

AGENCY INSPECTIONS: WHAT DO YOU DO?

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I. Introduction

There is a continued emphasis on enforcement activity begun in the 1980's by the United States Environmental Protection Agency ("EPA") and by the Occupational Safety and Health Administration ("OSHA"). It seems that each fiscal year new records are being set for levied fines and returned indictments. The Department of Justice always seems to have a conviction rate in environmental crimes cases that exceed 95%. Typically, OSHA also has very successful years. Since enforcement budgets for these administrative agencies are determined by enforcement initiative (read dollars collected in fines), the more enforcement activity, the larger the budget. As a result, the regulators are stepping up both civil and criminal enforcement activities with greater emphasis being placed on criminal enforcement. As one commentator has observed, often times the only difference between the civil and a criminal investigation depends on who get to your door first, the civil inspector or the criminal inspector.¹

Congress is also actively involved, redefining and strengthening environmental crimes, introducing new environmental crimes bills, establishing the United States Sentencing Commission to establish sentencing guidelines in criminal enforcement actions,² through the reauthorization of various acts (the Clean Air Act and the Resource Conservation Recovery Act) and through criticism of the EPA and OSHA for being too lenient in negotiating reductions in civil fines. Additionally, the community is becoming more environmentally aware and active. There is an increased environmental awareness in the community and as a result of this "greening" of the community, more questions are being asked and will be asked and greater scrutiny will now be given to all operational phases which may impact on the environment. All of this activity outside of the agencies is not lost on the investigators and all bear on the enforcement initiatives for both the EPA and the OSHA.

So what do you do when the inspector shows up at your facility and tells you that he has had a complaint filed by the "friends of dear Mother Earth" that your facility is pumping hundreds of thousands of pounds of pollutants into the atmosphere and that he wants to inspect your facility? What do you do when the investigator shows up at your facility at 5:00 p.m. on

¹ Current Developments, BNA 1255, Nov. 2. 1990.

² The Comprehensive Crime Control Act of 1984 established the United States Sentencing Commission. For an example of the harsh application of the sentencing guidelines in an environmental crimes case see *United States v. Pozsgai*, 897 F.2d 524 (3rd Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 48 (1990).

Friday afternoon, unannounced and without a warrant, and wants to conduct an inspection of your facility? What do you do when an investigator shows up at your facility at 3:00 p.m. on Tuesday afternoon with a search warrant and wants to seize all records of the facility? What do you do when an investigator, during an inspection, pulls out a video camera and begins making a videotape of the facility? What do you do when an investigator, during an inspection, demands to talk to all of your employees? What do you do when an investigator takes water, soil and air samples? What do you do when an investigator has hired a company to fly over your facility to take aerial photographs as part of their investigation? What do you do when an investigator has been monitoring activity at your facility from across the street? What do you do when a private contractor appears at your door and wants to inspect your facility? What do you do?

There are steps that can be taken to protect individual and corporate rights in an administrative investigation and there are steps that can be taken to minimize any inconvenience to individuals, corporate operations and even the agency investigator. It is a fact of life in the regulated industries that inspections will occur. In order to protect individual and corporate rights and minimize any inconveniences, preparation for the inspections is required. No longer will ignorance be tolerated; knowledge of the policies and procedures utilized by the administrative agencies in conducting inspections and the agency perspective for the reasons behind audits and inspections is a necessity. Knowledge and understanding of the statutory authority for the inspections and the limits on that statutory authority along with the procedures agencies use in implementing the statutory authority is an absolute necessity. Knowledge of agency policy and procedure will help minimize the risk of audits through preparation and training. Knowing your rights will allow better preparation, reaction and interaction with the inspectors during the inspection process.

II. Statutory Authority

A. Statutory Provisions

1. Occupational Safety and Health Act (“OSHA”): Under OSHA, the inspector may enter “without delay at reasonable times” to inspect and investigate.³ The inspector must show proper credentials and the entry may take place only during regular business hours or other reasonable times.⁴

2. Clean Water Act (“CWA”): The CWA gives the inspector or an authorized contractor the right to enter.⁵ The CWA does not restrict entry to reasonable times but does restrict access to documents to reasonable times.⁶ Again, proper credentials must be presented.⁷

³ 29 U.S. C. § 657 (1982).

⁴ *Id.*

⁵ 33 U.S.C. § 1318 (1982).

⁶ *Id.*

⁷ *Id.*

3. Resource Conservation and Recovery Act (“RCRA”): Under RCRA, the inspector, upon presenting the requisite credentials may enter the facility, inspect the facility and take samples.⁸ The entry must be at a reasonable time and must be “commenced and completed with reasonable promptness.”⁹ The reasonable promptness provision is unique to RCRA; however, as a practical matter, agencies will attempt to be prompt.¹⁰

4. Clean Air Act (“CAA”): The CAA is similar to the CWA in that the inspector may enter upon presentation of his credentials but entry is not necessarily restricted to reasonable times; however, like the CWA, document access is limited to reasonable times, so as a practical matter, it is very likely that entry will only be requested during “reasonable times.”¹¹

5. Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”): CERCLA allows entry to facilities at reasonable times to conduct inspection and to determine if an inspection is necessary,¹² CERCLA, like RCRA, has a reasonable promptness requirement.¹³

III. Agency Perspective:

A. Why Inspect?

1. The EPA inspections are performed for a number of purposes which include routine assessment of statutory and regulatory compliance, review of the facility activity and status with respect to a previously filed administrative enforcement action, review of the facility’s compliance with its permits and permit deadlines within the regulatory scheme and as a response to tips from neighbors of the facility or disgruntled employees at the facility or even former employees.

2. The OSHA inspections are performed for various reasons, also, and these include, again, routine assessment of statutory and regulatory compliance, review of facility activity and status with respect to previously filed administrative enforcement actions, response to tips of

⁸ 42 U.S.C. § 6927 (a).

⁹ *Id.*

¹⁰ Similar reasonable promptness language is also found in the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”); 42 U.S.C. § 9604 (e) (4).

¹¹ 42 U.S.C. § 7414(a) (2).

¹² 42 U.S.C. § 9604 (e) (3) and (4).

¹³ *Id.*

alleged violations at the facility and as a response to accidents which occur in “high hazard” industries.

B. Agency Internal Procedure

As with any agency practice, personnel/agency preparation is important.

1. Prior to an inspection, an investigation will: (a) determine the scope and objectives of the inspection;¹⁴ (b) coordinate, as necessary, the inspection activities with other regulatory or enforcement personnel such as the Department of Justice, state agencies, the Coast Guard, the FBI, or the Corps of Engineers;¹⁵ (c) develop an understanding of the technical, regulatory and enforcement aspects unique to the facility;¹⁶ (d) develop a plan, or strategy, for the actual inspection to make sure the inspection is consistent with the scope and objectives previously established;¹⁷ and (e) determine health, safety and equipment needs and requirements for the inspection.¹⁸

2. The purpose and objective of an investigation are intertwined and one cannot be determined without the other. The purpose and scope will help the inspector determine who to coordinate the inspection with, what information is needed on the facility, what documents will be required, whether sampling will take place and whether to give advance warning of the inspection to the facility.¹⁹

¹⁴ United States Environmental Protection Agency, Resource Conservation & Recovery Act Inspection Manual, § 2.2 (January 1989) (“RCRA Inspection Manual”). See United States Environmental Protection Agency, NPDES Compliance Inspection Manual, § 2.2 (July 1986) (“CWA Inspection Manual”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The RCRA Inspection Manual provides specific instructions for preinspection procedure as does the CWA Inspection Manual.

- What offices or agencies to coordinate the inspection with.
- What information on the facility and aspects of the facility the inspector should concentrate on in developing background information and studying the facility.
- What regulations and enforcement documents to obtain and review in preparation for the inspection.
- Whether or not sampling will be required during the inspection . . .
- Whether or not it is appropriate to notify the facility prior to the inspection.

RCRA Inspection Manual, at § 2.2

3. Once the purpose and scope is determined, the inspector will contact other agencies to coordinate the inspection process. The inspector may contact other federal programs (RCRA, CWA, CAA, CERCLA, TSCA or OSHA), other federal agencies (Department of Justice, the FBI, the Corps of Engineers) and state and local agencies. The purpose of the coordination is to avoid interference and to facilitate the sharing of information.²⁰

4. If activities are to be coordinated with any other agency either federal, state or local, the inspector will coordinate the schedules for the inspection, supply necessary information to the coordinating agency and generally operate as a clearing house of information.²¹

²⁰

Again, the RCRA Inspection Manual sets out the specifics:

- They are pursuing a planned action that might be interfered with by the inspection or should be coordinated with the performance of the inspection.
- The inspection may provide incidental share information that would be useful to them in their own regulatory or enforcement activities (e.g., an inspection at a facility with an NPDES permitted wastewater treatment facility that may be of special interest to the office responsible for water enforcement).
- The inspection is in part or in total being performed to provide them with information at their request (e.g., an inspection performed to verify permit application information or support an enforcement action).
- They share jurisdiction for RCRA enforcement at the facility, in which case scheduling joint inspections may be desirable (e.g., where a State agency has partial authorization covering some units at a facility, and the remaining units are subject to EPA enforcement).

RCRA Inspection Manual, at § 2.3.

²¹

The inspector's activities in coordinate the inspection may include:

- Scheduling joint inspections with other offices or agencies.
- Conferring with other offices or agencies to insure that the inspection satisfies their information needs (to the extent possible within the scope of the inspection).
- Obtaining relevant information on the facility's administrative or enforcement status, such as pending enforcement actions under RCRA or other environmental programs.
- Clarifying the scope of the inspection and areas of participation interest to the office requesting the inspection (e.g., the enforcement compliance specialist).
- Clarifying permit conditions or the status of the facility's permit application with the permit writer.
- Obtaining technical information on the facility from the permit writer.
- Obtaining facility information from other agencies. In particular, federal inspectors may find State and local agencies to be good sources of information on the facility. For example, some States maintain waste manifest records or histories that are useful in preparing for an inspection. Similarly, State inspectors may find that the Regional EPA office has useful information on the facility obtained prior to State authorization or for other purposes (e.g., the NPDES program).

RCRA Inspection Manual, at § 2.3.

5. Prior to the inspection, the investigators will pull all relevant agency files to further prepare for the inspection.²² Request your facility's file under the Freedom of Information Act; you will be amazed at what is in the file. Based upon the review of the facility files, the inspector will have developed a better technical understanding of the facility particularly its past compliance history.

6. Once the file review is completed, the inspector will then determine what equipment will be needed for the inspection. Attached at Appendix A is a list of equipment and supplies normally required for RCRA inspection.

22

For instance, a facility's RCRA file will contain:

- A summary of names, titles, locations and phone numbers of the responsible persons (operators, plant officials, municipal officials, etc.) involved in the facility's hazardous waste program. . . .
- A flow chart or other illustration showing processes used and design features of present and planned units and processes at the facility.
- For treatment, storage, and disposal facilities (TSDFs), a list of the wastes that are treated, stored or disposed by type of management.
- For generators, a list of the waste generated, including their origin.
- Inspection reports from previous State or Regional inspections, including photographs.
- A compliance history of the site, including a listing of any past compliance or enforcement actions and the current status of the actions. . . .
- Biennial, annual, or other reports submitted by the facility to the State or Region including the most recent monitoring reports where applicable.
- Previous EPA studies, consultant's reports, and laboratory reports.
- Citizens' complaints filed against the facility.
- A detailed map or plot plan showing the facility layout and location of waste management units, and any available sketches or drawings of the waste management units.
- Records of any phone conversations with facility representatives.
- The letter of notification of inspection sent to the facility and any response (if the facility is notified).
- The facility's RCRA Notification Form.
- The facility's RCRA Part A Permit application (for TSDFs)
- The facility's RCRA Part B Permit application (for TSDFs, if applicable).
- The facility's final RCRA Permit (for TSDFs, if applicable).

RCRA Inspection Manual, at § 2.3. The RCRA Inspection Manual suggests that the inspector:

- Develop a thorough technical understanding of the facility, the wastes managed, the waste management units used, and the processes employed at the facility which generate and treat wastes (as applicable).
- Develop an understanding of the compliance history of the facility, including past violations, facility efforts to correct compliance problems, and potential violations which may not have been remedied.
- Identify potential violations to be evaluated during the inspection based upon citizen complaints or inconsistencies in file materials.
- Determine applicable regulations to review. . . .
- Support development of the inspection plan for the facility. . . .

Id.

7. The completed inspection plan should address such areas as notification of the inspection to the facility (prior notice or surprise),²³ entry of the facility,²⁴ opening conference priorities,²⁵ records review and the field inspection.²⁶

C. The Inspection

1. Upon arrival at the facility, the inspector may not just enter and begin the inspection rather, according to policy, the inspector should:

a. Locate the proper official (owner, operator or agent) as soon as possible and determine that this official has the proper authority to help you.

b. Present identification to the proper officials, even if it is not requested. Keep identification in sight at all times while trying to locate the proper officials.

²³ Prior notification of the inspection will depend upon several factors:

- The purpose of the inspection and inspection strategy.
- Regional and State policy concerning notification.
- Suspicion that the facility is engaged in illegal dumping or other illegal (particularly criminal activities).
- The length of time the inspection is expected to require. Long inspections of complex facilities may require a substantial amount of facility worker's time. It may be desirable to schedule long inspections with the facility to insure that facility staff are available unless the purpose of the inspection requires surprise.

RCRA Inspection Manual, at § 2.6. Prior notification may also depend upon the past compliance history of the facility and experiences from previous inspections.

²⁴ Entering the facility – how should the inspector proceed upon entry to the facility? Should the inspector conduct an opening conference with facility representatives immediately following entry to discuss the purpose of the inspection, or first proceed with a visual inspection of certain operations or units or interest at the facility (before the owner/operators may have time to stop or conceal possible violations)?

Id.

²⁵ Conducting an opening conference – what topics does the inspector want to discuss with the facility representatives prior to reviewing facility records and conducting the visual inspection of the facility? If the inspector does not intend to conduct the opening conference immediately after entry, when does he or she want to conduct the conference, if at all?

Id.

²⁶ Conducting the visual inspection – what route through the facility or order of inspection does the inspector want to follow, if possible? What should the inspector be paying particular attention to in the inspecting the individual units (e.g., compliance with requirements of an enforcement action)?

Id.

- c. Document entry in logbook or field notebook, noting date, time, and names and titles of facility personnel encountered.²⁷
 2. Proper identification is the inspector's EPA agency identification card issued by the EPA. Additional identification may be required by EPA Regional policy. You can also ask for the inspector's driver's license to compare photographs and signatures.
 3. After presentation of proper identification and credentials, the inspector will seek consent to enter the facility to conduct the inspection.
 - a. The appropriate company official should be designated in advance for purposes of consent to inspect the premises.
 - b. The consent to inspect may be withdrawn at any time. Any segment of the inspection completed before such withdrawal remains valid. Withdrawal of consent is equivalent to a refused entry.²⁸
 - c. Consent to inspect the facility is not required for an inspector to observe and report on things in plain view and includes observations made while on private property in areas not closed to the public such as parts of the facility observed while the inspector presents identification. This is the "Open Field" doctrine.²⁹
 4. Should you deny access? You should deny access only for valid reasons such as:
 - a. The inspector does not have the safety equipment required by the facility under OSHA or NIOSH requirements.
 - b. The inspection is not taking place during working hours.
 - c. Remember – Not many valid reasons exist for not allowing access. Make sure you let them know access will be permitted upon compliance.
 5. Invalid reasons for denying access:

²⁷ *Id*

²⁸ *Id.*

²⁹ *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114 (1974).

- a. Not allowing the inspector to bring in necessary equipment (e.g., camera).
 - b. Not allowing the inspector access to documents.
 - c. Strikes and/or plant shutdowns.
 - d. The inspector refuses to sign a waiver or other legal document restricting the owner/operators liabilities or obligations.³⁰
6. When access is denied, the inspector will:
- a. Ask the reason for denial.
 - b. If the problem is beyond the inspector's authority, suggest that the official contact an attorney to obtain legal advice on his/her responsibility under § 3007 of RCRA.
 - c. Under no circumstances should the inspector discuss potential penalties or do anything that might be construed as threatening.
 - d. If access is still denied, fill out a "Denial of Access Report" (Exhibit 4.1) with the time, date, and names and titles of persons denying access. Obtain the signature of the facility representative if possible.
 - e. Leave the premises and document any observations made pertaining to the denial, particularly any suspicions of violations.
 - f. Report all aspects of denial of access to the appropriate Regional or State enforcement division to determine appropriate action to be taken and to get help in obtaining a search warrant.³¹
7. If access is denied, the inspector will get a search warrant. Once the inspector gains a search warrant to conduct the inspection:
- a. The inspection must be conducted in strict accordance with the warrant. If the warrant restricts the inspection to certain areas or to certain records, the inspector must adhere to these restrictions.

³⁰ *Id.*

³¹ *Id.*

b. If sampling is authorized, all procedures must be carefully followed, including presentation of receipts for all samples taken. The facility should also be informed of its right to retain a portion of the samples obtained by the inspector.

c. If records or property are authorized to be taken, the inspector must provide receipts and maintain an inventory of all items removed from the premises.³²

8. Sign in books: You may request the inspector to sign a log, passbook, or other form prior to entering a facility. Inspectors may sign logs or passbooks as facilities keep record of visitors to the facility and they are useful in the event of a fire or other emergency. Inspectors will not sign waivers or other legal documents that limit the facility's liability in the event of an accident.

9. Once the inspector gains access to the facility, he may or may not conduct an opening conference. The decision is left to the investigator's discretion.³³ The purpose of the opening conference is to firmly establish that the inspector is in control.³⁴

10. The investigator will conduct an opening conference to set the tone for the inspection, to provide information regarding the inspection, to establish schedules for interviews and to gather general information.³⁵

³² *Id.* at § 4.1.

³³ Depending upon the objective of the inspection, the inspector may want to see particular operations or locations in the facility prior to the opening discussion. For example, in an unannounced inspection of a facility with a suspected violation, the inspector may want to go directly to the site of the suspected violation in order to observe the violation before the owner/operator can stop, conceal, or otherwise obscure the non-complying operation or condition.

Id.

³⁴ From the opening discussion on throughout the inspection, the inspector should consider him or herself to be an investigative reporter trying to find information that shows that the facility is not complying with the regulators. Inspectors should question, question, and question some more. If inspectors are diligent in questioning facility personnel and in observing operations, they will be able to discern almost any inconsistencies in what they see, hear, and have previously reviewed, that may indicate a violation.

Id.

³⁵ The established purposes of the opening conference are:

- To outline inspection objectives. This will inform facility officials of the purpose and scope of the inspection and may help to avoid misunderstandings.
- To provide management with information on RCRA. During the initial inspection, the inspector may wish to discuss the provisions of RCRA with the manager and furnish a copy of the Act. The inspector is regarded as a source of regulatory information and can help strengthen Agency-industry relations.

11. Conducting the inspection. While each investigation/inspection is unique, the inspector may:

- a. Walk the facility;
- b. Ask lots of questions;
- c. Take lots of notes;
- d. Take formal statements;³⁶
- e. Take samples;
- f. Review documents/permits;
- g. Take photographs/videotape;
- h. Prepare inspection checklist;
- i. May even tape record statements;³⁷

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- To establish the order of the inspection. A discussion of the order in which operations will be inspected will help to eliminate wasted time by allowing officials time to make records available and to start up intermittent operations.
 - To establish meeting schedules. A schedule of meeting with key personnel will avoid time wasted in waiting for people to become available. The inspector should try to obtain business cards of all persons interviewed during the inspection.
 - To arrange for facility personnel to accompany the inspector. During compliance inspections, it is helpful if a facility representative accompanies the inspector to explain operations and to answer questions.
 - To set up a closing conference. A wrap-up meeting should be scheduled with appropriate officials to provide a final opportunity to gather information, to answer questions, and to complete administrative duties.
 - To advise management of the availability of duplicate samples. The facility has a right to request and receive immediately duplicates of any samples collected for laboratory analysis during the inspection as well as copies of the analysis results later (if an enforcement case is not pending or being pursued).
 - To gather general information. Any necessary general information, such as the name and address of the chief executive officer of the facility, should be obtained during this meeting.
 - To ascertain whether the owner/operator is going to claim any information as confidential business information. The owner/operator should inform the inspector if and when information is confidential. Direct questions such as: Do you want to make any CBI claims? may lead the owner/operator to get nervous and claim CBI unnecessarily. If the owner/operator does make that claim the inspector should provide the appropriate forms for making a claim of confidentiality.

RCRA Inspection Manual, at § 4.2.

³⁶ Since it is not in a custodial situation, no Fifth Amendment rights are implicated.

³⁷ One civil inspector has testified that he had not been trained in the use of a tape recorder. statements.

12. Closing Conference. When finished, the investigator will conduct a closing conference. The closing conference should be with the same people as in attendance at the opening conference.

a. Investigator will give:

- (1) Receipts for samples.
- (2) Receipts for documents seized.
- (3) May (or may not) discuss preliminary findings.
- (4) Advice of the availability of the sample analysis.

b. Investigator will not:

- (1) Discuss compliance status.
- (2) Legal effects.
- (3) Enforcement consequences.
- (4) Recommend consultants.
- (5) Advise of the availability of the follow-up report.

c. Inspection may result in investigator issuing a Deficiency Notice.

d. Investigator will then take information and samples and fill out their report, analyze samples and follow-up as necessary with any coordinating agencies.

D. When the Inspector Shows Up

1. Require identification and presentation of proper credentials (you may want to compare to photographic I.D. such as driver's license).

2. Decide whether or not to allow access (remember – there are very few valid reasons for turning away inspector).

a. Denial of access may create the wrong impression (i.e. that something is wrong at the plant).

b. If it is a criminal investigator with a proper warrant, a denial of access will subject you to arrest for contempt of court.

3. If a warrant is presented, get a copy of it –

- a. Read it.
 - b. Ascertain the scope of the warrant as the investigator is tied to the warrant.
 - c. The warrant will also determine what records can be seized.
4. After presentation of credentials make the inspector give you a statement regarding:
- a. What he wants to accomplish;
 - b. Whom he wishes to talk with; and
 - c. What he wants to obtain in regard to records and documents.
5. Agreement should be reached covering:
- a. Witness interview schedules;
 - b. Documents to be produced;
 - c. Sampling protocols; and
 - d. Confidentiality issues.
6. The Agreement should then be reduced to writing and provided to the inspector.

E. During the Inspection

1. Accompany the investigator at all times;
2. Employee (witness) interviews:
 - a. Insist on being present;
 - b. If possible, schedule separate interview, preferably before investigator speaks to them --- then find out what is discussed.
3. Civil investigators do not have to be allowed to talk freely with employees. Civil investigators do have subpoena power.
4. Criminal investigators will usually have a specific agenda for witness or employee interviews.

- a. You can not prevent employees from talking to the investigators.
 - b. Employees do not have to talk to investigators.
 - c. Alternative – give employees the rest of the day off.
5. Take notes during the inspection.
 6. If possible, videotape the entire inspection and the investigator. If the inspector takes video tapes or pictures, you are entitled to copies.
 7. If samples are collected make sure that they are collected properly. You may even want to take your own samples.
 8. Always request a sample split and have your own analysis done.
 9. You have a right to copies of photographs and sample splits or other physical evidence. Ask for them.
 10. If documents are requested by the inspector, request a written list of documents sought as you can provide documents at a later date after they have been reviewed for privilege and/or confidentiality.

IV. Inspection Follow-Up

- A. Written Request for Copies of:
 1. Photographs;
 2. Videotapes;
 3. Sample analysis;
 4. Field report filed by investigator;
 5. Return of seized documents
- B. Be persistent in getting copies.
- C. Review the field report carefully.
 1. If any problems, major or even minor, are found seek legal assistance.
 2. Move to correct problems.

D. If there is no evidence of non-compliance, you will probably not hear a thing; however, if you do not hear a thing, do not assume no action is being taken.

V. **Minimizing Exposure**

A. Avoid RCRA (easier said than done) through waste reduction and/or recycling.

B. Report non-compliance promptly; however, do not volunteer extraneous information.

C. Train your employees; environmental and safety training must include all personnel with special emphasis on operations personnel.

D. Hire help, including lawyers and consulting firms.

E. Get to know the regulators.

F. Conduct your own audits.

1. Problems may arise in funding the audit, securing the right people or consultants or the right mix of people and even with securing internal authority to conduct the audit.

2. Follow-up on audit. Reviewing an audit and deciding to do nothing is better than deciding to do nothing.

3. Designate responsibility within the company.

4. Make the necessary financial commitment.

5. Doing nothing can and will get you in trouble and may result in criminal action.

G. Prepare for inspections:

1. Make sure facility records are in order.

2. Establish procedures for:

a. Document retention; and

b. Facility access by agency personnel.

3. Make sure personnel know how to react.

a. Security guards;

- b. Environmental compliance personnel;
- c. Facility managers;
- d. Field/operators personnel;

H. Limit, as best you can, opportunities for investigators to talk to employees. An ingenious investigation will obtain subpoenas.³⁸

I. Institute a confidential suggestion box for environmental compliance and follow-up on each suggestion.

J. Make sure the facility has a firm environmental employee compliance policy; follow it and enforce it.

K. Designate a point person for inspections. That person should be:

- 1. Knowledge
- 2. Low key
- 3. Unflappable
- 4. Congenial
- 5. Should also attempt to establish a continuing relation with the agency personnel.

VI. Conclusion

Remember, the only difference between a criminal and civil offense depends on who discovers the problem first. With proper preparation, training and follow-up, you should find yourself on the right side of the law. I hope.

³⁸ See *Bailey v. Secretary of Labor*, 14 OSHR 1534, 19 OSHR 2083, *cert denied* S. Ct. No. 90-1218 (April 22, 1991).

APPENDIX A

GENERAL EQUIPMENT

Camera, film and flash equipment	Stamp pad
Disposable towels and rags	Compass
Pocket calculator	Stopwatch
Flashlight and batteries	Envelopes, pre-addressed to Document Control Officer (for CBI)
Tape measure	Winder meter or Admiral Beaufort wind scale
Pocket knife	Plain envelopes
Waterproof pens, pencils and markers	Square
Pocket tape recorder	Polyethylene bags
Clipboard	Ruler (for use as scale in photos)
Level	
Locking briefcase	
Range finder/optical tape measure	
Confidential Business Information Stamp (if needed)	

SAFETY EQUIPMENT

Safety glasses or goggles	Coveralls, long-sleeved
Rubber-soled, metal toed, non-skid shoes	Respirators and cartridges
Face shield	Hard hat
Liquid-proof gloves (disposable if possible)	Plastic shoe covers (disposable)
Ear Plugs	Self-contained breathing apparatus
Long Rubber apron	

SAMPLING EQUIPMENT

Bucket auger	Trowels
Conductivity meter	Sampling safety equipment (in addition to equipment on the safety equipment list):
Bucket	- Tyvek suit
Thermometer	- Booties
Containers	- Harnesses
- jars	- Gloves
- plastic (for metals)	- Chemical resistant unit
- organic sample containers	- Organic vapor analyzer
Tape (labeling, duct and electrical)	Decontamination equipment:
Bailers	- Buckets
Dissolved oxygen meter	- Alconex
Steel tape measure	- Brushes
Pumps	- Grate
Rope	- Deionized water
Glass tubes	- Steam cleaning machine
Ice	- Plastic bags
Scoops	

PAPERWORK

Proper identification

Copy of facility's inspection file, permit and monitoring schedule, including:

- Maps
- photographs
- enforcement actions

EPA Regional or State forms for:

- inspection confidentiality
notice

- enforcement actions notice
- declaration of confidential

business information

- receipts for documents and
samples

Notebook

Code of Federal Regulations and applicable
State code

Notice of inspection (if applicable)

Field data sheets

Chain of custody record