

308 How to Handle an Environmental Agency Inspection

David C. Cannon Jr.

Vice President, Environment, Health & Safety
PPG Industries, Inc.

Vincent M. Gonzales

Attorney
Sempra Energy Corporation

Judith A. Wenker

Senior Counsel
Texaco Inc.

Faculty Biographies

David C. Cannon Jr.

David C. Cannon Jr. is vice president, environment, health, and safety for PPG Industries. PPG is a diversified manufacturing company headquartered in Pittsburgh, Pennsylvania, with principal businesses in glass, fiberglass, chemicals, and coatings and annual sales exceeding \$8 billion. Prior to his current position, Mr. Cannon was associate general counsel in PPG's law department.

Prior to joining PPG 30 years ago, Mr. Cannon was an attorney for the US Department of the Interior and, before that, a trial attorney in the Land and Natural Resources Division of the United States Department of Justice [now Environment and Natural Resources].

Mr. Cannon serves on ACCA's board of directors. He has served as chair of ACCA's Environmental Law Committee and is the past president of ACCA's Western Pennsylvania Chapter, where he served as the first chair of the Chapter's Environmental Law Committee. He is also a member of the board of directors of the Environmental Law Institute.

Mr. Cannon received a BS from the University of Notre Dame and his JD from the University of Pittsburgh School of Law.

Vincent M. Gonzales

Vincent M. Gonzales is an attorney for Sempra Energy, working in both Los Angeles and San Diego. His responsibilities include providing environmental legal counsel to the corporation's regulated entities (Southern California Gas Company and San Diego Gas and Electric Company) and unregulated entities (Sempra Energy International, Sempra Energy Resources and Sempra Energy Solutions).

Prior to joining Sempra Energy, Mr. Gonzales served 10 years as in-house counsel for Atlantic Richfield Company (ARCO) in Los Angeles. In addition to environmental law, Mr. Gonzales also provided counsel in the areas of commercial law and real estate law for the various ARCO operating companies including ARCO Products, ARCO Marine, ARCO Alaska, and ARCO Pipe Line. Before ARCO, he was an associate in the corporations department of O'Melveny & Myers.

Mr. Gonzales is on the board of directors of the Asian Pacific American Legal Center of Southern California, currently serving as its treasurer. He is also a member and former president of the Philippine American Bar Association of Los Angeles. He is currently on the board of directors of ACCA's Southern California Chapter. He also cochairs the newly formed Air and Energy Committee of the Los Angeles County Bar Association's Environmental Law Section.

Mr. Gonzales received a BA from Haverford College and an MA in philosophy from the University of California, San Diego. He is a graduate of the University of Southern California Law School where he served as publication editor for the *Southern California Law Review*.

Judith A. Wenker

Judith A. Wenker is senior counsel and chief of the environmental section of Texaco Inc.'s legal department in Houston. Her responsibilities include counseling Texaco's oil and gas production clients, corporate environmental safety and health staff, and Superfund site technical managers, as well as supervisory and administrative duties with the environmental attorneys and support staff.

Prior to working at Texaco, Ms. Wenker was in-house counsel for Getty Oil Company where she helped develop Getty's environmental department, including its corporate environmental/safety audit program, and was a government attorney with the US Department of Agriculture's Litigation Division after graduating from law school.

Ms. Wenker is a member of the California and District of Columbia Bars, the Texas Women Lawyers Association, and the ABA. She is vice chair of the ABA Environmental Section's Corporate Counsel Subcommittee and has participated in State and ABA Bar seminars. Ms. Wenker is a member of Texaco's Volunteer Network Team.

Ms. Wenker graduated with a JD from University of San Diego School of Law, where she attended the evening program while working fulltime for a US Magistrate as court clerk.

Counseling Your Client on Environmental Inspections

By Vincent M. Gonzales

Reprinted with permission from the Los Angeles County Bar Association

I. Introduction

Like death and taxes, environmental inspections are inevitable. Even in this day of continuous monitoring, computerized recordkeeping, self-reporting of deviations, and remote transmission of compliance data, environmental inspections remain the simplest, yet most effective enforcement tool for environmental agencies.

An environmental inspection can be a routine visit lasting no more than an hour, carried out by a single inspector who is there to determine whether a particular piece of equipment complies with a specific regulation. An environmental inspection can also be comprehensive, multiple-day event where a team of inspectors from various federal, state and local agencies descend upon an entire facility to determine its compliance with almost all of the environmental laws and regulations that apply to it. And in a rare occasion where probable cause exists that an environmental crime has taken or is taking place, an environmental inspection can also occur pursuant to a search warrant. Regardless of how different these environmental inspections can be, there are a number of simple, yet effective steps that can be taken by the facility to prepare for such an eventuality.

II. Preparing for Environmental Inspections

A. *Make the best use of EH&S audit reports and recommendations.*

Promptly close any outstanding EH&S audit findings and diligently implement EH&S audit recommendations. An EH&S (environment, health and safety) internal audit performed on a periodic basis by an employee or a contractor is one of the more useful compliance tools available to a company. Generally speaking, an EH&S audit done in the normal course of one's business, however, would not be subject to any privilege or protection rendering it confidential. Therefore, the report resulting from such an audit may be reviewed or obtained by an environmental inspector. This means that an EH&S audit report containing issues or findings that have not yet been closed out or resolved, becomes a virtual roadmap through the facility of possible violations for the environmental inspector.

There are times, however, when an EH&S audit report can be protected as confidential under either the attorney work product or the attorney-client communication privileges. In the first instance, the attorney would need to show that the audit was performed under her direction and supervision in anticipation of imminent enforcement action or litigation. Even then, only the written audit report and drafts thereof, the field notes, the laboratory reports, and the attorney's own analyses would be subject to this

protection; the raw data underlying the reports and analyses, such as sample testing results and instrument readings, would not be. In the second instance, the earlier drafts of a routine audit report may be protected as confidential under the attorney-client communication privilege, although the final report itself may not be. During this report drafting phase, the attorney -- knowing that the final report may not be protected -- should advise the report writer on how to focus solely on objectively and matter-of-factly setting forth the audit findings and recommendations, while avoiding making value-laden statements or conclusions of a legal nature.

Two elements must be present before the government can show that a facility intentionally (i.e., criminally) violated an environmental regulation: (1) knowledge of the problem, and (2) failure to act. Since an EH&S audit report can be obtained by the government, an agency can easily establish element (1). All that is left to do, then, is to show that the facility failed to correct in a timely manner the problem(s) disclosed in the audit report. Therefore, it is imperative that EH&S audit recommendations be acted upon quickly and diligently to avoid any possible criminal prosecution.

B. Prepare environmental records and files for inspection.

Identify and segregate environmental records and files from others. Business records and files which are not required to be kept pursuant to an environmental law or regulation should be stored or kept in a separate location so that an environmental inspector does not "accidentally" review or copy them. Examples of such documents include sales records, tax records, documents containing marketing strategies, agreements with confidentiality provisions, and confidential legal memoranda or opinions. Keep these records and files in a file cabinet that can be locked.

Organize these records. First separate the permits from the records. Then organize them in terms of the equipment or process involved. Secondly, organize them in terms of media: i.e., air, water, waste, etc. Then with respect to the records, organize them in terms of whether they are monitoring, records, testing records or reports, and so on. Finally, put the permits and records in reverse chronological order. Keep them in a three-ring binder that would facilitate the addition or removal of selected items. And keep these binders in an accessible location, such as a bookcase or a desk. Organizing your environmental records in this way not only expedites the inspection, but it also gives the inspector a good impression of how well run your facility is.

Implement a procedure for ensuring that these permits and records are continuously updated and maintained. Try to do this on a regular basis, i.e., monthly. Maintaining these records should be in accordance with the requirements of the corresponding environmental law or regulation, or permit requirement. Older records which have been kept past their required retention periods, should then be maintained pursuant to the company's record retention policy, if one exists. If no such policy exists, then prudence dictates that these older records be kept indefinitely. They can be segregated from the current records and archived in an off-site storage facility, but they should not be destroyed or discarded.

Pre-designate a room where the inspector will review records. Make sure it is in a part of the facility where the inspector cannot become "distracted" by the various operations and activities at the facility. The room should be bare, such as a conference room or a spare, empty office. It may have a telephone, but it should not have a computer terminal which can access the company's databases, e-mail system, or other electronic records. It should be a room where egress and ingress can be easily monitored.

C. Establish an entry procedure.

Determine the identity of the inspector and the purpose of the inspection first before granting entry to the facility. Environmental inspectors have legal authority to enter a facility in order to conduct an inspection. Nonetheless, the facility owner or operator has the legal right to demand proper identification of the inspector and to receive an adequate description of the purpose and scope of the inspector's inspection before allowing entry into the facility. If proper identification has not been presented or the purpose of the inspection not adequately described, the company may respectfully deny entry to the inspector.

Have the inspector sign a visitor log and wear a "visitor" badge. Let the inspector know that this is a routine procedure followed by all visitors to the facility -- including visiting employees. The rationale for such a routine procedure is not just security, but also safety. In event of an emergency, the visitor log will enable emergency responders to ensure that all personnel have been evacuated from the facility.

After verifying the identity and authority of the inspector, make a photocopy of her business cards or authorization letter. If the inspector is someone you know and has been to your facility before, then there is little need to photocopy her business card every time she visits the facility. However, if it is an inspector you have never met before, then do not hesitate to go as far as calling that inspector's supervisor to verify his identity and authority. In the case of a contractor hired by the agency to conduct the inspection, make sure that that individual has a signed letter from the agency authorizing him or her to conduct the inspection on behalf of the agency. (More on this later.)

Have the inspector wait for the company representative or escort before proceeding into the facility. Either the company representative or the escort will be the official contact between the company and the inspector. Again, this is necessary on the basis of safety as well as security.

D. Establish an escort procedure.

Identify and train a number of facility employees to be escorts. These escorts play a crucial role in the success of a facility's response to or handling of an environmental inspection. Therefore, designate as escorts only those individuals or employees who are responsible, articulate, smart and reliable.

An escort must always accompany an inspector during an inspection. This is axiomatic. When an inspector is inspecting a piece of equipment, visiting an area or just roaming around the facility, she must always be accompanied by an escort. When the inspector is in the inspector's room reviewing records, the escort could either sit in the same room or sit just right outside in an adjacent office.

An escort must be cooperative, but must not volunteer information. As they used to say, "Loose lips sink ships." Inspectors are trained to be very observant and inquiring. It is perfectly fine for an escort to answer an inspector's general questions such as how does a piece of equipment function or where do the trucks enter and exit. Be careful, however, and avoid answering any questions the inspector asks regarding compliance issues, hazardous material spills or releases, tank or pipe leaks, etc. The escort should decline to respond and should instead, refer such questions to the company representative or the attorney. Even if the escort has the information to answer such questions, he also has the right to decline to speak to an inspector, as well as to speak to an attorney before responding.

If an inspector is taking any photographs or samples, then the escort must do the same. Make sure that each escort is equipped with an escort kit containing sample containers, a disposable camera, a notebook, pens, and latex gloves. The escort should remember to split samples with the inspector. The escort should also take pictures in the same manner and camera angle as the inspector.

There is a rare instance in which the inspector may be asked not to take any photographs, and that would be if the small static charge emanating from the camera might either ignite and cause a fire, or cause the sensitive electronics of an instrument or meter to malfunction. To avoid this situation, the escort and the inspector must agree during the opening conference on the areas where photographs may be taken and the areas where they may not.

As a side note, courts have recently allowed OSHA inspectors to use video cameras during an inspection. Therefore, be prepared to equip an escort with a video camera just in case an inspector uses one at the next environmental inspection.

Although escorts should not interfere with the inspection, they should also not assist the inspector. Any attempt to assist the inspector in her job may be misconstrued as an attempt, for example, to manipulate the results of a sampling event or to curry favor from the inspector. Worse yet, an escort assisting an inspector can pose an unreasonable risk of harm to that inspector, such as, for example, in a confined space entry search, where the escort may not be properly trained in confined space entry procedures.

E. Establish a procedure for handling the news media.

Never allow the news media to accompany an inspector. The reason for this is obvious: the news media do not have the same legal right or authority as the inspector to be at the facility. Although an inspector's findings and observations arguably constitute

public information, there is no reason or authority for such findings and observations to be immediately disclosed to the public, especially the news media. Furthermore, having news media personnel in the facility during an inspection can pose a safety risk not just to themselves, but also to the inspector and her escort.

Immediately inform the attorney and the public relations department of the presence of the news media. The attorney or public relations representative will do one of two things: (1) either deal directly with the news media and, therefore, leave the company representative and the escort alone to deal with the inspector; (2) or assist the company representative in responding to the news media.

Do not discuss anything relating to the inspection with the news media, unless you have been cleared by either your attorney or your public relations representative. It is highly recommended that company representatives undergo media training, so that they develop and perfect the skill of talking to the media. Of course, whether or not the inspector decides to talk to the news media about the inspection is a different issue altogether. It is primarily a function of that environmental agency's policy and the nature of the information that the inspector discloses. For example, there are federal laws that prohibit the USEPA from disclosing a company's confidential business information or trade secrets, unless it obtains prior written approval from that company to do so.

III. The Routine Inspection

Now that you have advised the facility on how to prepare for an environmental inspection, how should the facility implement these procedures and put everything into motion?

A. When the inspector shows up.

When the inspector first shows up at the facility, the security guard or the receptionist should first ascertain and confirm the inspector's identity and authority. He or she should then initiate the entry and escort procedures, as well as notify the company representative that an inspector has arrived. If a member of the news media has also shown up, then the company's news media procedure should then be initiated.

Sometimes, the inspector who arrives at the facility is either accompanied by a contractor working for that environmental agency, or is, in fact, a contractor. This raises two issues. First, is this contractor properly authorized to conduct or participate in the inspection? The contractor must produce an official letter of authorization signed by the appropriate person at the particular environmental agency, identifying the contractor and indicating that that contractor has been delegated the authority to inspect the facility on behalf of the agency. Second, will the scope of the inspection involve any records of a business confidential nature? If so, then the company must be protected from the risk of unauthorized disclosure by that contractor of such business confidential information to third parties, such as the company's competitors. The best way to address this would be to have the contractor sign a confidentiality agreement before initiating the inspection. If

the contractor refuses to do so, then another option would be to contact the appropriate person at the environmental agency and ask for a copy of the agency's agreement with the contractor. The attorney should then review this agreement to determine whether the contractor has agreed to keep confidential any confidential business information or trade secrets obtained during the inspection.

B. Hold an Opening Conference.

Holding an opening conference is an important first step that should not be skipped, even in the case of a routine inspection. At this opening conference, the company representative or the escort should confirm again the identity and authority of the inspector, as well as determine the nature, scope, and duration of the inspection. If the inspection is anticipated to last more than a few hours, or if it is designed to involve several areas of the facility, then the company representative should determine if more than one escort would be needed.

This is also the time to bring up any facility problems that are beyond the facility's control, but which may inadvertently hamper the inspection, such as an equipment breakdown or an organized work stoppage. Try and encourage deferral of the inspection until such time as facility conditions are back to normal. Furthermore, address any safety concerns associated with the inspection and ensure that the inspector is prepared and properly equipped for such hazards. Make sure that the inspector has had a recent safety briefing with respect to your facility.

C. Monitor the inspector.

The escort should take notes of what the inspector does. What specific words is the inspector using when making a certain physical observation? These notes would play an important role in the event that there is an enforcement order or notice of violation that results from this inspection. For example, note the method of sampling used by the inspector, whether a clean sampling device is being used for sampling, and whether the samples are being handled properly. The escort should take split samples when the inspector is taking samples. If the inspector is taking photos of a particular unit or area, the escort should take photos of the same unit or area, and from the same vantage point or angle. If the escort does not have a camera or her camera runs out of film, then either request a short break until the escort is given a camera or film by someone else at the facility, or request the inspector for copies of the photos that he is taking.

Limit employee contact with the inspector. Generally, an employee may not be compelled by an environmental inspector to be interviewed. Moreover, a company is not required to permit private employee interviews on company premises. Make sure that the company has an employee interview policy that covers interviews by environmental inspectors, and that the facility's employees are familiar with it.

Do not volunteer information or make admissions. This is a key guideline to live by. Generally, an inspector during the course of the inspection does not have authority to

require the facility to conduct a certain test or perform a certain operation if it is solely for the inspection. Of course, you should also be careful with respect to the extreme reading of this guideline, which would entail the idea of hiding things and purposely not disclosing facts which should otherwise be disclosed under the law.

Contact the company representative or the attorney if inspector seeks to go beyond scope of inspection. This is especially critical if the expansion of the scope entails entry into an area that would pose an unreasonable risk of harm to the inspector as well as the escort. One way to accommodate the inspector would be to schedule an inspection of that area on a day when the area is safe.

D. Hold a closing conference.

After the inspector has completed her inspection and before she leaves, ask her for a closing conference to discuss her findings. During this closing conference, go over the areas and records inspected and compare these to the list of areas or records discussed during the opening conference. Again, keep notes during this conference in order to minimize the risk of future misunderstanding. Take careful note of possible non-compliance items pointed out by the inspector. If the inspector alleges certain (possible) violations during this closing conference, then respond only by taking note of these alleged violations, without admitting that they are violations. Do not make any promises on behalf of the company or the facility with respect to correcting any alleged non-compliance items. Determine if there are any items or issues requiring any follow up with the inspector. Then escort the inspector off the premises.

E. Make sure to follow up, if necessary.

Confirm in writing any requests for documents made by the inspector. Advise the attorney if the inspector left a list of items, such as documents, test reports or records to be forwarded to the agency by a certain date. The attorney will first confirm whether the inspector has legal authority to request any of these items, and then will help the facility prepare a written response to this request.

Investigate any controversial findings made by inspector. Have someone check the records reviewed or check the equipment inspected in order to verify the inspector's observations. Once verified, determine what caused or gave rise to such an observation. Make sure that the attorney has been advised of this.

Finally, prepare for your files a written record of the inspection. Copies of the inspector's business card and field notes, as well as any notes taken by the escort and the company representative should be attached to this report.

IV. The Multi-Media Audit

A. *Prior to the Multi-Media Audit:*

Once the EPA has decided to conduct a multi-media audit ("MMA") of a certain facility, it begins its preparation by first putting together the team of inspectors that would conduct the MMA. They can include regular EPA inspectors, inspectors from the state and local environmental agencies, as well as EPA contractors.

Once the team has been formed, the team members begin preparing for the MMA by thoroughly researching the EPA's and other agencies' files about the facility and the owner/operator of the business. They also perform a pre-inspection reconnaissance of the Facility, by driving by the facility a few times.

A couple of weeks before the audit, the EPA may send a letter to the facility, notifying them that a MMA is about to be conducted of their facility. This MMA notification letter also advises the facility to prepare their environmental records for inspection, usually enclosing a list of the particular records to be reviewed. Of course, MMAs may be conducted without prior notice and there is no requirement that the facility be notified beforehand to prepare its records. In practice, however, a MMA notification letter benefits both the facility and the EPA, because it saves time in retrieving records and helps the EPA MMA team perform its work more efficiently. And since an MMA is very disruptive of a company's business, MMA notification allows the company to make the necessary arrangements to keep the business going while its employees are responding to the MMA.

B. *Preparing for the MMA*

Given the inherent difficulty and complexity in responding to a MMA, it is strongly advised that a facility's key personnel should not only be organized, but they should also receive training on MMAs. These individuals would include not only those designated as escorts, but also personnel from the operations, maintenance and business departments, security guards, receptionists and administrative assistants (collectively, the "MMA Response Group"). If the facility does not have sufficient personnel for the MMA Response Group, then the company should give thought to either temporarily using personnel from other facilities or, if that is not possible, hiring contractors.

This would also be the time for the company to contact its attorney to put her on alert as well as to allow her to participate in MMA training. The attorney would be useful in advising the facility personnel on a number of matters, such as how to prepare the records for inspection, how to answer an inspector's questions, what to do with confidential business files, and how to document the MMA, among other things.

During this training session, the MMA Response Group should be further broken down and organized into smaller teams: the escort team, the records team, the support team and the liaison team. The escort team's role and responsibilities in an MMA are

identical to their roles and responsibilities during a routine inspection, as discussed earlier in this article.

The records team is responsible for preparing the environmental files and records for inspection (in accordance with the guidelines discussed earlier in this article), using the MMA notification letter from EPA as a guide to identifying which records to pull. The attorney should work closely with the team to ensure that the responsive documents are retrieved and the non-responsive documents kept secured. The records team should also set up a procedure for making copies for the inspectors. It is best not to give the inspectors direct access to a photocopier, since it would be difficult for the team to keep track of which documents the EPA MMA Team is taking with them. This copying procedure would have the inspectors first review the documents and then tag those which she wants copied. A "runner" would then take these documents to the photocopier and make two sets of copies, with one set going to the inspector and the other set going to the team as a record of what the inspector had copied.

The support team consists of the security personnel and receptionists who would have the first contact with the inspectors. The team would also include the administrative assistants responsible for documenting the MMA: keeping escorts' notes, taking minutes during various meetings and conferences, preparing a sign-in/sign-out list of the personnel responding to the MMA, among other things. A person responsible for resources and equipment needed for the MMA would also be part of this team. Finally, the support team would also include the facility personnel functioning as "runners" during the MMA.

The liaison team is primarily responsible for setting strategy, implementing procedures, addressing problems, and for interacting with the EPA MMA team leader. This liaison team would consist of the company representative or facility manager, the escort team leader, the support team leader, the records team leader, an individual in charge of safety for all MMA participants, an administrative assistant, a public relations representative, and the attorney.

It is also advisable at this time to prepare a facility MMA handbook wherein the various teams, team members and team responsibilities are spelled out for the facility's reference. The handbook should also include MMA checklists as well as various forms such as inspection forms, sampling forms, daily activity log forms, and chain of custody forms, among other things. A map of the facility as well as safety guidelines should also be included in the handbook. The attorney should be involved in preparing this handbook, perhaps including, among other things, a confidentiality or non-disclosure form agreement that would be used in the event that a contractor is part of the EPA MMA team.

The company should then re-evaluate whether the pre-designated inspector's room will be large enough to accommodate the larger EPA MMA team. When choosing a larger room, the same considerations in choosing a room discussed earlier should be taken into account.

Finally, if time and resources are available, it is recommended that the company and its facility personnel undergo a mock MMA as part of its training. This exercise would allow the facility to assess fully an MMA's impact on the facility's operations, iron out any kinks in its MMA response procedures, as well as identify areas wherein further preparation is needed. Other facility personnel or even contractors acting as mock EPA inspectors would descend upon the facility and engage the various audit response procedures discussed below. An evaluation meeting should be held at the conclusion of this mock MMA to assess the facility's readiness.

C. Initiating the MMA

After the entry procedure has been triggered on day one of the MMA and the EPA MMA Team members have been appropriately signed in and their credentials copied and reviewed, the liaison team should hold an opening conference. This opening conference would address similar topics as an opening conference for a routine inspection, albeit on a larger scale. After establishing the scope and scale of the MMA, the liaison team might determine at this time whether it has sufficient personnel available as escorts. If it determines that it does not have enough escorts, then it should raise with the EPA MMA Team the possibility of "staggering" the inspection, i.e., designating certain days or times when the inspectors would inspect certain units or documents with respect to compliance with particular regulations. For example, air quality records and compliance would be addressed on days one and two of the MMA, water quality issues on days three and four, hazardous waste on days five and six, and so on. This would allow the facility to make full use of the limited personnel it has available, without becoming overwhelmed and without having to curtail or cease business operations during the MMA.

At the opening conference, the parties should also discuss setting up a twice-a-day briefing schedule, e.g., a daily morning briefing to discuss which records and units to inspect that day and any other specific issues, and a daily afternoon briefing to review findings, potential concerns or alleged violations, as well as discuss the next day's audit schedule. Aside from ensuring that sufficient communication and feedback is occurring between EPA and the facility, this daily briefing would also allow the facility to better respond to EPA's inspection needs, thereby expediting the entire MMA process. In other words, the faster the EPA MMA Team is able to conduct and conclude its MMA, the quicker the facility can get back to business and resume normal operations.

Last but not least, the opening conference would be the time to provide the EPA MMA Team a safety orientation session with respect to the facility: warning signals, escape routes, dangerous areas, among other things. Safety rules and procedures should be presented and gone over at this time. Personnel protective equipment ("PPE") such as hardhats, earplugs and safety glasses, may be issued to the EPA MMA Team, although EPA is primarily responsible for the safety of its inspectors and contractors. For example, PPE requiring individual fitting and specialized training on its use, such as a self-contained breathing apparatus, would be the responsibility of EPA to provide and not the facility's.

D. Monitoring the MMA.

The facility's teams should essentially follow the inspection monitoring guidelines discussed above with respect to routine inspections. The records team leader should ensure that a sufficient number of runners are available to assist the MMA Response Group, during the course of the MMA.

Unlike routine inspections, a MMA is a large and significant enough of an event that it would be difficult for a member of the public or of the news media not to notice it. Consequently, there is a good chance that the public relations representative-member of the liaison team will become very busy fielding inquiries from the news media, from local politicians, and from various citizen groups. Members of the MMA Response Group should be reminded that only the public relations representative shall communicate with the news media, the politicians, the neighborhood groups and citizen groups and others.

Before the morning briefings and after the afternoon briefings with EPA, the liaison team should meet. At the morning liaison team meeting, the scope of the day's inspection and the day's escort assignments can be confirmed. At the afternoon liaison team meeting, the findings and issues raised by EPA during the afternoon briefing would be discussed internally and responses prepared for the following day. Having these meetings would further ensure consistency in the facility's handling of the MMA as well as ensure that potential violations and concerns are addressed and resolved in a timely manner.

E. Concluding the MMA

As the MMA winds down, the MMA Response Team should hold a final, closing conference with the EPA MMA Team to go over any last minute findings or concerns, and allow the EPA MMA Team to return visitor badges and any PPE issued to them. The liaison team can go over the various lists of documents reviewed and copied, units inspected, samples taken, photographs taken, among other things. The liaison team can make a formal request for a copy of the EPA MMA Team's field notes, although EPA is not legally obligated to provide these. The liaison team should also ask for a list of items requiring any follow-up, such as documents or records that still need to be produced and provided to the inspectors. A schedule for providing these items should be agreed upon at this time. In some cases, a follow-up inspection might also be discussed and set up, particularly if certain units or equipment could not be inspected, because they were out of service for whatever reason at the time of the MMA. Finally, the liaison team should explore whether the facility will have an opportunity to resolve any problematic findings or issues before a formal MMA report is prepared and finalized.

V. Search Warrants

Although extremely rare, some environmental inspections are undertaken pursuant to either an administrative or a criminal search warrant, depending on the particular circumstances giving rise to the warrant.

A. *Preliminary points to ponder:*

The first key point that a company must fully understand and accept with respect to this kind of environmental inspection is that when a search warrant is served on a facility, that facility's personnel are on their own, at least for that brief period of time before its attorney arrives on the scene. There is no requirement that the inspectors have to wait for the attorney to show up. Moreover, the inspectors' resolve will be further strengthened by the fact that they are being accompanied by law enforcement officers who are armed.

The second key point that a company must fully understand and follow is not to destroy any document or delete any email -- no matter how innocuous or immaterial -- after the search warrant has been served. In the case of an inspection conducted pursuant to a criminal search warrant, the presumption is that criminal activity has taken or is taking place. It is certainly easier to prove that an existing document or email is innocent and irrelevant, than to prove the negative, namely, that the deleted email or destroyed document was not a criminal communication and, therefore, a "smoking gun".

The third key point to ponder is that a company does not want any of its employees, managers or shareholders to go to jail. Therefore, the managers, employees and others on site must be cooperative and not confrontational during the inspection.

B. *What is a search warrant?*

A search warrant is an order issued by a court authorizing the law enforcement officers to search a particular location for an individual or for specific evidence or information. It is issued on the basis of an affidavit sworn to by either an environmental inspector or, in many cases, a disgruntled employee who knows something about a facility's alleged non-compliance with certain environmental laws and regulations. The warrant specifies the name of the owner or operator of the facility to be searched, its address as well as a deadline for conducting the search. The warrant should also be properly signed and dated.

The most critical part of a search warrant is the scope of search, which is usually set forth as an attachment to the warrant. The scope would indicate exactly what the inspectors are there to inspect, specifying which records and documents to seize, which equipment to inspect, which samples to take, and so on. The company representative must read and understand this part of the warrant very carefully. During the search, there will be a tendency on the part of the inspectors and law enforcement officers to expand

the search beyond its stated scope, and the company representative must not consent to this expansion. (See discussion below.)

C. Search warrant is served.

Once the inspectors and law enforcement officers arrive on the scene (collectively, the "Search Team"), the receptionist or security guard must immediately implement the entry procedure as well as the escort procedure. Contact the company representation as well as the attorney immediately. If possible, maintain continuous telephonic communication with the attorney until she arrives on the scene. After having all of the Search Team members sign in and after carefully inspecting the credentials of each of the Search Team members, the receptionist or security guard must then make photocopies of the search warrant, enough to distribute to each of the escorts, including the company representative. A copy of the warrant should also be faxed immediately to the attorney.

Everyone at the facility who receives a copy of the search warrant must each review the document very carefully, making sure that the document: (1) is signed and dated; (2) correctly sets forth the address of the facility; (3) correctly states the name of the owner or operator of the facility; and (4) has not yet expired. Everyone should then carefully read and understand the scope of the search warrant. If anyone has any questions or comments regarding the scope, these questions or comments should first be directed to the company representative or the attorney, before communicating them to the Search Team.

D. The company representative deploys the Search Warrant Response Team.

Immediately after receiving the call from the receptionist or security guard that a search warrant is being served on the facility, the company representative should activate and deploy the Search Warrant Response Team whose organization and structure would be similar to that of the MMA Response Group, discussed earlier.

After carefully reviewing the search warrant and its scope, and after fielding questions or comments from the facility's search warrant response team, the company representative shall then initiate a dialogue with the Search Team leader, perhaps holding an ad hoc opening conference. The first issue to raise is safety: given the scope of the search, are the Search Team members properly equipped with the right PPE to conduct the inspection or search of a particular process unit or area safely? Will a safety orientation session be necessary before members of the Search Team start to search the facility? Are there enough escorts for each of the members of the Search Team so that no one's safety is compromised?

Second, the company representative must establish an understanding with the Search Team leader that the facility will cooperate fully with the Search Team, but that the Search Team must also cooperate by not attempting to expand the scope of the search. Any concerns or issues raised by the Search Team members to the company should first

be directed to the company representative in order to ensure that an appropriate response or resolution is achieved.

Third, the company representative must maintain communications with the escorts and be accessible to other members of the Search Warrant Response Team. He or she should remind the employees in the facility of the company's interview policy in case anyone gets interviewed by a member of the Search Team.

Finally, since an inspection pursuant to a search warrant is extremely disruptive, rather than attempt to continue operations or conduct business as usual at the facility, the company should be advised to consider temporarily closing the facility and sending home all non-essential personnel -- except, of course, for facility personnel who are part of the Search Warrant Response Team. Apart from not having these employees around for the Search Team members to interview, sending them home would also help expedite the search as well as ensure that there is no one else at the facility whose safety is at risk while the search is being conducted.

E. Always keep the scope of the search in mind.

The scope of the search will always be subject to some interpretation, primarily because the scope itself was probably drafted by someone with little knowledge of the facility and little understanding of the business. Indeed, there will be a continuing tension between the Search Team members who will attempt to interpret the scope broadly as well as attempt to expand the scope of the search, and the Search Warrant Response Team members who will keep the search focused narrowly within its scope and avoid consenting to any attempted expansion of the scope.

How would the Search Team members attempt to expand the scope of the search? By asking for the company representative's permission or consent. This is often attempted surreptitiously by asking questions such as "May I see the contents of this box?" and "It wouldn't be a problem if I searched this file cabinet marked 'Confidential', would it?". These attempts at courteousness by individuals who are armed and who presumably have a court order to search the premises, should be a tip-off to the members of the Search Warrant Response Team that the Search Team is attempting to expand the scope of the search.

Since it is prudent not to confront an armed individual who is being courteous, the most effective and least harmful way of responding to these attempts to expand the scope of the search would be to state clearly and loudly: "That is beyond the scope of the search warrant and you do not have my consent." If the Search Team member proceeds with searching the room or seizing the file without your consent, then the objection will be raised later in court that that expansion of the search was unconsented to and, therefore, illegal; consequently, any evidence seized during this unconsented search becomes "fruit of the forbidden tree" and will likely be thrown out by the court.

As mentioned above, the scope of the search may also address the search for and seizure of information that may be contained in computer hard drives and databases. Unless the inspectors are computer savvy enough to bypass passwords and download all of the needed information onto a floppy disk or cd-rom, more likely than not, they will seize the entire computer. The facility, therefore, needs to be prepared for such an eventuality and ensure that its databases and hard drives are backed up on a regular basis.

If the Search Team decides to seize documents that are either protected by the attorney-company or attorney work product privilege, or contain trade secrets and other confidential business information, the company representative or attorney should clearly register its protest. Although the company representative may still allow the Search team to take them, these documents should first be segregated from the rest of the documents, records and files being seized, and then placed in a sealed envelope marked clearly as containing confidential business documents or confidential documents protected under the attorney-client privilege or attorney work product privilege.

F. Concluding the search.

When the Search Team concludes its search and before it leaves, the company representative or the attorney should immediately request from the Search Team leader a receipt of all documents, records, file cabinets, computer hard drives, and other materials seized. You are entitled to such a receipt as a matter of law. Carefully check this receipt against each of the items being seized before these items are loaded onto the Search Team's vehicles. Also check the receipt against the notes being taken by the administrative assistant of the various files and materials taken. Immediately resolve any discrepancies before the Search Team departs from the premises. Ask the Search Team leader if there are any matters or issues that require any follow-up on the part of the facility

After the Search Team leaves, the company representative or the attorney should immediately conduct a debriefing of all Search Warrant Response Team members to determine and begin documenting exactly what has just transpired. Prepare an incident report containing the identities of all search warrant team members, their individual actions and statements, their attempts to expand the scope of the search, what materials or documents were seized as a result of an unconsented expansion of the scope of search, among other things. Make sure to attach to this report the search warrant, the receipt of items seized, and the various notes taken by the team members during the search.

VI. Conclusion

An ounce of prevention will always be worth more than a pound of cure. There is never a good substitute for being well prepared, especially for events that are potentially disruptive of or harmful to an enterprise. In the case of environmental inspections, being prepared to handle anything from a single inspector's routine visit to an organized and armed team of law enforcement officers serving a search warrant, can spell the difference between survival and growth, or the demise of your company's business.



How to Handle an Environmental Agency Inspection

*ACCA Annual Conference
San Diego, California
Vincent M. Gonzales, Sempra Energy
October 16, 2001*

Introduction



- I. Why Be Concerned with Environmental Inspections?
- II. Preparation
- III. Arrival of the Inspector
- IV. Beginning the Inspection
- V. Monitoring the Inspection
- VI. Ending the Inspection
- VII. Follow-Up

Why You Should Be Concerned

You WILL be inspected.

Inspections are the primary tool of enforcement.

There is substantial civil and criminal liability at stake, at both corporate and individual levels.

Preparation

- Make the best use of EH&S audit reports and recommendations.
- Prepare your records and files for inspection.
- Establish an entry procedure.
- Establish an escort procedure.
- Establish a procedure for handling the news media.

EH&S audit reports and recommendations

- *Promptly close any outstanding EH&S audit findings or issues.
- *Diligently follow or implement EH&S audit recommendations.
- *Treat all EH&S audit reports as confidential and keep them in a secure location.
- *If an inspector requests access to an EH&S audit report, decline such request and contact Legal immediately.

Prepare your records and files for inspection

- Identify and segregate required environmental records and files from others.
- Organize environmental records and files, and store them in separate binders or floppy disks.
- Make sure that permits and records are updated.
- Pre-designate a room where inspector(s) will review records.
- Instruct client to contact Legal before letting an inspector see or copy non-environmental records and files.

Establish an entry procedure

- *Allow inspector(s) to enter facility except if there is an immediate threat to their safety.
- *Have inspector(s) sign visitor log and wear "visitor" badges.
- *After verifying identity and authority of inspector(s), make photocopies of their business cards or authorization letters.
- *Have inspector wait for company representative.

Establish an escort procedure

- Pre-designate and pre-train enough employees to be escorts to match each inspector 1 to 1.
- Escorts must always accompany inspector(s) during inspection.
- Be friendly, but not talkative.
- If inspector(s) are taking any photographs or samples, then escorts must do the same.
- Escorts must not assist the inspector(s) to do the inspection, but escorts must also not interfere with the inspection.

Establish procedure for handling news media

- NEVER PERMIT NEWS MEDIA TO ACCOMPANY INSPECTOR.
- Immediately inform the Law Department or Media Relations of news media presence.
- Do not discuss anything relating to the inspection with the news media, unless you receive prior approval from either Legal or Media Relations.

Arrival of the Inspector

- Train all employees to contact immediately superintendent or other company representative upon arrival of the inspector(s).
- Verify identity and authority of the inspector(s).
- Immediately initiate entry procedure.
- If news media are present, do not allow them into the terminal and immediately initiate news media handling procedure.

Beginning the Inspection

- Hold an "opening" conference to determine the nature, scope and purpose of inspection.
- Initiate escort procedure.
- Agree on specific areas or records to be inspected.
- Do not agree to inspection of records or areas unrelated to purpose or scope of inspection, until inspector's authority to do so has been established.

Monitoring the Inspection

- Escort should take notes of everything the inspector says or does, including sampling, copying records or photographs.
- Limit employee contact with the inspector(s).
- Do not make any admissions, volunteer information, or create evidence for the inspector(s).
- Have escort contact Legal if inspector asks for access to areas or records beyond inspection's scope or purpose, such as confidential business records or legal documents.

Ending the Inspection

- Request a "closing" conference with the inspector(s).
- Take careful note of areas or records inspected and possible non-compliance items pointed out by the inspector(s).
- DO NOT ADMIT that any non-compliance items pointed out by the inspector(s) are violations.
- Do not make any promises you cannot keep when discussing how to abate or correct a non-compliance item.
- Escort inspector(s) off premises.

Follow-Up

- Confirm in writing any requests made by the inspector(s), and contact Legal when responding.
- Verify any questionable or controversial observations made by inspector(s).
- Contact Legal to discuss how to respond to non-compliance items alleged by inspector(s).
- Prepare and file a written record of the inspection.

ENVIRONMENTAL INSPECTION CHECKLIST

Prepare your records and files for inspection

- Segregate environmental records and files from others.
- Make sure that permits and records are updated.
- Pre-designate a room where inspector(s) will review records.

Entry Procedure

- Verify identity and authority of inspector and have him/her sign in and wear "visitor" badge.
- Contact company representative and, if necessary, Legal Department.

Escort Procedure

- Train enough employees to be escorts to match each inspector 1 to 1.
- Escort must always accompany inspector during inspection.
- Escort takes split samples and same photographs as inspector.
- Escort must not interfere with the inspection, nor assist the inspector.

News Media Procedure

- NEVER PERMIT NEWS MEDIA TO ACCOMPANY INSPECTOR.
- Instruct employees not to talk to the media, without prior approval from Legal or Media Relations.

Inspector Arrives

- Initiate Entry Procedure (see above).
- Initiate Escort Procedure (see above).
- Initiate News Media Procedure (see above), if necessary.

Inspection Begins

- Hold an "opening" conference to determine the nature, scope and purpose of inspection.
- Agree on specific areas or records to be inspected.
- Do not allow inspection of records or areas outside scope of inspection, until authority established.

Monitoring the Inspection

- Monitor everything the inspector says or does, including sampling, copying records or photographs.
- Limit employee contact with the inspector.
- Do not make any admissions, volunteer information, or create evidence for the inspector.
- Do not give inspector access to areas or records beyond inspection's scope, without Legal approval.

Inspection Ends

- Request a "closing" conference with the inspector.
- Take note of areas or records inspected and non-compliance items pointed out by inspector.
- DO NOT ADMIT that any non-compliance items pointed out by the inspector are violations.
- Do not make any commitments when discussing how to abate or correct a non-compliance item.
- Escort inspector off the premises.

Follow-Up

- Confirm in writing any document requests made by inspector.
- Clarify any questionable or controversial observations made by inspector.
- The facility and Legal work together on how to respond to non-compliance items.
- Prepare and file a written record of the inspection.

Multimedia Inspections

Some hints for making it through

David Cannon

VP EH&S

PPG Industries

October 16, 2001



PPG Industries, Inc.



1883

Pittsburgh, PA

**Glass, Coatings,
Chemicals & Fiber
Glass**

\$8.6 Billion (2000)

**125 Major
manufacturing sites**

23 countries



USEPA

- ***"Primary focus of multimedia program is compliance monitoring and enforcement, not compliance assistance."***
- ***"Many facilities and companies are operating in violation of more than one environmental statute."***



USEPA Multimedia Focus

- ***Chemicals***
- ***Iron and Steel***
- ***Oil***
- ***Telecommunications***



PPG - Lake Charles, LA

- **Southwest Louisiana**
- **1325 employees**
- **640 acres**
- **Products:**

Chlorine, Caustic Soda, Vinyl Chloride, Hydrogen, Chlorinated Solvents, Silicas, EDC, Ethyl Chloride, Vinylidene Chloride and Muriatic Acid



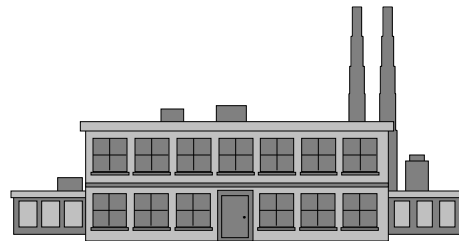
PPG - Lake Charles, LA

- **May, 1999 (10 days)**
- **June, 1999 revisit (3 days)**
- **4 Day warning (2 business days)**
- **14 Inspectors**
 - 1 USEPA
 - 6 NEIC
 - 7 LADEQ



- **Areas covered:**

- **Waste**
- **Water**
- **Air**
- **Toxic Substances**
- **Training**
- **Emissions Reporting**



- **Follow up requests, including 114**
- **Findings 6 months later, Nov. 99**



Upon arrival

- **Cooperate**
- **Request credentials**
- **Conduct full health & safety orientation**
- **Take this seriously**
- **Ask who, where, what**
 - **Warrant? Criminal? Civil?**
- **Notify plant, counsel and corporate**



Things that will make life easier

- ***Standby assistance from EHS staff***
- ***Designated company team***
- ***Thorough document management***
- ***EPA clarification of information requests***
- ***Pairing of plant personalities with EPA personalities***
- ***Daily debrief report from designated plant person to corporate (notification chain)***



More things that will make life easier

- ***Production personnel availability to explain operations to EPA***
- ***Use of conference room away from normal business activity; no distractions***
- ***Check of plant for open-ended lines***
- ***Check of plant for containment breaches***
- ***2-way radios***
- ***Having already reported self-discovered violations***



Even more things that will make life easier

- ***Proper behavior***
- ***"Time Out" after EPA outlines its goals to make proper plant assignments***
- ***Limited, random in-the-field conversations with operators***
- ***Formal opening meeting every day***
- ***Written list of EPA needs every morning***



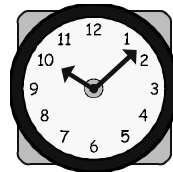
And yet more things that will make life easier

- ***Escorts at all times, even for smoking breaks***
- ***Early lists of sampling needs and locations***
- ***Administrative assistance always available***
- ***Established work hours***
- ***Use of deposition rules for employees:***



... meaning, of course

- ***Tell the truth***
- ***No cads***
 - ***concealment***
 - ***alteration***
 - ***destruction***



At the same time, protect yourself

- ***Get things in writing***
- ***Train your employees***
 - ***rights and obligations***
- ***Consult with counsel (who is remote)***
- ***Concede no wrongdoing or violation***



RESPONDING TO A CRIMINAL SEARCH WARRANT

Presented by Judith A. Wenker

- I. Anticipating a Criminal Investigation
- II. Preparing the Facility
- III. During the Raid
- IV. Conclusion

HOW YOU MIGHT END UP A TARGET

- Pattern of similar violations or period of multiple violations
- Perceived or actual false reporting
- Perceived or actual failure to report releases
- Poor Agency relationships
- Unsatisfactory handling of an Incident
- Disgruntled EHS Staffer
- The workload of the Environmental Crimes Strike Force

TEXACO RAID

- 35-40 ARMED INSPECTORS FROM MULTIPLE AGENCIES/LAW ENFORCEMENT
- CRIMINAL SEARCH WARRANT
- EARLY MORNING ENTRY
- QUESTIONED EMPLOYEES
- DISCOURAGED CONTACT WITH LAWYERS
- SEIZED DOCUMENTS & COMPUTER FILES
- 8 HOURS LONG
- LEFT MASSIVE SUBPOENA ON WAY OUT

Government's Authority: A Search Warrant is Issued on Probable Cause that a Crime has been Committed & that Specific Evidence of the Crime May be Found at a Particular Place.

They specify where the agents can search, what they are to look for and what they may seize.

PREPARING A FACILITY IN ADVANCE

- Training and Refresher Training
 - Appoint a Designated Greeter and Backup
 - Consider a Mock Raid
 - Provide Training in Do's and Don'ts
- Document/Computer Management
 - Segregation of Privileged and Trade Secret documents
 - Data Stored in Computers
- Team of Counsel

DURING THE INSPECTION

- Understand the SCOPE and the AREA to be searched & attempt to limit the search accordingly
- Consent vs. Acquiescence
- Try to find out the nature of the underlying investigation
- Be prepared for SURPRISE, CONFUSION, PANIC, UNCERTAINTY AND INTIMIDATION
- Accompany the inspectors/take split samples/photos.
Use of videotaping
- Try to limit the documents/computer data being taken.
Get inventory for later purposes
- Handling of employees/interviews of employees
- P.R. Issues

HOW TO HANDLE A CRIMINAL INSPECTION UNDER WARRANT

DO's

- . OBTAIN IDENTIFICATION OF AGENTS
- . CALL LEGAL IMMEDIATELY AND ASK AGENTS TO WAIT UNTIL LAWYERS ARRIVE
- . REQUEST A COPY OF THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT
- . REVIEW WARRANT FOR PREMISES WITHIN SCOPE

DON'TS

- . DON'T OBSTRUCT SEARCH
- . DON'T CONSENT
- . EMPLOYEES DON'T HAVE TO TALK TO THEM
- . DON'T LEAVE AGENTS ALONE IN OFFICES
- . DON'T TURN OVER PRIVILEGED MATERIAL
- . DON'T LET THEM TAKE YOUR ONLY COPY OF DOCUMENTS

IN SHORT

• DO NOT OBSTRUCT

BUT

• DO NOT CONSENT

• WARRANT IS FOR PAPERS NOT PEOPLE

Morgan Lewis
C O U N S E L O R S A T L A W

RESPONDING TO SEARCH WARRANTS

Reprinted from *Corporate Investigations and Criminal Defense Handbook*
© 2000 Morgan, Lewis & Bockius LLP

www.morganlewis.com

RESPONDING TO SEARCH WARRANTS

Federal law enforcement agencies are increasingly using court-ordered search warrants of corporate workplaces and facilities to further white-collar investigations. This trend has resulted in corporations suffering the spectacle and disruption of federal agents arriving without notice on the company doorstep, search warrant in hand. In-house counsel need to be prepared to react quickly and appropriately in such cases to protect the company's rights and interests. The following checklist will help a company's counsel prepare for and react to this disturbing law enforcement tactic.

WHAT YOU MUST KNOW ABOUT SEARCH WARRANTS

A search warrant is a written court order issued by a federal judge or magistrate or a judge of a state court of record with jurisdiction over your company's premises, directing a law enforcement officer to search specific premises and seize specific types of property. In the federal system, the warrant must be requested by a federal law enforcement officer or an attorney for the government. Fed. R. Crim. P. 41. It must be based upon a finding that grounds for the warrant exist or that there is probable cause to believe that the grounds exist. Those grounds are usually set forth in a sealed affidavit to the court.

Warrants must be executed within 10 days of the date they are issued and generally must be served during the daytime, which means between the hours of 6 A.M. and 10 P.M. The agents may use force when necessary to execute the warrant. The officer taking property under the warrant is

required to deliver a copy of the warrant and a receipt for the property taken. You also are entitled to an inventory of the property taken. At some point, you will be able to obtain copies of the documents seized. You also may be able to obtain a copy of the underlying search warrant affidavit from the court clerk, if the judge authorizing the warrant permits it.

WHAT YOU SHOULD DO WHEN A SEARCH WARRANT IS EXECUTED ON COMPANY PROPERTY

- ◆ Get an experienced lawyer on the scene as quickly as you can. Understand that this process can take many hours. Be patient and be prepared to spend the whole day.
- ◆ Tell the security guard to ask the agents to sign in at the front desk in accordance with company policy, which will create a list of the agents and their agency affiliations. Try to get a business card from each agent.
- ◆ Get a copy of the warrant as quickly as you can. If you are on the scene, get one from the agent. If you are not on the scene, have someone there get the copy and fax it to you.
- ◆ If it will take more than a few minutes for you to get there, ask to speak to the lead agent by phone. Emphasize that the company will do everything it can to make sure the search proceeds smoothly, but that as counsel for the company you would like them to hold off for a few minutes so that you can get there and make sure that everything is in order.

You are not required to consent to the search and you should not do so. If the agents won't wait, ask if they will participate with you in a conference call to the U.S. Attorney or the magistrate for the purpose of making the same request.

- ◆ Contact the most senior person at the facility, explain what is going on and outline the government's rights and the company's rights, discussed earlier. Explain that this is the time to remain calm.
- ◆ If you cannot get there within a reasonable time, do as much as you can by phone and have someone else work on getting a company lawyer or outside counsel to the scene.
- ◆ As soon as you possibly can, contact your public affairs department. They may get calls from the press and should be advised, generally, not to comment upon or confirm anything.
- ◆ Carefully review the warrant and take note of: (1) the exact premises to be searched; (2) exactly what is to be seized; (3) who issued the warrant; and (4) any time limits for executing it. If the agents conducting the search go beyond the specified premises, the specified items to be seized or the specified time limits, try to contact the responsible Assistant U.S. Attorney to insist upon their respecting the terms of the warrant.
- ◆ Assign one person from the company to each agent or group of agents for the entire period of the search. That person should accompany the agent or agents to observe their conduct, take extensive notes regarding the places searched, the time involved in each part of the search, and the conduct of each agent. Do not offer to assist. Do not volunteer information. If an employee talks with

the agents, make note of his or her name and the substance of the conversation.

- ◆ Establish a communications center at the facility and at your office. Keep the telephone lines clear for ease of communications. Have a senior person at the facility monitor the search from beginning to end and report to you at regular intervals.
- ◆ Government agents may seek to interview employees during the search. Although you cannot instruct employees not to speak to the agents, you may, if circumstances permit, advise employees that they are not obligated to speak to the agents, that they are entitled to be represented by an attorney during any interview, and that the company will provide such representation. If an employee talks with the agents, make note at the earliest possible time of his or her name and the substance of the conversation.
- ◆ Try to find out who is the lead government attorney handling this matter. From the agents or the attorney, try to find out what the nature of the investigation is, whether the company is a target/subject, whether any company employee is a target/subject, and whether there is a grand jury involved. Do not panic if they won't immediately tell you. They are obligated by law to eventually tell you before any further serious legal action is taken.
- ◆ Be prepared to provide an office or workplace for the lead agent. Try to resolve any problems related to the search with the lead agent, as opposed to having multiple discussions with the various agents.
- ◆ Classified information presents special problems in the context of search warrants. Try to determine if the agents

have appropriate security clearances. They may have some but not others. Contact your resident government security officer quickly and seek guidance. Take careful notes of everything said or done with regard to classified documents, especially any directions given to you by the security officer. If you do not have resident security officers, contact the local office of the Defense Investigative Service (DIS), which is the federal agency responsible for security oversight for classified materials at your company, or contact the customer's security representative for special access programs.

- ◆ Law department files or other attorney–client privileged materials may be part of the search. Guidelines in the manuals issued to U.S. Attorneys provide that a search warrant should normally not be used to obtain attorney–client materials. Ask the person conducting the search to stop because of the nature of the materials involved. Try to reach the Assistant U.S. Attorney handling the case and impress upon the assistant the seriousness of what the agents are about to do. If you cannot reach the assistant or your persuasive powers have failed, contact the magistrate who issued the warrant or, if that fails, any judge you can. This is an important issue worth pressing.
- ◆ Before the agents leave the premises with anything they have seized, obtain a detailed inventory. You are entitled to receive one and you will probably notice that they are making that inventory as the search progresses. If you have had adequate time to instruct the people accompanying the agents, you may want them to make their own inventories of the documents/things seized by the agents. You are not required to sign a receipt for the inventory and you should not do so if you are asked.
- ◆ Try to obtain copies of the documents before they are taken off the premises. You may not succeed, but ask anyway. Certainly if the agents are removing documents that are essential to carry on the business of the company (e.g., computer software or engineering drawings) you have a legitimate claim, especially if they can be easily copied on the spot without damaging the originals or impeding the search. This is an area in which you can be a bit more insistent. Remember that everyone has a boss. Do not be timid about escalating the request to a higher level of authority.
- ◆ Personally escort the lead agent from the premises after the search. Ask the agent to confirm that the inventory is a complete list of everything seized.
- ◆ Check with your security guards to make sure that all the agents have left the facility. Note the time the search was completed.
- ◆ As soon as the agents leave, careful note should be made of all the offices and other areas searched. For each area, list the names of the people who work there. Go through the area and identify what was taken and interview each person about the items taken. This will be very helpful in the ensuing investigation — both your own and the government's. Also, carefully inquire whether any agents spoke to any employees. If any conversation took place, gently but firmly get the specifics of that conversation from the employee.
- ◆ From what you have been able to piece together, you should see the outlines of the government's focus. Identify the people in your company who know the most about those issues and interview

them at length about any problems or concerns that they are aware of.

- ◆ Finally, reassure your fellow employees. They will be, in all likelihood, anxious and upset about the search.

WHAT YOU CAN DO TO PREPARE FOR A SEARCH WARRANT

Before the knock on the door arrives, you should take certain steps to ensure an appropriate and smooth response. First, you should develop and appropriately disseminate a corporate policy for every facility you operate. That policy should clearly state that if any law enforcement personnel arrive, the company lawyers should be notified immediately, before the agents are allowed onto the property. That policy should be signed by the general manager of the facility and copies should be made available to all department managers. In addition, you should conduct special training classes to explain things like company policy and the law relating to search warrants, service of process on company property and requests to interview company employees. Training should include a special briefing for appropriate levels of management at the facility and at the corporate level.

At each facility, the guard should have your name and telephone number right by the phone. You should also give them an alternate person to call if they cannot reach you immediately. In addition, each facility should have available written instructions for employees to use when accompanying agents during a search. These should be very basic: *e.g.*, get a pencil and paper, go wherever the agents go and write down what they do, say or seize; do not answer the agents' questions; call the communications center every 20 minutes and more frequently if something of note occurs. These instructions should be typed up and available in multiple places around the company. Often some sort of division deskbook is a good place to keep such things.

You should also mark law department files and, to the extent possible, attorney-client communications as "Attorney-Client Confidential and Privileged Communications." This will at least slow the agents' efforts to seize the material. Finally, you should identify competent criminal counsel to be contacted immediately if a search warrant is executed on company property.

FEDERAL ENVIRONMENTAL CRIMES

A. Clean Water Act

1. Misdemeanor Offense-Negligent Pollution of a navigable water of the United States, without a permit, or in violation of the terms of a permit. Also applies to discharges to publicly owned treatment works. 33 U.S.C. § 1319(c)(1).
2. Felony Offense-Knowing violations. 33 U.S.C. § 1319(c)(2).
3. Knowing Endangerment-Knowing violations by a defendant who knows he is placing another person in imminent danger of death or serious bodily injury. 33 U.S. C. § 1319(c)(3).
4. False Statements in Reports, and Tampering with Monitoring Devices or Methods. 33 U.S.C. § 1319(c)(4).

B. Clean Air Act

1. Felony Offense-Knowing violation of a substantive provision of the Act. 42 U.S.C. § 7413(c)(1).
2. Misdemeanor Offenses-Negligent Endangerment; Failure to Pay Fees. 42 U.S.C. § 7413(c)(3) and (4).
3. Knowing Endangerment-Release of hazardous air pollutant by a defendant who knowingly places another in imminent harm of death or serious injury. 42 U.S.C. § 7413(c)(5)(A).
4. False Statements. 42 U.S.C. § 7413(c)(2).
5. Defenses-Consent; endangerment reasonably foreseeable hazards of an occupation. 42 U.S.C. § 7413(c)(5)(C) and (D).

C. Resource Conservation and Recovery Act (RCRA).

1. Knowing transportation or disposal of a hazardous waste without a permit or in violation of a permit. 42 U.S.C. § 6928(d)(1) and (2).
2. Knowing transportation without a manifest. 42 U.S.C. § 6928(d)(5).
3. Knowing generation without proper documentation. 42 U.S.C. § 6928(d)(4).
4. Export violations. 42 U.S.C. § 6928(d) (6).
5. Used oil Violation. 42 U.S.C. § 6928(d) (7).
6. Knowing Endangerment. 42 U.S.C. § 6928(e).
7. False Statements. 42 U.S.C. § 6928 (d)(3).

- D. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).
 - 1. Failure to Notify of Release of Hazardous Substances. 42 U.S.C. § 9603(b).
 - 2. Knowing violation of record keeping and reporting requirements. 42 U - S. C - § 9603 (d) (2).
- E. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).
 - 1. Statute prohibits the sale of unregistered or mislabeled pesticides, and use of pesticides in a manner inconsistent with labeling. 7 U.S.C. § 136j.
 - 2. Registrants, producers and commercial applicators are subject to one year maximum misdemeanors for knowing such violations. 7 U.S.C. § 136(1)(b)(1).
 - 3. Private Applicators are subject to a 30 day maximum for knowing violations. 7 U.S.C. § 136(1)(b)(2).
- F. Other Statutes
 - 1. Toxic Substances Control Act. 15 U.S.C. § 1201, 2615.
 - 2. Ocean Dumping Act. Outlaws unauthorized dumping of material in waters of the United States, or transportation of material through waters of the United States for the purpose of dumping it. 33 U.S.C. § 1411, 1415.
 - 3. Act to Prevent Pollution from Ships. 33 U.S.C. §§ 1901-1912.
 - 4. Federal Lands Offenses.
 - a. Injuring property of the United States. 18 U.S.C. § 1361.
 - b. miscellaneous offenses. 18 U.S.C. §§ 1851- 1864.
 - 5. Wildlife Offenses.
 - a. Migratory Bird Act. 16 U.S.C. § 703.
 - b. Endangered Species Act. 16 U.S.C. § 1531.
 - 6. General Federal Criminal Provisions.
 - a. Conspiracy to commit an offense or to Defraud the United States. 18 U.S.C. § 371.

HYPOTHETICAL

- Disgruntled employees due to cutbacks, mergers, PMP reviews, relocations/whistleblowers who want to get even or earn rewards
- Confusion about meaning of regulations, permit conditions, what or how to report releases, exceedances, lab results, other disclosures to agency possibly including oral assurances by a friendly agency staffer that aren't correct that, say, results in averaging lab results when that isn't allowed/reporting numbers other than actual emissions based on models, past practice, agency guidance
- Reluctance of employees to manage, correct or report doubtful noncompliance that may result in management disapproval or finger pointing, large expenditures, that is the same thing done by others in the industry, that is being done by contractors, that has been going on for awhile, that isn't clear
- Replacement/successor environmental or safety people that might result in a new person not knowing the exact permit conditions, or in innocently continuing dubious practices of predecessor
- Failure to communicate changes in regulations by regional or corporate staff for various reasons
- Misunderstanding by staff level employees of strong management directives to cut costs, avoid or reduce violations, keep equipment running at all costs
- Failure of lab reports or operating logs to match reports to agencies/failure to report all samples or to selectively report the lower of duplicate, multiple results
- Lack of communication with labs or contractors on their understanding of regs and rules
- "Knowing" noncompliance based on nonpermitted upsets or need to keep facility operating while key equipment is out of order

SEARCH WARRANTS *QUIK*-CHECKLIST

DO NOT destroy anything.
Cooperate, but keep control.
Notify your attorney.

Have officers sign in.
 Notify superintendent or alternate.
 FAX search warrant to attorneys.

<p><u>Review Search Warrant:</u></p> <ul style="list-style-type: none"> ➤ <i>Are the name/address correct?</i> ➤ <i>Is it signed by a judge?</i> ➤ <i>Has the execution date expired?</i> ➤ <i>What is the Scope of the search?</i> <p><u>Coordinate & assign escorts:</u></p> <ul style="list-style-type: none"> ➤ <i>1:1 escort-officer ratio</i> ➤ <i>All officers must be escorted.</i> ➤ <i>Escorts know areas searched.</i> ➤ <i>Escorts take good notes.</i> 	<p><u>Do not expand the scope of search.</u></p> <ul style="list-style-type: none"> ➤ <i>Never consent to requests to expand the scope of the search.</i> ➤ <i>"May I search this area?"</i> ➤ <i>"Ok if I take these also?"</i> ➤ <i>Response: "That is beyond the scope of the search warrant."</i> ➤ <i>If officer insists, then say: "I will not interfere, but you do not have my consent."</i>
<p><u>Keep a comprehensive record:</u></p> <ul style="list-style-type: none"> ➤ <i><u>Files seized & areas searched.</u></i> ➤ <i><u>Members of search team.</u></i> 	<p><u>Computer hard drives can be seized.</u></p> <ul style="list-style-type: none"> ➤ <i>Back up critical databases.</i> ➤ <i>Label all privileged files.</i>
<p><u>Privileged & confidential files:</u></p> <ul style="list-style-type: none"> ➤ <i>Legal correspondence & memos; confidential business information; trade secrets.</i> ➤ <i>Protest seizure of these.</i> ➤ <i>Place in envelope marked: "Privileged & Confidential"</i> 	<p><u>Concluding the search:</u></p> <ul style="list-style-type: none"> ➤ <i>Get receipt of items seized.</i> ➤ <i>You are entitled to this.</i> ➤ <i>Check its accuracy.</i> ➤ <i>Request a closing conference:</i> ➤ <i>Not required, but just ask.</i> ➤ <i>Go over what areas were searched & items seized.</i>

REMAIN CALM & DO NOT PANIC.

CRIMINAL SEARCH WARRANT CHECKLIST

PRIVILEGED & CONFIDENTIAL

1. Obtain identification from the agents. Request a business card. Request a copy of the search warrant and the affidavit. (They are not required to give you the affidavit at this time and they probably won't, but it doesn't hurt to ask.)
2. Call your legal contacts immediately and fax them a copy of the warrant and affidavit.
3. Ask the agents to wait until your legal counsel arrives before conducting the search. They are not required to wait, and probably will not. **DO NOT STOP THEM** from entering, if they wish to proceed.
4. Inform the agents who the official company spokesperson is, and state that **ALL QUESTIONS MUST BE ADDRESSED TO THAT PERSON.**
5. **DO NOT DO THE FOLLOWING:**
 - (a) **Do not consent to the search;** tell agents that you do not consent, but will not interfere with the execution of the warrant (if agents insist on conducting the search before Legal representatives arrive).
 - (b) **Do not obstruct** the execution of the warrant.
 - (c) **Do not allow** anyone else to obstruct the execution of the warrant.
6. **DO THE FOLLOWING:**
 - (a) Before counsel arrives, appoint one person for each group of agents to observe the search and keep notes of areas searched, and all documents and evidence taken in the search.
 - (b) Excuse the employees from any areas being searched, while the agents are conducting the search. Only the observers and/or spokesperson should be present in an area at the time of a search. Send the excused employees to a separate area or room, or send them home for the day. Do not give the agents an opportunity to question or interview the employees.
 - (c) Advise employees that the agents may try to ask them questions, but the agents **have no right to interview employees.** Read the following statement to employees regarding questions from the agents.

"There are law enforcement agents here at our facility executing a search warrant. Under a search warrant, the agents have the right to look at our documents and computer files, but the agents HAVE NO RIGHT TO CONDUCT INTERVIEWS, AND THEY CANNOT FORCE YOU TO BE QUESTIONED OR INTERVIEWED. At this time, _____ is the official spokesperson for questions from the agents, and (s)he is answering all questions on behalf of the Company. If an agent asks you questions, or tries to interview you, we would like you to refer the agent to _____.

7. Request the agents to leave copies of **all** documents seized. If the agents will not leave copies of all documents, request that the agents leave or copy any documents that are essential for the operation of the business, including:
 - (a) personnel records;
 - (b) accounts receivables/payable records;
 - (c) customer/supplier lists;
 - (d) sales information; and
 - (e) records necessary to bill customers.
8. Request an inventory of all items seized and taken from the premises. The agents are generally required by law to give you a receipt and inventory of the items taken.
9. Take pictures of anything the agents photograph. Keep a written record of the time, date and scene/items photographed. If a video camera is available, use it to photograph the search.
10. If samples are taken, request split samples. If split samples are not given, take a sample from the same location in the same manner as soon as possible.

LEGAL DEPARTMENT CONTACTS FOR AGENCY INSPECTIONS OR CRIMINAL SEARCH WARRANTS