

# What To Do When an Environmental Inspector Shows Up

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# Part I

## Environmental Inspections



*“The crooks never sleep and neither does Clouseau.”*

-Inspector Jacques Clouseau

# The Right To Inspect

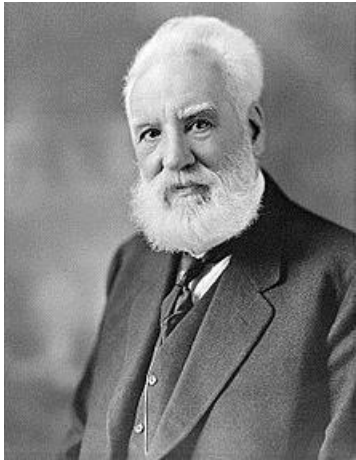
- ➔ Under several federal and state environmental management laws, U.S. EPA and state officials have the right to enter any regulated premises to access and copy records, inspect monitoring equipment, and take samples of air, water, and soil.

# Cooperating with an Inspection

- ➔ Inspectors ordinarily may not enter a facility without consent or a warrant
- ➔ Many permits require that inspectors be given access as a permit condition
- ➔ Avoid formally consenting to an inspection, either verbally or in writing, except in the most unusual circumstances
- ➔ But, you should cooperate with the inspection

# Part II

## Preparing for Inspections



*“Before anything else, preparation is the key to success”*

*-Alexander Graham Bell*

# Preparing for an Inspection

- ➔ If your facility is regulated, you should anticipate and prepare for an inspection
- ➔ Identify a short list of designated employees authorized to represent the company, accompany inspectors and answer questions
  - ➔ Ensure that at least one designee is available at all times the facility is open for business
  - ➔ Other employees should be instructed to direct the inspectors to one of the designated employees

# Designated Company Representatives

- ➔ Designated company representatives should be familiar with:
  - ➔ The facility and its operations
  - ➔ Applicable environmental laws and regulations
  - ➔ Existing environmental permits and approvals
  - ➔ Existing agreed orders or consent decrees
  - ➔ The facility's prior inspections and violations, including any past or current litigation or enforcement actions

# Designated Company Representatives

- ➔ Representatives should have access to:
  - ➔ A camera to photograph or videotape anything the inspectors photograph or videotape
  - ➔ Sterile receptacles or other equipment to obtain split samples of any samples taken by the inspectors
  - ➔ All applicable chain of custody or analysis procedures should be followed



# Prepare Your Records

- ➔ Various environmental laws and permit conditions require companies to keep certain records and make them available to inspectors upon request
- ➔ All such records should be kept in a separate location away from sensitive or confidential, proprietary business records
- ➔ These records must be easily accessible by company representatives
- ➔ These files should be updated regularly
- ➔ These procedures should be set out in the company's Records Retention Policy and/or Compliance Plan

# Part III

## Handling the Inspection



*“Trust, but verify.”*

-Russian proverb

# The Cardinal Rules

- ➔ In dealing with inspectors, all company representatives should be:
  - ➔ Honest
  - ➔ Professional
  - ➔ Courteous
  - ➔ Respectful
  - ➔ Cooperative

# The Cardinal Rules

- ➔ Remember that inspectors are humans who will appreciate basic courtesy and professionalism, and will react positively to honesty and openness
- ➔ Likewise, inspectors will be naturally suspicious of any company whose employees are rude or appear to be uncooperative, hiding information or providing false or misleading answers

# Take Notes

- ➔ Take notes of everything said and done from the moment the inspectors arrive until they leave
- ➔ If an enforcement action or lawsuit follows the inspection, it will be vitally important to know exactly what happened, and did not happen, during the inspection
- ➔ These notes will form the basis of an inspection report

# Initial Response

- ➔ Ask for a preliminary conference
- ➔ Request and examine each inspector's credentials
- ➔ Record the names and titles of the inspectors and the agency for which they work
- ➔ Get business cards, if possible
- ➔ Ask all inspectors to sign in

# Initial Response

- ➔ Identify the scope of the inspection
  - ➔ Is it limited to a particular issue, like air, water or waste, or is this a multi-media inspection?
  - ➔ Is it limited to a particular portion of the facility?
  - ➔ Is this part of a criminal investigation or simply an administrative inspection?
- ➔ If the inspectors indicate that the inspection is part of a criminal investigation, special procedures will apply
- ➔ If the inspectors decline to provide the requested information, note it and move on

# Initial Response

- ➔ Other questions
  - ➔ Do you have a warrant or written notice of inspection?
    - ➔ If so, request and retain a copy
  - ➔ What precipitated this inspection?
  - ➔ What records would you like to review?
  - ➔ What samples would you like to collect?
  - ➔ Do you intend to record or photograph anything?



# Initial Response

- ➔ Inform the investigators of the company's safety requirements and any safety or health hazards they may encounter at the site
- ➔ Provide the investigators the same safety gear, instructions, and training that you would provide any visitor
- ➔ Determine if the inspectors intend to photograph or videotape any areas of the facility that contain trade secret or proprietary business operations or information

# Initial Response

- ➔ Determine if the inspectors need a separate area or room to work
- ➔ Warn workers and supervisors in the areas to be inspected that an inspection is underway
- ➔ Cancel or reschedule appointments, as needed

# The Inspection

- ➔ Accompany the inspectors at all times while they are on site
  - ➔ Never allow any investigator to wander the facility unaccompanied
- ➔ Do not interfere with the work of the inspectors—stay out of their way and let them do their jobs
- ➔ The inspection should be limited to the areas of the facility identified by the inspectors and related to the media (air, water, waste) identified by the inspectors

# The Inspection

- ➔ Answer all questions fully and honestly
  - ➔ Providing false or misleading information could result in criminal charges
  - ➔ If you inadvertently provide inaccurate information, take all reasonable steps to correct the record
- ➔ If you do not have the information, don't guess
  - ➔ Offer to obtain the information and provide it later
- ➔ Do not volunteer information that is not requested
- ➔ Do not engage in “small talk” or discuss subjects unrelated to the visit

# The Inspection

- ➔ If the inspectors state that a violation exists, neither agree nor disagree—note it and move on
- ➔ Do not allow the investigators to question employees outside your presence while at your facility
- ➔ If samples are collected, carefully note the collection process used, ask what analysis is intended, and request split samples and copies of lab reports
- ➔ If the inspectors decline, take your own samples and submit them for laboratory analysis

# Inspector Misconduct

- ➔ Inspector misconduct is very rare, but it can happen
  - ➔ e.g., ignoring safety rules
- ➔ In the event of serious misconduct, first make every attempt to remedy the situation with the inspector
- ➔ If that is unsuccessful, you may ask the inspector to leave or withdraw any consent previously given and terminate the inspection
- ➔ Include any details in your post-inspection report to your attorney

# Records and Photos

- ➔ Regulated entities generally must provide monitoring and compliance records during or following inspection
  - ➔ Identify and withhold privileged documents
  - ➔ Provide copies only—original documents should be retained unless the inspectors have a warrant allowing them to seize the original documents
- ➔ Generally, inspectors are allowed to take pictures and videos

# Protecting Confidential Information

- ➔ Inspectors may request documents containing proprietary information or trade secrets
- ➔ Inspectors may request to photograph or videotape machinery or processes that are proprietary or constitute trade secrets
- ➔ In those situations, ask the inspectors if there is a way to avoid copying or recording those documents or processes
- ➔ If not, note that the materials are confidential, and take all necessary steps post-inspection to request that such materials be treated as confidential, and not subject to public disclosure, under state law



# What if the Inspector Alleges Violations?

- ➔ If an inspector notes a potential or actual violation:
  - ➔ If possible, correct the situation immediately and in the presence of the investigator, without admitting that a violation occurred
  - ➔ Otherwise, make it a priority to correct the situation immediately after the inspection
  - ➔ Document the actions taken via pictures or in writing
- ➔ It is acceptable to ask inspectors to clarify their position and explain why they believe a violation exists, but you should avoid arguments or debates

# Other Issues

- ➔ Photographs and videos
  - ➔ Generally, inspectors are allowed to take pictures and record videos
- ➔ Samples
  - ➔ Inspectors are generally allowed to take air, water, soil, and waste samples
  - ➔ Request split samples
  - ➔ Determine what kind of test inspector wants to conduct

# Part IV

## Post-Inspection Procedures



*Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.*

-Winston Churchill

# Concluding the Inspection

- ➔ After the inspection, request a closing or exit conference
- ➔ So that the company can remedy any issues as soon as possible:
  - ➔ Ask the inspectors whether they identified any violations, deficiencies, concerns or other issues
  - ➔ Ask the inspectors whether they have any compliance recommendations or suggestions
- ➔ Ask the inspectors to provide you a copy of their inspection report
- ➔ Ask inspectors to sign out

# Post-Inspection Reporting

- ➔ Fully document all events and conversations that occurred in a written report ASAP
- ➔ Follow your company guidelines, but we suggest addressing the report to the company's attorney
- ➔ The report should be written in careful, precise and businesslike language
  - ➔ The company's attorneys may want to use the report as evidence in a subsequent enforcement action
- ➔ The report should be limited to the facts
  - ➔ The report should reflect the inspector's conclusions about violations, but do not include your own

# Post-Inspection Reporting

- ➔ The Inspection Report should include:
  - ➔ Names, titles, and employers of all inspectors
  - ➔ A description of all areas inspected
  - ➔ A description of any samples taken by the inspectors
  - ➔ A list of documents reviewed
  - ➔ A summary of the inspector's concerns or alleged violations
  - ➔ A description of any recommendations, suggestions, or compliance assistance provided by the inspectors

# Post-Inspection Reporting

- ➔ Attach a copy of your notes and any documents provided to you by the inspectors to your report
- ➔ Consult with your attorney as to whether to submit any samples you took for analysis
- ➔ Make it a priority to correct any issues, however minor, that are noted during the inspection
- ➔ If you receive any follow-up notices, information, or requests from the inspector or their agency, consult with your attorney about supplementing your report

# Post-Inspection Reporting

- ➔ Immediately contact management, the legal department and/or outside counsel if:
  - ➔ An inspector identifies significant violations or any conditions that constitute an imminent and substantial danger to human health or the environment
  - ➔ An inspection occurs while the company is engaged in a dispute regarding environmental issues with a government agency or third party
  - ➔ An inspector engages in misconduct of any kind



# Part V

## Criminal Investigations



*I am not a crook.*

*- President Richard M. Nixon*

# Criminal Investigations

- ➔ How is it different?
- ➔ Company-Employee Relationship Issues
- ➔ Investigator Contacts Directly with Employees
- ➔ Search Warrants
- ➔ Subpoenas
- ➔ Corporate and Media Communications

# How is a Criminal Investigation Different?

- The punishments are more serious
- The investigation is more intrusive
- It raises a number of issues that may impact the company-employee relationship
- Criminal violations usually (though not always) involve intentional, knowing or reckless conduct rather than strict liability
- The government has heightened burden of proof
- Criminal enforcement is separate from civil enforcement – even if within the same agency

# Company – Employee Relationship Issues

- Company and an employee may have separate criminal liability and may not have similar interests
- Attorneys for the company are not employee's attorney
- Discussions between a company attorney and an employee may be privileged but the privilege belongs to the company and may be waived by the company
  - Employee must still maintain confidentiality unless company waives
- Employee may have “whistleblower” status that confers certain rights if the company takes disciplinary action
- Possible reimbursement of employee defense costs

# Investigator Contacts Directly with Employees

- May occur before the company even knows of an investigation
  - Employee does not have to answer questions
  - Employee has right to her own counsel
  - These decisions must be made by the employee
- Company can ask, but not require, employee to notify of contact by investigators
- Company may offer to have employee receive advice from company attorney or pay for employee's attorney

# Investigator Contacts Directly with Employees

- Before answering questions, employee may want to
  - Request ID and determine topics of interview
  - Consider whether to consult his own, or the company's, counsel and have them present
- If employee allows interview to occur
  - Must listen carefully and tell the truth
  - False or misleading statements may have criminal implications, even if NOT under oath
  - If counsel is not present, have your own witness (the investigator will!)
  - Take notes

# Search Warrants

- Issuance of search warrant means government has already presented some evidence of criminal conduct to a judge and the judge has found probable cause to believe a crime was committed
- Follow your company's response plan, if one exists
  - If you do not have one, you may want to create one
- Whatever you planned for the day must be put aside
- They have a team; you need a team
  - Their team has a lawyer; you need one too

# Responding to a Search – First Steps

- Identify the “agent-in-charge” (AIC)
  - Ask for name, agency represented and cell number; get business card if possible
  - Ask for a copy of the search warrant and supporting affidavit
  - Ask for name and telephone number of prosecutor (should be on warrant)
  - Ask for all agents to sign-in
  - Ask AIC to delay search until counsel arrives and can verify the validity of the warrant and identify privileged documents and materials
- Cooperate but do not Consent



# Responding to a Search – First Steps

- ASAP, notify company counsel of the search warrant and get counsel a copy; also notify appropriate management
- If possible, identify separate rooms or areas that the agents and the company can use
- Identify team members to follow and monitor the agents
- Make an early assessment as to what production processes, if any, will be affected or should be shutdown and take appropriate safety precautions
- Cancel or reschedule appointments

# Responding to a Search – Second Steps

- Read the warrant carefully
  - Is it signed by a judge or magistrate judge?
  - Is it being executed within the allowable time? (Usually within 10 days of issuance and between 6 am and 10 pm)
  - Have the agents come to the location identified in the warrant?
  - Does it specify particular offices or areas to be searched?
  - Identify the records to be obtained.
- Ask AIC if company or any of its employees are a “witness”, “subject” or “target” of the investigation

# Responding to Search – Second Steps

- Objecting to the Search
  - For example, warrant not signed or agents searching areas not identified in warrant or agents searching records not identified in warrant
  - Notify the AIC search has gone beyond the scope of the warrant and state the company's objection
    - Request that documents or other things seized that appear to be beyond scope be separately inventoried
    - Notify counsel so that prosecutor is notified, and if necessary, emergency relief may be sought from judge who issued warrant

# Monitoring the Search

- Follow all procedures described in Section III of this presentation for inspections
- Ask the AIC for permission to review seized documents to identify those that are critical to your operation or required by law to be kept; request ability to make copies as needed
- Make a record of any documents, computers files or objects seized

# Document Privilege Issues

- If you believe agents are searching in areas that may contain privileged documents
  - Notify the AIC and state that the company is not waiving any privilege protections
  - Request that company counsel be allowed to review area first
  - Request that the documents be segregated and sealed, but not reviewed, and separately inventoried
  - Notify company counsel so that issues can be raised with the prosecutor and/or judge who issued the warrant

# Responding to a Search - Employees

- Advise not to interfere with agents
- May inform them of their rights
  - No obligation to answer questions
  - No obligation to create or sign documents
  - May consult with an attorney and have attorney present at any interview
  - How they proceed is up to them
- Agents have right to attempt interviews, but they cannot detain employees based solely on search warrant
- When practical, send non-essential employees home

# Responding to a Search – Final Steps

- Review any issues with AIC and verify that you have contact information
- Ask AIC for inventory of documents and other things seized
- Have employees who work in areas searched to attempt to identify what was seized and verify the inventory
- Consult with company counsel about getting a copy of all documents seized

# Subpoenas

- Essentially a request for the company to produce documents or other tangible things by specific date (the “return date”)
- Typically, though not always, identical in scope to the search warrant
- Company must respond to the subpoena even though agents have already collected many documents via the search



# Subpoenas

- Often worded in great breadth and without time limits
- The return date is often impractical
- Company attorneys can negotiate modifications
  - To the return date
    - Usually, can get this postponed until a reasonable time after a company set of the seized materials has been obtained
    - Often a “rolling” production can be negotiated
  - To the scope, probably with an agreement to preserve other documents
- Need to consider confidentiality and FOIA concerns

# Subpoenas – Document Retention Issues

- ASAP after learning of a criminal investigation, routine document destruction activities should be stopped until reviewed with counsel for the company
  - Covers everything from staff getting rid of old documents in a storeroom to employees cleaning their offices
  - Includes documents, lab samples plus emails, text messages, back-up computer tapes, voicemails and other electronic storage
- Want this documented with a “document preservation” memo issued by company counsel
- Need to involve IT staff regarding electronic records

# Corporate and Media Communications

- Make sure corporate officers and board of directors are informed of the search and subpoena
  - In large companies, counsel will handle this
- Make sure public relations officers are notified
- For public companies, a criminal investigation may generate certain disclosure obligations
  - Details are beyond scope of this presentation
- Need to consider possible notifications to auditors, insurance carriers and others