7542, 7603, 7621; Clean Water Act 33 U.S.C. 1318, 1321, 1364, 1367; Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. 9604, 9606, 9622, Executive Order 12580, section 2(j)(2); Federal Insecticide, Fungicide, and Rodenticide Act 7 U.S.C. 136; Resource Conservation and Recovery Act 42 U.S.C. 6908, 6912, 6927, 6928, 6934, 6971, 6973, 6991, 6992; Safe Drinking Water Act 42 U.S.C. 300; Toxic Substances Control Act 15 U.S.C. 2610; 5 U.S.C. 301; and Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

§ 31.1 Procedures conducted by EPA for on-site civil inspections.

(a) All on-site civil inspections by EPA inspectors shall be conducted in accordance with this part. For purposes of this part, all references throughout to “inspection” or “inspections” refer to on-site civil inspections; this part does not apply to criminal inspections or investigations of environmental crimes.

(b) EPA inspections shall take place at such times and in such places as appropriate.

(c) At the beginning of an inspection, EPA inspectors shall present their credentials to the owner, operator, or agent in charge at the facility or site, if available. 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. However, such designation of records shall not preclude access to additional records.

(1) During the opening conference, EPA inspectors shall, where applicable and practicable, offer facility personnel the opportunity to obtain split samples or to collect duplicate samples.

(2) If the facility is a small business, EPA inspectors shall offer a Small Business Resources Information Sheet to help small businesses understand and comply with federal and state environmental laws.

(d)(1) EPA inspectors shall document observations, and, as appropriate, take environmental or other samples and take or obtain photographs and copies of documents related to the purpose of the inspection, and employ other reasonable investigative techniques.

(2) Where possible, EPA inspectors shall interview the owner, operator, agent or employee of an establishment. Reasonable investigative techniques include, but are not limited to, the use of monitoring devices/equipment to measure releases to the environment.

(e) EPA inspectors shall take reasonable precautions to ensure actions conducted during inspections will not cause hazardous situations, and, where appropriate, wear and use appropriate protective clothing and equipment.

(f)(1) 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.

(2) 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.

(g) After an inspection, EPA shall prepare an inspection report and share it with the facility. The content and format of the report may vary.

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