



Training Your Responsible Official and Supervisory Personnel: The Reasonable Inquiry Process

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Overview

- All state/federal environmental programs require that a “responsible official” sign permit applications/major reports
- The term “responsible official” has a similar but not identical definition under the major statutory programs
- Goal - person who signs should be a position to ensure the reliability of the information
- Significant penalties, including imprisonment, apply to providing false certifications under all major federal and state environmental laws

Authority Under Major Acts

Title V Air Permit	Responsible Official
Acid Rain Air Permit	Designated Official
Hazardous Waste	Responsible Corporate Officer
Solid Waste	Provide DEQ with proof of the legal authority to sign for the applicant (same for reports)
Water	Responsible Corporate Officer
SARA/EPCRA	Officially designated representative for Inventory reports, “senior management official” for TRI
TSCA	Authorized official of the respondent company
Safe Drinking Water Act	Principal corporate officer or duly authorized representative

Responsible Official – Who Qualifies

40 CFR 70.2 Title V Program

- **Corporate officer**
 - Person in charge of a principal business function such as a president, vice-president etc.
 - Any other person who performs similar policy or decision-making functions for the corporation; or

- **Person who is responsible for the overall operation of the permitted facility who has received written delegation from one of the above (i.e., is duly authorized) AND meets *either* of the following:**
 - Supervises 250 more persons or in charge of a \$25 million or more in sales or expenditures (2nd qtr 1980 dollars)
 - Receives ok from permitting agency before signing as RO

Duties of the Responsible Official

- **Explicit - To verify and document the information submitted is as accurate as possible**
- **Implicit – Ability to Require Corrective Action**
- **To do so requires a process for data management that the RO knows and is comfortable with**

Liabilities of the Responsible Official and Supervisors

- The RO signs as representative of the corporation, but may also be individually liable under environmental criminal provisions
- A supervisor of an employee or agent who commits an environmental crime is not liable simply due to position as supervisor - there must be criminal knowledge or intent on part of supervisor
- Cases are split between standard required
 - Some courts use “*conscious avoidance*” theory
 - Some courts say there must be *direct evidence* of supervisor’s participation



United States v. Merckle

- Sanitary engineer convicted in Ohio federal district court
- 31 charges of filing false reports with the Ohio Environmental Protection Agency
- Merckle was the Muskingum County Sanitary Engineer, and was responsible official for filing with OEPA the Monthly DMRs.
- He routinely ignored the laboratory data sent to him of effluent results and reported false non-detects or other compliant results

United States v. Dee

- Supervisory engineer for Army contractor responsible for RCRA compliance at research laboratory convicted for illegal storage and disposal activities of subordinates
- Factors:
 - Was aware that wastes generated by lab were RCRA wastes
 - Routinely and blatantly disregarded RCRA requirements by failing to take steps to ensure compliance
- No evidence that he instructed employees to undertake illegal action

United States v. Jackson & Peters (Huntsman)

- Jackson, plant manager and Peters, environmental manager, convicted in U.S. District Court in Beaumont for
 - conspiracy
 - making a false statement to EPA
 - violating the Clean Air Act (benzene NESHAP)
- Each sentenced to 3 yrs imprisonment and \$50,000 fine.
- Conviction overturned later on grounds due to judge improperly discussing jury instructions with the jury foreman.

United States v. Jackson and Peters (continued)

- Alleged conspiracy and false statements involving benzene release from a cooling tower. The environmental manager prepared and plant manager signed two reports:
 - report to state of “upset” and report of continuous release under CERCLA.
 - *CERCLA release report was deemed false because the event was an “upset”, not a routine ongoing continuous release*
- The counts for violation of the CAA (benzene NESHAP) involved a lightning-damaged benzene-contaminated wastewater tank
 - lightning caused fire that damaged 20 % of tank seals
 - failed to empty the tank or repair it within 45 days
 - defendants deemed personally involved in failure to comply because they knew requirements and did not direct repair within the deadlines

United States v. Littlehale and Taylor

- Littlehale, VP of Mfg. at Multi-Color Corp., a large label printing facility located in Indiana.
 - Indicted for conspiracy to violate the CAA and for making a false Title V permit application certification.
 - In Title V application- certified that a new press would not commence construction without permit and when it operated it would meet CAA requirements.
 - The press was installed before permit authorization and was operated for a period without an air pollution control device, in violation of the rules.
- Mr. Taylor, an employee was charged with Misprision of a Felony - he was aware that his supervisor, Littlehale, made the false statements in the permit application but did not report to authorities, including discussions during the investigation with IDEM
- Multi-Color Corporation paid a civil penalty but was not charged with a crime as, during an audit spurred by a management change, it uncovered and immediately disclosed the violations to IDEM and cooperated with the criminal investigation



Title V Annual Compliance Certification and Periodic Deviation Reports

- Sounds simple...
- Verify and document the facility's performance with **all applicable requirements** of the federal Clean Air Act and State Implementation Plan (SIP)
- Must be “true, accurate and complete, based on information and belief formed after a **reasonable inquiry**”

Why Are The Certifications Important?

- **Primary enforcement tool for EPA/DEQ**
 - Enforcement action likely on the items reported
 - Criminal and/or civil liability for false reporting
 - EPA public statements - facilities asserting 100% compliance will receive extra review
 - Failure to timely submit annual certification signed by RO or submission of certification with incomplete data is a *“high priority/significant violation”* under EPA guidance
- **Enforcement/litigation tool for citizen suits or class action suits**
- **Reports in Louisiana are easily viewed by the public on DEQ Electronic Data Management System (EDMS)**

Reasonable Inquiry

- “This language is similar to that in Rule 11 of the Federal Rules of Civil Procedure, upon which it was modeled. The provision makes clear that the signer must make a **reasonable (under the circumstances) inquiry** before attesting to the truth, accuracy, and completeness of the information and statements.”

56 Fed. Reg. 21,712 (May 10, 1991)

Questions Relevant to Reasonable Inquiry

- **Must a source evaluate all monitoring data recorded over the time period at issue to be reasonable?**
- **What factors does the scope of review depend upon?**
- **How active must the Responsible Official be in the process of data compilation and review?**



...Under the Circumstances

- **Magnitude of the Emissions**
- **Degree of Risk Posed By the Pollutant**
- **How Close to the Standard Are the Emissions**
- **Reliability of the Monitoring/Recordkeeping System**
 - **CEMS vs stack test vs. grab sample**
 - **automatic data recorders vs. human generated checklist**
- **Past Compliance or Operational Problems**
- **Experience of the Employees in the “Reasonable Inquiry” Data Gathering Process**

Title V Permit Structure

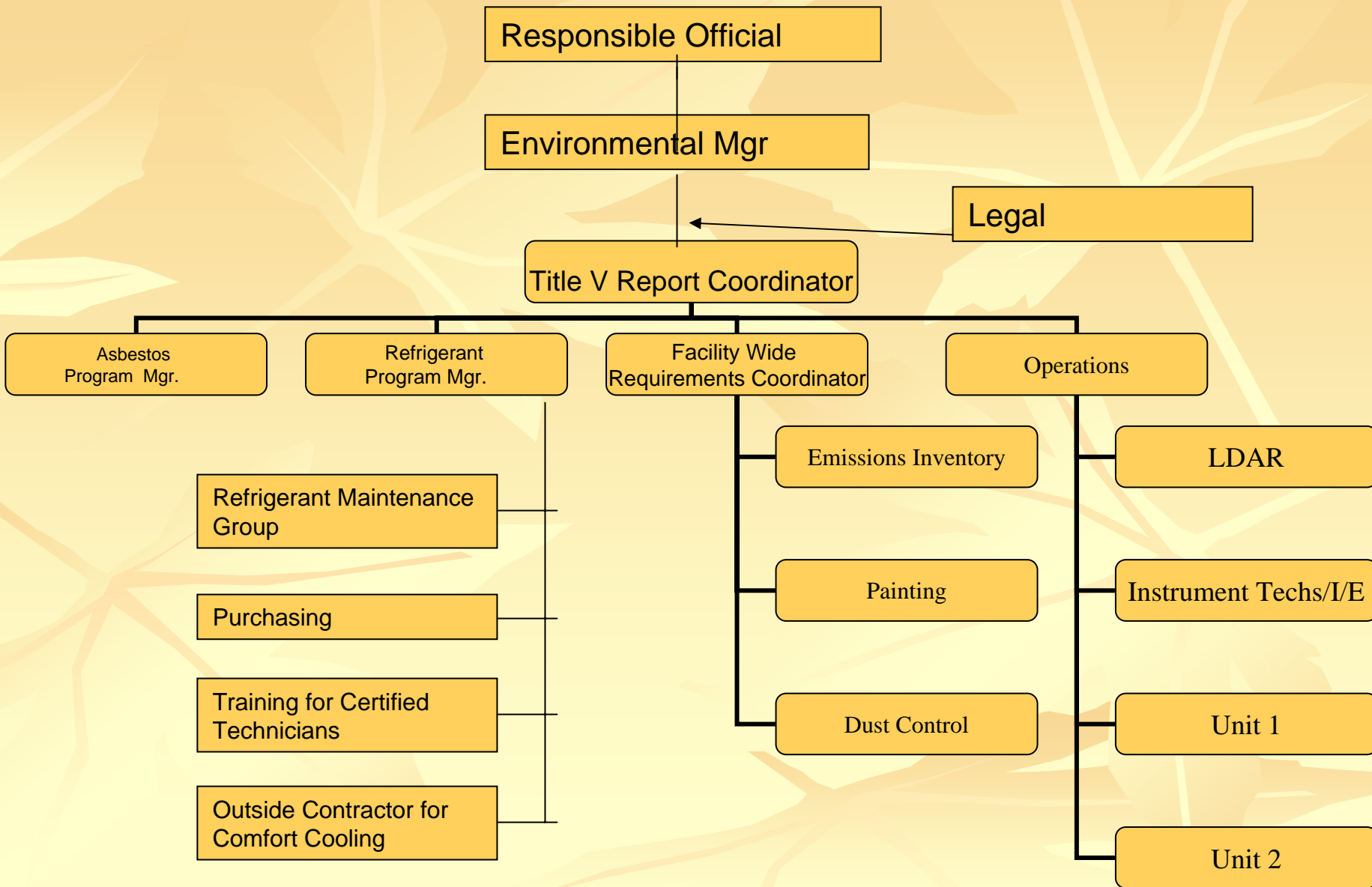
- **Standards of Performance**
 - Emission Limits
 - Work practice requirements
- Each standard of performance specified is to have monitoring, recordkeeping and reporting requirements specified that are sufficient to “assure continuous compliance” with the permit
- If the permit is properly written, reasonable inquiry constitutes looking at the required MRR
- No affirmative requirement to do more than specified MRR, but also cannot ignore other “credible evidence” that a deviation has occurred (*i.e., no conscious avoidance*)

Process for Reasonable Inquiry

- **Must have logical, systematic review of the MRR data**
 - **Not all records must be reviewed, but a sufficient number considering the magnitude of emissions, etc. factors from prior slide**
- **Should have a Title V reporting compliance coordinator for each permit and designated chain of reports**
- **Must have trained personnel who understand the scope. All knowledge should be able to be replicated by a back-up person – i.e., a written process that someone else can follow**
- **May want to consider Environmental Software Providers, opsEnvironmental, or other electronic management system**
- **Should include an electronic tasking program**

Process for Reasonable Inquiry (continued)

- **Should have a process in place to identify omissions of any obligations**
- **Should have a process to ensure that corrective action information has been effectively communicated**
- **Should have some link to management of change process**
- **Should have signature chain**





How Involved Should the RO Be?

- Have read and have basic knowledge of the structure of the underlying permit
- Be able to articulate the process of data gathering
- Allow time for a presentation and Q & A on the draft report and ask questions
- Institute procedure for periodic audit of process
- Same factors that govern scope of review for the whole reasonable inquiry process should govern scope of involvement – in particular if an area has had a problem before, warrants more review

Responsible Official Considerations

- Generally better to drive the RO down to the lowest level that complies with the definition as he/she will be closer to the operations being certified
- For same reason, may be better to have multiple Title V's for separate units rather than one site-wide (but then there is an issue for “site-wide” requirements such as 40 CFR Part 68 RMP, Part 82 refrigerant etc.)

Minimize Liability

- Identify all reports/documents requiring RO signature
- Consider delegations of “responsible official” status carefully
- Document all delegations
- Conduct training for responsible officials and those who provide the data to the ROs (particularly when new RO)
- Document the entire reasonable inquiry process to some extent
 - Written or electronic data gathering process
 - Signatory chain on data gathering for assigned areas
 - Any items determined NOT to be deviations should document reason
 - Document date of meeting with RO to review report (full minutes unnecessary)
 - Document any questions RO had for follow-up
 - Ex: Document that corrective action indicated on reports has been completed

Minimize Liability

- **When in doubt, report – but state any caveats/defenses**
- **Provide exculpatory/mitigating factors with potential noncompliance**
- **Always indicate corrective action already taken and to be taken**
- **Document that corrective action has been completed**
- **Benchmark areas with deviations so that more scrutiny to repeats**

Parting Thoughts

- [Draft] federal sentencing guidelines place heavy emphasis on having a compliance program
- Key elements of a compliance program under sentencing guidance are a good guide to reasonable inquiry process too
 - Periodic inspections or audits
 - Periodic training
 - Sufficient resources to comply
 - Employee discipline

