



# **CONTROLLING THE HEAT IN THE KITCHEN**

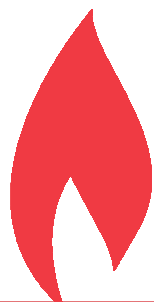
**Post Finding Strategies When Served With an FOV**

**EMSI – Environmental Services**



## Introduction: Brian Whitley

- Brian Whitley has been in the environmental industry for 24 years. He has successfully managed LDAR programs under consent decrees as attested by Third-Party Audits and Post Consent Decree Audits conducted by EPA and Facility Corporate Groups. His most recent efforts have been consulting for chemical plants on the new consent decrees known as ELPs (Enhanced LDAR Programs). In addition, he has served as an expert consultant for the Department of Justice as well as many chemical, pharmaceutical, oil & gas, and refining companies in the United States.



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# CONTROLLING THE HEAT IN THE KITCHEN



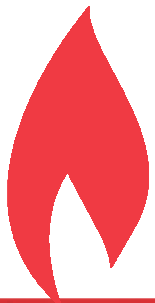
- There is substantial information regarding preventative maintenance, audit proofing, and keys to LDAR success.
- It is not often enough that we talk about mitigation after the audit. Why?
  - Talking about your mistakes is usually not an option!
    - Facilities in litigation with the USEPA are advised not to talk
    - Prohibited from attending seminars and symposiums where they could run into enforcement agents



# It is not often enough that we talk about mitigation after the audit. Why



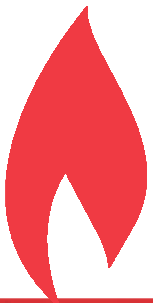
- Control of information is vital to minimizing litigation risk.
  - An attorney always wants to know the answer to the questions he is asking.
  - One misunderstood statement can result in a disadvantage that could cost the facility thousands of dollars



## It is not often enough that we talk about mitigation after the audit. Why



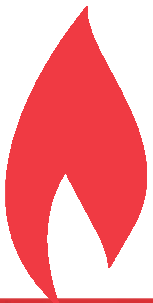
- The facility's higher level attorneys will choose to shut out individual HSE professionals from the discussions in order to control information.
  - You lose insight, and lessons learned
  - Some of the efforts of the HSE group are lost in translation



## How my unique vantage points allows for me to benefit you



- I have worked with the Department of Justice as an expert consultant to help negotiate settlements for alleged violations of federal rules.
  - By-products are:
    - Seeing prosecution strategies from the inside
    - Increased understanding of the legal system and its steps
    - Pitfall recognition from mistakes of the facilities in litigation

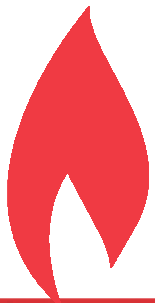


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## How my unique vantage points allows for me to benefit you



- I have assisted multiple facilities, throughout the United States, negotiate terms with the various EPA regions, as well as various state agencies.
- Sharing is caring!!!!

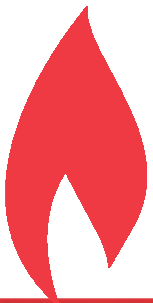


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## Phase I: Minimization of items in “The Book”

- Keep the enforcement agent from writing down issues by resolving the issues immediately at hand.
  - Maybe they will forget and won't ask about it... Wrong!!!!
  - Unanswered questions usually turn into assumed findings
    - Answering tomorrow what you could have done today is much more expensive
      - Attorney fees
      - Upper management time and input

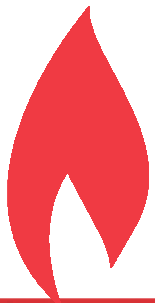




## Phase I: Minimization of items in “The Book”



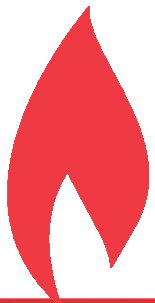
- Clearly defined closeout meetings at the end of each auditing day
  - Answer all unanswered questions by the time they arrive the next morning
    - Nightshift necessary?
    - Delegate to your staff that this is no light matter



# Phase I: Minimization of items in “The Book”



- Focus on the content of what's in that book
  - Every ounce of trouble will come from what is written
  - Clarification is necessary for your strategies

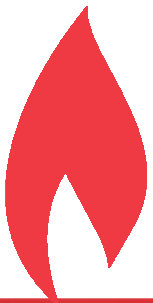


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## Phase II: “Verify all work performed by enforcement agents”



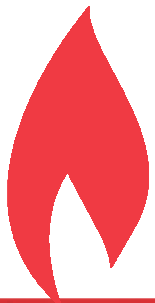
- Theory 1: Method 21 (M21) should be verified by one of your on machines
  - Allows for instant clarification on Leaks found
  - Makes Agent be sure that he is capturing a leak, gives benefit of the doubt to the facility



## Phase II: “Verify all work performed by enforcement agents”



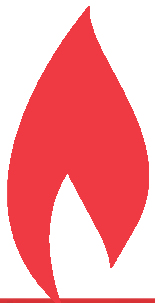
- Theory 2 “Ask to drift their machines at lunch and at the end of the day”
  - The drift will validate or invalidate all reading above background for the period in question
    - Works well if you are fixing leaks instantly
    - Why?



## Phase II: “Verify all work performed by enforcement agents”



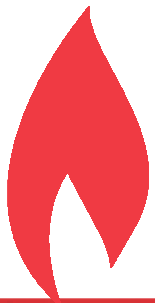
- Theory 3 “Ask for precision calibrations at the end of the visit”
  - If it was not performed prior to placing the machine in service it could invalidate the data collected
  - Will generally result in a more aggressive audit and a return visit



## Phase II: “Verify all work performed by enforcement agents”



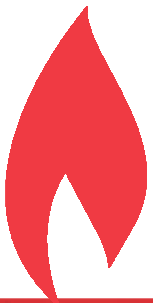
- I have found that Theory 1 has net the best results
  - The facility and the agency have the opportunity to be in sync with issues daily
  - Many leaks have been overturned because they could not be verified. How?
  - Observe and take notes
  - You gain an underlying element of control. How?



## Phase III: “Bring your Big Guns to the Show”



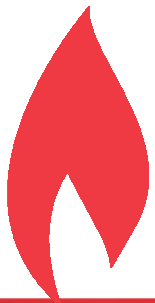
- One of the best ways to control the heat is through dissipation
  - “Dissipation Theory”



## Phase III: “Bring your Big Guns to the Show”



- Make sure you are getting what you paying for
  - In-House Programs
    - Develop a team of people that will work around the clock for Audit support
    - Make sure that your participating professionals understand the why's behind the job they perform



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# Time to Control the Heat

- What is the Story?
  - The story starts from the moment the Agency requests to come on-site
    - What happens when you assume?
    - What is trust without verification

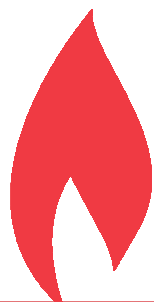


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# Time to Control the Heat

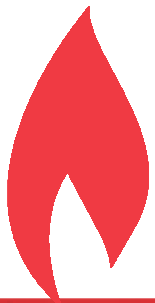
- Keep the mood cooperative but inquisitive
  - Providing lunch will allow for conversation to pry inside the agencies for initiatives and directives they have to follow
  - Do not be afraid to question their interpretation if you have done your homework
    - The enforcement agent's interpretation does not always coincide with the intent of the written rule
    - Consistency diminishes malice
- At the end of the day remember who you're telling the story to



# Preparing a reply to the enforcing agency



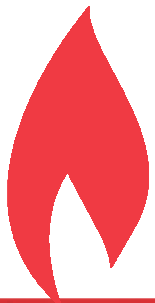
- Take your gloves off and get ready
  - It is an HSE professional's job to show their competence with what they have been entrusted
  - From the moment they leave the facility until they communicate with you could be over 6 months



# Preparing a reply to the enforcing agency



- Prepare your defense
  - OEL's
  - New equipment (Count Correctly!)
  - Missed monitoring events
  - Leak %
  - Missed compliance dates

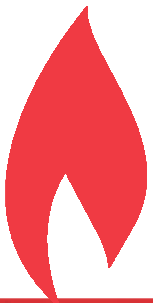


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# Preparing a reply to the enforcing agency



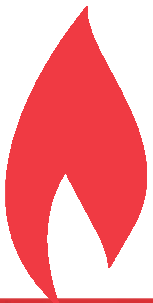
- Once the FOV is received, review with your HSE team in detail and close up any holes in your story.



# Preparing a reply to the enforcing agency



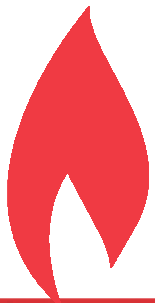
- Work with your facility's attorney to present the defensive data for strategy for the EPA meeting
  - Attorney's hate surprises (no detail is too small)
  - Stay relevant to situation



# Preparing a reply to the enforcing agency



- Requires you seeing the big picture... What is it?
- Gut check evaluation of staff that participated in running the LDAR program.
  - What's Method 21?
  - The data doesn't lie

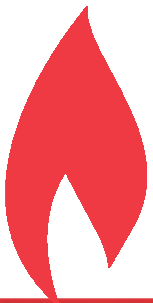


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# Beware of The Smoking Gun



- Most of the consent decrees that are in place are due to another violation that is so great in its nature that attempting to defend the LDAR violations is a small and moot point
- Conducting permit reviews
- Review and double check your permit application calculations
- Were all of your performance tests done according to protocol?
- If you have inherited someone else's work, it's best that you check it



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## How Far Do You Go???

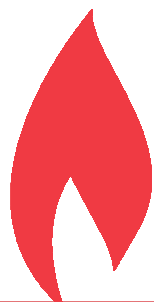
- Most of the cases from FOV's result in settlement
- This is about positioning and diminishing your litigation risk, not “winning”
- The balance between paying now and paying later
  - Attorney fees
  - CD implementation





## Settlement Negotiations

- THERE MUST BE SOMEONE INVOLVED IN THE MEETINGS THAT UNDERSTANDS THE COST OF IMPLEMENTATION

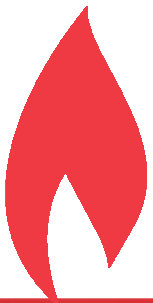


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# Settlement Negotiations



- The most common mistake is agreeing to something and not really understanding how it will cost you in the future
  - Missed M21 VS No Time Date Stamp
  - Quasi Directed maintenance
  - Hot torquing replaces components
- These costs, if agreed to, are for the life of the CD

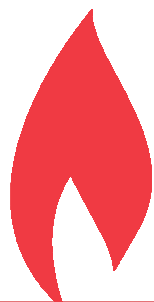


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## Settlement Negotiations

- Be prepared to demonstrate the obligation the EPA's request can place on the facility
  - It's not about the money... but really it's about the money
  - Consider negotiating higher SEP's to offset long term costs for certain items in a CD





## When it's all said and Done...

- Controlling the Heat is about accurate knowledge of your litigation risk
- It's about being honest about your LDAR program and being your own "devil's advocate"
- It's about defending what you did right and correcting what you did wrong, and telling the right story
- Remember, it's not about what the EPA believes as much as it is about what their attorneys can prove





# Questions?

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