Compliance and Enforcement Manual

Seventh Edition (2015)

"To conserve, improve, and protect Alaska's natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being."

Compliance and Enforcement Manual

for DEC Inspectors, Enforcement Officers, and Managers

May 17, 2016

The policies and procedures set forth herein and the internal program procedures adopted pursuant hereto are intended solely for the guidance of Alaska Department of Environmental Conservation personnel. These policies and procedures are not intended to be relied upon to create a right or benefit (substantive or procedural) enforceable at law by a party to litigation with the Alaska Department of Environmental Conservation. The Department reserves the right to take any action that is alleged to be at variance with these policies and procedures or that is not in compliance with internal office procedures.

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Division of Administrative Services
LuAnn Bower, Administrative Assistant II
Parrish Moses, Investigator III

Division of Air Quality
Joan Hardesty, Environmental Program Specialist III

Division of Water
Stephanie Mann, Environmental Program Specialist III

Department of Law, Environmental Section
Breck Tostevin, Senior Assistant Attorney General

Department of Law, Office of Special Prosecutions and Appeals
Carole Holley, Assistant Attorney General

Preface

When Alaska became a state in 1959, protection of Alaska's ecosystems fell to the Department of Health. In 1971, the Alaska Legislature formed the Alaska Department of Environmental Conservation, transferring authority to the new department. The legislation set out DEC's mission as follows: "to conserve, protect and improve its [Alaska's] natural resources and environment and control water, land and air pollution in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being." For nearly 40 years DEC has been working to do just that. A rigorous and fairly administered compliance and enforcement program will guarantee the success of this mission. Such a program is dependent on well-trained, qualified field personnel who both (1) conduct inspections and investigations that discover violations of the laws and regulations; and (2) collect the evidence necessary to prosecute violators successfully.

The primary purpose of this manual is to assist DEC Inspectors, Enforcement Officers and Managers in that endeavor. This manual provides the necessary policy and procedures for carrying out standard field inspections. These procedures are fundamental to compliance programs and provide staff with a method for conducting inspections. The term "Inspector" is used throughout this manual and refers to both Inspectors and Enforcement Officers. For a complete description of the difference between the two job descriptions refer to Chapter 2., The Inspector and Enforcement Officer.

Department staff is encouraged to provide changes or information that would improve the manual. Comments, information, and suggestions should be addressed to:

Environmental Crimes Unit
Division of Administrative Services
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, AK 99501

The information contained in this manual is comprehensive and designed to address a wide range of activities. Since each inspection may not involve all activities, the reader should refer to those parts applicable to the particular inspection.

COMPONENTS OF A COMPLIANCE & ENFORCEMENT PROGRAM

Chapter 1

A. OVERVIEW

People tend to think of compliance and enforcement in very simple terms: the Department performs an inspection, and if a violation of an environmental requirement is discovered, the government takes an enforcement action to make the company comply and perhaps pay a penalty. While this perception captures the essence of a compliance and enforcement program, it is important to understand the context within which such individual actions to detect and correct violations take place.

Designing and implementing a compliance and enforcement program involves a great many decisions. It begins with how a new law or regulation is written; enforcement staff is often involved in reviewing or drafting portions of regulations or permits to help assure that they are written in a clearly enforceable way. A compliance and enforcement strategy is then developed for each regulatory program which spells out how the Department will use the various tools it has available to achieve compliance by various segments of the regulated community. One element of the strategy is a compliance monitoring plan setting out the priorities and rationale for conducting on-site inspections and other types of compliance monitoring at different categories of regulated facilities. Another element is the enforcement response policy which sets out a hierarchy showing how seriously the Department views the many ways in which a regulation can be violated and the appropriate level of enforcement action and/or sanction associated with each.

At the individual activity level, there are still more decisions to be made, once a facility is scheduled for inspection. Inspections serve many functions. Each facility is likely to be subject to literally hundreds of requirements. What is (are) the specific purpose(s) of this particular inspection? How detailed an inspection will be conducted? Assuming that a violation was found by an inspector, additional decisions must be made by program managers. What level of action

should be taken given the seriousness of the violation and other factors such as compliance history of the facility? What if the facility is a federal facility? What if a contractor runs a federal facility? When should litigation be pursued? Should the Department settle? Then, once the enforcement action is completed (i.e., there is some agreement or order requiring the facility to come into compliance), what follow-up steps should be taken to ensure that the facility does what it is required to do?

Compliance Monitoring

Compliance monitoring encompasses all of the means used to determine the compliance status of a facility or site, ranging from in-office screening of self-monitoring reports to on-site facility inspections. On-site inspections are the main tool used. Such inspections fulfill the following objectives:

- Observe the facility and identify specific environmental problems, if any exist. This information will enable DEC to determine whether the facility is in compliance.
- Provide facts about a facility's or site's compliance status and/or about certain problems.
- Collect and preserve evidence of any specific problems that appear to be violations.
- "Show the flag" – the inspection itself creates a credible presence of the interest and power of government in the environmental compliance status of the inspected facility and other similar facilities.

Every inspection serves all four objectives to some extent, although the design of a given inspection will reflect the relative importance of each objective in that instance.

Enforcement Response to Violations

It is the Department’s policy to make a timely and appropriate enforcement response to any violations that have been identified by an inspection. There is a range of possible responses, representing different levels of seriousness and effort, and each program must consider which types are appropriate to given classes of violations.

The broad categories of enforcement responses encompass four "levels of action":

- Informal administrative responses, such as compliance letters.
- Formal administrative responses, such as a Notice of Violation or administrative complaint assessing a penalty.

- Civil judicial responses, such as an injunctive action in district court against the violating facility seeking a penalty and a court order to compel compliance.
- Criminal judicial responses, such as a criminal prosecution against a criminally negligent violator seeking a fine and imprisonment.

Follow-up to Enforcement Actions

After an enforcement action has been taken, the next question is whether the facility actually has complied with the terms imposed by the enforcement action, as well as with the law or regulation.

The Department establishes this in two ways:

- Scrutiny of reports, records, or plans the facility is required to submit to DEC. Many enforcement agreements include schedules by which specific activities must be completed along with the particular documentation that the facility must submit to demonstrate and report on its progress. Such reporting would be in addition to any other reporting already required by statutes and regulations.

- Inspection. This may include a specific follow-up inspection, earlier scheduling of the next routine inspection, or focusing the next routine inspection on the problems associated with the violation.

If the facility is found not to be in compliance, DEC will step up its enforcement action to a higher level of action. For instance, if a facility has not complied with an administrative order, the next step may be to initiate a lawsuit. Failure to comply is taken seriously by DEC, and more serious sanctions will be sought.

B. COMPLIANCE MONITORING

Thousands of facilities are subject to the environmental laws administered by DEC. Since each facility is likely to be regulated under several DEC statutes, and each regulation may include numerous requirements, it is virtually impossible for DEC to continuously check for compliance with every requirement at each facility. Therefore, one of the most challenging aspects of compliance and enforcement programs is developing strategy to make the most effective use of limited resources to achieve Department objectives.

Compliance monitoring activities take three basic forms:

- In-office review and screening of data submissions of source self-monitoring reports.

- Telephone or written requests for information.
- On-site inspections of various types.

Most programs rely heavily on inspections as a first-hand means for determining compliance, detecting violations, and identifying priority compliance problems.

Types of Compliance Monitoring

There are three basic types of compliance monitoring, and their use varies among programs depending upon the nature of the regulated substances, the types of sources involved, and other factors. Overall, the first two types of compliance monitoring listed below (source self - monitoring and inspections) are the most important.

- **Source Self–Monitoring.** A fundamental principal of U.S. environmental policy is that regulated parties should keep track of their own compliance status and report all or part of the resulting data to the responsible environmental agency. These requirements are based, in part, on the assumption that the obligation to collect and report this information will result in more attention from high-level corporate officials to prevent and correct pollution problems. Self-monitoring and reporting requirements are also an important tool for enforcement. Self-monitoring reports identify potential violations, help the Department schedule on-site inspections more effectively, and give inspectors a more complete picture of the compliance behavior of a given source than could be gained on a one-time visit. While required self-monitoring and submission of reports are key features of many programs, regulated sources also receive periodic on-site inspections. Part of the on-site inspection is a review of the source's self-monitoring, recordkeeping, and reporting practices; sources who submit incomplete, inaccurate, or false information are subject to civil and/or criminal sanctions.

- **Inspections.** Although self-monitoring has attained major importance, inspections are the backbone of DEC's compliance monitoring programs. They are the state’s main tool for officially assessing compliance. Inspections are vital to assuring the credibility of self-monitoring programs because the regulated community knows there will be a periodic assessment of the quality of the data that is submitted. An inspection is an examination into the environmental affairs of a single regulated facility. The principal purpose is to assess the performance of the facility to see whether it is in compliance with applicable environmental requirements. Findings from the inspection form the basis for a variety of actions the Department might take to bring a non-complying facility into compliance.

- **Area Monitoring.** Less used than the self-monitoring and inspections for direct compliance monitoring purposes, area monitoring consists of methods of monitoring environmental conditions in the vicinity of a facility or over a larger area. Methods used include ambient monitoring, remote sensing, and over flights. Area monitoring is used to assess progress in meeting legislated goals and standards, assess impacts of various activities, assess trends, and provide data useful in assessing risks and health impacts. It is also a useful screening device for identifying potential violations and areas where compliance problems may be found.

The Functions of On-Site Inspections

On-site inspections serve several functions in support of the Department's broad goal of ensuring environmental requirements are being implemented effectively. With respect to compliance monitoring, inspections may serve the following functions:

- Assessment of compliance status and documentation of violations for enforcement action.
- Inspections permit DEC to collect information that will disclose whether or not a facility is in compliance with requirements, as well as determine if source self-monitoring and reporting is being performed in accordance with established protocols.

Reasons for Inspections: Facility Selection Schemes

As part of its mission, DEC conducts on-site inspections for the purpose of determining facility compliance with regulations associated with specific legislation. However, since no program has virtually limitless resources required to inspect all facilities subject to these regulations, programs develop strategies allocating inspections to various segments of the regulated community. Essentially, there are four categories of inspections:

- **Routine.** Routine inspections are conducted at facilities that are members of a class or segment of the regulated community targeted under a neutral administrative inspection scheme. The Department has no indication that the facility is in violation prior to a routine inspection; the inspections are conducted to determine compliance with all (or a priority portion) of the programs requirements. Inspections can be announced or unannounced. The largest numbers of inspections are routine.

- **For cause.** If a facility is selected to be inspected for cause, there is some reason to suspect an actual violation exists based upon a tip, a complaint, source self –monitoring report, a referral from another agency, or other information. Under these circumstances, DEC may

perform an inspection to confirm noncompliance. An emergency may also evoke a “for cause” inspection if the situation may cause harm in the absence of immediate remedial action. One of the principal distinctions between "for cause" and “routine” inspections is in "for cause" inspections, the inspector will know in advance what he or she is looking for.

- **Case development support.** Sometimes an inspection is conducted to collect evidence, in addition to that collected on an initial inspection, to aid in continued case development and/or to support prosecutions.

- **Follow-up.** Follow-up inspections are performed to determine whether a facility found to be in violation during a prior inspection is now in compliance with the terms of the resultant enforcement action, such as a consent decree or administrative order. Such inspections help to ensure the integrity of the enforcement program; if the facility is found still out of compliance, DEC has the option of graduating to a stronger enforcement action.

The inspector should plan all activities and coordinate with the appropriate compliance personnel in their program before the inspection. The type of inspection may serve as a basis for deciding what activities will be conducted onsite and for determining what additional information is to be gathered or verified during the inspection.

C. ENFORCEMENT RESPONSES

An enforcement action is a response to something a person or company has done in violation of a law or regulation. The violator started the chain of events that led to enforcement action; the Department gets involved to correct the situation. It is Department policy that every instance of noncompliance is responded to in some way, with the type of response commensurate with the seriousness and circumstances of the violation.

DEC has a range of options determined by statute when contemplating an enforcement response against a violator. These options range from informal actions that take little effort to formal ones involving large commitments of time and money. DEC views these as its enforcement toolbox, from which the most appropriate tool may be selected for the job at hand.

The Goals of Enforcement

In choosing the appropriate enforcement response to a given violation, DEC tries to achieve several goals:

- Correction of the violation as quickly as possible. In many cases an environmental problem or threat has been created by a violation. It is the Department's goal to resolve that problem or threat quickly.
- Deterrence of future violations by the same party or by other parties.
- Equitable treatment of the regulated community through use of a uniform approach to selecting enforcement responses (i.e., similar violations are treated similarly).
- Punishment of serious wrongdoing by imposition of civil or criminal sanctions, such as fines and jail time.
- Effective use of enforcement resources by using the enforcement response that achieves the environmental and health goals with the least expenditure of money and staff time.

Types of Enforcement Responses

A broad array of possible enforcement responses are available under the environmental laws DEC administers. The Department usually has room to exercise judgment in selecting the response to a given noncompliance situation, including asking for additional data through its information gathering tools. The broad spectrum of responses reflects four "levels of action," differing in severity and in the scale of Department resources required. Inspectors play a role in each type of response. They may help in drafting informal responses or even formal complaints; they are often key witnesses in cases which are litigated.

A given violation may be addressed by actions at more than one level. It is DECs policy to escalate its enforcement response in a given case, if a lower-level response fails to achieve satisfactory results in a timely manner. The four levels of action are described here in order of increasing severity:

- **Informal responses.** These are administrative actions, such as a compliance letter, that are advisory in nature. In these actions, DEC advises the manager of a facility what violation was found, what corrective action is needed, and by what deadline the violation should be corrected. Generally, informal actions are used for lower priority violations and for first-time violators. Although informal actions carry no penalties or power to compel action, the record of informal actions can be used later to support more severe actions of the types discussed below.

    - A compliance letter establishes clear documentation about a violation and is used to give the responsible party an opportunity to enter into compliance assistance actions to correct the situation. The letter is used as an option to formal enforcement actions based on the particular circumstances warranting such consideration. (See Attachment 1-1)

- **Formal administrative responses.** These are formal, legal actions that result in an order requiring the violating facility to correct the violation and, in most cases, to pay a civil penalty commensurate with the seriousness and the circumstances of the violation. These administrative actions are strong enforcement tools; if a person violates the terms of an administrative order, DEC may obtain court action to force compliance with the order. Because they are generally the most expedient means of requiring correction, administrative actions are used heavily by most programs that have the authority for them. Administrative actions also include more rarely used options such as revoking or suspending permits or removing violating products from commerce.

    - A Notice of Violation (NOV) establishes clear documentation about a violation and provides notice to the operator of the violation. The NOV explains each violation and reiterates compliance dates established in the inspection report for correction of violations. The NOV may request that the violator cease and desist their violations; request a written report from the violator explaining why the violation occurred and the steps that will be taken to prevent similar violations in the future; establish a clear timeline for cleanup or repair of a problem; or request a written report that details the steps required to correct the problem. (See Attachment 1-2)

    - A Nuisance Abatement Order under AS 46.03.800 and .810 is an administrative order that allows the department to require a person guilty of creating or maintaining air, land, and/or water nuisances to abate the nuisance. If a person neglects or refuses to follow the abatement order, the Department can pursue criminal charges. (See Attachment 1-3)

    - A Compliance Order by Consent (COBC) or Consent Order under AS 46.03.020 is an enforceable agreement that lists the terms or conditions negotiated between the Department and the violator to resolve violations. A COBC is often used when the violator agrees to perform tasks in order to continue to operate while coming into compliance or conducting remediation and cleanup. The Department has the continuing responsibility to enforce the terms of the COBC. Under 18 AAC 95.160, the parties may enter into a Consent Order at any time during the compliance order proceedings.

    - A Compliance Order (CO) under AS 46.03.850 is an administrative order that establishes steps violators must undertake in order to abate a violation. The CO is a unilateral, non-judicial enforcement action that differs from the COBC in that it is not consensual. Prior to the issuance of a compliance order, notice of intent to issue the CO is required and an administrative hearing may follow. The downside

of compliance orders is the inability to obtain cost recovery, penalties or other monetary relief as part of the order. Monetary relief must be separately obtained either through negotiation or court action.

- An Emergency Order (EO) under AS 46.03.820 is an administrative order that temporarily abrogates the rights of the person upon whom the order is served. An Emergency Order will immediately stop an activity that presents an imminent danger to human health or welfare or that is likely to cause serious damage to natural resources or the environment. (See Attachment 1-4)

- A Settlement Agreement under AS 46.03.020 is a legally binding contract between the violator and the State to settle an action before or after filing a civil complaint and is generally used when further remedial actions are unnecessary to resolve a case and when filing a consent decree is not warranted. The final agreement must be acceptable to the violator, LAW, and DEC. If a civil complaint has been filed, the agreement must be negotiated and approved by Department of Law (LAW) in consultation with the Department.

- **Civil judicial responses.** These are formal actions taken into the court system by the LAW, Environmental Section at the request of DEC. Typically they are used against the more serious or recalcitrant violators of environmental laws, and/or to seek prompt correction of hazardous situations posing an immediate threat to human health or the environment. Preparation of civil judicial cases is resource-intensive, both because of LAW involvement and the more formalized procedures required for court actions than for administrative actions. Sometimes judicial litigation may take several years to complete. For these reasons, DEC often addresses violations through administrative mechanisms.

  - Civil Suit under AS 46.03.760 is an enforcement action that causes a violator to be liable to the State for a sum to be assessed by the court. A civil action is lodged in court by an Assistant Attorney General in consultation with the Department. There must be sufficient evidence available to prove the case in court.

  - Consent Decree under AS 46.03.020 is a judgment enforced by the court that addresses serious civil violations and can include stipulated penalties, response actions, cost recovery provisions, and payment of damages and civil assessments by the violator. A consent decree is very similar to a COBC except that the consent decree is lodged in court, and once approved by the court as an agreed upon settlement, is enforceable as a Court Order. Consent Decrees are the preferred tool for addressing serious civil violations.

- Temporary Restraining Order (TRO) and Preliminary Injunction under AS 46.03.765 are extraordinary court orders that the court modifies to specific situations that may require certain actions be taken by the responsible party, standards be met, or acts not be performed during the period prior to a trial. These orders are available as part of a civil suit that is sought before trial to protect human health or the environment.

- Permanent Injunctions under AS 46.03.765 is available if there has been a ruling in favor of the Department on either a TRO or a preliminary injunction. The Department may then request a trial on a permanent injunction. The TRO or preliminary injunction may remain in effect until the trial is over. The outcome of the trial will determine whether the temporary injunction is dissolved or made permanent. At trial both sides may present all relevant evidence. If the court rules for DEC, then a permanent injunction will be issued.

Civil enforcement actions are referred directly from the division director to the LAW-Environmental Section. The referral memorandum should go through the appropriate division director, with a courtesy copy to the DEC Environmental Crimes Unit (ECU). (See Attachment 1-5)

- **Criminal judicial responses.** These are taken when a person or company has committed a violation of the law through criminal negligence.[1] Here, the test is both subjective and objective. There is credible subjective evidence that the particular accused neither foresaw nor desired the particular outcome, thus potentially excluding both intention and recklessness. However, a reasonable person with the same abilities and skills as the accused would have foreseen and taken precautions to prevent the loss and damage being sustained. In a criminal case, the LAW-Office of Special Prosecution and Appeals (OSPA) prosecutes an alleged violator in the State Court system, seeking criminal sanctions, usually including fines and incarceration. Criminal actions are taken for flagrant, disregard for environmental laws (such as midnight dumping) and deliberate falsification of documents or records. Criminal cases are usually brought by LAW at the request of DEC, but LAW also can initiate them on its own. Criminal cases are the most difficult to pursue. They require special investigation and case development procedures, and they involve the highest standard of proof.

[1] AS 11.81.900(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

D. CRIMINAL ENFORCEMENT

The Department may also take criminal enforcement action against a company or individual depending on the nature and severity of the violation.[2] As a general rule of thumb, the less blatant violators with lesser environmental consequences should be addressed through administrative or civil enforcement actions, while the most serious environmental violations are investigated criminally. As opposed to civil actions, criminal actions are usually reserved for only the most serious violations, those that are committed with at least criminal negligence. Court conviction can result in the imposition of misdemeanor or felony convictions.

- **Misdemeanors.[3]** Environmental crimes are generally classified as class "A" misdemeanors. Persons convicted of class "A" misdemeanors face up to one year in jail and/or $10,000 fine, along with up to five years' probation. The court may also order restitution of reimbursable costs. An organization, such as a corporation, convicted of a misdemeanor faces up to a $500,000 fine, or three times the pecuniary gain.

- **Felonies.[4]** Persons convicted of felonies face fines ranging upward from $50,000 and jail from one year to life in prison without parole. For an organization, such as a corporation, maximum fines can easily approach half a million dollars.

For example, a person is guilty of a class "A" misdemeanor if the person negligently[5]:

- Violates 18 AAC 83., Alaska Pollutant Discharge Elimination System Program
- Violates a permit issued under the program authorized by AS 46.03.020(12)., Alaska Pollutant Discharge Elimination System Program
- Fails to provide information or provides false information required by 18 AAC 83
- Makes a false statement, representation, or certification in an application, notice, record, report, permit, or other document filed, maintained, or used for purposes of compliance with a permit issued under AS 46.03.020(12) or 18 AAC 83

[2] AS 46.03.790 Criminal Penalties

[3] Misdemeanors may be charged by filing an "Information" or a "Criminal Complaint." An Information must be prepared and filed by the Attorney General's Office. The Information includes an affidavit from the attorney in support of the charges. A criminal complaint can be filed by an authorized enforcement officer or an ECU investigator. The complaint must include a probable cause statement and must be sworn to in front of the court clerk.

[4] Felonies are typically charged by Information or Criminal Complaint. The defendant then has the right to be indicted by a grand jury. Once indicted, the indictment becomes the charging instrument and replaces the original Information.

[5] This list is not all inclusive.

- Renders inaccurate a monitoring device or method required to be maintained by a permit issued under AS 46.03.020(12) or 18 AAC 83

A person is guilty of a class "A" misdemeanor if the person with criminal negligence[6]:

- Violates a provision of:
  - AS 46.03., Environmental Conservation
  - AS 46.04., Oil and Hazardous Substance Pollution Control
  - AS 46.09., Hazardous Substance Release Control
  - AS 46.14., Air Quality Control
  - Any 18 AAC
  - Order of the Department
  - Permit
  - Approval, acceptance, or a term or condition of a permit, approval, or acceptance issued under AS 46.03, AS 46.04, AS 46.09, or AS 46.14

- Fails to provide information or provides false information required by:
  - AS 46.03.465., Information-Gathering Requirements
  - 46.03.475., Reporting Requirements.
  - 46.03.755., Discharge Reporting.
  - AS 46.04., Oil and Hazardous Substance Pollution Control
  - AS 46.09., Hazardous Substance Release Control
  - 18 AAC 83., Alaska Pollutant Discharge Elimination System Program
  - 18 AAC 69., Commercial Passenger Vessel Environmental Compliance
  - 18 AAC 75., Oil and Hazardous Substances Pollution Control
  - 18 AAC 78., Underground Storage Tanks

- Makes a false statement or representation in an application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with:
  - AS 46.03.250 - 46.03.313 applicable to hazardous wastes
  - 18 AAC 62., Hazardous Waste
  - 18 AAC 63., Siting of Hazardous Waste Management Facilities

- Makes a false statement, representation, or certification in an application, notice, record, report, permit, or other document filed, maintained, or used for purposes of compliance with:

[6] This list is not all inclusive.

  - AS 46.03.460 - 46.03.475 applicable to commercial passenger vessel environmental compliance program
  - AS 46.14., Air Quality Control
  - 18 AAC 83., Alaska Pollutant Discharge Elimination System Program
  - 18 AAC 69., Commercial Passenger Vessel Environmental Compliance
  - 18 AAC 50., Air Quality Control

- Renders inaccurate a monitoring device or method required to be maintained under:
  - AS 46.14., Air Quality Control
  - 18 AAC 50., Air Quality Control
  - 18 AAC 83., Alaska Pollutant Discharge Elimination System Program
  - Permit issued by the Department or a local air quality control program under AS 46.14., Air Quality Control
  - Permit issued by the Department under the program authorized by AS 46.03.020(12)., Alaska Pollutant Discharge Elimination System Program

- Fails to comply with the provisions of oil discharge contingency plan approved under AS 46.04.030, Oil Discharge Prevention and Contingency Plans, and the discharge is less than 10,000 barrels.

- Discharges oil in violation of AS 46.03.740., Oil Pollution, and the oil discharge is less than 10,000 barrels.

A person is guilty of a class "C" felony if the person with criminal negligence:

  - Fails to comply with the provisions of an oil discharge contingency plan approved under AS 46.04.030, and the discharge is 10,000 barrels or more.
  - Discharges oil in violation of AS 46.03.740., and the oil discharge is 10,000 barrels or more

Recognizing Potential Criminal Violations

It is neither expected nor desired that inspectors be able to define or even attempt an in-depth legal or investigatory analysis of whether criminal conduct has occurred or is occurring at regulated sources. The issues are complex and even the highly trained investigators in the Environmental Crimes Unit (ECU) will do that with the help of attorneys at LAW-OSPA. Nevertheless, it is important that all acts of the regulated community exhibiting actual or suspected environmental criminal conduct be referred to the ECU for review and possible investigation.

Evidence of criminal wrongdoing is seldom blatant, and usually is quite subtle. The decision on whether to refer a violation to the ECU for criminal investigation should be guided by two general measures - significant environmental harm or human health harm and culpable conduct.

- **Significant Environmental Harm or Human Health Harm.** The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as, the threat of significant harm to the environment or human health. The following factors serve as indicators that meet the measure of significant environmental harm. (Note: All factors do not need to be present.)

    - Actual harm is demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment. This factor will generally be self-evident at the time of referral.

    - The threat of significant harm to the environment or human health may be demonstrated by an actual or threatened discharge, release or emission. This factor may not be as readily evident, and must be assessed in light of all the facts available at the time of referral.

    - Failure to report an actual discharge, release or emission within the context of Factor 1 or 2 serves as an additional factor regarding criminal referral.

    - When certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal referral may provide a significant deterrent effect. While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

- **Culpable Conduct.** The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of referral. Culpable conduct, however, may be indicated at the time of referral by several factors. (Note: All factors do not need to be present.)

    - History of repeated violations. While a history of repeated violations is not a prerequisite to a criminal investigation, a violator's compliance record should always be reviewed. When repeated enforcement activities or actions, whether by DEC, or other federal, State and local enforcement authorities, have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the state's capacity to prove that a

violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.

- Deliberate misconduct resulting in a violation. Evidence, either direct or circumstantial, that a violation was intentional or willful will be a major factor indicating that criminal investigation is warranted.

- Concealment of misconduct or falsification of required records. In the arena of self-reporting, DEC must be able to rely on data received from the regulated community. If submitted data is false, DEC is prevented from effectively carrying out its function. Accordingly, conduct indicating the falsification of data will always serve as a basis for serious consideration to proceed with a criminal investigation.

- Tampering with monitoring or control equipment. The overt act of tampering with monitoring or control equipment leads to the certain production of false data that appears to be otherwise accurate. The resulting submission of false data threatens the basic integrity of the data and, in turn, the scientific validity of regulatory decisions.

- Business operation of pollution-related activities without a permit, license, manifest or other required documentation. Many of the laws and regulations within DEC's jurisdiction focus on inherently dangerous and strictly regulated business operations. DEC's criminal enforcement resources should pursue those violators who choose to ignore environmental regulatory requirements altogether and operate completely outside of DEC's regulatory scheme.

While the factors above apply equally to both individuals and corporations, corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done. On the other hand, DEC strongly encourages self-monitoring, self-disclosure, and self-correction. When self-auditing has been conducted (followed up by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred the corporation's constructive activities should be considered as mitigating factors. Therefore, a violation that is voluntarily disclosed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation generally will not be a candidate for a criminal investigation.

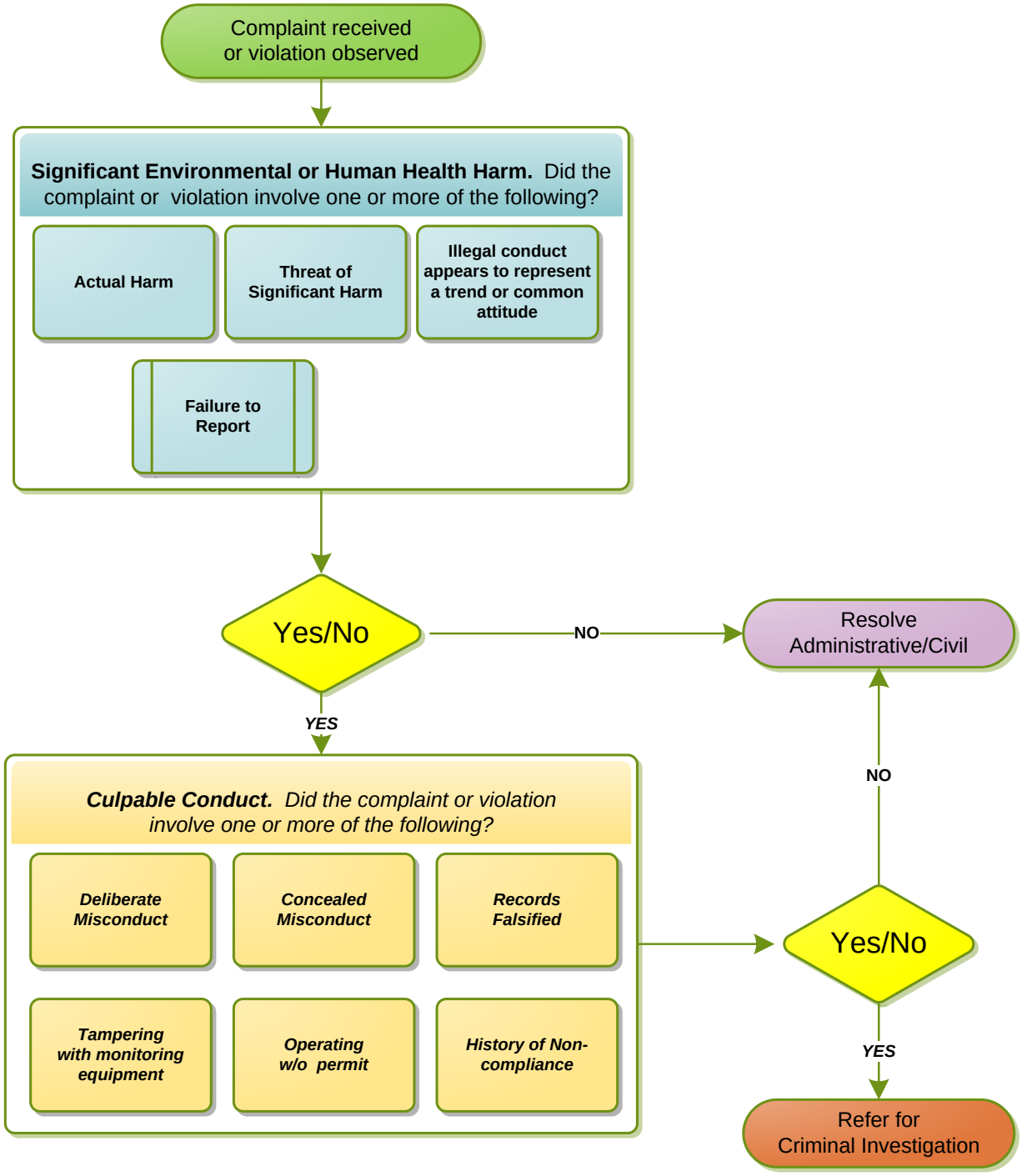


Figure 1-1. Recognizing Potential Criminal Violations

Criminal Investigations

Initiating an Investigation. An initial lead, or allegation of potential criminal activity, may come to the Department from any of several sources, including routine compliance inspections, citizen

complaints, and other federal, State, and local agencies. Department inspection and enforcement staff wishing to refer a matter to the ECU for investigation should consult with their program manager and division director. If after consultation with division management it is determined that a lead or allegation meets criminal criteria refer the matter to the ECU Chief Investigator. The Chief Investigator will evaluate the lead and, if necessary, assign an investigator for follow-up, assign a case number, and open an investigative file. If the reliability of the lead is unclear, the investigator will conduct a preliminary inquiry to determine the credibility of the allegation and make an initial assessment for the need of a more thorough investigation. This initial inquiry is brief and involves no extensive commitment of resources or time. The purpose is to reach an initial determination of the need for a complete investigation. During the course of a routine inspection, DEC inspectors are in a unique position to follow such leads. Inspectors should be alert to possible criminal activities such as falsified information in records and reports and illegal disposal. Facility staff may also volunteer information to inspectors about possible criminal activities.

Conducting an Investigation. If after the preliminary inquiry a decision is made to pursue a thorough investigation, an ECU investigator will contact the appropriate offices to determine whether any civil enforcement action is pending or contemplated against the investigative target. The investigator manages the investigation, under the supervision of the Chief Investigator. The investigator is responsible for determining the basic investigative approach; leading the conduct of interviews, assembling and reviewing records, and planning and executing surveillances; coordinating with the LAW-OSPA and other federal, State, and local law enforcement agencies; communicating with informants; contacting other witnesses; performing other investigative functions; completing all required reports; and carrying out coordination and notification requirements. The investigation will be conducted in accordance with ECU policies and procedures.

Security of Criminal Investigations. Information on criminal investigations must be provided only on a need to know basis. Active criminal investigations must not be discussed with personnel outside of the Department except as is necessary to pursue the investigation and to prosecute the case. Department policy is to neither confirm nor deny the existence of a criminal investigation. If an inspector receives a request for information from the news media, it must be referred to the Chief Investigator, who will determine the response. Written materials pertaining to the investigation must receive special care and attention. The ECU criminal investigative offices are equipped with secure office space, filing cabinets, and evidence rooms.

E. PARALLEL PROCEEDINGS

Most environmental statutes include both civil and criminal enforcement authorities. Effective protection of human health and the environment requires appropriate use of the full range of these authorities to identify and resolve violations. Although the great majority of DEC's enforcement actions are brought as either civil or criminal matters, there are instances in which both enforcement responses are appropriate. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

Consultation and Cooperation

Active consultation and cooperation between the Department's civil and criminal programs, consistent with all legal requirements, are critical to the success of DEC's overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the ECU to notify program managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the ECU when there are significant developments in the civil matter that might change the scope of the outcome being sought. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue through the resolution of all parallel matters.

In all parallel proceedings, the civil and criminal programs should initially meet to weigh the options and determine how to achieve the most complete and appropriate relief. In those instances where it is decided only the criminal matter will go forward, the criminal enforcement program must ensure that the civil program is advised in a timely manner. That notification should occur no later than a year before the expiration of the statute of limitations in the civil matter.

Consistent with legal restrictions, emphasis should be placed on ensuring that the activities of each program complement, but do not interfere with the other program and that information is gathered in such a way that it may be shared to the maximum extent appropriate.

Communication and consultation with the Department of Law should occur regarding all parallel proceedings. In matters where DEC's civil action is purely administrative, criminal investigators should discuss the parallel proceeding with LAW prosecutors. In matters involving a potential or

filed civil judicial action, civil and criminal enforcement personnel should each consult with their LAW colleagues.

Legal and Practical Implications

In deciding whether parallel proceedings are appropriate and how best to manage them, managers should be aware of the legal and practical issues affecting related proceedings, as well as the timing of enforcement activities. Factors that favor bringing the criminal proceeding to conclusion first include:

- The significant deterrent and punitive effects of criminal sanctions
- The ability to use a criminal conviction as collateral estoppel[7] in a subsequent civil case
- The possibility that imposition of civil penalties might undermine a prosecution or the severity of a subsequent criminal sentence
- Preservation of the secrecy of a criminal investigation, including completion of covert sampling
- Prevention of a defendant's premature discovery of evidence in the criminal case, through a defendant's exploitation of the civil discovery process to obtain evidence regarding the criminal proceeding
- Avoidance of unnecessary litigation issues, such as unfounded defense claims of misuse of process in the civil or criminal action
- Avoidance of duplicative interviews of witnesses and subjects
- Speedy trial requirements that a trial be held within specified time frames.[8]

Factors supporting the initiation or continuation of the civil judicial or administrative action prior to conclusion of the criminal action include:

- A threat to human health or the environment that should be expeditiously addressed through preliminary injunctive relief or response action
- A threat of dissipation of the defendants assets
- An immediate statute of limitations or bankruptcy deadline
- Only a marginal relationship exists between the civil and criminal actions

[7] Legal rule barring inconsistency: a legal rule that prevents somebody from stating a position inconsistent with one previously stated, especially when the earlier representation has been relied upon by others

[8] Alaska Rules of Criminal Procedure, Rule 45. Speedy Trial.

- The civil case is in an advanced stage of negotiation or litigation when the potential criminal liability is discovered

Legal Guidelines

Parallel proceedings present specific legal issues regarding investigations, discovery and litigation. In addition to complying with all legal and ethical requirements, enforcement personnel should follow practices that avoid even the appearance of overreaching or unfairness.

- **Information Requests and Inspections.** The criminal program does not direct the civil program's investigative activities, nor does the civil program direct the criminal program's investigative activities. It is entirely appropriate for the civil enforcement personnel to bring information to the attention of the criminal program and for criminal enforcement personnel to bring information to the attention of the civil program. The Department's regulatory inspections, including administrative searches with a warrant, must be objectively reasonable and properly limited within the scope of the statute and warrant.
- **Civil Discovery.** Any information obtained as a result of a legitimate civil purpose, including discovery, may be shared with criminal program personnel.[9] In responding to civil discovery, State attorneys may assert a law enforcement privilege to protect responsive files in a parallel criminal case. If there is a motion to compel production of the criminal files, the law enforcement privilege must be asserted explaining the harm that would be caused by disclosure of the records. This is a qualified privilege, however, and can be overcome if a litigant's need outweighs the State's interests in keeping the information confidential. Thus, the possibility that criminal investigation files might have to be produced is a factor to consider when determining whether civil litigation should go forward while the criminal proceeding is pending. Prior to informing a defendant of a decision by DEC not to assert this privilege, the civil attorney should coordinate closely with the Department and ensure that the privacy interests of individuals mentioned in the criminal case records are fully protected.
- **Double Jeopardy.** Parallel proceedings do not give rise to double jeopardy concerns.[10] The Double Jeopardy Clause of the Fifth Amendment only protects against the imposition of multiple criminal punishments of the same person for the same offense. To raise even a question about possible double jeopardy arguments, a civil penalty would have to be so punitive in form and effect that it transforms an intended civil remedy into a criminal penalty. Civil penalties should not be imposed that, taken together with criminal

[9] United States v. Kordel, 397 U.S. 1 (1970).
[10] Hudson v. United States, 522U.S. 93 (1997).

sanctions, are so grossly disproportionate to the underlying violations that they violate the constitutional prohibition of excessive fines.[11]

[11] Id., 522 U.S . at 103.

Attachment 1-1 Model Compliance Letter

Department Letterhead

[Date]

CERTIFIED MAIL Z 555 555 5555
RETURN RECEIPT REQUESTED

COMPLIANCE LETTER

Name of Facility or Person
Street or Mailing Address
City, State, and Zip Code

Re: **[*Insert brief description of alleged violation and cite here. (e.g.: Failure to obtain I/M inspection under 18 AAC 52.005*)]**

Dear **[*Name of Facility or Person*]**:

Our records indicate that on or about **[*date*]**, at **[*location*]**, Alaska, **[*Name of facility or person*] [*briefly describe the violation(s)*]**. Such actions are in violation of **[*cite permit number, and/or regulation, statute, etc.*]**

[*Insert a paragraph outlining the factual basis for sending the compliance letter, such as site visit, investigation of citizen complaint, sampling results, etc. Make it as complete as necessary to establish the violation*]

In order to comply with the State law, we request that you do the following:
[*List requested corrective actions, including deadlines.*]

Please respond to this letter within **[*specify number of days*]** of your receipt, either by calling me at **[*907-000-0000*]**, or sending your written response by FAX, mail, or email.

If you have any questions, please contact me at **[*907-000-0000*]** or e-mail at **[your.name@alaska.gov]**.

Sincerely,

Signature

Attachment 1-2 Model Notice of Violation

Department Letterhead

[Date]

NOTICE OF VIOLATION

[Insert brief description of violation and cite to relevant statute or regulation here.
(E.g.: Failure to Obtain I/M Inspection under 18 AAC 52.005)]

Name of Facility or Person
Company Name (If Applicable)
Street or Mailing Address
City, State, and Zip Code

Enforcement Tracking No. **[*00-0000-00-00000*]**
File No **[*00-0000-00-00000*]**

The Department alleges that on or about **[date]**, at **[location]**, Alaska, **[Name of facility or person]** did unlawfully **[briefly describe the violation(s)]**. Such actions are in violation of **[Cite permit number, and/or reg., statute, etc.]**

[Add a paragraph here outlining factual basis, such as site visit, citizen complaint, sampling results, etc. Make it as complete as necessary to establish the violation(s).]

To address the violation(s) described above, the Department requests that you do the following: **[list required corrective actions, including deadlines.]**

Penalties for violation of State statutes and regulations can be quite serious. In a civil action, a person who violates or causes or permits to be violated a provision of this regulation **[NOTE: This can be modified for violations or orders, permits, DEC approval, etc.]**, may be liable to the State for substantial monetary damages under AS 46.03.760. Depending on the nature of the violation, you may also be liable for the State's response costs under AS 46.03.822, for spill penalties under AS 46.03.758-759, for administrative penalties under AS 46.03.761, or for other kinds of damages or penalties under other statutes.

In a criminal violation, a person who acts with criminal negligence may be guilty of a Class A misdemeanor. AS 46.03.790. Upon conviction, a defendant who is not an organization may be sentenced to pay a fine not exceeding $10,000.00 and/or sentenced to a definite term of imprisonment of not more than one year. Upon conviction, a defendant that is an organization may be sentenced to pay a fine not exceeding the greater of $500,000.00 or an amount which is three times the

pecuniary damage or loss caused by the defendant to another or property of another. AS 12.55.035. Each day of violation may be considered a separate violation. Alaska laws allow the State to pursue both civil and criminal actions concurrently.

Nothing in this notice shall be construed as a waiver of the State's authority or as an agreement on the part of the State to forego judicial or administrative enforcement of the above-described violation(s) or to seek recovery of damages, cost and penalties as prescribed by law. In addition, nothing herein shall be construed as a waiver of enforcement for past, present, or future violations not specifically set forth herein.

_____

[*Full Name*], Enforcement Officer
Credential No. **[*R-000*]**

( ) Personally Served
( ) Sent by Certified Mail
_____

on the ____ day of _____, 200__.

Attachment 1-3 Model Nuisance Abatement Order

BEFORE THE STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION Complainant, versus Mr. John Doe` Bruce H. Jones 123 Main Street Anywhere, Alaska 00000 Respondent	AS 46.03.810

Enforcement Tracking # 00-000-00-0000

NUISANCE ABATEMENT ORDER

PLEASE TAKE NOTE:

This Nuisance Abatement Order is issued under the authority of AS 46.03.810(a). Failure to comply with this order may result in civil and/or criminal sanctions.

FACTUAL BASIS:
The Alaska Department of Environmental Conservation (DEC) has received complaints of

[*facts regarding garbage, offal, dead animals, or any other matter or thing that would be obnoxious or cause the spread of disease or in any way endanger the health of the community placed or deposited upon a lot, street, beach, or premises, or upon or anywhere within 200 feet of a public highway*] 46.03.810(a)(1); or

[facts regarding garbage, offal, dead animals, or any other matter or thing that would be obnoxious or offensive to the public or that would produce, aggravate, or cause the spread of disease or in any way endanger the health of the community allowed to be placed or deposited upon any premises owned by the person or under the person's control] 46.03.810(a)(1)

DEC finds that these activities are creating a public nuisance within the meaning of AS 46.03.810, and are obnoxious and/or offensive to the public.

Under the authority of AS 46.03.810, DEC hereby orders the owners and/or occupants of the property at **[address]** to abate the nuisance.

ACCORDINGLY:

IMMEDIATELY DISCONTINUE ***[THE ACTIVITY THAT RESULTED IN THE PUBLIC NUISANCE].***

AS 46.03.810(b) provides: "A person who neglects or refuses to abate the nuisance upon order of an officer of the Department of Environmental Conservation is guilty of a misdemeanor and is punishable as provided in AS 46.03.790. In addition to this punishment, the court shall assess damages against the defendant for the expenses of abating the nuisance." In a criminal violation, a person who acts with criminal negligence may be guilty of a class A misdemeanor. AS 46.03.790. Upon conviction, a defendant who is not an organization may be sentenced to pay a fine not exceeding $10,000 and/or sentenced to a definite term of imprisonment of not more than one year. Upon conviction, a defendant that is an organization may be sentenced to pay a fine not exceeding the greater of $500,000 or an amount which is three times the pecuniary gain realized by the defendant as a result of the offense or two times the pecuniary damage or loss caused by the defendant to another or the property of another. AS 12.55.035. Each day of violation is considered a separate violation. Alaska laws allow the State to pursue both civil and criminal actions concurrently. If you have any questions or concerns regarding this ORDER, you may contact Randy Regulator, Compliance and Enforcement, Division of Water, Department of Environmental Conservation, 555 Cordova Ave, Anchorage, AK 99501, phone (269) 451-XXXX; fax (907) 269-XXXX.

_____

Robert P. Boss
Compliance and Enforcement
Division of Water

Personally Served on the ___ day of ___, _____.
by _____

Attachment 1-4 Model Emergency Order

BEFORE THE STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the matter of:	
STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION	)
Complainant,	) 18 AAC 52.005
versus	)
John Doe, d/b/a Service Center 123 Main St Anywhere, Alaska 000000	)
Respondent	)

Enforcement Tracking # **[00-00000-000-0000]**

EMERGENCY ORDER

Based on a field investigation conducted **[Date]**, by the Department of Environmental Conservation and pursuant to the authority vested in me under AS 46.03.820 to issue orders necessary to abate a condition which represents an imminent or present danger to the health and welfare of the people of the State on an emergency basis, I find and order as follows:

FINDINGS OF VIOLATION

[Add paragraphs here outlining factual basis, such as citizen complain, investigation, sampling results, risks, etc. Make it as complete as necessary to establish the violation(s).] For example:

1. Respondent owns, operates, and is responsible for the domestic wastewater collection system and septic tank and soil absorption wastewater disposal system which serve the four apartments and the Service Center business located at 123 Main St, Anywhere, Alaska.

2. Due to deficiencies in the leach field soil absorption system, untreated sewage is presently being discharged to the land of the State.

3. On October 23, 2012, flows resulting from the discharge of untreated sewage were observed flowing from the leach field area into the middle of the public drive between Service Center of Anywhere and the adjacent businesses located on Main Street.

4. Samples were taken from the standing water in the road and above the leach field. The results were received from Southern Testing Laboratories showing 750,000 coliform colonies per 100 milliliters of water sampled.

5. The above violations are in clear violation of State Wastewater Disposal Regulations 18 AAC 72 section 010(a), and various statutes, including AS 46.03.100, AS 36.03.710 and AS 46.03.810.

6. The presence of untreated sewage discharged to the land in a populated area poses a severe and present danger to the people of the State, including those living in the apartments and those working at or visiting the adjacent business properties. Pets were observed playing near and on the contaminated sites and children frequent the area.

7. It would be prejudicial to the interest of the people of the State to allow this condition to continue during the pendency of any hearings.

Order

[List required corrective actions, including deadlines.] For Example:

1. Within 48 hours of receipt of this letter, Mr. Doe will arrange for weekly pumping of the septic tank that is causing the untreated domestic wastewater to run onto the lands of the State. The pumped wastewater must be hauled to an approved disposal site. An engineer registered in Alaska shall prepare and submit a written report identifying the problems and the necessary repairs within 72 hours of the receipt of this Order. After construction approval from the Alaska Department of Environmental Conservation the engineer will oversee the necessary repair work.

2. Mr. Doe will continue to pump the septic tank as needed to prevent the discharge of wastewater to the lands of the State. If the discharge of wastewater cannot be prevented by regular pumping, Mr. Doe must cease using the domestic wastewater disposal system until it is repaired.

3. Mr. Doe will immediately (within 24 hours) post signs around the area clearly visible to the public. This sign must inform the public of the presence of untreated wastewater and specifically instruct them to keep away from the contaminated area.

All neighbors potentially affected by the untreated wastewater flow must also be notified.

4. Within 24 hours of receipt of this notice the respondent will fence the affected area with material that prevents access by domestic animals and children (for example netting, snow fencing, etc.)

5. Within seven days of the receipt of this letter the respondent shall remove and appropriately dispose of any frozen untreated wastewater that has surfaced around the leach field area.

6. Within seven days of receipt of this letter the respondent shall submit a report by an engineer registered in the State of Alaska which outlines the extent of the untreated wastewater contamination.

7. Within 30 days of receipt of this order the respondent shall submit the final engineering report from an engineer registered in the State of Alaska which verifies that the approved repairs were made.

This order is effective immediately upon receipt. AS 46.03.820(a) requires the aforementioned violations be immediately discontinued, abated or alleviated, as specified in this Order. The obligations of this Order are joint and several as to the respondent named herein.

Each of the requirements of this Order are separate and independent and no requirement of this Order shall be deemed a condition precedent to respondent's responsibility to timely comply with any other requirements of this Order.

Additionally, if respondent disobeys or resists the terms of this Order, the department will, under the authority of AS 46.03.765 and AS 46.03.820 (d), seek enforcement of this Order in Superior Court. In addition the respondent may be liable under AS46.03.760 for civil damages of not less than $500 or more than $100,000 for the initial violation, or more than $5,000 for each day after that on which the violation continues and may be guilty of a Class A misdemeanor under AS 46.03.790.

The respondent has the right to request a hearing pursuant to AS 46.03.820(b). However, neither such a request nor the scheduling of a hearing will stay the effect of this Order.

This Order does not constitute a waiver by the Department of the provisions of any other State law or regulations and the Department reserves all lawful remedies in equity, by statute or the common law. AS 46.03.875 specifically provides for cumulative remedies.

Dated at _____, this _____ day of _____. _____.

_____
Commissioner
Alaska Department of
Environmental Conservation

Attachment 1-5 Enforcement Action Close Letter

Department Letterhead

[Date]

Name of Facility or Person
Company Name (If Applicable)
Street or Mailing Address
City, State, and Zip Code

RE: Enforcement Tracking # 15-0000-40-1330

This letter confirms that the terms and conditions set forth in the above-referenced Notice of Violation (NOV), which was delivered to _____ (name)_____ (the "Respondent") on ____date_____, have been fulfilled to the satisfaction of the Alaska Department of Environmental Conservation (DEC).

[Add sentence to show the source of the information upon which the Department is making the close-out decision.] This decision is based upon the review of the [respondent's letter] [Contractor's report], or [inspection by ___ of DEC] on (date). DEC requires no further action on the part of the Respondent in response to the above-referenced NOV. We consider the matter closed as of the date of this letter.

The Department appreciates your cooperation and interest in protecting Alaska's environment and avoiding the need for any formal enforcement actions. The department looks forward to working with you to cooperatively resolve any problems that may occur in the future.

Sincerely,

Enforcement Officer

Attachment 1-6 Civil Referral Memorandum Instructions

Department Letterhead

[Date]

Ms. Inside Addressee
Starts 1- 3 spaces below date line
Anchorage, AK 99501

Dear Ms. Addressee:

Confidential Enforcement Sensitive and Deliberative Process Privileged: Not for
Public Files

1. I recommend referring this case to the Attorney Generals Office for the initiation of enforcement proceedings.

2. Case Summary

A. Background

Be sure to include official file name and ledger codes. Also include all other names of the violators, companies, individuals etc. List all other related files.

Example: This is a shipwreck/oil spill case. This case involves the grounding of the F/V RECKLESNESS on Very Stormy Island. The F/V RECKLESSNESS is owned by Empty Shell, Inc., a one-ship Washington State corporation.

On January 16, 2012, the 92-foot fishing vessel grounded on Very Stormy Island. The vessel became stuck in the ice, lost its steering and after a dramatic rescue attempt by the Coast Guard ran aground. As a result of the grounding some 6,800 gallons of diesel fuel were spilled into the ocean. The vessel remains abandoned in a number of pieces on State tidelands.

B. Actions by DEC to Date

Example: On February 16, 2012, a letter was sent to Empty Shell, Inc. demanding removal of the wreck. The company responded on June 1, 2012 refusing to take any action on the grounds that…

Chronology.

Attach copies of all correspondence between DEC and violator concerning this matter.

C. Alleged Violations

(1) Generally describe violations in broad general terms.

(2) Then specifically list out each group violations, the statute, regulation, permit or approval violated. Indicate who violated provision and what evidence DEC has to make out specific elements of the violations. (Look at statute, regulation, permit in question and the definitions sections). Who, What, Where, Why, and How. Give names, addresses and telephone numbers of all witnesses. Identify important documents/samples and location and keepers of those documents/samples. Comment on the future availability of evidence, (*i.e.*, Coast Guard member leaving the State or samples will no longer be available if action not taken).

(3) Analyze the severity of the violation in terms of harm to human health or the environment, potential harm or harm to the regulatory scheme. (For example, failure to report a spill creates harm to the regulatory system since DEC cannot oversee cleanup).

(4) Did the violator comply voluntarily when confronted with the violation, did the violator attempt to conceal the violation, past history of noncompliance, what is the regulatory sophistication of the violator, could the violations been prevented, foreseen, or mitigated? Include copies of NOVs, warning letters, USCG or EPA actions.

(5) Other similarly situated violators. e.g., other contaminated sites in the area (State, federal or other). What is the status of those sites? Compare to industry norm or conduct.

(6) Actions by the federal government? Discuss federal program delegation, oversight, etc.

3. Recommended Enforcement Action

A. What Actions Are Recommended and Why

(1) Enforce compliance

(a) Administrative: compliance order, compliance order by consent, emergency order, and State funded cleanup and cost recovery, etc. What are the details of what would be included in the order or other action?

(b) Judicial: temporary restraining order, preliminary injunction, permanent injunction, etc.

(2) Recover Costs

(a) Get appropriate ledger code(s) and actual DEC costs. Check to see if a file log or timesheet or other informal time-keeping was used for the case in the past.

(3) Collect Civil Assessments Or Penalties (for which violations). See AS *46.03.760;* AS 46.03.758-.759.

(a) If recommended, quantify environmental damages from violations, is there a way to identify a monetary measure of damage?

(b) States costs (remember other agency costs such as DF&G, DNR, and DOT).

(c) Violators economic savings in not complying with the law. Estimated ball park costs of cleanup, equipment etc. What financial incentives did the violator have for taking the action? Compute value of money from date of violation (legal rate 10.5 percent annually or better use EPA BEN computer program).

(d) How long have the violations continued? Have any been corrected? Note the date the statute or regulation was effective and the date bad conduct occurred.

(e) Other comparable civil assessments collected? Amounts and dates.

(f) Determine size of company and ability to pay.

(g) Other factors in considering penalties: has DEC acted in a fair and consistent manner; are penalties appropriate to the gravity of the violations; does the penalty eliminate economic incentive for non-compliance, deter violations, encourage expeditious compliance. Consider the following gravity factors: seriousness of violation (potential for harm to integrity of system or environment or human health and extent of deviation from law), good faith efforts to comply or lack, ability to pay, risk or cost of litigation. Mitigating factors may be significant and must be considered.

(h) Consider possible alternative penalties: environmental audits, environmental projects, pollution prevention, training, equipment above and beyond required by law. Alternative penalties must be in proportion with the violation and potential penalties.

(4) Other Possible Regulatory Enforcement Actions: Contingency plan or permit suspension, modification, or revocation. Possible federal or other State agency violations?

(5) Criminal Action. Is one envisioned or referred?

B. Policy Considerations

(1) Time constraints.

(2) Why should this case be pursued and how will it create a positive precedent for other cases?

(3) Press release on recommended action?

(4) Public or legislative involvement.

(5). DEC acquiescence or delays.

(6) Other State bad actors.

(7) Other considerations (mitigating and aggravating).

C. Enforcement Problems

Any anticipated problems in enforcing a judgment or order? For example, is this a foreign or out-of-state company; a company in financial trouble, the violator is already in jail, etc> Federal government, State or municipal agency is the violator.

D. Any Additional Investigation Work Needed

Additional evidence or information that needs to be developed. Are final interviews completed?

4. Conclusion

Summary of Recommendations

Attachment 1-7 Criminal Investigation Referral Decision Tool

This decision tool sets out criteria to help distinguish violations meriting referral for criminal investigation from those more appropriately pursued by administrative or civil enforcement. The decision on whether to refer a violation should be guided by two general measures - **Significant Environmental or Human Health Harm** and **Culpable Conduct**. **Briefly describe the violation in the box provided. Use an additional sheet of paper if needed. Then place a "✓" in each box under the appropriate heading (Harm and Conduct) if it applies. One "✓" (or more) under both headings distinguishes violations meriting referral for criminal investigation.**

Violation Description:

Significant Environmental Harm or Human Health Harm. The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as, the threat of significant harm to the environment or human health. *(Note: All factors need not be present.)*

- ☐ **Actual harm**. Demonstrated by an illegal discharge, release, spill, emission, etc. that has an identifiable and significant harmful impact on human health or the environment.
- ☐ **Threat of significant harm**. Demonstrated by an actual or threatened discharge, release, spill, emission, etc.
- ☐ **Failure to report** an actual discharge, release, spill, emission, etc.
- ☐ **When certain illegal conduct appears to represent a trend or common attitude within the regulated community.** While the violation(s) being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

Culpable Conduct. The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of referral. *(Note: All factors need not be present.)*

- ☐ **Deliberate misconduct**. Evidence, either direct or circumstantial, that a violation was intentional or willful.
- ☐ **Concealment of misconduct or falsification of required records.** In the arena of self-reporting, ADEC must be able to rely on data to make regulatory decisions. False data prevents DEC from effectively carrying out its function.
- ☐ **Tampering with monitoring or control equipment.** Tampering with monitoring or control equipment leads to production of false data. The resulting submission of false data threatens integrity of the data and the scientific validity of regulatory decisions.
- ☐ **Business operation without a permit, license, manifest or other required documentation.** Many of the laws and regulations within ADEC's jurisdiction focus on inherently dangerous and strictly regulated business operations.
- ☐ **History of Repeated Violations.** May prove violator was aware of requirements, had actual notice of violations and acted in deliberate disregard.

THE INSPECTOR AND ENFORCEMENT OFFICER

Chapter 2

A. RESPONSIBILITIES

The primary responsibility of an inspector or enforcement officer is to gather information that can be used to determine the reliability of the permittee's self-monitoring data and evaluate compliance with permit conditions, applicable regulations, and other requirements. The inspector also plays an important role in case development and support. To fulfill these roles, inspector and enforcement officer are required to know and use policies and procedures for effective inspection and evidence collection; accepted safety practices; and quality assurance standards.

There are two duty positions in the Department:

- **Inspectors.** Inspectors are those personnel designated to perform inspections and evaluate compliance with the State's environmental regulations, statutes, or permits. They inspect facilities, review facility documentation, investigate alleged violations, review records, gather evidence, and make recommendations for enforcement actions. Inspector authorizations should be limited to staff that perform field work or review facility documentation related to compliance.

- **Enforcement Officers**. Enforcement Officers perform the same duties as inspectors; however, also have the ability to take enforcement actions. They perform inspections and evaluate compliance with the State's environmental regulations, statutes, or permits. They inspect facilities, review facility documentation, investigate alleged violations and issue enforcement documents such as Notices of Violation, Compliance Orders by Consent, Compliance Orders, Nuisance Abatement Orders, and facility closure orders due to violations under environmental and environmental health laws. (Each division has delegated authorities regarding who can sign different levels of enforcement actions.)

The division directors are responsible for determining which employees from their division will have inspection and enforcement responsibilities and be issued credentials.

Note: As previously mentioned in the Preface, the term "Inspector" is used throughout this manual to refer to both Inspectors and Enforcement Officers for simplicity.

Legal Responsibilities

Inspectors must conduct all inspection activities within the legal framework established by federal and State law. Inspectors also must be familiar with the conditions of specific regulations and permits, if applicable.

Procedural Responsibilities

Inspectors must be familiar with general inspection procedures and evidence collection techniques to ensure adequate inspections and to avoid endangering potential legal proceedings on procedural grounds.

Inspection Procedures. Inspectors should observe standard procedures for conducting each inspection element. The elements of the inspection process listed in **Attachment 2-1** are common to most compliance inspections. They are grouped by the major inspection activities:

- Pre-Inspection Preparation
- Entry
- Opening Conference
- Onsite Inspection Activities
- Closing Conference
- Inspection Report.
- Facility Follow-up

Evidence Collection. Inspectors must be familiar with general evidence-gathering techniques. Because the State's case in an administrative civil or criminal enforcement action depends on the evidence gathered, inspectors must keep detailed records of each inspection. These notes and documentation will be used for preparing the inspection report, determining the appropriate enforcement response, and giving testimony in an enforcement case.

In particular, inspectors must know how to:

- Substantiate facts with items of evidence, including samples, photographs, document copies, statements from witnesses, and personal observations.
- Evaluate what evidence should be collected (routine inspections).
- Follow chain-of-custody procedures

- Collect and preserve evidence.
- Write clear, objective, and informative inspection reports.

Quality Assurance Responsibilities

The inspector must assume primary responsibility for ensuring the quality and accuracy of the compliance inspection and the integrity of samples collected. It is the inspector who must ensure that all data introduced into an inspection file are complete, accurate, and representative of existing conditions. To help the inspector meet this responsibility, programs should establish quality assurance plans that identify individual responsibilities and document detailed procedures.

The objective of a quality assurance plan is to establish standards that will guarantee that inspection and analytical data meet the requirements of all users. Many elements of quality assurance plans are incorporated directly into the basic inspection procedures and may not be specifically identified as quality assurance techniques.

The inspector must be aware that following established inspection procedures are critical to the inspection program. These procedures have been developed to reflect the following quality assurance elements:

- Valid data collection
- Approved standard methods
- Control of service, equipment, and supplies
- Standard data handling and reporting.

B. INSPECTOR ROLES

Official Representative. The inspector is a representative of the Department and is often the only Department official the manager and facility workers will ever see in person. In dealing with these facility employees, the inspector must be professional, tactful, courteous, and diplomatic. The inspector's technical competence and know-how reinforce the credibility of the Department. Equally important is the manner in which the inspector explains the purpose of the visit, what the requirements are, and why the facility should comply with them.

Fact-Finder. The inspector assesses whether the facility is in compliance with the laws and regulations and with any relevant environmental permits. The inspector must be skilled in obtaining the critical information that is necessary for the Department to determine compliance or noncompliance. Often the key pieces of information are not easy to see and go beyond the

standard data from stack tests, effluent samples, temperature readings, and the like. A skilled inspector has developed the ability to obtain significant information through conversation with facility employees and knows how to follow up on these leads. When a facility is found to be not in compliance, the inspector may also be responsible for identifying the cause of the problem.

Enforcement Case Developer. The inspector collects and preserves evidence of noncompliance for use in enforcement actions. The inspection is usually the primary basis for the State's case both in administrative and judicial enforcement actions. The documentation in the inspection report and the inspector's field notes can make or break a case. The same is true of samples taken during the inspection. Without good documentation by the inspector, even the most thorough inspection may be useless for enforcement purposes. But an expertly prepared inspection report with its associated samples, results and photographs can be highly persuasive to a judge, a jury, or an administrative law judge. The inspector is often the key witness for the State in an enforcement proceeding.

Enforcement Presence. The inspector "shows the flag," creating a visible, credible presence of the interest and power of the State in the eyes of particular managers at a particular site. More important, the inspector's presence casts a wide shadow over other regulated facilities, whose managers are deterred from violating the environmental requirements because they know that an inspector may visit their facility, too. Enforcement, as personified in the inspector, is the underlying motivator for those managers who would not otherwise be concerned about keeping their facilities in compliance.

Technical Educator. The inspector serves as a source of regulatory information, and tactfully provides technical and compliance assistance to facility managers by directing them to useful sources of information relevant to problems observed at the facility. The inspector may discuss remedial actions that might be explored and may refer questions and problems to other Department personnel with pertinent expertise. However, the inspector does not give advice, as this could jeopardize future enforcement action.

Technical Authority. Inspectors are frequently called upon to help the Department interpret regulatory requirements, assess the adequacy of control measures, interpret technical data, and assess environmental impacts.

C. ETHICS

The integrity and professional impartiality of an inspector are crucial, because any of the inspector's findings that identify problems can be subject to challenge by the regulated party. Enforcement actions based upon the inspectors work may represent a major commitment of the

Department's funds and time, yet success before a court may hinge upon the inspectors freedom from bias or even apparent bias. This gives the highest importance to the inspector's compliance with regulations governing conflict of interest and ethics. Inspectors should familiarize themselves with the laws and regulations concerning conflict of interest and ethics.

State Ethics Act

Service in a public office is a public trust. The Ethics Act (AS 39.52.110) prohibits substantial and material conflicts of interest. Further, public employees cannot improperly benefit financially or personally from their actions as public employees. The Act does not, however, discourage independent pursuits and it recognizes that minor and inconsequential conflicts of interest are unavoidable.

Misuse of Official Position (AS 39.52.120)

Public employees may not use their positions for personal gain or to give an unwarranted benefit or treatment to any person. For example, public employees may not:

- Use their official positions to secure employment or contracts.
- Accept compensation from anyone other than the State for performing official duties.
- Use State time, equipment, property, or facilities for their own personal or financial benefit or for partisan political purposes.
- Take or withhold official action on a matter in which they have a personal or financial interest; or coerce subordinates for his/her personal or financial benefit.
- Attempt to influence outcome of an administrative hearing by privately contacting the hearing officer.

Improper Gifts (AS 39.52.130)

A Department employee may not solicit or accept gifts if it could reasonably be inferred that the gift is intended to influence the employee's action or judgment. "Gifts" include money, items of value, services, loans, travel (other than on-the-job), entertainment, hospitality, and employment. All gifts from registered lobbyists are presumed to be improper, unless the giver is an immediate family member of the person receiving the gift.

A gift worth more than $150 to a public employee or the public employee's family must be reported within 30 days if:

- public employee can take official action that can affect the giver
- gift is given to the public employee because he or she is a public employee

The receipt of a gift worth less than $150 may be prohibited if it could reasonably be inferred that the gift is intended to influence the public employee's action or judgment. Receipt of such a gift should be disclosed. Any gift received from another government, regardless of value, must be reported; the public employee will be advised as to the disposition of this gift.

Where to Seek Advice. Guidance on ethics laws is available from the Departments Ethics Supervisor.

D. TRAINING REQUIREMENTS

Training Curriculum

Before leading inspections/investigations, all inspectors must complete the DEC Basic Inspector Course and the program-specific minimum curriculum in the assigned program area(s). Experienced inspectors may be exempted from the basic curriculum, but new inspectors may not. There may be limited exceptions to program-specific requirements for new and experienced inspectors.

- **DEC Basic Inspector Course.** This 3-day (24-hour) introductory course is designed for Department Inspectors and Enforcement Officers. It provides an overview of all aspects of inspection preparation, conduct, and follow-up. This course provides an overview of the knowledge and skills needed for compliance inspections/field investigations under DEC's statutes. The Basic Inspector Course covers the fundamentals of environmental compliance monitoring inspections and integrates key concepts and procedures from the following three subject areas:
    - **Legal Authorities/Requirements.** Includes overview of environmental conservation statutes and enforcement authorities, the administrative and judicial enforcement process, collecting and documenting evidence for enforcement proceedings, authority and requirements for lawful entry.
    - **Technical Skills and Procedures.** Includes inspection site selection, and pre-inspection planning and preparation, recognizing and documenting violations, and sample collection and handling,
    - **Communications.** Includes gaining entry, inspector as educator, interviewing techniques, negotiations, and preparation of inspection reports.

The ECU is responsible for developing and delivering the DEC Basic Inspector Course curriculum. This manual supports the training curriculum and covers legal, technical, and communications topics associated with conducting compliance inspections in all Department programs.

- **Health and Safety Training.** The Department shall do everything necessary to protect the life, health, and safety of its employees.[12] Each division and program within the Department should develop health and safety training to ensure that inspectors know how to recognize hazards that are likely to encounter when conducting inspections and investigating complaints on the Department's behalf. The training curriculum should be designed to:
    - Meet the occupational safety and health standards and regulations adopted by the Department of Labor and Workforce Development (DOL&WD)
    - Prescribe the use of suitable protective equipment, safety devices, and safeguards prescribed for work and the workplace
    - Prescribe control or technological procedures, and monitoring and measuring inspector exposure in connection with hazards, as may be necessary for the protection of inspectors

  Inspectors are required to comply with occupational safety and health standards and all regulations issued under AS 18.60.010 - 18.60.105 that are applicable to the inspector's own actions and conduct.

- **Program-Specific Inspector Training.** Each division and program within the Department should develop program-specific training curriculum (i.e., required reading, specialized equipment, policies, procedures, sampling techniques, on-the-job training, etc.) to be used in concert with the basic course. The program-specific curriculum for each environmental program prepares inspectors and enforcement officers to conduct specific types of inspections and to obtain information and evidence in a technically and legally sound manner.

- **Refresher Training**

    - Health and Safety: In addition to the initial, inspectors should complete refresher training annually consisting of a review of all topic areas. Divisions and programs are responsible for coordinating and presenting Health and Safety Training for their assigned personnel.

[12] AS 18.60.075. Safe employment.

- Program-Specific Minimum Curriculum: Refresher training in program-specific curricula is strongly recommended, but at the discretion of the first-line supervisor. At a minimum, refresher training should occur at least annually, or more frequently, depending on the needs of the individual, and changing emphases or needs in the compliance and enforcement program. Divisions and programs are responsible for coordinating training for their assigned personnel.

- **Additional Training Opportunities.** The ECU staff provides in-house professional basic and advanced compliance and enforcement training. Courses are offered on an open-enrollment (scheduled), special session (request), and customized basis. The ECU staff is also available for training consultation. Additionally, the ECU coordinates inspector training with external agencies such as the Western States Project. Topics include, but are not limited to:
  - Environmental Investigations
  - Crimes Scenes
  - Interviewing
  - Photography
  - Evidence Collection
  - Inspection Documentation
  - Complaint Automated Tracking System (CATS)
  - Discovery
  - Appearing as a Witness

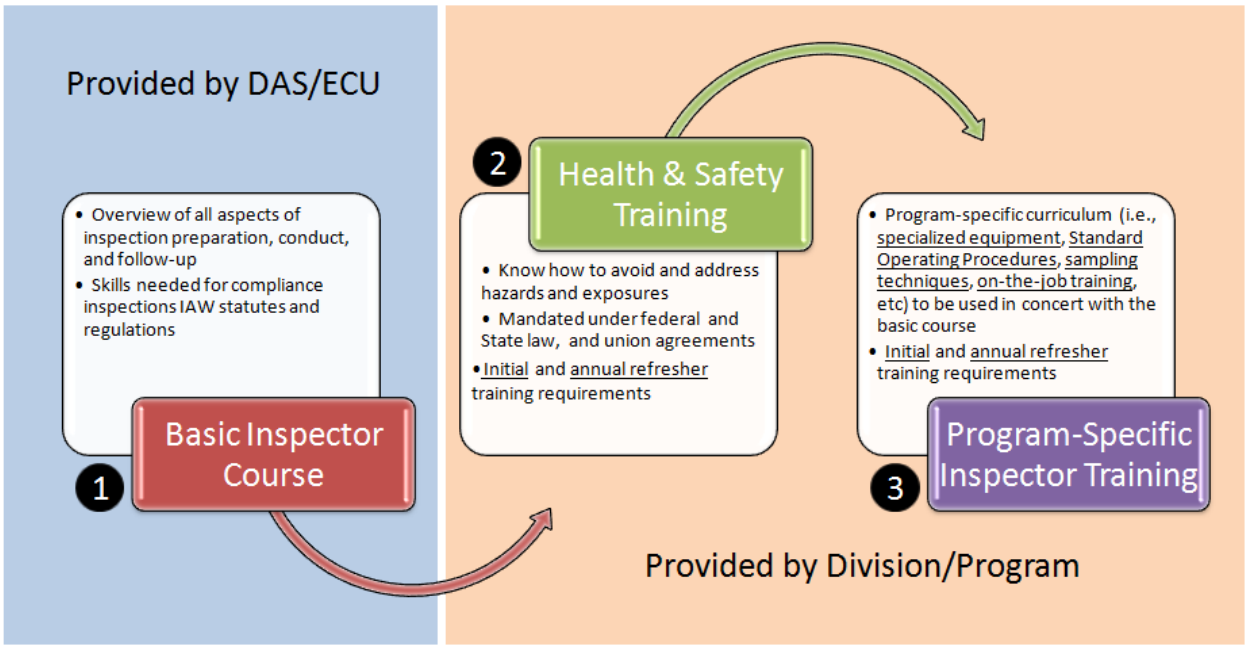


Figure 2-1. Basic Inspector Training Model

Training Exemptions

Exemptions for Basic and Program-Specific Minimum Curricula must be approved by the Commissioner. The first-line supervisor shall prepare a written request based upon guidelines for evaluating the previous knowledge, experience and/or training of the inspector, and shall submit this to the Commissioner, through their directors office, according to procedures adopted within their respective division. A copy of the approved written request shall be placed in the employee's official personnel file along with other training records.

Training Records

Each division and program is responsible for maintaining their own personnel's training records. Inspectors should keep a personal record of their completed training to include certificates and other completed training forms. Training certificates, on-line certificates, or transcripts can serve as an individual record of training completion.

E. APPOINTMENT

Appointment Recommendation

To properly appoint an employee to inspection or enforcement duties, the following actions must be taken:

1. Directors will identify qualified division staff to be appointed to inspection or enforcement duties. Directors certify that the inspector or enforcement officer has met each of the applicable training requirements established by the Department and the division (*i.e.*, required reading, training, and on-the-job training).

2. Directors will provide the ECU the following information on each appointment nominee for preparation of credentials:

    a. The full name of the appointee.

    b. Two recent digital photographs of appointee. Photographs should be taken using a digital camera. Images must be saved in .JPEG format by the person's name. The backdrop behind the subject should be white in color. To ensure best quality take the photo at a distance of four feet from the subject and submit the entire, un-cropped .JPG file.

    c. The current height, weight, hair color, eye color, and date of birth.

    d. A signature card with the signature of the appointee. To prepare the signature card, place a blank sheet of 8.5 x 11 white paper on top of the Signature Card Template (See Attachment 2-2, Page 2) and sign the top sheet inside the box with a “Sharpie” marker (the box on the template should show through the top blank sheet of paper). Scan and save the image as a .PDF file.

    e. A completed appointment recommendation on Form 1 - Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request. (See Attachment 2-2)

    f. Appointee’s training certificate or approved training waiver if applicable.

3. Once the above information is received, the ECU will prepare the credentials (Inspector or Enforcement Officer) and forward them to the Commissioner for approval and signature.

4. The ECU will forward the signed credentials to the requesting division director or designee for issuance to the appointee. A supervisor should review with the inspector the terms/conditions of the authorization prior to/at the time of issuance of a credential to the inspector.

Credentials

Credentials indicate the holder is a lawful representative of the DEC Commissioner and is authorized to perform inspections under DEC regulations. All authorized inspection and enforcement personnel will be provided with inspection or enforcement credentials signed by the Commissioner. Credentials are considered sensitive items. They are not to be used as a form of identification for non-inspection or enforcement purposes. (See Attachment -2-2)

- **Credential Card Errors.** Upon receiving a new credential, employees should carefully review for errors. Immediately report any errors to the ECU. If a processing error was made, a new card will be made and the incorrect cards must be returned to the ECU to be destroyed. If the error was on the Form 1 - Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request, the photograph, or signature card, the division will be asked to resubmit that item.

- **Credential Card Renewals.** Credential cards have no expiration date; however, card holders will be notified by ECU when their cards are five years old and will be given the option of receiving a new card at that time. If for some reason the employees card becomes worn or outdated (i.e., employee's name or physical appearance has significantly changed) before the five-year period, a new card may be requested by submitting a new Form 1 - Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request to the ECU with the justification.

- **Credential Card Accountability**. The accuracy of credential card data will be audited annually and reconciled at the end of the fiscal year against the credential card database. Division directors will be notified of individuals possessing credential cards within their divisions and will be required to conduct the audits and submit a report to the ECU.

    - **Collecting Old Credential Cards.** The Department must recover credentials when an individual is no longer authorized to perform inspection or enforcement duties. When new cards are issued or when cards are canceled (*i.e*., due to retirement, resignation, etc.) it is the responsibility of each supervisor to ensure that all old cards are collected and returned to the ECU to be destroyed.

- **Lost/Stolen Credential Cards.** If a credential is misplaced or stolen, the inspector will report this immediately to his or her supervisor, and the ECU as soon as possible but within 72 hours. Lost or stolen credentials will be replaced upon receipt of a new Form 1 - Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request from the employee's division director.

- **Transfers**. Credentials issued by the Department will be retained by employees who transfer from one division to another, unless one of the following applies:
  - The position in the gaining division does not have inspection or enforcement duties or responsibilities.
  - The division director in the gaining division does not require or desire the employee to possess enforcement or inspection credentials.
  - The individual is no longer qualified to perform enforcement or inspection duties.

- **Position Changes.** Divisions must submit credential card updates by filling out Form 1 - Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request for employees whose inspection or enforcement duty position change results in a different title appearing on the credential card.

Attachment 2-1 Model Program-Specific Inspector Training

DEH-Drinking Water Program

Program-Specific Inspector or Enforcement Officer Training

Mandatory and Recommended Training:

Mandatory Training

DEC Basic Inspector Course

Mandatory Self-Study/Review

Statutes/Regulations

- 18 AAC 80 Drinking Water
- Safe Drinking Water Act Sections 1401, 1412-1417, 1431, 1445, 1450 and, 1451.

Guidance/Reference Materials

- Review at least two completed Sanitary Survey reports. The inspector's first-line supervisor can determine that more than two inspection reports are necessary.

Recommended Training

- Sanitary Surveys - Sanitary Survey Training available from the Drinking Water Academy (DWA) http://www.epa.gov/safewater/dwa/course-sanitary.html
- Any rule specific inspections, the appropriate corresponding rule specific training available from DWA http://www.epa.gov/safewater/dwa/course-npdwr.html
- Introduction to the Safe Drinking Water Act available from DWA http://www.epa.gov/safewater/dwa/course-sdwaovrvw.html
- SDWA, the Public Water System Supervision program, and the National Primary Drinking Water Regulations http://www.epa.gov/safewater/dwa/course-sdwaovrvw.html

Recommended Self-study/Review

- Drinking Water web page http://www.epa.gov/safewater/

Mandatory On-the-Job Training (OJT) and mentoring with senior lead inspector:

- Inspectors are required to conduct at least 24 hours of sanitary surveys* with a senior inspector before leading a sanitary survey. The actual number of sanitary surveys required before the inspector is approved to lead sanitary surveys will be determined by the first-line supervisor.
- For compliance monitoring inspections, inspectors are required to conduct at least 8 hours of inspections* with a senior inspector before leading an inspection. The actual number of inspections required before the inspector is approved to lead inspections will be determined by the first-line supervisor. *Note this includes inspection preparation procedures with a senior inspector.

Mandatory Refresher Training:

- Program specific refresher training as identified by supervisor.

Attachment 2-2 Appointment Recommendation and Credential Card Request

State of Alaska
Department of Environmental Conservation

Inspector/Enforcement Officer Appointment Recommendation and Credential Card Request

Instructions: Please read all instructions before filling out this form. All fields must be completed in order to process this request.

Procedural Steps

I. Applicant

Item 1. Enter request date.
Item 2. Enter Employee #.
Item 3. Enter individual's last name, first name and middle initial.
Item 4. Enter individual's date of birth.
Item 5-8 Enter individual's height, weight, eye and hair color.
Item 9. Enter individual's position.
Items 10-11. Enter individual's assigned ADEC division and program.
Items 12-13. Enter individual's duty station and telephone number.
Item 14. Select reason for request.

II. Requesting Official

Item 15. Director recommends appointment as inspector or enforcement officer and certifies training completion in accordance with Department Policy.
Items 16-18. Requesting Director's Name, Signature and Date.

III. Authorizing Official

Items 19-21 Commissioner's Name, Signature and Date.

Processing

Divisions will complete items 1-18 on this form, sign, and submit to the DAS/ECU for processing. For new appointments also submit:

- Two color photographs of the individual in .JPG format. The backdrop should be solid white-in-color.
- Scanned signature of the individual in .PDF format using the attached signature card template.
- Training Certificate or waiver

DAS/ECU Internal Use Only

Received By: _____ Date: _____

Credential No. Issued: _____ Date: _____

Issued By: _____

I. Applicant

1.Request Date	2. Employee #			
3. Last Name	First Name		MI	
4. Date of Birth	5. Height	6. Weight	7. Eye Color	8. Hair Color
9. Position				
10. Division	11. Program			
12. Duty Station			13. Phone No.	

14. Reason for Request *(Select one)*

☐ New ☐ Change-in-Position ☐ Other _____

II. Requesting Official

15. Recommendation/Certification *(Select one)*

☐ **Inspector.** I recommend that the above named individual be authorized by the Commissioner to conduct inspections, and collect evidence in cases in which the Department of Environmental Conservation is or may be a party of interest. I find this individual fully competent to perform the aforementioned inspection duties.

☐ **Enforcement Officer.** I recommend that the above named individual be authorized by the Commissioner to conduct inspections, and enforce Alaska Statutes relevant to Titles 3, 17, 44, and 46, and collect evidence in cases in which the Department of Environmental Conservation is or may be a party of interest. I find this individual fully competent to perform the aforementioned inspection or enforcement duties.

I certify the applicant has met the minimum training requirements as stated in Department Policy. *(Attach Training Certificate or Waiver, if applicable)*

16. Name _____, Director

17. Signature	18. Date

III. Authorizing Official

19. Name _____, Commissioner

20. Signature	21. Date

Form 1 (1/2012) Page 1

Signature Card Template

Place a blank sheet of 8.5 x 11 paper on top of this Signature Card Template and sign the top blank sheet inside the box with a "Sharpie" marker (the box on the template should show through the top blank sheet of paper). Scan and save the image on the blank sheet of paper as a PDF file. Submit the scanned signature with the completed Form 1 to DAS/ECU for processing.

Attachment 2-3 Inspection and Enforcement Credential Fact Sheet

A DEC credential is a "pocket" warrant[13] authorized by the Commissioner that identifies the bearer as having the authority to act in an inspection, enforcement, or investigation capacity. However, the DEC's legal authority to perform the inspection, enforcement, or investigation functions is based on the applicable State environmental statutes passed by the Alaska State Legislature and signed by the Governor. The credential evidences the proper delegation of this authority and does not provide independently the authority to undertake these activities.

Department credentials should be issued only to those employees who routinely need them to actively perform official inspection, enforcement, or investigative functions. The language on the credentials states:

STATE OF ALASKA

THIS IS TO CERTIFY THAT
(DEC Employee's Name)

WHOSE SIGNATURE AND PHOTOGRAPH APPEAR HEREON IS AN
(Blank space for insertion of title)

Each credential includes ONE of the following titles:
Inspector or Enforcement Officer

Inspector. Authorized to conduct inspections and ensure compliance with Alaska statutes relevant to Titles 3, 17, 18, 44, and 46, and collect evidence in cases in which the Department of Environmental Conservation is or may be a party of interest.

Enforcement Officer. Authorized to conduct inspections, enforce Alaska statutes relevant to Titles 3, 17, 18, 44, and 46, and collect evidence in cases in which the Department of Environmental Conservation is or may be a party of interest.

[13] authorization: something that authorizes somebody to do something

Credential Card Example. This is the only authorized credential card.

The Do's and Don'ts of Using DEC Credentials. These do's and don'ts are established based on good management practices for ensuring the proper use of DEC credentials by Department employees. The practical purpose of the do's and don'ts is to make DEC employees aware of the importance to safeguard credentials, and limit their use to ONLY enforcement functions.

DO'S	DON'TS
Do use for official duties described in the credentials	Do NOT use for non-enforcement State business
Do present while conducting compliance inspections	Do NOT allow anyone to hold or take possession of your credentials
Do present while conducting compliance investigations	Do NOT loan the credentials to anyone. This includes other DEC employees.
Do use when responding to environmental complaints and/or spills	Do NOT photocopy the credentials
Do use to conduct facility audits	Do NOT fail to report a lost or stolen credentials to your supervisor
Do use to verify status as a DEC official when interviewing witnesses in the field	Do NOT allow anyone else to photocopy or use the credentials
Do use as identification for entry into facilities regulated under federal environmental laws and regulations	
Do safeguard storage of credentials	
Do always immediately report if the DEC credentials is lost or stolen to your immediate supervisor	

ENTRY AND INFORMATION GATHERING TOOLS

Chapter 3

A. LEGAL BASES FOR ENTRY

Statutory Authority. The legal basis for entry starts with the statutory authority to enter, whether expressly stated, or implied through the authority to enforce the statute or to compel compliance and/or impose sanctions on violators. Each of the statutes granting the Department authority to enter and inspect facilities, are presented in Attachment 3-1.

In the Supreme Court decision in Marshall v. Barlow's, Inc., U.S. , 98 S. Ct. 1816 (1978), the court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant. The decision bears upon the need to obtain warrants or other process for inspections. The scope of the Barlow's decision is broad and affects DEC compliance inspection programs. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this manual.

B. CONSENSUAL ENTRY

Arrival for the Inspection

To comply with statutory authority and to avoid any unreasonable search and procedural problems, a facility should be entered in the following manner:

- Arrival at the facility should occur during normal working hours, unless mitigating circumstances, such as an emergency, require immediate response during off-hours.
- The facility should be entered through the main gate; except where a facility, in its response to an inspection notification letter, has designated another entrance.
- The facility owner or agent-in-charge should be located as soon as the inspector or inspection team arrives on the premises.

- If there is only a guard present at the entrance, the inspector should present his credentials and suggest that the guard call his superior or the responsible facility agent.
- Locating the proper facility officials may take some time and require contact with several receptionists or secretaries. Inspectors should be careful to keep their official credentials in sight at all times during this process. Business cards may be used for introductory purposes, but do not replace official credentials for identification.

- If the facility provides a sign-in sheet, log, or visitors register, it is acceptable to sign it provided there is no restrictive language associated with it.

Credentials

When the proper facility officials have been located, the inspector should introduce themselves as a DEC inspector and present the proper DEC credentials. These credentials indicate that the holder is a lawful representative of the Commissioner and is authorized to perform inspections under DEC regulations. Not all statutes require the display of credentials, as shown in Attachment 3-1. In those programs where the statutes require display of credentials, the credentials must be presented whether or not identification is requested. In practice, Department policy is that even where not required by statute, inspectors should present their credentials to authenticate the representation they are State officials who have the authority to conduct inspections. After facility officials have scrutinized the credentials, they may wish to telephone the Department offices for verification of the inspector's identification. This is acceptable; however, credentials should never leave the sight of the inspector. Make a note in the field logbook that credentials were presented.

Consensual Entry

The Department's policy is to seek consensual entry. Consent means the intentional foregoing of right to privacy has not resulted from fear, ignorance, or trickery. In other words, consent to enter must be given knowingly and freely. Express consent is not necessary; absence of express denial constitutes consent. Therefore, in circumstances where the facility owner/operator complains about the entry, or otherwise expresses anger with the Department, the entry is still consensual unless the inspector has been asked to leave and/or the inspector has used coercion to obtain entry. For example, if an inspector suggests that failure to permit entry will result in

civil or criminal consequences, then the subsequent entry might not be considered consensual since the "threat" of negative consequences could be perceived as coercion.

The actual permission to enter a facility or private property may only be granted by the owner/operator or through due process by a court of law. The law specifies and grants the authority to the Department or the Department's agent (the inspector). The Department therefore has the requirement to identify the inspector as its official agent to a person-in-charge by showing his/her official credentials. The inspector may also be required to cite the statutory authority to enter the facility, the name of the Department he/she represents, and the scope of activities. *Without this initial introduction an inspector should expect to be denied entry*. If these steps are not taken the facility may allege misrepresentation or trespass.

Consent must be given by the owner of the premises, or some other person with authority to give consent, at the time of the inspection. In the absence of the owner, the inspector must make a good faith effort to determine who is in charge of the establishment, or is otherwise in a position to consent to the entry. The inspector should present his credentials to that individual. Note the name and title of the person giving consent in the field logbook. Consent is generally needed only to inspect the non-public portions of an establishment - i.e., any evidence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

Denial of Consent to Enter

If an inspector is refused entry into a facility for the purpose of an inspection, certain procedural steps should be followed:

- Arrival and Presentation of Credentials/Notices. Make certain that arrival activities were properly conducted, including that all credentials and notices have been properly presented to the facility owner or agent-in-charge.

- Tactfully Discuss the Reason for Denial. If entry is not granted, courteously ask why. Diplomatically probe the reason for the denial to see if obstacles (such as misunderstandings) can be resolved. If resolution is beyond the inspector's authority, he or she may suggest that facility officials seek advice from their attorneys on clarification of DEC's inspection authority.

- Carefully Record Observations in the Field Logbook. All observations pertaining to the denial should be carefully noted in the field logbook. Specifically, record the following:

    - Facility name and exact address.
    - Name, title, and authority of the person who refused entry.

- Name, address, and telephone number of the facility's attorney (if readily available).
- Date and time of refusal.
- Reason for denial.
- Facility appearance.
- Any reasonable suspicions that refusal was based on a desire to cover up regulatory violations, etc.

All such information will be helpful should a warrant be sought.

- Avoid Threatening or Inflammatory Statements. Under no circumstances should the inspector discuss potential penalties or do anything that may be construed as coercive or threatening. For example, the Barlow decision clearly established that the possessor has the right to ask for a warrant under normal circumstances. Therefore, refusal to permit entry for inspection purposes is not likely to lead to civil or criminal penalties, providing the refusal is based on the inspector's lack of a warrant, and one of the conditions discussed earlier with respect to warrantless entry does not apply. If the inspector were allowed to enter the facility in response to a threat of enforcement liability, it is likely that any evidence obtained through such an inspection would be challenged as inadmissible.

An inspector may, however, inform the facility representative that he intends to seek a warrant to compel the inspection. The inspector must be careful in phrasing such a statement. Do not state: "I will get a warrant." A later reviewing court may feel that statement usurped its authority to authorize a warrant and therefore may deny the warrant. Alternatively, even if the company later consents, following a statement that the inspector "will get" a warrant, there may be an issue as to whether the consent was coerced.

If the inspector decides to make a statement with regard to a warrant, it should be phrased along the lines of: "I intend to seek (or apply for) a warrant."

- Leave Premises and Contact Supervisor. If entry is still denied after attempting to resolve obstacles, the inspector should withdraw from the premises immediately after obtaining the information noted above in the field logbook. In such circumstances, if a written Notice of Inspection was required, a copy of the Notice should be left with facility officials to show that proper procedures were followed.

The inspector should telephone his or her supervisor immediately after leaving the premises.

The supervisor will confer with the designated Assistant Attorney General to discuss the desirability of obtaining an administrative warrant.

Withdrawal of Consent During Inspection

Occasionally, a facility may consent to an inspection and later withdraw the consent while the inspection is in progress. Consent to the inspection may be withdrawn at any time after entry has been made. Department policy regards withdrawal of consent as tantamount to a refusal to permit entry. Therefore, the inspector should follow the procedures cited above under "Denial of Consent" unless the inspection has progressed far enough to accomplish its purposes such that it is unnecessary to attempt to regain consent.

All activities and evidence obtained prior to the withdrawal of consent are valid. Therefore, evidence obtained by the inspector before consent was withdrawn would be usable in any subsequent enforcement actions and should be retained.

Conditional Consent

Conditional consent refers to the attempts by some facilities to restrict the Department's post-entry activities by imposing one or more requirements or restrictions on the inspector as a condition of entry. In essence, facilities attempt to co-opt inspectors or "hamstring" their activities.

Conditional consent most often takes the form of efforts to impose:

- Waivers, indemnity agreements, or releases.
- Confidentiality or secrecy conditions or agreements.
- Photographic restrictions.
- Duplication of the inspector's notes for facility review.

As a general rule, any request, requirement, or restriction that would necessitate deviation from standard procedures should be interpreted as an effort to impose conditions. The Department rejects all such efforts. Conditions to entry are not acceptable and the inspector should not agree to them. Efforts to impose conditions should be considered a denial of consent, and the inspector should respond accordingly. However, a request that the inspector wear a visitor's badge or that Department personnel comply with reasonable procedures (e.g., wearing a hard hat or safety eyeglasses) should not generally be considered "conditions" of entry. Even when entry has been obtained without any effort to impose conditions, the inspector must be sensitive to efforts that may be made during the inspection. If this occurs, the inspection should regard it as a revocation of consent, and proceed in the same manner as if consent had been withdrawn.

C. WARRANT ENTRY

The original statutes creating the DEC granted authority for entry and inspection "with the consent of the owner or occupier," to allow the Department to enforce its regulations.[14] This enabling legislation also authorized the Department to seek administrative search warrants to inspect actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, *Environmental Conservation* or AS 46.14, *Air Quality Control* or a regulation adopted under those chapters.[15]

A warrant is a judicial authorization for an appropriate official (e.g., an inspector) to enter a specifically described location and perform specifically described inspection functions. An administrative warrant can be obtained

- in advance of inspection
- when facility officials have denied entry to an inspector
- when consent to inspect has been withdrawn during an inspection

Standards or Bases for the Issuance of Administrative Warrants

The Barlow's decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of civil probable cause, 2) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme, or 3) of traditional criminal probable cause.

- **Civil Specific Probable Cause Warrant.** Where there is some specific probable cause for issuance of a warrant such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the Attorney General's Office in detail the basis for this probable cause. The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.
- **Civil Probable Cause Based on a Neutral Administrative Inspection Scheme.** Administrative searches in Alaska require the same "attenuated probable cause" that applies under federal law. For administrative searches, the Alaska Supreme Court has adopted the "attenuated probable cause" standard expressed by the U. S. Supreme Court in *Camera v. Municipal Court*, 387 U.S. 523, 534-39 (1966).[16] Under this standard, "probable cause" to issue an inspection warrant exists "if reasonable legislative or

[14] See sec. 3, ch. 120, SLA 197; AS 46.03.020(6).
[15] See sec. 3, ch. 120, SLA 1971; AS 46. 03. 860.
[16] See Woods and Rohde,Inc. v. State, 565 P.2d 138, 151 (Alaska 1977)

administrative standards" for conducting an inspection are satisfied.[17] Under this standard, "[t]here need be no probable cause to suppose a violation to support a warrant to inspect. All that is required is a showing that reasonable administrative standards for inspection have been established and are met in the inspection in question".[18]

Every program enforced by the Department has a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. The Assistant Attorney General (AAG) will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The AAG will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or district court judge.

- **Criminal Warrants.** Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector should request DEC Environmental Crimes Unit seek a criminal warrant under Rule 37 of the Alaska Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered.

Warrants are applied for and obtained ex parte, that is, without the knowledge of the other side. Past experience demonstrates that if the facility is aware of the effort to obtain a warrant, the Department will find itself bogged down in court motions and other delaying tactics. For that reason, it is inappropriate to give a facility advance notification of an inspection that will occur under a warrant. It can also be a criminal violation for anyone to disclose the existence of a warrant prior to its execution. When a warrant is needed, an AAG will assist in drafting the appropriate documents.

Where an inspection is not a routine inspection under reasonable legislative or administrative standards, specific evidence of an existing violation or evidence supporting a reasonable belief or suspicion of a violation may be necessary in order to support the balancing test for attenuated probable cause.[19] Further, if the purpose of an inspection is to gather evidence for a criminal

[17] See Camera, 387 U.S. at 538.

[18] See Woods and Rohde, Inc., 565 P.2d at 152 n.69, citing United States v. Thriftmart, Inc., 429 F.2d 1006, 1008-09 (9th Cir. 1970)cert. denied400 U.S. 926 (1970).

[19] See, e.g. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1977), Reich v. Kelly-Springfield Tire Co. (In re Kelly-Springfield Tire Co.), 13 F.3d 1160, 1166 (7th Cir. 1994).

prosecution (as opposed a civil investigation that could incidentally lead to criminal as well as civil enforcement), a criminal search warrant based on full probable cause should be obtained.

The inspector must draft three documents to obtain a warrant: an application for a warrant (Attachment 3-3); an accompanying affidavit (Attachment 3-4); and the warrant (Attachment 3-5) itself. Each document is captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document. Sample documents are provided as exhibits at the end of this section. (Occasionally, a Memorandum of in Support of Warrant Application will also be filed. This is essentially a legal brief, explaining to the judge or magistrate why he or she can do what is being asked.)

The inspector plays a significant role in the process of seeking a warrant. His or her knowledge and experience relating to the circumstances are crucial to the drafting of warrant documents. Inspectors are responsible for:

- Obtaining information that will permit a very specific description of the premises to be inspected.
- Providing specificity regarding the items to be searched and/or seized.
- Helping determine what laws/regulations/requirements apply or may have been violated.
- Providing the information amounting to "reasonable" cause or, alternatively, supplying the predetermined inspection schedule, which selected the site for inspection, if "reasonable" cause was not the issue.

Regarding all of the items, the inspector should help "cast a wide net," but one that is still legitimately founded on the facts and the applicable law. Drafting warrant documents is a particularly important area where attorneys and inspectors must work together as a team.

Seeking a Warrant in Advance of Inspection

A warrant may be obtained during the pre-inspection preparation phase, prior to going on-site. A denial of entry is not a prerequisite to obtaining a warrant. The Barlow's[20] decision recognized that an agency may wish, on occasion, to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. A pre-inspection warrant may be sought at the discretion of the division or program:

- A violation is suspected that could be covered up during the time needed to secure a warrant once the inspectors have arrived on-site.

[20] Id Marshall

- Prior correspondence or other contact (e.g., review of Department records) with the facility to be inspected provides reason to believe that entry will be denied when the inspector arrives.
- The facility is unusually remote so that a necessity to obtain a warrant at a later phase of the inspection process would be inconvenient to the State.

Seeking a Warrant for Denied Entry

It is Department policy to seek a warrant when all other efforts to gain lawful entry have been exhausted, and the inspector has carefully followed established entry/denial of entry procedures. Determination to secure a warrant will be made by the division or program in concert with other cognizant Department officials.

Securing and Executing a Warrant

Secure the Warrant. Once it has been determined that a warrant should be secured, there are precise procedures for obtaining and executing a warrant, as detailed below.

- Contact the Department of Law, Environmental Section. After a decision has been made to obtain the warrant, the designated division or program will contact the Department of Law, Environmental Section. The Department assists the Attorney General in the preparation of the warrant and necessary affidavits.

- Prepare the Affidavits. The affidavits are crucial documents in support of a warrant application. Each affidavit consists of consecutively numbered paragraphs that describe all of the facts in support of warrant issuance. If the warrant is sought in the absence of "reasonable" cause, the affidavit should incorporate the neutral administrative scheme that is the basis for inspecting that particular facility. The inspector plays a crucial role in preparing the affidavit. As indicated earlier, the inspector must help prepare, in detail, the description of the premises and the items to be seized. Details of the premises include: address (lot and range number or longitude and latitude, if appropriate), description of surrounding area, position on the block, number of buildings and relation to one another, description of each building (including color, height, construction material), signs and other unique identifying characteristics. The affidavit is signed by a person with first-hand knowledge of all the facts stated, although "hearsay" or "second-hand" knowledge can be used. In cases where entry has been denied, the inspector who was denied entry usually will be the person to sign the affidavit. An affidavit is a sworn

statement that must be notarized or sworn to before a judge or magistrate. (See Attachment 3-4)

- Prepare the Warrant for Signature. The warrant is a direction to an appropriate official (e.g., the inspector) to enter a specifically described location and perform specifically described inspection functions. The warrant also includes a "return of service," a "return" and an "inventory" of the items seized. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the judge or magistrate. The draft warrant should be ready for the signature. Once signed, it is an enforceable document. Either following the signature, or on a separate page, the warrant will contain a "return of service," which is used to report that the warrant was executed. This part of the warrant is to be dated and signed by the inspector after execution of the warrant and completion of the inspection. Inspectors should accompany the attorneys to the judge if possible. Often questions arise which might allow the judge to swear in the inspector in order to take additional information to supplement the affidavit. (See Attachment 3-3)

- Apply for the Warrant. The application for a warrant identifies the statutes and regulations under which the Department is seeking the warrant. The name and location of the site or facility to be inspected should be clearly identified and, if possible, the owner and/or operator should be named. The application can be a one or two-page document if all factual background for seeking the warrant is stated in the affidavit, and the application so states. The application is generally signed by an Assistant Attorney General on behalf of the Attorney General. The application for a warrant should be made as soon as possible after the denial of entry or withdrawal of consent. (See Attachment 3-3)

Inspecting with the Warrant. Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a peace officer when he goes to serve the warrant on the recalcitrant owner. The inspector should never attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a peace officer, the inspector should leave the establishment and inform the Assistant Attorney General. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a peace officer, the peace officer is principally charged with executing the warrant. Thus, if refusal or threat to refuse occurs, the inspector

should abide by the peace officer's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

There are several points that inspectors should keep in mind when conducting an inspection with a warrant:

- If questions arise in the field about the scope of the warrant, call the Assistant Attorney General. If the inspector discovers items which should have been included in the scope of the warrant but are not, the attorney may be able to coordinate getting the judge to amend the warrant by telephone. If a few items are taken that are later found to be beyond the scope of the warrant, they will have to be returned. This will not normally affect the items taken pursuant to the warrant. However, if too many items are taken, it could result in voiding the entire warrant or suppression of all evidence.

- Apply the "plain view" doctrine, which means essentially that if a piece of evidence is where it could be seen by anyone in a lawful position or place to make such an observation, the information can be included as evidence.

- Keep an eye open for evidence of other wrongdoing. Such evidence is generally admissible as long as the inspector had lawful authority to be in a position to see it.

- As with all inspections, interview as many individuals as possible and reasonable to accomplish inspection objectives. There are no restrictions on asking questions, although there is no obligation for the facility's representatives or other employees to respond.

Returning the Warrant. The "return" made on a warrant is a written report informing the court when and where the warrant was executed, who participated, generally what was done, what items (if any) were carried away from the premises, and whether a copy of the warrant was given to someone (listing the person's name and address). The inventory not only allows the court to help determine whether the inspection was within the scope of the warrant, but it also serves as the official record of items taken or copied. After the inspection has been completed, the warrant must be returned to the magistrate. A return of the warrant, within the time restrictions required by the court, is essential. Magistrates usually impose a time limit in the warrant that is estimated to be long enough to complete the proposed activities. If the activities are not completed during

the allowed time period, usually the warrant can be renewed or a new one can be issued based upon updated information. Whoever executes the warrant (i.e., whoever performs the inspection or the law enforcement officer) must sign the return form, and return it to the court. (See Attachment 3-6)

D. RIGHT OF WARRANTLESS ENTRY

Consent. Consent constitutes agreement and/or approval by an individual allowing a government official to search without a warrant. In doing so, the individual waives their right as granted by the Fourth Amendment and/or Alaska Constitution, Article 1 Section 14, which prohibits warrantless searches. In order to establish the validity of consent, it is your responsibility to ensure the following:

- The consent was given voluntarily and freely without duress (compulsion by threat) or coercion (to dominate by force).
- Deception was not used to obtain consent. Examples of deception are threats against family members, physical, psychological, or religious coercion, and relating false statements.
- The person consenting made a knowing and intelligent waiver. The person should be informed of the relevant circumstances and likely consequences.
- The person consenting must have the authority to permit the search.

When investigating citizen complaints on private property, non-regulated industry, etc. inspectors should obtain a written waiver signed by the person who gave consent. (See Attachment 3-2)

Open Fields and In Plain View situations. Observation by inspectors of things that are in plain view (*i.e.*, that are able to be seen by anyone in a lawful position or place to make such observations) do not require a warrant.

- **Open Fields.** Under federal law, the "open fields" doctrine is a long-established exception to the warrant requirement under which a warrant is not needed to conduct a search of land outside the curtilage of a home[21]. "Curtilage" means the area around the home to which the activity of home life extends. The relevant factors in determining whether an area is within the curtilage include its distance from the home, whether it is within a fence or other enclosure that surrounds the home, the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

[21] See Hester v. United States, 265 U.S. 57, 59 (1924); Oliver v. United States, 466 U.S. 170, 180 (1984).

(See Figure 3-1) The U.S. Supreme Court addressed the question of whether there is a reasonable expectation of privacy that society is prepared to recognize in open fields and concluded that there is not. This analysis was based in part on the fact that fences and no trespassing signs in rural areas are not effective in barring public access and the fact that the public and the government may lawfully survey lands from the air. This is the same analysis that would be applicable under the Alaska Supreme Court's criteria as outlined in the court case Woods & Rohde, Inc[22]. Where there is no expectation of privacy that society is prepared to recognize as reasonable, constitutional limitations on search and seizure are not implicated. The Department of Law has previously advised State environmental agencies of the availability of the "open fields" exception to the warrant requirement indicating DEC could engage in warrantless oil field inspections under the "open fields doctrine[23]"; and Department of Fish & Game officers could conduct warrantless inspections pursuant to the "open fields doctrine" on lands outside of immediate dwelling areas "where there is no reasonable expectation of privacy that society recognizes[24]."

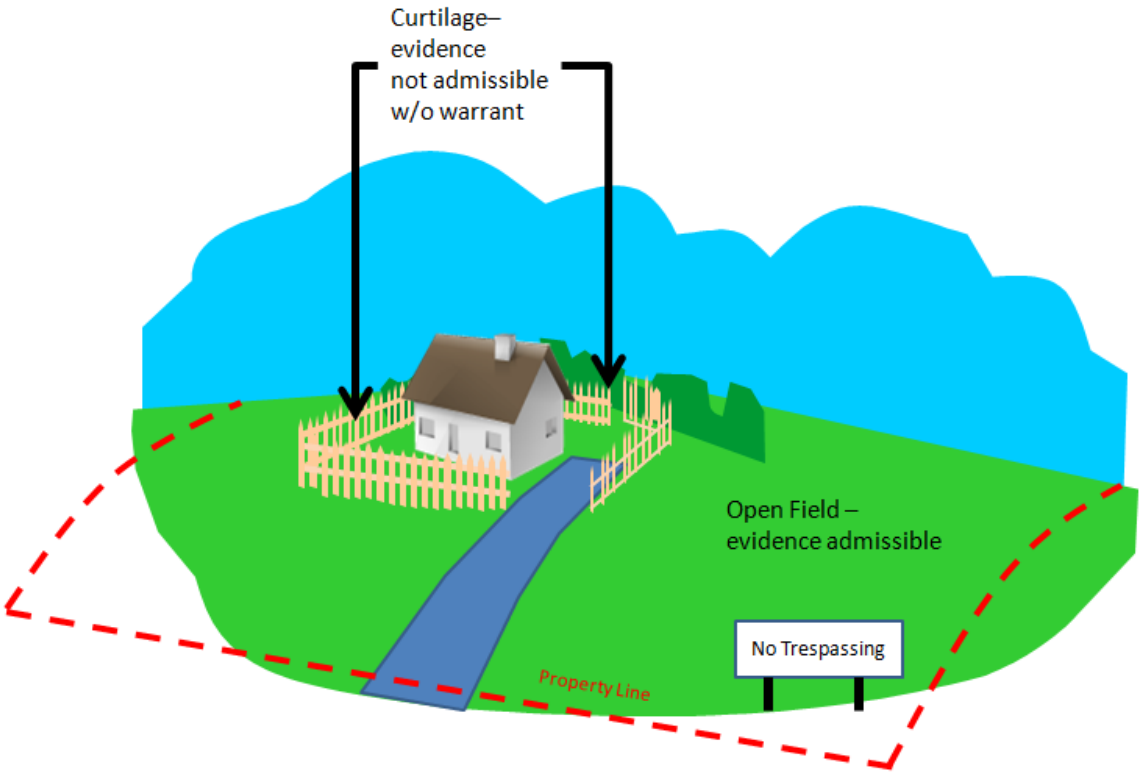


Figure 3-1 Open Fields Doctrine

[22] See 1998 Alaska Op. Atty. Gen. 90, 1998 WL 1108878 (Alaska A.G.)
[23] See, 1982 Inf. Op. Att'y Gen. 1 (July 7; 366-007-83)
[24] See 1984 Inf. Op. Att'y Gen. 6-8 (May 1; 166-346-83)

- **Plain View.** Under the plain view doctrine, observations made by an inspector are admissible if the inspector is legally in the position from which the observations were made, and the warrantless seizure of evidence observed in plain view may also be permissible.[25] The Alaska Supreme Court has recognized three basic requirements for a valid "plain view" seizure of evidence: (1) the initial intrusion which afforded the view must have been lawful; (2) the discovery of the evidence must have been inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent. The Alaska Supreme Court has clearly recognized the applicability of the "plain view" doctrine.[26]

Exigent Circumstances. Alaska recognizes exceptions to warrant requirements where there are exigent circumstances such as where there is a danger that evidence will be destroyed or removed before a warrant can be obtained.[27] Under federal law,

> [E]xigent circumstances are present when "a reasonable person [would] believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequences improperly frustrating legitimate law enforcement efforts[28]."

"The exigencies must be viewed from the totality of circumstances known to the inspector at the time of the warrantless intrusion[29]", and the government must show that there was insufficient time to obtain a warrant. Similar exceptions with similar criteria are available under Alaska law.

Alaska has recognized that exigent circumstances justifying a warrantless search or seizure may be established by the existence of probable cause," coupled with a "compelling need for official action and no time to secure a warrant[30]." The presence of exigent circumstances is determined by examining the "totality of circumstances of the case, balancing the nature of the exigency against the degree of intrusiveness of the warrantless search or seizure[31]." Factors for finding exigent circumstances include such things as the likelihood of destruction of evidence, likelihood of warning other suspects, and the need to assure personal safety. More specific guidelines have been outlined for an exigent circumstances search and seizure when destruction of evidence is threatened: "[t]here must be probable cause to believe that evidence is present, and the officers

[25] See Deal v. State, 626 P.2d 1073, 1078 (Alaska 1980)
[26] See, e.g.,Reeves v. State, 599 P.2d 727, 738 (Alaska 1979).
[27] See 1998 Alaska Op. Atty. Gen. 90, 1998 WL 1108878 (Alaska A.G.)
[28] See U.S. v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993)
[29] See U.S. v. George, 883 F.2d 1407, 1412 (9th Cir. 1989)
[30] See Ingram v. State, 703 P.2d 415, 422 (Alaska App. 1985) quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978).
[31] Id Ingram, 703 P.2d at 422

must reasonably conclude, from the surrounding circumstances and the information at hand, that the evidence will be destroyed or removed before a search warrant can be obtained[32]."

Emergencies. Alaska has clearly recognized the "emergency" exception to the warrant requirement[33]. Entry under the "emergency aid" doctrine without a warrant is permissible where (1) there are reasonable grounds to believe that there is an emergency and an immediate need to provide assistance for the protection of life or property; (2) the search is not primarily motivated by intent to seize evidence; and (3) there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched[34].

E. INFORMATION GATHERING TOOLS

A wide range of tools is available to the Department for use in gathering information about facility compliance with environmental requirements. Most directly related to the conduct of inspections are those authorities involving a physical intrusion onto premises, such as the Department's right to enter and inspect premises and to obtain warrants for entry. These authorities were discussed in the previous sections of this chapter.

Compliance information can also be gathered through the use of other investigative tools that do not necessarily involve a physical intrusion upon someone's premises. The principal mechanism is subpoenas.[35] The Department sometimes uses this authority to gain information in advance of or in connection with an inspection or enforcement investigation.

Authority to obtain (compel persons to provide) information through subpoenas exists in AS §46.03.020(7), **"**The department may conduct investigations and hold hearings and compel the attendance of witnesses and the production of accounts, books, and documents by the issuance of a subpoena…"

Administrative Subpoenas

An administrative subpoena is a non-court ordered command issued by the Department to compel the production of tangible information (e.g., records or documents) or the appearance of a person for the purpose of obtaining oral information.

[32]See Finch v. State, 592 P.2d 1196, 1198 (Alaska 1979)
[33] See, e.g., Schraff v. State, 544 P.2d 834, 841-44 (Alaska 1975); Gallmeyer v. State, 640 P.2d 837, 842 (Alaska App. 1982).
[34] Id Gallmeyer, 640 P.2d at 842
[35] The court rule on subpoenas in civil cases is Civil Rule 45.

Permissible addressees of subpoenas are typically any person who may have relevant information. Some arguments have been made that only "regulatees" are subject to subpoenas; however, it may be said that unless the statute is otherwise restrictive, a subpoena is addressable to any person who is genuinely believed to have relevant information.

The Commissioner has delegated subpoena powers to several program managers within the Department.

Subpoena Documents

- **Cover Letter to Subpoena Recipient/Custodian of Records.** The cover letter is completed on agency letterhead, explains the subpoena requirements, and provides instructions on how return of service should be made. (See Attachment 3-7)
- **Subpoena *Duces Tecum (To Produce Documentary Evidence).*** The subpoena *duces tecum* is a command to a person or organization to appear at a specified time and place and to bring certain designated documents, to produce the documents, and to testify as to their authenticity as well as any other matter concerning which proper inquiry is made. The subpoena must have the correct legal name of the business or person being subpoenaed. The address for either a person or business must be a physical address (not a Post Office (PO) Box). For businesses, the subpoena should be addressed to the Custodian of Records. The subpoena will have the DEC physical address for return of service. There will be a return of service date, which is the date the records should be provided to DEC. The required records can be listed on the face of the subpoena or can be listed in an Appendix. (See Attachment 3-8)
- **Appendix.** The Appendix, if needed, describes the records being subpoenaed. (See Attachment 3-9)
- **Subpoena Affidavit of Service.** This is not provided to the subpoena recipient and is completed by the inspector after the subpoena has been served. After the subpoena is served, the inspector completes the Affidavit of Service and maintains the original in the inspection file. (See Attachment 3-11)
- **Subpoena Certificate of Compliance (Recipient / Custodian of Records).** The Certificate of Compliance is provided to the recipient/custodian of records for completion when the records are provided to DEC. (See Attachment 3-10)

Service of Subpoenas

The subpoena should be served as soon as the inspector receives the signed original from the designated approval authority. The original subpoena should be placed in the inspection or

enforcement case file for retention with other case-related documents. The Custodian Cover Letter to Subpoena Recipient and Subpoena must be served.

A subpoena can be served by one of the following methods:

- **Certified Mail.** A subpoena can be served by registered or certified mail. Complete PS Form 1381 Domestic Return Receipt certified mail form from the US Postal Service by:
    - checking Item 4 "Restricted Delivery" box to restrict delivery of the subpoena only to the Recipient/Custodian of Records; and
    - addressing the return delivery receipt so that it will be returned to inspector (the party requesting the subpoena).

  Mail a copy of the subpoena to the Recipient/Custodian of Records and retain the original for the file. After the witness picks up the certified mail, the Post Office will return the green card (return delivery receipt) to you. Maintain the PS Form 1381 receipt to prove that the subpoena was served. (See Attachment 3-12)

- **Personal Service.** A subpoena can be served on a Recipient/Custodian of Records by employees of the Department, process servers, peace officers, or any person who is at least 18 years old and who is not a party to the action. The person who serves the subpoena must provide proof of the service by making an Affidavit of Service and signing it. The signature must be notarized. Maintain the notarized Affidavit of Service to prove that subpoena was served.

If the inspector believes the recipient is making a good faith effort to compile the requested records and simply needs more time, they may grant a reasonable extension to the due date. All such time extensions should be obtained in writing. If it begins to appear as if the recipient does not intend to properly comply, contact an Assistant Attorney General.

Delivery of Subpoenaed Records

While the subpoena recipient is technically required to deliver the records in person, it is acceptable to allow the recipient to mail the requested records.

- The issue of delivery should be addressed in the subpoena cover letter.
- Make sure you have the recipient sign a Certificate of Compliance attesting that all requested documents were provided.

Limitations of the Subpoena

There are shortcomings inherent in subpoenas when using them to obtain destructible or alterable items such as records and documents. Their advance notice feature enables a subpoena respondent to shred, destroy, hide, or otherwise sanitize such items while he engages in delaying litigation trying to nullify or to restrict the subpoena. How frequently this occurs is not known, but it has happened, despite the fact that a respondent has a legal duty to keep the subpoenaed items safe until all litigation concerning them has been resolved.

Computer technology has immeasurably enhanced the sanitizing ability respondents have when a subpoena is served. With the press of a finger on a keyboard, information can be electronically transferred to other locations with minimum risk of detection; therefore, the subpoena as an investigative tool to uncover tangible items is becoming increasingly less, not more useful. Warrants, on the other hand, partially disable a possessor from sanitizing subpoenaed items because officials with warrants simply show up, enter, peruse, and copy or carry away the records or documents or tangible items before sanitization can occur.

Attachment 3-1 Statutory Authority

I. Alaska Statutes.

The Alaska Statutes are the laws of the State as passed by the legislature. The statutes (1993 - current) are available online on the Alaska Legislature's website, and the current print version is available at all Alaska Court System law libraries and many public libraries. The Anchorage Law Library has a complete historical collection of Alaska Statutes. The official publisher of the Alaska Statutes is LexisNexis®. Their toll-free number is 1-800-446-3410. The 13-volume set is published biennially in October with an annual interim supplement.

Alaska Statutes are cited by title, chapter, and section. For example: **AS 3.05.040** (title 3, chapter 5, section 40)

TITLE	CHAPTER	STATUTE	DESCRIPTION
3. Agriculture and Animals	5. Powers and Duties of Commissioners of Natural Resources and Environmental Conservation	AS 03.05.040	Inspection. (a) To carry out the requirements of this chapter, on any business day during the usual hours of business, or at any time if the commissioner determines that there is an immediate threat to the health or safety of an animal or the general public, the commissioner or an individual designated by the commissioner as an inspector may, for the purpose of inspecting animals, animal products, agricultural products, or premises containing or having contained animals, animal products, or agricultural products, enter a storehouse, warehouse, cold storage plant, packing house, slaughterhouse, retail store, or other building or place where animals, animal products, or agricultural products are or have been raised, housed, kept, stored, processed, or sold.
17. Food and Drugs	20. Alaska Food, Drug, and Cosmetic Act	AS 17.20.070	Inspection By Department.

			An officer or employee designated by the commissioner shall have access to a factory, aquatic farm, or establishment, the operator of which holds a permit from the commissioner, for the purpose of ascertaining whether the conditions of the permit are being complied with. Denial of access for inspection is ground for suspension of the permit until access is freely given.
17. Food and Drugs	20. Alaska Food, Drug, and Cosmetic Act	AS 17.20.200	Inspections and Examinations. (a) The commissioner of environmental conservation or an agent shall have free access at reasonable hours to a factory, warehouse, or establishment in which foods or cosmetics are manufactured, processed, packed, or held for introduction into commerce, to enter a vehicle being used to transport or hold these foods or cosmetics in commerce, or to an aquatic farm in order to (1) inspect a factory, warehouse, establishment, vehicle, or aquatic farm to determine if the provisions of the commissioner's respective portions of this chapter are being violated; and (2) secure samples or specimens of a food, aquatic farm product, or cosmetic. (b) The commissioner of environmental conservation shall make or have made examinations of samples secured under this section to determine whether or not a provision

			of the commissioner's respective portions of this chapter is being violated. (c) The commissioner of health and social services has the same powers and duties with respect to drugs and devices as the commissioner of environmental conservation has with respect to food and cosmetics under (a) and (b) of this section.
18. Health, Safety, and Housing	35. Public Accommodations and Facilities	AS 18.35.350.	Enforcement Authority. The commissioner or the commissioner's designee is responsible for enforcing the provisions of AS 18.35.300 - 18.35.365.
46. Water, Air, Energy, and Environmental Conservation	3. Environmental Conservation	AS 46.03.020	Powers of the Department. (6)…at reasonable times, enter and inspect with the consent of the owner or occupier any property or premises to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with a regulation that may be adopted under AS 46.03.020 - 46.03.040
46. Water, Air, Energy, and Environmental Conservation	3. Environmental Conservation	AS 46.03.462.	Terms and Conditions of Discharge Permits. (b) The minimum standard terms and conditions for all discharge permits authorized under this section require that the owner or operator

			(5) shall allow the department access to the vessel at the time samples are taken under AS 46.03.465 for purposes of taking the samples or for purposes of verifying the integrity of the sampling process
46. Water, Air, Energy, and Environmental Conservation	4. Oil and Hazardous Substance Pollution Control	AS 46.04.065	Inspections. (a) In addition to other rights of access or inspection conferred upon the department by law or otherwise, the department may at reasonable times and in a safe manner enter and inspect oil terminal facilities, pipelines, exploration and production facilities, tank vessels, and oil barges in order to (1) ensure compliance with the provisions of this chapter; or (2) participate in an examination of the structural integrity and the operating and mechanical systems of those vessels, barges, pipelines, and facilities by federal and state agencies with jurisdiction. (b) When the department determines that no federal or state agencies with jurisdiction are performing timely and adequate inspections of an oil terminal facility, pipeline, exploration or production facility, tank vessel, or oil barge, it may perform its own inspection of the structural integrity and operating and mechanical systems of a facility, pipeline, tank vessel, or oil barge by using personnel with qualifications in the areas being inspected.

46. Water, Air, Energy, and Environmental Conservation	14. Air Quality Control	AS 46.14.515	Inspection. (a) An officer or employee of the department designated by the commissioner or an inspector authorized by the commissioner and certified under regulations adopted under AS 46.14.140 (a)(14) may, upon presentation of credentials and at reasonable times with the consent of the owner or operator, enter upon or through any premises of a stationary source regulated under this chapter to (1) inspect and copy any records required to be maintained; (2) inspect any emissions unit, monitoring equipment, or method required to be used; or (3) sample any emissions that the owner and operator of the stationary source are required to sample.

II. REGULATIONS

The Alaska Administrative Code (AAC) contains the regulations of all Alaska agencies. The current regulations are available online on the Alaska Legislature's website, and the print version is available at all Alaska Court System law libraries and many public libraries. The official publisher of the AAC is LexisNexis®. Their toll-free number is 1-800-446-3410. The AAC is updated quarterly. The Anchorage Law Library has a complete historical collection of AAC Registers.

Alaska Administrative Code citations are cited by title, chapter, and section. For example: **18 AAC 23.905** (title 18, chapter 23, section 905)

TITLE	CHAPTER	AAC	DESCRIPTION
18. Environmental Conservation	23. Hair and Body Art Schools and Shops.	18 AAC 23.905	Inspections. (a) The department may conduct inspections to determine compliance with this chapter. (b) The owner or operator of a school, shop, or facility subject to this chapter shall allow an employee or agent of the department, after proper identification, to enter and have free access to the school, shop, or facility during reasonable hours to (1) inspect all or any portion of the school, shop, or facility, including each type of shop required to have a certificate of sanitary standards under 18 AAC 23.310; (2) inspect all or any portion of any procedure area or other school, shop, or facility supporting or operating in conjunction with the school, shop, or facility being inspected;

			(3) examine any record required to be kept under this chapter; (4) investigate employees' illness or absenteeism if investigating a possible disease outbreak; and (5) examine equipment, instruments, and products, observe procedures, obtain samples, or conduct tests to ascertain compliance with this chapter.
18. Environmental Conservation	31. Alaska Food Code	18 AAC 31.900	Inspections and audits. (a) The department may conduct inspections or audits to determine compliance with this chapter and will record the findings on an inspection report. (b) The operator of a food establishment shall allow an employee or agent of the department, after proper identification, to enter and have free access to the establishment during reasonable hours to (1) inspect all or any portion of the establishment, including each type of operation required to have a permit under 18 AAC 31.020; (2) inspect all or any portion of any commissary, servicing area, or other facility supporting or operating in

			conjunction with the food establishment, including areas supporting vending machines; (3) examine records relating to the establishment's certified food protection manager, food worker cards, and food and supplies purchased, received, or used; (4) examine standard operating procedures and self-assessments conducted by the establishment, if the establishment is required to implement standard operating procedures or conduct self-assessments under 18 AAC 31.902; (5) investigate any employee illness or absenteeism to determine compliance with 18 AAC 31.300 or as part of a foodborne illness investigation, as specified in 18 AAC 31.907; (6) examine food, observe procedures, obtain samples, or conduct tests to determine compliance with this chapter; and (7) Interview employees to determine knowledge of and compliance with safe food handling procedures and food safety practices specified in this chapter.

18. Environmental Conservation	32. Milk, Milk Products, and Reindeer Slaughtering and Processing.	18 AAC 32.270.	Inspections. (a) The department may conduct inspections or audits with or without prior notice to assess compliance with 18 AAC 32.210 - 18 AAC 32.295. (b) In an inspection or audit to assess compliance with 18 AAC 32.210 - 18 AAC 32.295, the department may include (1) inspecting the cheese production facility; (2) examining labels, plans, and records; (3) investigating employee illness or absenteeism; (4) examining food; (5) observing procedures; (6) obtaining samples; (7) conducting tests; (8) interviewing employees; and (9) taking photographs.
18. Environmental Conservation	32. Milk, Milk Products, and Reindeer Slaughtering and Processing.	18 AAC 32.690.	Inspections. (a) The department will conduct inspections to determine compliance with 18 AAC 32.600 – 18 AAC 32.699 during usual business hours unless the department determines that conducting that inspection at a different time serves the interest of

			public health and consumer protection. (b) The operator of a slaughtering or processing facility shall allow a department employee or the department's agent to inspect all portions of the facility, food products, food ingredients, processing equipment, labels, plans, and records relating to critical control points and sanitation, and all other records needed to determine compliance with 18 AAC 32.600 – 18 AAC 32.699. (c) A person may not obstruct an inspector during an inspection. (d) The operator of a slaughtering or processing facility may accompany the inspector during the inspection. (e) The operator of a slaughtering or processing facility shall allow the department to take photographs.
18. Environmental Conservation	34. Seafood Processing and Inspection.	18 AAC 34.930.	Inspections. (a) The department will, applying its enforcement discretion, conduct inspections to determine compliance with this chapter or federal contract inspections during usual business hours. (b) a processor shall allow a department employee or the department's agent to Inspect all portions of the facility, seafood

			products, food ingredients, processing equipment, labels, plans and records relating to critical control points and sanitation, and all other records needed to determine compliance with this chapter. (c) A person may not obstruct an inspector during an inspection. (d) The processor may accompany the inspector during the inspection. (e) The processor shall allow the taking of photographs. (f) The inspector will leave a copy of the inspection report at the facility. (g) The department will, applying its enforcement discretion, suspend or revoke a permit if access for purposes of inspection described in (b) of this section is denied.
18. Environmental Conservation	50. Air Quality Control	18 AAC 50.345.	Construction, minor and operating permits: standard permit conditions. (h) The permittee shall allow the department or an inspector authorized by the department, upon presentation of credentials and at reasonable times with the consent of the owner or operator to (1) enter upon the premises where a source subject to the permit is located or where records required by the permit are kept; (2) have access to and copy any records required by the permit;

			(3) inspect any stationary source, equipment, practices, or operations regulated by or referenced in the permit; and (4) sample or monitor substances or parameters to assure compliance with the permit or other applicable requirements.
18. Environmental Conservation	53. Fuel Requirements For Motor Vehicles.	18 AAC 53.120.	Inspection and sampling. With consent from a person subject to this chapter, the department or its designee will (1) enter that person's business premises to determine compliance with this chapter; (2) inspect records subject to 18 AAC 53.090, 18 AAC 53.100, and 18 AAC 53.105; and (3) take gasoline samples for testing.
		18 AAC 69.085.	Access to commercial passenger vessels. For purposes of compliance with AS 46.03.462(b)(5), the owner or operator shall allow an agent or employee of the department, who is authorized in writing by the commissioner and upon presentation of credentials, to enter upon the premises where sewage, graywater, or other wastewater is stored, treated, conveyed, discharged, or sampled,

			(1) when samples are being taken and for the purpose of verifying the integrity of the sampling process, to (A) inspect any sewage, graywater, or other wastewater treatment, storage, conveyance, or discharge devices and the sampling ports; or (B) verify the owner's or operator's sampling process or procedures; or (2) to sample sewage, graywater, or other wastewater.
18. Environmental Conservation	72. Wastewater Disposal.	18 AAC 72.435.	Installation notification and inspection. (d) The department will, in its discretion, conduct an inspection of an installation or modification.
18. Environmental Conservation	75. Oil and Hazardous Substances Pollution Control.	18 AAC 75.480.	Inspections. (a) To verify compliance with the provisions of AS 46.04.030, AS 46.04.055, and 18 AAC 75.400 - 18 AAC 75.496, the department may conduct announced and unannounced inspections of a vessel, barge, pipeline, or other operation that is subject to the requirements of AS 46.04.030, AS 46.04.055, and 18 AAC 75.400 - 18 AAC 75.496. If practicable, an inspection under this section will

			be coordinated with other regulatory agencies.
18. Environmental Conservation	83. Alaska Pollutant Discharge Elimination System Program.	18 AAC 83.405.	Conditions applicable to all permits. (j) Inspection and entry. A permittee shall allow the department, or an authorized representative, including a contractor acting as a representative of the department, at reasonable times and on presentation of credentials establishing authority and any other documents required by law, to (1) enter the premises where a permittee's regulated facility or activity is located or conducted, or where permit conditions require records to be kept; (2) have access to and copy any records that permit conditions require the permittee to keep; (3) inspect any facilities, equipment, including monitoring and control equipment, practices, or operations regulated or required under a permit; and (4) sample or monitor any substances or parameters at any location for the purpose of assuring permit compliance or as otherwise authorized by 33 U.S.C. 1251-1387 (Clean Water Act).

18. Environmental Conservation	90. Pesticide Control.	18 AAC 90.700.	Inspection. (a) A department employee or designated agent may enter upon public or private premises at reasonable times and with the owner's or occupier's consent to (1) inspect containers, equipment, and supplies used to store, mix, load, transport, or apply pesticides; (2) inspect, investigate, or take samples in response to a complaint or investigation involving pesticides or their use, sale, distribution, storage and disposal; (3) inspect display, storage, retail, distribution, mixing, loading, or disposal areas; (4) take samples of pesticides; (5) observe the use of a pesticide; (6) inspect records required by this chapter; or (7) gather evidence, including the taking of sworn or unsworn statements, for use in evaluating or conducting proceedings to enforce this chapter. (b) If access is denied to a department employee or agent attempting to conduct an inspection under (a) of this section, or if circumstances warrant access without prior notice, the

			department will, in its discretion, apply to a court for a search warrant under AS 46.03.860 or other law.

Attachment 3-2 Consent to Search

CONSENT TO SEARCH

Case/File Number _____

I, _____having been informed of my
[Name of Individual Granting Consent]
constitutional right not to have a search made of the premises hereinafter mentioned without a inspection warrant and of my right to refuse consent, hereby authorize:

_____
_____
[Name(s) of Inspector(s) or Enforcement Officer(s)]
of the Alaska Department of Environmental Conservation (DEC) and other employees of DEC and /or DEC's agents and contractors to conduct a search of my property located at

_____
_____

_____
_____.

These persons are authorized by me to take from my property any materials or other property which they may desire.

This written permission is being given by me to the above named persons voluntarily and without threats or promises of any kind.

X_____ _____
(Sign) (Date)

Witnesses:

X_____ _____
(Sign) (Date)

X_____ _____
(Sign) (Date)

Attachment 3-3 Model Application for Warrant

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In Re: Application for Warrant to Inspect)
the property located at 123 Main Street,)
Anchorage, located in the Third Judicial)
District)
_____)

No. _____

APPLICATION FOR INSPECTION WARRANT

The State of Alaska, Department of Environmental Conservation, hereby applies to this court pursuant to AS 46.03.860 for a warrant authorizing it to inspect the above-captioned premises in order to inspect the property for threat posed by an alleged fuel oil release, assess cleanup options, and potentially excavate to reach the underground storage tank. This application is supported by the accompanying memorandum and affidavit.

Dated this ___ day of _____ at Anchorage, Alaska.

JOHN E. DOE
ATTORNEY GENERAL

By: _____
Assistant Attorney General
Department of Law
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
(907) 269-0000

Attachment 3-4 Model Affidavit

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In Re: Application for Warrant to Inspect)
the property located at 123 Main Street,)
Anchorage, located in the Third Judicial)
District)
_____)

No. _____

AFFIDAVIT OF _____

STATE OF ALASKA)
) ss
FIRST JUDICIAL DISTRICT)

I, _____, being first duly sworn, state that:

1. I am an environmental program specialist working for the Anchorage office of the State of Alaska, Department of Environmental Conservation (DEC) since June, 2006. One of my duties is to enforce DEC's statutes and regulations relating to contaminated site investigation and remediation.

2. On _____, another employee of DEC's Anchorage office received a telephone call from a citizen who stated they observed an unknown petroleum-like substance leaking into Unnamed Creek, creating a "sheen" on the water, and flowing down the Creek into Cook Inlet. DEC received several additional calls relaying the same description on _____. One or more of the citizens stated that a fuel-like odor was emanating from the unknown substance in Unnamed Creek.

3. Beginning on _____, and continuing until _____, I made several visits to the area where Unnamed Creek flows into Cook Inlet. I observed in several areas of Unnamed Creek and Cook Inlet a sheen on the water and also smelled a fuel-like odor emanating from the substance. From my training and experience. I believe that the substance is a petroleum-based substance.

4. It is a violation of state law under AS 46.03.740 and AS 46.03.745 to discharge, cause to be discharged, or permit the discharge of oil or a hazardous substance to land or water.

5. 18 AAC 75.310 and 18 AAC 75.315 state that cleanup of a spill of a hazardous substance, such as oil, must be performed.

6. AS 46.04.020, AS 46.09.020, 18 AAC 75.320 and 18 AAC 75.325 authorize DEC to begin cleanup activities if DEC finds that the response to a release is inadequate.

7. To determine the source of the release of the petroleum-based substance in Unnamed Creek, I walked upstream along Bear Creek from Gastineau Channel. As I walked I operated a Photo Ionization Detector (PID), which is a device DEC utilizes to detect petroleum gas (petroleum gas can be detected in the air when petroleum is released into the environment). The PID continued to register petroleum gas until I passed the property located at 123 Main Street, Anchorage, AK, which is a property containing real estate on both sides of Unnamed Creek and a residential building that sits on top of Unnamed Creek (the Creek flows underneath the building). The PID did not detect petroleum gas emanating from holes in the ice further upstream Unnamed Creek from the 123 Main Street property. I also did not observe any sheen in the water further upstream Unnamed Creek from the 123 Main Street property.

8. I observed several intake pipes on the 123 Main Street property that, from my training and experience, I know are commonly used to fill underground storage tanks (USTs) with oil. Based on my training, experience, and observations, I believe that the 123 Main Street property contains one or more USTs and that one or more of the USTs are leaking oil into Unnamed Creek.

9. On _____, I spoke to another DEC employee who stated that he had had a previous interaction with the owners of the property at 123 Main Street who he identified as Mr. and Mrs. John Smith. The DEC employee spoke to

Mr. Smith in or around 2005 in connection with a separate DEC investigation, and at that time Mr. Smith stated that he had one or more UST's on the 123 Main Street property.

10. On _____, the DEC employee called an acquaintance of the Smith's named Jane Doe in an attempt to ascertain the whereabouts of the Smith's. Ms. Doe stated that the Smith's were on vacation in Europe but would be back in the United States on or about _____. Ms. Smith stated that she was the caretaker of the 123 Main Street property, and gave DEC permission to enter the property in order to make the observations described above. However, Ms. Doe would not give DEC permission to undertake any cleanup activities on the 123 Main Street property.

11. DEC has contacted Mr. Smith's brother by telephone and he confirmed that the Smith's are on vacation in Europe. Mr. Smith's brother told DEC that he has attempted to contact the Smith's by telephone and e-mail to advise them of the release on their property but they have not responded. Therefore, DEC is unable to obtain voluntary consent to enter the 123 Main Street property in order to contain and cleanup the release.

13. DEC wishes to inspect the 123 Main Street property in order to contain and cleanup the release.

14. DEC wishes to inspect the Property and the underground storage tank to evaluate and, if needed, stem the potential on-going sources of fuel oil currently flowing into the stream and subsequently impacting the marine environment. In addition to visual inspection, DEC hopes to determine the quantity of fuel in the tank, add dye to the tank to conclusively identify the tank as the source of the pollution, be able to drain the tank through an existing fill pipe so that there is no longer a source of fuel contamination. If that is not possible, DEC may need to excavate to the top of the tank to drain the fuel from the tank. If the tank is drained by either method an alternate heating source would need to be established for the residence. Either of these efforts would stop the ongoing contamination. DEC's goal is to reduce or eliminate the ongoing release to the environment. Currently, there is no information available as to how much fuel is left in the tank

and how much additional fuel could continue to release into the environment, including the stream and marine environment.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

_____
Affiant

SUBSCRIBED AND SWORN to before me this____ day of _____.

_____
Notary Public, State of Alaska
my commission expires: _____

Attachment 3-5 Model Inspection Warrant

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In Re: Application for Warrant to Inspect)
the property located at 123 Main Street,)
Anchorage, located in the Third Judicial)
District)
_____)

No. _____

INSPECTION WARRANT

TO: Any Peace Officer or Field Officer or Employee of the State of Alaska, Department of Environmental Conservation

Upon application by the State of Alaska, Department of Environmental Conservation, supported by the Affidavit of _____, and an accompanying Memorandum of Law, and it appearing to the Court that reasonable administrative standards for conducting such inspections and investigations have been established and are satisfied in this case, and the Court being further satisfied that the requisite attenuated probable cause for an administrative inspection warrant exists under the Alaska Supreme Court's holding in Woods & Rohde, Inc. v. State, 565 P. 2d 138 (Alaska 1977), and further that information exists that the environmental laws and regulations of the State have been violated and that those violations present a potential threat to human health, wildlife and the environment;

YOU ARE HEREBY COMMANDED to enter without delay the above captioned premises, 123 Main Street, Anchorage, Alaska, serving a copy of this warrant by posting it on the premises and by mailing a copy to the absent owners

of record; and to investigate the source of contamination, assess source control options and, if necessary, excavate to the top of the underground storage tank and remove any oil from the tank and any contaminated soil in order to stop continuing release of fuel oil into the stream. DEC is authorized to re-enter the Property as necessary to conduct other inspections, investigations and cleanup activities until the release of oil from the Property has been contained.
This warrant shall be executed on or before __ 20__, and shall be returned to the clerk of this court together with an appropriate certificate of service.

Dated this ___day of _____, at Anchorage Alaska.

_____
District Court Judge

Attachment 3-6 Model Warrant Inventory and Return

Warrant _____ SW

Receipt and Inventory of Property Seized

_____
_____
_____
_____

Return

I received the attached search warrant on _____, ____, and executed it at _____ on_____, _____.

I hereby acknowledge receipt of the property above-described which was taken by me from the premises of _____ located at
_____ by authority of a search warrant issued by
_____, District Court Judge/Magistrate at _____, Alaska on_____, ____.

The above inventory was made in the presence of
_____.

I swear that this inventory is a true and detailed account of all property taken by me on the authority of this warrant.

Dated this ____ day of_____, _____, in _____, Alaska.

By

AK Dept of
Environmental Conservation

Signed and sworn before this ____ day of_____, _____,
in _____, Alaska.

By:

Judge/Magistrate

Attachment 3-7 Model Subpoena Custodian of Records Letter

Department Letter Head

[Date]

[*Name and physical address of the subpoena recipient*]
Acme Fuel Service
Attn: Custodian of Records
123 Main Street
Anchorage, AK 99501

Dear Sir or Madam:

Pursuant to Alaska Statute 46.03.020(7), the enclosed subpoena has been issued. The materials identified should be produced by the date and time indicated on the subpoena at:

> **[Name and physical address of where the documents should be produced]**
> *Alaska Department of Environmental Conservation (DEC)*
> *Attn:* ***[Name]***
> ***[555 Cordova Street***
> ***Anchorage, AK 99501]***

Should you elect to personally deliver the subpoenaed records, you will be required to attest to the completeness, accuracy and authenticity of the documents produced. Or, upon request, ***[Name]*** or another employee of the DEC will personally assume custody of the required materials at your office. However, by mutual agreement, the material may be sent by U.S. registered mail to DEC at the above address. If you elect to provide records via registered mail, you should include the enclosed personal affidavit/certificate of compliance as to the completeness, accuracy and authenticity of the documents mailed. Should the documents fail to arrive by the time and date set forth on the subpoena, this will be considered a failure on your part to comply with this subpoena.

Original documents are required by this subpoena. However, for the purpose of this subpoena, certified true copies of the original documents called for by the subpoena will satisfy this provision. The personal affidavit/certificate of compliance must be made by the actual custodian of records who has the complete legal standing for the company/corporation and can testify to their authenticity, accuracy and completeness of the documents produced. If certified true copies are produced, we reserve the right to review the original documents with advanced notice, and during normal business hours. Otherwise, original documents must be submitted.

Materials required by the subpoena should be accompanied by an index identifying each document or other materials and the item or items of the subpoena to which it relates. If for any reason any of the required materials are not furnished, prepare an itemized list of the location of materials and the reason for non-production.

You should bear in mind you have the right to consult with and have an attorney represent you in this matter. If you have any questions concerning the subpoena or the materials required to be produced, you may call **[*Name*]** at [***(907) XXX-XXXX***].

Sincerely,

Enclosures:
Subpoena To Produce Documentary Evidence
Certificate of Compliance

Attachment 3-8 Model Administrative Subpoena

STATE OF ALASKA
DEPARTMENT OF ENVIROMENTAL CONSERVATION

In Re: Investigation of the Acme Fuel Service) **SUBPOENA TO PRODUCE**
located at 123 Main Street, Anchorage)**DOCUMENTARY EVIDENCE**
_____)
No. **[00-000-000-0000 ← *Enforcement Number generated by CATS*]**

To: Acme Fuel Service
123 Main Street
Anchorage, AK 99501

Pursuant to AS 46.03.020(7), the Alaska State Department of Environmental Conservation requests that you produce for inspection and copying the following documents at the office of the Attorney General at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska, on [**date**] at [**time]**.

Any and all documents referring or relating to the Anchorage, Alaska, Acme Fuel Service station. Such documents may include, but not be limited to:

1. maps, diagrams, plans or as-built drawings showing the locations of the garage, the gasoline tanks, the dispensing pumps, and the delivery lines.
2. records relating to the specifications, construction and installation of the gasoline tanks, dispensing pumps and delivery lines, including the depth at which the tanks and delivery lines were installed, the type of materials from which the lines, fittings and tanks were constructed, whether the tanks were new or used, the manufacturer, cost and life expectancy of the tanks, dispensing pumps, fittings and lines;
3. Copies of correspondence and memoranda;
4. records of verbal communications;
5. agreements, including rental agreements, purchase agreements, sales/agreements, franchise agreements, commission/agent agreements, maintenance agreements, distribution agreements, etc;
6. records relating or referring to any petroleum product spills or leaks including documents relating or referring to all investigations, samplings, testing, inspections, reporting or measurements of any gasoline or other petroleum product which may have leaked or spilled, and an estimate of the amount of petroleum product lost;
7. documents referring or relating to financial or other security interest, statutory liens, deeds of trust, or mortgages in the inventory, equipment, fixtures, or real property located at the Anchorage Acme Fuel station;
8. records of all inspections and/or maintenance of the Anchorage Acme Fuel station performed by the owners or operators of the station or by Acme

personnel, agents, or contractors, and records of all repairs to or replacements including the date of the repair or replacements of equipment, the reason for the repair or replacement, and the name(s) of the person(s) who performed the repair or replacement;

9. records of all testing performed at the station, including tests on the underground tanks, the gasoline delivery lines, and the dispensing pumps, the date the tests were performed, the name of the person who performed the tests, and the reason the tests were performed;

10. copies of rules, regulations, policies and standards established by Acme and intended to apply to the conduct of the owners and operators of its franchises;

For the purposes of this subpoena, the term "document" is defined as follows: the original (or when the original is not in your custody or control, a carbon or other identical copy) form of any information that is written, printed, typed, drawn, stored, or otherwise memorialized in any form. "Document" includes information stored on machines, discs, tapes, drums, computer discs and hard drives, CD-ROMs, DVDs, and other electronic, magnetic, or digital devices or media which store *and/or* retrieve information.

Requests for modification of this subpoena may be made in writing to the attention of Assistant Attorney General [**Name**], Alaska Department of Law, 1031 W. 4th Avenue, Suite 200, Anchorage, AK 99501:

If you wish to challenge this subpoena, you may petition the Alaska Superior Court to quash it. If you do not file such a petition and if you fail to respond to this subpoena, the Office of the Attorney General on behalf of the Alaska Department of Environmental Conservation may commence a proceeding in court pursuant to Alaska Rule of Civil Procedure 45 and Alaska Statute 44.62.590 for an order directing you to show cause why you should not be held in contempt of court for failure to comply with this subpoena.

DATED at Anchorage, Alaska, this _____ day_____, _____.

COMMISSIONER LARRY HARTIG

By:

[Name]

[Date]

Division Director/Program Manager

Attachment 3-9 Sample Appendix for Subpoena Definitions

No. **[00-000-000-0000 ← *Enforcement Number generated by CATS*]**

Appendix A

A. Definitions:

1. "Document" or "documents" means any written, recorded, graphic material of any kind, photostats, microfilms, microfiche, tape or disc recordings, computer printouts and other data electronically obtained or otherwise stored from which information can be obtained, either directly, indirectly or by translation, through devices or readers, whether prepared by your or any other person, that is in your possession, custody or control. Any such document is to be produced in a reasonable useable form.

2. The terms "document" and "documents" mean the original document (or copy thereof if the original is not in your possession, custody or control) and all copies that differ in any respect from the original or that bear any notation, marking or information not on the original.

3. (Company *Name)* includes any and all predecessor and successor entities, whether or not incorporated.

B. Documents required:

This subpoena applies to the period of (*inclusive dates*) or (*specific date through the date of the subpoena*) and requires production of any and all documents pertaining to business conducted with (*Company Name*) including, but not limited to:

Attachment 3-10 Subpoena Certificate of Compliance

Subpoena Certificate of Compliance

I, _____, _____,
of
(Name) (Title)

_____
_,
(Company/Institution/Agency)

certify the records I provided (either)
to_____,

or by certified mail accountability number_____, return
receipt

requested, are accurate, complete, and in full compliance with the Department of

Environmental Conservation Subpoena
No._____.
(Unique Identification Number)

The following subpoenaed records are not provided. (If documents are withheld

based on privilege, identify each document, specify its author and addressee, date,

subject matter, all persons or entities to whom copies were furnished, and the
basis
of your claim of privilege.)

_____
_____
_____
_____
_____
(Use attachment if necessary)

In accordance with Alaska Statute 11.56.200(a), I certify under penalty of perjury
the foregoing is true and correct.

_____ _____
(Signature of Respondent) (Date)

Attachment 3-11 Subpoena Affidavit of Service

Subpoena Affidavit of Service

I certify that on the date stated below, I served Subpoena No._____ on

the person or corporation to whom it is addressed, _____,

in_____, Alaska.

_____

_____

Date and Time of Service Signature

Subscribed and sworn to before me this____ day of _____, _____.

_____

Notary Public, State of Alaska

My commission expires: _____

Attachment 3-12 Subpoena Service PS Form 1381

SENDER: *COMPLETE THIS SECTION*

- Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the maillpiece, or on the front if space permits.

1. Article Addressed to:

Acme Fuel Service
Attn: John Doe
123 Maine Street
Anchorage, AK 99501

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐Agent
☐ Addressee

B. Received by *(Printed name)*

C. Date of Delivery

D. Is delivery address different from item 1?
If YES, enter delivery address below:
☐Yes
☐ No

3. Service Type
X Certified Mail ❑ Express Mail
❑ Registered ❑ Return Receipt for Merchandise
❑ Insured Mail ❑ C.O.D.

4. Restricted Delivery? *(Extra Fee)* X Yes

2. Article Number
(Transfer from service label)

PS Form 3811, August 2001 Domestic Return Receipt

UNITED STATES POSTAL SERVICE

First Class Mail

●Sender: Please print your name, address, and ZIP +4 in this box ●

Your Name
Your Program/Division
Alaska Department of
Environmental Conservation
City, AK ZIP+4

EVIDENCE

Chapter 4

A. OVERVIEW

Definition and Types of Evidence

Evidence is the means or process by which any matter of fact that is being investigated (e.g., the existence of a violation) may be established or disproved. It is also any information, or proof, which clarifies or helps establish the truth of the fact or point in issue. The law of evidence embraces those rules which determine which evidence is to be admitted or rejected in a hearing or trial and what weight is to be given to evidence which is admitted. There are five types of evidence:

- **Testimonial** - A person's reported sense impressions and the opinions the person formed based on them (e.g., the inspector's testimony).
- **Real** - The object, item or thing itself (e.g., contaminated dirt).
- **Documentary** - A "document" having significance and effect due to its content (e.g., reports messages, logs, accounting ledgers, computer printouts, manuals, guidance, tape recordings).
- **Demonstrative** - Something other than the above which is prepared or selected to illustrate or otherwise make some relevant fact clearer or easier to understand (e.g., photographs, diagrams, maps, summaries, video tapes, models).
- **Judicially noticed** - Matters about which there could be no dispute and becomes evidence by virtue of their being so noticed by a judge (e.g., scientifically accepted testing devices, geographic locations, matters of common knowledge).

During the course of an inspection, inspectors may make observations, conduct interviews, and obtain statements, review and copy records, take physical samples, take photographs, and write notes in field logbooks. The testimony of the inspector, the samples and photographs, the notes and reports, and the sample tags and chain-of -custody forms, may all become evidence, as described by the first four types of evidence above. It is primarily through the testimony of the inspector that all of the other types of evidence will be properly identified, discussed, and introduced into evidence. Though not necessarily associated with a specific violation, inspectors

also document information relevant to establishing the legality of the inspection itself. Field logbook notes regarding entry procedures, signed items such as required notices, entry warrants, etc., is evidence that the inspector conducted a lawful inspection and had the authority to collect the evidence supporting the alleged violation(s).

Alaska Rules of Evidence

In civil and criminal court, the admissibility of evidence is governed by the Alaska Rules of Evidence (ARE). While they apply only by analogy to administrative actions, the concepts they represent are basic and helpful to the inspector's understanding of the evidentiary hurdles he or she must help surmount in order to get the products of the inspection for administrative purposes.

The most general and principal tests which must be met for the admission of all types of evidence are: (1) authenticity; (2) relevance; and (3) foundation.

- Authenticity or identification means that the evidence must be demonstrated to be what it is claimed to be (e.g., the sample taken during the inspection) (ARE Rule 901).
- Relevance means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (ARE Rule 401).
- Foundation means essentially that preliminary evidence must be presented first in sufficient detail to sustain a finding that the additional evidence is what the proponent says it is (e.g., a witness' testimony clearly showing personal knowledge of the matter being testified to) (ARE Rule 602).

B. DOCUMENTING EVIDENCE

The Alaska Rules of Evidence (ARE) treat all evidence, other than real evidence, as statements, whether they are verbal (e.g., the testimony of the inspector), written (all documents, reports, sample tags, etc.), or nonverbal conduct (gestures). The ARE define "hearsay" as a, “statement, other than one made by the declarant[36] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (ARE Rule 801) In layman's terms, Webster's Dictionary defines hearsay evidence as: "Evidence based not on a witness' personal

[36] The word declarant, when discussing the hearsay rule and its exceptions, refers to the person who makes an out-of-court statement.

knowledge but on matters told to him by another." The Rules then say that all hearsay is not admissible; and by definition make prior statements of a witness or admissions by a party-opponent not hearsay. Were the rules to stop there, virtually everything would be inadmissible. As with many rules, it is the exceptions to the rule which are, in effect, the rule.

The inspector's work product in any given case includes all written documentation (field notes, logbook, sample bags and tags, chain-of-custody forms, receipts, reports), all items taken from the facility inspected (including samples and documents), all recorded items (including photographs, video, and aural recordings), and the inspector's memory of the incident. The following exceptions of the hearsay rule help the inspector tell his or her story through testimony and documented evidence at trial.

The Inspector's Written Documentation

In order to ensure that the documents they create in the course of an inspection are admissible as evidence later, the inspector must create them routinely and contemporaneously with the events being described (ARE Rule 803(5) and 803(6)).

- **Field Logbook.** The inspector's notes in field, preferably contained in a bound logbook, are the core of all inspection activities. The logbook contains entry information (which demonstrates lawful entry) as well as notes on every aspect of the inspection correlated with evidence gathered at the site such as physical samples, interviews, photographs, and copies of documents. While the logbook should be a comprehensive roadmap to all that occurred during the inspection, it need not duplicate all that is already contained on the chain-of-custody form, for example. The entries should be concise but detailed enough to allow the inspector to remember what was meant by the notation shortly thereafter when creating a narrative report, or months later when the matter may come to trial. As with inspection reports, the entries need to be accurate and objective, with no legal conclusions drawn. The inspector should avoid noting his or her personal opinions on matters not relevant to the inspection. (See Chapter 9., Documentation)

- **Inspection Report.** In the broadest terms, the inspection "report" includes all of the documents described above which comprises the inspector’s work product. The "report" as used in the context of this immediate discussion is the narrative summary which expands on the details noted in the logbook and adds the other relevant and important details which the inspector further remembers. The report should be written as soon as possible after an inspection and be as thorough as possible. As with logbooks, all information should be accurate, objective, relevant, and cover all major items. The other documents of the inspection (e.g., photographs, chain-of-custody forms, notices,

receipts) should be referenced. The information should be based on first-hand knowledge, or note specifically who or what is the source of that information. While it is advisable to retain all the notes on which the report is based, it is not fatal to fail to do so except in some criminal cases, and then depending on the nature of the information recorded. Certainly, logbooks should be retained, if only to bolster the inspector's credibility and ability to recall accurately any given point. (See Chapter 12., Reports and Files)

Chain of Custody

The purpose of chain of custody procedures is to be able to trace possession of a physical sample or other physical evidence from the time it was obtained until it is introduced into evidence in legal proceedings. Inspectors must be able to demonstrate that none of the physical samples involved have been tampered with or contaminated during collection, transit, storage, or analysis. As discussed above, DEC must also show that the sample is authentic and relevant. To document chain of custody, an accurate written record must be maintained to trace the possessions of each piece of evidence from the moment of collection to its introduction into evidence.

Elements of Custody. A sample or other evidence is in "custody" if:

- It is in the actual possession, control, and presence of the inspector;
- It is in his or her view;
- It is not in the inspector's presence, but is in a place of storage where only the inspector has access; or
- It is not in the inspector's physical presence, but is in a place of storage and only the inspector and identified others have access.

If the integrity of the sample container sealing tags remain unbroken, it is not necessary to call every individual with "custody" of the sample to demonstrate that it was not tampered with or contaminated (unless, of course, certain methods of preservation, such as refrigeration, are necessary for analysis of the sample). The inspector's custody documents should reflect who was present during the various stages in the chain in order to call as witnesses these other individuals, if necessary.

Documenting Physical Samples for Evidence. In order to create adequate documentation for a chain of custody, the following documents are essential:

- **Field Logbook Entry.** The inspector should note the time, location, and reasons for taking the sample, any identification number assigned; any deviations from standard chain of custody or sampling procedures; observations about the sample that would aid identification.
- **Chain of Custody Record.** The chain of custody record identifies each person who had custody of the sample from the time of the inspection until the enforcement proceeding. It includes bills of lading or other shipping receipts as appropriate. All real evidence, with the exception of samples, will be accounted for using Evidence/Property Custody Document (Form 15) (See Attachment 4-1).
- **Receipt for Samples.** When as a program requirement or custom the facility owner/operator is given a receipt for samples, the inspector's copy of the receipt can aid in sample authentication.

Overview of Chain of Custody Procedures. The basic procedures involved in initiating and maintaining chain of custody are summarized below; more detailed instructions are contained in chapters covering relevant inspection activities.

1. **Establishing Custody.** The inspector establishes sample (or other evidence) custody by sealing it with a seal that will readily show if it has been broken. The inspector writes his initials and the date on the sample seal in waterproof ink.

2. **Preparing Evidence Documentation.** A major aspect of the chain of custody is the preparation and maintenance of written information describing the collection, shipment, and storage of the evidence. Documentation includes the entries in the inspector's field logbook, the seal, the chain of custody record, field sample data forms, shipping records, and any other relevant materials. The inspector prepares the initial documentation in the field and must ensure that the relationship between each physical piece of evidence and the related documentation is clear, complete, and accurate. For example, field logbook entries should include sample identification numbers and information about the collection of each sample so that any specifics can be traced back to the particular sample.

3. **Ensuring Custody during Transit.** At a minimum, the chain of custody record should reflect each person in custody of the sample and where it is stored while in their custody. The logbook should be used to note any relevant additional information such as special care in storage (e.g., refrigeration) or any deviations from the custodian's usual practices in handling samples in transit.

   At any point that anyone in the chain notices the seal is broken or that there is an irregularity with the accompanying documentation, that person should specifically note

the problem on the custody forms and immediately contact those prior custodians to remedy the problem or determine whether the sample needs to be retaken.

Upon arrival at the lab, the custodian should relinquish the samples to the lab technician and obtain their initials or name on the chain of custody form as receiving the samples, just as with anyone else in the chain. If the lab assigns different numbers to each sample, these new corresponding numbers should be noted as well.

4. **Special Considerations for Shipping.** When shipping samples to the laboratory, the following procedures will assure that the chain of custody is maintained:

    - Samples must be accompanied by the chain of custody record. The originator (e.g., the inspector) should keep a copy.
    - If sent by common carrier, obtain a bill of lading.
    - Include all receipts and shipping documents with the chain of custody documentation.

Photographs and Other Demonstrative Evidence

If a case goes to court, the civil or criminal attorney will rely upon the inspector to lay the appropriate foundation for the relevance and admissibility of photographs by indicating the photograph "fairly and accurately" represents the scene on the data in question. In order to ensure that this is possible, the inspector should create entries in the field logbook, including an identifying number for each picture, what is seen, the date and time, the specific location on the premises, and other descriptive information. The photos should be correlated with the entries in field notes contemporaneously. Failure to correlate the photos near in time to their exposure could affect the inspector's ability to lay the proper foundation later.

Inspectors should take precautions to ensure the integrity of the digital image and resulting photographs because they are easy to manipulate. Inspectors should ensure they meet the following minimum requirements when using digital photographs to document inspections.

The integrity of the digital image should be preserved.

- When inspectors use digital photographs as evidence, the person testifying should be able to verify the authenticity of the printed image. This includes knowledge on how the image was acquired, its relevance to the case, and how it corroborates testimony as to issues which may be disputed in the case.

- The quality of the photograph should be good enough to show details, objects, and relevant information.

Inspectors using a digital camera for inspections should be able to capture, store, print, and handle digital images properly.

- Inspectors should have equipment which will allow the secure use and storage of the digital images such as storage media, printer, and computer.
- The inspector should follow the recommended steps for handling digital images listed below.
- The inspector should not delete any digital images while conducting an inspection regardless of whether they are of poor quality.

A record of any copies of the digital images given to a facility should be kept in DEC's inspection file. The record should identify and describe the digital images and can be noted in the field notes, on a Photo-Log, or as a separate list.

Inspectors should create an archival copy[37] of all original images taken during the inspection as soon as practical after image capture. Inspectors should not delete any photographs taken. This archival copy should be labeled and maintained in the inspection file in a secure location. Any enhancements needed on the image should be made only to a working copy[38]. For legal reasons never edit the original images or archival copy. Ideally unalterable storage media such as a read-only Compact Disk (CD-R) should be used to create the archival copy. If this option is not available, other storage media (including alterable) may be used for the archival copy, provided the images can be verified and Chain-of-Custody procedures are followed to prevent tampering. When using an alterable storage media, cyclic redundancy check software can be used to verify the images.

When mailing the archival copy via postal mail, inspectors should place the storage media in a protective jacket, pouch, or equivalent with a custody seal and follow the procedures used for mailing samples to ensure its integrity.

The inspector should keep a Photo-Log in the inspection file of all the photographs taken including the printed images referenced in the inspection report:

[37] An archival copy is an unchanged, unedited copy of the original images that will be used as the permanent record. It is the functional equivalent to the "negatives" in film photography.

[38] The working copy is the "back-up" copy of the original images which may be used to make minor enhancements or edits such as cropping and improving contrast.

- The Photo-log is a record of the archival copy, which includes all the photographs taken during the inspections.

- The record should include: identity of the photographer, date, time, location, [including information identifying the location, latitude, and longitude], and a brief description of the pictures (including anything worthy of special note). This record may be a list of the photos noted as part of the field notes, may be a separate photo list, or a separate Photo-Log.

- For working copies, if images are transferred from one storage media to another or changes are made to an image, DEC should keep a record in the inspection file of the identity of the person making the transfer/change and the date of transfer or change. The record should include the type of change. Minor edits can be made to the working copy such as cropping, reduction, enlargement, or contrast improvement. Each change should be saved as a separate image file and documented so that all enhancements can be reconstructed, if necessary.

The inspection report should contain printed copies of the digital photos referenced in the report. The printed images should be initialed by the inspector and dated when the photo was taken (unless the photo is already imprinted with the date taken).

Other demonstrative evidence collected, for example, maps and diagrams, are admissible at a hearing or trial with the same foundation as photographs: "Does this fairly and accurately reflect what you saw at the facility?"

Statements of Individuals as Evidence

The details of how to document statements are covered in Chapter 8; this section emphasizes the importance of statements as evidence against the regulated entity. Statements carry as much weight and are as persuasive (if not more so) as the samples and documents gathered at the facility. The primary rule regarding statements, ARE Rule 801(d)(2), *Admission by Party-Opponent*, is not an exception to hearsay, but actually defines the following as not hearsay:

The statement is offered against a party and is

- the party's own statement, in either an individual or a representative capacity
- a statement of which the party has manifested an adoption or belief in its truth
- a statement by a person authorized by the party to make a statement concerning the subject

- a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship
- a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy

In short, almost anything said by anyone associated with the facility being inspected is admissible evidence against that individual or the facility in an action by DEC against either. As the details of the rule indicate, it is important for the inspector to gather enough information from or about the person speaking in order to establish the person's relationship with the facility. If the statement made by someone is so against that person's interest, either pecuniary or proprietary, that it tends to expose the speaker to civil or criminal liability, and is such that a reasonable person would not have made such a statement unless they believed it to be true, that statement is admissible against the individual or the facility without more needing to be shown. (ARE Rule 804(b)(3), Statement Against Interest) Even if statements documented by the inspector are not directly admissible as evidence, they are important for locking the speaker into a position on any given subject. Should the declarant later testify at odds with what was said to the inspector, the declarant can be impeached (credibility challenged) by being questioned about what was said to the inspector and then have the inspector take the stand and testify regarding what was said. (ARE Rule 613, Prior Inconsistent Statements) Finally, if oral statements are not used as evidence, they are extremely useful in developing leads and making cases. In sum, ask questions and get as much information as possible from individuals associated with the facility.

Documenting Records from the Inspected Facility

"Records" can include documents, reports, receipts, messages, notes, phone logs, printed manuals, monitoring and inspection logs, accounting ledgers, computer printouts, tape recordings, photographs, etc. All of these, under the rules of evidence, can be "statements" and therefore admissible under the rules just discussed (i.e. ARE Rules 801(d)(2), 804(b)(3), and 613.) If a proper foundation is laid, they may also be admissible under the business record exception (ARE Rule 803(6). Finally, the absence of records that should be present is what may be most important, and that fact is admissible under ARE Rule 803(7).

The subject of records review is more thoroughly discussed in Chapter 7. Suffice it to say here that the inspector may take, copy, seize, take photographs of, or dictate the contents of the facility's records as authorized by the statute(s) under which the inspection is being conducted. If the inspector feels that particularly incriminating records are about to be destroyed, the inspector should seize them and the Department will worry about their admissibility at a later date. To authenticate such evidence, the inspector will need to be able to show, at a minimum,

that the evidence in question was gathered during the particular inspection and demonstrate the records' authorship, location, and distribution.

The ability of the inspector to gather evidence about who authored the document, where copies of it were located within the facility, and to whom it was distributed, cannot be overemphasized. Where questions of personal liability arise in a given case, particularly criminal, being able to show intent and knowledge through the facilities own documents could be essential.

Ideally, the inspector will also be able to demonstrate the integrity of the evidence, that is, that steps were taken to safeguard it between the time of the inspection and the enforcement proceeding.

- **All evidence types.** The logbook should always contain notes describing the exact source of the evidence (e.g., the second file cabinet left of the door, third drawer from the top) and the reason it was collected. Any identifying numbers or marks that the inspector placed on the materials should also be noted so they can be traced back. (See also Chapter 9B. Field Notes)

- **Copies of records.** "Copies" of records include photocopies, close-up photographs of records or computer screens, or "hard copies" of computerized information. They should be dated and initialed by the inspector and assigned an identifying number noted in the field logbook. The facility may be given a receipt for the copies; this can also help authentication. Inspectors can also place documents in an envelope, seal the envelope with an official seal, and prepare a chain of custody form to begin chain of custody procedures. (See also Chapter 7 A. RECORDS INSPECTION)

Attachment 4-1 Evidence/Property Custody Document

STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

EVIDENCE/PROPERTY CUSTODY DOCUMENT	COMPLAINT NO. (1) _____ FILE NO. (2) _____
TITLE OF CASE (3)	CASE OFFICER (4)
RECEIVING OFFICE *(ADEC Office)* (5)	ADDRESS *(Street, City, State, & Zip Code of Receiving Office)* (6)
NAME OF PERSON FROM WHOM RECEIVED (7)	ADDRESS *(Mailing Address of Person From Whom Received)* (8)
LOCATION FROM WHERE OBTAINED (9)	TIME/DATE OBTAINED (10)

ITEM NO.	QUANTITY	DESCRIPTION OF EVIDENCE *(Include model, serial number, condition and unusual marks or scratches)*
		(11)

SPECIAL HANDLING REQUIREMENTS / REMARKS (12)

CHAIN OF CUSTODY

ITEM NO.	DATE	RELEASED BY *(SIGNATURE)* (13)	RECEIVED BY *(SIGNATURE)*	REASON FOR CHANGE OF CUSTODY
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	

FORM 15 - (Rev 1/97)

CHAIN OF CUSTODY CONTINUED

ITEM NO.	DATE	RELEASED BY (SIGNATURE)	13 RECEIVED BY (SIGNATURE)	REASON FOR CHANGE OF CUSTODY
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	
		(Name)	(Name)	

14 **FINAL DISPOSAL ACTION**

RELEASED TO OWNER OR OTHER *(Name/Agency)*

DESTROY OR OTHER *(Specify)*

15 **FINAL DISPOSAL AUTHORITY**

ITEM(S) _____ ON THIS DOCUMENT, PERTAINING TO THE (CIVIL) (CRIMINAL) INVESTIGATION INVOLVING _____ (IS) (ARE) NO LONGER REQUIRED AS EVIDENCE AND MAY BE DISPOSED OF AS INDICATED ABOVE. (If article(s) must be retained, do not sign, but explain in separate correspondence.)

(Typed/Printed)Name of DA, AO or ECU Investigator) (Signature) (Date)

16 ***FOR USE BY EVIDENCE CUSTODIAN***

CONTROL NUMBER _____ **BIN/LOCATION OF EVIDENCE** _____

( ) Held for Evidence ( ) Case Completed ( ) No Case

Evidence/Property Custody Document (Form 15) Instructions. Fill out all applicable blocks on the Form 15 in ink upon seizing or receiving evidence. To make corrections, draw a single line through the incorrect information and initial the corrections.

Item 1. Complaint No. Enter the number from CATS assigned to the investigation.

Item 2. File No. Enter the DEC file number where all documents related to the investigation will be maintained.

Item 3. Title of Case. Enter a descriptive title of the inspection activity or investigation i.e. “ACME Oil Spill”.

Item 4. Case Officer. Enter the name of the Case officer seizing or receiving the evidence.

Item 5. Receiving Office / Address. Enter the name of the DEC Office collecting the evidence.

Item 6. (Receiving Office) Address. Enter the address of the DEC Office collecting the evidence.

Item 7. Name of Person From Whom Received. In instances where evidence is collected from a person, enter the name of the person who released the evidence.

- If the evidence is found at the scene, the word "Scene" is entered in the “Name of Person” block and “N/A” is entered in the “Address” block.

- When receiving evidence from confidential sources/informants (including technical surveillance), write “investigative activity” in “Name of Person” block.

Item 8. Address - Enter the address of the person who released the evidence.

Item 9. Location From Where Obtained - State the specific site where evidence was collected i.e. “ACME Oil Company, 123 Main St., Anchorage, AK”.

Item 10. Time/Date Obtained. Enter the time and date the evidence was seized or received.

Item 11. Item No. Enter the item number if more than one item of evidence is listed on the document. Efforts should be made to list all dissimilar items of evidence on separate documents.

Item 12. Quantity. Enter the number of like items seized. You may list similar items on a single document if you cannot individually identify them and they are not likely to be separated, i.e., pills, cigarettes in pack, blank CDs in a container, etc.

Item 13. Description of Evidence. The primary purpose of describing the evidence is to identify the evidence at a later date. Focus your description on any unique characteristics or markings that distinguish the item from other similar items. Some examples of possible evidence descriptions are:

- Suitcase, black leather, 5" cut across one side panel, extremely worn. Owner could not estimate value. Initialed and dated by John Doe (JJD, 4-29-11) on handle.

- Dell Dimension Laptop, Black -in-color, Serial Number A987B654, used. Owner estimates value at $500. Initialed and dated by John Doe (JJD, 4-29-11) on bottom.

- Drum, approximately 55 gallons in size, bearing brand name ACME on side, blue, red, and white in color, of metal like construction, scuffed, dented, rusted and approximately ½ full of an oily type substance, bearing markings "10 W 30 Motor Oil" on the side. Initialed and dated by John Doe (JJD, 4-29-11), on top of drum.

Item 12. Special Handling Requirements / Remarks. Identify any special handling requirements or provide remarks as needed.

Item 13. Chain of Custody. Complete the "Chain of Custody" when evidence changes custody. For an example, Inspector Smith seizes an item of evidence at a crime scene. Inspector Smith would be the Case officer obtaining the evidence. When Inspector Smith returns to the Office and turns in the evidence to the evidence custodian, a change of custody must be completed. The chain of custody must be annotated correctly or the integrity of the evidence may be questioned.

Item 14. Final Disposition Action

Item 15. Final Disposal Authority

Item 16. For Use by Evidence Custodian

- **Document Control Number.** When evidence is received in the depository, the custodian must assign a sequential Document Control Number from the evidence log. This number consists of two numbers separated by a hyphen. An example is "7-02" which indicates the seventh Evidence/Property Custody Document received in calendar year 2002.

- **Bin/Location of Evidence.** Enter the bin number where the evidence is located inside the evidence room, or in the case were evidence is stored in an evidence storage area outside the evidence room, enter that location. (For example, when items are stored at an alternate secured storage site because they are not suited for the evidence room).

PRE-INSPECTION PLANNING & PREPARATION

Chapter 5

A. OVERVIEW

A good inspection begins with planning. Indeed, more time should generally be spent on planning the inspection than on conducting it. Planning is the thought process by which the inspector identifies all activities relating to the inspection from its objective (purpose) through execution (actual conduct) and follow-through. By knowing "why" the facility is being inspected, "what" should be looked for, how it will be found, and "where" attention should be focused, the inspector will make the most efficient use of field time and ensure that the appropriate information for subsequent compliance or enforcement purposes is collected. By the time the inspector gets to the field, he or she should:

- Have a clear objective of what accomplishments are expected from the inspection so that any contingencies once in the field are readily adapted to.
- Know the applicable program regulations, compliance history, and physical site layout in order to clearly define the scope of activities the inspector will undertake at the facility.
- Know the Standard Operating Procedures (SOPs) for the type of inspection activities to be conducted, and have the right equipment and material for conducting the inspection and collecting, preserving, and documenting samples and other evidence.
- Know the safety plan for protecting all members of the inspection team from potential hazards or harmful exposures on site.

Thorough pre-inspection planning should accomplish the following purposes:

- Ensure that the inspection is properly focused.
- Provide a systematic framework for comparing a facility's practices against applicable Department standards.
- Develop the most efficient and effective approach for inspection efforts given available resources (e.g., manpower, time, etc.).
- Identify the protocols for the inspection (i.e., technical, including quality assurance and safety).

- Determine team task assignments in the field when more than one inspector will be onsite
- Ensure the availability and preparedness of equipment and documents necessary for onsite activities.

Inspector Responsibilities

- **Legal Requirements.** Since inspectors directly represent the Department to members of a regulated community, it is essential that they carefully abide by the legal and regulatory requirements determining program operations. Inspectors should be familiar with and observe all of the regulations associated with their respective inspection protocols. Further, inspectors must know and uphold the specific legal requirements that have been established for inspections, including:
    - Presentation of proper credentials.
    - Presentation of required notices and receipts.
    - Proper handling of confidential business information
- **Evidence Gathering.** Inspectors must be familiar with general evidence gathering techniques. Since the State's case in a civil or criminal prosecution depends on the evidence collected during an inspection, it is imperative that each inspector keep detailed records in a field logbook for each inspection. This data will serve as an aid in preparing the Inspection Report, in determining the appropriate enforcement response, and in giving testimony in an enforcement case. In particular, inspectors must know how to:
    - Substantiate facts with items of evidence, including samples, photographs, document copies, statements from witnesses, and personal observations.
    - Evaluate what evidence is necessary to establish compliance or, in the event of noncompliance, to support enforcement actions.
    - Preserve the chain of custody.
    - Collect and preserve evidence in a manner that will be incontestable in legal proceedings.
    - Write clear, objective, and informative Inspection Reports.
    - Testify in court and administrative hearings.
- **Safety.** The inspection of environmentally regulated facilities always poses a certain degree of risk. To avoid unnecessary health and safety risks, the inspector and his or her first-line supervisor should be familiar with all safety guidance and practices. As a general rule, the Department should employ safety precautions that are used by the facility

personnel at a minimum, but always follow Department safety requirements if they are more stringent. In addition, inspectors should:

- Use safety equipment in accordance with guidance received and labeling instructions.
- Maintain safety equipment in good condition and proper working order.
- Dress appropriately for the particular activity, and wear appropriate protective clothing.
- Use any safety equipment customary in the establishment being inspected (e.g., hard hat or safety glasses).

- **Quality Assurance.** The inspector must understand the basic elements of the applicable divisions or programs quality assurance policy and must assume primary responsibility for ensuring the quality of compliance inspection data. While other organizational units play an important role in quality assurance, it is the inspector who must ensure that all data introduced into an inspection file are complete, accurate, and representative of existing conditions. To help the inspector meet these responsibilities, programs should establish quality assurance plans that identify individual responsibilities and document detailed procedures. The objective of a quality assurance plan is to establish standards that will guarantee inspection data meet the requirements of all users. Many elements of quality assurance plans are incorporated directly into the basic inspection procedures and may not be specifically identified as quality assurance techniques.

The inspector must be aware that following established inspection procedures is critical to the inspection program. These procedures have been developed to reflect the following quality assurance elements:

- Valid data collection
- Use of approved standard methods
- Control of service, equipment, and supplies
- Quality analytical techniques
- Standard data handling and reporting

B. DEFINING INSPECTION SCOPE AND OBJECTIVES

An initial step in developing an effective plan for an inspection is to identify the purpose and objectives (including data quality objectives) of the effort. Inspectors need to know "why" they are performing an inspection in order to properly focus their on-site activities.

Knowledgeable Department personnel should be able to inform the inspector as to the reason for inspection: routine, "for cause," case development support, or follow-up. Knowing the reason for inspection will permit the inspector to properly define its scope. Specific inspection objectives can be determined through discussion with program managers. If the purpose of the inspection is to collect evidence for an enforcement case, consultation with the ECU or the Attorney General's Office is essential.

Once the inspection objectives have been identified the inspector can identify a "working" understanding of the boundaries/limits of inspection activities. The statement of the scope can be further refined and included as part of the written Inspection Plan, but it is useful to have a "working" definition of the inspection scope for undertaking a focused review of facility records/files.

C. REVIEWING DEPARTMENT RECORDS

A focused review of records in the files relating to a facility is essential to pre-inspection preparation and to the overall success of compliance inspection efforts. Such a review will save time and minimize inconvenience during an inspection by not requiring examination of information that has previously been made available. The review will also acquaint the inspector with the requirements that apply to the site, as well as important background information, such as facility operations and compliance history. Information relevant to the upcoming inspection can be abstracted from these files and may be documented in the written Inspection Plan. While this chapter will concentrate on written material available in the files, the review process should also include interviewing Department personnel who are familiar with the facility to be inspected.

In general, review of records will enable inspectors to:

- Become familiar with the facility type, size, and operations.
- Discover inadequacies, inconsistencies, or voids in the information, thus determining the need to request additional information from the facility.
- Minimize inconvenience to the facility personnel or unnecessary use of on-site time by not requesting information already provided to the Department.
- Clarify technical and legal issues before entry.
- Develop an appropriate Inspection Plan that documents this information and applies it to shaping a methodological design for the most efficient use of inspection time and manpower resources.

Review Considerations: What to Review and Why

The following documents and types of information can be found in DEC files and may be useful in planning time and resource allocation, selecting appropriate field techniques, and preparing documents and equipment.

- **General Facility Information**. General facility information may include:
    - Maps showing facility location, geographic features, and relationship to surrounding areas.
    - Aerial photographs.
    - Names, titles, and phone numbers of responsible officials or facility representatives.
    - Any special entry requirements.
    - Past, present, and future process operations and production levels.
    - Safety equipment requirements.
    - Control and other relevant equipment.
    - Descriptions of the facility's recordkeeping and filing systems.

This type of information is relevant for addressing several issues, for example:

- The facility location has a bearing on time scheduling and transportation arrangements/costs for the inspection.
- Geographical features may help determine physical sampling plans.
- Personnel and associated responsibilities can be used to determine who to interview with respect to certain issues; e.g., who is responsible for training employees or for self-monitoring data/reports?
- Entry requirements or prior history of refusal to allow entry need to be handled before going on-site; e.g., do you need to get a warrant?
- Other information shapes the inspection, such as what safety equipment DEC inspectors must use on-site or what kinds of equipment and recordkeeping systems are in use that might be inspected.

- **Permits.** Permit Applications and Special Exemptions from Requirements. Permits provide information on the limitations, requirements, and restrictions applicable to discharges, emissions, and operations; compliance schedules; and monitoring, analytical, and reporting requirements. Applications provide technical information on facility size, layout, and location of pollutant sources; treatment and control practices; contingency plans and emergency procedures; and pollutant characterization types, amounts, and points/locations of discharge or emission. Special exemptions from requirements may

have been granted by the Department; in granting the exemption, the Department may have placed additional requirements on the facility. Be certain that the permit is the most current one for the facility.

This information is critical to orienting the inspector to what to look for on-site, given the priorities established within the scope of the inspection; for identifying the major requirement against which the inspector should review the facility's operations; and for planning the most effective use of time and manpower resources.

- **Prior Inspection Records and Reports on Enforcement Proceedings.** The following types of information may be available:
    - Compliance history, including reports, follow-up studies, findings, and remedial action.
    - Past conditions of noncompliance.
    - Previous enforcement actions.
    - Pending enforcement actions, compliance schedules, and/or variances.

Special note should be made of pending enforcement actions, compliance schedules, and any violations observed in previous inspections so the facility can be checked for current compliance in those areas where a history of noncompliance has been documented.

- **Self-Monitoring and Other Reports Prepared by the Facility.** Inspectors should review these documents and note any discrepancies with inspection records and reports, permits, or other information. If information is not clearly presented or if any discrepancies exist, the inspector may decide to request additional information from the facility or may pay particular attention to such items during the upcoming inspection as a means of clarifying the information.

- **Correspondence.** Correspondence between the facility and DEC may contain particularly important information for inspectors. Sometimes, an agency's response to correspondence from the facility can affect the requirements that are applicable to the facility, permit notwithstanding; the inspector needs to know about this before conducting an inspection.

Aside from the documents referred to above, which are specific to a given facility and are likely to be found in Regional files, other items of a more generalized nature may be of assistance to the inspector. Included in this category are:

- **Laws and Regulations.** The various underlying environmental statutes and related regulations establish standards, procedures, controls, and other requirements that may

be applicable. Inspectors may use this information to familiarize themselves with the applicable rules. It is useful for inspectors to take copies of the laws and regulations to the inspection site to show and/or distribute to facility officials if requested.

- **Technical Reports.** Documents and References. This includes a range of books, journals, and other publications that provide generic information on industrial process operations, as well as specific data on advantages, disadvantages, and limitations of application associated with available treatment/control techniques. An inspector's knowledge of the process(es) and the associated control equipment at a facility significantly contributes to the success of an inspection, particularly in the area of diagnosis of control problems. It is therefore important to use technical resources to acquire knowledge of specific processes, operations, and maintenance of all types of control equipment, and inspection procedures for various types of control equipment and industrial processes.

- **Commercial Data Systems.** If there are no or limited Department files on the facility to be inspected, the inspector may consult Dun & Bradstreet or other commercial data systems to learn such information as type of business and size.

D. NOTIFICATION OF THE FACILITY

The Department is not required by law to provide advance notice of inspection. However, program policies vary with respect to providing a facility with advance notification of an on-site inspection. Depending on the type of inspection and program policy, a facility may be notified in writing or by telephone that an inspection is imminent. The potential advantages and disadvantages associated with both unannounced and announced inspections are presented below.

Unannounced Inspections

The potential advantages of the unannounced inspection include:

- The opportunity to observe the source under its normal operating conditions, since the source does not have time to prepare for the inspection.
- Given unannounced inspections, the regulated community is never sure when, or if, their facility will be inspected. To the extent that the perceived risk of detection of violations serves as a deterrent to noncompliance, the specter of unannounced inspections may induce a source to monitor its compliance status to minimize its exposure to detection of noncompliance and ensuing enforcement actions.

- Unannounced inspections may be interpreted by the regulated community as a stronger surveillance and enforcement posture than announced inspections since they take place without advance warning.

The potential negative aspects of performing unannounced inspections are:

- The source may not be operating or key personnel may not be available.
- There could be an adverse impact on Department/facility relations.

Announced Inspections

Announced inspections are performed by the Department when some specific purpose is served by providing such notice. Situations where announced inspections may be appropriate are:

- When specific information is sought that must be prepared by the facility, or where the facility must make significant accommodations for the inspector to gather the information.
- To ensure the availability of specified facility personnel when their assistance is necessary for the successful performance of the inspections, i.e., the information they provide cannot be obtained from other on-duty plant personnel or by a follow-up information request.
- When inspecting government facilities or sources operating under government contract where entry is restricted due to classified operations.
- When inspecting unmanned or extremely remote facilities.

In general, notification is not recommended when a facility is suspected of improper recordkeeping or illegal discharges and/or emissions; the concern that advance notification might contribute to destruction of records or to actions that alter physical conditions prior to inspection justifies an unannounced inspection. In such circumstances, and depending upon the requirements of the underlying statute, written or verbal notification can be presented at the time of the unannounced inspection.

E. PREPARATION OF THE INSPECTION PLAN

The development of a sound inspection plan prior to going on-site is as important to the total compliance monitoring and enforcement process as the generation of a high-quality, well documented inspection report. While plans should be flexible enough to adapt to unanticipated situations encountered at the site, the inspection plan should be designed as an organized

approach to guide-the conduct of the inspection. Its basic purpose is to provide the inspector or inspection team with a step-by-step guide to collecting relevant evidence about a facility's procedures and practices that have been included in the scope of the inspection.

The inspection plan serves several purposes:

- States the reason for inspection: a brief history of why the inspection is taking place and the inspection objectives (i.e., what is to be accomplished).
- Records the scope of the inspection: identifies the functional areas, assessment topics, and level of inspection.
- Specifies inspection procedures and associated rationales: which field and analytic techniques will be used to collect what information; what recordkeeping systems will be reviewed; which personnel will be interviewed; which samples will be collected; and for each step, why.
- Defines task assignments and time scheduling, based upon overall inspection objectives and methodology.
- Details resource requirements (costs) based upon planned activities and time allocations.
- Provides clear guidance for what kinds of evidence should be collected and documented in field logbooks.
- Includes a Quality Assurance Project Plan, where required.
- Identifies a safety contingency plan, where required.

The investment of time required to produce a quality inspection plan is worth the effort because it constitutes a "walk-through" that should save time and resources during the actual inspection. The inspector must assess precisely what questions are appropriate to address in a short planning document. However, general guidelines for developing the inspection plan are included here.

The Elements of a Written Inspection Plan. While the length and complexity of the plan will vary, the inspection plan should include at a minimum:

- **Objectives/background history of the inspection.** This introductory section should entail a brief history and statement of the reason for this particular inspection (e.g., routine, "for cause," case development, or follow-up). It should also stipulate what the investigation is to accomplish and how the information obtained will be used, as noted earlier.

- **Scope and assessment topics.** The inspection plan should explicitly state the scope and assessment topics. Each of the assessment topics should be framed as questions to establish the actual task that will be performed during the inspection.

- **Inspection Activities and Field Techniques.** Once the inspection tasks (derived from the assessment topics) have been established, determination must be made as to which evidence collection technique (i.e., observation, records review, interview, samples) is most appropriate for each task, as follows:

    - Observation: List what activities, operations, and/or equipment will be observed (e.g., control and treatment units for spills, leakages, out-of-service conditions and causes).
    - Records: List the records that will be reviewed for compliance, along with the information content and retention requirements of each type of record.
    - Interviews: List the positions of key personnel with whom meetings should be held to address specific assessment topics (e.g., meet with the individual responsible for training employees in emergency procedures).
    - Samples: Develop a sampling plan according to program policy and guidance.

- **Sampling Plan.** Sampling inspections also require detailed advance quality assurance and logistical planning. Preparation must include calibration of any instrument to be used in the field.

- **Other Logistical Considerations.**

    - Safety requirements
    - Setting priorities – how to critically review the contemplated on-site activities and tailor them to match staffing, time, costs, etc.
    - Logistical planning, resources needed, and contingency plans for entry (e.g., legal considerations), opening and closing conferences, and applicable informational/training/technology transfer materials.

Attachment 5-1 contains a generic inspection planning checklist the inspector can use to help generate ideas for their next inspection.

Attachment 5-1 Generic Inspection Planning Checklist

GENERIC INSPECTION PLANNING CHECK LIST

- **OBJECTIVES**
  - What is the purpose of the inspection?
- **TASKS**
  - What records, files, permits, and regulations will be checked?
  - What coordination with laboratories, other programs, attorneys, and state or local governments is necessary?
  - What information must be collected?
- **PROCEDURES**
  - What specific processes of the facility will be inspected?
  - What procedures will be used?
  - Will the inspection require special procedures?
  - Has a QA/QC plan been developed, and is it understood?
  - Has a safety plan been developed, and is it understood?
  - What are the responsibilities of each member of the inspection team?
- **RESOURCES**
  - What personnel will be required?
  - What equipment will be required?
- **SCHEDULE**
  - What will be the time requirements?
  - What will be the order of inspection activities?
  - What will be the milestones (What must be done, compared with what is optional?)

GAINING ENTRY AND OPENING CONFERENCE

Chapter 6

A. GAINING ENTRY

The Department's authority to conduct inspections is discussed in detail in Chapter 3, as are DEC's policy and procedures for consensual entry and for seeking and inspecting with a warrant. It is essential to follow these procedures and to document that they were followed to assure that any information collected during the inspection cannot be challenged as being unlawfully obtained.

Key points associated with beginning entry to a facility for inspection purposes are summarized below; see Chapter 3B for a complete discussion of each.

- DEC's policy is to enter with the consent of facility officials.
- Arrival should be during normal working hours and through the main entry point unless special circumstances dictate otherwise.
- Credentials must be presented whether identification is requested or not.
- DEC's inspection authority is broad. It includes authority to take samples, take photographs, photocopy documents, or otherwise manually or electronically record any information at the facility.
- If facility officials deny consent, seek to limit the scope of the inspection, or otherwise attempt to place conditions on the inspector's conduct of the inspection, the inspector should leave the premises immediately. The inspector should contact the appropriate DEC official (usually, the inspector's supervisor, who consults with civil attorneys) and await direction on next steps to take, such as seeking a warrant.
- When inspecting with a warrant, the inspector must follow carefully the terms and conditions of the warrant.

B. OPENING CONFERENCE

Once credentials and notices (if required) have been presented, the inspector can proceed to hold the opening conference with facility officials. During this meeting, the inspector presents an

overview of the inspection plan and queries facility officials to gain a fuller understanding of the facility's organization, to obtain current information regarding facility operations and processes, and to clarify any key issues or ambiguities identified during the process of planning the inspection. This section addresses the inspector's role in conducting the opening conference, together with relevant meeting agenda items. This section concludes with a discussion of mid-course adjustments that may be needed in response to information divulged during the opening conference.

The Inspector's Role During the Opening Conference

The opening conference establishes a forum for the exchange of information between DEC inspection personnel (and by extension, the Department) and facility officials. This information exchange should focus on, but not be limited to, the inspection itself. The inspector should be aware of several principles that can increase the effectiveness of the opening meeting:

- Gain an early rapport.
- Start the meeting on a positive and professional note.
- Prepare and use any supporting information that will enhance the discussion
- Acknowledge that the inspection may disrupt daily facility routines, but assert that reasonable efforts will be made to minimize such disruptions.
- Listen carefully and be willing to answer facility officials' questions. But, do not permit yourself to be maneuvered into bending DEC policies/procedures or overstepping your authority in an attempt to accommodate facility representatives. For example, do not give opinions that are "shot from the hip" about whether facility practices, as described during the discussion, are acceptable and will be found in compliance.

A cooperative working relationship developed during this opening meeting can set the tone for the remainder of the inspection. It also can be used as the foundation for strengthening Department- industry relationships. If approached properly, the opening conference provides an ideal opportunity for the inspector to function as a public relations liaison and educator.

From the perspective of both the Department and the regulated community, the inspector is well positioned to serve as a source of regulatory information. As such, the inspector should provide tactful help before, during, and after the inspection. Document what information you may provide.

Meeting Agenda Items

The opening conference should be used to inform facility representatives of the general purpose and scope of the inspection and the requisite logistical arrangements. At the same time, the inspector should use the meeting to refine an understanding of the facility's operations and practices so that an assessment can be made of the necessity to make mid-course adjustments to the Inspection Plan.

Statement of Purpose. An outline of inspection objectives will inform facility officials of the purpose and scope of the inspection, and may help avoid misunderstandings. The inspector should explain the anticipated post-entry inspection activities in general terms. This discussion should avoid providing the facility representatives with the precise focus of the inspection. There are two reasons to emphasize the general purposes, while avoiding the specific focus of activities:

1. Providing facility representatives with the specifics may create a situation whereby they use that knowledge as essentially advance notification, and contrive some appearance of compliance (or hide violations) in those areas they now know will be subject to scrutiny.

2. The use of a general description of purposes minimizes the likelihood that facility officials, once having consented to the inspection as generally described, will withdraw consent based upon their perception that the inspection includes more than they understood and agreed to (or at least, did not refuse). Conversely, the use of specifically focused statements of purpose may circumscribe the nature of a facility's consent. That is, facility representatives may incorrectly perceive that they are agreeing only to those items mentioned and, by extension, not to any others. Such perceptions could contribute to misunderstandings later on.

Understanding Facility Operations and Practices. The opening conference permits inspection personnel to query facility representatives about current operations and practices, as well as organizational accountability and personnel, that may not have been included (or requires clarification) in Department records. The key areas to address are (as adapted from the "Environmental Auditing Skills and Techniques Workbook," Arthur D. Little, Inc. for the Edison Electric Institute):

- **The nature of the operations.** The inspector should establish what activities take place from an operational standpoint; what materials are used; and what the environmental implications are.

- **The major facility environmental programs.** The inspector should query what programs are in place at the facility, such as effluent sampling, analysis and reporting, training, inspection and maintenance of pollution control equipment, emergency response, etc.

- **The applicability of environmental regulations.** Verify that facility operations and programs have not changed in such a way as to alter the regulations or requirements that apply to the site. For instance, the inspector may learn that a facility has recently obtained a new permit to store wastes on-site or that it no longer has PCBs on-site. Such information will permit the inspector to review and revise the Inspection Plan, if necessary, by shifting the emphasis of planned activities, deleting inappropriate activities, and/or adding new activities that were not initially considered relevant.

- **Key responsibilities, authorities, and accountabilities.** The inspector should establish who is responsible for: specific environmental activities, communicating the chain-of – command in case of emergencies, developing environmental performance measures, etc. In addition, it is important to clarify what authorities have been specifically delegated, and how accountabilities are established and maintained. A telephone directory or a chart showing how the facility is organized can be requested. The above information will assist the inspector in determining which individuals are knowledgeable about specific areas and who should be interviewed.

Logistical Arrangements. Logistical requirements and arrangements should be addressed in the opening conference to minimize delays and avoid misunderstandings. Relevant considerations include:

- **Accompaniment.** It may be beneficial to encourage a facility official to accompany the inspector during the inspection (or selected parts of it) to describe the facility and its principal operating characteristics and, where appropriate, to indicate which information relating to secret processes or methods of manufacture could be claimed as confidential in accordance with AS 46.03.020(6).

- **Safety requirements.** The inspector should determine what facility safety regulations will be involved in the inspection, and should be prepared to meet these. DEC typically has its representatives use the same safety equipment that is actually used by employees.

- **Order of inspection.** A discussion of the order in which operations will be inspected will help eliminate wasted time by allowing officials time to make records available and start up intermittent operations.

- **List of records.** A list of records to be inspected will permit officials to gather and make them available for the inspector. If, however, the inspector has any reason to believe that such "advance warning" will tempt facility representatives to "sanitize," withhold portions, or destroy records, such a list should be prepared for inspector use only, but not for submission to facility officials.

- **Meeting schedule.** Based upon the planned inspection activities and the inspector's understanding of facility personnel responsible for key assessment topic areas, a schedule of meeting times can be developed. This will permit key personnel to clear time to meet with the inspector.

Mid-Course Adjustments to Inspection Plan

After the opening conference, the inspector should have sufficient information to decide whether any fundamental changes to the inspection plan, which was developed prior to arriving on-site, are necessary. If the opening conference did not uncover any information that requires adjustment of anticipated activities, then the inspector should proceed as planned. However, if the opening meeting provided information that is critical to meeting inspection objectives, but was not originally anticipated, then on-site activities should be adjusted accordingly.

RECORDS REVIEW

Chapter 7

A. RECORDS INSPECTION

While conducting effective records inspections is an important investigative skill for inspectors, it is an art that is developed largely through experience and practice. This is due to the variety and complexity of records requirements, types of recordkeeping systems, and ways in which records can be used to identify and document compliance problems.

As for all other aspects of an inspection, inspectors must be familiar with the records requirements and related inspection procedures of the particular program for which the inspection is being conducted. This section discusses the considerations involved in conducting records inspections under any program and the procedures for documenting for evidence purposes the information collected and/or copies of records obtained during the inspection.

Legal Aspects of Records Inspection

Authority. Environmental statute contains language concerning inspection of records. Inspectors must know the specific provisions of the statute under which the inspection is to be conducted. However, absence of statutory authority to remove records can be overcome when the inspection is conducted pursuant to a warrant that specifically authorizes the removal. The procedures in this section pertain to inspections where only copying is provided by a statute.

Records as Evidence. Records can include tapes, phone messages, printed manuals, business records, photographs, etc. It is important to the admissibility of records as evidence that the inspector document enough information to demonstrate the records' authorship, location, and distribution. The Alaska Rules of Evidence (ARE) define the basis for introducing records as evidence. Records are "statements" of the defendants and admissible under ARE Rule 801(d)(2). They also are admissible as business records under ARE Rule 803(6). Finally, the absence of records is important, and that fact is admissible under ARE Rule 803(7).

Objectives

The basic purpose for inspecting facility records is to determine compliance with environmental requirements.

The primary objectives of records inspection are:

- To determine whether records required by statute or regulation are being adequately maintained.
- To use facility records as a means of substantiating compliance (or noncompliance) with other requirements.

Types of Records

The inspector may need to examine the following types of records:

- Annual Reports
- Production Records
- Shipping Records
- Inventory Records
- Sales Records (Invoices, Receiving Records, Etc.)
- Best Management Practices Plan
- Process Records
- Procedures And Guidance Documents
- Quality Control Records
- Disposal Records
- Labels and Literature
- Permits -- State, Local, and Federal
- Correspondence
- Exemptions
- Training Records
- Personnel Records
- Self-Monitoring Records
- Operation and Maintenance Records
- Quality Assurance Plan

Information Retrieval Systems. Inspectors will encounter many electronic and visual systems for storing information needed for an inspection. Computers, microfilm, microfiche, and other

systems will not pose retrieval problems if the inspector has carefully established inspection objectives and knows the type of information he or she needs to obtain.

Review Considerations

When reviewing records, inspectors should enter into the field logbook the kinds of records examined, and the reasons for examining them. Particular attention should be paid to the quality of information being reviewed. When reviewing records, the following questions should be kept in mind:

- Is the information complete?
- What are alternative sources for the same information?
- Has the facility made an honest attempt to meet recordkeeping requirements?

In addition, inspectors should look at records in terms of the following general considerations:

- Compare current reports with field data or past reports for possible discrepancies or too much consistency which may suggest false reports.
- Check for completeness, accuracy, and quality of required records and reports.
- Ascertain compliance with record retention requirements.
- Compare information contained in the records with first-hand observations.

Guidelines for inspecting records under each program are covered in program-specific materials.

Targeting and Locating Records

The specific inspection objectives will help determine exactly what records and/or information the inspector will need to examine. In this process, the inspector should:

- List the kinds of records needed for compliance, and their retention requirements. (Refer to the program-specific procedures and to the related regulations and permit requirements for guidance.)
- Become familiar with the company's recordkeeping system. (A field note entry about the system may help with future inspections.)
- Establish priorities for the material to be reviewed.
- Request that records personnel point out pertinent files and sources.
- Check back-up systems and cross-filing systems which may make retrieval more efficient.

There is often more than one route to the information needed for an inspection. Different firms may organize data in different ways. Inspectors should be aware of alternative approaches to data retrieval. For example, a firm may consider disposal records to be a subcategory of its shipping or transportation file system.

Distribution of Records

As discussed in Chapter 4 Evidence, it is important for the inspector to gather as many facts which evidence the distribution of a record in a company, i.e., who saw it and when. These facts could include concurrences, location of copies of the document in more than one location, or other documents that make reference to the document in question. These facts can be essential when attempting to establish the knowledge or intent of any individuals, either personally or on behalf of the company, in cases where these elements are relevant.

Copying Records

Records and files may be stored in a variety of information retrieval systems, including written or printed materials, computer or electronic systems, or visual systems such as microfilm and microfiche. When copies of records are necessary for an inspection report, storage and retrieval methods must be taken into consideration:

- Written or printed records can generally be photocopied on-site. At a minimum, all copies made for or by the inspector should be initialed and dated for identification purposes. (See Identification details below.) When photocopying is impossible or impracticable, close-up photographs may be taken to provide suitable copies.

- Computer or electronic records may require the generation of "hard" copies for inspection purposes. Arrangements should be made during the opening conference, if possible, for these copies. Photographs of computer screens may possibly provide adequate copies of records if other means are impossible.

- Visual systems (microfilm, microfiche) usually have photocopying capacity built into the viewing machine which can be used to generate copies. Photographs of the viewing screen may provide adequate copies if "hard" copies cannot be generated.

Identification Procedures

Immediate and adequate identification of records reviewed is essential to ensure the ability to identify records throughout the Department custody process and to ensure their admissibility in court. When inspectors are called to testify in court, it is imperative they be able to positively identify each particular document and state its source and the reason for its collection.

Initial, date, number, and write in the facility's name on each record, and log these items in the field logbook.

- Initialing/Dating. Each inspector or program should develop a unique system for initialing (or coding) and dating records and copies of records so that he can easily verify their validity. This can be done by initialing each document in a similar position, or by another method, at the time of collection. Only the copy should be initialed, not the original document. All record identification notations should be made on the back of the document. The inspector must be able to positively identify that he so marked the document.

- Numbering. Each document or set of documents substantiating a suspected violation or violations should be assigned an identifying number unique to that document. The number should be recorded on each document and in the field logbook.

- Logging. Documents obtained during the inspection should be entered in the field logbook by a logging or coding system. The system should include the identifying number, date, and other relevant information:

    - The source of the record (i.e., type of file, individual who supplied record).
    - The physical location of the record (i.e., address of the facility, building number, room number).
    - The manner of collection (i.e., photocopy, other arrangements).

General Considerations for Handling Records

- Return originals to the proper personnel or to their correct location.
- Keep related records grouped together.
- Confidential business records should be handled according to the special confidential provisions discussed below.
- All records need to be secured when not in actual use by the inspector.

Confidentiality Considerations and Procedures

During the examination of records, inspectors may view or copy documents that are considered confidential by the company. It is recommended that such documents be avoided unless they are essential to the completion of the inspection.

Preliminary Indications of Confidentiality. Under ideal circumstances, a facility official will accompany the inspector and make preliminary indications of the business information considered confidential. Such information should be entered into field logbooks; a non-confidential reference should be made to the information, and the information should be placed either in a separate field logbook or on separate sheets, which are then to be considered the confidential documents. When the facility official is unwilling or unable to make such preliminary indications, the inspector must exercise judgment in deciding which information should not be entered into the regular field logbook.

Manual Copying of Records. Only that information essential to the inspection should be copied manually from facility records. If it is known or suspected that a business confidentiality claim might be made, either place the data in a separate field logbook marked "confidential claim" or on a separate sheet of paper which then becomes a document.

Photocopying Documents. If only some information is needed from facility records to be photocopied, it is suggested that potentially confidential portions not necessary to the inspection be shielded. To ensure that such shielded copies will be admissible as evidence if needed, the inspector should obtain the signature of the facility official on the back of the photocopy under a statement which reads:

> *"I hereby acknowledge that this is a photocopy of a page from our (kind of record). A portion of the page was shielded and not photocopied at the company's request."*
>
> *Facility Official Signature*
> *Date*

For long documents, one statement listing the relevant pages may be substituted.

Identification of Confidential Documents. Each page of each document copied either manually or by photocopy should be stamped "Claimed Confidential Business Information" or "Claimed Trade Secret" as soon as confidentiality is claimed. The documents should then be segregated and maintained separately under a claim of confidentiality.

Environmental Statutes Concerning Confidentiality

Environmental Conservation

Information relating to secret processes or methods of manufacture discovered during [an inspection or similar] investigation is confidential in accordance with AS 46.03.020(6).

The Alaska Uniform Trade Secrets Act (AS 45.50.910- .945) similarly protects "trade secrets" from disclosure to third-parties outside the department. "Trade Secrets" under the Uniform Trade Secrets Act is defined as information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain an economic advantage from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. These provisions provide that while DEC may inspect and obtain information that constitutes a trade secret, "proprietary" or confidential business information for a legitimate regulatory purpose, its confidentiality must be maintained by the department.

Other program specific confidentiality provisions include statutes and regulations involving pesticides, financial records under the UST program, hazardous waste (AS 46.03.311), Alaska food code (18 AAC 31.015), milk, milk products and reindeer slaughtering and processing (18 AAC 32.925), seafood processing (18 AAC 34.025), chemical or biological agents used to respond to oil spills, and air quality control. Some of these provisions are discussed below. You should look at the specific provisions applicable to program involved.

Permits, permit applications, records, reports, and information and documentation obtained under AS 46.03.302 – 308 (pesticides) are available to the public for inspection and copying. However, upon a showing satisfactory to the Commissioner that a record, report, permit, application, or information would, if made public, divulge methods or processes entitled to protection as trade secrets, the Commissioner shall treat the record, report, permit, application, or information as confidential in accordance with AS 46.03.311(a).

Financial records submitted to the Department or the board by the owner or operator of an underground petroleum storage tank system are confidential and not subject to inspection or copying under AS 09.25.110 - 125. The Department, in consultation with the affected owner or operator, shall determine which information is confidential in accordance with AS 46.03.440(a).

Oil and Hazardous Substance Pollution Control

The Department may maintain the confidentiality of a manufacturer's proprietary technical information relating to chemical and biological agents used to control or mitigate the effects of

an oil discharge. The Department may refuse to release the information unless the manufacturer authorizes its release or unless a court of law orders its release in accordance AS 46.04.025.

Air Quality Control

In accordance with AS 46.14.520, records, reports, and information, and parts of records, reports, and information, other than emission data, in the Department's possession or control are considered confidential records and shall be kept confidential and in separate files if the owner and operator have certified under oath to the Department or authorized local program that

- public disclosure would tend to adversely affect the owner's and operator's competitive position; and
- the records, reports, or information, or parts of the records, reports, or information, would divulge production figures, sales figures, processes, production techniques, or financial data of the owner and operator that are entitled to protection as trade secrets under AS 45.50.910 - 945 (Alaska Uniform Trade Secrets Act).

B. RECORDS SAMPLING STRATEGIES

Sampling techniques are commonly used as a systematic means of assessing compliance when there is a large population of documents or items subject to regulatory requirements. Reviewing a selected portion will identify individual violations as well as provide an overall indicator of the extent of compliance. If the inspector observes many violations or a particular pattern of noncompliance, this may suggest the need for more extensive examination and/or other follow-up. If no noncompliance is found in the sample, the inspector can reasonably conclude that the facility is in compliance.

The ability to develop and carry out appropriate records sampling strategies is a basic skill needed by all inspectors. The purpose of the material in this section is to provide inspectors with a foundation in the basic principles and techniques for sample design and selection, and the documentation that should be kept in the field logbook about the sampling methods used.

Applying the principles and approaches described here to select a portion of items to sample should allow reasonable conclusions about the facility's compliance to be drawn, in circumstances when all records, equipment, or events cannot be reviewed, investigated, or analyzed by the inspector. Material in this section was adapted from the "Environmental Auditing Skills and Techniques Workbook" prepared by Arthur D. Little, Inc., for the Edison Electric Institute.

This section addresses only those techniques and principles an inspector could use in selecting the number and specific items (e.g., individual records, equipment, circumstances or events) to review, analyze, or investigate when these items are too numerous for the inspector to examine all of them.

Basic Steps in Sampling

The six basic steps below are designated to help ensure that each sample selected is both appropriate and defensible:

Step 1: Determine Objective of Inspection Step. The first step in the sampling process is determining the objective to be met by the inspection step, that is, what particular aspect of a regulatory requirement is to be reviewed? An example of an objective would be: "To determine that the facility is performing the required inspections of PCB equipment." While this type of determination may appear to be obvious, it helps the inspector identify clearly the boundaries of the population under review.

Step 2: Identify Population for Review. The next step is to identify the actual population of records, equipment, documents, etc. under review. For example, when the objective of the protocol step is to verify that air pollution control equipment is maintained regularly or periodically, the inspector should first identify the number of pieces of equipment involved. Likewise, when verifying the existence of a hazardous waste training program, the first step is to identify all employees who potentially should have been trained. Frequently, the size of the population can be estimated based upon review of selected documents, a facility walk-through, and interviews with facility personnel.

As the population is being identified, pay careful attention to whether there are any major subsets or key segments of the population that need to be included in the review. For example, when identifying the population of employees to be included in the annual hazardous waste training, pay attention to new hires, temporary employees, and personnel on different shifts. Defining these subsets or segments enhances the selection of the most appropriate sample method.

Since the results and conclusions reached will be based only on what has been sampled, it is critical to define the population before starting to sample. An incorrectly defined population will adversely affect the results. Even the most rigorous and effective sampling approach may result in improper or inaccurate conclusions if the population was not defined correctly. For example, a common mistake would be to approach the review of a facility's hazardous waste training

program by intuitively defining the population as "all those employees for whom training records exist."

- **Determine the Sampling Frame.** After the population is identified, the next task is to determine the sampling frame of interest –that is, will the sampling frame be the entire population of employees, or only a particular segment (e.g., new employees)? If a particular segment is chosen, will the sampling frame be the entire subset or only selected aspects of the subset (e.g., hourly employees)? The frame of interest is selected largely based on the professional judgment of the inspector, the purpose of the inspection, or the priorities of the program.

- **Identifying Potential Bias.** The final task in Step 2 is to identify if there is any potential bias in the sampling frame that has been selected. The following questions should be considered:

    - Were there any limits placed on the inspector in selecting the sampling frame?
    - From what records or other information was the population under review identified?
    - Are other data missing that would influence the sampling frame selection?

While it may be difficult to answer these questions based on the information available, the inspector should recognize the potential for bias to be introduced in the sampling process.

Step 3: Select Sampling Method. When should sampling techniques be used?

- When the entire universe of events, actions, records, waste streams, etc., will not be inspected;
- When program guidance does not otherwise dictate the methods to be used to select the number and specific items to be sampled; and
- When information is not available which offers clear judgments to be made on the most likely items to explore to find violations.

The choices among judgmental sampling and alternative sampling methods are described more fully below.

Judgmental Sampling

Judgmental sampling is frequently used when the inspector has reason to suspect that a violation or violations may occur. Sampling is directed to the segments of the population where problems or deficiencies are likely to exist. For example, the inspector may have learned during the opening conference that in the previous three months there had been a turnover of personnel responsible

for maintaining air pollution control and monitoring equipment. Based on this information, the inspector might decide to focus sampling activities on those three months.

In short, judgmental sampling is used most effectively in situations where the inspector suspects a problem. It is important to note, however, that a judgmental sample cannot be used to draw compliance conclusions about the whole population. It may, however, provide the inspector with an indication of whether proceeding further with probabilistic sampling is needed to ascertain compliance with requirements. For example, if recently hired, temporary employees have been adequately trained, this suggests that the facility has a good training program; the inspector decides to check no further.

Alternative Sampling Methods

Probabilistic sampling is the most commonly used sampling method. In probabilistic sampling, data are selected in an organized, methodical manner to represent the population that is being reviewed. There are several different methods of statistical sampling; each is described below.

- **Random Sampling.** Random sampling is the most widely used statistical sampling method. In this method, all items in a population have an equal chance of being selected; the objective is to select items purely by chance. This method may be preferred when the objective of the review is to obtain evidence representative of the total population. There are two basic ways to gather a random sample. An inspector may pull records or items at random, without prejudice. Or the inspector can number the documents, records, or items within the population and then use a random number table (See Figure 7-1 and Attachment 7-1) to determine which are to be reviewed.

Random Number Table

545	555	523	619	065	196	335	918	168	153	463	534	587	427	908	200
057	752	403	448	844	392	480	747	681	350	609	097	100	623	788	029
570	948	549	012	356	854	360	577	459	812	489	926	613	820	933	858
083	410	094	841	869	051	506	406	972	008	634	756	125	282	079	687
595	606	072	670	382	512	651	969	484	470	780	585	638	478	958	517
108	068	719	499	894	709	531	798	997	666	659	414	416	940	104	346
886	264	865	328	673	905	677	627	510	862	805	243	929	136	249	175
399	726	045	157	185	367	822	456	023	324	950	072	442	598	395	004
912	922	036	986	698	563	702	286	801	521	830	901	954	794	275	833
424	890	109	816	211	025	848	115	314	982	976	730	467	991	420	662
937	581	061	645	724	221	993	944	826	179	121	559	980	452	566	491
715	777	301	474	502	683	873	773	339	641	001	388	758	649	446	055
228	239	207	303	014	880	019	602	852	837	147	217	271	111	591	884

Figure 7-1 Random Number Table

Using a Random Number Table

- Using a random number table, first pick a random place to start. This can be done by pointing blindly at the chart and beginning where the finger ends up or other similar approach.
- Start in any direction from the point of entry on the table. Read up, down, or sideways, but maintain the same system throughout the process.
- If a sample is a single digit (numbers 1-9) only one column of numbers needs to be read (i.e. 288). If numbers are double digits (numbers 10-99) read the first two columns of numbers, ignoring 00 (i.e. 288). Pick as many numbers as needed. If a sample of 4 items out of 10 is needed, keep reading until 4 numbers from 1-10 are found.

  For example (See Figure 7-2),

  - A sample of 5 out of a population of 10 is needed
  - The sampler's pointed finger lands at column 3, row 3 -- so that is the starting point.
  - The sampler chose to read down the chart using the first two digits:
    - 549 - 54 is too large
    - 094 - number 09 is selected
    - 072- number 07 is selected
    - 719 - 71 is too large
    - 865- 86 is too large
    - 045- number 04 is selected
    - 109- number 10 is selected
    - 061- number 06 is selected
  - The random sample of 5 is: 4,6,7,9, and 10

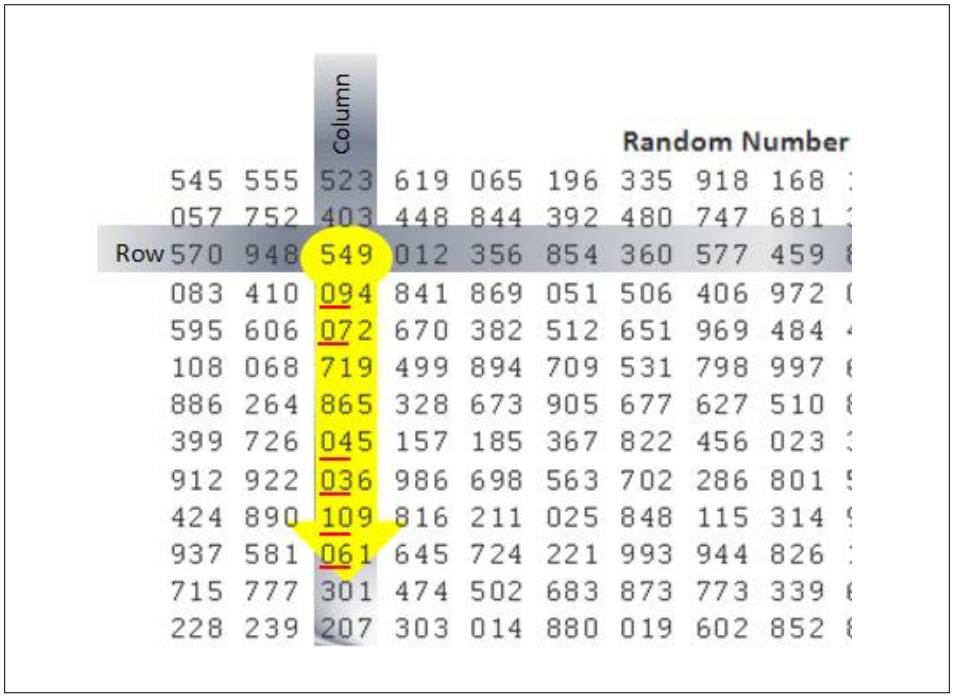


Figure 7-2. Using a Random Number Table

When using random sampling, it is important that the inspector use a random starting point in his or her review of records, equipment, etc., to ensure an equal probability that any given sample will be drawn.

- **Block Sampling.** In block sampling, the objective is to draw conclusions about the population by examining certain segments or clusters of data that have been selected at random. Block sampling is often used when the population is so large that random sampling would produce too many subjects for review. For example, the inspector wishes to verify that a facility was following its waste analysis plan and finds that the facility analyzes 500 waste samples each week. The inspector also learns that laboratory staff is well-qualified and each has at least three years of experience. Based on this information, the inspector feels comfortable about staff capabilities and concludes that drawing a random sample to verify conformance with the waste analysis plan would be inefficient and cumbersome. Instead, the inspector drew a block sample of waste analyzed by selecting all samples analyzed on Mondays and Fridays during the second and fourth weeks of January, March, June, September and December. Note that this method would have been inappropriate if the inspector had learned that there were significant differences in segments of population, e.g., the laboratory supervisor is *not* present during Saturday analyses, or an unusually large number of samples were analyzed in a particular month.

- **Stratification Sampling.** Stratification sampling is somewhat similar to block sampling in design. The objective of stratification is to arrange items by important categories or subsets, such as day-shift versus night-shift employees or high versus low effluent volumes. Stratification sampling allows the inspector to categorize populations by groups. Each group may be reviewed for comparison purposes, or one or more groups can be tested if the inspection's purpose is served by focusing on key segments of the population under review. For example, an air inspector may learn that, although a plant operates 24 hours a day, the highest volume of activity occurs during the second shift. The inspector might decide to evaluate compliance with permit limitations by focusing mainly on the monitoring information gathered during the second shift. This approach would not have been appropriate, however, if the activities of the unit occurred or were spaced evenly throughout the day.

Stratified random sampling is useful when the inspector observes wide variations in size or characteristics of the population. Stratification has an inherent bias in that the inspector focuses on only a select segment(s) of the population. However, depending on the size of the sample, it may provide information on each group tested.

In some situations, an inspector may wish to develop a stratified judgment sample if he or she suspects that a certain segment of a population requires investigation or identifies a potential problem in the population under review. For example, the inspector might suspect that training programs for second-shift employees are insufficient because of higher production volumes and many new hires. In this case, the inspector might select second shift employees as the sample group for testing of training programs.

- **Interval Sampling.** The purpose of interval sampling -- also known as systematic sampling -- is to select samples at various intervals (e.g., every tenth item is reviewed). As in random sampling, each item must have an equal chance of being selected. Thus, the first item in interval sampling must be picked at random. A common way to determine sampling intervals is to divide the total population size by the desired sample size. For example, the inspector may be determining the facility's compliance with requirements for weekly RCRA self-inspections. The inspector decides to select a sample of ten weekly reports for a 52-week review period. To develop an interval sample, the inspector decides to review every fifth report and uses a random number table to determine the random start. If the starting point selected was the second week, then the inspector would select the self-inspection report for the second week and the self-inspection reports for every fifth week thereafter. In interval sampling, it is important to know the size of the population (see Step 2) and the appropriate interval to avoid obtaining too small -- or too large -- a sample.

- If an interval sample begins to look like it is too large, the inspector should not end the interval sampling as soon as the desired number of items has been reviewed. If ended early, the sample would represent only the first part of the total population; thus, the inspector uses the original interval to draw the entire sample, and then reduces the sample by selecting an interval or random number of the items for exclusion from the sample.

- Alternatively, the inspector can stop once it becomes obvious that the sample will be too large, and select a different interval more appropriate to the desired sample size. The new interval must then be used for the entire selection.

- If the sample turned out to be smaller than the desired number, it can be enlarged by obtaining another interval sample with a new random start. However, to draw reasonably confident and reliable conclusions about a population, several intervals with different random starts should be developed.

Step 4: Determine Sample Size. Sample sizes can be determined either statistically or based on the inspector's judgment. While a statistically based sample with high confidence levels is ideal for enforcement, it is not always feasible. For taking physical samples, in particular, there may be practical limitations on the number of samples that can be collected. As noted earlier, program priorities and evidentiary needs dictate sampling decisions in the field.

In the absence of such program-specific guidance, determining an appropriate sample size is dependent upon the population characteristics and specific inspection objectives. In all cases, the sample should be adequate enough to be representative of the total population. A suggested scheme of determining minimum sample size is presented below. It is excerpted from Military Standard 105D (see Figure 7-3) and is commonly used for conducting inspections. It is intended to provide the reader with a starting place for developing samples that can be used to draw reasonably confident and reliable inferences about a population.

Determination of Minimum Sample Size	
Population Size	Sample Size
2-8	3
9-15	5
16-25	8
26-50	13
51-90	20
91-150	32
151-280	50
281-500	80
501-1200	200
1201-3200	315
3201-10,000	500
Military Standard 105D, "Sampling Procedures and Tables for Inspection by Attributes," April 1963.	

Figure 7-3. Determination of Minimum Sample Size

Step 5: Conduct Sampling. The inspector is now ready to conduct sampling. The inspector should be alert to any possible bias entering the sampling process. Independent records should be used wherever possible to develop the sample, and records for sampling should be selected by the inspector, not facility personnel. For example, if the inspector is verifying hazardous waste training and obtains training records from the training officer, the records may show those employees who have been trained. The inspector should, therefore, obtain a complete list of all employees (e.g., from personnel or payroll records) and select a sample from those independent records rather than from the records that verify only that training was given. The time frame within which the sample was obtained is also important to sample representatives. For example, if the period under review was January 1, 2012 to January 1, 2013, the records selected for sampling should encompass some portions of the entire review period, and not, say, those for December 2012 only. The more closely the sample represents the entire population as well as the entire review time frame, the more representative the sample becomes.

Step 6: Document Sampling Strategy. The final step in the sampling process is documenting in the field logbook the inspector's rationale for selecting the sample and how the sample was selected. The following can serve as a checklist for information that should be included in the field logbook:

- The objective of the inspection
- The population, subject, or topic under review

- How and why that population was selected
- The type of sampling method employed
- The reasons why that sampling method was used
- Any potential bias in the sample selected
- The sample size and reasons for selecting that sample size
- How the sample was representative
- How the sample was actually selected
- The results of the sampling (unless physical samples that require laboratory analysis)

Attachment 7-1 Random Number Table

Random Number Table

545	555	523	619	065	196	335	918	168	153	463	534	587	427	908	200
057	752	403	448	844	392	480	747	681	350	609	097	100	623	788	029
570	948	549	012	356	854	360	577	459	812	489	926	613	820	933	858
083	410	694	841	869	051	506	406	972	008	634	756	125	282	079	687
595	606	574	670	382	512	651	969	484	470	780	585	638	478	958	517
108	068	719	499	894	709	531	798	997	666	659	414	416	940	104	346
886	264	865	328	673	905	677	627	510	862	805	243	929	136	249	175
399	726	745	157	185	367	822	456	023	324	950	072	442	598	395	004
912	922	890	986	698	563	702	286	801	521	830	901	954	794	275	833
424	119	036	816	211	025	848	115	314	982	976	730	467	991	420	662
937	581	916	645	724	221	993	944	826	179	121	559	980	452	566	491
715	777	061	474	502	683	873	773	339	641	001	388	758	649	446	055
228	239	207	303	014	880	019	602	852	837	147	217	271	111	591	884
741	435	087	132	527	076	164	431	630	033	292	047	784	307	737	713
254	897	232	961	040	538	044	260	143	495	438	876	296	769	617	542
808	032	359	643	056	818	000	455	355	921	957	583	970	075	231	028
637	810	821	789	885	331	462	601	184	434	419	729	799	853	693	173
466	323	017	669	714	109	658	746	013	946	615	874	363	366	889	053
295	835	213	814	277	622	120	626	842	725	077	754	192	878	085	199
124	348	675	960	107	135	316	771	671	237	273	900	021	391	547	344
953	861	872	840	936	647	778	917	235	750	735	045	850	904	743	224
782	374	333	985	765	160	974	797	064	263	932	925	679	682	205	370
611	152	530	131	594	938	171	942	893	775	128	070	508	195	402	515
440	665	992	010	423	451	633	088	722	288	590	216	338	707	863	661
269	177	188	156	252	964	829	968	551	066	786	096	167	220	060	540
098	690	384	301	081	476	291	113	380	579	248	241	996	733	256	686
928	203	846	181	910	989	487	259	209	092	444	387	825	245	718	831
757	981	042	327	739	767	949	139	038	605	906	267	654	024	914	711
320	494	504	472	568	280	145	284	868	117	103	412	483	536	376	857
149	006	701	352	398	793	342	430	697	896	299	558	312	049	573	002
978	519	163	498	227	305	803	310	526	408	761	703	141	562	034	882
150	569	039	417	481	879	975	441	477	043	851	939	947	537	178	883
409	334	142	146	979	274	712	644	214	836	541	911	067	864	473	381
270	744	302	588	505	680	584	445	385	114	413	648	449	035	246	943
971	242	118	915	708	676	772	349	071	321	306	616	740	353	210	556
099	776	206	182	509	007	513	612	907	238	086	011	174	278	804	003
377	832	834	358	522	764	304	283	091	589	095	311	193	546	223	347
554	668	593	817	144	428	575	603	785	240	140	706	742	368	490	860
016	813	422	330	340	308	405	116	247	386	704	219	204	514	319	372

INTERVIEWS

Chapter 8

A. OVERVIEW

Interviews are a highly valuable, but often underutilized, means of gathering information during an inspection. Oral and written statements obtained from facility personnel are usually admissible evidence. An inspector with good interviewing skills can elicit information and develop important facts that might otherwise be missed.

While written materials cannot replace practical experience for learning and improving interviewing skills, the techniques presented in this section can help shorten the training time needed to become a successful interviewer. Many of these techniques are designed to ease the tension and anxiety that plant managers and employees may experience at the thought of being interviewed by a Department enforcement official. Other techniques are designed to aid inspectors in composing questions that will more effectively elicit useful information.

B. STATEMENTS AS EVIDENCE

Oral or written statements obtained during an inspection are generally admissible in court under exceptions to the "hearsay evidence" rules. Statements made by a company employee are an example. Even when statements made during an inspection interview are not admissible, they are still useful for cross-examination purposes or to develop leads for investigation.

Documenting the Interview

A written record should be made of each interview. As applicable in the particular circumstances, this may be in the form of an affidavit, a verbatim record of questions and answers, unsworn statements, or informal notes. Some people are inhibited by the sight of an inspector taking notes, while others may feel that the inspector's failure to take notes indicates a lack of interest in them and in what they have to say. In the final analysis, the inspector must evaluate the individual in each interview to determine the correct approach.

- **Note taking.** It is important to take accurate field notes; however, it is equally important that the note taking or documentation process be unobtrusive and not interfere with the interview process. If the interviewee's pace is too fast, wait for appropriate breaks in the conversation and "backtrack" by reviewing salient points. Try slowing the conversation by deliberately slowing the delivery of questions. Experts have found that when a strong rapport is established between two individuals engaged in conversation, the pace of one influences the other. Only as a last resort should the inspector ask the interviewee to slow down a bit. Keep in mind that such a request, no matter how reasonable, asks the interviewee to abruptly change pace and usually tends to dampen somewhat the enthusiasm that is causing the heightened speed of the conversation. Avoid frequent interruptions or asking for an answer to be repeated. If two inspectors are present, a useful technique is for one to ask questions and the other to take notes. This approach also avoids any potential for lost credibility because of differences in inspectors' notes.

- **Use of Tape Recorders.** There are no legal barriers to the use of tape recording equipment by the inspector solely for the purpose of recording his/her own observations during the inspection. Also, the inspector may record an interview, if it is done with the knowledge and consent of the interviewee. If permission to record is obtained, the permission should be recorded on tape at the beginning of the conversation and acknowledgement of the permission should be obtained on tape at the end of the conservation. If a given investigation requires tape recording individuals without their knowledge, the inspector should consult with an Assistant Attorney General with the Department of Law, Environmental Section. In considering the use of a tape recorder, the inspector should gauge whether the interviewer is more or less likely to talk freely.

- **Written Statements.** If the information given by the interviewee seems especially significant, the inspector should attempt to obtain a signed, written statement. The principal objective of obtaining a statement is to record in writing, clearly and concisely, relevant factual information so it can be used to document an alleged violation. This statement of facts is signed and dated by the person who can testify to those facts in court, and it may be admissible as evidence.

C. STEPS IN PLANNING AND CONDUCTING INTERVIEWS

While each interview will be different because of the dynamics between the individuals involved and the topics to be covered, there are several basic steps to an interview.

- Planning. In this step, topics to be covered and information needed from the interviews is decided, individuals to be interviewed identified, and time and places for the interviews scheduled.

- Conducting. This step includes introductions, discussion of the interviewee's position and responsibilities, more detailed questioning on specific points, and summarizing to assure accuracy.

- Documenting. This step, which happens in part concurrently with the conducting step, includes note taking, and when appropriate, obtaining a written statement.

Planning the Interview

Outline the "Unknowns". The inspection plan sets out the objectives of the inspection. An outline of topics for which interview information is likely to be needed will help identify individuals who should be interviewed. An outline of questions or topic areas should be prepared to assure that all needed information is solicited.

Identify Interviewees. In addition to facility managers who can describe company operations and policy, generally, it is useful to interview directly the persons who are carrying out the various regulatory responsibilities (e.g., recordkeeping, operation, and maintenance) to determine the facility practices. Others may also be interviewed to flesh out the details of a suspected violation. In most cases, it is desirable to interview every person thought to have relevant information. Often, at least a preliminary list of individuals who should be interviewed can be developed during the opening conference with facility management.

Scheduling and Logistics. To the extent possible, without subverting the purpose of the interview or the inspection, try to schedule the interview at a time that is convenient for the interviewee. Generally, it is most comfortable for the interview to take place in the interviewee's own work area (e.g., in the plant area rather than in a conference room). A schedule for interviewing various facility personnel can often be worked out during the opening conference.

Set Objectives for the Interview. Before each interview, identify the specific reason that the individual is to be interviewed, that is, the individual's relationship to the information being sought and what he or she is likely to know. Jotting down key questions in advance can help assure that the objectives of the interview are met.

Conducting the Interview

Step 1: Identification.
An interviewer's attitude and behavior will set the stage for the interview. Always be professional when interviewing someone. An interviewer should:

- Properly identify themselves by name, without using acronyms.
- Identify interviewee (i.e. Name, title, role)
- Eliminate noise and physical communication barriers
- Watch for non-verbal clues

Step 2: Rapport
Developing a rapport (a harmonious or sympathetic relation or connection) with an interviewee will help him or her feel comfortable when talking to the interviewer. Seven useful words to help defuse an emotionally volatile situation "that must be very hard for you". Making eye contact and speaking to the person will also help in building a connection.

Step 3: Questions
An interviewer should move from asking general to specific questions. Start with open-ended questions that will elicit a narrative response. Clarify with structured questions requiring short responses. Ask the interviewee to explain his or her responsibilities as they relate to the topics being inspected or investigated. Remember to listen attentively, pay attention to the facts. Never interrupt.

Step 4: Summary
Summarize the interview to get agreement on the facts. Allow the interviewee to correct any mistakes.

Step 5: Close
Thank the person. It is always beneficial to ask, "Is there anything I didn't ask you that you think will help me with this investigation?" Tell them how to reach you with information they remember later.

D. QUESTIONING TECHNIQUES

Questions are the principal tools of interviewing. The quantity and quality of information obtained will usually be proportional to the inspector's skill in formulating and asking questions.

Some of the fundamental characteristics of good question construction are:

- Make questions short and confined to one topic
- Make questions clear and easily understood
- Use neutral words

Types of Questions

The Seven "Ws". When complete answers to the seven questions below are obtained, the issue being explored is usually resolved satisfactorily. These questions are basic to all interviews.

- What? (What happened?)
- When? (When did it happen?)
- Where? (Where did it happen?)
- Why? (Why did it happen?)
- How? (How did it happen?)
- Who? (Who was involved?)
- Which? (Which one reviewed the records?)

The questions "Why?" and "Why not?" are the most powerful and are of great value in interviews.

Precise Questions. The precise question is one that calls for a specific or an exact answer. It limits the requested answer to definite items of information. Precise questions help keep the discussion and pattern of thinking moving toward a particular goal. Usually they will extract the desired information quickly and with minimum effort. The following questions are increasingly precise in ascending order:

Q: What did you do?
Q: What did you do when you were growing up?
Q: What did you do last year?
Q: What did you do yesterday afternoon?
Q: What did you do at about 3: 15 yesterday?

Free Response Questions. Questions should generally be framed to require a narrative answer. Soliciting "yes" or "no" answers usually restricts the information that the subject may be inclined to give and usually is inadequate to completely answer the inquiry. Questions requiring a "yes" or "no" answer frequently are leading or suggestive. They may be acceptable when summarizing or verifying information, but should not be used when seeking new information.

Questions to Avoid

Leading Questions. Leading or suggestive questions are those which suggest the desired answer, assume something to be fact which has not been established as a fact, or embody a fact and require a simple negative or affirmative answer. Leading or suggestion questions tend to influence the answers given by the interviewee and should be avoided while asking for original information and monitoring inspection. Leading questions can be useful in getting a particular answer or in refreshing an individual's memory; they are frequently used in cross-examination to test or break down previous statements. Examples of leading questions in order of their suggestiveness:

Q: Did you see a _____?
Q: Didn't you see a _____?
Q: Didn't you see the _____?
Q: Wasn't there a_____?

Instead ask the following:

Q: What did you see?

Double or Triple Negative Questions. Questions or statements involving double or triple negatives are confusing and often suggest an answer opposite to the correct one. They should never be used. Examples:

Q: Didn't he have no dinner?
Q: Couldn't you see him neither?

Instead ask the following:

Q: Did he have dinner?
Q: Could you see him?

Complex Questions. Complex questions and statements are those that are too complicated to be easily understood, cover more than one subject or topic, require more than one answer, or require a complicated answer. Example:

Q: Where did you get the truck and how did you load the drums in it?

Instead ask the following:

Q1: Where did you get the truck?
Q2: How did you load the drums in it?

Question Sequencing

An issue is an occurrence, situation, or subject in an inspection that needs to be explained or resolved. Issues are generally resolved by sequences of questions. As a rule, a separate sequence is required to resolve each issue. The sequence of questions should push towards the resolution of the issue.

- **General to Specific.** The most efficient means of resolving an issue is to have the questions cover it by progressing from the general to the specific. Seek general information on the setting of an event before exploring details. Determine what was done before exploring how it was done.

- **Reaching Backward.** Questions will progress more logically with less risk of omissions if transition is used to connect thought. To do this, start with known information and work toward areas of undisclosed information. An efficient method of achieving this sequence is to mentally reach backward over the known information and frame the next question as the logical continuation of the facts previously related. The following illustration portrays use of the "known to unknown" sequence orientation before proceeding to the next question. Statements that are enclosed in parentheses are the unspoken thoughts of the interviewer as he prepares to frame each new question:

  Q: (You said earlier you went to Anchorage.) Now what means of transportation did you use?
  A: A car.
  Q: (If you went in a car?) Who drove?
  A: I did.
  Q: (You drove a car to Anchorage.) Was anyone with you?
  A: Two guys went with me.
  Q: (You drove a car with two passengers.) What were their names? Etc.

Applying Interviewing Techniques

Free Narrative. Free narrative is an orderly continuous account of an event or incident given with or without prompting. It is used to get a quick resume of what a person knows or is willing to tell about a matter. Usually it can be initiated by requesting the individual to tell what he knows about the matter. Frequently, the interviewee must be kept from digressing, but use a minimum of interruption and do not be too hasty in stopping him from wandering in the narration. He will sometimes give valuable clues while talking about things that are only partially related to the

matter under consideration. Be careful not to erroneously interpret deviations from the anticipated narrative as wandering.

Systematic Questioning. Systematic questioning (termed "direct examination" in legal proceedings) is designed to bring out a connected account of an event or an incident. In an interview, its purpose is to elicit new information or to fill in details omitted during free narrative. Following are tips for eliciting more details in the interview.

- Begin by asking questions that are not likely to cause the interviewee to feel threatened.
- Ask the questions in a manner that will develop the facts in the order of their occurrence or in some other systematic order.
- Ask only one question at a time and frame the questions so that only one answer is required by each question.
- Give the interviewee ample time to respond. Do not rush him.
- Try to help him remember but do not suggest answers, and be careful not to imply any particular answer by facial expressions, gestures, methods of asking questions, or types of questions asked.
- Repeat or rephrase questions again and again if needed to get desired facts.
- If answers are not perfectly clear, have the interviewee explain them again.
- Give the interviewee time to qualify his or her answers.
- Separate facts from inferences or opinions.
- Recognize conflicting information and learn when to say "show me."
- Get all of the facts. Almost everyone can provide more information that he initially recalls or admits knowing.
- After the interviewee has given a narrative account, ask questions. Answers to little things will frequently contain clues to previously unreported information of interest.
- After each segment of the interview, ask the interviewee to summarize their information and have them verify the correctness of the statements.

E. CREATING A PRODUCTIVE INTERVIEW ATMOSPHERE

The most productive interviews are those in which the interviewee feels comfortable and respected. The following suggestions were adapted from "Environmental Auditing Skills and Techniques Workbook" prepared by the Edison Electric Institute.

Attitude and Approach

If the inspector comes across as professional, courteous, genuine, and non-threatening, the interviewee is more likely to provide candid information.

- Be courteous. The interviewee is more likely to give a positive response if he feels respected. Acceptance of the interviewee's statements in a matter-of-fact way can reduce threat. The inspector's choice of words can also influence the tone of the interview. For example, "You seem very determined," is a less threatening comment than "You are very stubborn."

- Use an appropriate voice tone and inflection. Each interview should be conducted in a tone of voice that will be perceived as soft, friendly, and gentle.

- Do not jump to conclusions. An interview can quickly turn sour if the inspector indicates that he or she has drawn a negative (or positive) conclusion. Conclusions regarding compliance status are not likely to rest solely on interview statements. Also creating a poor atmosphere is making a quick notation in the field logbook accompanied by a statement such as "Thank you, that's all I need." A better approach is to say, "If I understand you correctly, you are saying you do have a plan, but it has not been approved by a professional engineer. Is that correct?"

The Interview Setting

A poor interview setting can detract substantially from an effective interview. The following suggestions can aid in setting a comfortable atmosphere for the interview.

- Go to the interviewee's work area. People are most comfortable in their own work place. Except for the rare situation where it is completely impractical, conduct the interview in the interviewee's own work area.

- Make sure the interviewee feels that there is sufficient privacy. Only the interviewee knows whether he or she feels constrained by other employees who may be nearby or within earshot. Give the interviewee a chance to opt for some place more private.

- Make sure both people are "on equal ground." Both the inspector and interviewee should be on equal ground, that is, seated or standing together in a comparable way.

- Try to keep it "one-on-one." Whenever possible, try to avoid having two or three inspectors "gang up" on an individual. If more than one inspector is present, only one should ask the questions; the other(s) should take notes.

- Minimize distractions. Noise and interruptions are the most common distractions. If there is a high level of noise, ask if it would be all right to find a quieter place. If there are constant telephone calls, explain in a polite and respectful way that uninterrupted time is needed and suggest that a secretary take calls.

Non-Verbal Communication

Much of the information exchanged during an interview is done non-verbally. Communication is a composite of meanings, expressed through gestures, facial expressions, voice inflection, and posture as well as through speech. Following are a few suggestions regarding non-verbal communication that can aid in interviews.

- **Shake hands.** Start each discussion by shaking hands with the interviewee, to show respect and make him or her feel more comfortable.

- **Maintain eye contact.** Eye contact often connotes interest in, and attention to, what the interviewee is saying. It may also aid the inspector to distinguish body language that presents a different message than what is being spoken.

- **Keep the right distance.** Sit at a comfortable distance from the interviewee. Generally, a distance of three to five feet is appropriate.

Non-verbal statements. Recall that an interviewee's gestures and responses or lack or response to what someone else says can be statements or adopted statements by the interviewee. Watch for and note these.

DOCUMENTATION

Chapter 9

A. OVERVIEW

Any sense perceptions an inspector has while carrying out an inspection may be useful. They include anything the inspector sees, smells, hears, or touches. They may be captured for later use by illustrations (such as photographs, maps, and sketches) or by notes in a logbook.

Observations and illustrations are important for several reasons. They enhance the admissibility and credibility of other evidence. They provide a context for other evidence, such as physical samples. They help a judge or jury form a mental picture of the inspected facility or site, so the various pieces of evidence can be better understood. They may also be evidence in themselves.

Several kinds of observations can be used to corroborate a single piece of the story. For instance, physical samples taken at a given site may be supported by logbook notes describing the site, by a sketch or map notation, and by a photograph of the sampling site.

Observations can be fruitful even in purely procedural parts of the inspection. For instance, if the inspector is denied entry, notes should be entered in the logbook describing the appearance of the facility and the conduct of company officials, and a photograph of the facility entrance may be taken. The notes and photograph will substantiate that the inspector was actually at the site. They paint a picture in a judge's mind of the events as they occurred.

Once the observations are captured by the means described below, it is important to preserve their value as evidence. In any enforcement case, DEC must be able to show that a given piece of evidence was gathered during a particular inspection. For this reason, documentation of the illustrations is important.

B. FIELD NOTES/LOGBOOK

The inspector's field notes document what the inspector saw, heard, smelled, or touched. Field notes serve as evidence to corroborate other forms of evidence, such as physical samples or photographs. They serve as the foundation for preparing inspection reports and refreshing the inspector's memory about the inspection prior to giving testimony. They may be subject to discovery and disclosed to the opposing side and may be entered as evidence in a trial.

Since they may be disclosed to the opposing side in an enforcement case, field notes must contain just the facts. Even if the inspector believes the inspected facility is clearly in violation, that conclusion must be omitted. Instead, all the observed conditions that led the inspector to that belief should be meticulously recorded in the notes.

Inspector's Field Logbook

The inspector's field logbook is the core of all inspection documentation. It should contain accurate and inclusive documentation of all inspection activities. The logbook is used as the basis for preparing the inspection report and to refresh the inspector's memory regarding the specifics of sample collection and other inspection procedures should the inspector be called upon to testify. Logbooks are the property of DEC and become a part of the official inspection file. Language in the logbook should be objective, factual, and free of personal feelings and conclusions of law. The logbooks can be provided to the opposing side during the discovery process of an enforcement case and can be entered as evidence in court.

The Logbook. Inspectors should use only bound field logbooks for maintaining field records, preferably with consecutively numbered pages.

- **Sampling Procedures.** Inspectors should identify all sample collection equipment, field analytic equipment, and equipment utilized to make physical measurements in the logbook. All calculations, results, and calibration data for field sampling, analytic, and physical measurement equipment should also be entered. All sampling and field analysis equipment must be traceable to the specific piece of equipment used and the inspector who did the work. The rationale for taking the particular sample, including sample selection and representativeness considerations, should also be noted.
- **Documents.** All documents taken or prepared by the inspector should be noted and related to specific inspection activities. (For example, photographs taken at a sampling site should be listed, described, and related to the specific sample number.)
- **Unusual Conditions and Problems.** Unusual conditions and problems should be noted and described in detail.

- **Interview Notes.** Names and titles of facility personnel and the activities they perform should be included along with notes from the statements they made.
- **General Information.** Names and titles of facility officials, size of facility, description of operations, number of employees, and other general information, such as how the facility keeps its records, may be useful in case development as well as for future inspections.
- **Other Incidents.** Detailed notes should also be kept about any other incidents that occurred during the inspection, such as an electrical power failure or tampering with equipment.

Entries in Field Logbooks. Since an inspector may be called to testify in an enforcement proceeding long after the inspection was conducted, it is imperative that each inspector keep detailed notes on every aspect of the inspection, including interviews, visual observations, records assessments, and sample collection and handling.

Entries in the logbook should correlate readily with particular samples, photographs, copies of records, or other documentation collected by the inspectors, such as by an assigned identification number. This will allow tracing back to the exact time, place, conditions, and procedures employed for gathering each piece of evidence. Types of information that should be entered in the field logbook include:

- Identification Numbers. Each piece of evidence collected (document, physical sample, photograph) should be keyed to an entry in the field logbook.
- Observations. All conditions, practices, and other observations that will be useful in preparing the inspection report or will contribute to valid evidence, should be recorded.
- General Procedures. Inspectors should list all procedures followed involving entry, records inspection, and document preparation. Such information will help avoid damage to case proceedings on procedural grounds.

C. PHOTOGRAPHS

Since a judge and jury cannot be present on the inspection, the best way for them to see, and believe, what transpired is through photographs. The enforcement of environmental law is dependent upon the effectiveness of inspectors as information-gatherers. Increasingly, photography has played an important role in that process. Photographs provide inspectors not only with visual documentation contributing to more accurate inspection reports, but also with evidence for enforcement proceedings and objective descriptions of conditions found at a facility.

Photographs are some of the best physical evidence, and the easiest to authenticate and therefore admit into evidence in court. The test is simply that the inspector has to say that any given photograph does "fairly and accurately represent" what the inspector saw on the date in question at the site in question.

When enlarged and placed in view in the courtroom, photographs can be the best means of duplicating what occurred months or years earlier during an inspection. Clear photos of relevant subjects, taken in proper light and at proper lens settings, provide an objective record of conditions at the time of the inspection. In this respect, photographs can be the most accurate demonstration of the inspector's observations.

Photographs can also be helpful to the field team during future inspections, informal meetings, and hearings. For all its advantages, however, photography requires skill. The investment of time and materials in photography for the collection of evidence can be justified only by the quality and usefulness of the photographs. This section will assist the inspector in achieving the best photographic results.

Photographs as Evidence

Fair and Accurate Representation. Drawings, diagrams, maps, and plans have long been used as evidence of the buildings, lands, or machines they represent when the things themselves cannot conveniently be brought into court. Since the development of photography, photographs have generally been received as evidence on the same basis as maps and diagrams. It is essential to admissibility that the subjects which the photographs portray be relevant and material to the case; however, there must also be testimony that the photograph is a fair and accurate representation of the object or scene which it portrays. If the photograph is not a fair and accurate representation of the object or scene, even though the object or scene may be relevant and material, the photograph may not be admitted as evidence.

Prejudicial Photographs. The question of admissibility is determined by the judge according to rules of exclusion applicable to other types or kinds of evidence. However, because photographs are traditionally susceptible to subjective misinterpretations, the courts have exercised a broader discretion in disallowing them as evidence. Even though a photograph may be a fair and accurate representation of a relevant and material matter, the judge may reject it if in his or her opinion it would be misleading or would not aid the jury in a better understanding of the facts. Such a photograph, otherwise admissible, will be rejected if the judge believes that it may create an undue prejudice in the minds of the jury. For example, color pictures of human death or injury that show quantities of blood and gore can create an emotional reaction in the viewer that is in

excess of that warranted by the probative value of the evidence. Photographs may be excluded for that reason.

Authentication. The authentication of a photograph prior to its being received in evidence may be accomplished by any witness whose familiarity with the subject matter of the photograph allows him or her to testify that it is a fair and accurate representation of the object or scene it portrays. The testimony of the person who took the picture is not necessary. If the photographer is called as a witness, it is not enough to simply claim to have taken the photograph. The photographer must also be able to say that the picture is a fair and accurate representation of the object or scene. It is the fairness and accuracy of the representation that is important. Unless the processes and techniques of picture-taking, and printing are themselves relevant to the question of accuracy, the judge may take judicial notice of such processes and techniques. This was not true years ago when photographs were first offered as evidence, and judges often required the testimony of the photographer as an expert witness to authenticate all photographs. Today the general principles of photography are well known as applications of the natural laws, and they are appropriately the subject of judicial notice. Most courts now accept that the central issue is the fairness and accuracy of the representation.

The Right to Photograph

The right to inspect gives rise to the inherent right to document the inspection by means of photographs. Inspectors should take photographs of anything needed to complete the objectives of the inspection. (Inspectors are cautioned not to take pictures of other inspectors at work, however. All such photographs might be subject to discovery should an enforcement action be pursued, and could hurt the State's case if they show even a slight error.)

Attempts to Impose Conditions. Photography often draws a negative reaction from facility officials, who may seek to prevent or limit the use of cameras on facility property. DEC considers such efforts to restrict the taking of photographs as an attempt to impose unacceptable conditions on consent to enter. If facility officials do not withdraw these attempts voluntarily and without coercion, the inspector should consider it a denial of consent and proceed according to pertinent guidance in the section on Consensual Entry, Chapter 3B. Before concluding that the proposed restrictions on photography constitute a denial of consent, the inspector may tactfully attempt to resolve any concerns or objections facility officials rise about the use of cameras. It may be prudent to go ahead with the inspection without taking photographs, raising the issue with facility officials again only if a particular photograph is essential to completing the objectives of the inspection. Inspectors should be aware of the sensitivities involved in photographs, and avoid taking unnecessary photographs of facility operations. Sometimes in water cases it has been effective to explain to the officials that waste streams, receiving waters, and wastewater

treatment facilities are public information, not trade secrets. Moreover, photographs may be taken without consent from areas generally open to the public, both outside and inside a facility.

Confidentiality. Photographs may be subject to a claim of confidentiality[39]. To avoid difficulties arising from confidentiality claims, it is recommended that all unnecessary background be shielded when photographs are taken, or the subject may be moved to another area.

Tips on Taking Photographs

When taking photographs, the inspector should imagine how the photographs will look in an administrative hearing or courtroom. Photographs should always be taken with a view toward how they can be used as evidence. If the subject is a barrel, make sure the barrel fills up the view finder. If the subject is a building and grounds, then back off to allow these to fit into the viewfinder.

The most useful photographs are those that convince the viewer he or she is actually seeing the thing the inspector saw. A good photograph requires no explanation except the time and place it was taken. The viewer will gain confidence in the photograph if it is sharply in focus and properly exposed. To achieve such photographs, the inspector should learn to use camera equipment well.

The Inspector should be familiar with the camera's features before using it during inspections. He/she should read appropriate manuals and practice using the camera. In addition, the inspector should know the following:

- How to store an image
- The capacity of the storage media being used
- How to transfer images from one storage media to another
- How and what is needed to print good quality images
- How to use the different settings (resolution choice, digital zoom, close-up, flash, etc.)
- The camera's limitations (weather, zooming, lighting)

Before taking pictures, the inspector should:

- Ensure that the camera and supporting equipment are appropriate to the task
- The camera should possess appropriate resolution and capacity for the type of photo required, including close-up or distance photos, if needed
- Ensure that the camera is in working order

[39] AS 46.03.020(6). Information relating to secret processes or methods of manufacture discovered during investigation is confidential and therefore should be handled accordingly.

- Check the settings – make sure the date/time settings are properly set
- Make sure there is adequate storage media for the projected number of photos needed
- Make sure that fresh and back-up batteries are available.

Photographic documentation should tell the story with as little need for narrative as possible. This is done by shooting series of establishing shots followed by subject and then detail or close-up photographs. The proper terms are the "establishing" or broad perspective shot; the "medium" or subject shot; and the "detail" or close up shot.

- The **"establishing or broad perspective shot"** is a photograph taken from a distance which shows not only the subject but one or several permanent landmarks which can be used for reference in establishing the exact location.

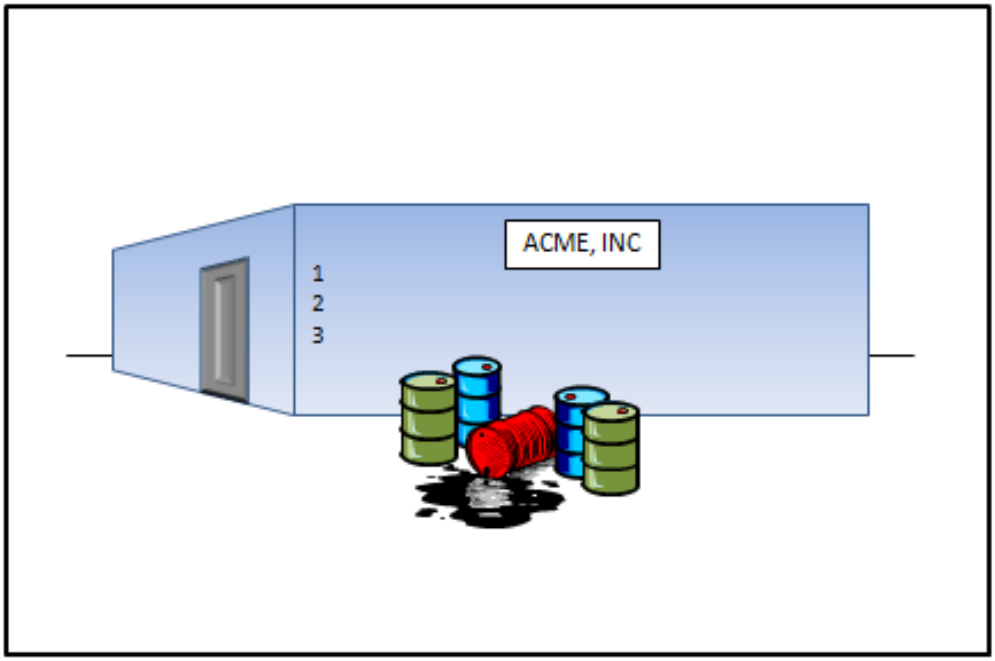


Figure 9-1. Establishing or broad perspective Shot (Photo)

Establishing shots should show an identifiable landmark (*i.e.*, street sign, monument, building address, etc.). It may also be important to show the compass orientation of the subject. (*i.e.*, the drums were on the south side of the building).

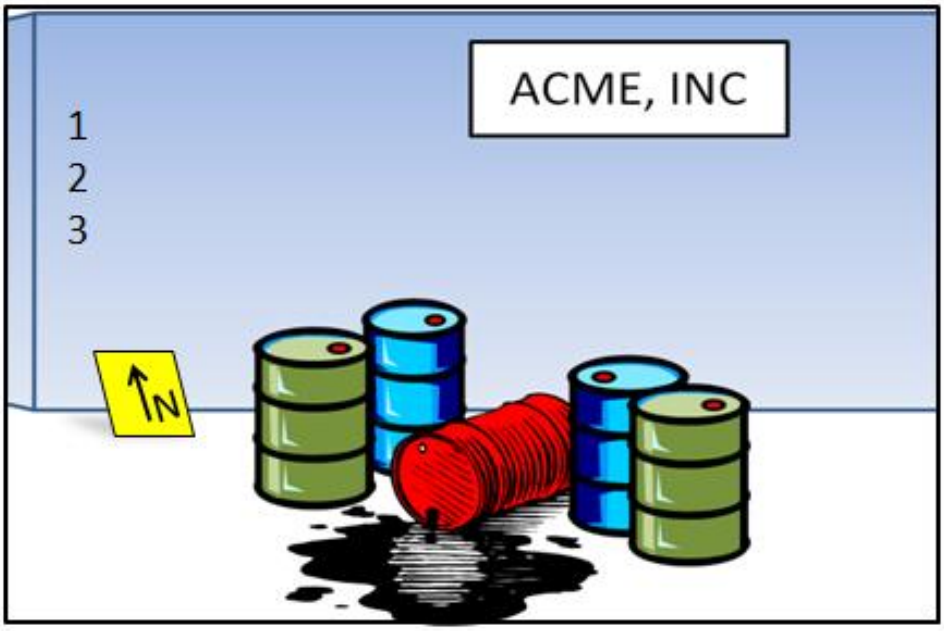


Figure 9-2. Establishing or broad perspective Shot (Photo)

- The **"medium or subject shot"** will emphasize a specific object or event. Sometimes it will be shot in series to view all sides. "Post-its®" may be used to identify the item in the photograph. Numbers or identifiers on the "Post-its®" can be recorded in the field log for reference and easy identification when writing the narrative report. Rulers and other scales help determine size of items in the photograph. If used take photographs with and without "Post-its®" and scales. If a scale is not available use a common object like a coin or pen to show the scale of the object in the photograph.

Figure 9-3 . Medium or Subject Shot (Photo)

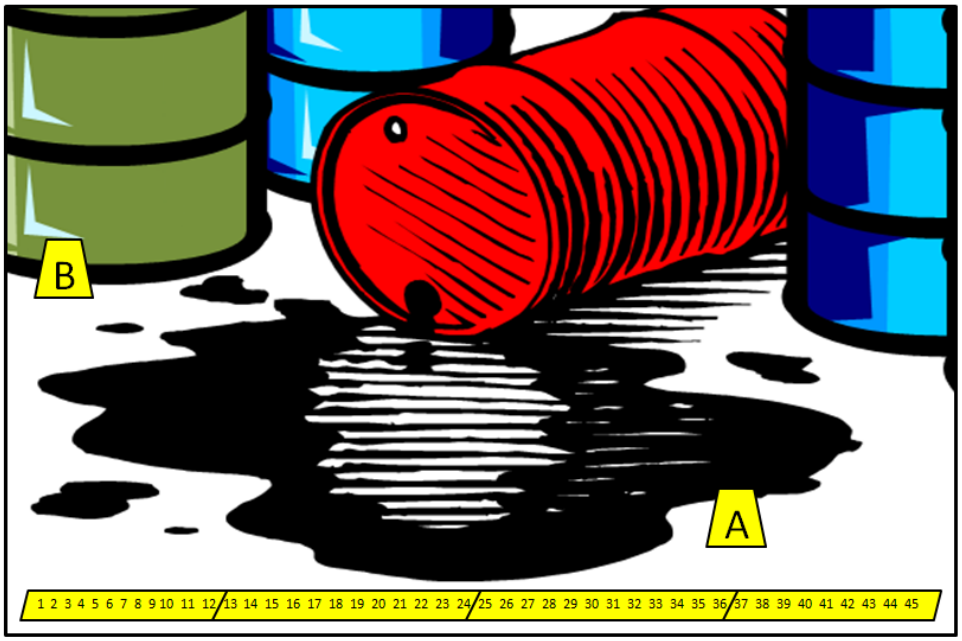


Figure 9-4. Medium or Subject Shot with "Post-its" and Scale (Photo)

- The **"close-up or detail shots**" should show the issue under review and/or enough information to identify the specific item or event in question.

Figure 9-5. Close-Up or Detail Shot (Photo)

For example, the photographic documentation in Figure 9-6 below tells the story of a fictitious used oil spill at Acme, Inc, 123 Maine St., Anywhere, AK. The photographic documentation is derived from the photograph examples in Figures 9-1 thru 9-5.

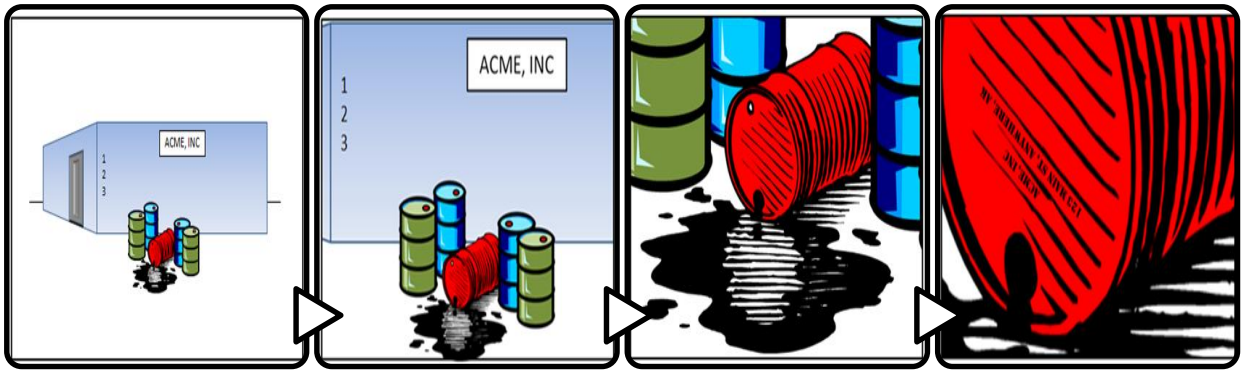


Figure 9-6. Series of establishing shots followed by subject and then detail or close-up photographs

When taking Photographs, the inspector should attempt to show the subject from as many angles as possible (*i.e.*, 360°). Arguments will often be raised about what is not shown in the photographs.

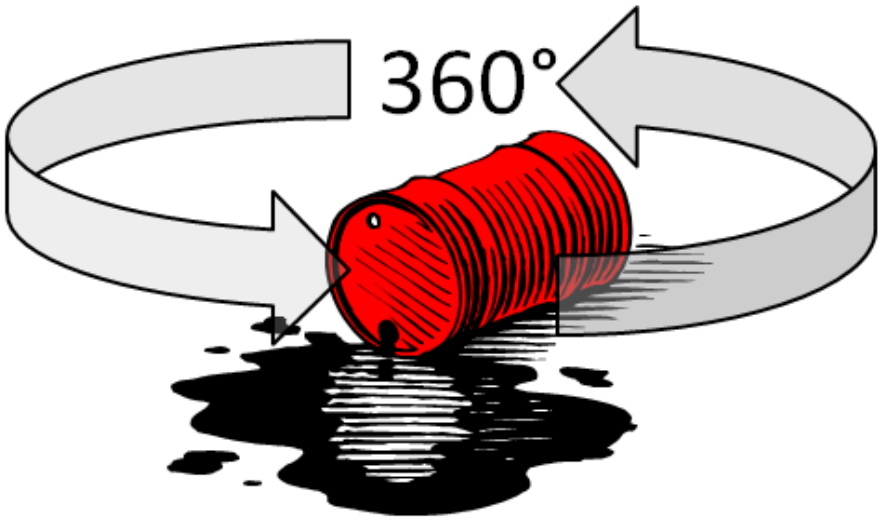


Figure 9-7. 360° Perspective

Documenting Photographs. In order for photographs to be entered as evidence, DEC must be able to authenticate that they fairly and accurately represent what the inspector saw at a given facility on a given date. (The inspector need not have taken the photo him- or herself, but must be able to testify that the photo "fairly and accurately" represents what he or she saw.) Documentation of information about how, when, and where the photograph was taken will aid in the authentication process.

An effective means for documenting photographs is keeping notes in chronological order in the field logbook about the pictures that are taken. Notes in the field logbook can be used to help refresh the witness' memory prior to testifying in court. Even if the inspector does not remember what it is that the picture portrays, so long as he or she wrote these notes and can state that they are somehow connected with the picture, that information alone is enough to say that the picture does fairly and accurately represent what he or she saw on the day in question. Some inspectors keep a separate photo log in addition to notes in the logbook. (See Figure 9-8 and Attachment 9-1)

PHOTO LOG

Case Title: ACME, Inc Inspection File #: 0000-0000 Date: 5/4/2013
Location: Anywhere, AK Inspector/Photographer: John Doe

Photo #	File Name	Description	Comments
1	DSC_001	Five 55-gallon drums on south side of 123 Main Street, Anywhere, AK (ACME)	Establishing Shot
2	DSC_002	Five 55-gallon drums on south side of 123 Main Street, Anywhere, AK (ACME)	Establishing Shot
3	DSC_003	Black oily substance petroleum like substance spilled from drum	Medium Shot
4	DSC_004	Spill drum markings for "ACME" and "Used Oil"	Close-Up Shot

Figure 9-8. Photo Log

Minimum Photograph Documentation. Documentation for each photo or group of related photos should include the following information:

- The number of each picture
- The date and time
- Name of the facility and specific location on the premises
- Lighting and weather conditions
- A brief description of the scene, if necessary
- The number(s) of related physical samples (if any)

The photographer is not required to record the aperture settings and shutter speeds for photographs taken within the normal automatic exposure range. However, special lenses, filters, or other image enhancement techniques should be noted.

After the Inspection. The inspector should use the following procedures when storing/handling digital images:

- Number each Storage Media (storage card, smart media, or other card) sequentially and label it with the name of the facility and date taken. Indicate what pictures from the inspection are contained on each.
- Store each incident/inspection's images on one storage media card, if possible, clearly identifying pictures captured for each inspection**.** Images from one incident/inspection should not be split between two electronic storage cards unless the storage media does not have enough memory to store all the images from one inspection/incident.
- Before each inspection create a "head-slate" image label and photograph it. (See Attachment 9-2)
- If images from more than one incident/inspection need to be captured on a single storage card, insert a "blank" image after the "head-slate" image.
- Ensure that there is adequate space on your hard drive, and as soon as possible after each incident/inspection, download the images from the camera's storage media to the hard drive of the computer, verifying that the images have been successfully transferred. (Note: Do not change the images in any way).
- Using the downloaded images, copy them to a CD-R, other removable permanent storage media, or a "Read-Only" computer folder to create the archival copy.
    - Label the archival copy or folder with the time, date, name of facility/site, and "Archival Copy".
    - File the archival copy with inspection report in a secure location.
- Once an archival copy is securely filed, the original storage media may be erased and re-used.
- Create a second copy of working images from the downloaded images to use for enhancements such as cropping or contrast. Label this "Working Images".
    - If any images are changed, save each change as a separate file so that it can be replicated, if necessary.
    - Note any image changes and record the file numbers on the photo log and include it with the Inspection Report.

D. DRAWINGS AND MAPS

As the inspector records observations at a facility, some things prove difficult to describe in words or photographs, yet they may be essential to the story. These must be captured in visual notes such as drawings, maps, charts, and schematic diagrams. Such visual notes can be important evidence in court, and they are helpful in composing the inspection report.

Drawings and maps can provide graphic clarification of site location relative to the overall facility, the parameters of a spill or contamination, the relative height and size of objects, and other information which, in combination with samples, photographs, and other documentation, can produce an accurate, complete evidence package.

Formal maps, prepared by cartographic techniques and based on notes made in the field, are also required for some purposes.

All the forms of visual notes described here should be referenced in the field logbook at the time they are made. A drawing or sketch can be entered directly into the logbook itself; this integrates it clearly with other notes in chronological order.

Maps

A rough map drawn during the inspection can be a valuable piece of evidence. A judge or jury will hear many facts during a trial and may have difficulty remembering them. A map of the site provides a frame of reference onto which they may hang these otherwise forgettable facts. Even if it is necessary later to draw up a more presentable map, the original drawing corroborates what the inspector saw at a facility.

A map also helps the judge or jury form a mental picture of the facility through the eyes of the inspector. The layout of a facility can be hard to grasp when a person hears it described in words. Anyone who has tried to get around in an unfamiliar city knows the difficulty of learning a layout. A map helps the viewer across this hurdle.

Some types of maps the inspector may make are:

- General map of the facility;
- Map showing where photos and samples were taken;
- Map showing where potentially non-complying situations were observed;
- Map showing the layout of a particular part of the facility on which the inspection focused major attention.

Sometimes a prepared map is used in the pre-inspection planning, to select sample sites or plan the inspection effort. It may be useful to take a copy of this map along on the inspection and enter notes on it to show where samples, photos or other observations were taken. Notes on this map should be cross-referenced to notes in the logbook.

Informal maps drawn by the inspector should be simple and free of extraneous details. Basic measurements and compass points should be included to provide a scale for interpretation.

Maps should be signed and dated. If drawn separately from the logbook, each map should be numbered, signed and dated, and cross-referenced in the logbook at the appropriate point in the chronology. Formal site maps prepared by cartographic techniques are often prepared for hazardous waste site investigations and some other investigations that may result in enforcement actions. The inspector should consult with program managers about the need for such mapping in a particular situation and about how to secure cartographic services.

Sketches and Diagrams

Sketches, diagrams, and other visual notes can be used to capture features that may not be clear in photographs. Although not as accurate or credible as a photograph, such drawings are a good backup method where photography cannot do the job. Sometimes a photograph would contain so much detail that the crucial features are not clear or would require too much explanation. In such cases a good, sketch diagram can be invaluable.

Tips on Making Sketches and Diagrams

Before beginning a sketch, the inspector should obtain a comprehensive view of the scene. Determine the sketch limits – decide what to include and what to exclude. If the scene is complicated, a number of sketches may be necessary for adequate documentation. There are primarily three types of sketches.

- **Overview sketch** – consists of a bird's-eye-view or floor plan sketch of the scene. This is the most common type of sketch and consists of items on the horizontal plane.

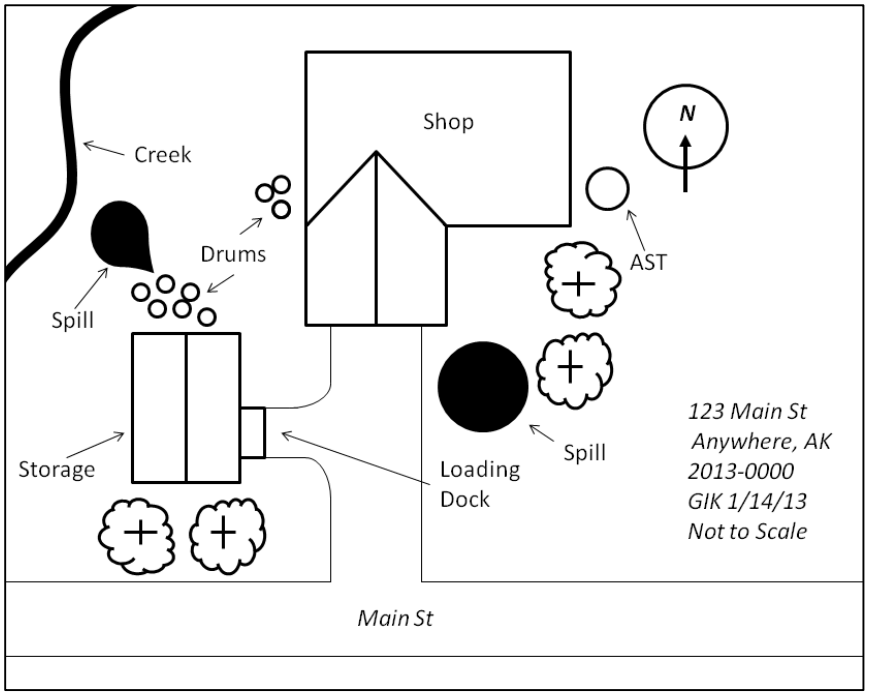


Figure 9-9. Overview Sketch

- **Elevation sketch** – portrays a vertical plane rather than a horizontal plane. Examples include oil and chemical spills on vertical surfaces such as topographical features (i.e. hills).

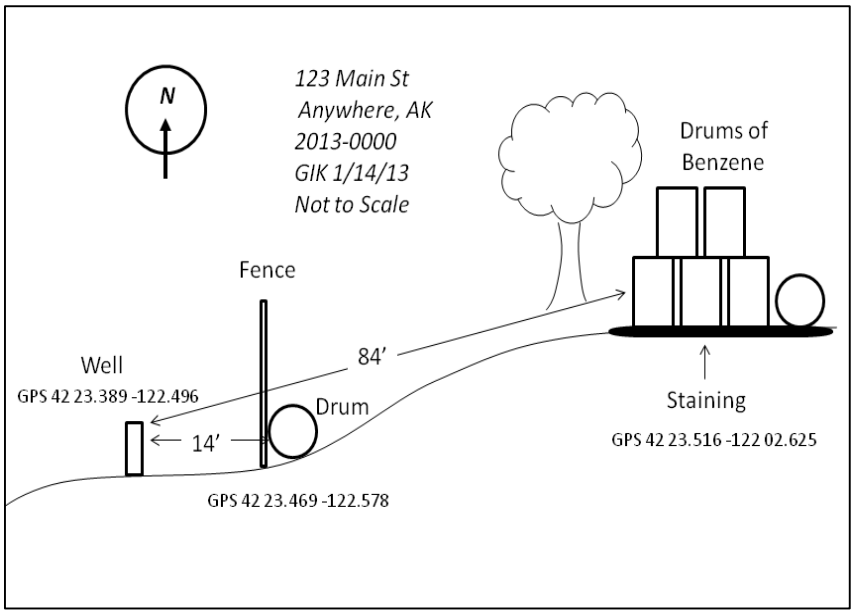


Figure 9-10. Elevation Sketch

- **Exploded view or cross-projection sketch** – consists of a combination of the first two sketches. It is similar to a floor plan except the walls have been laid out flat and objects on them have been shown in their relative positions.

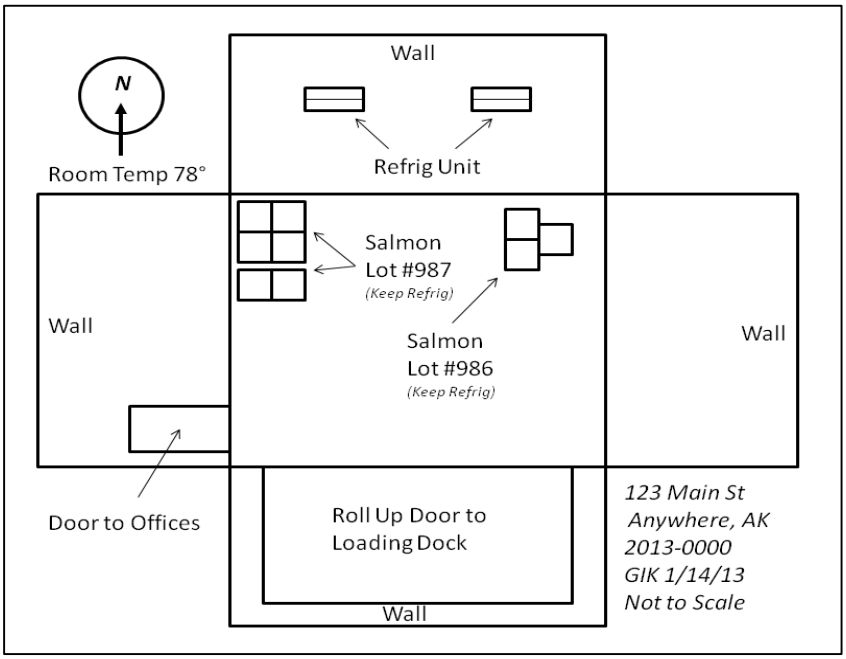


Figure 9-11. Exploded View or Cross-Projection Sketch

To Scale or Not to Scale

- **<u>"Drawn to Scale" diagrams</u>.** To avoid a distorted view of the scene, measurements must be reduced in proportion so that they bear correct relationship to each other. Select the scale of the diagram by fitting the longest dimension in the scene to the area of the paper being used. Graph paper should be used when creating this type of sketch. Each block represents a specified length of measurement. Use convenient units for the scale (one block = 1 foot).

- **<u>"Not to Scale" diagrams</u>.** The sketch can be accomplished more quickly than a scaled diagram. Items are placed in the diagram based on approximation. This type of diagram may provide a distorted view of the scene. Correct proportions and relationships between objects may not be maintained. Measurements are recorded on the sketch or in a chart. This rough sketch may be used to complete a scaled diagram later. These diagrams should be clearly marked "Not to Scale."

Creating the Sketch. If the scene is large, the inspector should make a very rough sketch of the area while obtaining an over-all view of the scene. This initial rough sketch serves as a reference when making more complete sketches. Enlarged sections of this rough sketch can be made as separate drawings in order to bring out greater detail.

Begin taking measurements and laying out a rough sketch.

- Lay down a baseline. This usually consists of the longest uninterrupted side of a room or, if outdoors, the curb line, building line, or even an imaginary line between two fixed points.
- Take other measurements of the periphery of the scene and add them to the baseline.
- Having established the outer boundaries of the sketch, add various objects in their proper positions.

Measurements – write them down!

- Measurements can be recorded directly on the sketch or in a chart.
- Long distances may be measured with a vehicle odometer.
- Critical measurements should be checked by two people.

Locating Objects on a Sketch

All points require two measurements for a two-dimensional sketch.

- **Rectangular coordinates** – an object is located by making a measurement at right angles from each of two walls. Works well for indoor measurements

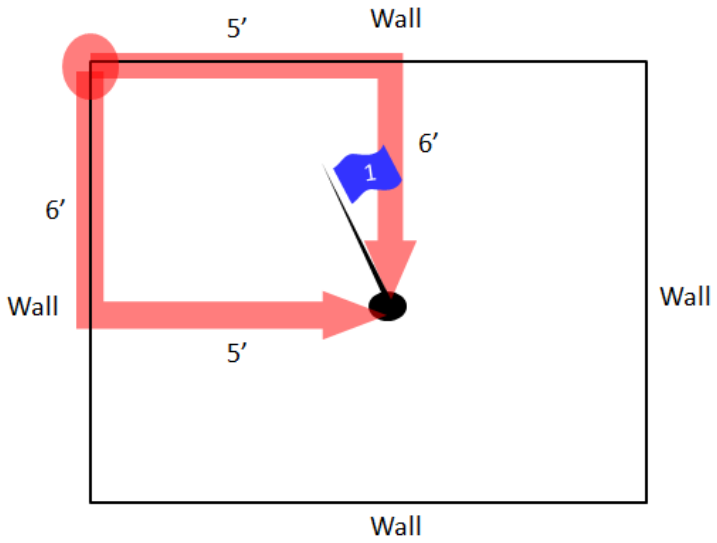


Figure 9-12. Rectangular Coordinates.

Item 1 is located using rectangular coordinates.

- **Transecting baseline** – particularly useful in large, irregularly shaped outdoor areas.
    - Transect the area by laying down a tape measure along some convenient line so it crosses the entire area
    - Locate this line in the diagram from fixed points at the scene.
    - Locate objects in the sketch by measuring their distance from this established baseline. Measurements must be taken at right angles to the tape.
    - Record how far along the baseline the distance out to the object was measured. This provides the two measurements needed to locate the object.

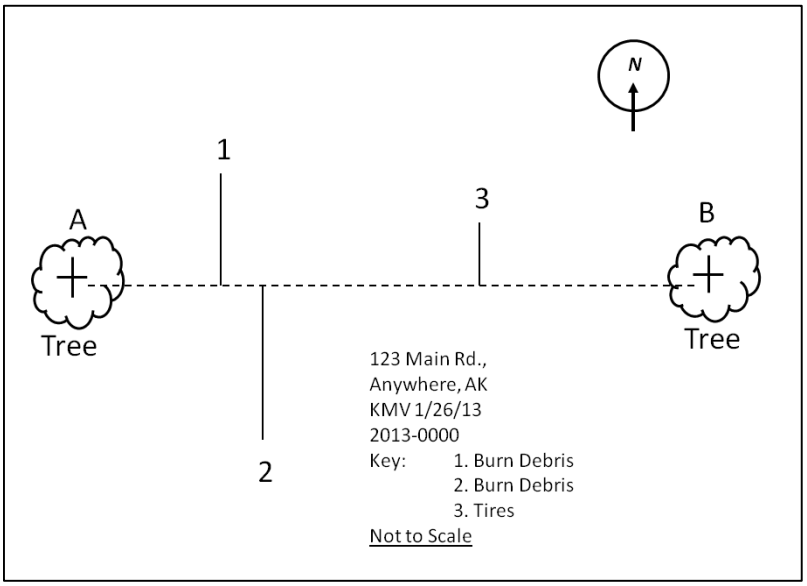


Figure 9-13. Transecting Baseline.

The dotted transecting baseline AB is between two trees (trees can be marked with orange paint for later identification). The two measurements needed for each point are (1) how far each item is from the baseline (solid lines north and south) and (2) how far east on the dotted baseline from point A the objects are (distance to where the solid lines intersect the dotted line).

- **Triangulation** – measurements are taken from two fixed points at the scene to the object you desire to locate. For example, item 1 in Figure 9-14 is located by taking measurements (length of the dotted lines) from two corners of the building. Note: Make sure to measure the distance between the two fixed points.

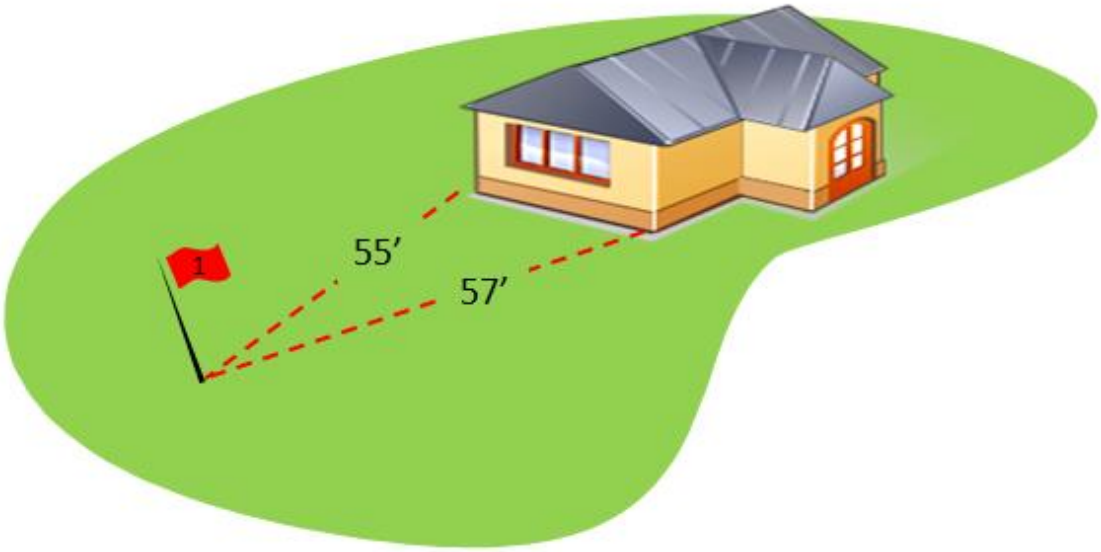


Figure 9-14. Triangulation

Item 1 is located using triangulation from the two corners of the building.

Illustrating the Sketch

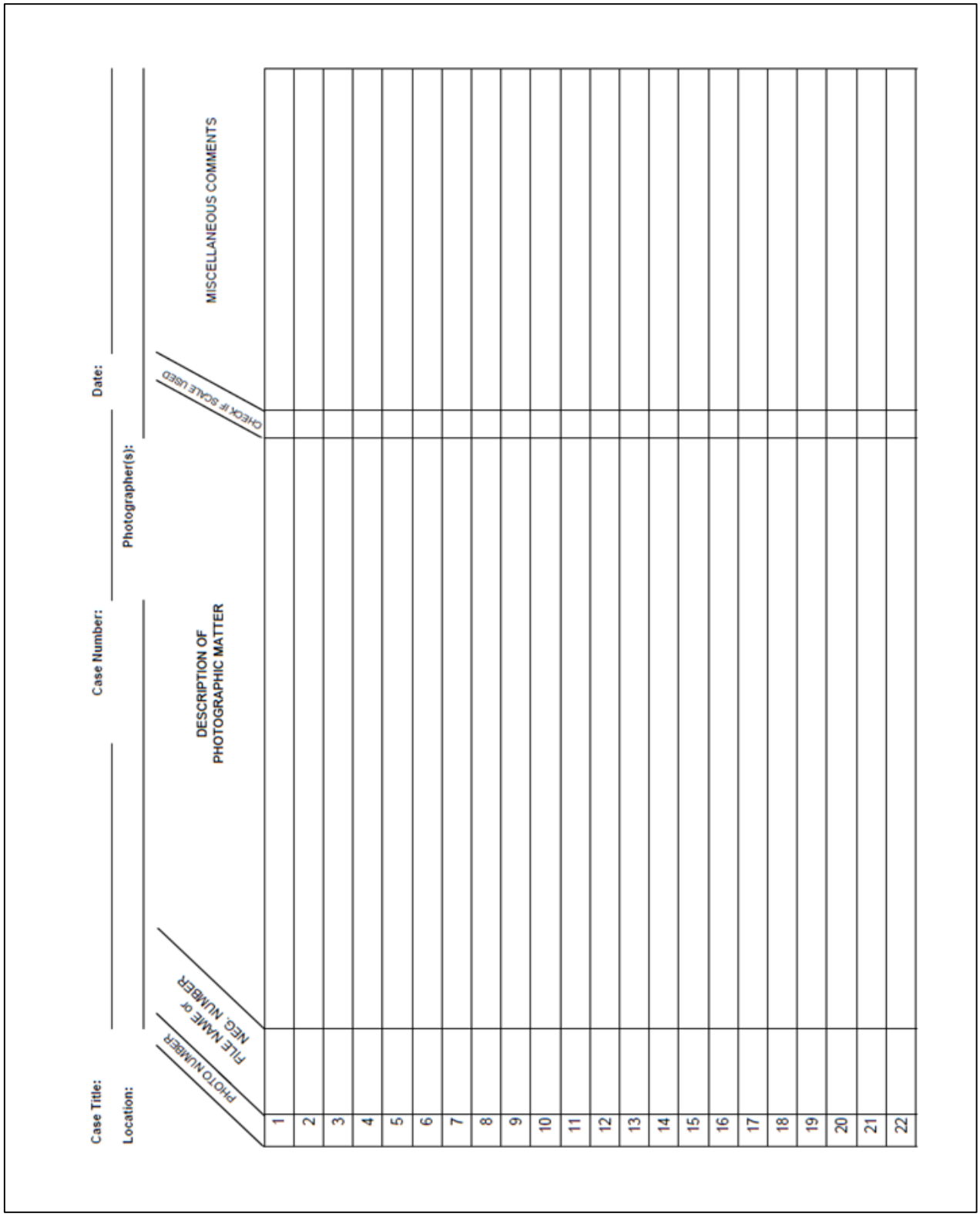
- Do not attempt to draw an object as it appears. Use symbols instead.
- Use lettered or numbered squares, circles, figures, or points to represent various objects in the sketch. Explain in the diagram key what these objects represent.
- If photography markers are used, ensure they correspond to same objects in the sketch. For example, if photo marker #5 is used to mark a 55-gallon drum, make sure the 55-gallon drum in the sketch is labeled #5.

Labeling the Sketch

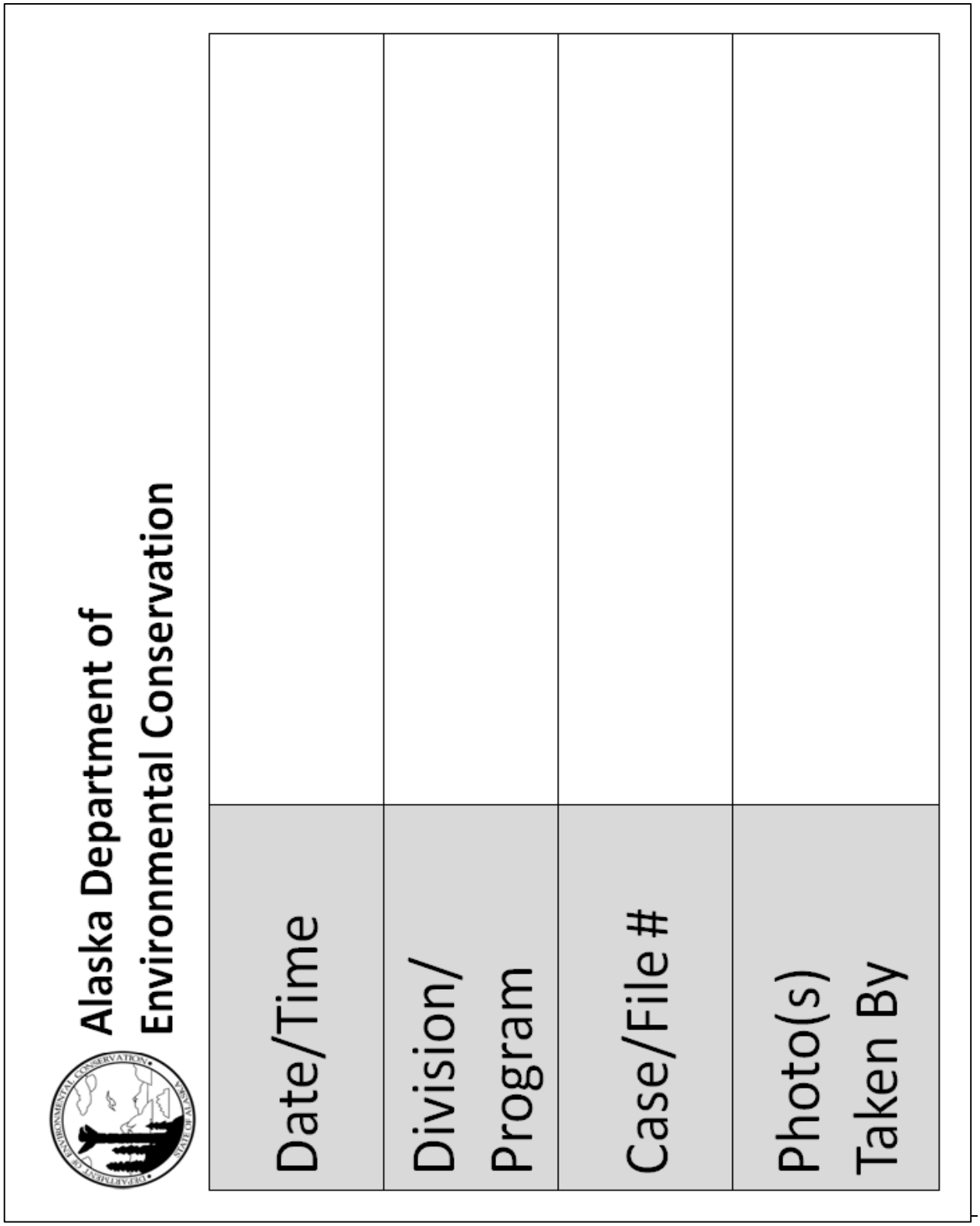
The following should be recorded on the sketch:

- Address or location of scene.
- Case/File Number.
- Date sketch was made and by whom.
- A key to identify the different objects in the sketch if not self explanatory.
- An arrow to show the direction of north.
- Scale used for the sketch or the statement "Not to Scale".

Attachment 9-1 Photograph Log



Attachment 9-2 Photograph & Video Head Slate



PHYSICAL SAMPLING

Chapter 10

A. OVERVIEW

Physical sampling plays a fundamental role in DEC's enforcement effort. The term physical sampling as used here means collecting tangible, physical samples of soil, water, air, waste streams, or other materials. Many enforcement actions are supported by the results of taking, recording, and analyzing physical samples and the measurements of physical conditions that are taken in association with sample collection.

Physical samples confirm the presence and concentration of contaminants or pollutants; they can also indicate the operating conditions of key processes or equipment at a facility. In enforcement efforts, sampling results are used for two principle purposes: (1) as evidence to substantiate suspected violations; and (2) to determine the extent of environmental contamination, such as might be needed to calculate an appropriate penalty amount.

There are three basic types of sampling:

- Container sampling (e.g., samples drawn from tanks or drums)
- Environmental sampling (e.g., soil, water, air)
- Biological sampling (e.g., plants, fish)

This chapter is not intended to teach inspectors how to sample. Rather, the purpose of this chapter is to provide inspectors with a basic understanding of the principles and procedures involved in sampling for evidence purposes. It provides only an overview of the considerations involved in collecting representative samples of high quality. Specialized training on sampling procedures should be addressed through program-specific training.

Not all DEC inspectors actually conduct physical sampling. However, they are likely at some point to request others (such as other staff from DEC or contractors) to conduct sampling, will need to use the results of sampling inspections in their work, and/or will review the results of sampling conducted by the regulated community. Consequently, inspectors should be familiar with what

goes into planning for and conducting a quality sampling effort. This knowledge will help inspectors:

- Communicate sampling needs effectively, particularly with regard to establishing sampling objectives and data quality requirements.
- Make realistic projections of the costs and time required for carrying out sampling and obtaining the results, and
- Consider data quality limitations when interpreting and using sampling data.

Each potential sampling situation involves many decisions, starting with the first decision that a sample is or is not needed. Whenever sampling is undertaken, additional decisions are made to assure that the following three key elements of a good sampling effort are addressed:

- Well-articulated objectives and plans to meet them. The first step in a sampling effort is establishing its objectives, including decisions regarding the quality of data that is required to meet the objectives. To provide DEC with data that accurately reflects the relevant conditions present at a site or facility, a comprehensive sampling and sample analysis plan must be developed for every inspection.

- Observance of policy and procedures. Specific policies and procedures have been developed to ensure efficient and effective sampling evidence gathering. These procedures – which encompass the many detailed components of sampling and documentation procedures – are designed to help ensure evidence generated by inspectors will be admissible and credible in court, balancing this need with practical and cost considerations. Inspectors are expected to follow these procedures.

- Established context and relevance to the regulations and site conditions. In compliance inspections, the principal purpose of physical sampling is to determine if a site or facility is in compliance with requirements specified by the Department's regulatory programs. While the collection of samples of materials may be an integral component of an inspection, associated measurements of physical conditions (e.g., wind, temperature, pH) at the site and the analysis of the samples are equally important. Without both quantitative analytical data and qualitative descriptions to support the physical samples collected at the site, the results obtained from a sampling inspection will be of little practical value.

Note: The term "physical sampling" is defined broadly to include measurements of physical conditions such as temperature, wind conditions, and pH which are also often taken in a sample collection effort.

B. POLICY CONSIDERATIONS IN SAMPLING

Planning and conducting an inspection involves decisions regarding whether physical samples are needed and, if so, how the sampling should be carried out. The policy considerations involved in sampling focus largely on the question of whether physical samples are needed in a given inspection situation. Once a decision is made to take samples, other policy questions meld with technical issues and must be resolved before sampling begins. Such policy/technical issues, covered in subsequent sections of this chapter, include establishing the objectives of the sampling and assuring the data collected will be of the quality and representativeness needed to meet these objectives.

Samples as Evidence

The physical samples taken during a compliance inspection or investigation are often the key evidence substantiating that a violation occurred (or demonstrating that the facility is in compliance). Depending on the regulation involved, samples may be needed to show:

- A particular regulation applied to the site or facility
- A permit standard has been exceeded (e.g., a waste stream has a higher concentration of pollutants than allowed by the permit)
- The extent of a contamination problem (i.e., contamination has seeped from the soil under a leaking tank to the ground water).

In order for the results of physical samples to be readily accepted as evidence in court, the samples must be of known quality, collected following sound technical procedures, and representative of conditions at the location where they were collected.

Program-Specific Guidance on Sampling Decisions

As noted earlier, not all inspections involve collecting physical samples. Guidance established by each regulatory program should provide general direction on when to sample at a site. Inspection protocols should prescribe specific activities (records review, interviews, observations, and/or physical sampling) that should be conducted in order to assess and document compliance.

Sampling Decisions in the Field. The wide varieties of field situations encountered make it virtually impossible to specify in advance in all cases whether samples should or should not be taken. The final judgment must be made by the inspector in the field. Inspectors should become familiar with the priorities assigned to various types of violations in the penalty and enforcement response policies of their programs. This knowledge will assist them in determining sampling and

other documentation needs. The guidelines below set out the general principles for sampling and priorities for the types of situations in which sampling should be undertaken.

General Guidelines for Sampling

1. Take a sample whenever one is needed to prove a violation. This would mean taking a sample of any material that needs to be verified as containing the substance(s).

   Example: To show that an industrial discharger is exceeding the permit limit for a parameter, there must be proof that the discharge actually contains the constituent above the permitted amount.

2. Sample only when there is reason to suspect the substance is present. Unless there is some reason to believe that the regulated substance at issue is present, there is little likelihood of finding it through indiscriminate sampling.

   Example: If there is no independent reason (e.g., a statement by a facility employee) to suspect that the several stacks of drums that are observed contain hazardous waste, there is no reason to assume that they do.

   On many inspections, a very large number of samples would have to be taken, resulting in an unduly long inspection and unreasonable backlog of samples to analyze. Further, it may be logistically impossible to collect and transport that many samples. Thus, there is a third rule.

3. Always attempt to verify the presence of the substance by a means other than sampling. The most common sources of independent verification of the presence of the substance are records, nameplate or label information, and statements by facility personnel (which may or may not be correct). Other sources include obtaining information on raw materials, process operations and waste streams. Such sources may be contested, but experience to date indicates that usually they are not. Thus, sampling may become less important when there is other evidence of the presence of the substance (or an amount in excess of a limit) although there is always the potential that records and/or labels are erroneous or falsified.

   Example: A company's self-monitoring reports show levels in excess of the permit limit for a given constituent or constituents; or a facility employee states that waste oil is placed in the indicated drums.

These general rules would assure the best case preparation in all instances, but they are sometimes impractical to observe.

C. TECHNICAL CONSIDERATIONS IN SAMPLING

Several technical issues must be considered to assure the sampling data collected on an inspection will be of a quality sufficient for the Department to draw a proper conclusion about the compliance status of a facility and will be viewed as credible evidence substantiating the Department's position should an enforcement action be pursued.

While this objective is relatively straightforward, meeting the objective involves many decision and actions regarding how samples will be collected and analyzed. These include such decisions as determining:

- The number, location, and type of samples and/or measurements that will be taken;
- The specific techniques that will be used to collect the samples;
- The volume of samples that will be collected; and
- How the samples will be managed in the field (e.g., sample preservation, packing and shipping).

As a means for ensuring that each sampling effort goes through a careful thought process before it is undertaken, a Quality Assurance Project Plan (QAPP) should be prepared in advance. This planning activity is designed to make sure each sampling collection and analysis effort will meet its intended objectives.

D. QUALITY ASSURANCE/QUALITY CONTROL

Department staff should be familiar with the policies and objectives outlined in the QAPP to assure proper interaction between the field, laboratory, and data management. Quality assurance/quality control (QA/QC) is a process that should be used in all phases of the sampling inspection effort from the planning stage through the final report preparation. In order to meet the sampling objectives, QA/QC procedures should be followed throughout the effort. The objective of QA/QC is to produce data that meet the user's requirements and satisfy the sampling objectives.

The quality assurance project planning activities described here are designed to assist in generating data that are complete, precise, accurate, representative, and comparable. Following these guidelines should enable the inspector to answer the following questions:

- What data are needed for evidence?
- Does the collected data represent the activities at a site or facility?
- Has the proper data been collected?

- Can the collected data be defended?

Quality Control (QC) - is (or should be) a normal part of good field and laboratory practice. It is the "built ins" included in methods to be sure the data generated is the data desired. QC includes all of the procedures applied to data collection and generation activities in order to achieve and maintain a desired level of data quality as established by program managers.

- The desired level of data Quality should be based on the intended use of the data. The QC should include all of the technical controls used, such as sampling and analytical methods; use of blanks, replicate, and duplicate samples; inclusion of performance or standard samples; and standard curves and statistics.

- Controls start with the design of the data acquisition project and carry through to the ultimate data reporting and completion of all of the documentation of the use of these controls.

Quality Assurance (QA) - refers to the procedures used by program management to assure the QC is what is required and it is being adhered to at any point on the project.

- QA constitutes the overview and monitoring processes designed to be sure the quality of the data generated meets the desired levels as established by management.
- These controls include establishing data quality objectives based on the intended use of the data, the institution of procedures for formalizing planned documents prior to the initiation of data collection activities, and the use of audits to identify problems in QC.

Data Quality. The quality of data is traditionally expressed in terms of precision, accuracy, representativeness, comparability, and completeness. A brief definition of these terms is included below.

- **Precision** - the reproducibility of the data.
- **Accuracy** - the closeness of a measured value to the true value. Two parameters that indicate data accuracy are bias and confidence levels. Bias is the difference between the average value of a set of measurements of a standard and the reference value of a standard. The confidence level is an estimate of the reliability of a sample value.
- **Representativeness** - the extent to which the data characterize the environmental condition of the site or operation in question.
- **Comparability** - the equivalency of the data sets.
- **Completeness** - the measurement of the confidence with which the data resulting from a collection activity meets the sampling objectives.

E. QUALITY ASSURANCE PROJECT PLAN (QAPP)

A QAPP should be prepared for each sampling inspection. This is necessary to ensure the data collected meets and satisfies the sampling objective. However, while a QAPP needs to be prepared for every sampling effort, it can build on the established Standard Operating Procedures (SOPs) that have been prepared on a program-specific basis. While the SOP is usually too generic to be applied directly to each sampling effort, it does provide a framework for building a QAPP. Therefore, a QAPP can be very lengthy and involved, for example if applied to a complex field investigation, or it may be very abbreviated, relying upon existing procedures. However, whether it is prepared in advance, or constructed on-site, the thought process must be the same.

The purpose of preparing a QAPP is to initiate a thought process in which the inspector thinks through, in overall terms, the design of a sampling plan that will meet the sampling objectives. The QAPP must be flexible enough to allow the sampling objectives to be met despite changes and modifications that may occur in the field. However, if the QAPP is modified, all of the changes need to be documented to show that changes have not compromised the sampling objectives.

Elements of a QAPP. The format and outline used for quality assurance plans vary, but the content will generally include the items discussed below.

- Project Description and Site Location. This element documents the what, where, and why of the project being conducted. It should include some of the history and the justification for the project, and deals with the physical aspects defining the project area, space, and environmental concerns requiring the generation of data.

- Project Measurement Objectives. This states the information requirements of the project. They may be defined by regulatory specifications or may be based on enforcement needs requiring investigative procedures developed scientifically to address one particular site or type of problem. Ideally, this will be a joint decision of both, the inspector / investigator and the project manager.

- Sample Rationale and Network Design. This describes the decision process for taking samples or measurements at particular sampling points. Although such decisions (rationale) are site related, the mechanism of selecting the actual sampling points (network) is a mixture of applied statistics, regulatory requirements, enforcement needs, and common sense.

- Analyses Rationale. This is designed to help the preparer of the QAPP document the required information relevant to analytical methods. This element of the QAPP initiates

the paper trail of physical accountability of the project. It is here that some of the field QC samples normally used are designated as QA samples, and so listed.

- Data Quality Objectives. This lists what elements, compounds, classes of compounds, and/or physical data are required. Tied to this is the method(s) the planners have chosen (usually from experience, consultation with the laboratory, or because of regulatory requirement) to best generate the type of data desired and help ensure data comparability. The method listed usually spells out the detection limit, and should help define precision and accuracy for the total measurement system, or at least for the analyses specified.

    - The complete information lets the planner define the actual amount of data generated, and be certain that sufficient data are acquired to satisfy the plan and its validity. It provides a built-in control to be sure that the actual samples taken are analyzed and reported, or that their loss results in a corrective action. The data quality objectives are used to ensure the data are representative of the actual site conditions and the results should be expressed in terms or units comparable with previously collected data.

- Sample Procedures to be Used. This section identifies what procedures are to be used. It should result in a professional understanding of both technical and management special considerations.

- Sample Custody and Documentation. This is the core of the paper trail. It is important to remember that these procedures are designed to protect the integrity of the evidence and the sampler; he or she may be called upon years later to testify about the sampling.

- Calibration Procedures and Frequency. Designed mostly for physical measurements in the field and laboratory, this is generally best dealt with by use of SOPs which define calibration and standardization procedures, required frequency, and operational checks (e.g., zero and span adjustments). It is also the place to list acceptable deviations, or cite alternate approved methods. Field expedients are acceptable, provided they do not compromise data required by a regulation, are technically sound, and are completely documented.

- Preventative Maintenance. This is an extension of the above, but more concerned with the instruments used and documenting their consistent condition. This section is best satisfied if both laboratory and field instruments were covered in a SOP listing each manufacturer's operational and maintenance recommendations.

- Corrective Action. Samplers have some flexibility in meeting QA/QC requirements when actually conducting field operations. If in the sampler's professional opinion, the field operation cannot be performed as described in the plan, the sampler can exercise his or her training, ability, and professional innovativeness in generating the data required. The sampler can add or subtract samples or other activities, provided that the changes and the reasons for the actions are documented. The sampler must justify his or her actions later on, but if there was sufficient cause to deviate from the plan, there should be no problem with addressing the issues covered in the Corrective Action Checklist.

- Sample Alterations. The same philosophy applies as above, but is aimed more at the actual measuring or analyzing protocols used both in the field and in the laboratory. They both supply defensible reasons for deviations from a plan, and track changes in the amount of data generated for a specific plan.

Coordination of QAPP Preparation. During the development of the QAPP for a sampling effort, the inspector should interact with laboratory staff, program staff, and the Attorney General's Office, if needed. The laboratory staff can participate in the development of the sampling plan and provide insight into the type of sampling that needs to be conducted. In addition, the laboratory staff are a resource to be used in the data interpretation phase, particularly if data irregularities develop. Working with other program staff in developing the QAPP can help the inspector to understand what evidence needs to exist for sampling a site or facility.

Modifications to the QAPP. When faced with a situation during a field sampling effort that is either unexpected or unanticipated, the inspector must decide on an appropriate response. The inspector should be able to recognize the need to modify the QAPP based on conditions observed in the field. Spontaneous sampling can be appropriate if the inspector has gone through the same series of decision-making processes that went into the original QAPP. It is important to know just how far the QAPP can be modified without compromising or altering the original sample objectives. In order to do that, the following questions need to be addressed:

- Can the original objectives still be met?
- Can the sampling be satisfactorily done with the existing equipment?
- Is it safe to sample?

Whenever a QAPP has been modified or adjusted, all changes must be documented in the inspector's field notebook. Included in this documentation should be the rationale for any modifications and what course of action, if any, was taken to modify the sampling plan. (See Attachment 10-1 and 10-2)

F. SAMPLE DOCUMENTATION

Sample documentation procedures include means of establishing both chain of custody and the precision, accuracy, and representativeness of the samples. The procedures discussed below cover the basic elements that should be a part of all sample documentation procedures. Inspectors should also become familiar with any additional or different documentation procedures for their location.

The basic procedures are designed to assure that an inspector will be able to testify that a particular sample was drawn from a particular location at a particular time, describe the procedures that were used to obtain the sample, and explain how the integrity of the sample was secured.

The basic procedures are:

- Documentation of objectives and methodologies to establish precision, accuracy, and sample representativeness, including records of:
    - Field measurement and sampling process
    - Laboratory analytical methodology
- Documentation procedures to establish chain of custody, including records of:
    - Chain of custody initiation
    - Sample identification
    - Sample seal
- Field logbook entry and other documentation approaches

Documentation of Precision and Accuracy

Field Measurement and Sampling Process. The procedures used for collecting and handling samples and performing field measurements in the sampling process should be documented as written procedures or by citing appropriate references containing detailed sampling procedures. The procedures should be detailed enough to ascertain the:

- Exact location where each sample was collected
- Types of sample containers used for each parameter or group of parameters
- Sample container preparation process
- Sample collection process
- Sample preservation and handling
- Type and frequency of calibration and maintenance of field analytical procedures
- Calibration and maintenance of field instruments
- Identification and documentation of samples
- Custody of samples collected

Chain of Custody

For a further discussion on chain of custody as it relates to the admissibility of physical samples (and other collected materials) as evidence, refer to Chapter 4 of this manual.

Chain of Custody Procedures. The concept of custody requires the maintenance of several procedures to ensure the authentication of the sample. These procedures begin with the identification of the sample and continue through the laboratory analysis process.

- **Establishing Custody**. Sample custody is initiated at the time of collection by sealing the sample with evidence tape (see Figure 10-1).

- **Preparing Sample Documentation.** An important aspect of the chain of custody is the preparation and maintenance of written information describing the collection, shipment, and storage of the sample. Preparation of this documentation is the responsibility of the inspector and lab personnel. Properly maintained, this documentation will serve as a clear and complete account indicating that the sample offered into evidence was the same one which was collected.

The documentation includes, but is not limited to, the entries in the inspector's field notebook, sample labels, and the Chain of Custody Record.

- **Coordinating sample and documentation.** The inspector needs to assure that the relationship between the physical sample and the related documentation is clear, complete, and accurate. The sample number, date, and inspector's initials should appear on all documents, and the forms should be completed accurately and completely.

- **Ensuring custody during transit.** Shipment of samples to the laboratory should involve the following procedures:

    - Samples must be accompanied by the Chain of Custody Record. Copies of documents should be retained by the originator.
    - If sent by common carrier, a bill of lading should be obtained.
    - All receipts and shipping documents should be included in the Chain of Custody documentation.

Initiating Chain of Custody Record. Preparing the Chain of Custody Record initiates the process that controls and records access to the sample once it has left the inspector's possession. The sample number relates the sample to the Record which accompanies the sample through all the processing stages.

Field Logbook Entry. The inspector's entry in the field logbook is the principal reference for the sample. The following information should be included about each sample collected:

- Sample identification number
- Any other unique identifying marks on the container
- Date and time of collection
- Description of specific location of collection and sketch or photograph if applicable
- Collection method (should include collection equipment; field analytical equipment; all calculations, results, and calibration data for field sampling analytical, and physical measurement equipment. All sampling and field analyses must be traceable to the type of equipment used and the inspector who did the work).
- Rationale for selecting the sample and representativeness considerations
- Description of any deviations from standard protocols
- A note regarding provision to the facility of duplicate or split samples, if appropriate.

Sample label. Each sample container should be marked immediately upon collection with sample information with an adhesive sample label. In some cases, particularly with biological samples such as vegetation, the information may have to be included with or wrapped around the sample.

Sample Seal. Once the sample has been collected and tagged, its container should be sealed with evidence tape (see Figure 10-1) or placed inside a self-sealing plastic bag. The inspector should first write his name or initials, and the date on the container or bag. The sample container

or wrapper should be sealed so it may not be opened at any point without breaking the seal and/or the original unit package. Not more than one sample should be sealed under one seal.

Figure 10-1. Sample Seal

Attachment 10-1 Model Quality Assurance Project Plan (QAPP)

QUALITY ASSURANCE PROJECT PLAN

[Title of Project (or portion of project addressed by this QAPP)]

Prepared for:
[Enter the contact information including affiliation and physical address]

Project Identifier/Case No. **[Enter specific identifier]**

Prepared by:

[Enter the contact information including affiliation and physical address]

[Enter date]

SECTION A – PROJECT MANAGEMENT

A.1 Title of Plan and Approval

Quality Assurance Project Plan
[Enter Title of Project]

Prepared by:
[Enter Affiliation]

_____ Date: _____
[Enter name, Organization], Project Manager / Principal Investigator

_____ Date: _____
[Enter name, Organization], Quality Assurance Manager (or equivalent)

_____ Date: _____
[Enter additional contacts, as needed]

_____ Date: _____
[Enter additional contacts, as needed]

A.2 Table of Contents **[TOC must be regenerated upon completion of QAPP content]**

A.3 Distribution List

List the individuals and their division, program, etc that need copies of the approved QA Project Plan and any subsequent revisions, including all persons responsible for implementation (e.g., project managers), the QA managers, and representatives of all groups involved.

Name, Agency/Company, Title, other contact information as needed

A.4 Project/Task Organization

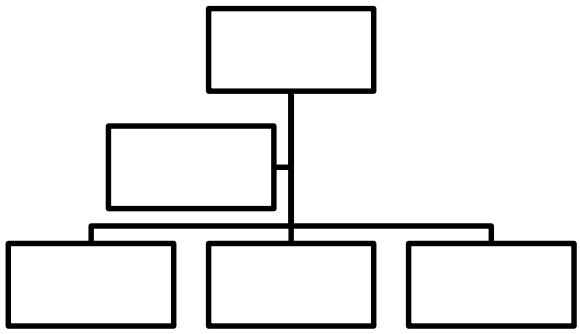
Identify the individuals or organizations participating in the project and discuss their specific roles and responsibilities. Include the principal data users, the decision makers, the project QA manager, and all persons responsible for implementation. Project QA manager position must indicate independence from unit colleting/using data.

Table A.1 Roles & Responsibilities

Individual(s) Assigned	Responsible for:	Authorized to:
[Name]	**[Responsibility]**	**[Action]**

Provide a concise organization chart showing the relationships and the lines of communication among all project participants. The organization chart must also identify any subcontractor relationships relevant to environmental data operations, including laboratories providing analytical services.

Figure A.1 Organization Chart



A.5 Problem Definition/Background

State the specific problem to be solved, decision to be made, or outcome to be achieved.
Include sufficient background information to provide a historical, scientific, and regulatory perspective for this particular project.

- ***Clearly state problem to be resolved, decision to be made, or hypothesis to be tested***
- ***Historical & background information***
- ***Cite applicable technical, regulatory, or program-specific quality standards, criteria, or objectives***

A.6 Project/Task Description

Provide a summary of all work to be performed, products to be produced, and the schedule for implementation. Provide maps or tables that show or state the geographic locations of field tasks. This discussion need not be lengthy or overly detailed, but should give an overall picture of how the project will resolve the problem or question described in A.5.

- ***List measurements to be made/data to obtain***
- ***Note special personnel or equipment requirements***
- ***Provide work schedule***

A.7 Quality Objectives & Criteria

Discuss the quality objectives for the project and the performance criteria to achieve those objectives. EPA requires the use of a systematic planning process to define these quality objectives and performance criteria.

- ***State project objectives and limits, both qualitatively & quantitatively***
- ***State & characterize measurement quality objectives as to applicable action levels or criteria***

SECTION B – DATA GENERATION & AQCUISITION

B.1 Sampling Process Design (Experimental Design)

Describe the experimental data generation or data collection design for the project, including as appropriate:

- ***Types and number of samples required***
- ***Sampling network design & rationale for design***
- ***Sampling locations & frequency of sampling***
- ***Sample matrices***
- ***Classification of each measurement parameter as either critical or needed for information only***
- ***Validation study information, for non-standard situations***

B.2 Sampling Methods

Describe the sampling procedures:

- ***Identify sample collection procedures.***
- ***Identify sampling methods and equipment***
  - ***Sampling methods by number, date, and regulatory citation, where appropriate***
  - ***Implementation requirements***
  - ***Sample preservation requirements***
  - ***Decontamination procedures***
  - ***Any support facilities needed***
- ***Describe specific performance requirements for the method.***
  - ***Address what to do when a failure in the sampling or measurement system occurs***
  - ***Who is responsible for corrective action***
  - ***How the effectiveness of the corrective action will be determined and documented***

B.3 Sampling Handling & Custody

Describe the requirements for sample handling, hold times, and custody in the field, laboratory, and transport. Examples of sample labels, custody forms, and sample custody logs should be included.

B.4 Analytical Methods

Identify analytical methods to be followed (with all options) & required equipment.

- **Specify any specific method performance criteria**
- **State requested lab turnaround time**
- **Provide validation information for non-standard methods**
- **Identify procedures to follow when failures occur**
- **Identify individuals responsible for corrective action and appropriate documentation**

B.5 Quality Control

Identify QC activities needed for each sampling, analysis, or measurement technique. For each required QC activity, list the associated method or procedure, acceptance criteria, and corrective action. State or reference the required control limits for each QC activity and corrective action required when control limits are exceeded and how the effectiveness of the corrective action shall be determined and documented.

Describe or reference the procedures to be used to calculate applicable statistics (e.g., precision, bias, accuracy).

B.6 Instrument/Equipment Testing, Inspection, and Maintenance

Describe how inspections and acceptance testing of instruments, equipment, and their components affecting quality will be performed and documented to assure their intended use as specified.

Describe how deficiencies are to be resolved, when re-inspection will be performed, and how the effectiveness of the corrective action shall be determined and documented.

Identify the equipment and/or systems requiring periodic maintenance and/or calibration. Describe how periodic preventative maintenance will be performed, including frequency, to ensure availability and satisfactory performance of the systems. Note availability & location of spare parts.

B.7 Instrument/Equipment Calibration and Frequency

Identify all tools, gauges, instruments, and other sampling, measuring, and test equipment used for data generation or collection activities affecting quality that must be controlled and calibrated.

Describe or reference how calibration will be conducted using certified equipment and/or standards with known valid relationships to nationally recognized performance standards. If no such nationally

recognized standards exist, document the basis for the calibration. Indicate how records of calibration will be maintained and be traceable to the equipment.

B.8 Inspection/Acceptance of Supplies & Consumables

State acceptance criteria for supplies and consumables and describe how they will be inspected for use in the project. Note responsible individuals.

B.9 Data Acquisition Requirements for Non-Direct Measurements

Identify type of data needed from non-measurement sources (e.g., computer data bases and literature files), along with acceptance criteria for their use. Define intended use and describe any limitations of such data.

B.10 Data Management

Describe data management process from generation to final use or storage. Describe standard record keeping & data storage and retrieval requirements. Provide examples of any forms or checklists to be used.

Describe data handling equipment & procedures used to process, compile and analyze data (e.g., required computer hardware & software). Describe the process for assuring that applicable information resource management requirements are satisfied.

SECTION C – ASSESSMENT AND OVERSIGHT

C.1 Assessments and Response Actions

Describe each assessment to be used in the project including the frequency and type (e.g., surveillance, management systems reviews, readiness reviews, technical systems audits, performance evaluations, data quality).

- **What is expected information from assessment?**
- **What is assessment success criteria?**
- **What is assessment schedule?**

Describe response actions to each assessment.

- **How will corrective actions be addressed?**
- **Who is responsible for corrective actions?**
- **How will corrective actions be verified and documented?**

C.2 Reports to Management

Identify frequency and distribution of reports to inform management of project status:

- **Results of performance evaluations & audits**
- **Results of periodic data quality assessments**
- **Any significant QA problems**

Identify the preparer and recipients of reports, and describe any actions the recipient should take as a result of the report.

SECTION D – DATA VALIDATION AND USABILITY

D.1 Data Review, Verification, and Validation

State criteria for accepting, rejecting, or qualifying data; include project-specific calculations or algorithms.

D.2 Verification and Validation Methods

Describe the process for data validation and verification. Identify issue resolution procedure and responsible individuals. Identify the method for conveying results to data users. Provide examples of any forms or checklists to be used.

D.3 Reconciliation with User Requirements

Describe how the project results will be reconciled with the requirements defined by the data user or decision maker. Outline the proposed methods to analyze the data and determine departures from assumptions established in the planning phase of data collection. Describe how reconciliation with user requirements will be documented, issues will be resolved, and how limitations on the use of the data will be reported to decision makers.

Attachment 10-2 Checklists Useful in Quality Assurance Review

Quality Assurance Review Checklists

This attachment contains two checklists:

1. Sample Handling, Preparation, and Analysis Checklist
2. QAPP Review Checklist

These checklists were developed as tools for managers to screen for completeness of documentation. The items listed on the checklists are not ranked or identified to indicate which items are trivial and which are of major importance. When using these checklists, it is extremely important to ensure that a mechanism is established for assessing and addressing important comments or violations during the data assessment (e.g., Data Quality Assessment [DQA]) stage.

SAMPLE HANDLING, PREPARATION, AND ANALYSIS CHECKLIST

This checklist covers most of the appropriate elements performed during the analysis of environmental samples. Functions not appropriate for a specific analysis should be annotated.

Information on the collection and handling of samples should be completely documented to allow the details of sample collection and handling to be re-created. All information should be entered in ink at the time the information was generated in a permanently bound logbook. Errors should not be erased or crossed-out but corrected by putting a line through the erroneous information and by entering, initialing, and dating the correct information. Blank spaces should have a line drawn through to prevent addition of information. Each set of information should have an identifying printed name, signature, and initials.

<u>Sample Handling</u>

- Field Logs — Documentation of events occurring during field sampling to identify individual field samples.
- Sample Labels — Links individual samples with the field log and the chain of custody record.
- Chain-of-Custody Records — Documentation of exchange and transportation of samples from the field to final analysis.

1. SAMPLE HANDLING, REPORTING, AND ANALYSIS CHECKLIST

FIELD LOGS			
Element	**Y**	**N**	**Comment**
Project name/ID and location			
Sampling personnel			
Geological observations including map			
Atmospheric conditions			
Field measurements			
Sample dates, times, and locations			
Sample identifications present			
Sample matrix identified			
Sample descriptions (e.g., odors and colors)			
Number of samples taken per location			
Sampling method/equipment			
Description of any QC samples			
Any deviations from the sampling plan			
Difficulties in sampling or unusual circumstances			
SAMPLE LABELS			
Sample ID			
Date and time of collection			
Sampler's signature			
Characteristic or parameter investigated			
Preservative used			
CHAIN OF CUSTODY RECORDS			
Project name/ID and location			
Date and time of each transfer			
Carrier ID number			
Integrity of shipping container and seals verified			
Standard Operating Procedures (SOPs) for receipt on file			
Samples stored in secure area			
Holding time protocol verified			
SOPs for sample preservation on file			
Identification of proposed analytical method verified			
Proposed analytical method documentation verified			

2. QAPP REVIEW CHECKLIST

Element	Y	N	Comment
A1. Title and Approval Sheet			
Title			
Organization's name			
Dated signature of project manager			
Dated signature of QA officer			
Other signatures, as needed			
A2. Table of Contents			
A3. Distribution List			
A4. Project/Task Organization			
Identifies key individuals, with their responsibilities (data users, decision makers, project QA manager, subcontractors, etc.)			
Organization chart shows lines of authority and reporting responsibilities			
A5. Problem Definition/Background			
Clearly states problem or decision to be resolved			
Provides historical and background information			
A6. Project/Task Description			
Lists measurements to be made			
Cites applicable technical, regulatory, or program-specific quality standards, criteria, or objectives			
Notes special personnel or equipment requirements			
Provides work schedule			
Notes required project and QA records/reports			
A7. Quality Objectives and Criteria for Measurement Data			
States project objectives and limits, both qualitatively and quantitatively			
States and characterizes measurement quality objectives as to applicable action levels or criteria			
A8. Special Training Requirements/ Certification Listed			
States how provided, documented, and assured			

PHYSICAL SAMPLING

Element	Y	N	Comment
A9. Documentation and Records			
Lists information and records to be included in data report (e.g., raw data, field logs, results of QC checks, problems encountered)			
States requested lab turnaround time			
Gives retention time and location for records and reports			
B1. Sampling Process Design (Experimental Design) States the following:			
Type and number of samples required			
Sampling design and rationale			
Sampling locations and frequency			
Sample matrices			
Classification of each measurement parameter as either critical or needed for information only			
Appropriate validation study information, for nonstandard situations			
B2. Sampling Methods Requirements			
Identifies sample collection procedures and methods			
Lists equipment needs			
Identifies support facilities			
Identifies individuals responsible for corrective action			
Describes process for preparation and decontamination of sampling equipment			
Describes selection and preparation of sample containers and sample volumes			
Describes preservation methods and maximum holding times			
B3. Sample Handling and Custody Requirements			
Notes sample handling requirements			
Notes chain-of-custody procedures, if required			
B4. Analytical Methods Requirements			
Identifies analytical methods to be followed (with all options) and required equipment			
Provides validation information for nonstandard methods			
Identifies individuals responsible for corrective action			

Element	Y	N	Comment
Specifies needed laboratory turnaround time			
B5. Quality Control Requirements			
Identifies QC procedures and frequency for each sampling, analysis, or measurement technique, as well as associated acceptance criteria and corrective action			
References procedures used to calculate QC statistics including precision and bias/accuracy			
B6. Instrument/Equipment Testing, Inspection, and Maintenance Requirements			
Identifies acceptance testing of sampling and measurement systems			
Describes equipment preventive and corrective maintenance			
Notes availability and location of spare parts			
B7. Instrument Calibration and Frequency			
Identifies equipment needing calibration and frequency for such calibration			
Notes required calibration standards and/or equipment			
Cites calibration records and manner traceable to equipment			
B8. Inspection/Acceptance Requirements for Supplies and Consumables			
States acceptance criteria for supplies and consumables			
Notes responsible individuals			
B9. Data Acquisition Requirements for Non-direct Measurements			
Identifies type of data needed from non-measurement sources (e.g., computer databases and literature files), along with acceptance criteria for their use			
Describes any limitations of such data			
Documents rationale for original collection of data and its relevance to this project			
B10. Data Management			
Describes standard record-keeping and data storage and retrieval requirements			
Checklists or standard forms attached to QAPP			

Element	Y	N	Comment
Describes data handling equipment and procedures used to process, compile, and analyze data (e.g., required computer hardware and software)			
Describes process for assuring that applicable Office of Information Resource			
Management requirements are satisfied			
C1. Assessments and Response Actions			
Lists required number, frequency and type of assessments, with approximate dates and names of responsible personnel (assessments include but are not limited to peer reviews, management systems reviews, technical systems audits, performance evaluations, and audits of data quality)			
Identifies individuals responsible for corrective actions			
C2. Reports to Management			
Identifies frequency and distribution of reports for:			
Project status			
Results of performance evaluations and audits			
Results of periodic data quality assessments			
Any significant QA problems			
Preparers and recipients of reports			
D1. Data Review, Validation, and Verification			
States criteria for accepting, rejecting, or qualifying data			
Includes project-specific calculations or algorithms			
D2. Validation and Verification Methods			
Describes process for data validation and verification			
Identifies issue resolution procedure and responsible individuals			
Identifies method for conveying these results to data users			
D3. Reconciliation with User Requirements			
Describes process for reconciling project results with DQOs and reporting			
limitations on use of data			

Element	Y	N	Comment
Describes any limitations of such data			
Documents rationale for original collection of data and its relevance to this project			
B10. Data Management			
Describes standard record-keeping and data storage and retrieval requirements			
Checklists or standard forms attached to QAPP			
Describes data handling equipment and procedures used to process, compile, and analyze data (e.g., required computer hardware and software)			
Describes process for assuring that applicable Office of Information Resource			
Management requirements are satisfied			
C1. Assessments and Response Actions			
Lists required number, frequency and type of assessments, with approximate			

CLOSING CONFERENCE

Chapter 11

A final meeting with facility officials will enable the inspector to "wrap up" an inspection. During this meeting, receipts can be prepared, questions can be answered, and information gaps can be resolved.

Responding to Questions on Inspection Results

Facility officials will understandably be interested in what the inspector found out about the facility's compliance. This is a sensitive area legally, so it is critical that the inspector be very careful in what he or she says. Following are acceptable ways of handling two common questions raised by facility officials.

"Did you find any violations?" If asked if any violations were found, the inspector may point out various items that facility officials might want to re-check for compliance purposes. However, the inspector should not offer seemingly final conclusions regarding the facility's compliance status. There are several reasons why:

- The inspector has not had time to reflect upon and correlate all that has been observed.
- Laboratory analyses may not have been completed.
- The intricacies of DEC administered statutes and regulations do not lend themselves to "off the cuff" assessment.
- The inspection findings may only represent a portion of the enforcement case.

Additionally, should the facility later be informed that the inspection did substantiate a finding of violation, facility officials are likely to insist the DEC inspector stated "no violations" at the time he left the premises, and therefore question the final assessment.

"Can I see (or copy) your notes?" Facility officials may assert that they have the right to see -- or copy -- notes made by DEC inspection personnel. Although they may submit a Public Records Request, which the Department must respond to within 5-10 days, Department policy is not to permit "viewings" onsite or in the absence of a records request.

Whether a request is made orally or in writing will determine how much time the Department has to respond to the request in accordance with 2 AAC 96.

- Oral requests = 5 working days.
- Written requests = 10 working days beginning the day after the request is received.

If a public records request is made for records (or portions of a record) related to compliance and enforcement cases that could reasonably be expected to interfere with enforcement proceedings and should be withheld, that finding can be verified with the Regulations Program Coordinator in the Commissioner's Office who can check relevant statutory and regulatory citations and, if necessary, help draft a response to the requestor. For additional information see *DEC Public Records Requests Guidelines Training Bulletin, July 2008.*

Industry Outreach

Since the inspector is often the only contact between the Department and the regulated industries, he or she should be aware of opportunities to maintain and improve Department - industry relations. The closing conference provides an ideal opportunity to offer various kinds of help to facility officials. The inspector will have just completed an inspection, and will have first-hand knowledge of questions, problems, and ways to help overcome them. In this role, the inspector should be careful, however, to answer only those questions that are within his or her ability or authority. The inspector should in no case recommend that a particular step should be taken to address a problem. Such advice may be wrong, and if the facility is later found to be in noncompliance, DEC's ability to pursue an enforcement action would be jeopardized. The inspector can offer or suggest resources that are available to facility officials to help overcome problems (e.g., technical publications, special services). Inspectors should refer questions and problems to other DEC personnel as needed and follow-up with those personnel when practical to see that facility officials receive a response.

REPORTS AND FILES

Chapter 12

A. THE INSPECTION REPORT

The ability of the Department to make an appropriate decision with regard to whether and what level of enforcement action should be taken is largely dependent on the quality and content of the inspection report and the official inspection file.

The results of all work done by an inspector are finally expressed in some form of written report. Although one measure of an inspector's success in enforcement is the quality of his reports, many inspectors do not appreciate the importance of report writing. Proper documentation of an inspection is a key aspect of an inspector's job. Supervisors and attorneys who review the report must have all the facts to make appropriate and effective decisions. Well-written reports create an impression of a well-conducted inspection, and facilitate the report review and decision-making process.

The purpose of the inspection report is to present a factual record of an inspection, from the time when the need for the inspection is perceived through the analysis of samples and other data collected during the inspection. An inspection report must be complete and accurate, because it will provide the basis for potential enforcement actions and may become an important piece of evidence in litigation. The length and format of inspection reports may vary based on program and individual program policy.

The objective of an inspection report is to organize and coordinate all evidence gathered in an inspection in a comprehensive, usable manner. To meet this objective, information in an inspection report must be:

- **Accurate.** All information must be factual and based on sound inspection practices. Observations should be the verifiable result of first-hand knowledge. Enforcement personnel must be able to depend on the accuracy of all information.

- **Relevant.** Information in an inspection report should be pertinent to the subject of the report. Irrelevant facts and data will clutter a report and may reduce its clarity and usefulness.
- **Comprehensive.** The subject of the report (i.e., any suspected violations) should be substantiated by as much factual, relevant information as is feasible. The more comprehensive the evidence, the better and easier the prosecution task.
- **Coordinated.** All information pertinent to the subject should be organized into a complete package. Documentary support (photographs, statements, sample documentation, etc.) accompanying the report should be clearly referenced so that anyone reading the report will get a complete, clear overview of the subject.
- **Objective.** Information should be objective and factual; the report should not draw conclusions.
- **Clear.** The information in the report should be presented in a clear, well-organized manner.

After an inspection has been completed there is a psychological letdown. Reporting what happened during the inspection may then seem a burdensome chore, but the inspector's job is not finished until the report is complete and the official files are in order. Remembering the simple rule that "no job is complete until the paperwork is finished" will assist the inspector in planning and conducting the inspection so that the report will accurately portray the findings of the inspection. Recall also, as discussed in Chapter 4, that unless the report is prepared routinely and contemporaneously with the inspection, it may not be used to refresh recollection or be admissible as evidence.

Elements of an Inspection Report

No single standard DEC inspection report format exists; the specific information needs will vary depending on the program and regulatory requirements involved. While the format and exact contents of the inspection report vary, the report should always contain enough information that the reader can determine the following:

- The specific reason for the inspection;
- Who participated in the inspection;
- That all required notices, receipts, and other legal requirements were complied with;
- What actions were taken during the inspection, including the chronology of these actions;
- What statements, records, physical samples and other evidence was obtained during the inspection
- What observations were made during the inspection; and

- The results of sample analyses related to the inspection.

Although the specific information requirements in a given inspection report will depend on the type of inspection and what was found, most reports will contain the same basic elements:

- Inspection Report Forms
- Narrative Report
- Documentary Support

Inspection Report Forms. Individual inspection report forms, developed for most regulatory programs, are designed to collect standard, reviewable information about an inspection. Inspection report forms are only one aspect of a complete report and should by no means be considered to be sufficient documentation of the inspection in themselves. They function as guides to ensure that all basic data are being collected, and are generally completed as the inspection progresses. Individual items on these forms often need clarification and elaboration; inspectors normally use the field logbook for this information.

In cases where inspection report forms are unavailable, inappropriate, or not comprehensive, the inspector should record pertinent information in the field logbook. This information should be used in the narrative of the Inspection Report to clarify and expand upon the information from the Inspection Report Forms.

Narrative Report. The narrative portion of an inspection report should be a concise, factual summary of observations and activities, organized in a logical, legible manner, and supported by specific references to accompanying evidence (documentary support). A work plan will simplify preparation of the narrative and will help ensure that information is organized in a usable form. Basic steps involved in writing the narrative report include:

- **Reviewing the Information.** The first step in preparing the narrative is to collect all information gathered during the inspection. The inspector's field logbook and all Inspection Report Forms should be reviewed in detail. All evidence should be reviewed for relevancy and completeness.

- **Gaps** may need to be filled by a phone call or, in unusual circumstances, a follow-up visit.

- **Organizing the Material.** Organization of the information can take many forms, depending on the case, but should present the material in a logical, comprehensive manner. The narrative should be organized so that it will be understood easily by the reader.

- **Referencing Accompanying Material.** All evidence (e.g., copies of records, analytical results, photographs) that accompany a narrative report should be clearly referenced so the reader will be able to locate them easily. All support documents should be checked for clarity prior to writing the report.

- **Writing the Narrative Report.** Once the material has been reviewed, organized, and referenced, the narrative can be written. The purpose of the narrative report is to record factually the procedures used in, and findings resulting from, the evidence-gathering process. In this report, the inspector should refer to routine procedures and practices used during the inspection, but should describe in detail facts relating to potential violations and discrepancies. The field logbook is a guide for preparing the narrative report.

- **Attachments.** Supporting information should be attached to the report, to ensure that reviewers have all of the data needed to fully evaluate the compliance situation. All of these attachments should be fully referenced in the report.

    - List of Attachments. Prepare a list of all documents, analytical results, photographs, and other supporting information attached to the report. A general index list, rather than detailed descriptions will aid case development personnel in locating specific documents.
    - Documents. Attach copies of all documents and other evidence collected during the inspection. All documents should be clearly identified. In cases where documentary support items cannot be included easily with the report, it may be possible to substitute descriptive information.
    - Analytical Results. Attach sample data and quality assurance data. This may be presented as tables here, with pertinent information summarized in the body of the report.

If the inspector has followed the steps presented in this manual, the report can develop logically from the organizational framework of the inspection. In preparing the narrative, simplicity should be a prime consideration:

- Use a simple writing style; avoid stilted language.
- Use an active, rather than passive approach (e.g., "He said that ... "rather than "It was said that... ").
- Keep paragraphs brief and to the point.
- Avoid repetition.
- Proofread and edit the narrative carefully.

Note Regarding Standard Operating Procedures. When the inspector has followed Standard Operating Procedures (SOPs) precisely in gaining entry, taking samples, etc., this can be easily noted in the report (e.g., "following standard procedures, Joe Smith gained entry to ... "). If there were any unusual circumstances or deviations, however, these should be included in the report in more detail.

Confidentiality Considerations and Procedures. All documents and other materials that have been declared confidential business information by facility officials must be handled according to the security measures that have been established for such materials. Confidential information includes not only the materials themselves, but also any reports -- such as inspection reports -- generated on the basis of confidential information. Generally, this will involve limiting access to the report to the fewest number of people possible.

In preparing the inspection report, it may be possible to reference confidential material in a non-confidential way, such as by providing a general description of the information and a reference number to the confidential documents. An alternative is to include the information in the inspection report but treat the entire report as a confidential document.

Inspection Report Evaluation Guide

The organization and format of an inspection report can vary based on the practice of the division or program, the particular circumstances of the inspection, and the individual writing style of the report writer. No matter what form the report takes, however, the report should contain information about the facility or site inspected, a detailed description of specific inspection activities that were performed, and substantiating information on any suspected violations that were observed.

Attachment 12-1 is an Inspection Report Evaluation Guide which contains questions that should be answered by each inspection report, regardless of the organization or format the report follows. Note that being able to answer all of these questions is a sign of a high quality inspection, as well.

B. OFFICIAL FILES

The official files related to an inspection or investigation comprises the Department's legal documentation of its activities. All original documents, data, and evidence related to an inspection become part of the official records and should be treated as potentially admissible evidence in legal proceedings. Further, the opposing side in an enforcement proceeding is likely

to have access to these files as part of the discovery process. The inspector should always maintain a diligent and professional manner in recording notes of conversations, planning meetings, interviews, inspection observations, sample and data collection activities, and interactions with individuals related to the project. These notes should be prepared immediately, or as soon after the interaction or observation as is possible, to avoid loss of important details. All such records should be dated, legible, and contain accurate and complete documentation. Their language should be objective, factual, and free of personal feelings or inappropriate information. Avoid recording personal or irrelevant information where this information may become part of official records.

Components of the Official Files

Historical Records. Historical records related to a project are probably already contained in the official files for the facility being investigated. These records may include permit applications and associated documentation; inspection plans and reports from previous inspections; reports of laboratory data from samples collected during previous inspections or submitted by the facility; site maps, plans, drawings, and descriptions; and photographs, photocopied records, and other physical samples or evidence about the facility. All of these records are available to inspectors, and should be used to provide a background of knowledge about the facility and its history. This information will often be valuable in planning an inspection.

The Inspection File. The inspection file normally contains all of the records associated with an inspection. This file is reviewed by case development personnel as part of the evaluation of whether an enforcement response should be made to potential violations identified during the inspection, and if so, what type of enforcement response should be made. A missing required inspection notice or incomplete chain of custody record, for example, could jeopardize the Department's ability to successfully prosecute a violation.

There are differences in program policy and practice, so no one list of file contents will be appropriate for all situations. The list of contents which follows can serve as a guide to the types of records that should be kept in the inspection file.

- **Communications.** For each inspection, communications may occur in many forms and among many individuals. Copies of all official correspondence, possibly including notifications of intent to conduct an inspection, requests for data, and informational correspondence, should be included in the official files. Records of telephone and personal conversations also should be included.

- **Notice of Inspection.** If the authority in the statute under which the inspection was conducted requires presentation of a notice of inspection, the inspection file must contain evidence that a written notice of inspection was presented.
- **Verification of Credentials.** Some statutes also require that an inspector present appropriate credentials to the owner, operator, or agent in charge of the inspected premises. Therefore, the inspection file should contain evidence that proper credentials were presented.
- **Declaration of Confidential Business Information.** These items are contained in the inspection file when materials have been claimed as confidential. The Declaration collected during the inspection will be reviewed for signatures, dates, and a complete listing of all documents and samples for which confidentiality was claimed. See Chapter 7.
- **Inspection Plans.** The plans should be reviewed to ensure they presented the objectives, scope, logistics, and schedules for the inspection. Inspectors should be prepared to explain the inspection rationale and any deviations from the plan.
- **Inspection Report**. Inspection reports, including attachments, should be included in the inspection file.
- **Enforcement Action**. Compliance Letters, Notice of Violations, etc.
- **Inspection Report Form.** If the program has an inspection form or checklist that is completed for each inspection, a copy should be included in the file.
- **Other Evidence.** Other evidence that should be kept in the official files includes photographs, copies of documents and records, statements, affidavits, drawings and sketches, etc., collected during the inspection.
- **Custody Records.** There should exist a complete inventory of sample tags and seals, chain of custody records, and related materials that demonstrate the traceability and proper identification of samples taken during an inspection. Chain of custody records include all of the following items: Official Chain of Custody Record forms used to record the custody of all samples and other physical evidence collected during an inspection, copies of letters authorizing laboratories to dispose of samples related to the project, and sample tags or labels from samples that have been destroyed by the laboratory.
- **Laboratory Analyses.** Test results from any laboratory analyses made in connection with the inspection should be included in the inspection file.
- **Subpoena.** If a subpoena was issued, a copy must be included in the inspection file. It will be reviewed to ensure it was issued properly and there was compliance with the requirements of the document.
- **Warrant.** If a warrant was issued, a copy of the warrant application, warrant, and inventory should be in the file. These will be reviewed to ensure the warrant was properly issued and the inspection complied with its terms.

- **Field Logbook.** The bound field logbook used by the inspector to record his or her field activities on the inspection becomes part of the official file (although it may not be physically located in the file itself). Once completed, the logbook becomes an accountable document; it does not belong to the inspector.

Attachment 12-1 Inspection Report Evaluation Guide

INSPECTION REPORT EVALUATION GUIDE

The organization and format of an inspection report can vary based on the practice of the program, the particular circumstances of the inspection, and the individual writing style of the report writer. No matter what form the report takes, however, the report and its attachments should contain the answers to the questions which follow.

Basic Inspection Information

- Who prepared the inspection report?
- Who signed the inspection report, and on what date?
- Who performed the inspection (all participants)?
- What is the name and location of the facility/site?
- What is the facility/site's mailing address and telephone number?
- What is the name and title of the responsible official who was contacted?
- What was the reason for the inspection (e.g., routine, response to a complaint, for cause)?
- What are the names and titles of all of the DEC personnel who participated in the inspection?

Entry/Opening Conference

- What are the facts about the entry (e.g., date, time, entry location, agent-in-charge...)?
- Is there documentation that proper entry procedures were followed?
- Were all required notices and credentials presented?
- Is there documentation that facility officials were informed of their right to claim information confidential?

- Were there any unusual circumstances about gaining consent to enter (e.g., reluctance, attempts to limit inspection scope, attempts to place special requirements on inspectors)? How were they handled?

- Who was present at the opening conference? What topics were discussed?

Background on the Facility/Site

- What type of facility/site is it?

- What types of activities and operations take place at the facility/site?

- Who owns the facility or site (e.g., corporation, proprietorship, partnership, Federal or State agency, non-profit organization)?

- How many years has the facility been in existence?

- How many employees are there at the site?

- Have any major modifications been made to the facility? Are any future modifications or expansions planned?

- At what level of capacity is the facility operating? How many shifts? How many hours per day and days per week? What relationship does this information have to the inspection that was performed?

- Which operations/processes/activities at the facility were examined during the inspection?

- Which operations/processes/activities at the facility were not examined?

Inspection Activities

Records Inspection

- Is there a general description of how records are kept at the facility?

- What was the purpose of reviewing records?

- What facility records were reviewed?

- How were the specific records selected for review (e.g., was an auditing technique used, were all records reviewed)?

- Are records that were photocopied or data manually copied from records adequately identified and documented?

- Were any suspected violations found? (Each should be fully documented, making sure all of the information required by the section below on suspected violations is included.)

Physical Sampling

- What was the inspector's sampling plan for the facility/site?

- What physical samples were collected at the site?

- Are the sampling techniques used adequately explained?

- Are all samples clearly tied to an identification number, location, and purpose?

- Are sampling conditions and other physical aspects of the sample (e.g., color, texture, and viscosity) described?

- Were any deviations from the sampling plan and/or standard operating procedures (SOP) adequately explained and documented?

- Are the chain of custody procedures documented?

- Are the results of laboratory analysis clearly presented?

- How do the sample results compare to permit limits?

Illustrations and Photographs

- Are photographs taken during the inspection referenced? Properly documented?

- Is there some information about the inspection that could be made easier to understand through a diagram or sketch in the inspection report?

- If sketches, diagrams, or maps are used, is the scale and/or other relationships shown clearly?

Interviews

- What are the names and titles of facility officials and other personnel who were interviewed?
- Are their statements clearly summarized?
- What are the names and addresses of any other individuals who were interviewed or who were witnesses?

Closing Conference

- Is there documentation that required receipts for samples and documents were provided?
- Is there documentation that facility officials were given an opportunity to make confidentiality claims?
- Are statements the inspector made to facility officials regarding compliance status, recommending actions to take, or other matters noted?

Documentation of Suspected Violations

The heart of the inspection report is really the documentation and substantiation of suspected violations, which allows the Department to determine whether a violation occurred, how and why it occurred, and its seriousness. This substantiating information includes all of the evidence of various kinds that has been collected. In an actual inspection report, some of the answers to the questions on the preceding pages might be answered in the portion of the report which discusses the evidence collected and other particulars regarding each suspected violation.

The inspection report should answer the following questions for each suspected violation.

Documentation of Suspected Violation

- What regulation is suspected to have been violated?
- What information proves that the cited regulation applies to the facility/site?
- Using the elements of the regulation as a guide, what information proves that the suspected violation occurred?

- What sampling methods (if appropriate) were used to determine that the violation occurred? Are any deviations from sampling methods adequately explained?

- What information shows that possible exemptions to the rule do not apply?

Cause of Violation

Note: Not all programs require this information, but it may be useful even where not required for such purposes as negotiating an appropriate remedy and penalty and for planning future inspections. Causal information must be stated carefully so that it does not provide the violator with an excuse for the violation.

What information documents the possible cause of the violation (e.g., direct observations of gauge readings, production logs, physical appearance of materials, statements by facility personnel)?

Is there any supporting information confirming/disapproving a possible claim of an upset or other exempt activity?

Other Mitigating and Aggravating Factors

The level of enforcement response is based on the seriousness of the violation. Civil penalty amounts are based on the economic benefit, gravity and circumstances of the violation, which is usually a calculation of the extent of the violation (e.g., amount of material involved) and the extent of the actual or potential harm that was or could be caused by the violation. This base penalty can be adjusted upward or downward based on such factors as past compliance history, or efforts made by the facility to correct the violation.

The inspection report should contain information that will support the appropriate determination of the seriousness and extent of the violation as well as other information that might be useful in penalty calculation.

What is the seriousness of the violation (e.g., amount of emissions, length of time of excess emissions, nature of emissions, location of source, perceived public impact)?

What harm resulted or could result from the violation?

What efforts did the facility make to correct the violation?

How difficult will it be to comply (e.g., availability of technology, cost of complying, time required to correct the violation)?

What is the facility's past compliance history?

APPEARING AS A WITNESS

Chapter 13

A. OVERVIEW

Inspectors perform a vital role throughout the regulatory enforcement process. An enforcement action begins with the inspector collecting and documenting on-site evidence. This chapter deals with the inspector's responsibility to present evidence in formal legal proceedings.

Due in large part to the high quality work that inspectors produce, the Department files strong cases. Nearly all of the cases that the DEC files result in out of court settlements that will not usually require the inspector's testimony. Of the cases that do not settle, a substantial majority of the legal action takes place in the administrative law system rather than the State courts. Major differences distinguish the administrative system from State courts, such as rapid processing and the absence of a jury. Despite the differences between these two legal proceedings, the inspector's role as a witness will remain predominantly the same.

Under most circumstances an inspector will be called as a "fact witness." A fact witness describes personal knowledge obtained through one of the five senses. Throughout the enforcement process, everything an inspector hears, sees, smells, samples, or records may become evidence about which he or she may be questioned. Many cases are tried years after the field and laboratory activities have been conducted. Thus, the inspection report and field notebook should be sufficiently detailed and legible to allow the inspector to reconstruct the inspection "on the record."

B. PRE-TESTIMONY MATTERS

Preparation

Preparation is the key to giving accurate and effective testimony. Successful preparation requires a substantial time commitment. Attorneys and witnesses work together in two types of preparation: factual and procedural.

The inspector will complete most of the factual preparation by writing the inspection report as described in this manual. The witness and the attorney will meet to discuss details from this report. Other items should also be discussed, including the field notebook, photographs, and the inspector's qualifications. Qualifications include the inspector's educational degree, professional accreditations, inspector training, and on-the-job experience. The inspector's qualifications must never be exaggerated. Even a small exaggeration may cause the inspector's testimony to lack credibility.

The inspector should inform the attorney of any problems, questions, or concerns in the case as early as possible.

The attorney has the primary responsibility over procedural preparation, which is assembling the facts for presentation in a formal legal setting. In addition to one-on-one preparation, the inspector and attorney may consider whether the inspector should participate in a mock trial or visit a hearing to observe other witnesses testifying. During one-on-one preparation, the attorney and the inspector should discuss:

- Times and dates that require the inspector's attendance.
- Legal etiquette and procedure.
- General legal framework of the case.
- Significance of the inspector's testimony in this framework.
- Probable areas of questioning, including direct and cross-examination.
- What documents, if any, will be used by the inspector during testimony.

Before giving testimony, the witness should again review inspection documents, his or her professional qualifications, and information provided by the attorney. This review should be repeated until the witness has become thoroughly familiar with the details of the testimony and how it will be presented.

An inspector may be subpoenaed, even if he or she no longer works for DEC, to give testimony by the opposing attorney if their personal observations are pertinent to the matter. A subpoena is a court order to appear, and it is a mandatory legal process that does not suggest dishonesty or bias, an inspector should not be offended if he or she receives a subpoena. If an inspector is subpoenaed, the Department of Law (LAW) should be contacted immediately. Time will be short to prepare to give testimony or to fight the subpoena.

Legal Etiquette, Appearance, and Demeanor

A witness's conduct should reflect the solemn nature of the administrative or judicial proceeding. To act in accordance with required legal etiquette, a witness should:

- Dress conservatively following the advice of the attorney.
- Arrive early and be available immediately when called to testify.
- Address the judge as “your honor.”
- Treat an administrative proceeding as seriously as a State court trial.

A witness should not

- Whisper, talk, or make jokes in the hearing room. If necessary, a note may be passed.
- Bring magazines or newspapers into the hearing room.
- Discuss the case within the hearing of anyone but the attorney.

Posture, speech, and appearance influence a witness’s credibility. An inspector is a professional who collects, preserves, and presents evidence. In order to convey a professional demeanor, an inspector should:

- Firmly but politely speak to the opposing attorney.
- Appear natural and animated, but not impatient or overly anxious to testify.
- Minimize nervous tendencies.
- Remain calm.
- Refrain from showing hostility toward the opposing counsel, the specific defendant, or the regulated community as a whole.

C. GIVING TESTIMONY

General Considerations

A witness gives testimony to create a legal record of the facts. Before giving testimony, a witness will take an oath that he or she will tell the truth. Failure to tell the truth is actionable as perjury. A witness may give pre-trial testimony in a deposition or trial testimony under direct examination or cross-examination.

To give effective testimony, a witness should 1) listen, 2) pause, and then 3) answer if possible. Listening carefully to the wording and implications of an attorney’s questions requires significant effort. If the witness does not understand the question, he or she should stop to think, have the question repeated, or have it explained.

A witness should pause before answering. Pausing provides time to think, makes the response more considered and deliberate, and gives the attorney time to object if necessary. When

pausing, the witness should not use words such as “um.” As the court reporter documents everything spoken, these words may incorrectly indicate hesitation when later read from the written record.

When answering, a witness should

- Reply with a “Yes” or “No” when appropriate.
- Speak in complete sentences when answering more fully.
- Be as descriptive as possible in referring to exhibits or photographs. For example, “In the upper right hand corner, we see” rather than “Here, we see.”
- Stop immediately if the judge or either of the lawyers begins to speak.
- Avoid memorizing answers to potential questions.

A witness’s credibility is defined as the degree of confidence that the judge or jury gives to the witness’s testimony. The opposing attorney will try to “impeach” a witness’s credibility by suggesting the following: bias, inaccuracy, inability to recollect, false testimony, or even corruption. To lessen the opposing attorney’s ability to discredit the witness’s testimony, the witness should:

- Always tell the truth.
- Answer only the question asked, without volunteering information.
- Explain answers fully. If the opposing attorney does not allow a full explanation, the State’s attorney can choose to bring this out later in the trial during a redirect examination.
- Answer within the limits of his or her knowledge of the facts.
- Willingly say, “I don’t know,” or “I don’t remember,” if that is the case.
- Correct any mistakes in his or her previous testimony as soon as a mistake is recognized.
- Carefully identify estimates.
- Never exaggerate.
- Never guess.
- Avoid absolutes, like “I always…” or “I never…”.

Pre-Trial Testimony: Depositions

In a civil court trial, an inspector may be subpoenaed to give a deposition, which is pre-trial questioning under oath by the opposing attorney. Depositions are not often conducted in administrative hearings. Participants include the attorneys for each side, a court reporter, and

the witness. Most importantly, a judge will have no role in deposition testimony unless one side abuses the process and the other side seeks relief.

The attorney may use a deposition to "discover" information or to contradict a witness's testimony at trial. In most cases, deposition testimony will not be used as a substitute for live testimony, but parties can use deposition testimony in place of court testimony by agreement. To properly prepare for and give deposition testimony, an inspector should:

- Read the notice of deposition.
- Consult with the State's attorney to determine what documentation will be necessary.
- Realize that he or she is not "off the record" until completely away from the deposition setting.
- Request a break whenever needed.

After the deposition is transcribed, the witness can read it to make any appropriate corrections. Small errors always exist, but some transcripts can contain errors in translation that are of a serious nature. Errors in technical details, such as numbers and units, can have a large impact. A witness should never waive the right to read and sign the finished deposition.

Trial Testimony: Direct Examination

The State's attorney will question the inspector during direct examination in order to put the facts known by the inspector on the record in a well-organized and logical manner.

A good direct examination leads the inspector through his or her entire testimony using a dialogue of short questions and answers. The attorney is responsible for asking appropriate questions in the correct order and ensuring that nothing important is omitted. The witness is only responsible for answering the attorney's questions completely and truthfully.

In order to avoid legally objectionable or tactically unwise remarks, the witness should trust the attorney's final decision concerning what questions to ask at the hearing. If the inspector has forgotten a fact, the attorney may refresh the inspector's recollection with documents, such as the inspection report. The attorney might also ask, "Is there anything else?" to signal to the inspector that something has been left out.

Redirect examination is a round of questioning only concerning issues raised during cross-examination. Redirect will give the attorney an opportunity to reduce any damage done to the credibility of the inspector's testimony during cross-examination.

Trial Testimony: Cross-Examination

Cross-examination, questioning by the opposing attorney, will subject the witness to a more difficult interrogation than direct examination. The opposing attorney will try to cast doubt on the credibility of the witness's testimony. Many witnesses fear counsel techniques such as leading questioning and twisting interpretation. The State's attorney will try to protect the witness from abusive uses of these techniques.

The witness can also protect the credibility of his or her testimony by 1) answering briefly, 2) answering accurately, and 3) remaining calm. Answering briefly consists of being responsive to the question, but not volunteering extra information. Avoid rambling, even if the opposing counsel remains silent.

In addition to the recommendations in the section "Giving Testimony," answering accurately requires listening carefully for the following types of questions:

- Questions that inaccurately paraphrase the witness's previous testimony. The error should be corrected or the previous answer restated in full.
- Hypothetical questions or questions requiring a "Yes" or "No" answer. If these questions may compel a misleading or incomplete answer, the witness should explain the answer fully at that time or later during redirect if cut short by the opposing attorney.
- Two-part questions. The inspector should ask the attorney to restate the question or carefully answer each part separately.

Even when a witness's truthfulness, occupational competence, or professional conclusions are challenged, he or she should remain calm. An angry, sarcastic, or argumentative answer is inconsistent with the inspector's role as a neutral government witness. Remaining calm will add credibility to the inspector's testimony. Becoming familiar with the process, including participation in a mock trial can help reduce the stress of cross-examination.

D. SPECIAL CONSIDERATIONS

Technical Testimony

An inspector frequently presents technical facts. The inspector must balance the need to be technically accurate with the need to reduce scientific issues to simple terms and concepts.

The first barrier to communicating technical information is the use of jargon. The inspector should prepare carefully in order to simplify his or her language without over-simplifying the scientific concepts. The inspector should:

- Speak as clearly as possible. The court reporter may have difficulty recognizing numbers and unfamiliar technical terms.
- Provide a glossary of technical terms, including acronyms, to the reporter.
- Review the meaning of frequently used acronyms, such as DEC meaning the Alaska Department of Environmental Conservation.

Even after the witness explains the definitions of the technical language, the underlying concepts may still be difficult to understand. To teach the necessary technical concepts, the inspector and attorney should consider using:

- Short answers in a logical progression of questions.
- Slow enough questioning to avoid information overload.
- Diagrams and pictures.
- Appropriate analogies.

Finally, the inspector should not try to outdo the opposing attorney on technical issues. Not only may the inspector confuse the judge or jury in the process, but also a well-prepared attorney will have thoroughly studied the subject before trial and will have a large advantage in legal debate. To successfully answer questions regarding technical information, an inspector should:

- Examine questions and answers for assumptions and exceptions.
- Look for inaccurate paraphrasing of the inspector's previous testimony.
- Always identify estimates.
- Use references in cases of complicated details. For example, the inspection report could be consulted before testifying about the characteristics of a specific sample.

Expert Witness

Expert witnesses give opinions on the record. An expert witness has technical or other specialized knowledge that helps the judge or jury better understand the case. In order to prove a witness's expertise, his or her qualifications are introduced by one side and cross- examined by the other side. Only those opinions that the witness is qualified to express by virtue of special training or experience will be admissible.

An expert is not necessarily someone from outside the Department with particular academic or research credentials. Due to the inspector's professional expertise, he or she might be asked

specific questions that require an opinion or might even be called as an expert witness. The State's attorney will object if the opposing counsel asks inappropriate questions and will decide whether to use the inspector as an expert witness. The inspector should stay carefully within the scope of the subject matter of which they have been designated to testify on and recognized as an expert on.

PRESS AND PUBLIC RELATIONS

Chapter 14

A. OVERVIEW

Department inspection and enforcement staff should be aware the public and press have a desire and a right to know about DEC enforcement activities. However, since premature release of sensitive information may jeopardize the status of an enforcement proceeding, the Department cannot always provide unlimited access to information or fully answer all questions. This chapter reiterates DEC's press policy, a discussion of the inspector's role in addressing inquiries, and guidance for dealing effectively with Public Records Requests. Statements to the "public" include statements made to the press, facility officials, and third parties such as citizens.

The Department has an open approach to press and public relations which allows members of the press to contact DEC employees directly for information. However, the potential for confusion and damage to the Department's investigation and enforcement efforts makes it essential that all public statements regarding a particular investigation be coordinated through one individual. When there is substantial public and press interest, special arrangements for handling inquiries may be made, such as assigning a staff person from the press office to help. In all circumstances, the reason for having one person coordinate is to assure the Department speaks with one voice and has knowledge of exactly what information has and has not been released publicly.

B. PRESS RELATIONS

The Department has an open policy when it comes to dealing with the media. Employees, with supervisory consent, are authorized to answer questions posed to them by reporters on subjects of which they are knowledgeable. Staff may conduct interviews for radio, television, print and digital media. DEC's public information officer provides media training for new and experienced

employees on a routine basis and is always available for assistance. Employees are not required to conduct interviews with the media.

Response to Media Inquiries in Civil Proceedings

Publicity of enforcement activities is a key element in deterring noncompliance with environmental laws and regulations. Publicizing Department enforcement activities on an active and timely basis informs both the public and the regulated community about DEC's efforts to promote compliance. Press releases should be issued for judicial and administrative enforcement actions, including settlements and successful rulings, and other significant enforcement program activities. Ensure press releases are coordinated with the Department of Law for civil enforcement cases. Further, the Department employs a range of methods of publicity such as articles, prepared statements, interviews, and appearances at seminars by knowledgeable and authorized representatives of the Department to inform the public of these activities.

Response to Media Inquiries in Criminal Proceedings

The existence or non-existence of any criminal investigation must never be confirmed, denied, nor discussed. Even to acknowledge the existence of an investigation might prejudice the rights of an individual or compromise an investigation. When asked, Department personnel must respond: "It is Department policy to neither confirm nor deny the existence of a criminal investigation." Of course, to be effective, this response must be utilized habitually even when it is known that no criminal investigation is planned or under way. In the event that this response proves insufficient to quell a particular inquiry, Department personnel may direct the inquirer to the ECU (who will generally be much more accustomed to handling persistent inquiries), but under no circumstances may Department personnel acknowledge the existence or nonexistence of a criminal investigation or provide any information related to it.

At any time after a prosecutor has been assigned or the case has been referred to LAW, DEC personnel will not respond to media inquiries or volunteer comments on the case, whether oral or written, for attribution or not, without the prior expressed approval of the Department of Law, until the case is concluded absolutely. Such media inquiries will normally be forwarded to the prosecutor.

Dealing with the Press during Field Investigations

Circumstances may arise during an inspection when inspectors may be called upon to deal with the press. When an inspector has just completed a particularly sensitive inspection or on-site investigation and is met at the plant or facility gate by a local news team, it is important to know what should and should not be said to the media. The following general guidelines should help inspectors through these occasions.

- What must voluntarily be made known to the press (except during a criminal investigation)
    - Any known dangers to the public health.
    - Any information that would dispel unfounded rumors about health dangers that are circulating in the community around the site being investigated.
- What can be told to the press voluntarily or in response to questions (except during a criminal investigation)
    - What DEC employees are doing.
    - How DEC is doing it (e.g., sampling techniques, how the equipment works, how the lab goes about analyzing the samples).
    - Why it is being done (e.g., to protect water quality, drinking water safety).
- What can be said during a criminal investigation or during a pending criminal enforcement case
    - Department employees should voluntarily provide information about real dangers to public health or information needed to dispel panic and fear caused by unfounded rumors of health dangers.
    - If asked by the press or public, a DEC employee may state if a search warrant has been used since the affidavits used to obtain the warrant are public information.
- What cannot be said during a criminal investigation or during a pending criminal enforcement case
    - Do not confirm, deny, or discuss the existence or non-existence of a criminal investigation.
    - Make no characterization of the investigation, other than what is said in the affidavits used to obtain the search warrant.
    - Say nothing that would infringe upon the rights of potential or actual defendants.
    - Say nothing that would compromise the integrity of the investigation.

- Do not respond to inquiries about a pending criminal enforcement matter without the express authorization of the ECU or the prosecutor.

For additional help with media relations, consult the DEC media relations guide or contact the Department's Information Officer. Additional guidance can also be found in DEC's policies and procedures under the Commissioner's Office section.

C. PUBLIC RECORDS REQUESTS

The Alaska Public Records Act (APRA), AS 40.25.100 - 40.25.295, and the regulations that implement it, 2 AAC 96.199 - 96.900 (hereinafter referred to collectively as the "Public Records Act" or "Act"), embody the rule that government records are generally open to public inspection. "Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours."[40] Consistent with opinions of the Alaska Supreme Court, the legislative findings to the 1990 amendments to the Act state that "public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government."[41] Also, the regulations implementing the APRA state that "It is the policy of the executive branch of government to disclose public records and to provide copies of those records in an expeditious manner. Disclosing public records and making copies of them upon payment of the required fees, if any, is a public agency obligation."[42]

The Department is committed to responding to requests for public records in full compliance with the requirements of the Alaska Public Records Act (APRA). The steps outlined herein are intended to provide guidance to the Department on how to comply with the Act. These internal steps do not impose additional requirements on the Department, nor do they modify the requirements of the Act, but are intended to promote uniformity and consistency when responding to a public records request.

Upon receiving a clear request for public records and payment of all recoverable search and copying fees, the Department will provide, in a timely manner, non-protected records that are not statutorily excluded from disclosure. To ensure that this occurs, internal steps for responding to a request to the Department are outlined below. These steps do not supplant any requirement

[40] AS 40.25.110(a)
[41] Ch. 200, § 1, SLA 1990; see a/so, e.g., Fuller v. City of Homer, 75 P.3d 1059, 1061-62 (Alaska 2003); Gwich'in Steering Comm. v. State, Office of the Governor, 10 P.3d 572, 578 (Alaska 2000); City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P .2d 1316, 1323 (Alaska 1982).
[42] 2 AAC 96.200(a)

of any federal or state law (including a court order); nor are they intended to substitute for a careful reading of the Act, regulations, and judicial opinions.

"Public records" means books, papers, files, accounts, writings, including drafts and memorialization's of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs."[43] Although the definition of "public records" is broad, it does not, as noted below, include all records in the Department. Also, excluded from the APRA are certain categories of public records, such as "records required to be kept confidential by a federal law or regulation or by a state law: including records that are protected from disclosure by a common law privilege."[44] The department and the divisions within the Department are "public agencies."

Responding to a Request for Public Records

Determine Who Handles the Request. If a division receives an oral or written public records request, the division director determines whether the division, another division, and/or the commissioner's office should respond. If the commissioner's office receives an oral or written request, the designated public records custodian determines whether the commissioner's office and/or one or more Department divisions should respond. When a division responds to a records request, the public records custodian should be copied on any high profile records requests. (Hereinafter, the division/division director and commissioner's office/commissioner are referred to as the "Department"/"Department head.")

Determine That the Request Is Covered. The Department determines whether the request is covered by the APRA. A request need not reference the APRA, but the requested record must (a) be a "public record," as defined by AS 40.25.220(3); (b) not be statutorily excluded from the APRA; and (c) not be "readily available"-i.e., "available during state business hours in a DEC office or in a public library." [45] Readily available records include public records that are on a Department's website or are otherwise publicly available on the Internet. Duplicates (i.e., records with no meaningfully different markings, including some electronic records with only different metadata) are not public records. Also, records containing only personal information are not public records. The Department is not required "to compile or summarize records" or "to manipulate data to create new records in response to a request for public records". [46]

[43] AS 40.25.220(3)
[44] AS 40.25.120(a)(4)
[45] 2 AAC 96.100(b)
[46] 2 AAC 96.210(b)-(c)

Respond To Oral Requests

- If the public records request is made orally, the Department must inform the requestor of the provisions of 2 AAC 96.310. [47]
- If an oral request seeks a variety of records, the requestor may be required to put the request in writing. [48]
- If a physical or mental disability prevents a requestor from making a written request, the Department shall assist the requestor in preparing a written request or treat the oral request as a written request. [49]
- An oral request is "deemed denied if not granted within five working days after the office of the public agency responsible for maintaining the requested records receives the request," [50] [51] If an oral request is denied, the requestor's only remedy is to make a written request. [52]

Log Written Requests. Log all written requests for public records that are covered by the APRA, unless the requests are for records covered by 2 AAC 96.300, i.e., for records prepared for routine distribution. [53] The Log is in: Outlook, Public Folders/All Public Folders/DEC-PF/Allshare – Public Records Request Log. The following information is logged:

- The date the request was received by the responding Department
- The name of the requestor
- Whether notice of receipt of the request was sent to the requestor under 2 AAC 96.310
- The date that any clarification was requested under 2 AAC 96.315. log entries are preserved for one year. See State of Alaska General Administrative Records Retention Schedule, Schedule # 100.3, Item No. 70.
- The dollar amount collected for record requests over 200 pages

The Regulations Program Coordinator will coordinate logging in requests for public records on the same subject that involves multiple divisions within DEC.

The log of requests for public records is a public record. It must be preserved, included as a separate item on the public agency's record retention schedules, and provided upon request in accordance with 2 AAC 96.300. [54]

[47] 2 ACC 96.310(b)
[48] 2 ACC 96.310(b)
[49] 2 AAC 96.310(d)
[50] 2 AAC 96.310(c)
[51] In calculating any regulatory deadlines, the day that the request was received or other triggering event occurred is excluded from the subject period; the day that the response or other action is due is included. Id.
[52] 2 AAC 96.310(c)
[53] 2 AAC 96.320(a)
[54] 2 AAC 96.320(b)

Acknowledge Receiving Requests. If the requestor provides a stamped, addressed postcard, promptly notify the requestor of the date that the request was received. [55]

Determine Whether the Requestor is Involved in Litigation with the State. The requestor may be asked whether they are involved in litigation, i.e., is a party or is representing a party involved in judicial or administrative litigation, with the state where the requested records could be sought "in accordance with the rules of procedure applicable in a court or an administrative adjudication." [56] If the requestor is involved in litigation, consult with LAW to determine whether to inform the requestor to make the request in accordance with the applicable court or administrative rules.

Do Not Request an Explanation or Justification; Do Not Discriminate

- Do not request "a justification or explanation of need or intended use." [57]
- Do not discriminate "among requestors or classes of requestors, such as academic researchers, state and federal agencies, members of the public, news organizations, genealogists, or nonprofit groups." [58]

Request Clarification.

- Within 10 working days after receiving a request, the requestor may be asked to clarify the request: "[i]f the records are described in general terms, the agency shall attempt to communicate with the requestor in order to identify the public records requested, speed the response, and lessen the administrative burden of processing an overly broad request." [59] Requests for clarification "may not be used as a means to discourage requests." [60]
- If emails are sought, consider asking the requestor to clarify whether they want the Department and/or the State Security Office to search for them. Although only the Department can search for draft emails, the Department cannot electronically search for emails of former employees, unless their employment was very recently terminated; nor can the Department search for emails that were emptied from deleted items folders. (Deleted emails are automatically emptied after seven days.) The State Security Office can search for any recoverable emails in the state's email archive system. (Draft emails are not in the state's email archive system because they were not sent or received.) The State

[55] 2 AAC 96.310(a)
[56] AS 40.25.122; 2 AAC 96.220
[57] 2 AAC 96.220 also states: a public agency may inquire whether the person making the request is a party, or represents a party, involved in litigation with the state or a public agency to which the requested record is relevant. If so, the requester shall be informed to make the request in accordance with applicable court rules.
[58] 2 AAC 96.230
[59] 2 AAC 96.315(a)
[60] 2 AAC 96.315(a)

Security Office uses terms and/or phrases to search email fields-including the “to," "from," "date/time,” "subject," and "message" fields-and any readable attachments. The State Security Office charges $57.84 per hour for personnel time. Copies cost the same regardless of whether the State Security Office or the Department performs the search. If a requestor wants the State Security Office to search for emails, the Department works with the State Security Office to design the search; the design is subject to the requestor's approval. A request for a search by the State Security Office is governed by A5 40.25.115 and 2 AAC 96.400 - .460.

- Within 10 working days after receiving the response to a request for clarification, ask the requestor for additional clarification, if needed.

- After clarification, determine whether the request is covered by the APRA. The time limits for responding to requests begin anew upon receiving clarification. [61]

Identify the records custodians. Upon receiving a clear request, promptly identify the employees and contractors who may have possession, custody, or control of responsive records (i.e., "records custodians").

Instruct the records custodians to preserve records. Instruct all records custodians to ensure that all responsive non-electronic and electronic public records that are in their possession, custody, or control are not lost or destroyed. For example, all automated deletion protocols that might result in the deletion of responsive records must be suspended. If responsive records might be lost or destroyed if they are not collected, then the records custodians (or other Department personnel) must search for and collect them. If necessary, consult with the Department of Law to determine whether a legal hold should be issued.

Estimate the Recoverable Costs. Within 10 working days after receiving a clear request, work with the records custodians to estimate the search and copying costs. If, in a calendar month, searching for and copying records in response to all of a requestor's requests exceeds five person hours, the requestor must pay for the entire amount of time required to perform those tasks.[62] Other time spent responding to a request, including reviewing records for protected information, is not recoverable. For Department records, the requestor is charged the salary and benefit costs of the person performing the work.[63] The hourly rate is the employee's annual salary and benefit costs divided by 1,950 hours (i.e., 37.5 hours times 52 weeks). The least expensive qualified persons perform the searches and copying. The requestor is also charged $O.25/page for copies

[61] 2 AAC 96.315(b) "Time limits set out in this chapter do not begin to run until a sufficient description of the records is received in the office of the public agency responsible for maintaining the records."

[62] AS 40.25.110(c)

[63] AS 40.25.110(c)

of paper records that are 8.5 inches by 11 inches or 8.5 inches by 14 inches. The department has a policy of waiving the copying fee for record requests under 200 pages. If questions arise regarding recoverable costs, including for contractor records, consult with the Department of Law.

- If the costs of copying records cannot be estimated until after the search and review for protected information, the copying costs are estimated after those tasks are completed.
- Within 10 working days after receiving a clear request, provide the requestor the estimate of recoverable costs with instructions to make the check payable to the State of Alaska.

Address requests for fee reductions or waivers. Who the requestor is and why the records are sought are irrelevant.[64] Consult with LAW and the designated public records custodian before responding to a request for a fee reduction or waiver. Information on waiver of fees and public interest outreach can be found at 2 AAC 96.370(a)(1).

If there will be recoverable costs, receive payment before beginning work

- Do not begin searching until all estimated costs are paid unless the requestor is a news organization.[65]
    - News organizations must pay the estimated search cost in advance only if the request is "unreasonable or in bad faith," the news organization failed to pay for a previous request, or searching for records "requires extraordinary expenditure of state resources."[66]
- Do not copy records for any requestor, including a news organization, until all estimated recoverable copying costs, including personnel time, are paid,[67] or you are reasonably certain that the requestor has agreed to pay and the payment is on its way.
- Records may be reviewed at the Department. If the requestor wants to review records at a Department office other than where they are located and the records can be moved-i.e., because they are not working copies-the Department may send them to the requested office if the requestor pays the shipping costs in advance.

Log time searching for and copying records. For billing purposes, each person participating in the search and/or copying must record how much time was spent performing those tasks. The

[64] 2 AAC 96.220; 2 AAC 96.230
[65] AS 40.25.110(c); 2 AAC 96.360(c)
[66] 2 AAC 96.360(c)
[67] AS 40.25.110(c); 2 AAC 96.360(c)

Department of Law can help determine whether the Department should keep track of additional information.

If the estimate is expended before the work is completed, suspend work and estimate the recoverable costs to complete the work. If an estimated payment is exhausted before the search or copying is completed, suspend the work; estimate the cost of completing the search or copying; and before continuing the search or copying (follow instructions for "If there will be recoverable costs, receive payment before beginning work"). The requestor can withdraw the request, and the amount paid will be returned; or the requestor can pay the chargeable fees to complete the response tasks. In some circumstances, the requestor may opt to receive the records collected instead of having the estimated payment returned; the Department of Law can help determine whether this option is available.

Review each record for protected information; log wholly protected records and, if necessary, redacted information.

- Review each responsive record to determine if it is exempt (in whole or in part) from disclosure under AS 40.25.120(a)(1)-(12). For example, a record may be exempt from disclosure if it contains information that is confidential under
    - federal constitutional provision,
    - federal statute or regulation,
    - state constitutional provision,
    - state statute, or
    - federal or state court order.

  A record may also be exempt if it is covered by the attorney-client privilege, attorney work-product doctrine, executive privilege, deliberative process privilege, or the balance-of-interests test.[68] Consult with the Department of Law if a question exists regarding whether any information is protected from disclosure.

- If protected information and non-protected information can be meaningfully separated, redact the protected information.[69]

[68] 2 AAC 96.210(d)
[69] AS 40.25.120(a); 2 AAC 96.210(d)

- In most cases, records that are withheld because they contain protected information must be listed on a log of protected records that identifies the following information to the extent that it can be derived from the record:
    - the date that the record or redacted information was created or received by the Department;
    - the type and size of the record;
    - the author or authors of the record or redacted information;
    - the recipient or recipients of the record or redacted information;
    - the general subject of the record or redacted information; and
    - the grounds on which the record or redacted information is protected from disclosure
- A redacted record need not be logged if all of the information that would be logged is contained on the part of the record that will be produced.
    - Do not log a record that is withheld (in whole or in part) if logging it would violate a right: e.g., where acknowledging the existence of medical records would violate the right to privacy. Consult with the Department of Law if you have questions about whether logging a record is appropriate.

Consider notifying persons who reasonably might have a legally protected interest in the nondisclosure of information. Some records may contain information about a person that the person does not want the Department to disclose. If the Department determines the record does not contain any protected information, but the Department believes a reasonable person may want to dispute that determination, then, the Department may give that person an opportunity to review the record. Upon review, the person may request that the Department protect the information, and may seek a protective order if the Department rejects the request. Providing this opportunity, however, is not a basis for extending any deadlines for producing the record. If it appears additional time is necessary to allow a person to review a record, you must timely request an extension of time from the requestor if no other basis exists for extending the deadline. The Department of Law can help determine whether a person should be given this opportunity.

Comply with all regulatory deadlines

- If the Department determines that a request "is, in fact, a request for electronic services and products," within 10 working days after receiving the request, provide the requestor the reasons for the determination.[70] Electronic services and products are computer-related services and products provided by a public agency, including:

    - electronic manipulation of the data contained in public records in order to tailor the data to the person's request or to develop a product that meets the person's request
    - duplicating public records in alternative formats not used by a public agency, providing periodic updates of an electronic file or data base, or duplicating an electronic file or data base from a geographic information system
    - providing on-line access to an electronic file or data base
    - providing information that cannot be retrieved or generated by the existing computer programs of the public agency
    - providing functional electronic access to the information system of the public agency; in this subparagraph, "functional access" includes the capability for alphanumeric query and printing, graphic query and plotting, nongraphic data input and analysis, and graphic data input and analysis
    - providing software developed by a public agency or developed by a private contractor for a public agency
    - generating maps or other standard or customized products from an electronic geographic information system

- Work with the records custodians to determine the time needed to collect the records, review them for protected information, and, if necessary, prepare the log of withheld and/or redacted records.

- If the request is clear and there are no estimated recoverable costs, within 10 working days after receiving the request, provide the records and/or deny the request, unless the deadline for responding was extended. (2 AAC 96.325(a)). Note: only the commissioner or the Department employee delegated denial authority by the Commissioner may deny the request.

- If the request is clear and there are estimated recoverable costs, within 10 working days after receiving the required payment, provide the records and/or deny the request, unless the deadline for responding was suspended (because the payment was expended before

[70] 2 AAC 96.325(b)

the search and copying were completed) or the deadline was extended. (2 AAC 96.325(c)). If the deadline for responding was suspended and the requestor pays the new estimate, the Department must provide the records and/or deny the request within the number of days that remained before the suspension and any applicable extension.

Consider asking the requestor to agree to an extension. Any deadline can be extended "if the requestor agrees in writing that the requested records need not be supplied until a specified date." (2 AAC 96.325(g)).

Extend the 10-working-day period, if appropriate

- The time to respond can be extended for an additional 10 working days if at least one of the criteria in 2 AAC 96.325(d) applies: "(1) there is a need to search for and collect the requested records from field or other offices that are separate from the office responsible for maintaining the records; (2) there is a need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request; (3) there is a need for consultation with an officer or employee who is absent on approved leave or official business; (4) the basic response period comes during a peak workload period; or (5) there is a need to consult with legal counsel to ensure that protected interests of private or government persons or entities are not infringed." The time can be extended "only as to those specific documents within the request as to which the circumstances apply." (2 AAC 96.325(d)).

- Notify the requestor of an extension under 2 AAC 96.325(d) before the initial ten-working-day period for the search and copying expires. The notice must "state the reasons for the extension and the date by which the office expects to be able to furnish the requested records or to issue a determination that the records are not disclosable. The notice must include a statement that the extension is not invoked for the purposes of delay." (2 AAC 96.325(d)).

Request an extension from the attorney general, if appropriate. If more than 20 working days are needed to avoid "substantially impair[ing] the other functions of the public agency or an office responsible for maintaining the requested records," the Commissioner may ask the attorney general to grant an additional extension. (2 AAC 96.325(e)). These should be coordinated with the consulting attorney from the Department of Law.

Respond to the records request

- Provide any non-protected responsive records, redacted records, log of protected records and/or information, and/or notice of denial. A record is provided "in the form in which it is maintained or disseminated by the" Department. (2 AAC 96.355(a)). "A copy of an

electronic public record is generated by copying the electronic file that was used to produce the printed form of the public record." (2 AAC 96.355(b)). 2 AAC 96.440 governs the release of proprietary software.

- Return any amount of a prepayment that was not expended on recoverable costs.
- A request is denied under 2 AAC 96.335(a) in the following situations: (1) no responsive records exist; (2) no responsive records were located despite a diligent search; and (3) any responsive records are withheld or redacted. A request may be denied only by the Commissioner or a Department employee delegated denial authority by the Commissioner, 2 AAC 96.335(b); if a person delegated denial authority issues the denial, "the notice of denial must reflect this delegation." (2 AAC 96.335(c)). A denial "must be in writing; must state the reasons for the denial, including any specific legal grounds for the denial; and must be dated and signed by the person issuing the denial." (2 AAC 96.335(c)). Re-state 2 AAC 96.335(d) in the denial notice. (2 AAC 96.335(d)). A copy of 2 AAC 96.335 - 2 AAC 96.350 must be enclosed. (2 AAC 96.335(c)). A denial is issued upon delivery to the United States Postal Service or hand-delivery to the requestor. (2 AAC 96.335(e)).
- If a request is denied because a public record that the Department believes it possesses cannot be located, the office responsible for maintaining the record must (a) continue to search for it "until the record is located or until it appears that the record does not exist or is not in the public agency's possession" and (b) periodically update the requestor of its progress. (2 AAC 96.335(f)).

Preserve records that are not provided in whole or in part. If access to a public record is denied, in whole or in part, the record may not be destroyed or, with one exception, transferred from the Department's custody "until at least 60 working days after the requestor is notified in writing that the request has been denied, or if there is an administrative or judicial appeal or other legal action pending at the end of the 6O-working-day period, until the requestor has exhausted those actions." (2 AAC 96.335(g)). The record "may be transferred to state archives and records management services as provided by AS 40.21 and regulations adopted under AS 40.21."

If a denial or any other action is appealed consult with the Department of Law and the Office of the Commissioner.

For additional help with Public Records Requests, consult the DEC Public Records Requests

Guidelines or contact the Department's Regulations Program Coordinator. Additional guidance can also be found in DEC's policies and procedures under the Commissioner's Office section.

Glossary of Acronyms and Terms

Acronyms

AAC	Alaska Administrative Code
AAG	Assistant Attorney General
APRA	Alaska Public Records Act
ARE	Alaska Rules of Evidence
AS	Alaska Statute
AST	Alaska State Troopers
AUSA	Assistant United States Attorney
CATS	Complaint Automated Tracking System
CD-R	Compact Disk-Recordable
COBC	Compliance Order by Consent
CO	Compliance Order
DAS	Division of Administrative Services
DEC	Department of Environmental Conservation
LAW	Department of Law
DOL&WD	Department of Labor and Workforce Development
ECU	Environmental Crimes Unit
EPA	Environmental Protection Agency
EPA-CID	Environmental Protection Agency-Criminal Investigation Division
EO	Emergency Order
NOV	Notice of Violation
OSPA	Office of Special Prosecution and Appeals
OSHA	Occupational Safety and Health Agency
SOP	Standard Operating Procedure
TRO	Temporary Restraining Order
QA	Quality Assurance
QC	Quality Control
QAPP	Quality Assurance Project Plan

Terms

Alaska Rules of Evidence. These rules apply in all proceedings in the courts of the State of Alaska except as otherwise required by the Constitution of the United States or this state or as otherwise provided for by enactment of the Alaska Legislature, by the provisions of this rule, or by other rules promulgated by the Alaska Supreme Court. The word "judge" in these rules includes magistrates and masters. Similar rules of evidence apply in proceedings in the federal courts.

Affiant. The person who makes and subscribes an affidavit.

Affidavit. A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Chain of Custody. A chronological written record of individuals who have had custody of the evidence from its acquisition until it's final disposition.

Compliance Assistance. Information and technical assistance provided by DEC to help the regulated community satisfy the requirements of Alaska's environmental laws. Compliance assistance includes providing the regulated community with general or sector specific information (e.g., workshops, newsletters, fact sheets, notices) about legal requirements applicable to that particular sector (e.g., regulations, reporting deadlines, appropriate technologies). Compliance assistance can also include on-site assistance or facility audits to help the owner/operator identify and reduce or eliminate pollution sources.

Consent Decree. A Consent Decree is very similar to a Compliance Order by Consent except the Assistant Attorney General files an action with the court, and once agreed upon by the court becomes enforceable as a Court Order.

Compliance Order. An order issued by the DEC that directs the violator to take certain steps. A compliance order should only be used when the violator has the financial resources to be reasonably expected to comply with the order. The order typically requires undertaking of long term corrective action undertaken and normally contains milestones for various steps.

Compliance Order by Consent . A negotiated compliance order between DEC and the violator. The COBC can establish civil penalties for violation of the order and should establish measurable milestones for corrective action by the regulatory party. Also referred to as a Consent Order.

Compliance History. A regulated party's past environmental violations.

Consent Order. See Compliance Order by Consent.

Criminal Negligence. A person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. AS 11.81.900(4).

Demonstrative Evidence. Something other than the above which is prepared or selected to illustrate or otherwise make some relevant fact clearer or easier to understand (e.g., photographs, diagrams, maps, summaries, video tapes, models).

Deposition. Oral statements made under oath to be used in court in place of the spoken testimony of the witness. In rare instances depositions are made based on written questions.

Discovery. pre-trial phase in a lawsuit in which each party, through the law of civil procedure, can obtain evidence from the opposing party by means of discovery devices including requests for answers to interrogatories, requests for production of documents, requests for admissions and depositions.

Documentary Evidence. A "document" having significance and effect due to its content (e.g., reports messages, logs, accounting ledgers, computer printouts, manuals, guidance, tape recordings).

Emergency Order. An order signed by the Commissioner to abate a violation or health hazard or directing someone to take steps out-lined in the order.

Evidence. Anything that helps to ascertain the truth of a matter, or gives proof of a fact. Evidence to be used in courts must satisfy evidentiary rules.

Information. A document filed by the prosecutor with the criminal court alleging violations of law signed by the prosecuting attorney.

Judicially Noticed Evidence. Matters about which there could be no dispute and becomes evidence by virtue of their being so noticed by a judge (e.g., scientifically accepted testing devices, geographic locations, matters of common knowledge).

Notice of Violation. A written record that the Department has formally notified a violator that a particular action violates the law.

Nuisance Abatement Order. An order issued by an officer of the Department to abate a water, air, or land nuisance.

Peace Officer. A public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders. AS 11.81.900 (b)(43)

Subpoena. The usual writ (order) for the summoning of witnesses or the submission of evidence, as records or documents, before a court or other deliberative body.

Real - The object, item or thing itself (e.g., contaminated dirt).

Temporary Restraining Order. Temporary Court order issued on short notice without a full hearing when the court is convinced that some serious harm may result if delay occurs.

Testimonial Evidence. A person's reported sense impressions and the opinions the person formed based on them (e.g., the inspector's testimony).


DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STATE OF ALASKA