

CHAPTER FOUR

INSPECTIONS AND INVESTIGATIONS

4.0 Determining Non-Compliance

The inspection and investigation is the linchpin in the compliance and enforcement process. The decision-making processes that are described in Chapters 5 and 6 are based upon the information gathered during the investigation.

A determination of non-compliance can be made through evaluation of information gathered from diverse sources. The Department's files, databases, and personnel as well as site inspections and eyewitnesses are all valuable sources of information and should be thoroughly consulted at the onset of the investigation. A thorough review of the files and databases will often reveal a history of interaction with the Department that can be a valuable tool during the compliance and enforcement process. Site-specific information is equally valuable and provides the foundation upon which the case will be built. Detailed notes, photographs, and conversation records documenting the inspection play a critical role in the development of the case.

The discovery of a violation can come to the Department's attention in a number of ways. It may be discovered upon examination of periodic reports submitted by a permit holder in accordance with the terms of the permit. A violation may be discovered after a private citizen complains to the Department, either informally or by a verified (sworn) complaint filed with the Department pursuant to Section 403.412, Florida Statutes. Inspections (routine, aerial, or otherwise) by Department staff may uncover a violation, or other local, state, or federal agency personnel may report a violation to the Department.

Notice of a possible violation is never enough to establish that a violation has occurred, however. In deciding whether a violation has occurred, the Department must be sure that it has

sufficient evidence to prove every element of the violation, which are contained in the applicable statutes and rules. For example, Section 403.161, Florida Statutes, provides that it is a violation to fail to comply with a permit. To prove a permit violation requires that the Department prove (1) that a valid permit exists (or existed at the time of the violation), (2) that the responsible party had the duty to comply with the permit, (3) that the responsible party performed, failed to perform, or was otherwise responsible for the acts that led to the violation of the permit, and (4) that the act or failure to act was, in fact, a violation of the permit. All these elements must be proven for the Department to prove a violation, and if the permit condition is complicated, then many more elements will be involved.

4.1 Jurisdiction

Prior to initiating an administrative or judicial proceeding against an alleged violator, the investigator must determine whether the Department or Board of Trustees has jurisdiction over the alleged violation. Jurisdiction over an alleged violation depends on whether the Department or the Board of Trustees has statutory or rule authority over the activity. Statutes over which the Department has jurisdiction include Chapter 161 (Beaches and Coastal Systems), Chapter 253 (State Lands), Chapter 369 (Aquatic Plants), Chapter 373 (Dredge and Fill), Chapter 376 (Petroleum, Dry Cleaners, and Hazardous Substances), and Chapter 403 (Air and Water Pollution, Drinking Water, Solid Waste, Mangroves).

Sometimes the Department does not have jurisdiction over a problem, even an environmental problem. For example, some citizen complaints may involve problems over which the Department has little or no control. These include backyard feuds, naturally occurring concentrations of contaminants, zoning violations, local resentment towards a nearby company and its products, or low concentrations of contaminants (not violations) that may cause illness or

allergy to a hypersensitive individual. Sometimes another state agency may have jurisdiction. Therefore, the investigator must determine whether the Department has the authority to address the problem. In some instances, the District staff and OGC should make this determination collectively.

Once it appears that the Department has jurisdiction, it should proceed to investigate the facts and circumstances surrounding the alleged violation. Almost all investigations require one or more inspections. Sections 4.2 through 4.11 of this chapter detail basic procedures that the enforcement staff should employ in investigating violations. These procedures can be summarized in three essential steps: (1) preparation for an on-site inspection, (2) conducting the inspection, and (3) documenting the inspection.

4.2 Preparation for an On-Site Inspection

The investigator must perform background research to obtain as much information as possible on the alleged violation before going on-site. Preparatory research should provide the investigator with knowledge of the type of violation, location, industrial process, imminent hazard conditions, and any historical or operational data that will help the inspector understand the context of the violation and what to expect. At the very least, such background research should include all Department enforcement, whether criminal, civil, or administrative, and permitting, certification, lease, or other authorization files on the facility where the violation occurred. Relevant information from other regulatory agencies such as USEPA and local programs is also useful. Also, if proprietary issues are involved, relevant state lands documents need to be reviewed.

In addition to information about the violation, the inspector should also collect information about the alleged violator and others who may have knowledge about the violation

or helpful background facts. If the case involves a corporation, the inspector should search corporate information at the Florida Secretary of State's website. The process for searching this website is described in section 4.9 below.

Determining property ownership and property control, such as lessees or renters, is also important. Property ownership can be searched at the clerk's office at the local county courthouse. Sometimes the information is available on-line. The process for determining property ownership is described in Section 4.7.

4.3 Regulatory Inspections - Obtaining Site Access

Site access is usually essential for an adequate inspection. Sometimes enough information can be obtained from neighboring properties or from flying overhead, but usually close, on-site inspections are necessary. In addition to inspections, sometimes the Department needs site access to perform remedial action to correct conditions that may affect the environment. Typically, the Department only needs short-term access to a site for activities that can be completed in a day or two, but occasionally it needs long-term access that can last up to several years. Each of these access issues should be approached differently.

Questions about site access should be directed to OGC, but site access involves more than simply legal considerations. For legal, personal safety, and commonsense public relations reasons, Department employees should exercise care when accessing sites. By using care, any difficulties associated with site access can be minimized, if not eliminated altogether.

4.3.1 Site Access -- Statutory Authority

Several state statutes grant the Department the authority to access sites. Other sources of site access authority include permits, consent orders, other administrative orders, permission forms, easements and licenses, inspection warrants, and court orders. Whether a particular site

access statute applies will depend upon the program and situation involved. As discussed further below, a site access statute standing alone is not adequate for a Department employee to access a site. Regardless of the authority granted by statute, a Department employee should never forcibly enter property if the owner, operator, or person in charge of the property denies access. If access is denied, you should consider using an inspection warrant as described in Section 4.3.3.1.

Section 403.091, Florida Statutes, is the Department's general short-term site access statute. Inspection authority under Section 403.091 cannot be delegated to another agency or individual who is not a duly authorized representative of the Department.

Section 403.091(1)(a), Florida Statutes, allows any duly authorized Department representative, at any reasonable time, to enter and inspect, for the purpose of ascertaining the state of compliance with the laws or rules and regulations of the Department, any property, premises, or place (except a building which is used exclusively for a private residence) on or at which any of the following are located or being constructed or installed, or where records are required to be kept under Chapter 403 or Sections 376.30-376.319, Florida Statutes:

1. A hazardous waste generator, transporter, or facility, or other air or water contaminant source;
2. A discharger (including any non-domestic discharger who introduces any pollutant into a publicly owned treatment works);
3. Any facility as defined in Section 376.301, Florida Statutes; and
4. A resource recovery and management facility.

Section 403.091(1)(b), Florida Statutes, allows any duly authorized representative at reasonable times to access and copy any records required under Chapter 403 or Sections 376.30-

376.319, Florida Statutes; inspect any monitoring equipment or method; sample for any pollutants as defined in Section 376.301, effluents, or wastes that the owner or operator of such source may be discharging or that may otherwise be located on or underlying the owner's or operator's property; and obtain any other information necessary to determine compliance with permit conditions or other requirements of Chapter 403 or Sections 376.30-376.319, Florida Statutes, or Department rule.

In addition to the general site access authority under Section 403.091, Florida Statutes, other statutes provide site access authority relating to particular regulatory programs.

Section 403.858, Florida Statutes, allows any duly authorized representative of the Department (or the Department of Health) to enter, take water samples from, and inspect any property, premises, or place (except a building that is used exclusively for a private residence) on or at which a public water system is located or is being constructed or installed, at any reasonable time, for the purpose of ascertaining the state of compliance with the law or with rules or orders of the Department.

Section 373.319, Florida Statutes, allows the Department to inspect any water well or abandoned water well. Duly authorized Department representatives may at reasonable times enter upon any premises for the purpose of such inspection.

Section 373.423, Florida Statutes, allows authorized representatives of the Department (or the governing board of a water management district), upon completion of the work, to perform periodic inspection of a permitted stormwater management system, dam, reservoir, impoundment, appurtenant work, or work (as defined in Section 373.403(5), Florida Statutes). During construction or alteration, Section 373.423(1), Florida Statutes, provides for such

periodic inspections pursuant to Section 403.091, Florida Statutes, as are deemed necessary to ensure conformity with the approved plans and specifications in the permit.

Section 376.303(4), Florida Statutes, allows the Department to require a property owner to provide site access for activities associated with contamination assessment or remedial action. The procedures for implementing this statute are described in section 4.3.4.

4.3.2 Site Access--Permission

Section 403.091(2), Florida Statutes, provides that an inspection under Section 403.091(1), Florida Statutes, may be conducted only after consent for the inspection is received from the owner, operator, or person in charge, or an appropriate inspection warrant is obtained. In addition, to ensure personal safety and promote commonsense public relations, even where a site access statute does not require permission, or a permit condition, consent order, or other administrative order explicitly gives site access authority to the Department, the Department should usually seek prior permission from the owner, operator, or person in charge, or a court.

4.3.2.1 Site Access Permission by Owner, Operator, or Person in Charge -- Express Permission

Express permission for site access may be obtained from the person with authority to grant access to the property, and it is important to determine whether the person from whom permission is sought has the authority to grant that permission. This is typically a commonsense determination, but sometimes it is not clear who has authority. The Department may obtain permission for site access by telephone, personal contact, letter, or completed permission form (a sample permission form is in the Appendix). When asking for site access, the purpose and scope of the inspection should be described. A convenient way to describe the inspection to the person from whom permission is being sought is to give the “who, what, when, where, why, and how”

of the proposed inspection. If verbal permission is obtained, the inspector should make a written record of the permission including the name and position of the person granting permission.

The Permission to Enter Property form is used for long or short-term inspections, but the permission given through the form is voluntary and can be revoked at any time. If the Department needs long-term access and desires more secure permission, it should consider obtaining a license or easement from the property owner. The license or easement creates legal rights for the Department to use the property for specified purposes and can be enforced by the Department if access is denied. They may be appropriate if the Department installs long-term monitoring wells or remediation systems. The Department can only obtain a license or easement by voluntary agreement from the landowner. Forms for the license and easement are in the Appendix, and District or Division staff should consult with OGC when considering a license or easement.

Except in unusual circumstances, the Department should make contact seeking site access permission and inspections during normal working hours. Circumstances justifying after-hours contacts or inspections would be present when the person to be contacted is unavailable during normal working hours, or where the activity or harm is believed to occur after-hours, such as during an oil spill, open burning, etc.

The Department representative must be prepared to present appropriate credentials, i.e., a Department identification card, when permission for site access is sought in person and at the time of any inspection. Under Section 403.091(1)(c), Florida Statutes, no person may refuse reasonable entry or access to any authorized representative of the Department who requests entry for purposes of inspection and who presents appropriate credentials, nor may any person obstruct, hamper, or interfere with any such inspection. Similarly, under 373.423(3), Florida

Statutes, no person may refuse immediate entry or access to any authorized representative of the Department (or the governing board of a water management district) who requests entry for purposes of such inspection and presents appropriate credentials. However, these statutes do not give the Department the right to forcibly enter property if access is denied even if the inspector presents proper credentials.

If permission is granted, the investigator must restrict the inspection to those areas to which access has been authorized and only of those sources or activities that the Department regulates. If permission to inspect particular portions of the property is not explicitly denied, the failure to object implies consent, as long as the original purpose of the investigation, as stated to the person who gave permission, does not change. For example, it is reasonable to assume that permission to inspect “the sewage treatment plant” implies permission to also inspect the percolation ponds or drainfield, but not a drinking water treatment facility. If permission is granted for a specific type of inspection such as a sewage treatment plant inspection, and a different type of violation is discovered on the property, such as a hazardous waste or air pollution violation, the investigator must obtain additional permission to enter and further inspect areas to which permission has not been granted to follow up on the new violations. If permission is restricted to a particular date or time period, these restrictions must be honored.

If permission is denied or revoked after initially being granted, the investigator should leave the area, document the conversation, and immediately contact his or her supervisor. This applies even to written permission that was previously given. The facts regarding denial or revocation should immediately be referred to OGC so that appropriate legal remedies can be initiated if necessary.

In no case should the investigator attempt to force entry onto a site, even if the Department has a license or easement. When entry has been denied or revoked, the investigator should not request the presence of an officer of the law to obtain consent, unless it is necessary to deal with an immediate and serious danger to public health, safety, or the environment. An investigator must scrupulously avoid conveying any direct or indirect threat of sanctions or punishment to a person who refuses or revokes permission to enter.

4.3.2.2 Site Access Permission by Owner, Operator, or Person in Charge - Implied Permission

In certain circumstances, site access permission can be inferred, but permission to enter cannot be inferred when the person controlling the site specifically objects. Permission can typically be inferred when a site is accessible to the general public without trespassing. In such situations, the investigator can proceed to the site of the violation without obtaining prior approval. Permission to enter cannot be inferred if a site is inaccessible to the general public, such as the interior of a business, factory, or a private backyard. In no case should an investigator enter a private residence unless express permission is received.

Property is not generally accessible where it is protected by a fence or by “posted,” “no trespassing,” or “keep out” signs. However, if the violation is in plain view from an area off the property or from navigable waters, regardless of whether submerged bottoms are privately or publicly owned, the investigator may document violations without obtaining prior approval, as long as the data can be collected without trespassing. If a site is fenced and the person controlling the site is unavailable, the investigator should not attempt in any way to gain access to the property. If a site is fenced, without signs restricting access, and the gate is open, the site

is still considered inaccessible to the general public. Even if the site is fenced on three or fewer sides, the investigator should resolve this uncertainty in favor of requesting permission.

Implied permission can be inferred when an emergency exists that requires site access for response action by appropriate personnel. Examples would include an overturned tanker truck or other situation where site access is necessary to respond to an immediate and serious danger to public health, safety, or the environment. In such situations, law enforcement or fire department personnel, if not already on scene, should be contacted as soon as possible. If an emergency exists but the person controlling the site specifically objects to entry, Department personnel should stay out of harm's way and await direction by law enforcement or fire department personnel. However, in an emergency, fencing or signs that generally restrict access are not considered specific objections to entry by appropriate personnel responding to the emergency. No Department employee untrained to respond to an emergency should attempt to respond in such a situation.

4.3.3 Judicial Authorization for Site Access

In lieu of obtaining permission from the owner, operator, or person in charge, site access authorization can be obtained from an appropriate court. The decision to seek judicial authorization to enter a site involves consideration of various factors, such as the time and expense of court procedures, possible takings claims made by the property owners against the Department, whether alternatives to site access are available to document compliance, and the difficulties that might arise from an uncooperative owner, operator, or person in charge. Any such factors need to be weighed by the appropriate District or Division staff in consultation with OGC. Often voluntary site access permission will be preferable. However, situations can exist where court authorization is necessary or preferred.

4.3.3.1 Inspection Warrant

One form of court authorization for site access is an inspection warrant. Under Section 403.091(3), Florida Statutes, upon proper affidavit being made, an inspection warrant may be issued when it appears that the property to be inspected may be connected with or contain evidence of the violation of any permit condition or the provisions of Chapter 403 or Sections 376.30-376.319, Florida Statutes, or any rule properly promulgated thereunder, or when the inspection sought is an integral part of a larger scheme of systematic routine inspections that are necessary to, and consistent with, the continuing efforts of the Department to ensure compliance with any such provisions or rules. Only duly authorized Department representatives may conduct inspections under Section 403.091(3) inspection warrants.

Inspection warrants should not be used to gather information about violations at sites that already are the subject of pending Department litigation for those violations. The Florida Rules of Civil Procedure authorize inspections during litigation but only after the proper documents have been filed.

The decision to seek an inspection warrant should be made on a case-by-case basis in light of the urgency associated with the inspection. For example, an inspection warrant might be pursued when a surprise inspection is planned to eliminate the risk of a delay that could be caused when the inspector appears unannounced at the site, the person with authority to grant access is not available, or they deny or delay a decision on granting access. An inspection warrant might also be pursued when access is denied or permission is delayed. Inspection warrants are not always needed; sometimes the information needed to prepare the inspection warrant affidavit is sufficient by itself to prove the allegation.

Once the decision has been made to seek an inspection warrant, the inspector should prepare the inspection warrant and affidavit forms. A sample inspection warrant and affidavit form are in the Appendix. All the relevant facts about the suspected violation should be used, including the site's address (and, if possible, its legal description), reasons why an inspection is necessary, the statutes and rules alleged to have been violated, and a chronology of activities at the site. The purpose, length, and scope of the inspection, and whether samples, photographs, or videotapes will be taken, should also be specified.

A duly authorized Department representative who will be participating in the inspection should take the affidavit and inspection warrant form to the circuit or county judge on duty for issuing warrants. The judge may ask some questions about the grounds for the warrant or the details of the inspection. Once the warrant is obtained, the inspector should request that a law enforcement officer accompany the Department to the site. Either a local law enforcement officer or a law enforcement officer from the Department or the Florida Fish and Wildlife Conservation Commission is appropriate.

When an inspection warrant is issued, the Department must conduct the inspection in accordance with the warrant. Preparations for the inspection should be made before going to the court for issuance of the warrant so that the inspection can be conducted forthwith upon receipt of the warrant and completed within any time period specified in the warrant. For example, if the Department is authorized to make copies of records, then the inspector should bring adequate copying equipment and paper to the site. Typically, an inspection warrant will be considered ineffective two weeks after issuance.

4.3.3.2 Sampling under an Inspection Warrant

Inspection warrants are for inspecting, not remedial action or long-term monitoring. Therefore, soil or groundwater sampling performed under an inspection warrant should be limited to establishing the violations and their sources, and the choice of well design should be carefully considered. District or Division personnel should discuss with OGC in detail the anticipated sampling prior to seeking an inspection warrant. The Department should take reasonable steps to minimize the intrusion while still gathering the necessary information, and the inspector should take special care when performing soil or groundwater sampling under an inspection warrant to avoid or minimize conflicts with site owners or operators who may oppose the sampling, even when extra care not required by the inspection warrant. Unless the owner, operator, or person in charge has given permission to keep the wells in place, any wells or soil boring holes should be appropriately filled and any equipment should be removed at the conclusion of the inspection. If leaving wells on-site for follow-up sampling might be necessary, litigation seeking site access, discussed below, will usually be preferable to an inspection warrant.

4.3.3.3 Litigation Seeking Site Access

If site access is needed to perform contamination assessment, remedial action, or longer-term inspection, the Department may bring a court action under Section 376.303(4), Florida Statutes, to require a property owner to provide site access. Generally, only if all reasonable efforts to obtain the permission have failed, will the Department consider litigation seeking site access. OGC should be contacted if a District or Division is concerned that litigation seeking site access is necessary. Such site access also can be required through administrative

proceedings (discussed in section 4.3.4), but an administrative order for site access has to be enforced through a lawsuit if the owner still refuses access.

To obtain site access for assessment or remedial action unrelated to Chapter 376, Florida Statutes, a court action (or administrative order) under other laws, such as Chapter 403, Florida Statutes, can be considered. If the owner, operator, or person in charge of a site is party to a permit, consent order, or other administrative order with a provision giving the Department a right of site access, a court action to enforce the provision may be appropriate.

If a site access order is entered, it will set the restrictions for assessment or remedial action at the site. An incremental approach should be considered to avoid or minimize conflict with the property owner. In an incremental approach, a site access order is obtained to perform the initial assessment, and the court reserves jurisdiction to consider authorizing further steps if needed. Breaking site access orders down to the smallest reasonable increments of assessment or remedial action ultimately could be worthwhile if it minimizes or avoids conflicts.

As with inspection warrants, which are discussed above, particular attention should be paid to design of the monitor well. For example, if the Department believes that long-term monitoring may be necessary, the Department could request that the initial site access order allow the wells to remain in place until receipt of the analytical results in order to determine whether the wells are still needed. In this way, the court could enter additional site access orders for remedial action or follow-up sampling based on the analytical foundation of the initial assessment work.

In any inspection, the Department should strive to minimize any inconvenience to the business or activities conducted at a site by limiting the site access to the shortest time possible. For example, to the extent reasonably feasible, and particularly if requested by the owner,

operator, or person in charge, the installation of wells or other equipment should be scheduled after normal business or peak hours, or located to avoid more frequently trafficked areas. Showing a willingness to consider the needs of the owner, operator, or person in charge will demonstrate the good faith of the Department.

Consistent with the court's instructions, and as soon as reasonably feasible, any physical impacts of the assessment or remedial action should be appropriately addressed. Soil boring holes or excavation depressions should be promptly filled, wells should be promptly closed, and any equipment, piping, or treatment systems should be promptly removed. OGC should be kept fully informed as to the activities conducted to ensure conformity with the court's instructions.

4.3.3.4 Site Access During Litigation

OGC should be contacted if access is needed to a site that is involved in Department litigation. While Department litigation concerning a site is pending, access to the site regarding violations that are the subject of litigation may be controlled or affected by different judicial or administrative procedures or orders. OGC, in consultation with the applicable District or Division personnel, will determine if site access should be obtained as provided under the Florida Rules of Civil Procedure or under other judicial or administrative procedures or orders.

4.3.4 Administrative Site Access

Under Section 376.303(4), Florida Statutes, the Department can compel a property owner to grant site access for activities associated with assessment or remedial action of sites contaminated with pollutants or hazardous substances as defined in Section 376.301(20) and (34), Florida Statutes. The assessment or remedial action could include installing wells, removing contaminated soil or groundwater, sampling, etc. This access would be for actions that are too long-term for an inspection warrant. In some circumstances, the Department may be able

to order the property owner to grant a third party, such as a respondent, access to perform the work.

The Department obtains access by issuing an administrative Order for Access for Contamination Assessment or Remedial Action. The Department should attempt to obtain voluntary permission from the property owner before issuing an Order for Access. A model Order for Access is in the Appendix. These orders must be reviewed by OGC before they are issued by the DDM.

If a party is responsible for performing the assessment or remedial action that requires access to a neighboring parcel, the Department generally will want assurances that the party has made all reasonable efforts to obtain voluntary permission, and has pursued any private cause of action for site access before the Department will assist with site access. If all other reasonable efforts to obtain site access fail, and it is needed for assessment or remedial action, pursuing litigation for site access might be the only reasonable alternative.

4.4 On-Site Inspection

Inspections for enforcement or compliance purposes should not be “fishing expeditions” and should have a particular purpose and intent. The inspections discussed in this manual are to investigate and collect information about alleged violations. To that end, the inspector should know what needs to be accomplished and bring the necessary equipment and background information to accomplish it. Keeping in mind “who, what, where, when, and how” can help guide the investigation.

Typically, the first thing to look for is the location of the violation. Once found, the condition of the area should be documented. If the violation involves something that can be seen, photographs of the violation should be taken. Often a single photograph will tell the story

more clearly than pages of written description. A sketch of the site should be made showing the location from which each picture was taken. Because the investigator or investigative team may enter the scene after a violation has occurred the evidence of a violation may no longer be obvious. For example, concentrations of a pollutant may have decreased since its initial discharge. Even so, indirect evidence of higher contaminant concentrations may still remain on the property through the presence of damage or effects caused by the discharge. Look for and document the damage to vegetation in the area such as an unusual patch of discoloration, tip burns, etc.

The inspector should also document how the violation occurred. The cause of the violation may often be ascertained from physical inspection of the source of emission or the equipment involved in the violation. Record the name and identification numbers on company equipment, license plate numbers, and any additional information that will facilitate identification of the equipment used at the violation site. Equipment serial numbers should be noted when possible. The identification must do two things: (a) distinguish the exact piece of equipment, and (b) describe all important constituents of the equipment that affect the generation of pollutants or that are required by any applicable permit. The description should also reflect design, process, or operational characteristics that affect the violation, if known. The investigator should check the equipment and determine by interview and observation the actual conditions under which the equipment in question was operated during the time of the violation. The cause of the violation may also be documented from statements made by the plant operator during an interview, such as declarations regarding equipment failure, improper adjustments, poor maintenance, and variation in operating procedures. In others, however, it may be necessary to conduct follow-up inspections.

Rarely can all the information be collected through inspections alone, and interviews will typically be necessary, along with follow up inspections. Many times people are willing to talk about what happened, who was involved, past practices, etc. It is perfectly acceptable to ask questions during an inspection unless the person in charge instructs otherwise. The inspector should make a note if this happens.

Interview area residents to determine what they saw, heard, or smelled, or any discomfort they experienced or damage they noticed. Be sure that statements are in their own words and write down what people have said as soon as possible. Do not ask leading questions. Visit the site of the violation and pay special attention to areas where residents had noticed damage to determine whether the effect is still present. If the pollutants involved are hazardous and the effects or residues are still present in the area, take all necessary precautions and do not enter until receiving clearance from the person in charge of cleanup activities.

Make sure to carry with you on all inspections the devices that are needed to measure, sample, or observe possible violations. When measuring distances, use a tape measure or similar device and use points of reference that are likely to remain at the site. A tape measure and a camera should be standard equipment when conducting any inspection.

4.4.1 Violation Corrected

If the on-site inspection shows that the violation has been corrected, the District Office Assistant Director should decide whether further corrective or remedial action is necessary. If the pollutant is still being discharged or emitted, the investigator should work with the District Office Assistant Director and the violator and determine the most efficient and effective means for stopping the discharge or emission. Every effort should be made to encourage the violator to voluntarily eliminate the conditions that caused the violation.

4.4.2 Ongoing Violation

If the violation is ongoing, try to determine the cause of the violation; the person who made the managerial or business decision that resulted in the violation; the machinery or equipment involved in the violation; the operation, design, or maintenance factors that caused the violation; the witnesses to the violation; previous enforcement actions taken; and permits, leases or other authorizations issued, if applicable.

4.5 Documenting the Inspection (Post-Inspection Reporting) and Investigation

Proper and thorough documentation is fundamental to the Department's enforcement efforts. Documentation both establishes the current violation and a basis for finding a history of non-compliance. The discussion in this section concerns the kinds of information that are important and how they should be memorialized, whether they are in an inspection report or in the enforcement file as a whole.

Detailed and clearly written inspection notes are critical. Sometimes these notes will be referred to years later after the inspector is gone or memories have faded. Clear reports can resolve disputes about what happened when or who said what. The post-inspection documentation also must note pictures or samples that were taken, who was interviewed, and what was said. Conversations with a responsible party are particularly important because they can be used as evidence in a later proceeding if they are detailed enough.

The evidence required in a trial or hearing to prove the elements of a violation should be carefully documented. At minimum, the following facts should be established: (a) jurisdiction and violation; (b) location and date of the violation; (c) the persons responsible for the violation; and (d) the cause of the violation.

In more complex cases, however, more detailed explanations may be necessary. In refinery operations, for example, schematics of flow processes and material flow with notations of observed vapor pressure and temperature, etc., should be drawn to locate and estimate the possible losses of vapors and gases. In other cases, the investigator should indicate, for example, whether or not combustion equipment is operated at higher or lower temperatures than permitted, whether dampers are stuck, whether flame ports are blocked, or whether auxiliary burners for multiple-chamber incinerators are firing.

4.5.1 Witnesses

The investigation report should contain the name, address, and telephone number of the person who reported the violation unless the report is anonymous. If the person responsible for the violation is the person reporting it, this should be indicated. Include a detailed description of what the person saw and to the extent possible a step-by-step account of what happened.

Sometimes a witness may be reluctant to provide more information or may be hesitant to relate details of which he or she is uncertain. In such cases, the inspector can assure the witness that any information is helpful at this stage of the investigation but indicate the witness's uncertainty in the interview notes. The inspector should ask for the names of other people who may have knowledge of the circumstances of the violation, information on other violations, or the whereabouts or contact information of the violators and other witnesses.

A list of other people who have knowledge of the violation should be prepared and made part of the report. This list should include at least the investigator and the person reporting the violation and the names of any other un-affected persons who have firsthand information of the violation that may assist the Department in substantiating the violation. It also helps to note what each witness knows and what each has said. Include the witness's addresses and telephone

numbers. Be sure to take very specific notes about what the violator said to you because these statements could be used against him or her at a hearing or trial.

4.5.2 Pictures

Take photographs or video of the violation. To the extent possible, these should show fixed points or landmarks that can be used to pinpoint where the violation occurred. Do not write on the front of pictures, identifying information should be written on the back of the picture or on another document that clearly identifies and references each photograph and is kept with the photographs. A log should be maintained, with entries at the time that the photographs or video are taken, indicating the date pictures or video were taken, the type of camera or video equipment and film used, description of the location where the photographs or video were taken, and a brief description of the contents of the photograph or video, and the individuals present when the photographs or video were taken, their place of employment, and their position. This information should be transferred to the back of the photographs or recorded separately as described above.

4.6 Location

Recording the precise location of the violation allows the Department to determine property ownership, find the area later, and establish a baseline for a history of non-compliance determinations. Location information should include the address (the number and street, rural route and box number), the latitudes and longitudes, or some other established landmark. If the street address is unknown or unavailable, the block number may be used with the street name. Try to get a post office box number, if available. When a violation is located in a remote area, the report should contain a sketch showing the location of the violation, its position relative to an established landmark, and instructions for reaching the site from some known road. A legal

description of the property is required for cases that involve an impact on the underlying property, such as potential or confirmed ground water contamination or dredge and fill violations.

4.7 Obtaining Legal Descriptions and Ownership Information

If a formal enforcement action is contemplated, it is often necessary to obtain the legal description of the property and to determine the legal owner of the property. The best source for this information is the public records (also referred to as "Official Records") of the county, which are kept in the court clerk's office at the county courthouse and the county tax assessor's office. These offices are usually housed in the county courthouse but in larger counties may be in a separate government building. Some of this information is be accessible through the Internet. The best source for the complete legal description is a copy of the deed conveying the property to its current owner. In some instances, an instrument other than a deed, typically a will or a judgment, conveys the property. All such instruments are usually recorded in the public records.

If the name of the owner of the property is known, locating a copy of the deed is a simple matter. Most counties maintain a "grantor/grantee" index, and the name of the owner is simply looked up in the grantee index. The index cites the book and page number of the Official Records in which the deed is recorded (these records are usually kept on microfilm, but local practices vary), and the legal description can simply be copied or photocopied from the deed. Ask assistance from a court clerk to find the necessary information.

Another type of index is a tract index, which lists documents affecting property by the location of the property rather than by the names of the persons involved in the land transactions.

It is best to ask a court clerk for assistance in using a tract index, because procedures vary from county to county.

If an accurate street address or other precise location of the property is known, the county tax assessor's office can provide the name of the current owner or owners and an abbreviated property description. The complete legal description, if needed, can then be obtained in the manner described in the preceding paragraphs.

It should be noted that property transactions can sometimes be quite complicated, and, if a question arises during the course of checking the public records, or if a dispute exists over who owns the property, OGC should be contacted for assistance.

4.8 Responsible Parties

Identifying all persons legally responsible for a violation is a cornerstone of a successful enforcement case. The Department's statutes broadly define legally responsible persons to include individuals, firms, corporations, partnerships, trusts or trustees, joint ventures, governments, or other legal entities. Legally responsible persons include not only those directly responsible for the specific act that resulted in the violation but may also include people who supervised, managed, or controlled the activity, or who had the power to stop the violation. Examples of typical responsible parties include landowners, their contractors, the on-site manager, and the bulldozer operator, or a corporate officer, plant manager, and the employee who dumped solid waste.

Whether the supervisors and managers are also liable depends on the specific facts of the case and the statute, rule, or order that has been violated, and OGC should be consulted when trying to determine who should be included in the list of responsible persons. The investigator, therefore, should at least report the name of the company, its form of ownership (partnership,

individual, trust, corporation, etc.), the highest authority contacted, and the name and job description of the employee or person operating the equipment at the time of the violation. Phone numbers of these persons should be listed when available. This is also a good time to check with the Office of the Secretary of State on the status of the corporation, which is discussed in the next section. In later stages of the enforcement action it is necessary to verify the current ownership of any property involved and the current status of any corporations because these may have changed since the initial investigation.

4.9 State Corporate and Partnership Information

The Florida Secretary of State maintains a list of all corporations registered to conduct business in the State of Florida, which can be accessed through your computer. The state corporate listing will provide the following information:

- * Whether the corporation is registered with the Secretary of State;
- * Whether the corporation is active or inactive;
- * Whether the corporation has changed names;
- * The name and address of the registered agent;
- * The names and addresses of the corporate officers;
- * When the corporation was first incorporated;
- * When annual reports have been filed.

The corporate database can be searched by the name of an officer or director, which can provide helpful information on other companies owned or controlled by the same people. You can also search for corporations with similar names. It is important to verify that the proper entity has been identified; many corporations have similar sounding names. It is also important to identify individuals involved in the violation and their relationships to the violator or

violation, such as corporate officer, employee, partner, or contractor. This website can give you information about how the violators, corporate employees, and corporations may be related. Similar information concerning partnerships can also be obtained from the Secretary of State. If you need any assistance, contact OGC or someone in your office that has experience with such searches.

Sometimes a business will operate under a “fictitious name,” which is different than its legal name. For example, “Joe’s Garage” may be the name on the sign of a business owned by “Smith Enterprises, Inc.” Only Smith Enterprises, Inc. has the capacity to be sued or to enter into settlements. Therefore, care should be taken to ensure that the Department is pursuing or settling with a real legal entity. As a general rule, corporate names always end in “company,” “corporation,” “incorporated,” or the abbreviations “co.,” “corp.,” or “inc.” Fictitious names never end in those designations, except for “company” or “co.” Fictitious names must be registered with the Secretary of State, which maintains a database of fictitious names. This database can be searched just like the corporate information database.

4.10 Sampling and Analysis

Sampling and analysis play a key part in ground water, surface water, storage tank, and hazardous waste cases, and frequently in potable water and solid waste cases. Sampling and analysis performed at the site should be documented. The persons performing the sampling and analysis, the procedures followed, and witnesses to these activities should be recorded. Additionally it is imperative that the chain of custody procedures are followed and all forms completed. Chain of custody procedures are used in both administrative and judicial proceedings to prove that the analytical results match the samples taken at the site and that the samples were not tampered with in transit. In addition, it is crucial that proper Quality

Assurance and Quality Control procedures be followed to ensure the reliability of the data and that all testing protocols be followed. For example, a turbidity violation cannot be established without a background sample. If no background sample is taken or if the background location is improper, the sample will not be useable. Otherwise valid analytical results may be excluded from evidence if the Department is unable to prove how the samples were collected, transported, stored, and analyzed.

Sampling and analysis is very expensive and time consuming and cost recovery is often difficult, so the Department should not take any samples that are not necessary to prove a violation or to assess an environmental risk. Therefore, close cooperation and coordination with the Department laboratories is essential to ensure the best use of the various sampling resources and that results are available at the earliest possible time. The Department has a limited sampling and analysis contract with outside laboratories. The laboratory in Tallahassee should be notified prior to taking samples that you plan to send to the Department chemistry or biology lab, and the appropriate bureau should be contacted regarding the use of outside laboratories.

The District field inspector and/or District chemist should decide what media are to be sampled and what analysis is necessary. They should carefully review the circumstances and the statute to determine what samples must be taken to prove the elements of the case and discuss this with OGC if there are any questions.

Only qualified personnel should sample potentially hazardous materials, and field personnel should not undertake sampling unless they have been adequately trained for that type of sampling. A field health and safety program has been established for employees who may have to come into contact with hazardous waste. USEPA uses its own personnel and outside

contractors to sample hazardous waste. USEPA sampling assistance should be requested through the appropriate Division of Waste Management staff.

4.11 Technical Support for Criminal Violations

District staff is almost always needed to support the investigation and prosecution of an environmental crime. Potential criminal activity should be discussed with the Division Program Administrator and/or the District Office Assistant Director. Criminal referrals are made to the Florida Fish and Wildlife Commission, Criminal Investigation Section. The referrals should be sent to the Major that heads up the FWC Criminal Investigation Section using the form found in the Appendix to the Enforcement Manual.

4.11.1 Criminal Search Warrants

Regulatory staff may participate in the execution of a criminal search warrant. A criminal search warrant is a court order directing a reasonable search, based upon probable cause, of a specific location where the subject of the search has a reasonable expectation of privacy guaranteed under the Fourth Amendment to the U.S. Constitution. Although the level of probable cause necessary to search a regulated industry is similar in both administrative and criminal search warrants, the procedures applicable to criminal search warrants are different from administrative Inspection Warrants issued under §403.091, F.S., which are discussed in section 4.3.3.1.

Obtaining and serving the search warrant is the responsibility of the law enforcement agency, but an inspector may participate in the development of the probable cause upon which the judge issues the warrant. Sworn law enforcement officers, who may take anyone necessary to assist them with the execution of the warrant, must serve search warrants, and the law enforcement agency that obtains and serves the warrant must manage and conduct the search and

must provide the court and the subject of the search with a copy of the "return" on the warrant. The "return" is a detailed inventory of the evidence seized.

One law enforcement officer will direct the execution of the search warrant. The search must be carefully coordinated and sufficient personnel must be on site to accomplish the required tasks. Sometimes a prosecutor may be present when a warrant is served, but normally, a prosecutor will be available by phone to assist the search team. Most often, the law enforcement agency will serve the warrant and secure the property before the regulatory staff arrives. Upon arrival, regulatory staff should expect to be briefed on the situation and disperse to their pre-assigned tasks. The lead law enforcement officer will provide information on the scope of the warrant and its execution. The scope of the warrant is critical to the integrity of the search and later admissibility of any evidence seized and should be carefully explained to the search team.

Typically, a criminal search can be broken into three parts: 1) search and seizure of samples and photographic evidence; 2) search and seizure of business records, computer and literature information; and 3) interviews of employees and other witnesses. Keep in mind that evidence that is in "Plain View" but not covered by the scope of the warrant may still be seized. The assistance of regulatory staff is applicable to all three parts of the search.

Be prepared for searches. Simple equipment such as writing pads, large numbers of "sticky" labels, paper clips, rubber bands, spring binders, and boxes may be required to manage records. For field searches that require measurement and mapping of the site, tape measures, rolling tape measures, and compasses are often helpful as are aerial photos that can be marked up. Searches for buried material often require backhoes and metal detectors. Most sites require that the people conducting the search be OSHA/EPA safety trained and that appropriate safety

equipment is used. For chemical sites, a site safety plan must be developed and followed and arrangements should be made to assure worker safety.

4.11.2 Evidentiary Sampling for Criminal Cases

Regulatory staff are a critical component in sample planning, collection and analytical interpretation for criminal cases. Compliance and enforcement personnel should also be aware that routine samples collected for regulatory cases are frequently used as evidence in future criminal cases. Therefore, great care should always be taken to ensure that all samples are collected in accordance with the current *FDEP Standard Operating Procedures for Field Activities* as adopted by Rule 62-160 F.A.C (FDEP SOP). The regulatory staff should never take environmental samples for criminal cases unless they have been specifically trained to take environmental samples and their actions are in accordance with the FDEP SOP.

The Bureau of Emergency Response (“BER”) manages an environmental forensic sampling program to ensure that chemical and environmental samples are collected in a safe, proper and legally defensible manner. The services of the forensic program are available by request to the Bureau of Emergency Response (BER) manager in the District. The District Office Assistant Director will work with the lead case agent and the regulatory specialists to develop a sampling plan that will meet the objectives of the criminal case. The input of regulatory specialists is vital in order to ensure that the necessary environmental evidence is collected to prove violations in specific program areas. The sampling plan is then used to schedule samples with the Department’s Central Laboratory and to ensure that all necessary personnel, equipment and sample containers are brought to the site.

Prior to serving a search warrant or conducting a consent sampling event, the District Office Assistant Director should schedule samples into the DEP Laboratory Information

Management System (LIMS). The sample request is clearly identified as a criminal case, and all case information is password protected. In the LIMS system, the necessary sample glassware is automatically ordered and a sample kit including glassware, preservatives, and coolers is delivered via express mail. In some cases, samples must be collected immediately (i.e. dumping in progress, surface water violations, etc.) and a sampling kit cannot be shipped from the lab. BER maintains a stock of appropriate sampling equipment in each District for these instances.

Once on site, all personnel will be briefed on the operations plan and site safety plan. BER may bring in contractor support if heavy equipment or additional assets are required. In most instances, the collection of samples for criminal cases involves substances that are substantially hazardous to human health or the environment. The use of chemical protective suits and respiratory protection is often required. In all cases, the safety guidelines identified in OSHA 1910.120 (Hazardous Waste Operations and Emergency Response) must be followed.

The sampling event typically begins with the collection of equipment blanks and background samples. Media samples are then collected in order of those samples suspected to be least contaminated to those suspected to be most contaminated. The sample containers are then properly labeled, sealed with evidence tape, and packed into coolers for shipment to the Department's Central Laboratory. Holding times, preservation techniques, and evidentiary chain of custody procedures must be followed at all times. Documentation requirements, field quality control, sampling procedures, preservatives, holding times and evidentiary chain of custody procedures are all clearly identified in the FDEP SOP.

The Central Laboratory will analyze the samples and provide a certified analytical report to the District Office Assistant Director or the person identified in the LIMS request. The analytical data should be carefully reviewed and the results compared to regulatory thresholds.

The expertise of regulatory staff in their program areas is required for data interpretation and to determine if violations have occurred. A data summary letter identifying the exceedences and violations is then prepared for the lead investigator and prosecutor.

It is important that field samplers keep detailed field notes, photographs, and other pertinent information in their case file. Personnel are frequently called upon to testify about their sampling activities months or even years after the event. The records will be extremely valuable to refresh your memory and to prove that the analytical results are valid.

4.11.3 Safety Plan

At any search site involving chemicals, Department hazardous waste or emergency response staff is responsible for the development and execution of the site safety plan, establishment of an exclusion zone, and compliance with site safety procedures by the search team. In certain cases, a fire department Hazmat team may assume responsibility for initial entry and safety assessment and establish protection levels and exclusion zones. In these cases, Department staff should defer to their decisions. In the event of disagreement on safety issues, the correct decisions are those that lead to the greatest personnel safety, even though evidence may be compromised.

4.11.4 Records

The search and seizure of records is another area where assistance by the regulatory staff is necessary. The search team must determine in advance what kinds of records are to be searched for and seized, and how far back the records should go. Depending upon the facts of the case, the nature of the violations suspected, and the specifications in the warrant, records over five years old are usually not needed.

4.11.5 Interviews

It is usually beneficial when a knowledgeable and assertive Department staff person assists the law enforcement officer in conducting employee interviews. Usually, the officer will direct the interview with periodic input from the regulatory staff person. The interview strategy should be clearly worked out ahead of time.

4.11.6 Inventory

All evidence seized must be inventoried during the search. A copy of the inventory must be left at the facility, and the original returned to the judge who issued the warrant. The inventory is the responsibility of the supervisory law enforcement officer, but regulatory staff should inventory the evidence seized during their part of the search and give that information to the supervising officer. If a computer is available at the search site, a Search Warrant program that assists with returns and evidence management can be used. The program can be obtained from the BEI.

The search should be confined to the area where items listed in the warrant could reasonably be located. Most businesses will direct the search team to the appropriate records. However, if they do not, it is up to the search team to search every reasonable place on the property described in the warrant where the listed items could be located. The supervising officer will decide questions about the proper scope of the search.

The participants should take notes and thoroughly document everything found during the search. Write a thorough report and file it. Do not take photographs or videotapes without prior approval of the supervising officer. Photographs and videotapes must be listed on the warrant return.

During a search, a defendant, an employee, or an attorney for the defendant or corporation may try to impede the team's work. Do not discuss the matter with them. Instead, politely direct them to the supervising officer or the prosecutor and continue the search. If they become insistent or interfere, call the matter to the attention of the supervising officer and then continue the search until the supervising officer directs otherwise.

4.11.7 Photography

Pictures are indeed worth a thousand words. Good photographs go a long way toward proving a case, criminal or civil. The same procedures described in Section 4.5.3 should be followed in regards to photography.

The cameras that provide the most useful images are automatic 35 mm still cameras. Law enforcement agencies often use larger format cameras because the photos can be enlarged without deterioration of picture quality. However, 35 mm should be considered the standard for environmental enforcement. Single lens reflex cameras are preferable, but viewfinder cameras do very well. Databack systems that print the date on the photograph are useful, but the photographer needs assure that the date is accurate before the pictures are taken.

Do not use Polaroid cameras to document criminal case evidence. They are not very useful for evidentiary purposes because their prints cannot easily be enlarged or duplicated with quality.

Although convenient, digital cameras can create additional grounds to challenge the accuracy of the photograph, especially if the image is manipulated before it is printed. If you are using a digital camera and need to enhance a photograph for any reason, you should save a copy without any enhancement.

Automatic cameras offer the advantage that the photographer usually does not have to defend the mechanics of how the photo was taken. Wherever possible use natural light, even if you must use fast film.

Photograph logs are very useful as a means of identifying a particular shot and its subject. They are recommended where systematic documentation is needed. Film roll number, location, and date should be kept in photograph logs. Light conditions and/or weather should be noted. The log should identify each frame by frame number and subject. Chain of custody on the photographs can be maintained on the back of the log.

Photographs should be taken from the perimeter of the area in toward the center in increasingly close shots. Be sure to capture all objects and markings thoroughly so they can be identified later. This is particularly important with drums and waste containers. Pencils, rulers, pens and similar familiar objects can provide a reference to the sizes of objects in the frame. Photograph samples after they are taken and labeled.

Aerial photography can be a very useful tool, and the availability of law enforcement aircraft may make it feasible. Moderate film speeds and high shutter speeds will help assure clear aerial photos.

4.11.8 Videotaped Evidence

Videotape is a very useful method of collecting evidence provided certain precautions are used.

Generally, never videotape a crime scene or any other violation scene with the recording microphone turned on. No narrations or comments should be made that can be recorded by the video recorder. It is easy to reach erroneous conclusions, make other verbal mistakes, or make disparaging or prejudicial comments during a live narration. The video should be supported by

live testimony later in the case without any taped comments that conflict with sworn testimony. Remember you cannot erase taped verbal errors.

A crime scene should be videotaped from the outside perimeter inward. Move from the general to the detailed. Be sure to videotape all the significant details, not just those you deem most important at the time. Videotapes or photographs should be used to document the location of everything on-site and its condition prior to the search. Similarly, a second tape or series of photographs should be taken after the search is completed to document the condition of the search site as you prepare to leave.

Safety preparations should be videotaped, but on-site personnel should not be taped while they are doing their jobs. Likewise, the taking of samples should generally not be videotaped. Record the samples after they are taken (including the split samples for the defendant).

Videotapes should be labeled in the same way as photographs. Keep them in a locked, limited access evidence file or transfer custody of them to the law enforcement agency conducting the search.

4.11.9 Measurement and Mapping

Environmental crime scenes should be measured and mapped after consultation with the responsible law enforcement officer. Dimensions should be measured using rulers, tape measures, or rolling tape measures and should be indicated on the map or sketch. All markings should be recorded from drums or other containers, as should markings from any other object(s) that may identify the source and/or suspect. It may also be useful to mark the frame numbers and directions in which you took photographs on the map. Be sure that the map can be understood, is directionally oriented, shows major landmarks or other fixed objects in relation to the crime scene and is of sufficient scale to be clear and understandable.

A large-scale aerial photograph is often useful for identifying landmarks and sampling or violation locations and dimensions. Suitable scaled aerial photographs are usually available from the Department of Transportation, Water Management District, or County Planning or Engineering Office.

Weights should be determined using scales that are certified accurate for commerce. Scales should be re-certified each year by a qualified service company.