

HOW TO MANAGE AN AGENCY INSPECTION

BEFORE, DURING AND AFTER



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This paper discusses the steps you should take before, during and after an inspection by the federal Environmental Protection Agency (EPA) or the federal Occupational Safety and Health Administration (OSHA).

In a typical year, EPA and state environmental agencies conduct over 90,000 inspections throughout the United States. The federal OSHA did 40,993 inspections in FY 2010.

The goal of an EPA inspection is to ensure that companies comply with their permit conditions and to protect the public from toxic and hazardous wastes. In 2010, these inspections resulted in over \$168 million of criminal, civil and administrative penalties. OSHA imposed over \$100 million fine on a single company recently. OSHA's inspections are designed to protect workers from unsafe conditions at the workplace.

This paper discusses some practical steps you can take to manage an agency inspection.

Different Types of Inspections

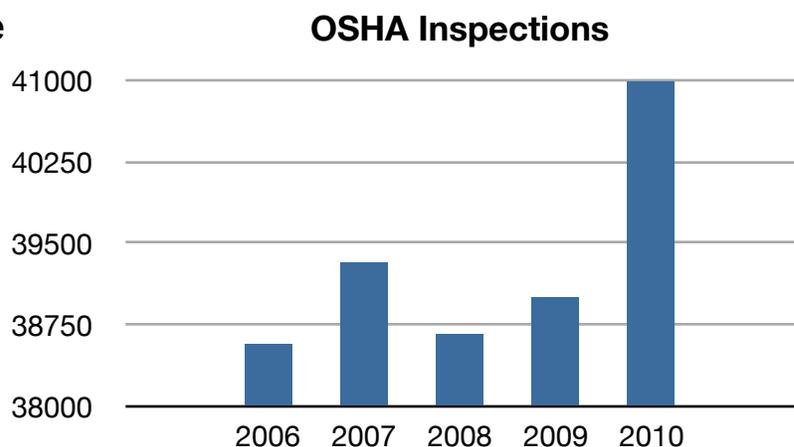
In general, there are three types of inspections:

Compliance Inspection -

This is a routine compliance evaluation inspection in which the agency determines your company's compliance status concerning published environmental regulations. Many of these are programmed inspections.

For example, OSHA inspects worksites that have been scheduled based on certain selection criteria. The worksites are generally selected according to national scheduling plans for safety and health. Or they can be selected based on regional priorities. They could be inspections targeting industries or worksites that have unusually high rates of injuries. OSHA has a database that collects injury and illness data from approximately 80,000 employers with 40 or more employees.

Case Development Inspection. This is an inspection performed to help the agency develop its case against an organization. These inspections are normally done when a routine compliance inspection uncovers evidence of serious violations or noncompliance. An inspector is then dispatched to collect additional evidence to support the any future enforcement actions.



Joint Federal/State Inspection. This is when inspectors from federal and state (or state and city) agencies show up at your front gate. For example, the federal inspector is assessing how his state counterpart inspects your facility! This is the worse type of inspection and you can be sure that the state inspector will be extra diligent.

How Are Companies Selected For Inspection

Organizations are targeted for inspections for various reasons:

Industry Specific Initiatives. The EPA periodically targets a specific industrial sector for inspection based on the industry's overall compliance history. For example, in recent years the flexographic printing operations in the metropolitan New York area were targeted by Region II, and the foundries in Oklahoma and the oil & gas exploration sector in the Gulf of Mexico were targeted by Region VI because of increasing environmental incidents and concerns in these industry sectors. Region II targeted university campuses for compliance inspection.

History of noncompliance. If your organization has a long history of non-compliance, you have a much greater chance of being targeted for additional inspections. The agencies will likely schedule you for followup inspections. "Failure to abate" is a very serious citation from OSHA.

Community and employee Complaints. People in your community complain to the agencies that your facility is releasing some harmful substances or objectionable smell into the environment. The most common complaint is odor from wastewater treatment and certain food processing plants. EPA will often initiate an inspection after an unauthorized release of chemicals from a facility. Employees have the right to report unsafe working conditions. They also can, and often do, report observed or perceived environmental violations at the workplace. Sometimes underlying labor-management disputes or tension will also prompt such complaints. Many of these complaints will trigger an OSHA visit.

Un-programmed OSHA inspections. These are OSHA inspections to respond to alleged hazardous work conditions identified at the workplace. This type of inspection typically responds to imminent dangers, fatalities, catastrophes, complaints, and referrals.

Enforcement Data Collection. The agency may inspect a facility to obtain additional evidence for criminal enforcement purposes.

Note that many agency inspections are not announced in advance. OSHA law specifically prohibits unauthorized advance notice of inspections. This

is to prevent speedy alteration and disguise by employers in making changes in worksite conditions.

There are exceptions to this rule.

If the presence of employer and employee representatives on the appropriate personnel are needed to aid in the inspection process, then the agency may provide notice of the inspection. Another situation where advance notice is given would be in the case where such notice would enhance the probability of an effective and thorough inspection. An example would be a complex fatality investigations.

An agency sometimes will make an appointment to visit a facility for record review. They do this because they want to make sure that the person who is most familiar with the records will be present during the inspection.

Agency's Authority for Site Entry:

Generally, EPA has the authority to enter any establishment where hazardous wastes are (or have been) located, generated, stored, treated, or disposed. Many federal and state statutes specifically provide environmental agencies with such inspection authority.



Another origin of an agency's inspection authority comes from the permittee. For example, every air or wastewater permit typically contains boilerplate language that says that by accepting the permit, the permittee is giving the agency

the authority the right to:

- Enter and inspect the facility during reasonable and normal working hours without a warrant if consent is given knowingly and freely.
- Inspect and obtain samples of wastewater, air emission, and hazardous wastes.
- Request information and obtain copies of certain records.
- Take pictures of conditions at the facility.

The right of entry now becomes a permit condition. Denial of entry could then be considered as a permit violation.

Sometimes an agency will seek a warrant in advance of an inspection if the agency feels that the employer is likely to refuse entry by the inspector.

What are Your Rights?

You have the fundamental right to be free from unreasonable searches under the Fourth Amendment. You also have the following rights:

- **Safety Procedures:** You can require the inspector to adhere to your established safety procedures. For example, if the inspector doesn't have the personal protection equipment required under your safety policy, you can request that he or she return later with the proper equipment.
- **Consultant Or Attorney:** You can have your consultant or attorney present during the inspection. But keep in mind that the inspector does not have to change his schedule or wait for your consultant or attorney to arrive. OSHA inspectors will not wait for more than an hour.
- **Refusing Entry:** You can refuse entry by the inspector or withdraw your consent for the inspector's presence at your facility at any time during an inspection. If you refuse entry, you should understand the negative consequences that could follow. All inspectors are instructed to consult with their legal counsel when access is denied to them and they will return with a warrant from a magistrate or judge and you will then have to let them in. If there is any threat of physical violence to the inspector, the inspector will most likely return with armed escorts.

Keep in mind that you may have already given consent to agency inspection when you applied for and accepted your wastewater discharge or air emission permit. Refusal to allow an inspector entry to review your permit records in effect exposes your organization to a violation of a permit condition, which can carry significant penalties.

The term "refusal of entry" or "denial of entry" is broadly defined by most agencies. Refusal of entry exists when the employer refuses to permit the inspector to enter the premise or hinders the inspection after entry has been granted. Once the inspector determines that a refusal of entry has been made, the inspector will leave the premise and immediately notify the refusal to the agency.

When entry has been allowed and the employer subsequently interferes with the work of the inspector, the inspector would determine where and not to consider such action as a refusal. Examples of such interference includes refusal to permit the inspector to freely walk around the facility, examine records essential to the inspection, take photographs and videotape, or take samples.

In an OSHA inspection, if you refuse to permit the inspector to speak privately with any of your employees, it will be regarded as “denial of entry.”

Whenever an inspection encounters forcible resistance, opposition, interference, assaulted or threatened with assault while in the performance of official duties, all inspection activities will stop. The inspector will leave the premise and may return with armed law enforcement officers as escort. The inspection will not likely end with a possible outcome for you.

How To Effectively Prepare for an agency Inspection

Although agency inspectors are not required to give you advanced notice of their arrival, in some cases notice is given before an inspector shows up. Very often you may have warning that your facility will be inspected because the inspector is seen inspecting other facilities nearby.

Once you are aware of a pending inspection, you can prepare for it by taking the following steps:

The first thing to do is look at your housekeeping. The physical appearance of your facility is an indication of your compliance status. Inspectors are to probe deeper when they see unsanitary or messy conditions at a facility.

The second thing to do is brief your employees on how they should behave during the inspection. Tell them they must always be truthful with the inspectors. Providing false documents or information to a federal inspector is a crime especially if the material being withheld is essential for the inspector to perform this duty.



In other words the employees should answer truthfully to all questions posed by the inspector. If the inspector neglects to ask the appropriate questions, it is not the employees duty to provide answers to a missing question. Advise your employee’s not to speculate on any issue. Only answers truthfully if they have personal knowledge of the events being questioned by the inspector.

Also inform you employees that it is not their duty to volunteer information or to speculate on things for which they have no personal knowledge. It is also not the employee’s duty to help the inspector to do his job. For example, if the inspector is observed to be collecting a sample using a

wrong sampling bottle, it is not your obligation to point that out to the inspector.

Do the following things:

- Review all the regulations that apply to your operations.
- Read your permits and make sure you understand the permit conditions. You should be more knowledgeable about your own permits than the inspector.
- Obtain a checklist of what the inspector might be looking for. You should try to obtain a copy of the agency's inspection checklist beforehand. Many of these checklists can be readily downloaded from the agency's website.
- Conduct a mock inspection of your facility using the agency checklist. The purpose of the mock inspection is to identify any areas of deficiency that you can fix before the inspector shows up. It is absolutely NOT necessary to prepare a report outlining all the deficiencies that you have discovered during a mock inspection. It is also not necessary to send out a broadcast e-mail to everybody outlining all the deficiencies that you have found. It is unwise to develop a documented paper trail of your violations which can be discoverable by the agency.
- Organize your records. When the agency inspects your facility, it generally begins with an inspection of your files and records such as your discharge monitoring reports, hazardous waste generator manifests, weekly inspection logs, OSHA-200 logs, etc. You should assemble your records and files in a separate room for the inspector to review. In that way, the inspector will not need to search through all your files.
- Identify privileged documents (i.e., attorney-client privileged communication) and keep them out of the review area and make sure that they are clearly marked as such to avoid inadvertent inclusion with other documents.
- Advise your employees of the visit and designate a team or person to escort the inspector **at all times** during the plant tour.
- Alert your corporate staff, consultant and legal counsel. Make sure you know where to reach them by phone.
- Have camera and film readily available. The most practical way is to keep several disposable cameras in your office.

The Opening Conference

You should always request an opening conference when the inspector shows up. Most inspectors will do that. This meeting can often set the tone of the inspection and will give the inspector the opportunity to discuss the scope of his inspection with you. At this meeting, you should:

- Have someone take copious notes of the questions and answers.
- Observe how the inspector keeps records in case you need to subpoena them.
- Introduce your inspection team and provide the inspector with a map and description of your facility.
- Explain your established health and safety policy and procedures that the inspector needs to follow.

Note that employee representatives have the right to be present at an OSHA opening conference. They can request a separate conference if they so choose.

The OSHA inspector would also inform the participants that video camera and an audio recorder may be used to provide a visual record and that the videotape and audiotape will be used in the same manner as handwritten notes and photographs in OSHA inspections. If the employer refuses to allow videotaping during an inspection, the inspector will contact his area director to determine if the videotaping is critical to document the case evidence. If it is, refusal by employers to let the inspector take video would be treated as a denial of entry.

What to Expect during the Actual Inspection

The actual inspection will include a document review and a site inspection.

DOCUMENT REVIEW - The inspector will review documents pertaining to the subject of the inspection. You are **not** required to divulge to the inspector any documents or information that you are not required by law to maintain. If you have such information and are not prepared to share with your inspector, you do not have to let the inspector know of its existence.

Here are some typical examples of what an agency inspector might request for a couple of different types of inspections:

Wastewater Treatment Plant Inspection-The agency inspector will review the plant's maintenance record; how the flow meters are calibrated and the laboratory analysis records upon which your plant's Discharge Monitoring Reports are prepared

Resource Conservation and Recovery Act (RCRA) - The inspector may check the facility's hazardous waste inventory and manifests and may look for the presence of signed manifests, updated contingency plans, weekly inspection logs, employee training records, etc. The inspector will also check your waste storage area and the accumulating date to make sure the time limit (90 days for a large quantity generator) has not been exceeded.

Safety Inspection - the OSHA Inspector will conduct a walk-through of the workplace taking note of any workplace related hazards that are not in compliance with OSHA standards. Under OSHA law, the inspector has the right to interview any employees privately on all the work site. Refusal to allow such interview would be considered to be a refusal of entry by the OSHA inspector. The employees representative also has the right to be present during these private interviews. The employers are required to provide OSHA records within four hours upon request. As a matter of law, OSHA inspector will not cite any employee for violating OSHA standards at the workplace. It is the responsibility of the employer to make sure that the employees comply with OSHA standards and the employer is expected to take disciplinary measures against any employee who refuses to comply. Disciplinary measures are to include dismissal.

SITE INSPECTION

After reviewing your records, the inspector will take a site tour. You should always escort the inspector throughout the tour and take the most direct route to where the inspector wishes to visit.

Listen to the inspector's questions and answer them in a forthright manner. Do not volunteer information that is not related to the questions. If you don't know the answer based on your own direct personal knowledge, say so. Never speculate. Instruct your employees to do the same. Take copious notes during the walk around.

If the inspector takes any photograph, you take photo of the same event at the same time as the inspector so that you will be able to reconstruct your own record later.

Always request a split sample if the inspector take a sample. Since the purpose of obtaining such a split sample is to ensure the accuracy of the agency's data, you need to follow the agency's procedures and protocol in performing the analysis in case you decide to challenge the agency's results later. You only want to do the analysis if you are sure that the results

will be favorable to you since your test results may be discoverable by the agency.

Request a copy of the agency's analytical results on the samples taken during inspection. Normally, the agency will provide you with a copy of its inspection report with the analytical results.

Never reprimand your employees for any noted violations in front of the inspector. This projects a very negative image of your management style. The inspector will not be impressed. Furthermore, you will have made an eternal enemy out of the employee whom you humiliate in front of an inspector.

What To Do In The Closing Conference And After The Inspection

At the closing conference, an inspector will usually summarize the observations and findings made during the inspection. There are some Do's and Don'ts you should remember during the closing conference:

DO:

- Document the inspector's comments including observations, opinions or alleged violations.
- Ask the inspector to clarify his allegations as to where, when, who, what, why and under which regulation.
- Correct any factual errors made by the inspector and note it in writing.
- Clarify any misunderstanding the inspector may have about your operations. This is very important because some inspectors may not have sufficient background in your industry to understand your manufacturing processes.
- Request copies of all documents, reports and photographs from the inspector.

DON'T:

- Admit to any alleged violations in the presence of the inspector or fellow workers.

- Sign any statements acknowledging any violations prepared by the inspector without checking with legal counsel.
- Argue with the inspector. There will be plenty of time to challenge the results of the inspection.
- Get belligerent with the inspector. You don't want to win the skirmish and lose the war.



The advantage of Immediate abatement

If you can easily correct a non-compliance situation noted by the inspector during the plant tour, do so and tell the inspector before he leaves your facility.

OSHA has a quick-fix penalty reduction plan that gives the employer an opportunity to abate an alleged violation within 24 hours. Once the abatement is confirmed, the employee would qualify for a quick fix penalty reduction of 15%. Only violations that are classified as other than serious qualify for the quick-fix penalty reduction. The corrective action must be permanent and substantial rather than temporary. For example installing a guard on the machine will be considered to be permanent and substantial as opposed to removing an employee from the zone of danger.

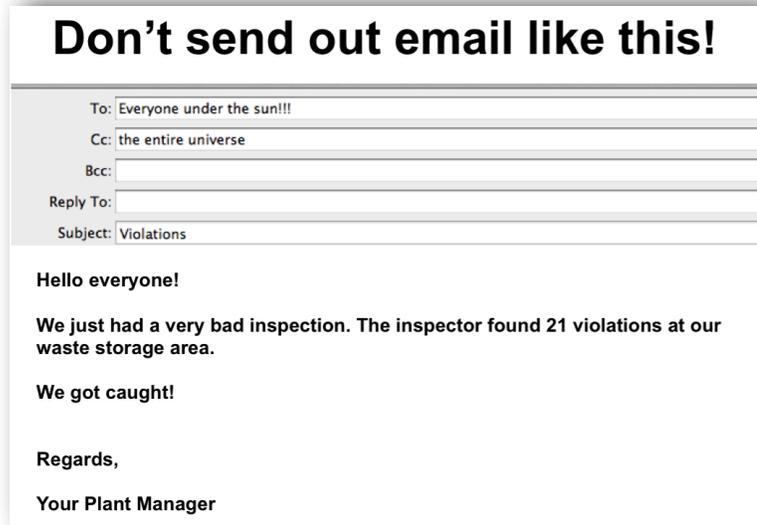
Quick-fix penalty reduction under OSHA will not apply to high gravity, serious, willful, repeated, or failure to abate violations. It also would not apply to violations related either to a fatality or illness or any incidents resulting in serious injuries to employees. It also will not apply to blatant violations that can be easily corrected. An example of correcting a blatant violation would be turning on a ventilation system to reduce employee exposure to a hazardous atmosphere.

RESOLVING ANY ISSUE AFTER THE INSPECTION

If the inspector has alleged any violations at the closing conference, you need to do the following as soon as possible:

- Review and verify any allegations made by the inspector.
- Read the pertinent regulation carefully and read it again. There have been many instances where an inspector has cited the wrong regulations.

- If you feel you may have committed a violation, discuss the matter with your direct supervisor and legal counsel and nobody else - not even your coworkers.
- Do not fire off an interoffice email telling everyone about all those violations that the inspector has uncovered. A much better approach is to send out a “reminder email” later reminding every one of the requirements pertaining to the situation without admitting to any wrongdoing.
- Create separate files for any anticipated citations and start preparing your own case and building your argument if you plan to contest any alleged violation. That’s why you need to take really good notes and pictures during the inspection. Your legal team will have to rely on your personal knowledge of the inspection to make its case.



REMEMBER: You always have the right to challenge or contest any citations that an inspector may issue as a result of the inspection. You can contest it on the grounds of errors made by the inspector.

If the alleged violations are true, you can always negotiate with the agency to arrive at a lower penalty. Your success in penalty negotiation will depend on your past compliance record, your working relationship with the agency, and to some degree, your demeanor during the inspection.

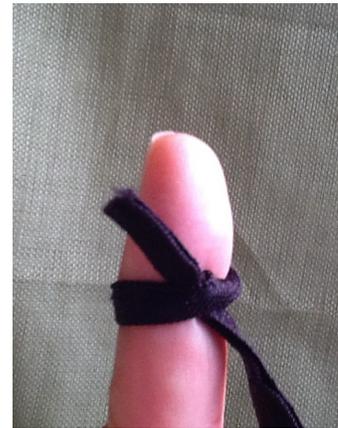
OSHA normally will give a 15% reduction for good faith effort if the employer has documented an effective safety and health management system with incidental deficiencies. Some examples of good faith efforts would be minutes of employees safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing health and safety in the workplace.

One final thought - always try to resolve any disputes at as low a level as possible. If you can't resolve the matter with the inspector, take it up with the supervisor and slowly work your way up the agency chain of command. Remember that the higher you go in an agency, the less control you will have over the enforcement process.

Summary of key points to remember:

Here are some practical steps to remember in dealing with an agency:

1. Always make sure you have maintain good housekeeping practice.
2. Read your permits and understand their requirements.
3. Think hard about the consequence before you deny entry to an inspector.
4. Do a mock audit of your facility if you know you are going to be inspected. Use agency checklist to do the mock audit.
5. Never document your mock audit results. Just fix the problems.
6. Tell your staff to never lie to an inspector.
7. Answer truthfully when asked but never volunteer information and never speculate.
8. It is not your job to help the inspector do his job.
9. Always ask for split sample from the inspector.
10. Never reprimand an employee in front of the inspector.
11. Never use an inspector as a cheap consultant.
12. Fix any problems the inspector discovers before he leaves if possible.
13. Resolve issues with the agency at the lowest level possible.



Additional References

There are several excellent resources on agency inspections from EPA and OSHA. They can all be download from the agencies' websites. Local environmental agencies also have inspection checklists you can download for free.

- EPA's RCRA Inspection Manual, dated October 1993
- EPA's Multimedia Investigation Manual, dated March 1992.
- OSHA's Field Operations Manual, dated April 22, 2011

About the Author



Norman Wei is principal of Environmental Management and Training, LLC., a consulting and training company based in Florida. He conducts environmental compliance seminars (both public and in-house) throughout the country. Over 1000 companies have sent their environmental/safety professionals to his seminars.

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