

WORKING WITH DEP'S OFFICE OF GENERAL COUNSEL

Presented by
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Inspections- what do they have to do with OGC?

Presented by Kelly L. Russell

Short Answer:

- Everything!

Why?

- Burden of Proof.

Burden of Proof

- What does “burden of proof” mean?
- In a legal action: it is the plaintiff's or petitioner's duty to prove a disputed assertion or charge.

Who has the burden of proof in an enforcement action?

- The Department has the duty to present sufficient evidence to a judge or jury to show that violations have occurred.

Back to what this has to do with inspection reports?

- The inspector and good inspections are the Department's key to sustaining or meeting its burden of proving that violations have occurred. Inspection reports are evidence that can be used for or against the Department!

What do both OGC and the Department Staff need to make a good case?

- Good evidence- which primarily stems from thorough inspections and clear, detailed inspection reports.

So what makes a good inspection?

- Preparation.
- Documentation.
- Verification/Follow up.

Preparation?

- You must know what's going on with the facility before you inspect it. This will tell you some of the things you will be looking for when you perform an inspection:
 - Who is supposed to be responsible for any compliance and cleanup issues at the facility? Who is supposed to be the property owner? Who is supposed to be the tank owner? Have any of these people changed?
 - Are there open violations? Have any of the past violations been corrected and is there documentation that you can obtain/san to show when any violations occurred?
 - What equipment is supposed to be at the facility and has anything changed?
 - What was the layout of the facility during the last inspection based on the site drawings and photographs? May enable you to determine whether structures have been removed or installed, whether a contaminated area has been paved over, or to spot landscape changes indicating recently excavated soils in an area where there had never been documented contamination.
 - Had any discharges occurred at the property and what is the status? Should cleanup activities be underway and is it clear that site assessment activities have or have not been initiated?

Documentation

- Who?
- What?
- When?
- Where?
- Why?



Documentation- Who?

- Who did you contact at the property?
- Who was present at the property?
- Who else would be able to verify what was seen or heard at the property?
- Provide as much contact information as you can, so that if witnesses are necessary, they can be found at a later date.



Documentation- What?

- What was observed? BE VERY SPECIFIC. Use your senses- sight, smell, touch, when appropriate. Write it down and also take a picture of it, whenever possible.
- What wasn't observed? What was missing that should have been there? Again, pictures may help depict what is missing.
- What was said and by whom? Were any admissions or statements made by owner/operator/person in charge/other witnesses? If so, write it down.

Documentation- What?

- Be careful when documenting information. Remember that you may be asked to recite what happened at the facility- therefore simply checking boxes in FIRST may not help you remember what happened at a facility. Using the journal and adding detailed notes is imperative to a good inspection and may be the only thing that helps you remember a facility. Ambiguities must be avoided when documenting information.
- Remember that others will read your inspections and have to rely on them to understand what happened at a facility and to understand the violations. Therefore, adding notes and reviewing them to verify that they say what you mean is extremely important.
- Remember that the inspection itself may be used as evidence to demonstrate that violations did or did not occur at a facility. Poorly documented inspections can be used against the Department.

Documentation- When?

- When did you make your observations? date, time. Add this information to your notes section.
- When did others make their observations? When you speak to potential witnesses, it is important to understand time frames.
- When did you take your pictures- be sure that the date and time of the picture is accurate and well documented on the picture itself. Be sure to describe why the picture was taken.

Documentation- Where?

- Where were you when you made your observations?
- Where was the location of what you observed, both the site and the actual violations?
- Again, pictures are extremely helpful and documenting what is displayed in the picture will be important if someone needs to understand why a picture was taken or what the picture is depicting.

Documentation- Why?

- Why were you unable to observe certain things? Were you denied access? Were you unable to open the fill ports to measure product/water in the tank? Did the owner/operator fail to provide notice of certain activities? Was the weather a certain condition that would distort the true condition of the property (rainy day- unable to observe soil conditions)?
- Why are certain records and paperwork unavailable? Was the facility boarded up, preventing access to any documents which may have been at the site or were the documents not at the site at all. Was the paperwork unavailable because 5 working days notice was not provided to the facility owner or operator? These facts make a difference when alleging paperwork violations.
- Be careful with the "why" part of the question. Do not make an opinion you're not qualified to make, or which you will not be able to back up. Document facts not opinions.

Verification/Follow up

- When someone states that their paperwork is at a different location- follow up.
- If there is a new operator or there appears to be a new owner- check the property records- verify.
- If someone claims that the contractor is on their way- verify- call the contractor, get a copy of the contract. If necessary, be present when work is performed.
- If you see something happening at a facility that is not within your area of expertise- talk to staff from another program area to follow up with your concerns.

What does all of your information and documentation do for an enforcement case?

- Prevents it- when responsible parties are faced with well-documented violations, they are more likely to work with the Department to correct violations.
- Provides ease of resolution at the District level- again if a person is faced with concrete facts and proof, they are usually more willing to resolve violations.
- Allows for ease of settlement- whether at the OGC level or below, if an attorney representing a responsible party sees that violations are well documented, they know that the Department can sustain its burden of proof and is more likely to settle.
- Provides the Department with enough evidence in court to show the Judge or Jury that the violations have indeed occurred and that the person that the Department has named in the law suit is responsible for those violations.
- Long term- people talk, and when they see that the Department has a good record of making strong cases against violators, people will be less likely to violate.

VIOLATIONS & THEIR SIGNIFICANCE LEVELS

Presented by
Peter J. Caldwell



There are three types of tanks violations:

- SNC - A ("Significant Non-Compliance A")
- SNC - B ("Significant Non-Compliance B")
- MIN ("Minor Violation")

Why different significance levels?

- The SNC categories govern when and how the inspector refers violations to the DEP District Office

Significance Levels

- SNC As are the highest priority and involve a serious threat to human health and the environment
- SNC Bs are a high priority but may not pose as great a threat to human health or the environment
- Minors are violations that may not pose a significant threat to human health or the environment

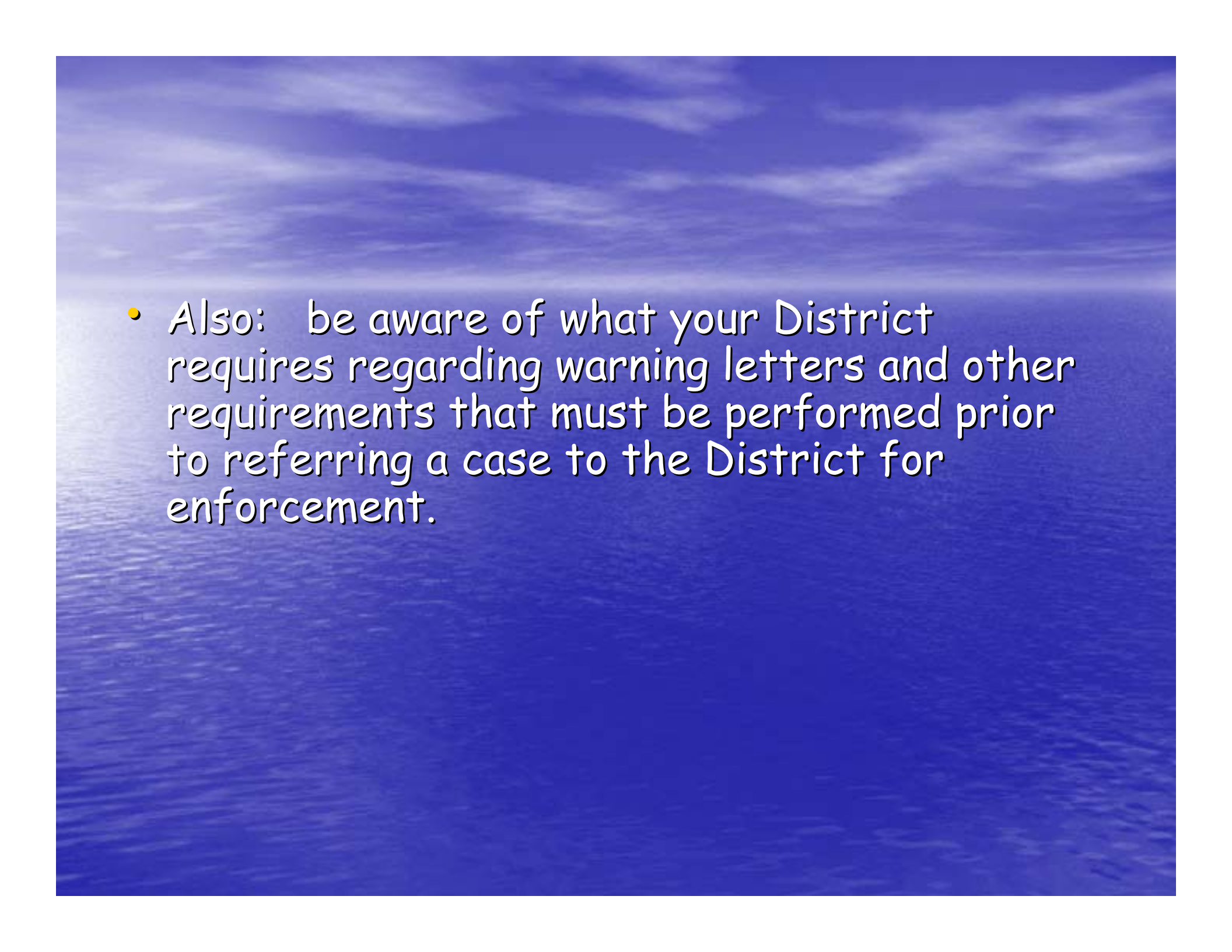
County Inspection - violation identified

SNC A- must
be referred
to district
within 5
working days
of issuance of
NCL

SNC B- must
be referred to
district within
90 days of
issuance of
NCL, if
violations
remain
unresolved

Minor- if
unresolved
after 180 days
from date of
inspection- local
program to
contact
District to
discuss

Referral to District

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- Also: be aware of what your District requires regarding warning letters and other requirements that must be performed prior to referring a case to the District for enforcement.

How will I know what level the violation is?

- Look on the inspector's data entry checklist for a column marked "Significance Level" or "Sig."
- In this column, you will see the symbols "A", "B", or "N" beside each listed violation:
 - "A" = SNC - A level violations
 - "B" = SNC - B level violations
 - "N" = MIN - Minor Violations
- Also look at the FIRST system, where the same information is available

IMPORTANT REMINDER:

- Repeat Minor Violations: If the violation is categorized as a minor, but has been found repeatedly in inspections, you should contact the District on whether the case is appropriate for referral.

REFERRAL TO THE DISTRICT

Presented by Ashley Cass



What happens once the case is referred to the District?

- Non-compliance Letter and/or Warning Letter Issued
 - The letter is issued to all potentially responsible parties.
 - Responsible parties include the owner of the property, the owner of the tank system, the operator of the facility, and a discharger.

If the Responsible Party responds:

- There may be a meeting between the RP and the Department
- An RP can agree to perform the corrective action(s) and/or agree to resolve penalties through:
 - Short Form Consent Order (SFCO)- when all corrective actions have already been verified to have been performed
 - Model Consent Order- when there are any corrective actions that are still necessary to bring the facility into compliance
 - OGC reviewed Consent Order- whenever there is any deviation from the Model Consent Order and corrective actions are still necessary

If the Responsible Party Does not Respond or the Response is not Adequate:

- The matter is referred to OGC for enforcement
 - through a Notice of Violation (NOV)- (administrative complaint)
 - through a case report requesting that a complaint and/or a petition for enforcement of a "final order" be filed in civil court

REFERRAL TO OGC

Presented by Amy Duffey

REFERRAL TO OGC

- The District refers a case to OGC as:
 - Consent Order
 - Notice of Violation ("NOV")
 - Case Report (Complaint/Petition for Enforcement)

CONSENT ORDERS

- Use when Respondent has agreed to settlement
- All Long-form and Short-form Consent Orders which deviate from the model must be sent to OGC for review
 - requests to change standard language may occur during negotiations
 - over 1,000 consent orders executed yearly
 - important to treat all responsible parties consistently

Consent Order "Dos and Don'ts"

Do:

- title the document "Consent Order"
- Make sure adequate support exists for factual allegations
- include a finding of violation
- refer to penalty payments as "civil or administrative penalties"

Don't:

- Include language limiting consent order's use in subsequent administrative or judicial proceedings
- negotiate away right to publicize information contained in the Consent Order

NOTICE OF VIOLATION ("NOV")

- An NOV is an administrative complaint
- Use when Respondent fails to settle via Consent Order or fails to respond to a Warning Letter and the penalties sought are \$10,000 or less.
- Department bears the burden of proof
 - Need adequate information in inspections to support allegations

NOV Process

- Draft NOV is sent to OGC for review and returned to the District for issuance
- Once NOV is issued, Respondent must file petition for either formal or informal hearing within 20 days
 - If Respondent files a petition for formal hearing - proceeds to administrative hearing (trial before an Administrative Law Judge, "ALJ") which will end with the issuance of a Final Order by the ALJ once all evidence is heard.
 - If Respondent fails to file a petition - a Default Final Order is issued
- NOVs can be resolved through the entry of a Consent Order

NOV "Dos and Don'ts"

Do:

- Ensure all allegations are supported by the facts
- Use the model to assist in drafting the NOV
- provide OGC with all relevant supporting documentation
- Follow the rule for the violation you are citing
- Pursue penalty multipliers when appropriate

Don't:

- make allegations you cannot support or aren't comfortable supporting
- Use assumptions, beliefs, or what others have said to make an allegation unless other concrete facts support the position
- Fail to check (and double-check) dates and parties

COMPLAINT/PETITION FOR ENFORCEMENT

- Action filed in circuit court
 - Petition for Enforcement: used when seeking enforcement of the terms a Consent Order/Final Order which have not been complied with
 - Complaint: used when pursuing new or additional violations not the subject of a Consent Order/Final Order; when the Department is seeking a temporary injunction to immediately stop a violation from occurring; or when penalties sought exceed \$10,000
- Department bears the burden of proof

Complaint/Petition for Enforcement Process

- District sends OGC a case report
- Attorney will draft Complaint/Petition for Enforcement and file in the appropriate circuit court
- Will proceed to trial and Final Judgment, or will resolve matter via Consent Final Judgment (settlement agreement)
- If responsible party complies with all terms of final judgment, no further action necessary
- If responsible party fails to comply with all terms of a final judgment:
 - OGC should be contacted to pursue a Motion for Contempt
 - If noncompliance only involves the non-payment of penalties, District should pursue collections in accordance with DEP procedure

APPEALS

- Appeals of Final Orders or Final Judgments can be made by the violator or by the Department when it is believed that the application of the law was incorrect or when it is believed that the facts presented were insufficient to support the finding of the judge below.
- Proof is still very important in appeals - facts cannot be changed once established at the trial court level. Final Orders or Judgments can be reversed and/or remanded if Department did not properly meet its burden of proof at trial or hearing