

# NPDES Compliance Inspection Manual

## *Chapter 19*



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# CHAPTER 19 – APPEARING AS A WITNESS

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## A. INTRODUCTION

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Inspectors perform a vital role throughout the regulatory enforcement process. An enforcement action begins with the inspector collecting and documenting on-site evidence. This chapter deals with the inspector's responsibility to present evidence in formal legal proceedings.

Due in large part to the high-quality work that inspectors produce, EPA files strong cases. Nearly all these cases result in out-of-court settlements that will not usually require the inspector's testimony. Of the cases that do not settle, a substantial majority of the legal actions take place in the EPA administrative law system rather than in federal courts. Major differences distinguish administrative from federal courts, such as rapid processing and the absence of a jury. Despite the differences between these two legal proceedings, the inspector's role as a witness will remain predominantly the same.

Under most circumstances an inspector will be called as a "fact witness." A fact witness describes personal knowledge obtained through one of the five senses. Throughout the enforcement process, everything an inspector hears, sees, samples, or records may become evidence about which he or she may be questioned. Many cases are tried years after the field and laboratory activities have been conducted. Thus, the inspection report and field notebook should be sufficiently detailed and legible to allow the inspector to reconstruct the inspection "on the record."

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## B. PRE-TESTIMONY MATTERS

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### PREPARATION

Preparation is the key to giving accurate and effective testimony. Successful preparation requires a substantial time commitment. Attorneys and witnesses work together in two types of preparation: factual and procedural.

The inspector will complete most of the factual preparation by writing the inspection report as described in this manual. The witness and the attorney will meet to discuss details from this report. Other items should also be discussed, including the field notebook, photographs, and the inspector's qualifications. Qualifications include the inspector's educational degree, professional accreditations, inspector training as required by EPA Order 3500.1, and on the job experience. The inspector's qualifications must never be exaggerated. Even a small exaggeration may cause the inspector's testimony to lack credibility.

The inspector should inform the EPA attorney of any problems, questions, or concerns regarding the case as early as possible. An example of one such concern is the confidential business information (CBI) procedures inspectors must adhere to. CBI procedures that bind inspectors during inspections also have implications for the legal proceeding.

The attorney has primary responsibility over procedural preparation, which includes assembling the facts for presentation in a formal legal setting. In addition to one-on-one preparation, the

attorney may consider whether the inspector should participate in a mock trial or visit a hearing to observe other witnesses' testimony. During one-on-one preparation, the attorney and the inspector should discuss:

- Times and dates that require the inspector's attendance
- Legal etiquette and procedure
- General legal framework of the case
- Significance of the inspector's testimony in this framework
- Probable areas of questioning, including direct and cross-examination
- What documents, if any, will be used by the inspector during testimony

Before giving testimony, the witness should review inspection documents, his or her professional qualifications, and information provided by the attorney. This review should be repeated until the witness has thoroughly refreshed himself of the details of the facts relating to the case. Testimony should appear genuine, not contrived as if a script were being followed. Additionally, the attorney should prepare the witness as if he is testifying in court before the witness testifies in court. The witness may ask the attorney to prepare a mock trial to better understand and be comfortable with the process before the actual trial.

An inspector may be subpoenaed to give testimony by the opposing attorney or even by the EPA attorney. A subpoena is a mandatory Court Order to appear in court if an inspector is subpoenaed, the appropriate EPA attorney should be contacted immediately. Time will be short to prepare to give testimony or to respond to the subpoena.

### LEGAL ETIQUETTE, APPEARANCE, AND DEMEANOR

A witness's conduct should reflect the solemn nature of the administrative or judicial proceeding. To act in accordance with required legal etiquette, a witness should:

- Dress conservatively following the advice of the EPA attorney.
- Arrive early and be available immediately when called to testify.
- Address the judge as "your honor."
- Treat an administrative proceeding as seriously as a federal court trial.

A witness should **not**:

- Whisper, talk, or make jokes in the hearing room. If necessary, a note may be passed.
- Bring magazines or newspapers into the hearing room.
- Discuss the case within earshot of anyone but the EPA attorney.

Posture, speech, appearance and attitude influence a witness's credibility. An inspector is a professional who collects, preserves, and presents evidence. To convey a professional demeanor, an inspector should:

- Respectfully respond to questions posed by the opposing attorney on cross-examination.
- Remain natural and animated, but not impatient or overly anxious to testify.
- Minimize nervous tendencies.
- Remain calm.
- Refrain from showing hostility toward the opposing counsel, the specific defendant, or the regulated community as a whole.

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## C. GIVING TESTIMONY

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### GENERAL CONSIDERATIONS

A witness gives testimony to create a legal record of the facts. Before giving testimony, a witness will take an oath that he or she will tell the truth. Failure to tell the truth is actionable as perjury. A witness may give pre-trial testimony in a deposition or trial testimony under direct examination or cross-examination.

To give effective testimony, a witness should 1) listen, 2) pause, and then 3) answer if possible. Listening carefully to the wording and implications of an attorney's questions requires significant effort. If the witness does not understand the question, he or she should stop to think, ask to have the question repeated, or ask to have the questions clarified or explained.

A witness should pause before answering. Pausing provides time to think, makes the response more considered and deliberate, and gives the attorney time to object if necessary. When pausing, the witness should not use words such as "um." These types of words may incorrectly indicate hesitation when later read from the written record.

When answering, a witness should:

- Reply with a "Yes" or "No" when appropriate.
- Speak in complete sentences when answering more fully.
- Be as descriptive as possible in referring to exhibits or photographs. For example, "In the upper right hand corner, we see..." rather than "Here, we see..."
- Stop immediately if the judge or either of the lawyers begins to speak.
- Avoid memorizing answers to potential questions.
- Never manipulate an answer to benefit one side.

A witness's credibility is defined as the degree of confidence that the judge or jury gives to the witness's testimony. The opposing attorney will try to "impeach" a witness's credibility by suggesting the following: bias, inaccuracy, inability to recollect, false testimony, or even corruption. To minimize the opposing attorney's efforts to discredit the witness's testimony, the witness should:

- Always tell the truth.
- Answer only the question asked, without volunteering additional information.

- Explain answers fully. If the opposing attorney does not allow a full explanation, the EPA attorney can choose to give the witness an opportunity to explain the answer fully on redirect examination.
- Answer within the limits of the facts.
- Don't hesitate to say, "I don't know," or "I don't remember," if that is the case.
- Correct any mistakes in the testimony as soon as mistakes are identified.
- Carefully identify estimates.
- Never exaggerate.
- Never guess.
- Avoid absolutes, like "I always..." or "I never..."

### PRE-TRIAL TESTIMONY: DEPOSITIONS

In a federal court trial, an inspector may be subpoenaed to give a deposition, which is pre-trial questioning under oath by the opposing attorney. Depositions are not often conducted in administrative hearings. Participants include the attorneys for each side, a court reporter, and the witness. Most importantly, a judge will have no role in deposition testimony unless one side abuses the process and the other side seeks relief.

The attorney may use a deposition to "discover" information or to contradict a witness's testimony at trial. In most cases, deposition testimony cannot be used as a substitute for live testimony. To properly prepare for and give deposition testimony, an inspector should:

- Read the notice of deposition.
- Consult with the EPA attorney to determine what preparation and review of documentation will be necessary.
- Realize that he or she is not "off the record" until completely away from the deposition setting.
- Request a break whenever needed.

After the deposition is transcribed, the witness can read it to make any appropriate corrections. Small errors always exist, but some transcripts contain absolute disasters. Errors in technical details, such as numbers and units, can have a large impact. A witness should never waive the right to read and sign the finished deposition.

### TRIAL TESTIMONY: DIRECT EXAMINATION

The EPA attorney will question the inspector during direct examination to put the facts known by the inspector on the record in a well-organized and logical manner.

A good direct examination leads the inspector through his or her entire testimony using a dialogue of short questions and answers. The attorney is responsible for asking appropriate questions in the correct order and ensuring that nothing important is omitted. The witness is only responsible for answering the attorney's questions completely and truthfully.

To avoid legally objectionable or tactically unwise remarks, the witness should trust the EPA attorney's final decision concerning what questions to ask at the hearing. The attorney's reasoning behind the questioning may be limited, but the witness should trust that the attorney is asking the questions necessary to convey the story behind the violations. If the inspector has forgotten a fact, the attorney may refresh the inspector's recollection with documents, such as the inspection report. The EPA attorney might also ask, "Is there anything else?" to signal to the inspector that something has been left out.

Redirect examination is a round of questioning only concerning issues raised during cross-examination. Redirect will give the EPA attorney an opportunity to reduce any damage done to the credibility of the inspector's testimony during cross-examination.

### TRIAL TESTIMONY: CROSS-EXAMINATION

Cross-examination, questioning by the opposing attorney, will subject the witness to a more difficult interrogation than direct examination. The opposing attorney will try to cast doubt on the credibility of the witness's testimony. Many witnesses fear counsel techniques such as leading questioning and twisting interpretation. The EPA attorney will try to protect the witness from abusive uses of these techniques.

The witness can also protect the credibility of his or her testimony by 1) answering briefly, 2) answering accurately, and 3) remaining calm. Answering briefly consists of being responsive to the question, but not volunteering extra information. Avoid rambling, even if the opposing counsel remains silent.

In addition to the recommendations in the section "Giving Testimony," answering accurately requires listening carefully for the following types of questions:

- Questions that inaccurately paraphrase the witness's previous testimony. The error should be corrected or the previous answer restated in full.
- Hypothetical questions or questions requiring a "Yes" or "No" answer. If these questions may compel a misleading or incomplete answer, the witness should explain the answer fully at that time or later during redirect if cut short by the opposing attorney.
- Two-part questions. The inspector should ask the attorney to restate the question or carefully answer each part separately.

Even when a witness's truthfulness, occupational competence, or professional conclusions are challenged, he or she should remain calm. An angry, sarcastic, or argumentative answer is inconsistent with the inspector's role as a neutral government witness. Remaining calm will add credibility to the inspector's testimony. Becoming familiar with the process, including participation in a mock trial can help reduce the stress of cross-examination.

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## D. SPECIAL CONSIDERATIONS

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### TECHNICAL TESTIMONY

An inspector frequently presents technical facts. The inspector must balance the need to be technically accurate with the need to reduce scientific issues to simple terms and concepts.

The first barrier to communicating technical information is the use of jargon. The inspector should prepare carefully to simplify his or her language without over-simplifying the scientific concepts. The inspector should:

- Speak as clearly as possible. The court reporter may have difficulty recognizing numbers and unfamiliar technical terms.
- Ask your attorney to provide a glossary of technical terms, including acronyms, to the court reporter.
- Review the meaning of frequently used acronyms, such as explaining that “OECA” is an acronym for “the Office of Enforcement and Compliance Assurance.”

Even after the witness explains the definitions of the technical language, the underlying concepts may still be difficult to understand. To teach the necessary technical concepts, the inspector and attorney should consider using:

- Short answers in a logical progression of questions
- Well-paced questioning to avoid information overload
- Diagrams and pictures
- Appropriate analogies

Finally, the inspector should not try to outdo the opposing attorney on technical issues. Not only may the inspector confuse the judge or jury in the process, but also a well-prepared attorney will have thoroughly studied the subject before trial and will have a large advantage in legal debate. Inspectors should walk the judge or jury through a technical analysis using plain language and help them understand why EPA needs to take a particular action to protect public health or collect economic benefit to discourage further violations.

To successfully answer questions regarding technical information, an inspector should:

- Examine questions and answers for assumptions and exceptions.
- Look for inaccurate paraphrasing of the inspector’s previous testimony and politely correct them. An opposing attorney may try to restate your testimony with an inaccurate perspective to benefit the defendant.
- Always identify estimates.
- Use references in cases of complicated details. For example, the inspection report could be consulted before testifying about the characteristics of a specific sample.

## EXPERT WITNESS

Expert witnesses give opinions on the record. An expert witness has technical or other specialized knowledge that helps the judge or jury better understand the case. To prove a witness' expertise, his or her qualifications are introduced by one side and cross-examined by the other side. Only those opinions that the witness is qualified to express through special training or expertise will be admissible.

An expert is not necessarily someone from outside the agency with particular academic or research credentials. Due to the inspector's professional expertise, he or she might be asked specific questions that require an opinion or might even be called as an expert witness. The EPA attorney will object if the opposing counsel asks inappropriate questions and will decide whether to use the inspector as an expert witness. The inspector should stay carefully within his or her limits of expertise and knowledge whenever asked a question requiring an opinion.