



# Maintaining and Defensible Compliance Record

**CAPCA – 2018 Fall Conference**

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# Agenda

- Introduction and Background
- Electronic Communications
- Other Documents
- Privilege and “Business Advice”
- Take-Aways

# Introduction and Background

- Information in Electronic Age
  - From U.S. mail and faxes to e-mails, texts, Snapchat, Pinterest, Instagram (and the next evolution)
- Environmental Litigation
  - Tougher to manage/control information (there simply is too much of it)
  - Environmental litigation has high stakes and can be in the media
  - Typically involves third parties (consultants, agencies)

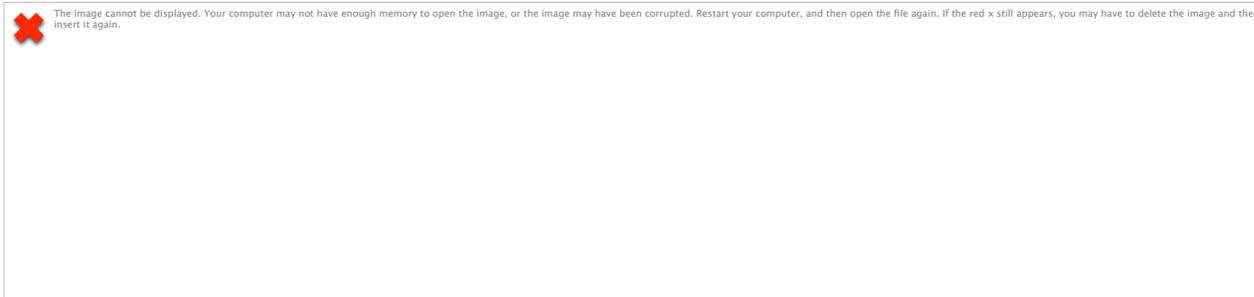
# Easy Lessons (Discipline 1.0)

- Be honest
- No personal e-mails, texts, instant messages
  - Don't mix personal and business
  - Receipt of unwanted communications (college buddies), delete (or reply) (get a good firewall)
- Be professional
  - No cursing; sloppy or demeaning language; tirades or expressions of extreme frustration
  - Don't try to be funny or sarcastic
  - Play your role without opinions or editorials
- Accomplish as much as possible with calls
  - Remember that voicemails are now digital

# Closer Calls (Discipline 2.0)

- Professional demands breed mistakes
- Frustration breeds mistakes
- Unsupported opinions create risk; think like a lawyer and include caveats
- The worst e-mails are generated during the day-to-day grind
- You may have no choice but to create electronic communications that cause the company risk. Just be careful.

# When e-mailing, texting, etc. put yourself in this mindset:



**Thursday, May 31, 2018**

**8:12 am**



**Thursday, May 31, 2018**

**8:56 am**



**Thursday, May 31, 2018**

**5:38 pm**



# In a deposition:



**Someday in the not too distant  
future....**

**10:07 am**



**Later that day....**

**11:47 am**





Verizon

8:16 AM

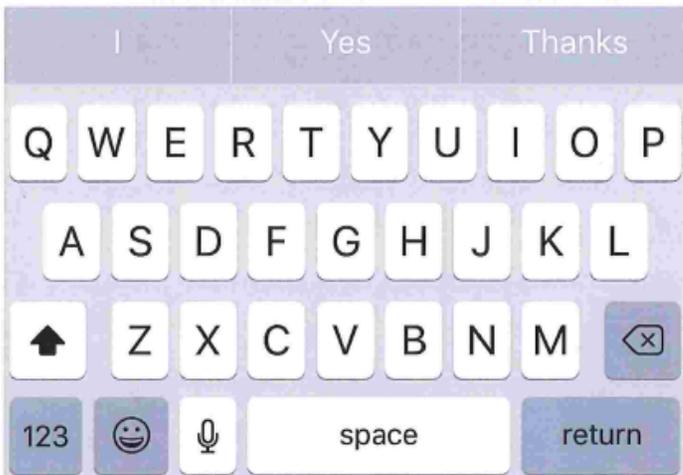
62%

New iMessage

Cancel

To: Joe

Looks like CB baghouse failed again. Dodged another bullet. Inspector here yesterday. I'll wait to run my daily VE until this settles down. Plume may be heading offsite. Pic attached. Need to notify neighbors?





**Keely, Claire**

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**To:** joe.jamison@company.com; EHS team  
**Subject:** Loss of CB Baghouse #4 and resulting plume – IMPORTANT – PLEASE READ

Joe, I want to alert you and the EHS team to the CB baghouse plume I saw when I was conducting my daily VE inspection just a little bit ago. This always seems to happen over a holiday or weekend. Sorry to ruin your vacations. Sent you all a photo when I was out in the plant. As you know, we've had this issue at Baghouse #4 for the past two years but this is the worst I've seen. It looks like a complete equipment failure this time. It was only a matter of time given the shape the unit was in. I've contacted mountainous and alerted the management team. Utilities is hear to. Jeremy was out of town but he is on his way back to the plant. We need to decide pretty quick whether this is a reportable event and even if it is not, whether we go ahead and call it in. Seems like we should make a call to get out front on this?! On the other hand, the agency was not so kind to us last time we tried "to do the right thing." It's your call Joe. We do have neighbors, some of them "seasoned." Please let me know what you want me to do as soon as you can. I am here by myself and I am oncerned an inspector will come knocking soon. None of us want another NOV for obvious reason. Hope you had some fun on your vacation before this. 😊

Claire

**1:23 pm**





### Transcribed Voice Mail From Claire Keely 5/31/18

Hey Joe, It's Claire. Sorry to bother you on your vacation. It never fails. Stuff like this happens only on holidays and weekends. Listen, CB Baghouse #4 failed while I was out in the plant doing my VE inspection. Looks like a complete failure, just as you predicted several months ago. It's bad. The plume is so thick I can't see the water tower. The wind is picking up and the plume is moving. I am worried about what's in the particulate at such high concentrations and where it will land. The homes to the East of the plant usually receive most of the carbon black but they're pretty good about it, except for the crazy lady in the brick ranch. Maybe now corporate will give the plant money for the long overdue repairs. It's about time. Please call me as soon as you can. I'm afraid an inspector is going to show up and it's just me and security here right now. Thanks for your help. See ya.



## Root Cause Analysis Form

*Directions: A root cause analysis review should be initiated by the Plant. The purpose of the root cause analysis is to identify the problem and define the necessary corrective actions required to address it.*

**Event Name:** Carbon Black Baghouse Failure (CB #4)

**Event Date:** May 31, 2018

### Event Description

In the morning of May 31, 2018, C. Keely identified a black plume in the vicinity of the carbon black baghouse.

### Timeline Leading to Event

- Carbon black baghouse (CB#4) installed in 1982.
- In 2006, process modifications increased production capacity by 20%. Modification resulted in increased airflow to the baghouse from 10,000 acfm to 12,000 acfm.
- Frequency of VE events increased substantially after the modification. Maintenance instituted more frequent bag replacements. Shift supervisors were also told to notify the EH&S anytime higher-than-normal VE. Funds were requested to replace the baghouse with a larger system, but were denied twice.
- Plant reduced manufacturing operations to one shift from 2009 through 2014 and laid off overhead and maintenance staff. No VE events were recorded during this period.
- VE events began to increase in frequency again as the plant returned to normal operations around 2014. Shift supervisors were told again to notify the EH&S of any such events.
- On May 17, 2016, a Capital Request was submitted to corporate for funds to replace the Carbon Black baghouse (*see attached*). The Capital Request was again denied.
- Frequent VE events continued, and appeared to be getting worse with visible emissions sometimes reaching 80% and higher. In the 6-month period prior to May 31, shift operators reported abnormally high VE on eight separate occasions. We also received complaints from the neighborhood east of the Plant on multiple separate occasions in the past two years. CB emissions cause health effects.

### Recommended Corrective Actions

Replace Carbon black baghouse (CB#4) with a new and properly-sized unit.

### Investigative Team

Lead: Joe Jamison, EHS Team  
 Claire Keely, EHS Tech  
 Stan Housman, Corporate EHS  
 Jenny Lambert, Legal

**Signature of Team Lead:** s/ Joe Jamison

**Date:** August 31, 2018



	<b>Capital Request</b>	CR NR
	Plant/Location	Cost Center 11 03 0
Investment Description <b>SYSTEM MODIFICATIONS</b>		
Capital status (local curr. 000)	Transfer	Local Curr. (.000) €(.000)

**Scope/Reason**

Comply with Federal and State Environmental Protection Agency regulations regarding carbon black emissions and prevent future lawsuits by improving three (3) areas associated with the CB systems at the plant. Plant has received three NOVs for same issue in last two years. Reduce health concerns for seven residences within .25 mile of plant that typically receive harmful particulate at their properties.

**CB#4 Baghouse System:** Improve system to reduce severe housekeeping, safety, and environmental problems. Our facility has been cited by EPA, the State and OSHA for exceeding the allowable limit of carbon black.

**Vacuum Cleaning Units:**

Improve ability to clean carbon black the plant can be considered out of compliance with the local EPA permits and regulations associated with carbon black emissions

U.S.A.	<b>CAPITAL REQUEST NO:</b>	Page: 2 of 2
	<b>CR Title:</b> CB #4 BAGHOUSE SYSTEM MODIFICATIONS	Date: 17-May-16

**Alternative Solutions:**

**CB BAGHOUSE SYSTEM**

Great strides have been made through maintenance efforts and employee awareness into making the current system acceptable, however it is a 35 year old, outdated system that should be updated. For many years the plant has requested funds to totally replace this system with a state-of-the-art system but the funds have always been rejected. This unit will provide a much improved method than what is currently installed and will bring the plant back into compliance with environmental and OSHA regulations.



**3:45 pm**





(4) The permit shield shall not apply to sources subject to Sections 70.7(e)(5) and 70.7(e)(2) and (3).

(g) Emergency provision.

(1) Definition. An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) Effect of an emergency. An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of Section 70.6(g)(3) are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee shall submit verbal notification of the emergency to the Department within 24 hours of the time when emission limitations were exceeded, followed by written notification within 30 days. This notice fulfills the requirement of Section 70.6(a)(3)(iii)(B). This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.



**Office of Environmental Quality Control  
Bureau of Air Quality  
Title V Operating Permit**

ABC Enterprises  
100 Main Street

**PART 3.I - EMERGENCY PROVISIONS [SC Regulation 61-62.70.6(g)(3)]**

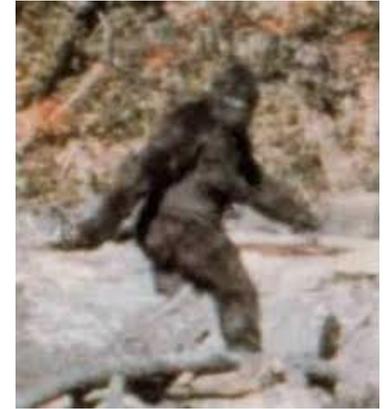
Condition Number	Condition
3.I.1	<p>In the case of an emergency, as defined in SC Regulation 61-62.70.6(g), the permittee shall demonstrate an affirmative defense of emergency through properly signed, contemporaneous operating logs, or other relevant evidence that:</p> <ol style="list-style-type: none"> <li>1. An emergency occurred and that the permittee can identify the cause(s) of the emergency;</li> <li>2. The permitted facility was at the time being properly operated; and</li> <li>3. During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit.</li> </ol>
3.I.2	<p>Additionally, the permittee shall submit verbal notification of the emergency to the Department within twenty-four (24) hours of the time when emission limitations were exceeded, followed by written notifications within thirty (30) days. This notice fulfills the requirement of SC Regulation 61-62.70.6(a)(3)(iii)(B). This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.</p>
3.I.3	<p>This provision is in addition to any emergency or upset provision contained in any applicable requirement. In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.</p>

# In court:





# What is “privilege” anyway?



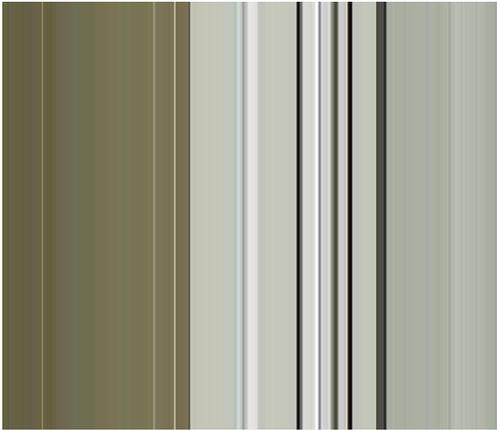
- Attorney-Client, Work Product, etc.
- Listen to your lawyer on how to protect the privilege but assume there is no privilege
- Privilege depends on the Judge’s mood
- Privilege does not attach to most third party communications
- Privilege could be waived intentionally or by accident
- Privilege could be used against you in a transaction

# Take-Aways

- Be honest, smart and professional
- Think before you write any e-mail, instant message or text
- Count to 10 (or 100) before sending controversial e-mails
- Assume all e-mails will see the light of day
- Assume there are no legal privileges but work to protect them anyway

# Take-Aways

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# Questions?