Water Compliance and Enforcement – Module 2

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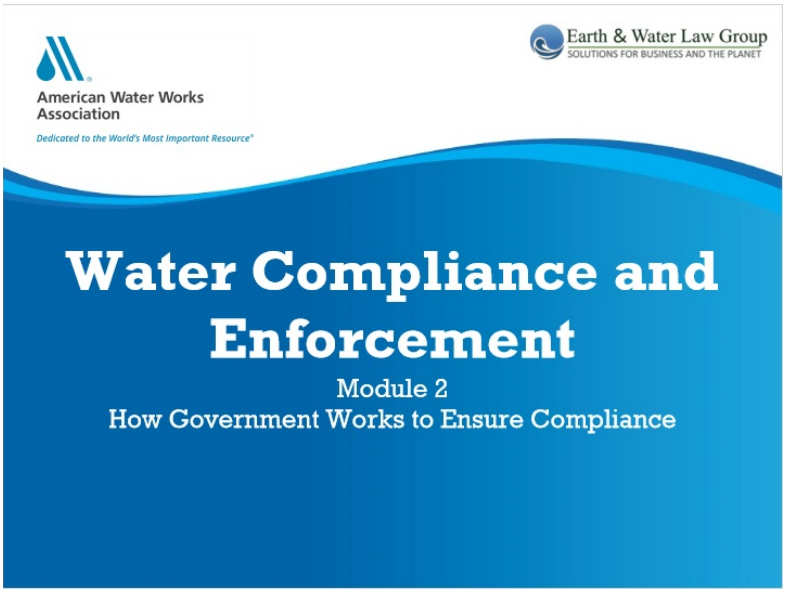
1.1 How Government Works



Notes:

On behalf of the American Water Works Association, welcome back to "Water Compliance 101." My name is Doug Parker, and as the former Director of the Environmental Protection Agency's Criminal Investigation Division, I helped lead the government's efforts at enforcing violations of the Clean Water Act and Safe Drinking Water Act.

In this module I'll lead you through some of the critical requirements of our water protection laws and the legal authorities and techniques used by government to ensure adherence to the law and enforce against non-compliance in the water sector - all in order to better position you to understand your operating requirements and maintain compliance.

In our first module, we laid the foundation of water compliance - The Clean Water Act and the Safe Drinking Water Act - the laws that the federal government passed to ensure clean and safe water -laws and regulations often overseen and enforced at the state and even local level. We also discussed the critical elements of each of these laws including permitting within the Clean Water Act and drinking water standards within the Safe Drinking Water Act. And within each law, the principles of self-reporting and voluntary compliance are essential. In module 2, we'll dig into how the government oversees compliance and enforces against non-compliance in the water sector and talk about some of the areas of specific focus that you should be aware of within your own operations.

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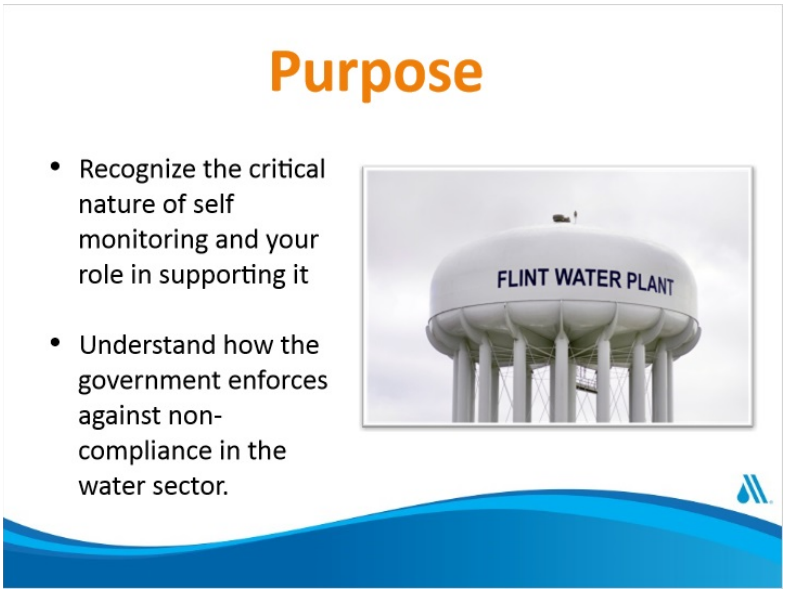
1.2 Purpose



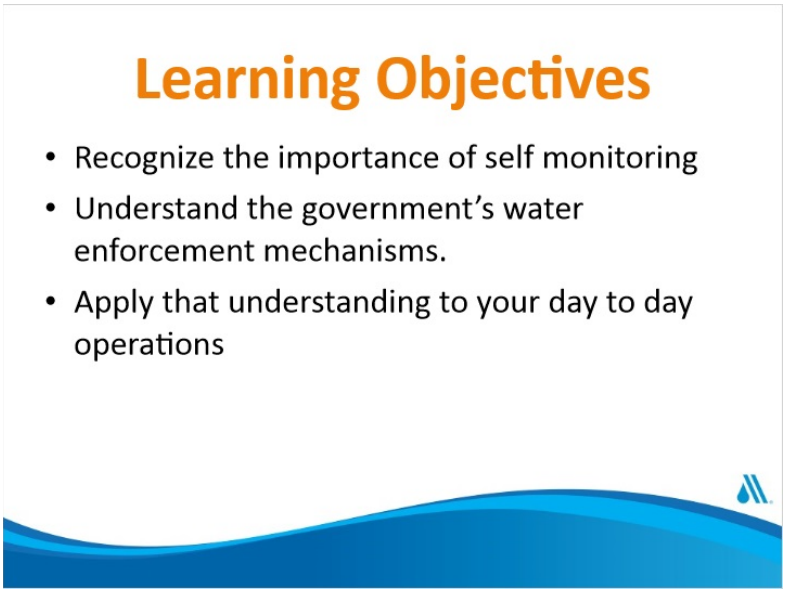
Notes:

As President Lincoln is reported to have said, “laws without enforcement is just good advice.” America’s water laws definitely ***do not*** fall into the “good advice” category as they contain significant provisions for enforcement - including criminal enforcement. And, there is an ample record of strong enforcement under both the Clean Water Act and Safe Drinking Water Act. We’ll go over the enforcement tools used to ensure the safety and quality of our water and ***how*** the government goes about enforcing against misconduct in this sector.

We’ll also talk more about the **absolutely critical** nature of self-monitoring and self-reporting - and the expectations for voluntary compliance in the water sector. There are ample opportunities for you and your colleagues to display that commitment during every day operations - as well as in routine and unexpected reporting. If you can pull one primary lesson from this training, it will be that the government relies on you to be honest, and if you are found to be dishonest - or simply misleading - you are placing yourself and your organization at risk - along with the public you serve.

And although this may sound a little alarming, the more you know, the better prepared you and your team will be to continue providing clean and safe water - and uphold your commitment to the public.

1.3 Learning Objectives



Notes:

This objectives of this module are to provide you with an understanding of the tools that the government uses to ensure compliance with our water laws and recognize the critical importance of self-monitoring by water operators and utilities - as well as how you apply those lessons to your work. We'll also drill down into how the government uses those tools and how they relate to the critical concept of self-monitoring in the water sector.

As we've said previously, (and will say again) self-monitoring is a foundational principle of our water laws, and the authors of these laws and the subsequent regulations recognized this so put mechanisms in place to enforce against instances when serious violations of those principles occurred.

1.4 Agenda

Notes:

We'll first dive into self-monitoring and then move to the rationales for enforcement - deterrence, a level playing field and ultimately protection of public health.

We'll go discuss how the government investigates and enforces against such alleged violations, and, we'll tie the activities at your facility directly back to the government's compliance and enforcement priorities. Understanding how your work relates to the government's concerns is a critical element in establishing an effective compliance ethic.

At a bottom line level, the more you know about the specifics of self-monitoring, and the government's approach to enforcing violations of this practice, the better prepared you will be to operate in compliance and effectively serve the public.

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1.5 It all starts with honesty…

Notes:

At their core, the Clean Water Act and Safe Drinking Water Act are public health and laws. They came about in the early 1970s due to the burgeoning pollution of our waterways and concerns about the safety of our drinking water. As we discussed in the earlier module, they were designed to keep pollutants out of our waterways through a system of permits and government oversight and to keep our drinking water safe though the regulation of contaminants and protection of source water.

Embedded in each of these laws are the concepts of voluntary reporting and self-monitoring. Without it, the foundations for clean and safe water would crumble. Therefore, when these core principles are violated, the government takes a very dim view of such conduct. The Clean Water Act has specific penalties and includes criminal penalties for violations such as false statements, tampering with monitoring devises, and selective sampling which renders the reporting inaccurate.

Violations of the Safe Drinking Water Act related to inaccurate reporting can be charged under the separate five-year felony of 18 USC 1001 which we spoke about in module 1. Remember, it all starts with honesty, accuracy, and timeliness. Being imperfect is not a crime, but misleading, delaying, and falsifying certainly can be.

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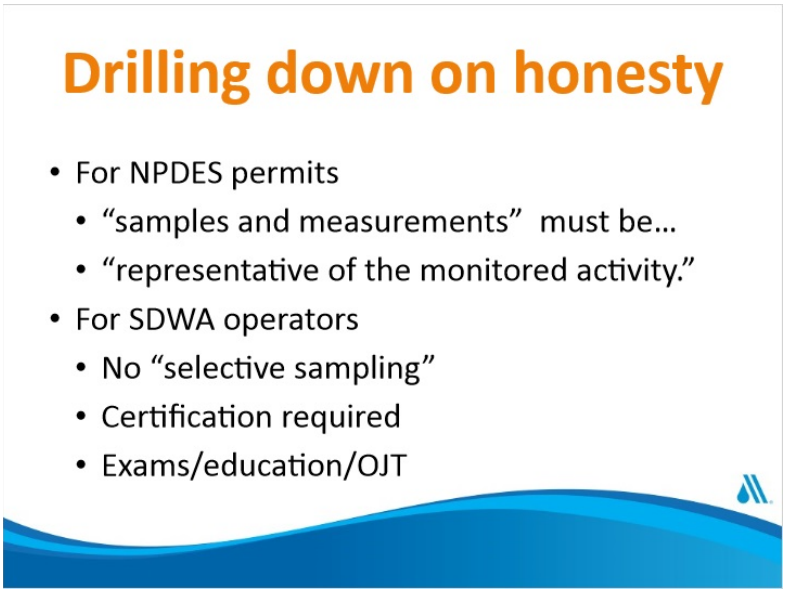
1.6 Drilling down on honesty



Notes:

Both the Clean Water Act and Safe Drinking Water Act go into great detail about the specific activities that must be attested to in order to ensure accuracy and compliance with the law.

It is not just a matter of reporting ***accurate*** numbers but ensuring that what goes into those final numbers are beyond suspicion. The Clean Water Act requires representative sampling and ensuring that monitoring devices are not tampered with or rendered inaccurate. Similarly engaging in selective sampling under the Safe Drinking Water Act is also not permitted. In basic terms, if you tell regulators you got an "A", but it's done as a result of cheating or manipulating reporting or sampling you get an "F" from them - and leave yourself open to criminal scrutiny.

The Safe Drinking Water Act also required EPA to set minimum standards for the certification and re-certification of public water operators. States must also establish certification renewal and re-certification procedures for operators as well. In appropriate circumstances, operator certifications obtained under false pretenses may offer an avenue for prosecution for false statements.

Now, I realize we are talking a lot about honesty and accuracy, but those are the building blocks of compliance, and you will see specific requirements related to that principle throughout our water laws and accompanying regulations.

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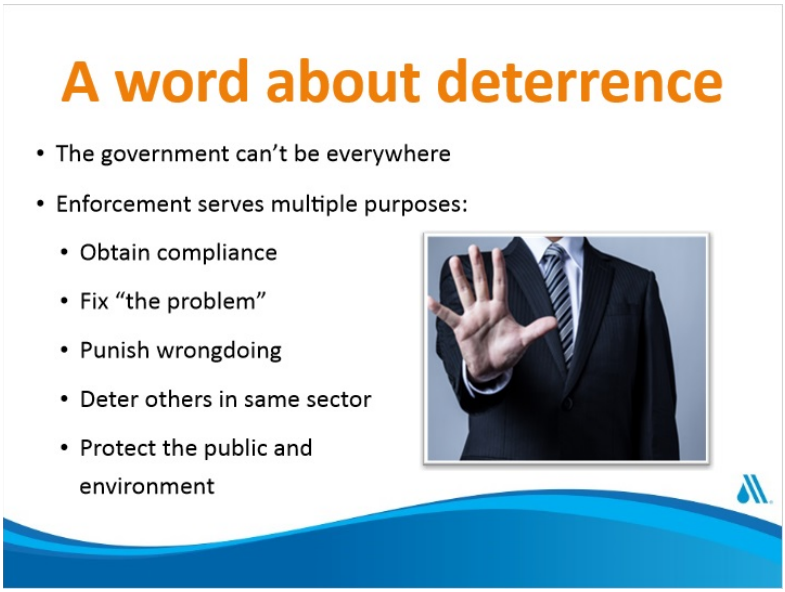
1.7 A word about deterrence



Notes:

Before we talk further about specific requirements, it's worth taking a quick look at the philosophy behind enforcing our water laws.

As much as enforcement actions are designed to punish specific wrongdoing, they also have a much larger purpose: protecting the broader public by deterring misconduct across the wider sector. You will see that the government works hard through press releases and publication of its actions to inform the public about completed enforcement cases. This is not done to further punish the individuals or entities involved by bringing further scrutiny, but to spread the word and the consequences of these actions so that others are deterred from such conduct and the public is aware of the specific incident.

Beyond punishment, enforcement actions often include requirements, where appropriate, to "fix the problem" which may include upgrades or remediating the impacts of the non-compliance. Ultimately, whether it be obtaining compliance, correcting an existing problem, punishing wrongdoing, or deterring others from misconduct, the real goal is to protect the public and the environment from current and future threats.

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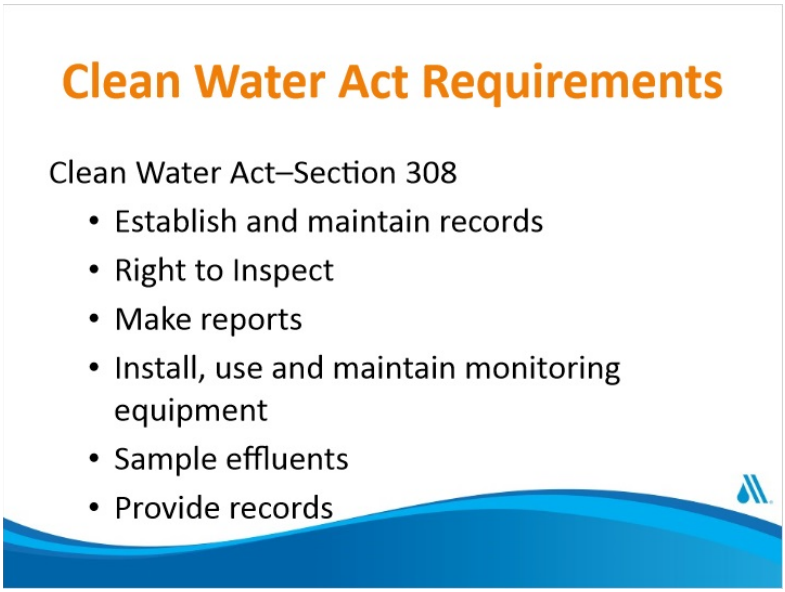
1.8 Clean Water Act Requirements



Notes:

Now let's talk a bit more about some critical Clean Water Act requirements to set up what government enforcement efforts focus on.

Section 308 of the Clean Water Act lays out some of the critical requirements of the Clean Water Act and the authorities that the EPA and delegated state programs have to enforce it. This section of the law essentially states that the EPA (through the administrator of the agency and its personnel) shall require the owner or operator of any point source (yes, that likely includes your facility if it ultimately discharges into a water way), to:

establish and maintain records, make reports to the EPA or state, install, use, and maintain monitoring equipment or methods (including where appropriate, biological monitoring methods), sample effluents (in accordance with such methods, at certain locations, at required intervals, and in such a manner as the EPA Administrator prescribes), and provide such other information as he or she (i.e. the EPA) may reasonably require;

And the EPA Administrator or his/her authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his/her credentials - shall have a right of entry to any premises in which an effluent source is located or in which any records required to be maintained under this law **and** may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under this section of the law, and sample any effluents.

So, if your facility has an NPDES permit, it is required to follow these rules. There is not really any wiggle room here. These records are required to be maintained (and must be provided if requested by the EPA or delegated program), the types of sampling, including intervals, is proscribed, and you have to report and attest to all of this under the potential penalty of a felony. And your permitted facility and related records are subject, with a few exceptions, to unannounced inspection and review.

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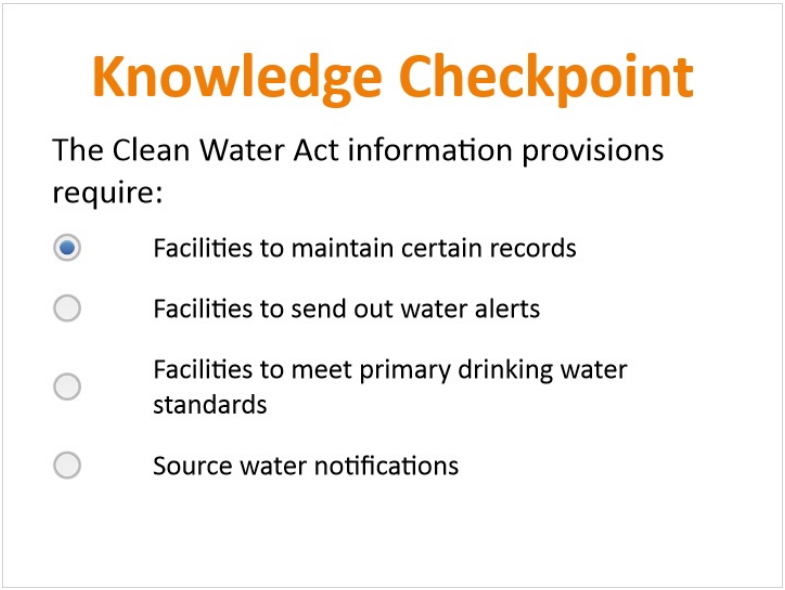
1.9 Knowledge Checkpoint

(Multiple Choice, 10 points, 3 attempts permitted)



Correct	Choice
X	Facilities to maintain certain records
	Facilities to send out water alerts
	Facilities to meet primary drinking water standards
	Source water notifications

Feedback when correct:

That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

Notes:

Let’s pause and check in on what we’ve learned thus far. As we discussed, Section 308 of the Clean Water Act requires regulated facilities to maintain certain records, which can include monitoring reports, chemical additives and maintenance records.

1.10 SDWA Requirements

Notes:

The requirements under the SDWA are fashioned a bit differently than the CWA, but the basic principles of truthfulness in reporting, timely reporting and the government's ability to oversee operations remains basically the same.

Public water systems must meet the national standards set forth in the primary drinking water regulations. The EPA published regulations setting national primary drinking water standards for more than one hundred contaminants, categorized as microorganisms, disinfectants, disinfectant byproducts, inorganic chemicals, organic chemicals, and radionuclides. Most of these standards are maximum contaminant levels (or known as "MCLs"). A few contaminants require treatment techniques which were created to reduce the level of the contaminant where it is not economically or technologically feasible to determine an MCL.

The states and the EPA may issue administrative compliance orders and may bring civil enforcement actions against public water systems that fail to meet these national primary drinking water standards, and a state has primary enforcement authority under the SDWA during any period when it has a program at least as stringent as the federal program. Once the EPA approves such a program, the federal government may bring a civil enforcement action only if the state fails to do so after receiving a 30-day notice from the EPA Administrator that a public water system is noncompliant.

It should be noted again, that there are no direct criminal penalties for failing to meet drinking water standards. Nevertheless, operators of public water systems are required to show compliance with applicable MCLs through periodic reporting. (These are often referred to as monthly operating reports or "MORs," but it is important to note that reporting requirements are not ***just*** limited to these monthly reports.) Falsifying such a report may be a criminal violation of 18 U.S.C. § 1001. And as you recall federal prosecution is possible even if the false statement is made to a state agency.

The SDWA also has requirements that operators must meet in order to be certified and included in these requirements is certain levels of "on the job training." If should be noted that falsifying certifications can also be subject to criminal penalties.

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1.11 Common Violations

Notes:

Let's move from the core requirements to some of the common violations that are consistently seen and enforced against by both federal and state regulators and prosecutors. Monitoring and treatment of water obviously requires many steps and there are many steps along the way to demonstrate compliance. The government looks at those specific areas in assessing a facility's operations. Monitoring reports are foundational to the success of the country's water programs, and inaccurate or incomplete reports are red flags to regulators. Additionally, maintaining and calibrating equipment such as pH meters is central to compliance, and failures to report certain bypasses or tampering with monitoring devices would be likely both be viewed as moving into criminal conduct.

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1.12 Applying these lessons

Notes:

The reality is that just about every minute that a water facility is operating, its activities are intersecting with the requirements of our nation's water laws, and you and your colleagues demonstrate compliance in your day to day actions. Every time you make accurate reports of required data, ensure the working condition of monitoring equipment, the appropriate treatment of water, and training of your colleagues, you are demonstrating compliance and meeting the requirements of our water laws. And on those rare occasions when an upset or incident occurs, and you report it in a timely manner and take appropriate steps, you are meeting the spirit and mandates of these laws as well.

Compliance in many ways is doing your job as required. But it is important to remember though, that these are not simply "best practices," but legal mandates that are serve as the minimum legal requirements.

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1.13 Ramifications of non-compliance

Notes:

It's also worth hitting the pause button to reflect not simply on compliance but what some of the impacts of non-compliance can be. In the most serious cases, public health can be impacted, ***and*** enforcement actions can occur including criminal enforcement - and the threat of incarceration in the most extreme cases. Environmental harm and public health impacts can also arise along with injuries of plant and utility personnel. And at the end of the day, your ability to work in the industry could be on the line if your certifications are put into jeopardy through your own conduct. And importantly, noncompliance can lead to a negative public image for your facility and a loss of customer confidence.

The costs of improper actions are very significant to plant operators and the public.

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1.14 How is non-compliance identified?

Notes:

So, now that we know that regulators care about (because these facts are embedded in law…) ***and*** know of their ability to inspect, oversee and enforce against non-compliance in the water sector, let's take a look at how they lean about allegations of misconduct in the water sector and investigate them.

As we learned, the EPA and delegated state programs have the ability to inspect facilities that are subject to both the Clean Water Act and Safe Drinking Water Act. Information learned from these inspections can be used as the basis of an enforcement action if violations are identified.

Credentialed inspectors have the right to request information about the operation of the facility in question. One note to always remember is that these inspections do not have to be announced, and you should never impede them or seek and limit them. That being said, it is always smart to exercise caution when conducting any type of environmental inspection, so appropriate health and safety considerations should always be understood and shared with inspectors while on site.

Environmental regulators will also often analyze compliance reports found in the form of DMRs, MORs or even consumer confidence surveys and these may be compared to actual samples that are taken on site or at an outfall to gauge the accuracy of the reports. They may also learn of alleged misconduct from employees who view themselves as whistleblowers and voice concerns directly or anonymously to regulators or even law enforcement. And individuals or community groups may raise concerns to regulators related to issues of odor, visible discharges, or even their own sampling results which they believe may show violations. In some instances, non-compliance is identified by a water utility self-disclosing violations it learned of.

Government investigators generally take information from inspections or citizen reports and conduct an initial evaluation. They will likely evaluate whether this is a significant matter requiring immediate attention (such as a potential threat to drinking water) or whether it is likely more routine. In the latter case, follow up may not necessarily involve any actual enforcement action, but could include corrective measures or required follow up - even when a notice of violation is issued. The response from the regulators is likely be driven by the relative seriousness of the allegations.

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1.15 Civil Enforcement Tools

Notes:

If violations are serious enough to be referred for civil or administrative enforcement, some sort of violation notice may be issued as the initial step that the facility must respond to. This “NOV” often serves as the basis or findings of non-compliance and may be based on an inspection, records review, actual sampling or all of these actions.

In a civil or administrative investigation, the government may send a formal request for information seeking specific records. (Remember the Clean Water Act and Safe Drinking Water Act provide the EPA and approved programs the authority to issue these requests.) If your facility receives such a request it must truthfully respond to it, and if there are issues with missing or incomplete records, then be honest and up front about those circumstances. Obstructive or misleading behavior can turn a routine administrative matter into a potentially more serious criminal matter due to concerns about deceptive behavior.

A government investigation may also include physical sampling of discharge points and treatment facilities, an engineering review or analysis of treatment data. Ultimately, your facility or utility will have an opportunity to respond to the findings and the matter could end anywhere from no action to a financial penalty or even criminal penalty with required remedial relief. It simply depends on the facts identified over the course of the investigation.

It’s important to note that any violations or concerns that inspectors see related to other laws - such as management of waste chemicals - can be evaluated by the government as well.

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1.16 Criminal Enforcement Tools

Notes:

Criminal enforcement is reserved for the most serious allegations of misconduct, and although the investigative tools overlap somewhat with civil enforcement, there are some key distinctions.

First of all, criminal prosecutions face a higher burden of proof (remember beyond a reasonable doubt) and these investigations have certain Constitutional limitations that are present in ***any*** criminal investigation. Absent consent being provided, in most cases judicially authorized search warrants have to be obtained to seize evidence from inside a facility. That is a much more intensive process than simply sending an information request as can be done in the context of civil proceedings. In the case studies ahead, we will outline both the conduct that led to criminal enforcement and the stringent requirements that criminal investigators and prosecutors must meet to appropriately investigate such conduct. And whether a detective is looking into a bank heist or the falsification of DMRs, the same basic Constitutional and judicial requirements apply - including protections against illegal searches and the presumption of innocence.

So, now that we have highlighted the additional burden in criminal cases, let's talk a little about the different tools investigators apply when investigating serious misconduct in the water sector. Criminal investigators will often interview witnesses, conduct surveillance to identify patterns of conduct and may perform what is known as industrial surveillance which may involve surreptitiously sampling discharges in the sewer system. They also can serve subpoenas which are a requirement to turn over certain records and evidence, and investigators may also use traditional tools such as handwriting analysis or computer forensic techniques in an effort to identify potential evidence of criminal misconduct.

All of these tools are applied in an effort to determine if serious wrongdoing occurred and to legally obtain evidence of such wrongdoing that could be presented in Court proceedings. In the case of a criminal investigation, a prosecutor will make the ultimate decision on whether the evidence exists to formally pursue criminal charges in a matter. At that point, if charges are filed, traditional court proceedings are followed, including the possibility of a trial by jury.

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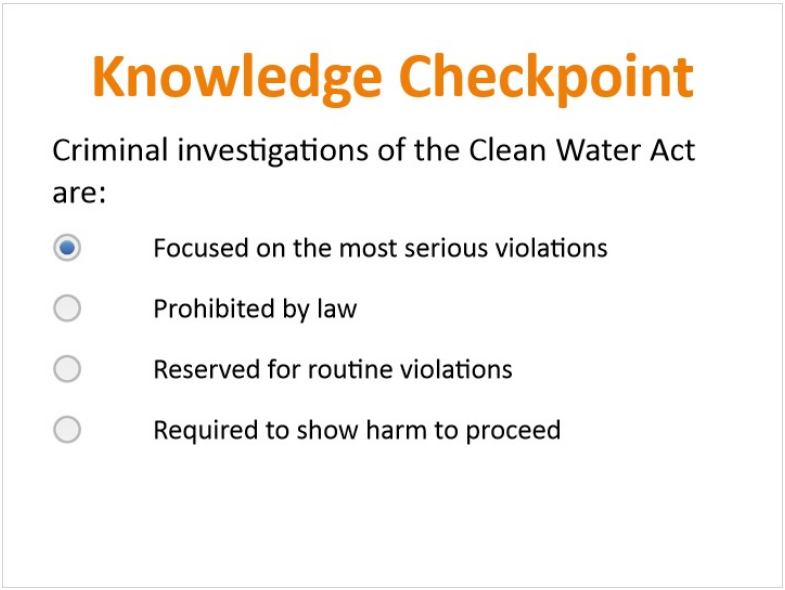
1.17 Knowledge Checkpoint

(Multiple Choice, 10 points, 3 attempts permitted)



Correct	Choice
X	Focused on the most serious violations
	Prohibited by law
	Reserved for routine violations
	Required to show harm to proceed

Feedback when correct:

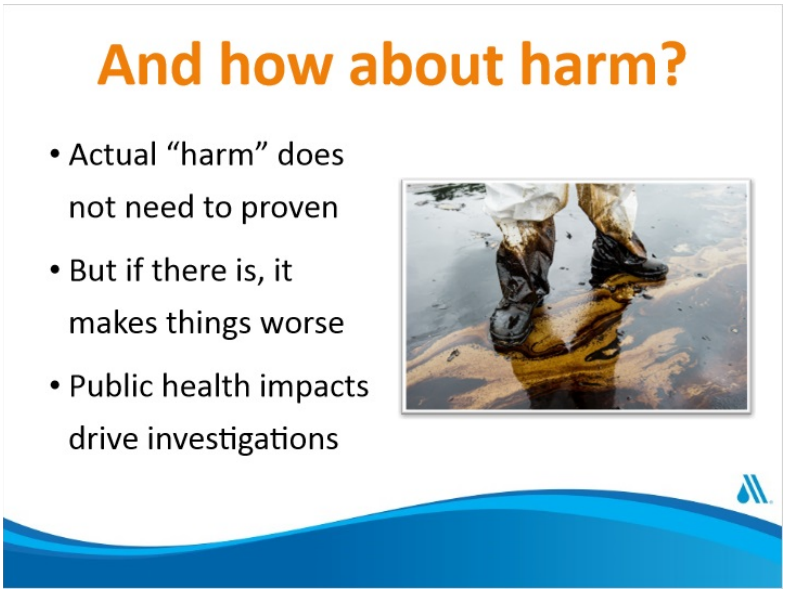
That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

Notes: Let's take a step back for a quick knowledge check point. If you answered "A" you are correct. Criminal enforcement is reserved for the most serious matters in the water sector. Harm is explicitly not required to be shown but can drive interest and evidence of it can be used in enforcement proceedings.

1.18 And how about harm?



Notes:

A quick word about harm. Obviously, no one operating a water facility is interested in causing harm to its customers or the environment, but demonstrating actual harm is also not a requirement in most water enforcement matters - including most criminal enforcement cases. Precisely because of the potential of environmental harm and public health impacts, these violations are taken seriously even when no actual harm may be evident. Never assume "no obvious harm = no enforcement."

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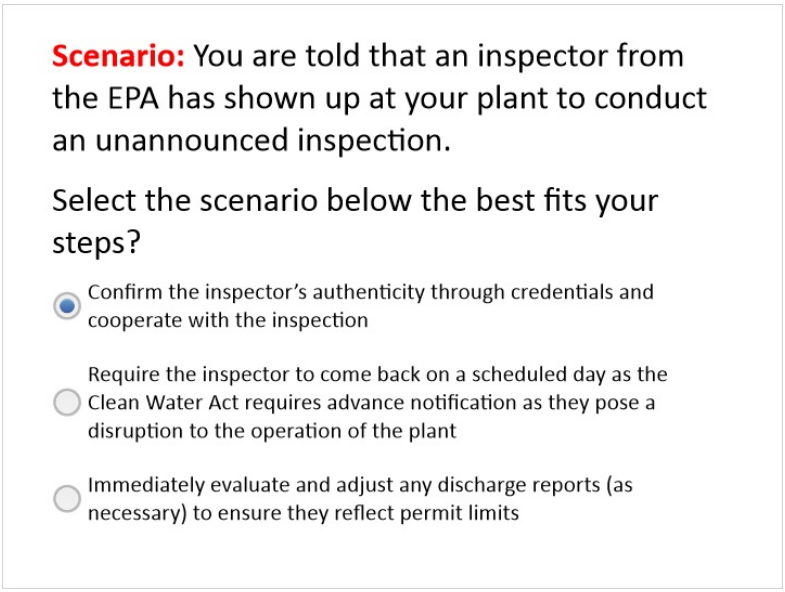
1.19 Scenario: You are told that an inspector from the EPA has shown up at your plant to conduct an unannounced inspection. What is your first step? Select one option below.

(Multiple Choice, 10 points, 3 attempts permitted)



Correct	Choice
X	Confirm the inspector's authenticity through credentials and cooperate with the inspection
	Require the inspector to come back on a scheduled day as the Clean Water Act requires advance notification as they pose a disruption to the operation of the plant
	Immediately evaluate and adjust any discharge reports (as necessary) to ensure they reflect permit limits

Feedback when correct:

That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

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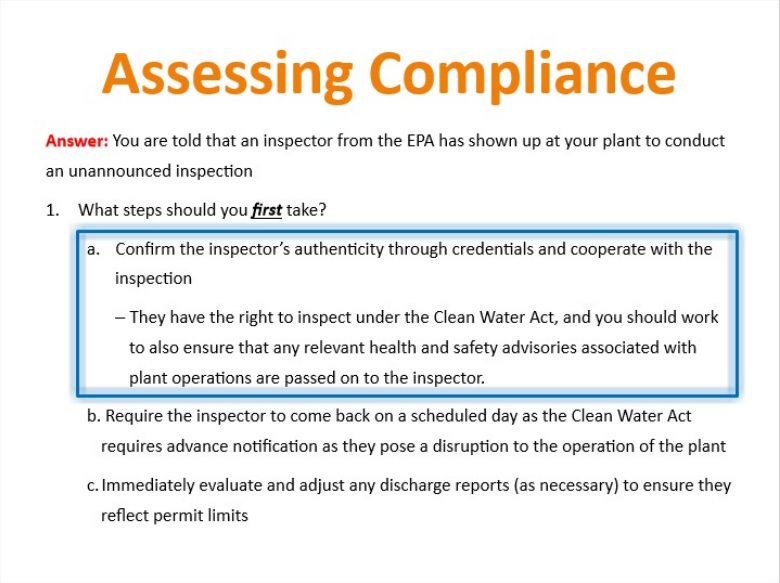
1.20 Assessing Compliance



Notes:

As discussed, when being inspected, the best rule is to cooperate, and the law is that credentialed inspectors have access to the facility to carry out their inspection, including reviewing records and evaluating processes. Health and safety considerations are always important, but they should never be used as a screen or even ruse to impede an inspection.

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1.21 Summary

Notes:

So, we've talked a good deal about the importance of self-monitoring as the foundation of water compliance and the government and public's reliance on that principle to ensure clean water. We've also talked about the broad legal authorities that government at the federal and state level, and even certain local governments, has to oversee compliance, investigate alleged non-compliance and pursue enforcement actions where facts support such actions. As a regulated entity, that is the legal landscape you operate in and as someone who the public has placed their trust in you should welcome that scrutiny. The best defense against an enforcement action - or non-compliance is to operate within the proscribed regulations, identify and resolve operating issues quickly, report any exceedances in a timely fashion, and ensure that your colleagues understand this is the expectation and requirement for your operations.

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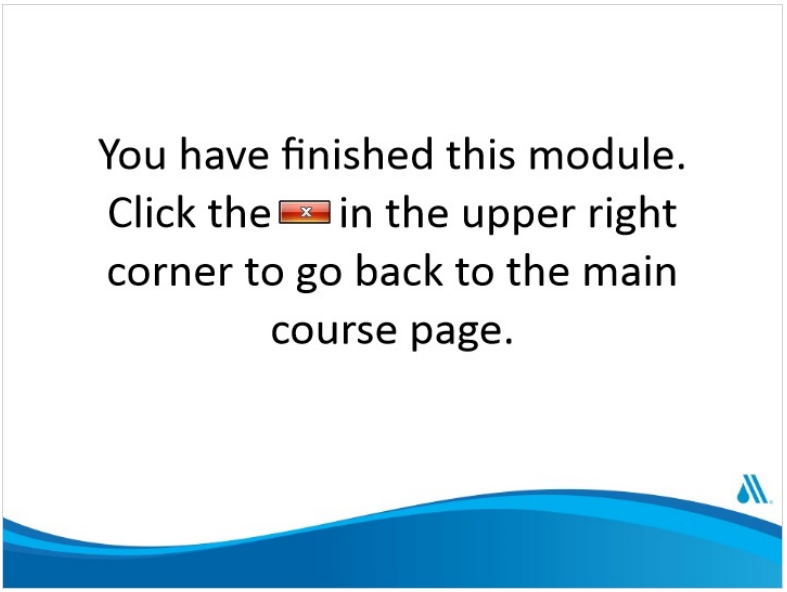
1.22 Resources

Notes:

For more information visit:

The Environmental Law Institute's Water Overview and the U.S. Environmental Protection Agency

1.23 Closing



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