



# Conducting Environmental Compliance Inspections

## Inspector's Field Manual International Edition



### A Basic Procedure Manual

\* This **Field Manual** is the core of many inspection manuals rolled into one. The fundamentals outlined here are intrinsic to most compliance inspections or investigations.

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# PREFACE

## ABOUT THIS MANUAL

This manual represents one internationally accepted model for conducting compliance inspections. However, other models exist that may be equally or more applicable to a particular regulation or program. It is not designed as guidance for conducting any specific type of inspection. That information will be found in specialized program training. Here you will find only the basics — information you may refer to occasionally to regain your footing on a familiar shore.

This manual was adapted from a U.S. EPA inspection manual written by W. Douglas Smith. It is co-edited and adapted for international use by Mr. Smith, and Davis Jones of EPA's International Enforcement and Compliance Division. It is designed as a stand-alone manual, but is also used in conjunction with broader initiatives set forth in U.S. EPA's International programs.

The material covered here is written in plain language with examples intended to be relevant to the widest possible audience. Long experience has shown that students have had better retention and understanding when their instruction is personalized and explains why a procedure exists rather than simply citing the procedure.

The material is very general and the student should defer to other manual with more specific guidance and procedure for a particular statute or regulatory program.

The manual is designed for easy reference in the classroom as well as the field. Chapters are identified in the table of contents. There are occasional “discussion” sections designed to stimulate group reflection and debate. Significant vocabulary is identified in bold face or italics. Experienced investigators and inspectors commonly use the techniques described here but this does not mean that they are the only acceptable methods. The intent is to help you establish a sound foundation and allow you to adapt your own style.

Chapters are arranged so that you will first gain fundamental knowledge that is necessary before going into the field. Later chapters will tell you about working in a team, and lead you through a typical inspection routine from beginning to end. There is a chapter on conducting complex, highly sensi-

tive, multimedia inspections. The final chapters will instruct you in writing your report, and how to be a witness should your case go to court.

Above all this is a “living” or “evolving” document. Feel free to make comments to the author; W. Douglas Smith, U.S. EPA Region 10; 1200 6th Avenue, Mail Stop OEA-095; Seattle, Washington 98101; on the web at <Smith.Doug@epa.gov>; or by telephone to (206) 553-6700.

## WHAT IS A GOVERNMENT INSPECTOR?

In this manual the term “inspector” includes all field personnel who collect information that may be used to determine compliance status. The inspector is the personification of the entire agency he/she represents because it is the inspector that knocks at the public’s door. Inspectors and their work are under constant scrutiny. The quality of the inspector’s work is a direct reflection on the credibility of his/her agency as well as the inspector. The inspector’s enthusiasm must be tempered with diplomacy and manifest itself in diligent work rather than an overbearing demeanor. It is through the inspector’s five senses that the agency monitors the real world. The appropriate use, accuracy, and verification of what the inspector senses is the focus of this manual.



The inspector seeks and gathers verifiable information; through the concisely organized presentation of a narrative report; and may be a witness for a fact determination. The inspector is an agent of the government, representing the very people he/she regulates. Fairness, equity and integrity are cornerstones of the inspector’s job. The inspector must never abuse that authority. An inspector must always strive to report objectively, thoroughly, and without personal bias. If there is a motto for the inspector it is **“Find the truth. Tell the truth. Protect the truth.”**



Information and personal knowledge comes in phases. Inspectors first conduct an investigation where information of verifiable quality is gathered and organized. Information of verifiable quality is usually referred to as documentation. In the next phase, inspectors organize their observations and supporting documentation into a body of data (usually a narrative report) where it is reviewed against standards set forth in law. These investigation and inspection phases are often repeated until enough information is documented to make an adequate evaluation of compliance.

The inspector provides information and personal knowledge that is used to determine the “facts” of an issue to be decided. An inspector may be called upon as a witness before a deciding body (court, judge, hearing officer) to testify about his/her experience. So what is a fact, and how is a fact determined? The popular, scientific and legal definitions of a fact are quite different. In the legal universe, there is no such thing as a “fact”, unless it is decided by the “trier of fact” (judge, court or hearing official). The inspector is not usually granted the authority to interpret the law and make the final institutional or agency determination of compliance. The most common role of the inspector is to inspect for compliance, gather documentation, and provide testimony that can be entered into evidence. This makes the inspector a “witness of fact” rather than a “trier of fact.”

As an agent of the government, the inspector must constantly strive to maintain the highest standards of thoroughness, ethical conduct, and quality assurance. Inspectors must set an unimpeachable example to the public, regulated community, and to the agency that depends upon the inspector’s work to ultimately determine compliance.



# FIELD SAFETY

Before we begin working through a typical inspection, you should become familiar with some basic information. We want you to come back in one piece, so let's begin with safety.

Environmental compliance inspections are potentially dangerous. These dangers can be minimized through adequate knowledge and planning.

There are tens of thousands of chemicals produced, stored, transported or used annually. Industrial sites producing or using these chemicals have process machinery, transporting equipment, structures and conditions that present their own hazards. The ultimate responsibility for your safety rests with you. Here are some clues to help you recognize them:



## THE FIVE HAZARD CATEGORIES:

- Chemical
- Fire and Explosion
- Radiological
- Biological
- Physical

### Chemical Hazards

Chemicals may be solids, liquids or gaseous. The health effects of chemical exposures may be either chronic or acute. Exposure may be direct or indirect. Reactions may be immediate or require long periods of time to manifest themselves such as with carcinogens. Health effects may be cumulative from many exposures over time. You must not depend upon your senses alone to warn you of exposure, as your reactions may not be quick enough to prevent injury or even death. Therefore you need to gather the necessary information, plan ahead and provide yourself with the correct personal protective equipment (PPE) and caution against all hazards before entering a potentially dangerous area.

### Fire and Explosion

Fire or explosions may result from chemical reactions such as nitric acid and wood, sodium and water, aluminum powder and iron oxide. Even flour dust can explode under the right conditions. Combustion needs three things to

take place. These three things are known as the fire triangle; and consist of fuel, heat, and an ignition source. The typical ambient breathing atmosphere has sufficient oxygen for combustion. In this case, all that is needed is an ignition source and fuel. There are many substances that can produce a fire or explosion that are found in industrial settings. Sometimes, generally safe chemicals can produce dangerous by-products. These may include peroxides, uncontrolled off-gassing, or combinations of incompatible materials that produce flammable or explosive mixtures. Changes in temperature may cause chemicals to boil causing a Boiling Liquid Expanding Vapor Explosion (BLEVE). Other ignition source may include camera, flashlights, and cellular phones.



Cigarettes are one of the most common accidental ignition sources in an industrial setting. Only smoke in areas designated for smoking or better yet, don't smoke at all. Health data indicates that all respiratory exposures to hazardous materials are many times more likely to cause damage if you smoke.

### **Radiological Hazards**

Radiation sources may present external or internal danger. Some common sources are medical equipment, radioactive wastes from medical facilities, X-ray equipment, some electronic equipment, and even smoke detectors. Generally the greater the radiological hazard the more likely it is to be controlled. Highly radioactive sources will often have an obvious means of identification through hazard markers, labels or through detection equipment.

### **Biological Hazards**

Biological hazards cause more lost man-hours for inspectors than all the other hazards combined. They consist of micro and macro-biological sources. Microbiological sources include viruses, bacteria and parasites. Every facility is a separate environment where plant personnel bring bacteria and disease into a central location. You should be particularly cautious around food and water sources, rest rooms and washing facilities. Macro-biological sources may cause harm from bites or stings and include things like guard dogs, insects, snakes and other animals. Biohazards also include botanical sources such as poisonous plants and allergic reactions caused by dust or pollen.

### **Physical Hazards**

These include things that cut or crush you, things that you might trip over or fall into or slip on. They also include extremely high or low temperatures,

dry or humid atmospheres, poor lighting and excessive noise. The potential of injury from physical hazards may be increased by circumstances where your senses are impaired, such as poor hearing because of hearing protection or an inability to communicate by voice because of excessive noise. Visibility may be impaired from a full-face respirator. Bulky protective clothing may make it difficult to move around in tight spaces. Protective clothing may be a hazard because it is too hot, heavy or bulky. There is a fine line between paranoia and prudent caution but in the end it is always better to be cautious. A thorough and comprehensive understanding of real and potential hazards is best achieved by having a safety conscious attitude.

**The following are some of the more insidious hazards that are often overlooked:**

### **Oxygen Deficient Areas**

These may exist in confined spaces and depressions. Oxygen can be displaced by other gasses or be consumed by chemical reaction. Excessive concentrations of oxygen can be dangerous because of increased risk of combustion or explosion.

### **Confined Spaces**

These can contain pockets of trapped gasses. Alleyways between buildings are often overlooked but may contain stagnant gasses and trapped fumes. Ditches and depressions may contain denser gasses such as methane, carbon monoxide or hydrogen sulfide. Trucks, railroad cars, and ship cargo holds may also trap dangerous gases.



### **Electrical Hazards**

These may be obvious such as transformers, exposed wires or electrical panels. They may also include lightening or static discharges generated by high voltage electrical equipment. Underground electrical cables may be encountered during excavation. High voltages can “arc” if you provide a better electrical path to ground.

### **Fatigue and Stress**

Fatigue and stress reduces sound judgment. Avoid excessive stress of all kinds. Stay warm and dry. Avoid extremes of heat or cold and provide adequate insulation. Monitor fatigue and allow adequate rest periods. Fatigue may also alter behavior and create tensions among the people you are working with. Sometimes wearing Personal Protective Equipment (PPE) causes physical or psychological stress. Provide shelter and a place to gather and





organize your resources. Provide adequate, safe drinking water or liquid refreshment (not diuretics like coffee or tea). Keep high intensity work time to a minimum.

### **Loss of Peripheral Perception**

This can result from focusing your concentration too closely is another common error. This may distract you from other dangers around you.

In areas where hazards are high, use the “buddy system” to work in teams and watch out for each other.



**ATTITUDE MEANS “THINK SAFETY”:** Use all of the available clues to help you recognize hazards and prepare for them. The following clues will help you to recognize many hazards:

- Begin by asking people at the facility about hazards.
- Container shape or construction may indicate the nature of its contents
- Location and/or how it is being used may indicate contents
- Markings or color may indicate a hazard. Placards or labels may be required but may be absent. Look for signs of old markers.
- Always consider a container hazardous until proven safe
- Documentation like shipping papers or manifests may help identify hazards
- Pay attention to your senses. One of the greatest hazards is to focus so closely that you fail to notice an obvious smell, sound or visual clue that you are in danger.
- Drive safely.



## **FIELDNOTES & LOGBOOK**



Fieldnotes are briefly stated reminders, taken contemporaneously with an activity, that will be referred to later to construct a more comprehensive narrative report. In an emergency, other notes may be made on a napkin, the

palm of your hand or any writing surface and referred to as soon as possible to record the information into a unique and site or event specific “logbook” or directly to a narrative report.

**Portable:** The logbook should be small enough not to impede the normal activities of an investigation. Most inspectors prefer a notebook they can store easily in a pocket or briefcase. Some notebooks are available with water resistant paper.

**Dedicated:** Each logbook should be site or event specific. There are simple reasons for this: (1) It may become evidence and it becomes burdensome to maintain the confidentiality of other sites and events that may be in the same logbook. (2) Contrary to popular perceptions, a dedicated logbook saves paper and money. If there is more than one site or event entered in a single logbook and it becomes necessary to copy log entries or redact other information. The labor, potential for litigation, and cost of materials quickly exceeds the extremely low cost of separate logbook.

**Paginated:** Consecutive page numbers show that nothing is missing and provides references for easy access to entries.

**Bound:** Bound logbooks are less likely to lose pages or get out of sequence. They are also more durable to rough handling.

**Properly identified and dated:** The name of the site or event and the date should be recorded on each page, as well as the inspector’s name or initials.

The inspector’s logbook is a unique document, intended for the personal use of the inspector to assist in constructing a more detailed final report.

The following are some practical considerations in taking and keeping field notes in your logbook:

1. Many inspectors write initial entries on only one side of the logbook. The opposite page is then used to add further details as they become available, allowing the inspector a means of going back to add information in the appropriate location.
2. Entries in the logbook should be objective, factual and without subjective conclusions. Be brief or abbreviate as necessary. Field notes are intended for your eyes. You are the one who has to interpret and

use the information. There are two exceptions: (1) Professional opinions such as an engineering analysis. (2) You may write a subjective opinion as a reminder to yourself for further follow up. In either case you should identify your reasoning. For example: “follow up to verify statements by Mr. Jones.” would be acceptable. “Mr. Smith is a dirty rotten liar.” would not be acceptable because your logbook may be disclosed in future litigation.

3. Each inspector usually develops his or her own shorthand or code to streamline note taking.
4. Field notes should be made as contemporaneously as possible.
5. Anything given to the facility or taken from the site, including samples and documents, should be thoroughly and accurately logged.
6. Clip or staple business cards in the logbook for later reference.
7. Photographs are usually identified in the inspector’s logbook.
8. The logbook should be protected from moisture. There are several types available that will shed rain and still accept pencil or ink.

What should go into the logbook?

1. Inspector’s name.
2. Any information relative to the site or event.
3. Site entry procedures, events, and contacts, especially if there were problems
4. The names of site contacts should be recorded as well as their titles and phone numbers or means of contacting them at a later date.
5. Times of specific events should be recorded in the logbook.
6. Deviations from any established protocol or procedure should be thoroughly recorded.
7. Interview notes
8. Names and contact information of anyone interviewed.
9. Discussion of unusual conditions
10. All sampling information
11. Photograph/video log
12. Items or material taken or given and who gave and/or received it.

The logbook or field notes should be kept as part of the inspection file. Even after the final report is completed, the inspector's notes can be an important reference if questions arise later in the enforcement process.



## **A TYPICAL INSPECTION**

A compliance inspection has eight basic phases. They are:

1. Site selection
2. Preparation
3. Entry and opening conference
4. Field investigation, including interviewing and collecting evidence.
5. Records investigation and review
6. Closing conference
7. Report writing
8. Referral for follow-up/enforcement
9. Being a witness



## **INSPECTION SITE SELECTION**

Sites for inspections are usually selected using four criteria:

1. The agency considers its available resources and then makes an unbiased or random selection of sites from all of the identifiable members of a regulated community. This is frequently referred to as a "neutral inspection scheme".
2. The agency makes a selection that emphasizes a specific sector of the identifiable regulated community. This selection is usually based upon enforcement history, potential threat, or other clearly researched criteria.
3. The agency makes a selection based upon information received from the public or other external sources such as a tip or complaint.
4. Emergency responses.

How the agency weighs each of the criteria should be explained in a written and public compliance monitoring strategy so the public can see that the selections are made in a fair and transparent manner.

## **PRE-INSPECTION PREPARATION**

*“The harder I work the luckier I seem to be”*

*By Frances Ellen Smith*

**Off-site preparations:** Thorough preparation is the key to a successful inspection. The following is a discussion of the preparation for a typical inspection.

### **HISTORY AND LIAISON WORK**

You should be to learn all that is available about the facility, its history, processes and potential concerns. Some of this knowledge may come from staff. Seek other inspectors who have experience with the facility. Other sources of information are unlimited but often include permits, current litigation, agency negotiated agreements, databases, business licensing data, property records, and other agencies.

There may be local or national agencies that have information and should be involved in planning an inspection. These agencies often have overlapping or parallel responsibilities. If you fail to inform any of these entities that feel territorial about a facility there may be serious repercussions to you, the inspector's agency or the facility. The facility's management may have increased anxiety when you show up and the facility is used to seeing another inspector or agency. This can be compounded if that individual or agency does not know about or support your inspection.

Make your immediate chain of command familiar with the objectives and schedule of your inspection. New inspectors often complain that there is little supervisory support for their work in the field. This is usually because supervisors were not fully informed and prepared before the inspector went into the field.

Part of your planning should be a decision whether or not to notify the facility that you will be conducting an inspection. If you make the decision to give prior inspection notification to the facility, try to give the least forewarning possible. Most major violations are not easily covered up in a short



span of time but many lesser issues that can lead to major concerns if undetected. Technical violations that involve documentation and process control leave a paper trail. Illegal disposal, housekeeping and day-to-day operations may only take minutes to disappear.

***Discussion topic:** What is to be gained and/or lost in announced verses unannounced inspections. How do these relate to your obligation to accurately monitor the facility's day-to-day compliance? You might begin by asking your discussion group the following question: Who gains the most from announced inspections, violators of the law or those who are usually in compliance?*



### **PREPARE YOUR KIT FOR ACTION**

Load your camera, and fill out all paperwork before entering the site. It can be frustrating when you have to do it hurriedly in front of an impatient plant manager who has just left a critical break down just to deal with you. You may want to write a few reminders in your notebook to make sure you cover special topics or inspect an operation of particular importance. Peel off “Post-It®” sheets with little reminders can be placed in your notebook an easily removed once you complete each task. They may be used to mark documents you want copied. “Post-Its®” may also be placed on photographic subjects to help you identify things later.



### **PLANNING FOR SAMPLING**

Are you planning to take samples? Are you prepared to sample if an unexpected incident is discovered? Do you have a sample plan? Have you notified the laboratory of your intentions? Laboratories don't like unannounced, high priority requests that interfere with their on going work. We will discuss sampling in more detail later in this manual.



### **RECONNAISSANCE**

This is an important and often overlooked step to pre-inspection preparation. Drive by and scout the facility before you attempt to enter. You may wish to consider the possibilities and adjust your approach. Take time to review your kit and checklists. The facility is never what you anticipated in the office. Use this time to adapt to any previously unforeseen contingencies. Consider the site layout, safety considerations, places and operations

you want to include in your inspection, and decide if there is anything going on you want to visit immediately.

A reconnaissance over a longer period of time is called surveillance. Let's review some of the legal aspects of surveillance. Most considerations fall under the "plain view doctrine". In general terms this means that as long as you have legal standing to be where you make the observation there can be no complaint from the party you are observing. So you can even use telescopic assistance to watch a facility from a public road or any property where you do have permission to be. It may even be permissible to fly over a site and use high-powered equipment to make observations.

There is another application of the "plain view doctrine" you should be familiar with. Let's say you were given permission to enter a facility to conduct a compliance inspection. At some point in time you make an observation of a potential violation but the facility suddenly decides you should leave. You should take mental note of everything you saw before you were asked to leave as well as everything you see as you leave. All of this information will be admissible as potential evidence because you had "legal standing" to be where and when you made the observation.

Let's quickly review your steps up to now. The facility was selected using one of the four criteria and you were assigned to conduct a compliance inspection. You have reviewed all available information and contacted everyone you think should know about your activities. All of the administrative clearances have been taken care of and your supervisor knows where your going, what you plan to do, and any concerns you may have in case you might need their help while in the field. If you plan on taking samples you have contacted the laboratory and made all the necessary arrangements with them. You have a sample plan attached to your overall project plan. Your inspection kit and has all of the necessary documents, notices, and your credentials. You have found your way to the facility and performed a reconnaissance. Now you are ready to enter.

## **ENTRY**

This unit will offer practical information about the legal basis for entering a facility to conduct an inspection, requirements that the inspector must do to request permission to enter a facility, how an inspector can determine if he/she has been denied entry, and methods of preventing denial of entry.



Most agencies' policy is to *seek consensual entry first*. The fundamentals of entry are not much different than what you would expect if someone came to your door and asked to come in. You would expect them to come to the front door at a reasonable time and to speak to someone in authority. You would want to know if their business was official or not, who they were and who they represented. You would want to know what they wanted to see or do. Facilities deserve the same respect from the government, and usually agree to let inspectors in.



*The actual legal authority to enter a facility or private property to conduct an inspection is specified by the law.* This does not mean that an inspector is free to enter whenever or wherever they please.



In the United States the actual permission to enter a facility or private property may only be granted by the owner/operator or through due process by a court of law. The law specifies and grants the authority to the agency or the agency's agent. The agency therefore has the requirement to identify the inspector as its official agent to a person-in-charge by showing his/her official credentials or identification. The inspector is also required to cite the statutory authority to enter the facility,

the name of the agency he/she represents, and the scope of activities. *Without this initial introduction an inspector should expect to be denied entry.* If these steps are not taken the facility may allege misrepresentation or trespass.

If consensual entry is denied, the agency may request a court to enforce the agency's legal authority by issuing a warrant. Over the years, a considerable amount of case law has been generated concerning the scope and conditions of authorized entry and the protection of individual rights to privacy. In very broad terms most countries' courts have repeatedly upheld statutory authority to enter a facility for the purposes of conducting a compliance inspection. However, under no circumstances should the inspector assume authority without thorough knowledge of the law and adherence to required procedures. There may be other legal requirements for the inspector, such as notifying the facility prior to the inspection. Make sure you know and follow any specific requirements that apply to the inspector.

If the facility denies the inspector entry, a court (judge or magistrate) with adequate jurisdiction may direct the inspector to enter a facility to obtain information, objects or documents through the execution of a warrant. The inspector is then strictly limited to the tasks identified in that warrant.



In many legal systems, if access is denied, the inspector should contact the agency's attorney who will assist in getting a warrant. There are two kinds of warrants an agency may seek. These are for either civil administrative or criminal proceedings. There are two bases for a civil administrative warrant: (1) a reasonable cause to believe that a violation has occurred, is occurring or is about to occur at the facility; or (2) selection of the facility for inspection because of a preexisting inspection plan. A reasonable expectation of denial may add weight to this. Criminal warrants are granted for "probable cause" that a crime has been or is being committed.



Regardless of the authority to enter a facility, the best approach to gaining entry is through proper procedure and the application of the appropriate "demeanor" by the inspector.

***Discussion Topic:** Why is proper procedure and appropriate attitude so important? Behave with others, as you would expect them to behave with you. This is especially applicable to entry and should be reflected in your demeanor as well as how you conduct the inspection. How would you expect to be inspected if you operated the facility? How would you react to arrogance or threatening behavior? What would you interpret as threatening behavior? Exchanging business cards is a good way to introduce yourself and get information about your site contacts without lengthy and redundant questioning, however, remember that a business card is not your official identification. Only credentials properly introduce your official identity. How would you feel if inspectors failed to identify themselves properly or explain the purpose and scope of their visit? Wouldn't you want to know the authority they had to conduct the inspection and interrupt your work? Would you want this stranger wandering around your facility without notifying you or someone you had placed in charge? There are numerous legitimate reasons why facility management might not want you on their site until they fully understand your purpose and authority. Industrial spying is a serious issue around the world. Many industries compete tenaciously for marketing advantage or for a process or technology that might give them a competitive edge. Highly technical industries are especially sensitive.*



## **WHAT IS DENIAL OF ENTRY?**

You are denied entry when a person-in-charge at the facility says you are denied. You are also denied entry when the facility places conditions on your activities that prevent you from fully carrying out and/or documenting the

intended purpose of your inspection. However, you must complete all of the following requirements first, before making that decision:



#### **Your entry requirements:**

1. Did you enter through the main gate or reception area?
2. Did you locate the person-in-charge as soon as you arrived?
3. Did you identify yourself (Credentials) to a person-in-charge?
4. Did you explain the legal basis for your inspection?
5. Did you visit the facility at a reasonable hour? (i.e. regular business hours, operating hours, or hours when the issues of compliance are best observed?)
6. Did you explain the scope of your inspection?
7. If applicable, did you present the necessary written notices?



Only after you have satisfied these first seven requirements with a friendly, patient, professional attitude, may you then make a denial determination.

#### **NOTE:**

***“Expressed consent is not necessary, absence of expressed denial constitutes consent to proceed.”***

#### **How do you decide when you have been denied entry?**

1. Were you denied consent upon entry? (*Consent is intentional relinquishing of the right of privacy that has not resulted from fear, ignorance or trickery*) You may be denied entry by anyone on site, however; you should insure that denial is from someone in actual authority. This is why your attitude, and identification to the person-in-charge is important.
2. Were you confronted with unreasonable delays? The inspector is the only one that can determine what is an unreasonable delay. It therefore falls on the inspector to communicate this to the person-in-charge. (e.g. “I have been waiting 45 minutes. My time and resources are limited, and I can only wait another half hour. If I cannot begin by then, I will have to consider this a denial of entry.”) During this time the inspector may call their office for guidance and to request assistance if pursuit of a warrant seems appropriate.



3. Were unreasonable conditions made by the facility, such as not allowing photography or sampling to take place? Sometimes conditions are added later that compromise your ability to investigate, document or complete your inspection? The inspector can adjust to some limitations but others may be too restrictive. Only the inspector can make this determination.
4. Was your safety deliberately threatened in anyway? That includes verbal threats or suggestions that harm might come to you that is not accidental (Failure to remove a threat such as refusing to secure a guard dog is an example of entry denial.) Once again, only the inspector is capable of determining if their safety has been threatened. If you encounter hostile or dangerous behavior, leave immediately; your safety comes first.

**If you are denied what do you do?**

Try again. Explain your position carefully, politely. Don't allow their behavior or your emotional reactions to their behavior to prevent you from being fair and professional. You must always maintain your poise. If denial is clear and nonnegotiable, leave immediately and adjust your plan of action. If denied entry, call your office and discuss your next course of action. You may choose to seek legal authority to regain control of the situation. In the meantime, you may make observations from any public areas, such as the street, looking onto the facility's property.

**Anticipated denial.** If you have reason to believe that the facility will deny you access based on a previous experience, you may consider obtaining a warrant before your visit. This is especially useful in cases where a facility has denied access in the past, or you need to respond to a violation without delay.

**The four commandments of inspector demeanor** (in order):

- **Be nice.** If that fails...
- **Be kind.** If that fails...
- **Be fair.** If that fails...
- Regroup and **seek objective control.**

The point here is that regardless of the behavior you are confronted with, you must always be “fair” when performing your duties. When you feel you can no longer be objectively fair, leave, regroup and try again when you are sure you have the support and tools to insure fairness. Fairness is your minimum obligation to the agency and public you serve.

**YOU ARE THE GOVERNMENT** to the facility. When a facility has offered numerous obstacles to the investigation, it may be personally rewarding when you discover a complicated or major compliance issue. Regardless of events, however, you should not express enthusiasm in their discomfort. You are a professional representing the awesome power and authority of the government. Use that authority with a fair, friendly, patient and a professional demeanor.

## THE OPENING CONFERENCE



**They learn what you want. You learn what they have.**

The opening conference is your opportunity to let the facility know who you are and what you plan to do. Show your official credentials and exchange business cards. The opening conference is an opportunity to thoroughly explain the scope of your activities. Another objective is to discover who is responsible for the operations you intend to investigate. The person-in-charge may choose to delegate someone with more specialized knowledge to assist you.



The opening conference is an opportunity to learn more about the facility operation, plant layout, management structure, the plant processes, plant safety and other information relevant to your visit. Let management know how long you expect the inspection to take so they can assist you with the least interruption of their regular activities. Learn about the safety concerns and policy at the plant. You should already have the required safety training to conduct an investigation at the facility. At the opening conference you can learn what specific kinds of personal protection equipment (PPE) you will need. Ask if the plant has an evacuation procedure, what signal is given, and were to go in an emergency. A facility representative who is familiar with the safety procedures should accompany you during the inspection.

A brief explanation of the methods that will be used to document the inspection will prevent problems later. These methods will commonly involve making copies of records, drawing diagrams, taking samples, talking to em-

ployees, taking notes on paper or tape recorder, and taking photographs or using video. If the facility still has concerns about the methods of documentation, attempt to negotiate another substitute method but do not give up the ability to document thoroughly, accurately and under your conditions. Denial of these commonly accepted documentation tools might be considered a denial of entry if some alternative cannot be arranged.

NOTE: If your reconnaissance revealed an urgent concern in the field, forgo the next part of the opening conference and go to that location immediately. Once an inspector has announced their presence illegal operations tend to cease. There are trade-offs that you should be concerned about if you choose this option. You will know less about the operation of plant processes, layout, and especially safety issues. Take care.

Obtain a facility process diagram and the most complete and current map available. This will insure that you do not miss anything in your tour of the facility and help you log the precise locations where you make important observations.



**“People tend to get out of the way for someone who knows where they are going.”**

**By W. Benton Smith**

If the facility still has concerns about the methods of documentation, attempt to negotiate another substitute method but do not give up the ability to document thoroughly, accurately and under your conditions.

***Helpful hint:** When a facility asks you not to take pictures, explain how it will take much more time to take exact measurements and make accurate diagrams or sketches instead of taking photographs. The facility will often prefer that the inspection be completed quickly and may reconsider letting you take photographs. They may also have specific concerns about photographs that you can accommodate and still take the picture.*

If you think sampling will be required, ask the facility representative if they would like split-samples or to take duplicate samples. The law may require that you offer the facility split or duplicate samples. Usually the facility will provide its own sample containers. If the facility is unable or unwilling to provide its own containers, you should provide containers for them so that you may proceed with sampling.

If the facility places restrictions on the inspections that compromise your ability to complete the inspection, take note of the restrictions as well as your efforts to resolve the issue. You should then inform the facility that their conditions have resulted in a denial to complete the inspection. Immediately go to a private location and contact the agency to inform the appropriate office of the denial. This is not a sign of inexperience or lack of ability on your part as much as it establishes a benchmark for the agency to exercise further legal options. There is little to be gained and much that may be lost if you personally debate legal issues of authorized entry with the facility or facility counsel.



***“If in danger or in doubt, leave immediately and call agency counsel!”***

There is little to be gained and much that may be lost by debating your authority to conduct an inspection with the facility staff or especially facility counsel; leave that task to your agency’s attorneys.

The most significant key to gaining entry is by adopting a demeanor that is cordial, direct, assertive, and professional. So what is professional? That means that within the limitations of the law, policy, training and guidance you adapt your demeanor to the situation so that you are more likely to obtain the desired result. This is a high and often ambiguous standard. It is usually better to error on the side of politeness. Remember the facility may perceive you as threatening even if they have done nothing wrong and perception is usually worse than fact when it comes to behavior. Also remember that the facility does not only see you, but also the entire agency and government you represent.

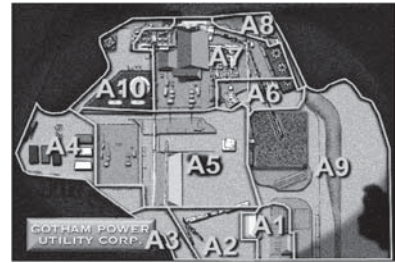
## **FIELD INVESTIGATION**



**How do you investigate the operational aspects of a facility?** The two most common methods are the facility tour and the process based investigation. On larger sites either method is often preceded by a brief walk or drive around to help orient the inspector to various landmarks and operations. Take notes and mark the places on your map that you want to return to and investigate in greater detail.

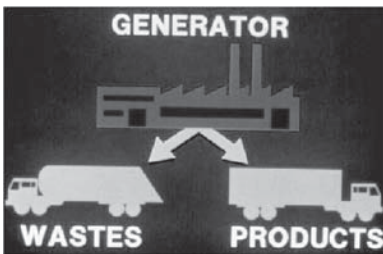
## THE WALK ABOUT

This is a systematic and inspector directed tour of the facility. The pathway may be directed by geographic criteria, process lines, waste streams, monitoring or material management areas or any other parameter the inspector decides is important. You should trace your path on the site map to insure that important areas are not missed.



## THE PROCESS ORIENTED INVESTIGATION

Most processes can be divided into similar parts. Raw materials are gathered and enter the process. Energy goes into the process. Something happens during the process that produces a product, releases energy, and produces by-products and waste. At each of these phases there is usually some means of monitoring what is happening. There will also be collection and material management areas. Log your path on the site map as you complete your observations in each area.



You will take notes, photographs, conduct interviews, make diagrams and perhaps take samples as you tour the plant facilities. Record each site or event with more than one method of documentation and remember that redundancy is important for all critical compliance issues.

Be cautious of a psychological dynamic that often takes place during the documentation process. The facility staff will quickly identify when you are concerned about something as you increase your emphasis on documentation. Take care that you don't appear to pounce like a zealous predator from one violation to another. Try to maintain a methodical pace and demeanor throughout the inspection so that you do not over emphasize issues that may be a potential liability to the facility. If you don't guard against this phenomenon you run the risk of facility paranoia and unpredictable behavior. However, it is also important to obtain concurrence and confirm critical aspects of your observations with site personnel. Here are a few examples where the answers are critical to an inspector's observations:

Q. "Where are we?"

A. "The north side of the boiler plant."

Q. "That pipe looks like it's leaking."

A. "Actually that's a pressure relief pipe and that's just steam."



Q. “Do you see a label anywhere?”  
A. “Here’s one on the back, by the wall.”

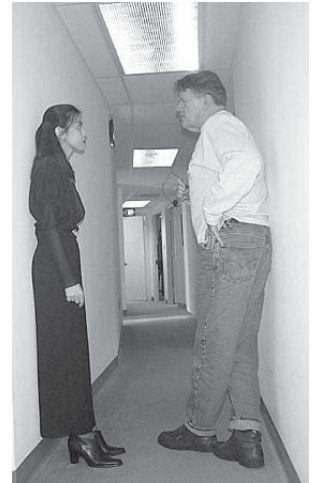
Q. “What is in that smoking drum?”  
A. “Tetraethyl death...RUN!!”



## THE INTERVIEW

*“An interview is a conversation with a purpose.”*

The interview is one of the inspector’s most useful tools for gathering information. It may consist of a simple exchange of information or a thoroughly staged and planned series of interrogations. Interview techniques have been improved over the centuries but fundamentals remain. The following outlines the basic procedures and considerations in a typical interview.



### INITIAL CONSIDERATIONS

Review background information; organize the kind of information you will be seeking; plan the questions you will ask and how you will ask them; establish a time and location for the interview; and insure the subject’s security and comfort during the interview.

### INTRODUCTION AND IDENTIFICATION

Identify yourself and the reason for the interview. This is essential in establishing a trusting and honest rapport with the subject. Conversely, you should let subjects identify themselves and obtain all necessary personal information.



### ESTABLISH A RAPPORT

By being open and friendly you will set the mood and establish the subject’s trust that you are only interested in finding the truth. When you begin the interview smile, shake hands, introduce yourself and briefly explain why you are conducting the interview. Go over the kind of information you are trying to obtain. Explain that you are conducting a compliance inspection (or that you want to understand an event or process, etc.) and that you value and respect what the subject (the person you are interviewing) may have to offer.

How you ask a question is often more important than the question itself. Therefore, it is important to plan your line of questioning, make the subject as comfortable as possible, and listen attentively to their responses.

**“You never get a second chance to make a first impression.”**

### **TECHNIQUE: GETTING TO THE 5 W’S AND A HOW**

“Now make yourself comfortable, try to remember and tell me...”

- Who
- What
- Where
- Why
- When
- How

There are no limits to the techniques you may employ when interviewing someone (the subject). You must adapt to the environment, circumstances, and personalities involved. You may use what is called “free narrative” and simply ask the subject to tell you what they know and then sit back and listen with only occasional comments or questions to fill in vital information as it is revealed. The most common method of conducting an interview is to direct the dialogue with a series of well-planned questions, which often flow from gathering general information to questions about specific details.

The following are a few recommendations to consider when conducting an interview:

- *Plan your interview.* What do you want to get from this subject? What are the major topics you will ask about and in what order?
- *Avoid questions that may be answered with a simple yes or no.*
- *Keep your questions clear and uncomplicated* by asking one question at a time and avoiding compound questions.
- *Maintain control.*
- *Ask follow-up questions to verify assertions.* (“Why do you say that? How do you know that?”)

- *Repeat or rephrase information to verify* that you have understood accurately and completely.
- *Evaluate the completeness and reliability* of the answers. If you feel the subject is compromising their response, you may need to approach the topic from a new direction or work more on the rapport.
- *Begin by noting the subject's name, position, job duties, and other personal information.*
- *Listen carefully.* This accomplishes several things. Listening helps maintain rapport. No one wants to talk openly to someone who is not paying attention. Listening attentively insures that you do not miss information and allows you to use information as it comes to adjust your questions and maintain control.



- *Use simple acknowledgments and pauses* to motivate the subject to continue their narrative. *It is a social phenomenon that people feel motivated to fill in the blanks in conversations when there are periods of silence.* It is often useful to simply acknowledge what they have already said and wait for more information. Let the silence stretch out and look at the subject as though you are expecting further information. “Uh huh.” Followed by silence. Or, “Yes, and then what?” Followed by silence will often motivate the subject to fill in the silence with further information.



- *Avoid negative or accusatory statements.*
- *Avoid appearing overbearing or using words of authority.* Intimidation is occasionally a method used when a subject is being interrogated (an interview against the subject's will) for information that they do not want revealed. Interrogation is most likely to be applicable in a criminal custodial situation.



- *Show concern for the subject's comfort and situation.* Empathize with the difficulty the subject may have in revealing the information, but that the information will probably be revealed through other means and it would be so much more valuable to hear the truth from the subject.
- *Start with non-threatening topics such as general background information.* For example: “What do you do here at Acme Dumping? Oh, then you would know how wastes are handled in the plant, wouldn't you?” From this you may proceed to more specific questioning and the subject knows that you know they have knowledge.



- *These are key words to consider when expressing your professionalism in conducting an interview:* Sympathy, attentiveness, patience, thoroughness and especially fairness.



- *Conclude your interview by summarizing and verifying the important information you noted.* Ask and provide opportunities for additional information and/or clarification. When closing your interview, express your appreciation for their time and effort and reestablish the rapport. Provide them with a means of contacting you if they remember something or wish to provide further information. Try to end the interview with their trust in your integrity intact. You may meet again.



Surprisingly the most common error in documenting an interview is failure to note the most fundamental information. At a minimum this information should be recorded:

- Who were you talking to?
- What did you ask them?
- What did they say?



**Poor questions get poor answers:**

One common mistake is to ask a question with the answer included in it. The subject will usually agree with the answer you gave in the question. Here are some examples:

Q: “You don’t have any toxic materials around here, do you?”

A: “No sir.”

Q: “There aren’t any buried drums on your property, are there?”

A: “I don’t think so.”

Q: “You have all the necessary records, don’t you?”

A: “Sure.”

Q: “Your Spill Prevention and Control plan is up to date, isn’t it?”

A: “Yup.”



The following questions ask for the same information but will stimulate the subject to provide more information:

“What chemicals do you handle?”

“Do you know of anything buried on the property?”

“Where do you keep the \_\_\_\_\_ records?”

“Do you have a Spill Prevention and Control plan?”



The last two questions require a follow up. You should verify important assertions made by facility personnel. A statement that something exists is not the same as verifying by sight or measurement.

**Know when to shut-up and listen.** Experience teaches you when to hold the subject to specifics and when to let the subject continue. There are a few key guidelines to remember when first interviewing someone. They are:

- Plan your objectives and sequence of questions ahead of time.
- Establishing a rapport (friendly, attentive and down to business) is a matter of experience.
- Don't over emphasize your note taking.
- Give people time to answer and listen.
- Don't make promises of confidentiality or protection you can't keep.
- Try to have privacy for the interview.
- Obtain their name, position, and how you can get in touch with them at a later time.
- Give them your name, position and how they can get in touch with you at a later date.
- Enforcement should not be mentioned. Emphasize that you are just trying to get to the truth.
- Avoid leading questions.
- Avoid double negatives and other complex phrases.
- Avoid multiple subjects in your question.

The following shows a line of questioning that leads from the general to the specific:

Q. "Whom do you work for?"

A. "Acme Polluters."

Q. "How long have you worked for them?"

A. "About six years."

Q. "And what do you do there?"

A. "I open bungs on drums from Mega Chemical Corp. Then I pump them dry."

Q. "After you pump the drums, what do you do with the contents?"

A. "I pump it into a tanker truck."

Q. "Then what happens?"

A. "The truck takes it to the landfill."

Q. "Which landfill is that?"

A. "The county landfill mostly."

Q. "Anywhere else?"

A. "The old quarry near the water tower."

Q. "What's in these drums?"

A. "Usually solvents like trichlor, MegaCorp collected from print shops."

Q. "Are there labels on these drums?"

A. "Sometimes."

Q. "Uh huh?" (Note: sometimes a simple affirmation followed by silence will stimulate the subject to offer more information than another question would.)

A. "There are Hazardous Waste labels and sometimes there are company labels that show what the stuff is and how to dispose of it."



# EVIDENCE — THEORY AND PRACTICE

The inspector should prepare to conduct and document their investigations so thoroughly that the case will successfully stand up in a court of law. After you return to the office, it is difficult or impossible to correct mistakes and major oversights made in the field. It therefore falls upon the inspector to understand what is required to establish credible evidence in a court of law and apply that knowledge at the earliest opportunity while conducting the investigation.



*The inspector should have the mind set that every inspection will go to court. They should anticipate arguments for the defense and provide solid evidence against those arguments before they are presented in court.*



## WHAT IS EVIDENCE?

**“Any type of proof...legally presented at a trial...for the purpose of inducing belief in the minds of the court or jury....”**

**Black’s Law Dictionary**



**Evidence** is just documentation that satisfies the “*Rules of Evidence*” for admissibility in a court of law. Documentation is anything that provides verifiable information used to establish, certify, prove, substantiate or support an assertion. Photos, notes, reports, statements, samples, diagrams, models, and records are all examples of documentation.

Evidence of almost any kind is acceptable if it aids in understanding the truth of a matter in question. Before documentation may be “entered into evidence” for use in deciding a fact, it must be of verifiable quality and satisfy the “*Rules of Evidence*” for admissibility. **Foundation, authenticity, and relevance** are the three primary criteria that form the corner stones of credible information. They should be thought of as links in a chain; failure to satisfy just one criteria and the entire chain will fail.



## **Foundation:**

*This is the argument that one piece of information leads to the next in a logical sequence.* It may be thought of as a pyramid of information with one piece building upon the other. In the following narrative you can see how one piece of information builds upon the other. “John Doe works at ACME Dumping. Mr. Doe operates the outflow valves at the discharge pipe. On the

3rd of March, Mr. Doe was at his duty station when Joseph Smith, Plant Manager directed Mr. Doe to discharge untreated waste into the storm drain. On the 4th of March the Environmental Protection Agency took samples from the pipe and from the storm drain that subsequently indicated levels of Chromium that were higher than the allowable limits. Process information from the plant reveals that Chromium is a waste material commonly found in ACME Dumping's untreated waste." This foundation of related information is used to show that ACME Dumping was responsible for illegally discharging regulated amounts of Chromium waste.



**Authenticity:**


This means the evidence must be demonstrated to be what it is claimed to be. For example was this sample taken from the discharge pipe at ACME Dumping really representative of what was in the pipe? Was the sample analysis conducted properly so that the results accurately show the true concentrations of Chromium in the discharge? Are the lab reports accurate? These are all questions that lend themselves to the authenticity of material brought before the deciding official, judge or court. If there is a perception that the information "could have been compromised," the information will not be accepted into evidence. Sampling and analysis quality assurance efforts and chain-of-custody procedures are examples of practices that show the *authenticity* of the information.



**Relevance:**

The evidence must pertain to the fact in question tending to make the existence of the fact either more or less probable than would be the case without the evidence. Think of it this way; so what does this have to do with what we are trying to decide today?

The judge determines the admissibility of evidence in court. Under most circumstances the case reviewer will make a preliminary determination if there is enough potential evidence to proceed with a case and assess a penalty. In some agencies this may be the inspector. In others it may be a separate Compliance Program Office with prosecutorial discretion. However, the final decision on the admissibility of evidence can only be made by the trier-of-fact and that is the judge.



**Every violation has a set of required "elements of proof."** Imagine you were the inspector in the hypothetical foundation case discussed above. What was the violation you were trying to prove? ACME Dumping broke the law by discharging an illegal concentration of a regulated substance. Did you

provide the “elements of proof” necessary to establish this as a fact? What does the law specifically state is required? Did they exceed that standard? Who did it? John Doe was told to do it by Joe Smith, Plant Manager. John Doe was in a position to do it when it happened? Did you establish that the pollutant came only from the one source? To do this you would need to establish that there was no pollutant above the discharge point and that there was at the discharge point. In our example the samples indicate that the regulated substance was in the pipe and an identical substance was found in the storm drain? Is that sufficient? Was the substance found a regulated substance? Were the sample methods and quality assurance protocols followed? Did the analysis indicate that concentrations of Chromium in the storm drain were above the legal limits? Did ACME break the law? The case appears to have most of the *elements of proof* to decide the facts of the matter in question.

This case would not have appeared so clear if the inspector did not fully understand the importance of the information they gathered while in the field, and especially how that information might be used and questioned later. You should think these issues through while you are in the field and have the best opportunity to do something about them.

#### **In Review:**

Lets review how an investigation proceeds from information gathering to ultimately deciding compliance in court. The inspector’s investigation process gathers information that must be organized and verified but not all of the information will be used as documentation for compliance analysis in the narrative report. Documentation is relevant information of a verifiable quality, so the documentation in the report should apply to the evaluation of compliance (elements of proof). Some documentation may be necessary to provide evidence to a court. Only evidence can be used in a court to decide an issue. Witnesses will provide some evidence by their sworn testimony but the rest will come from documentation with Foundation, Authenticity, and Relevance (FAR) to the violation/s to be decided. Inspectors might fail in this process if they gather information that is not verifiable. They might also fail by having good documentation but not gathering documentation that provides the “elements of proof” for each alleged violation. If the inspector did not provide enough potential evidence the case will not proceed. Enforcement programs will not initiate cases unless they believe they could win in court.

You should now begin to see the key role the inspector plays in initiating and building an enforcement case. You can also see that the inspector must head

off problems by anticipating them while they are in the field or before. The inspector must have a thorough understanding of the difference between just information and good documentation that may later need to qualify as evidence and establish the “elements of proof”.



## WHAT DO YOU DOCUMENT?

The short answer is *everything*. It is the inspector’s responsibility to keep track of all notes that contribute to the inspection report. Inspection reports must be written “near in time” to the inspection so that relevant information can be documented while it is still fresh in the inspector’s memory. The longer the time between the inspection and the report the greater the possibility that the inspector’s memory or credibility will be brought into question.

## A QUESTION OF ETHICS

*“An institution prone to hiding its mistakes is an institution incapable of learning from them.”*

*by the author*



## What if you made a mistake?

While you are expected to perform at the highest standard of professionalism, mistakes can and do happen. Integrity demands that you stand accountable for mistakes; however, it is usually possible to compensate for a mistake. If you or any member of your team do make or discover an error; clearly identify it, evaluate its potential affects on the your objectives, and if possible correct the mistake rather than covering it up. Document every step in making the correction. The fact that you found the mistake and attempted to correct it maintains your integrity. This behavior is important even if an uncorrectable mistake compromises the entire case. It is better to lose one case than suffer the potential of losing your credibility or worse yet, the credibility of the government. We all make mistakes occasionally. Learn from them.

***Discussion topic:*** *What could happen if you hide a mistake or fail to make a notation of a critical mistake? Here are some general considerations. Who or what entity does the government serve? Is this service corrupted when mistakes are covered up? Who benefits when a corrupt case goes to court? Who loses when a bad case is discovered? What are the chances that a significant mistake will go undiscovered?*



*There is good documentation and poor documentation but there is seldom too much documentation.* The only restraint is time and resources. It is better to document something from several approaches than just one. Taking a sample may be good, but a sample, combined with a thorough record and a photograph is better. If one piece of documentation fails the others may be enough to establish the facts. You should not assume that one piece of documentation is conclusive by itself. The *quantity* of evidence is important but so is the *quality* of evidence. The quantity and quality of documentation brought forward by the inspector will be compared with that of the defendant.



This brings us to the issue of “*best available evidence.*” In simple terms a copy is not as good as the original. A good copy is acceptable if the original no longer exists. A good copy is better than a poor copy, a poor copy may be better than nothing, and so forth. If a case goes to hearing or court your data will be compared with the defenses’ data. You are not only expected to do the right thing, you are expected to do the right thing right (correctly). This is the corner stone to *quality assurance* and *quality control* (QA and QC).



**“Do the right thing and do the right thing right.”**


*By Roy R. Jones*

### **What is the difference between a civil administrative proceeding and a criminal proceeding?**

Guilt in a *criminal case* must be proven *beyond a reasonable doubt*. All criminal cases are tried in a court of law. The judge determines the admissibility of evidence. The tests for admitting evidence in a civil court are similar to a criminal proceeding but intolerance of potential error is far more critical in a criminal case. In a criminal case the defendant’s liberty may be at stake. For this reason the defendant is given certain rights which are designed to insure the ability to question every aspect of the prosecution’s argument and the higher standard to establish guilt *beyond a reasonable doubt*.

In an *administrative civil proceeding* the assertions of guilt may be performed by the agency or in a court of law. In a civil case guilt is proven by the preponderance of evidence. In the United States this is a step process. First the agency evaluates compliance against a matrix established in law and policy. Cases of lower severity may result in a *notice-of-violation* or smaller

penalty assessment directly from the agency. If the case fits standards of higher severity it may be taken by the prosecutor (the legal arm of the government) and will automatically be elevated to a court of law. It may also be elevated to court if the defendant contests the violation alleged by the agency.



The inspector and the agency will be better off if they establish violations with the strongest possible documentation so that it may be admissible as evidence if the case should be contested or become “probative” (contribute to accurate proof) in a civil court or criminal proceeding. The inspector must have a thorough knowledge of evidence and elements-of-proof as they may be applied in a civil and criminal proceeding. Note: We use the term “fact” now because we are using evidence in a court to determine facts. Facts do not exist legally unless determined in court based upon the admissible evidence.

## **CLASSES OF EVIDENCE**

Evidence is broadly placed into two classes:

1. *Direct evidence* tends to establish a fact without inference or presumption. It may involve a witness or take the form of a photograph, signed statement, film or record.
2. *Circumstantial evidence* proves a fact indirectly by proving another fact from which an inference or presumption may be drawn.



***Direct or Circumstantial evidence may take several forms:***

1. *Real Evidence* consists of tangible objects that can be seen or felt. The trier-of-fact can reach a conclusion based upon their own senses rather than those of witnesses. Real evidence may be documentary, physical or scientific.
  - A. *Documentary evidence* is written material that “speaks for itself”.
  - B. *Physical evidence* is something tangible that was part of, or related to an actual event.
  - C. *Scientific Evidence* consists of an analysis based upon known and established methods, materials and means of measurement. Authentication is required to establish precision and accuracy of the analysis. Quality assurance (QA) and quality control (QC) are critical requirements.



2. *Testimonial evidence* consists of information supplied by witnesses rather than objects, documents, or scientific analysis. In general a witness may testify to the limit of their five senses and competency. An oath or affirmation is required.
  - A. *Lay or Fact witnesses* are allowed to testify only to experiences detected through their five senses. They heard, saw, smelled, touched or tasted something. Opinions are allowed only under very limited circumstances.
  - B. *Expert witnesses* are used where the average person would not be able to make a reasonable judgment based on facts or data presented. These frequently are highly complex or technical issues where professional standards and credentials are required. Other experts are often introduced to challenge the first expert's credentials as well as their competency.



An inspector is usually called upon to be a *fact witness* unless they are an engineer, chemist or carry other professional credentials. Caution should be taken if an agency wishes to establish an inspector as an expert witness because it places unnecessary emphasis upon the inspector's category of professional competency rather than the credibility of the evidence brought to court by the inspector.

3. *Demonstrative evidence* is a diagram, photograph, model, representation, or illustration used to help prove a fact. In some cases it may include summaries of large or highly complex documents. It is usually used to assist testimonial information and make it more understandable to the trier-of-fact.
4. *Judicial notice* refers to things so commonly known or recognized that the "trier of fact" (hearing officer or judge) does not require authentication. An example of this might be the length of a meter or that the sun rises in the east. A word of caution is necessary here. An inspector should never assume that the trier-of-fact has the same educational and experience background. A judge may not be familiar with a meter if they were educated where feet and inches were the standard. A drum may contain 55 gallons to you but 44 gallons to someone who has experience in a more specialized industry. Some things are always subjective, such as love, hate, loyalty, or preference. You may have absolute confidence that a light was red but red and green may appear the same to people with some forms of color blindness. One of the greatest errors an inspector can make is to


assume others will perceive something the same way he or she does. This difference in honest perception is the basis for the argument that the inspector should document an object or event with as many different methods as time and resources will allow.



## WHAT IS THE BEST EVIDENCE?

Rules of evidence demand the best evidence be presented to determine the facts of an issue. What does that mean? Evidence must be reliable, authentic and in its most original form.

1. *Best evidence rule:* prohibits the introduction into evidence of any secondary evidence (i.e. copy) unless it is shown that the original document has been lost or destroyed. Where the terms of a writing (written document) are material to the case, the original should always be produced if possible. Certified identical copies are called conformed copies.
2. *Authentication:* Before information is received into evidence, it must be authenticated with proof that shows it is what it claims to be. (i.e. a sample must have proof that it came from a specified place and has not been altered on purpose or by mistake.)
3. *Chain-of-custody:* This is the complete, unbroken record of all individuals who have maintained control over the evidence since its acquisition. Without a complete record of custody it becomes impossible to prove the evidence has not been compromised and therefore may not be authentic.



**Discussion topic:** *How do you determine when you have enough quantity and high enough quality of documentation to prove a fact? A single piece of evidence does not usually determine a fact or win a case. The individual bits of information in the allegation may be true and accurate yet the picture may still not be detailed enough to reach a conclusion. The total body of evidence should tell a story that will reveal the whole truth being considered.*

**Let me give you an example:** Four wise and intelligent tribes lived all their lives, without contact with each other, on the north, south, east and west sides of the same mountain. From their independent perspectives each studied the mountain thoroughly and recorded every event and detail as accu-

rately as humanly possible. A panel of experts determined that each tribe had made and kept thorough, honest, and accurate records. The four observers exchanged their documentation and each accused other of misrepresentation or even lying. It was not until they put all of the documentation together that the tribes realized that they each had only part of what was necessary to truthfully describe the whole mountain. Conclusion: The complete and absolute truth lies outside one person's ability to perceive it from any one place or time.

## PHOTOGRAPHS

### **The cornerstones to good case development:**

We have already talked about the interview as a productive source of information. The inspector will ultimately produce a written narrative of the issues and events of their inspection in a report. Three other common forms of physical and demonstrative evidence that will accompany this report are samples, records and photographs.

*“One good photograph is worth a year in court.”*

*By the author*



### **PHOTOGRAPHIC DOCUMENTATION**



A photograph is an image made with light. These include such processes as photocopies of documents, film, video, and digital imagery. Photographic evidence has been known to have more real and subjective influence on a case than solid technical data because of its ability to tie things together and add perspective. The Chinese once said that “...a picture is worth a thousand words.” That may have been a very conservative observation. Photography is one of the best yet poorly utilized tools in documentation. One reason it is so valuable is the ease in getting it entered into evidence. How do you enter a photograph into evidence? Usually the counsel asks a single question to a witness present when the photograph was taken?



**“Is this a fair and accurate representation of what you saw?”**

This is actually a rather subjective test because it asks an opinion of a “representation” (the photograph). However, the witness had good “standing” from actually being there when the photograph was taken to form an opinion. The court recognizes that people perceive things differently. The court will usually allow fair and honest attempts by people to describe what they saw and did even if they differ from others present at the same time. Considerable latitude is given when a witness says that a “representation” (i.e. photograph) appears to depict what they saw. Some very poor photographs have been allowed into evidence because they were the best available representation and what was shown materially contributed to the matter being decided. There may be arguments about film speed, camera, lighting, angle and a host of other considerations but the foundation comes back to one principle. Someone who was actually present believed that the photograph accurately pictured something that was critically important to the court.



### What are some of the most common problems with photographic images?

1. **Too few photographs:** Case reviewers, lawyers and triers-of-fact were not there when the inspection took place and photographs help them understand what happened.
2. **Poor quality photographs:** The important information cannot be seen in the photograph. A poor photograph also reflects upon the professionalism and skill of the inspector.
3. **Failure to identify the subject in a photograph:** What were you trying to show? This is often the result of snapping shots without thinking about what you are trying to capture. Make your photographs tell the story. Log what each photograph is intended to show.
4. **Failure to secure the original:** It is possible that you may be accused of tampering with an image. The technology to alter images has been around as long as there photography has been around. The defense against these accusations of tampering is to maintain the original in controlled custody. Have a secure archive for negatives, video tapes and original digital images. Original digital images must be saved to alternate storage media to create an “archival original” as soon as possible after image capture. This “archival original” must be labeled as such and kept secure. Any enhancements needed should only be made to a copy. Never edit the original or archival original. This way an image can always be compared with the original. Today



many documents and images are copied digitally and archived in that form to conserve space and prevent deterioration over time. Each copy must be “conformed” by an expert archivist to insure that it is an “exactly accurate” copy of the original before it is placed into storage.

All photographs are manipulated and are never true copies of reality. Someone other than the one who took the picture usually processes the photography and manipulates the color and exposure, either manually or through automation. Digital images may also be manipulated. In either case this manipulation is usually to enhance the image so that the image is improved rather than to distort or substantially alter the representation of reality. This brings us back to the test for entering photographs into evidence. “Is this a fair and accurate representation (not “exact copy”) of what you saw?” Someone may say it is and someone else may say it is not and the photograph may still be entered into evidence if there is nothing else to contradict it.



### **Correcting common misconceptions about photography:**

1. Each photograph does not require burdensome information about camera, film, lens, aperture, shutter speed, photographer, and weather attached to it. This information may be helpful but it is usually not critical unless your photographs will be compared with the photography of others.
2. The facility does not have the right to process your film. How would you insure authenticity if a potential defendant handled the original image before it came into your custody? You couldn't, so think twice before you let them process it. There may be legitimate concerns about confidentiality of processes, so there may be times when you allow the facility to review the photographs first.
3. Some facilities may believe that denial of photography is not denial of entry. This is up to the inspector. If the inspector cannot properly document compliance or noncompliance he/she may decide it is impossible to perform the inspection. In this case denial of photography would be denial of entry. The inspector has the call.



### **What is the best photographic media?**

Slides, prints, digital or video all have their place and applications. The most important thing is to *learn to be expertly proficient* with whatever media

you choose. A sharp, clearly lit photograph is often only second to the inspector's personal observations of a subject when it comes to case winning evidence.

## **DIGITAL STILL AND VIDEO PHOTOGRAPHY**

Digital videography is rapidly gaining popularity in enforcement documentation. It provides an instantly accessible color image, offers real time high fidelity sound, and is easily viewed on common television monitors. Some of the newest video models offer resolution beyond broadcast quality and many have the capability to take single images with the sharpness of a film camera. At least one manufacturer offers digital video cameras that are capable of taking good black and white images in total darkness. The digital format allows the inspector to download video clips and still images directly to their computer for entry into reports or for transmittal by the Internet. Digital still cameras are approaching the resolution of color film and offer wider shadow and light tolerance. Another consideration is the lower operating cost of digital photography. The initial cost of a medium quality digital still camera is little more than that of a medium quality film camera, however, this is quickly changing. Over time the cost of film becomes a serious consideration. Digital media may be downloaded into a "conformed CD archive" that takes little space, will remain uncorrupted for many decades, and the original tape or disk may be used over and over again.

### **The basic photo-documentation kit:**

1. Camera and normal lens in proven good working order
2. A haze filter to protect the lens
3. Extra battery for camera
4. Stroboscopic flash or sustainable light for video
5. Extra batteries for flash
6. Plenty of extra film or digital memory cards (3 or 4 times what you think you will need)
7. Post-its® to identify the subject in the photograph
8. Waterproof notebook and pen
9. Small 6-inch ruler for size reference
10. Compass to note orientation of the photograph
11. Convenient carrying case



Some optional equipment might include a polarizing filter to subdue reflections and allow you to capture images through glass better. A wide-angle lens can be applied to interior photography and confined spaces. Telephoto lenses have applications in open field and surveillance at a distance or where safety issues might prevent you from getting closer to the subject. Make sure that you understand the distortions these specialty lenses contribute to the accuracy of your photography. Wide-angle lenses make things appear farther apart than they really are, and telephoto lenses compress distances.

You are expected to use sampling equipment, operate a vehicle, calibrate monitoring devices and use many other pieces of equipment in a professional manner to document and report your findings. Photography is one of the most important forms of documentation and should be considered a required skill with the same professional expectation. The cost of good equipment and thorough training in photography is a bargain to any agency.



### **Photo documentation should tell a story**

Use three basic kinds of photographs to help accomplish this: the establishing shot, the medium or subject shot and the close-up.

1. The *establishing shot* shows a wide area that includes the subject and a fixed landmark to establish location and help the viewer understand where the subject is located.
2. The *subject shot* shows the entire object or special area of an event that the photographer wants to emphasize to the viewer.
3. The *close-up shot* shows unique details of the object or event that makes it unique and different from other similar objects that may be in the same area.





Think about your message before you begin taking pictures. What are the “elements of proof”? A photograph can have only one perspective at a time. To alter the perspective will require more than one photograph. Each of these categories of photographs may require several different perspectives to fully document what the photographer needs to illustrate. For example, it may be especially important to show the subject from all sides if the absence of marking or labels is significant to compliance. If it is important to show that an object is near a waterway you may choose to take several establishing shots from up and down stream as well as from both sides of the waterway. If there are many similar objects nearby you should take as many perspectives and close-up photographs as necessary to document the unique markings, position, and characteristics as possible of the subject.



The three photographs above show the “subject” (drum) from several perspectives. It also shows that only the drum was leaking and the liquid was flowing from the drum onto the concrete pad and from the pad to the soil. Each of these photographs shows a specific “element” of proof necessary to initiate an enforcement action.



#### **Some unique considerations when using video**

The single greatest advantage of video photography is the ability to record motion. Too much motion is also the most common fault of those using video. Hold the camera steady by leaning against something if you have to. Sweeping the camera from one area to the next is called a “*pan*”. Using a special lens to move from near to far or far to near is called a “*zoom*”. Keep pans and zooms to a minimum or take the risk of making your audience sick. Let the images in the frame move rather than making the camera move. Only use a pan or zoom when the relationship of the subject to its surroundings is critically important. When you must zoom or pan, keep the movement slow and steady. If you keep the ratio of still camera shots to pan or zoom shots at 10 or more to one, you may avoid vomit bags in the courtroom.

Digital video has some of the highest quality sound recording capability available. This capability also has benefits as well as problems. The microphone will pick up everything, including comments you may not want recorded. Here again planning is critical. Think through what you want recorded. Restrict extraneous comments by other inspection team members. One successful method is to keep the lens cap on and narrate what the next scene is about to show, then turn the sound recording off and record only the video portion. If your camera does not have a “mute” switch to turn the sound off you may block the sound by inserting a “blind plug” into the “external microphone” jack.

Whenever recording video or audio make sure that you have permission from a “person-in-charge” at the facility. This is usually accomplished soon after entering a facility. Most federal and state agencies are severely restricted against “covert” invasion of privacy and require clear permission from the parties involved. Learn the law and adhere to it.



**“Absence of expressed denial constitutes consent to proceed.”**


*Discussion topic: United States case law over the years has repeatedly held that expressed consent is not always necessary. Absence of expressed denial constitutes consent to proceed provided that all the parties concerned have a reasonable expectation to understand who is doing what, when, and how. This especially applies to entry onto a facility for purposes of conducting official business. In some cases it may also apply to using recording devices to document images and sound. If all parties know who you are, your purpose and have seen the camera and you do not attempt to use the camera secretly, you may consider that you have been granted permission until actually told to stop using it. How much detail should the inspector go into when stating to the person-in-charge what methods will be used to document the inspection?*

When the inspector uses photographic documentation properly it is possible to generate an accurate image of events that is so compelling that days or even weeks of litigation can be avoided. The photograph here shows an intentional discharge and spill from a truck. The license plate was used to verify the identity of the owner and the entity responsible for the discharge. This photograph, sample evidence, and testimony by the inspector eliminated most arguments by the defense and the case quickly concluded with a substantial enforcement action and penalty.

# RECORDS


A record is any means of memorializing an event, person, place or thing. Most laws authorizing inspections also authorize the inspector to review “relevant” records to determine compliance. The following are just a few of the common records that may offer important information for the inspector:

Annual reports	Production records
Shipping reports	Manifests
Inventory records	Sales reports
Process records	Permits
Quality control records	Waste management records
Environmental management system	Employee training records
Self-monitoring records	Discharge monitoring reports
Licenses	Articles of incorporation
Property records	Logs
Maintenance records	Spill reports
Safety records	Accident reports



The inspector should have a general outline of the records they will need to review during their inspection. The inspector can bring this list up in the opening conference with the person-in-charge and review them immediately or postpone the review while other aspects of the inspection take place elsewhere. The inspector will have to make this determination based upon several factors:

1. The records may not be immediately available.
2. The inspector may believe that an illegal activity is taking place outside the office area and choose to postpone the records review.
3. The inspector may want to inspect the process area first and compare real time monitoring data with records kept in the office.



Whenever possible the inspector should review original records. These are called “primary” records. This may be complicated today because many records are kept as databases on computer systems. When reviewing hard copy documents you may wish to identify records you want copied by marking them with a Post-it® or paper clip. At a minimum the inspector should look at the following areas in the records reviewed:

1. Summary reports should be cross-checked with the original data whenever possible.
2. Check for completeness and accuracy of required records and reports.
3. Determine if records are kept for the required length of time and reporting periods.
4. Compare information contained in the records and databases with firsthand observations.



When you review records you should make note for future reference, where the records were kept, who was responsible for keeping the records, who gave you the records, and whether or not the records were kept in computer databases or in hardcopy. The following notations should be made for each document copy or at least for each set of related documents you receive:

1. On each document;
  - a. Inspector's initials, document code (i.e. attachment A-1, A-2, etc.), and the date the document was taken.
  - b. Stapled items only need this information on the cover page.
2. In the inspector's notebook or in the inspection report;
  - a. What the document is
  - b. Who gave the document
  - c. Physical location of the original document

Typical methods of reviewing routine or periodic records:

1. Random (or shotgun) sampling
2. Best judgment call by inspector (Production may dramatically increase in the summer months so the inspector may emphasize those months.)
3. Complete audit of all related records (Usually this is done where there are not many records to review such as all discharge reports since the last inspection three months ago.)
4. Other options
  - a. Every other one, third one, 10th one, etc.

- b. Only specific dates
- c. Only specific topics
- d. Only outgoing shipments
- e. Only exceedances in the discharge monitoring reports

Make sure to note the method you chose and make a brief explanation why that method was chosen. Take copies of all documents that are relevant to potential noncompliance.



**Discussion topic:** *Would a facility cheat on its records? What might be some possible motives? What might be some possible disincentives? What is your role?*

The enforcement data indicates the following: The vast majority of companies operate with little or no fraud or intent to violate the law. Some will occasionally make mistakes and quickly recover when the mistake is pointed out. Often these facilities are embarrassed and angry about the violation. Sometimes the anger is at their having made the error, and sometimes the anger is at you or the invasive and troublesome government. It helps if you understand their psychology and frustration. **However, those that do intentionally cheat don't intend to get caught.** The cheaters are often the most friendly and personable to the inspector and have thought their deception through in detail. Do not let the demeanor of the facility operators distract you from a thorough and unbiased investigation of the truth. If they are truthful and honest, the documentation will only prove it. Be cautious when facility operators complain that the government has a grudge against them or that you are not acting in *good faith*. They want to distract you from the truth. The good faith you are acting under is the faith of the agency and public that you will find the truth in a dispassionate, thorough and unbiased manner. Good faith should not be confused with *blind faith*, believing in everything a facility representative tells you.

## SAMPLING



### WHEN, WHY, HOW

Sampling and sample analysis may be necessary to document potential evidence of noncompliance. Sample analysis is expensive, so make sure it is



necessary. Individual programs approach sampling and the need to sample differently, so carefully follow any specific guidance you have.

Once the inspector has made a determination that sampling is necessary the next consideration is to insure that the sample will be representative of the site, situation or time that he/she wants to characterize. There are two fundamental types of sampling, composite and grab. Composite samples may be described as a uniform measure taken of a specified volume, area or time. A grab sample may be described as a sample of a precise place at a precise moment in time. Usually sample exercises are thoroughly planned in advance and meticulously executed. However, it may be necessary to take spontaneous samples of opportunity. These unanticipated samples may be required because of changes in a facility's processes, permit status, or because there has been an event that requires chemical evaluation.

The procedures for taking samples are too complex to go into detail in this document. Specialized training in sampling, shipping, analytical methods, quality assurance, and data quality should be considered fundamental to the development of every inspector.



#### **When to take samples:**

1. When there is no data available
2. When there is insufficient data
3. The data available is in doubt
4. Data is needed to document an event, discharge or release
5. Sampling is required by law or permit

Program specific guidance or manuals will provide more specific instruction about when and how to sample.



#### **Sample Plans**

Initially there should be a plan with the method identified to target a specific chemical (what chemical to look for). The inspector should clearly identify the minimum chemical detection limits (such as parts per million) required for the analysis. The inspector will also have to identify the *level of confidence* required in the analysis. This is usually expressed in terms of + or - percent. For example, it may be required to have a better than 90% confidence that the analysis will detect all Polychlorinated biphenols (PCBs) greater

than 50 parts per million. If this information is not in a site-specific plan, it should be in a general *Standard Operating Procedure* (SOP) kept on file.

SOPs are written general procedures that should be used for the most common types of sampling. Each organization or agency should have SOPs on file that are followed for all routine activities. This insures defensible repeatability, consistency and a written record of approximately what was done when an inspector finds it necessary to take a sample of opportunity. Inspectors should be familiar with SOPs common to the subjects they work with. When an inspector must alter a procedure because of unique circumstances in the field, the inspector should document and explain how and why he/she altered the procedure.



### **Site-specific Project Plan**

There are many confusing terms and protocols, which relate to the same general issues in the diverse programs within any agency. It is the inspector who has the responsibility to keep track of his/her own objectives and translate them into the jargon of the program the inspector is working under. These activities and protocols are usually written into a site-specific inspection plan that outlines the objectives and expected activities to achieve those objectives. Project plans vary from simple and routine to highly complex and comprehensive, usually depending upon the complexity of the site and objectives.



### **Quality Assurance Project Plans**

To ensure that each sampling effort goes through a careful thought process before it is undertaken, most agencies require that a Quality Assurance Project Plan (QAPP) be prepared in advance. In addition to a discussion of the areas of investigation, sampling activities, methods, and analysis, the project plan addresses technical issues, safety, roles and responsibilities, and reporting requirements. This plan is designed to make sure that each activity will meet its intended objectives and be legally defensible through established and accepted protocols. The person who generates the QAPP is referred to as the Project Manager (PM). The person who has the lead responsibilities in the field for carrying out the plan is referred to as the on-scene Project Manager. Lawyers, program, and laboratory staff do not have the field experience and knowledge of the site-specific objectives to write the QAPP; the generation and execution of the plan must be the responsibility of the lead inspector though he/she may enlist the assistance of other specialists and professionals.



### **Data Quality**

A considerable amount of data may result from samples collected in the field. This data is of little value unless it is of good quality. The initial step in setting sample objectives is to clearly establish the ultimate use of the data that will result. This step sets the foundation for designing the sample plan and a means to compare and assess the results. Data quality of a representative sample is referred to in terms of *precision* and *accuracy*. *Precision* refers to the variability of the measurement process when identical portions the same sample is measured more than once. For example three separate analyses of the same chlorine sample may be 58 parts per million (ppm), 61 ppm, and 59 ppm. There was a variation of only 3 ppm. The precision was indicated by a difference of 3 ppm. *Accuracy* refers to the closeness of an observed measurement value to the sample's true value. If data is to meet the objectives established for a sample collection effort, precision and accuracy must be maintained.



*This is an analogy that may help you understand precision and accuracy. Think of the sample as a target bull's-eye. The exact center of the target represents the true chemical concentration. How close to the center each analysis comes is a measure of accuracy in finding the true value. How closely the results group together is a measurement of the precision. If the analytical data is widely dispersed the precision is at fault. If the data varies from near the center to far away the accuracy is poor.*



**Sample documentation centers around four prime issues:** insuring that the sample is representative, tracking the sample, using proper methodology, and reporting the data in a form that is applicable. The procedures necessary to accomplish this are outlined in the QAPP.

1. Was the sample representative of what you wanted to evaluate for compliance? Did it represent a specific waste stream, site, event, or time period?
2. Can you prove where it came from, where it went, what was done to it, and that there was not an opportunity to compromise the sample along the way? A standard form that tracks everyone who handled the sample and when it entered and left their possession is useful to establish the "chain of custody."
3. Was the correct methodology followed to insure that the sample was (a) taken properly for the substance and matrix in question, and (b)

were the proper analytical methods used to make an accurate and precise evaluation?

4. Was the analytical data reported in the appropriate units to determine compliance? Were all quality assurance and quality control measures also reported?

These are a few of the tools used to track sampling events:

- Field log or notebook
- Field photography
- Field lab data sheet
- Sample numbers
- Sample labels
- Analysis request
- QAPP
- Sample plan
- Check lists
- Field generated diagrams, maps and measurements
- Chain of custody

## **THE CLOSING CONFERENCE**



The closing conference is important for several reasons. First of all it is an opportunity to confirm your observations and review your preliminary findings with facility personnel. Part of your job may be to inform the regulated community as well document compliance. Before you may make suggestions you should make sure there is a full understanding of the subject matter. Review your observations and request clarification that might offer a more complete or accurate evaluation of the event or subject. The fact that you made this request during the inspection may be important if new material is provided by the facility at a later time and they claim that you never requested the relevant information.



If litigation takes place at some later date it is not uncommon for opposing counsel to argue improprieties, inspector negligence or even incompetence. They may make accusations like, "...you did not indicate that anything was a problem", and that, "... if you had, my client would have provided the information." The closing conference is your chance to go over and verify all of your significant observations and to request clarification or further documentation. Note what you reviewed, what requests you made, who you made them to, if you requested further documentation and when that documentation was to be provided.



**Should you make on-site compliance determinations?** The short answer is, no, unless there is a specific authority or agency policy to do so. It is not the inspector's role to unilaterally circumvent all of the agency's review and compliance options. There are some cases where small issues or even penalties may be issued by the inspector. This would be similar to a policeman writing a ticket. Larger issues with greater liability usually have more extensive checks and balances to insure required "due process" before making a final compliance determination.

There is a fine line between informing the facility that there "may be serious issues of noncompliance, and telling them that there were specific violations. There are similar cautions not to conclude that, "There were no violations." Temper your observations with phrases like these. "In my experience, this appears to be a violation of this or that citation in the law." Refer them to the specific statute in the law and let them reach their own conclusions. This way you are pointing out the issue but that the agency must make the final determination. You have not compromised any options the agency may have and you have not confirmed absolutely that a violation has or has not taken place. In addition you have deferred to the actual law so that they may make their own determination.

Often, facility manager may seek your advice on improvements or actions they must take to come into compliance. Carefully consider with your agency the type and extent of advice you give. Simple, straightforward advice is usually fine, but the inspector's role may become unclear if they act as a consultant to the facility. The agency may ser this role, but they should use other personnel so as not to jeopardize the inspector's role.

# THE INSPECTION REPORT



If your hard work can be said to produce a product it is the inspection report and attachments. An inspection report is the permanent record in clear, succinct, factual language suitable for the intended audience. The primary objective in generating the report is to organize and coordinate all documentation and potential evidence in a comprehensive, understandable and usable manner. The narrative and supporting documentation must be:

**Accurate.** All information must be factual and based upon sound practices. All observations must be the verifiable.

**Relevant.** Information in the report should be pertinent to the subject and objectives of the inspection. Information that is not material to the objective should be omitted.

**Comprehensive.** You should leave nothing out which would contribute to an accurate determination of the facts or support the objective of the inspection. It is better to have too much good evidence than not enough.

**Organized.** Your report should be well organized and flow in logical sequences. Readers with less technical experience or knowledge should be able reach rational conclusions based upon the narrative and supporting evidence.

**Objective.** Factual information should be presented objectively without drawing conclusions. Let the narrative and logical presentation of information lead the reader to draw his/her own conclusions.

**Clear.** The report should be written at a level for its intended audience. It should be succinct and to the point.

**Professional appearance.** This is a permanent record and a professional document subject to scrupulous review. Use acceptable grammar with proper spelling and punctuation. Make the document legible, neat in appearance and organized for easy use.

## Some practical considerations:

1. Write in the first person. "I asked Joe what he did."
2. Write in the active voice. "Joe told me that he buried the drums behind the shop."

3. Write in logical order. Most inspectors write their reports in the same sequence that they conducted their inspections. Attachments and supporting documents should be identified appropriately and in logical relationship with the narrative. For example: “I reviewed the waste manifests and discovered a mistake in the number of drums in section 1(a) of the manifest dated March 12, 1998 (See attachment A-3).”
4. Write the report so that information is easy to find. This is often aided by the use of headings.
5. Avoid being excessively formal or technical. You should try to clarify rather than make it unnecessarily complex or technical. Most newspapers are written in 6th to 8th grade language to transmit information to the widest possible audience. This should be a consideration for the report writer also. Clarity is far more important than sounding academic.
6. Avoid the use of colloquialisms, jargon or offensive language. Here are two examples: “The perp exited the sport utility vehicle.” This is cop talk jargon and of little use. This is a better example and provides more useful information. “Joe Dokes got out of the red, 1988 GMC Suburban.”
7. If your professional credentials (Engineer, chemist, scientist, etc.) and inspection objectives require you to reach a professional conclusion do so with a clear explanation of your logic, calculations and supporting materials. This should be outlined clearly enough in your report that any other individual with similar professional credentials can repeat your work and reach the same conclusion.
8. Provide supporting verifiable data for any calculations or summaries included in the report.
9. Avoid making assumptions by using words like “all”, “never”, “always”.
10. Write an Executive Summary if the report is long. Most managers will not have the time to read the entire report, so a summary will quickly focus them on the conclusion.

*A good report gives the important information so clearly and completely that no one has to explain further.*





Various program offices interpret writing style as discretionary. The facts tend to prove otherwise. In the courtroom, style is strictly “first person singular”. Passive voice begs clarification. Who did what to whom? Just say it right out the first time. “I asked Joe.” “Joe said Susan did it.” “Susan told me she did it.” The less difference there is between the language used in the report and the same information given later in testimony the better.



**The bottom line to a good report:** A good report is so clear and so complete that the inspector could die and the potential evidence would still be able to support the case to a successful completion.



**The following outlines typical headings and pertinent information common to most compliance reports:**

**Heading:** This should include the type of inspection, site or activity name, and the date of the inspection.

**Facility**

**Address:** Corporate or head office address where all official correspondence should go.

**Site**

**Address:** Exact geographic location of the site, especially if different from the Facility Address.

**Site**

**Contacts:** Name, position or title, and telephone number.

**Inspection**

**Team:** Name, position or title, and telephone number.

**Site**

**History:** This may include the compliance history, and the history of the facility site location, processes and ownership. There should also be a brief description of the present operation.

**Inspection**

**Time/Date:** The hour, day and year of the inspection.

**Opening**

**Conference:** To whom did you show your credentials? Who was present, and what were their titles or positions; what was discussed; were there specific arrangements? You should describe if entry was granted or denied, special conditions, problems or restrictions.

**Field**

**Inspection:** This is a narrative of the field inspection, events and observations. Where did you go? What did you do? What did you see?

**Record**

**Inspection:** What records were reviewed? What records were copied and taken? Where were the records kept and who was in charge of them? What selection method was used to review records?

**Closing**

**Conference:** Who was present? What was discussed? Did you request further information, from whom and by what date?

**Samples:** What samples were taken, where, when, and of what? Attach copies of all supporting documentation and chain-of-custody. You should also include a discussion of the time, method of packaging, transporting to, and receiving samples at the lab.

**Compliance**

**Concerns:** State as your opinion only. Regulations may be cited in the report or may be cited in an “enforcement confidential” memorandum of transmittal to the program office or counsel. Some attorneys have strong feelings against the inspector drawing any enforcement conclusions at all, because it may complicate or limit the agency’s discretionary powers.

**Attachments:** List and identify all notes, documents, photographs, notices, and documentation. This may be done in the inspection narrative itself or in an index of attachments.

**Date and**

**Signature:** It is your report, so sign it!

# TEAMWORK AND COMPLEX INSPECTIONS



The inspector is a critical member of a larger team. Samples require chemists and scientists to analyze and evaluate data. Staff in various programs may evaluate the inspector's findings to make a final determination of compliance and enforcement options and lawyers will develop the case for agency action.

All of the steps that are required for a single media inspection have even greater emphasis when conducting multimedia, high profile or complex inspections. Additional considerations come into play as the inspector now takes on the role of *Team Leader*. The team leader must provide critical *coordination*; insure rapid, accurate and clear *communication*; maintain a *chain of command*; and protect *confidentiality*.



1. *Teamwork* is the cornerstone to any work involving more than a single person. Members of the team must respect the work required of other team members. The team leader should serve as the central focus of critical information and encourage team members to share information within the bounds of the team and its objectives. The team leader should also serve as the central focus if the members of the press should arrive and request information. If a single member begins to act alone and without consideration to other members the entire effort may be placed in jeopardy.
2. *Confidentiality* must be maintained throughout the entire exercise from planning to enforcement referral. This applies to all activities and communications outside the team.
3. A *chain-of-command* is necessary for coordination, and to deal with issues affecting two or more team members, or between the facility and the team. Facility staff quickly learns that it can disrupt an inspection by dividing team members and creating confusion.
4. *Communication* must be maintained through all phases of the planning, preparation and execution of the inspection, case development and potential referral. Once again the central focus should be the team leader.
5. *Coordination* and planning are critical to the smooth execution of any exercise. It is especially important where there is a potential for an enforcement action.

# CONDUCTING MULTIMEDIA INSPECTONS



**Multimedia inspections** are an agency level activity rather than an individual media or program activity. Multimedia inspections are broad spectrum, and can be politically sensitive and resource consumptive compliance monitoring activities. Multimedia inspections have high visibility. They achieve a “snap shot in time” of a facility’s compliance under several or many regulatory authorities. This form of inspection represents a significant portion of the total compliance impact on high priority segments of the regulated community and may provide a better foundation to establish more efficient and innovative routes to compliance.



**Multimedia** inspection activities require all the methods used in single media inspections but differ from single media inspections by elevating the importance of **teamwork; confidentiality, chain of command, communication and coordination**: Teamwork is vital to the ultimate success of every activity in a Multimedia inspection. No “Lone Heroes”. The team leader should be careful in selecting team members as neophyte or even veteran single media inspectors may not realize the importance of working as a member of a team.

For these reasons only journey and senior level inspectors should be expected to participate in these task force level enterprises. Advanced leadership skills are mandatory when leading multimedia inspections. The “Team Leader” has a significant role to play in every phase of the inspection from preparation, to field execution, coordination, reporting and follow up activities. This individual should be of senior status with a broad range of investigation, field inspection, technical, program, communication and administrative skills.



**Team Leaders should be senior inspectors with expertise in leading investigations in at least two media. In addition team leaders should have experience and skills in the following:**

1. Demonstrated leadership skills
2. Skills in project management
3. Experience leading one or more single media inspections as part of a multimedia inspection

4. Demonstrated tact and diplomacy in dealing with the regulated community and other regulatory authorities
5. Serving as a liaison, project coordinator and insure QA/QC.



**Inspectors taking the lead for any individual media must meet minimal criteria which include the following:**

1. Completion of all required training
2. Knowledge of agency's policies and procedures on the following topics:
  - a. Inspection authorities
  - b. Entry procedures/problems
  - c. Enforcement action procedures and policies
  - d. Common legal issues encountered during and resulting from inspections
  - e. Basic safety procedures and concerns
  - f. Specific safety concerns for the facility being inspected
3. Thorough familiarity with Quality Assurance requirements:
  - a. Sample collection
  - b. Identification, preservation and transporting
  - c. Chain of custody procedures
4. Knowledge of relevant industrial processes, waste control and waste monitoring
5. Documentation skills through uses of the following:
  - a. Interviews
  - b. Photography
  - c. Document and record review
  - d. Technical and investigatory deductive reasoning
  - e. Communication skills (verbal and written)
6. Basic understanding of the procedures for obtaining warrants, affidavits, technical requirements for warrant application and warrant procedures for serving warrants and obtaining and documenting warrant returns.



## CONCERNS IN THE FIELD FOR ALL TEAM MEMBERS

1. Report any observations, materials or events that may be of interest to other team members. This is a team effort and information should be freely exchanged among inspection team members.
2. Keep confidential information under strict control.
  - a. Keep confidential information and subjective observations with team members private.
  - b. Keep all team documentation, project plans, safety plans and log-books secure and under strict document control.
  - c. Sensitive discussions should not take place on facility telephones where they may be overheard.
3. Laboratory samples and materials must be maintained under chain-of-custody **at all times**.
4. Restrict on-site activities to normal working hours unless appropriate for activity being monitored.
5. Keep the Team Leader informed of all contingencies and events that may alter existing schedules or procedures.
6. The Team Leader should handle all media contacts and those should be very limited and planned beforehand. Agency coordination is usually advisable.
7. Always maintain a thorough, polite, and professional demeanor.
8. Do not criticize any team activity, another member of the team or associated agency in public at any time during the inspection.



### The following are typical of the early planning phases of a Multimedia inspection:


1. **Targeting** through a neutral inspection scheme by the cooperative input of regulatory agencies.
2. **“Need to Know”** distribution of information to agency managers.
3. **Deciding which media or regulatory programs** should be covered at each targeted site.
4. **Selection of specific program inspectors** for each site inspection.

5. **Scheduling** by those responsible for coordinating and conducting the inspections.
6. **Logistics and planning** for each site.

It is imperative that confidentiality be maintained throughout inspection planning and scheduling. Even the most casual mention of a targeted site can leak out and create frustrating and unnecessary damage control. Communication should be kept to face to face contact, controlled telephone access, or written communication stamped "Enforcement Confidential".

Avoid the following:

1. Public mention of the site
2. Uncontrolled notes or memos
3. Mention of the site to those not involved directly with the inspection

 **SCHEDULING:** Sequencing of specific activities will vary based upon inspection priorities. If the specific media inspection is broad in scope, or will be complex because of an extensive permit, or involves sampling, it will usually be scheduled toward the beginning of the multimedia inspection period to allow extra time. Placing the broader based inspections first also allows an early overview of the entire facility, operations and processes which can be shared with other inspection team members.

Every site requires continual adjustment and modification of the team schedule and methodologies. Each step must be justified and defensible through QAQC documentation. Not doing this could negate the viability of the entire effort.

Get your inspection report drafted quickly so that debriefing can take place promptly after the inspection is completed. Many will need a general idea of the compliance issues resulting from the inspection.

***"Inspectors that build good case files tend not to have to go to court."***

*by the Author*



## ON BEING A WITNESS



### The oath of affirmation:

“Do you swear to tell the truth, the whole truth, and nothing but the truth?”



### TELLING THE TRUTH

You can only tell the truth about what you know and perceive to be the truth. The hard part is determining what you actually know and telling it accurately. It has been some time since you conducted the investigation and inspection phases that brought you to this point. It is not uncommon for months or even years to have passed. Time and events have clouded your memory. But now you are asked to pledge your most solemn oath that you will tell the **truth**, the **whole truth** and **nothing but the truth**. Suddenly those words begin to take on serious meaning.

Have you ever said something that wasn't the truth? Of course you have — everyone has. Have you ever exaggerated, embellished, or added a little here and there to bolster your story a little? Once again, we all have. Did you ever argue your viewpoint and speak authoritatively about something you weren't really sure of? Once again, most people do this with some regularity — some more than others. You see it around the office when people express personal opinions about sports, religion, politics or international events. The stronger their emotions on the subject the more they are inclined to add unsubstantiated information. Everyone tends to offer opinions with less than perfect information. Sometimes people have advanced to elevated positions of authority and responsibility on less than credible credentials. Right?

One of the court's primary responsibilities is to diminish this aspect of human nature to the greatest degree possible and attempt to find the truth and then use the truth to make a determination whether an alleged fact exists.



The first step is to have the witness appear in person and offer their highest oath of commitment to tell the truth. This oath is intended to have a religious, social and legal basis. The point of the oath of affirmation is that the witness swears that there is no higher personal, public or private obligation than to tell the truth to the court.



The court backs the vow of affirmation up with the threat of severe punishment if you don't tell the truth. Failing to tell the truth under sworn testimony

is called perjury. Perjury cannot only lead to a loss of credibility but even a loss of freedom and incarceration. Are we starting to get your attention yet?


You have been told that you are a possible witness in a legal proceeding based upon something you participated in perhaps years ago. Your agency has spent enormous quantities of time and resources to arrive at this juncture and now it is depending upon you to support its actions. Suddenly you realize that you don't remember much about the details of that activity. However, all is not lost. You have read this manual cover to cover and taking the counsel offered here, you performed your investigation and documented the inspection thoroughly and accurately. There is a complete record and you have an experienced and highly trained counsel to help you. Right? If not, you are in deep doo doo.

## **HOW TO PREPARE FOR GIVING TESTIMONY**

Your counsel has reviewed every piece of documentation and determined what will be absolutely necessary to enter as evidence. The essential core of that evidence will be the "elements of proof" for the agency's allegation that a violation of law has taken place.

### **Review and Preparation Phase**

Review the documentation establishing the "elements of proof" first. Then review everything else. Go over this with your counsel and discuss the way counsel will bring this before the court for admitting it into evidence. What aspects of the "5-Ws" do you have personal knowledge about? Equally important, what don't you know?

 Are there areas where the documentation is weak? You may know these weaknesses better than counsel. Inform them and discuss how this will be addressed. It is during this preparation phase that you and your counsel will firm up your agency's case and attempt to anticipate everything the court and counsel for the defense might bring out against it.

It is often a good idea to visit the court to become familiar with the surroundings.

### **Drill or Practice Phase**

One of the worst things that can happen for any lawyer is for information to start coming out that they had not prepared for. Therefore your counsel will tell you how they will use you in court. Counsel may actually tell you what

questions they plan on asking and what your answers will be. Counsel wants to know what you have to contribute and keep your testimony only to that information and not offer opposing counsel an opportunity to deviate from your agency's view of the argument. The more experienced counsels recognize the importance of this drill and the need for you to know what you will be asked and for them to know what you will answer. Lawyers hate surprises.



### **Court is Theater**

The function of the court is to use the truth to decide if a fact exists or not. The function of the agency's counsel is to bring true evidence before the court and persuade the court that an alleged fact (i.e. violation) exists. The function of opposing counsel is gain the greatest benefit to their client permissible under the law, regardless of the truth. The judge is the referee that insures that the play remains within the rules of law. Understanding these functions will help you from taking things too personally.



### **Discovery**

Opposing counsel will usually have a chance to review your documentation and anticipate your arguments before appearing in court.



### **Kinds of Witnesses**

There are two kinds; *fact* or *lay* witness, and *expert* witness. As a fact witness you may testify on anything you experienced with your senses. Expert witnesses may offer professional opinions within the bounds of their professional qualifications and credentials. Think twice before allowing your counsel to present you as an expert as this may open you up to greater testing by opposing counsel.



### **Court is Adversarial**

The three most common attacks on a witness are *competency*, *credibility*, and *impeachment*. *Competency* is determined by the judge and done on a case by case basis. A competent witness is legally qualified to testify. For a fact witness that usually means that they are alive and have the majority of their mental faculties. Nearly anyone is competent if they were present at the event and any of their five senses were working. *Credibility* refers to your worthiness for belief. Here the defense has a chance to peck at you on the stand. Were you qualified to make the observation? Is there any reason the court or hearing officer should not believe what you say? There are many subtleties here. A lack of composure under fire can tarnish your credibility in the view of a jury or hearing officer. Do not elaborate beyond your direct knowledge or you open yourself to attacks on your credibility. *Impeachment*

is what happens when the defense detects a flaw in your testimony. The job of the defense is to assault that chink in your credibility until it looks like a chasm to the trier of fact (judge). Stick to what you know. The defense should be aggressive in attacking the evidence and who obtained that evidence.



***Always tell the truth! Always tell the truth! Always tell the truth!***

Your counsel should have prepared you well before you give testimony. You should be well briefed on the strengths and weaknesses of your knowledge and the case. Refresh your memory by reviewing all of the available documentation, especially your report, photographs and notes. You should be comfortable with the courtroom and its procedures. Your counsel should have reviewed the questions they intend to ask you and may review your answers as well. This is not cheating, but opposing counsel may try to create doubt or insecurity in your mind by asking the question, “Did you discuss this with your attorney before you came here?” as if there were something wrong with that. Your answer should be a truthful, “Yes.” Your counsel should have reviewed their questions and how you said you would answer those questions. Opposing counsel might continue and then ask you, “...and what were you told to say?” The implication would be that your counsel told you what to say. Your answer should be a truthful, “I was told to tell the truth.”



**What if you are instructed to perjure yourself?**

What if, in their zeal to bolster a case or insure a certain victory, your agency counsel should direct you or even suggest an answer other than what your personal knowledge and experience knows to be the truth? You should immediately inform them that you will only testify what you know to be the truth. Remember your oath of affirmation is to the court, not the agency. ***Your oath to the court supersedes all others.*** You cannot and must not hold any obligation above your duty to inform the court of the truth.

This also holds true if you learn of an inaccurate statement you made under oath subsequent to giving testimony. In this case you should proceed as follows:

1. Immediately inform your agency counsel and determine if the statement was material to the case.
2. Through agency counsel determine how the court and defense counsel should be informed.
3. Clearly determine what the true information should be and if you are correctly clarifying this information to the court.
4. Notify the court and defense counsel.

***Discussion topic:** What if you testified inaccurately (for any reason) and after discovering this your counsel or the agency directs you to remain silent? Is there any political or legal obligation that supersedes your oath to the court to provide truthful testimony? Here is a helpful hint: You gave your oath to the court when you gave testimony.*

There are rare examples where subsequent information may alter preexisting testimony. For example a laboratory may learn that an analysis report may be inaccurate if they learn that chemicals used in calibrating their equipment may have been out of date. If this has the potential to alter the outcome of the case there is an obligation to inform the court. This information is said to be “material” to the court.



**Here are some practical aspects of being a witness:** The more you say the more chance the defense has to find an area of weakness. **DON'T RAMBLE.** Answer only the question put to you and then **shut up.** A common error is to answer a question which is anticipated but has not actually been asked. You may think you know where the defense is going, but they may have another agenda or may not have thought of the issue at all. What you may have just brought up, may or may not be relevant and can take days and even weeks to deal with. If you don't know, say “I don't know”. Don't allow defense counsel to intimidate you into answering a question you don't have direct knowledge of. Pause to collect your thoughts and emotions. This will also give your counsel a chance to object.

If you don't understand a question you should **PAUSE** and take time to think about it. You cannot answer a question you do not fully understand. It is usually permissible for you to ask for rephrasing or that a complicated or compound question be broken up. You may ask the judge to allow you to refer to your field notes, photographs, inspection report or ask that the question be repeated if you need to. Some aggressive defense counsels may press you for answers by establishing a rhythm of easy “yes or no” questions and then abruptly change pace with a complicated question in hopes of getting a poorly considered answer or compromising your composure. Simply pausing before you answer will allow you to reflect and maintain your demeanor. Don't let the defense counsel's silence motivate you to ramble. Remember how silence was used in interviewing? This trick was probably perfected in the legal arena. Leading questions, intimidation, assaulting your credibility, or twisting interpretations are all counsel techniques which have ethical boundaries. However, some defense attorneys may tend to test these boundaries if they find a technique working to their clients favor. Don't allow any

action by the defense to affect your emotions or behavior. Your attorney is allowed to object to possible breaches of protocol and your calm composure will only reflect your professionalism.



*Trials are by nature adversarial*, recognize it, stick to what you know, and answer only the question put before you. Some defense attorneys are even more aggressive than just described. However, you are far more likely to suffer from boredom than an aggressive assault. Here is the bottom line; you are there as a **WITNESS**. Relate what you did and what you know and always, **ALWAYS TELL THE TRUTH!**

**The inspector's motto:**

- \* **FIND THE TRUTH**
- \* **TELL THE TRUTH**
- \* **PROTECT THE TRUTH**