Business & The Environment
CONFERENCE • EXPO

Preparing for an Agency Inspection

Cast (Not Quite Ready For Hollywood)

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Our Play

- Act I – The "Arrival"
- Act II – The "Inspection"
- Act III – The "Record Review"
- Act IV – The "Close Out Meeting"

Act I – The "Arrival"

Takeaways

ARRIVAL AND CHECK-IN

Always ask to see identification. They must provide this.

Generally, don't deny inspector access to your facility (if you are a permitted facility, the State may have a permit/contractual right of access) – This does not improve trust or the mood of the inspector.

If you are uncertain whether inspector has a right of access, ask the inspector to please wait until she/he can be escorted around the facility and call your manager or in-house/outside legal counsel.

It is OK to say you would like your (Env. Manager, Lawyer, etc.) to be present during the inspection, but the inspector may choose not to wait very long – have a Communication Plan in advance!

Avoidance, delay, or deception can hurt your company's chances for a favorable results.

Denial of access can be considered a violation in certain circumstances. There may be times when denying access is appropriate.

Takeaways (cont.)

OPENING CONFERENCE

Ask why the inspector is there? What is the scope of the inspection? What do they want to see?

Introduce all participants from your company. Agency will introduce its team.

If there are safety videos, go through them with the inspector and let them know about any safety hazards. Make sure inspector has appropriate PPE.

Provide an overview of the facility and its environmental, health and safety programs, as relevant.

Identify areas in the workplace or documents that might reveal confidential trade secrets and get the inspector's confirmation that photographs of confidential areas or documents will be noted as "trade secret" in the agency's file. Send a confirmation letter or email.

Takeaways (cont.)

INTERACTING WITH THE INSPECTOR

The tone you set during your first interaction will set the tone for the remainder of the relationship. An aggressive or uncooperative tone signals to the inspector you may have something to hide or to be defensive about.

The same inspector assigned to your facility will likely come back again and again (potentially for years to come) – remember this.

This is a relationship. Treat it like one.

Inspectors MORE THAN ANYTHING need to believe you are listening to them and that you "get it."

Do not think you can get an inspector taken off your case by complaining to their manager – this almost always results in the same inspector coming back – now angry (at you).

The agency will not likely admit it, but angry inspectors can and sometimes do take more aggressive action against people/companies they don't like.

Act II – The "Inspection"

HAZARDOUS WASTE GENERATOR REQUIREMENT	Regulatory citation(s)	Compliance?			Comments
		Yes	No	N/A	
RECORDKEEPING AND REPORTING REQUIREMENTS					
EPA Identification Number	40 CFR 262.18(a) OAR 340-102-0018				
Retain HW manifests (3 years)	40 CFR 262.40(a)				
Retain land disposal restrictions notices (3 years)	40 CFR 262.17(a)(9) 40 CFR 268.7(a)(8)				
Retain waste determination data (3 years)	40 CFR 262.11(f)				
Annual reporting	OAR 340-102-0041				
Annual report for waste exported	40 CFR 262.83(g)				
Retain annual reports (3 years)	OAR 340-102-0040(2) 40 CFR 262.42(b)				
Hazardous waste generator fees	OAR 340-102-0065(1)				
ACCUMULATION TIME LIMITS					
On-site storage for ≤ 90 days	40 CFR 262.17(a)				
WASTE IDENTIFICATION REQUIREMENTS					
Hazardous waste determination for each solid waste	40 CFR 262.11(a-e) OAR 340-102-0011				
Volatile organic waste determination (40 CFR 265 Subpart CC)	40 CFR 262.17(a)(1)(i) 40 CFR 265.1084(a)(1)				
Determine all applicable waste codes and underlying constituents	40 CFR 262.17(a)(9) 40 CFR 268.9(a)				
Land disposal restrictions waste determination	40 CFR 262.17(a)(9) 40 CFR 268.7(a) 40 CFR 262.11(f)				

GALAXY
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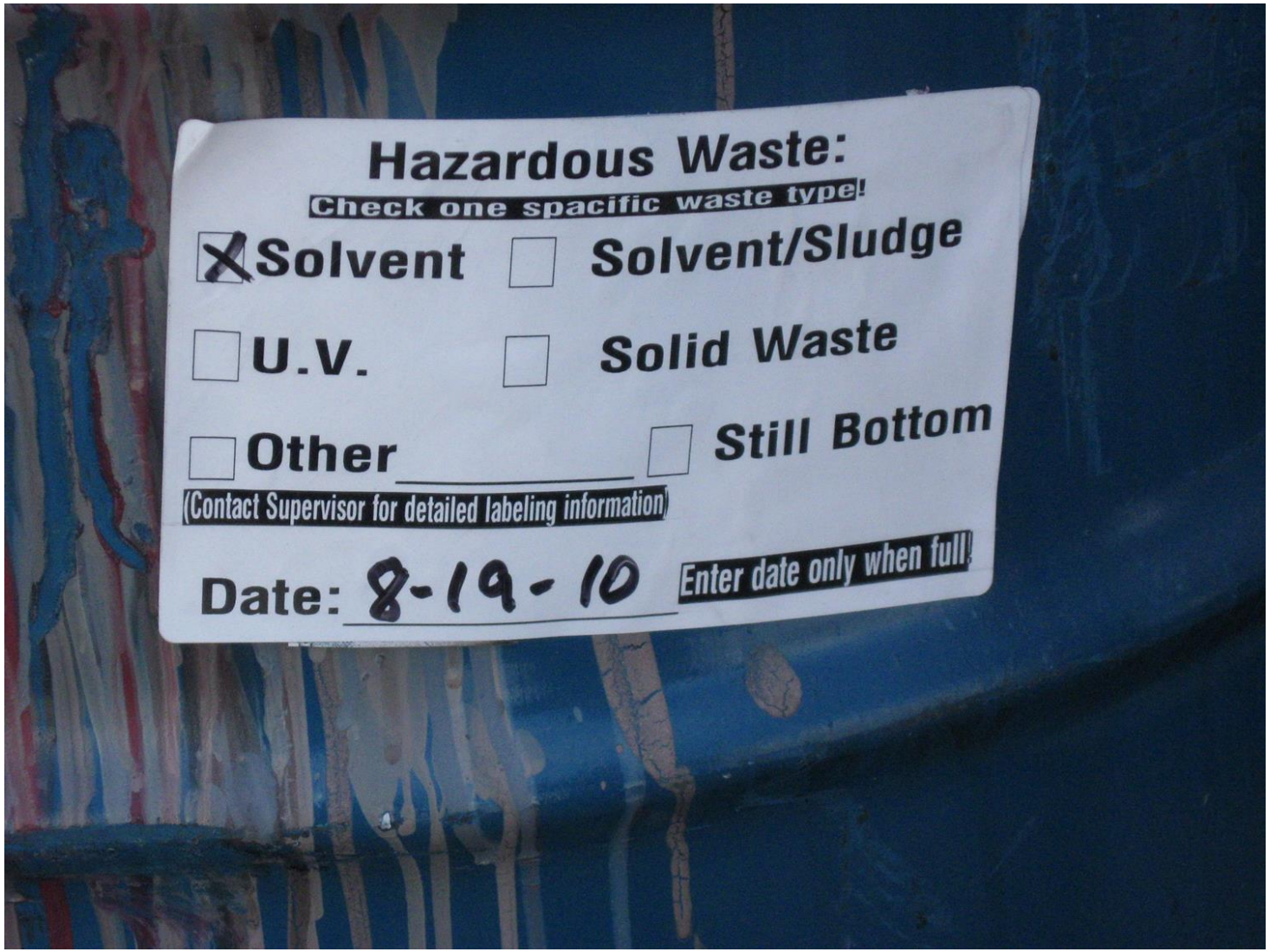
Hazardous Waste:
Check one spacific waste type!
X Solvent
Solvent/Sludge
U.V.
Solid Waste
Other
Still Bottom
(Contact Supervisor for detailed labeling information)
Date: 8-19-10
Enter date only when full!

PUPUSAS
OPEN
Salvadorean Cuisine

AFTER LUNCH - INSPECTION CONTINUES…
THEY RETURN TO THE "BACK 40" LOT…

Takeaways

THE SITE WALK

Always stay with the inspector.

Don't rush the inspection.

Stay on track. If the inspector is there to inspect the hazardous waste storage area – take them straight there. Do not take them on a tour of the facility. Walk outside to a closer entrance if needed to avoid taking the inspector through the facility and exposing the Company to plain view enforcement actions.

If the inspector takes a photo of something, you should take a photo of it too.

What about video?

If the inspector takes a sample, take a split sample (or ask for one from them).

Keep a record – you are allowed to take notes (or even a recording – but you should tell the inspector you are doing this).

If asked questions, respond only to the specific questions asked. Do not volunteer information.

Always tell the truth. If you don't know the answer to a question, say so - don't make up an answer or speculate.

What you say can and will be used against the Company (and potentially against you).

Takeaways (cont.)

INTERVIEWS

Talk to In House/outside legal counsel in advance about how to respond if inspector wants to interview someone – the rules differ for environmental and OSHA regulator access to employees.

Company and individuals have the right to have counsel present, but this should be a policy that is discussed and understood in advance – sometimes this can cause a delay that annoys the inspector but may be worth it to ensure communications are clearly tracked.

Attend and assist in all interviews of supervisory employees. Unlike non-supervisory employees, the statements and admissions of a supervisor may legally bind the company.

Management witnesses should be prepared in advance as to possible subject areas during their interview, and the "dos and don'ts" for giving testimony, including just answering the questions, avoiding speculation and the importance of telling the truth.

In some cases, lead employees or foremen are considered supervisory employees, as are safety directors, salaried managers and professionals. Seek advice from your company's legal counsel if you are in doubt.

Act III – The "Record Review"

Takeaways

RECORDS REVIEW

Electronic records are becoming the norm.

Have your permit/regulatory files up to date and in order.

Separate CBI/privileged documents from permit/regulatory files.

Bring the records to the inspector—DO NOT LET THE INSPECTOR GO THROUGH YOUR OFFICE, FILE CABINET OR SEARCH YOUR COMPUTER RECORDS. (EXCEPTIONS FOR DOCUMENTS KEPT ONLINE).

Be prepared to produce documents that are required under the regulations. Examples of required documents include hazardous waste manifests, waste determinations, training records, bi-annual reports.

Offer to make copies or send electronic versions of records identified by the inspector.

Takeaways (cont.)

DOCUMENT REQUESTS

Generally speaking, you should take the following steps when responding to requests for documents that are not specifically required to be produced by law:

- To avoid later misunderstandings, have the inspector put all document requests in writing or in an email.
- Obtain a clear understanding of when and where the inspector wants the documents to be produced.
- Before producing any records, make sure that they are complete and accurate.
- Keep a copy or a list of all documents provided.
- To prevent or limit disclosure, care should be taken before confidential documents or privileged, trade secrets and medical records are provided. As necessary, consult with legal counsel before providing any confidential documents.

Act IV – The "Close Out Meeting"

Takeaways

THE CLOSE OUT MEETING

Always ask for a post inspection closeout meeting. This may take place at the end of the inspection or on a later date.

Make sure you take notes on what is discussed, asked, and promised.

Ask questions!

Confirm what inspector wants.

It is OK to have a technical, regulatory or even legal disagreement with the inspector, but do so respectfully and at the right time and place (it is OK to call a subsequent meeting to discuss interpretations/technical issues).

Takeaways

FOLLOWING UP AFTER THE INSPECTION

If potential violations were documented at the inspection:

- Immediately share the information about the potential violations with management and legal counsel.
- If not already corrected during the walk-around inspection, you should begin to address and correct violations or other safety hazards observed during the inspection, even if you intend to challenge or contest the proposed regulatory enforcement actions. Correcting known hazards shows your company's good faith, an important factor in resolving the enforcement actions later. Failure to correct could result in higher penalties.
- Discuss with management/legal counsel whether to correspond with the inspector about correction of violations.

Takeaways

FOLLOWING UP AFTER THE INSPECTION

After you receive the inspection report:

- Closely review the report and identify any issues and areas of disagreement with the inspector.
- Acknowledge receipt of the report and let the agency know if you plan to reply and, if so, when.
- Prepare a response that addresses three buckets:
    1. Correct any factual errors
    2. Show/provide evidence of correction – take photos and provide applicable records
    3. Dispute alleged violations (as appropriate)

Questions?