

FROM INSPECTION TO ENFORCEMENT

FROM THE ENFORCEMENT PERSPECTIVE

Spring 2007

EPA/STATE and LOCAL Tenth ANNUAL
AIR INSPECTOR WORKSHOP

April 17-19, 2007

Galveston, Texas

Nidhi O'Meara, Office of Regional Counsel, Region 5



- NEWS

- “A hard beginning
maketh a good ending.”

--John Heywood

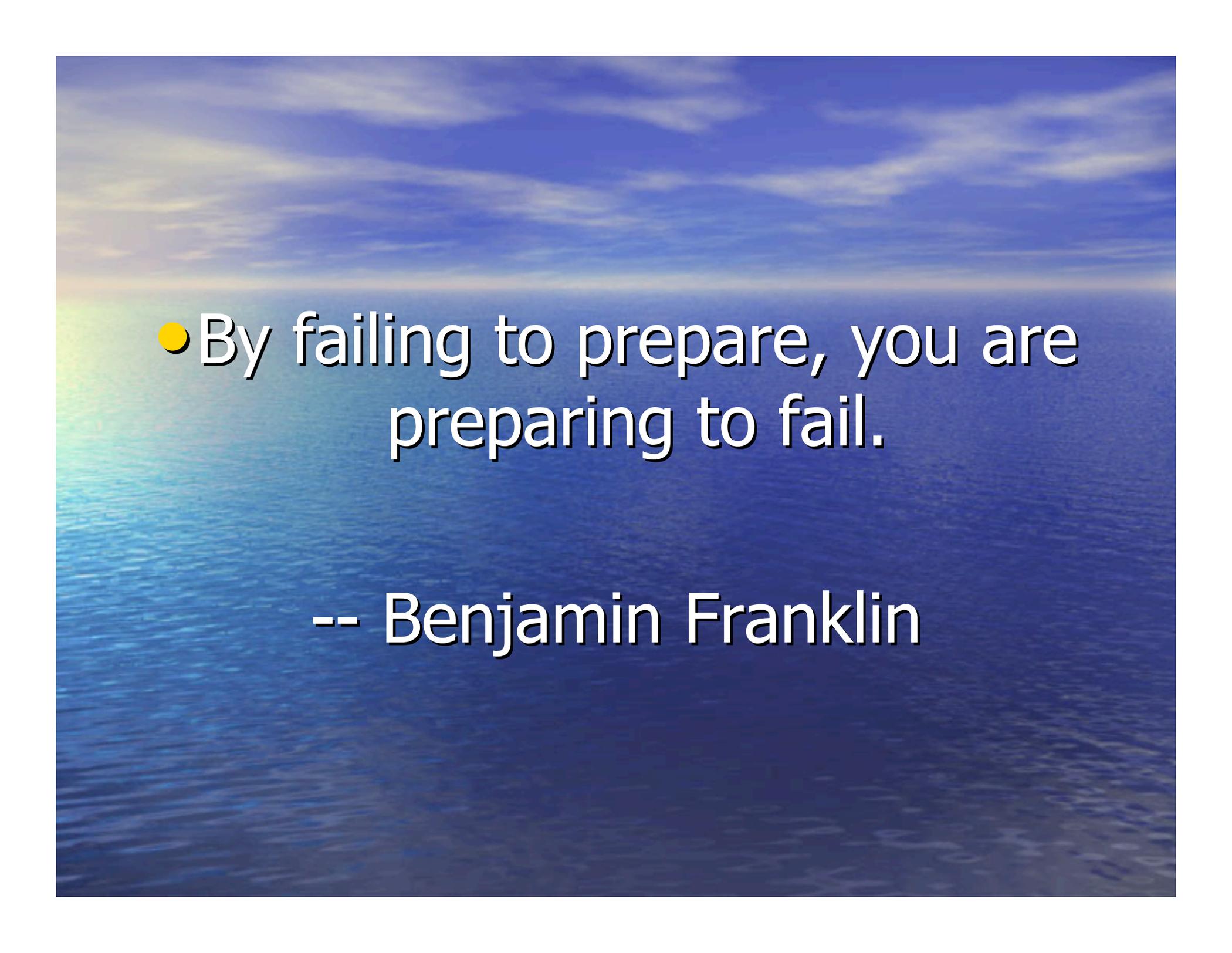
Why are inspections so critical to the enforcement process?

- Confirm compliance
- Gather evidence to prove facts of violation
- Regulatory presence
- A strong inspection yields strong evidence and quick resolutions

Inspectors are the window to our world

Why are inspectors so critical to the enforcement process?

- Official representative
- Fact finder
- Inspectors are the five senses for the enforcement team
- Inspectors play a crucial role in making sure environmental laws are implemented

- 
- By failing to prepare, you are preparing to fail.

-- Benjamin Franklin

Half the fun is getting there!

Inspection Planning and Preparation:

- Determine what you want to accomplish during the inspection
- Know who you want to interview
- Know what tasks you want to accomplish
- Utilize your checklist - refer to it, do not rely on it
- Focus on key legal elements
- Review all available information before you go to the facility

Know the key elements of proof necessary to document noncompliance before an inspection

- Identify the purpose of the inspection
- Make sure you understand the legal requirements of the statute and regulations for which you are checking for compliance
- Every element of the legal requirement has to be met

CAA EXAMPLE

breaking down a violation into its
elements of proof

- Owner demolished a building without providing written notice of intention to demolish.

The Elements of Proof

- Prima facie case:
 - Each owner of a demolition activity shall provide the Administrator with written notice of intention to demolish at least 10 working days before demolition begins.
- Standard of proof:
 - preponderance of the evidence
 - Our burden of presentation and persuasion to establish that the violation occurred and that relief sought is appropriate

The Elements of Proof

- Elements of proof to support violation:
 - “owner”
 - “of a demolition activity”
 - “provide the Administrator with written notice of intention to demolish”
 - “10 working days before demolition begins”

"Who Gave You the Right to Inspect My Property?!"

Know Your Authority for Entry

- Be prepared to answer this question
- Citing to the specific authority that allows you to come onto the property is the easiest way to diffuse the situation
- Present your credentials
- Get consent

"Who Gave You the Right to Inspect My Property?!"

Know Your Authority for Entry

- Handle claims of confidentiality appropriately
- Do not sign waivers or releases
- When entry is refused, leave and seek attorney assistance

"Who Gave You the Right to Inspect My Property?!"

Know Your Authority for Entry

- May be able to obtain a warrant
- Do not need consent in "open fields" and "plain view" situations

Should you sign this waiver?

[REDACTED]

PERMISSION TO TOUR [REDACTED] FACILITIES

Permission to tour the facilities of [REDACTED] located at [REDACTED] is granted to the person indicated below, providing that said person agrees to the following:

Any products, procedures, equipment, or conversations seen, observed, or heard in the production, filling, or distribution areas of [REDACTED] are considered to be proprietary information and will be held in utmost confidence. Said person also agrees that said information will not be disclosed to any third party.

Since safety is the number one priority at [REDACTED] all guests who wish to tour [REDACTED] facilities will also agree to wear any personal protective equipment deemed necessary for the areas being toured.

My signature below indicates that I will comply with the above and I agree to keep any and all information from my tour of the [REDACTED] facilities confidential.

Signature

Printed Name

Company

February 23, 2007

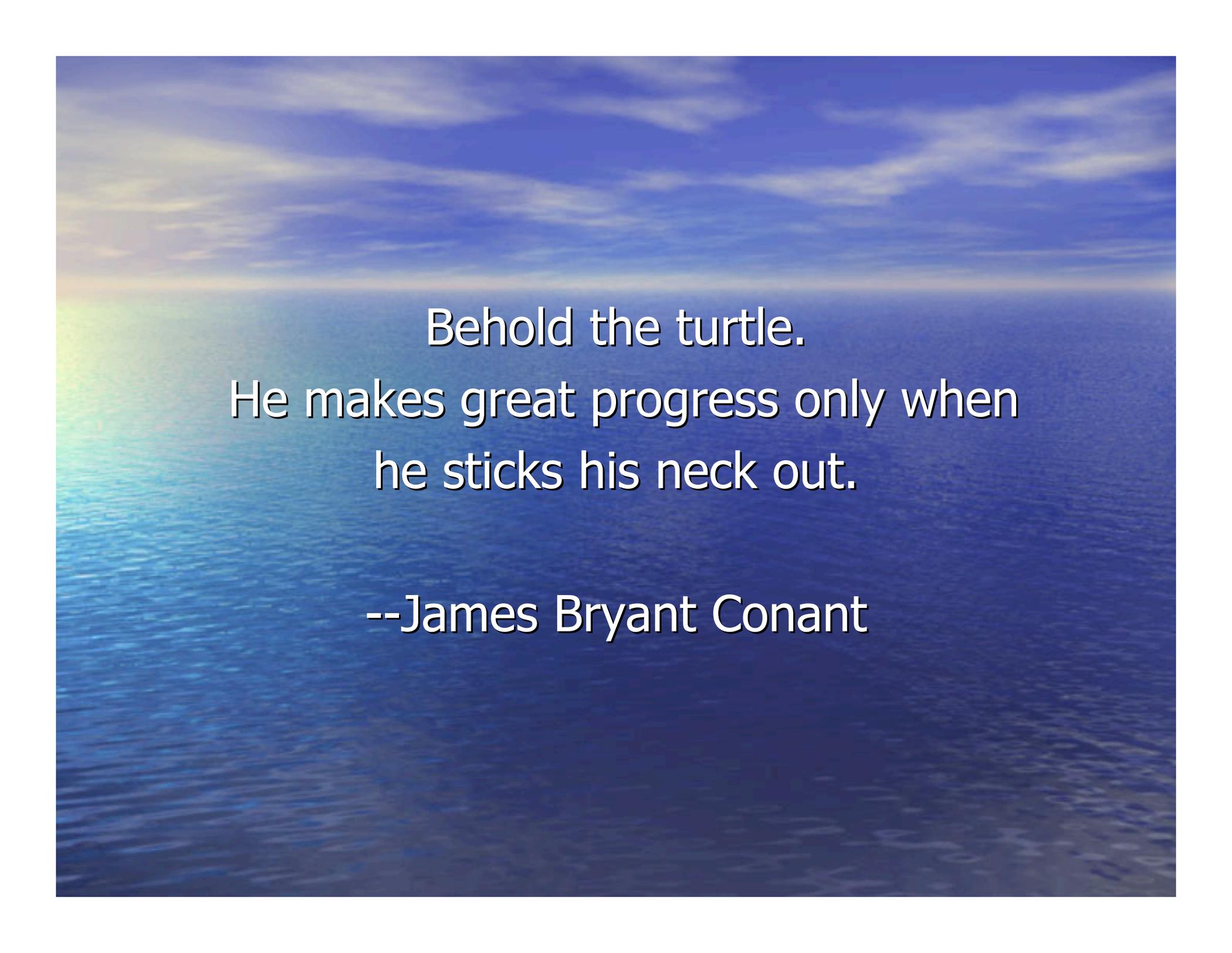
Date

Permission granted by*:

[REDACTED]

February 23, 2007

Date
[REDACTED]



Behold the turtle.
He makes great progress only when
he sticks his neck out.

--James Bryant Conant

Conducting an Effective Inspection

- Ask the right questions and the right follow up questions
- Check out inconsistencies
- Take detailed notes throughout and immediately after the inspection
- Good field notes yield good inspection reports

Effective Interviewing

- The 6 W's:
- Questions should be framed to require a narrative answer rather than a "yes" or "no" answer.
- Refer; Do Not Rely:

Ensure good communication skills

- Ensure proper communication with the facility
- Ensure proper communication through your inspection report
- Be careful how you make a record
- Near in time records are critical

A Poor Quality Inspection is a Great Defense!

Poor Quality Inspections Yield Poor Environmental Benefits

- Could cause enforcement team to draw wrong conclusions
- Could effect Agency credibility
- Could cause unnecessary delays and added cost to pursuing an enforcement action
- Creates unnecessary obstacles to successful prosecution of a case

A Poor Quality Inspection is a Great Defense! Poor Quality Inspections Yield Poor Environmental Benefits

- Could cause substantial mitigation during settlement
- Could cause enforcement team to drop any possible enforcement
- Could result in a loss in court

Documenting Information Collected During The Inspection

- Inspector field notes and inspection reports are critical
- Field notes and inspection reports should be
 - Objective
 - Factual
 - Free of any personal feelings
 - Clear, concise and objective

Documenting Information Collected During The Inspection

- Take detailed contemporaneous notes
- Do not assume anything
- Good field notes will yield good inspection reports which will yield successful resolution of violations.

Exit Interview

- Debrief
- Present any receipt for documents and/or samples
- Clarify if any follow up needs to be done.

Types of Evidence the Inspector Can Collect

- Testimonial
- Documentary
- Demonstrative
- Real

Testimonial Evidence: What the inspector was told

- Key thing to remember: You must have the interviewee substantiate statements
- You must ask the right questions
- You must take notes to document the testimonial information
- You must always be specific in your notes

Documentary Evidence: Written record you collect or copy

- Purpose of a records inspection:
 - Determine if records exist
 - Determine compliance
- Make a list of documents you have collected and make sure that each collected document is labeled and corresponds to the list of documents you have created.
- Follow up with deadlines

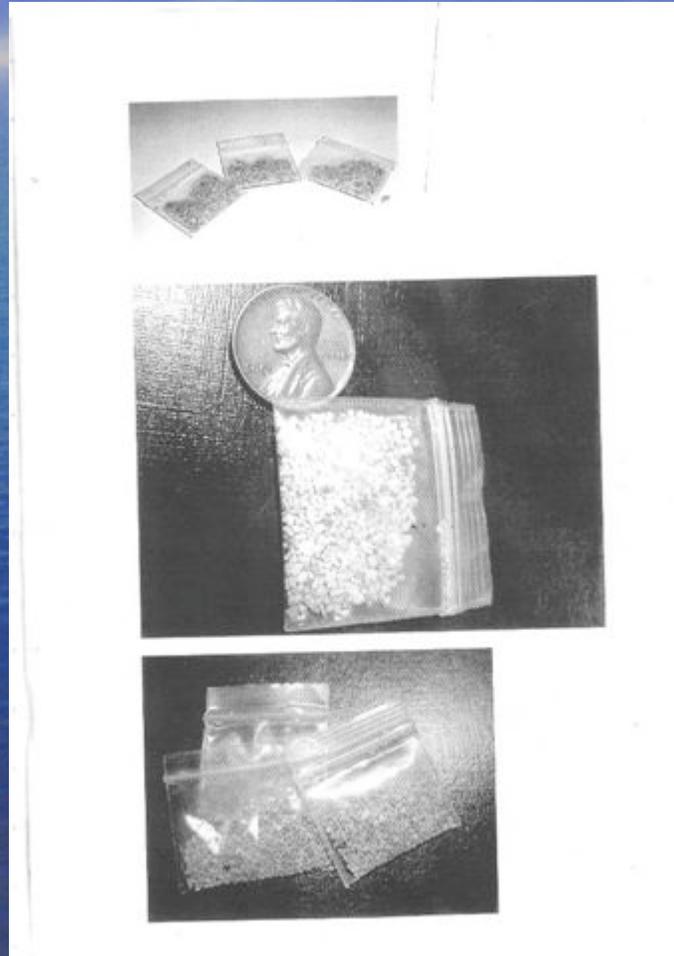
A Picture is Worth a Thousand Words!

Demonstrative Evidence:

Photos you take, Drawings you make

- Demonstrative evidence is a great source but is underutilized
- Why use Demonstrative Evidence such as photographs, maps and diagrams?
 - Can have a great impact on the enforcement team, opposing counsel and the judge
 - Can captivate and engross an audience
 - Can assist in making the testimonial evidence more understandable and convincing
 - Can provide visual evidence of violation.
 - Can make the existence of a violation more probable than not.

Perspective is Important





How big is this pothole?



How big is it now?



Put the photo into perspective



Now how big is it?



Admissibility of Photos

- When are photos admissible in court?
 - **Is the photo relevant?**
 - **Is the photo authentic?**
 - Need testimony regarding:
 - Basis of the witness's knowledge of the scene depicted
 - That he/she recognizes the scene in the photo and
 - That the photo is a true and accurate depiction of the scene at the relevant time.

Admissibility of Digital Photos

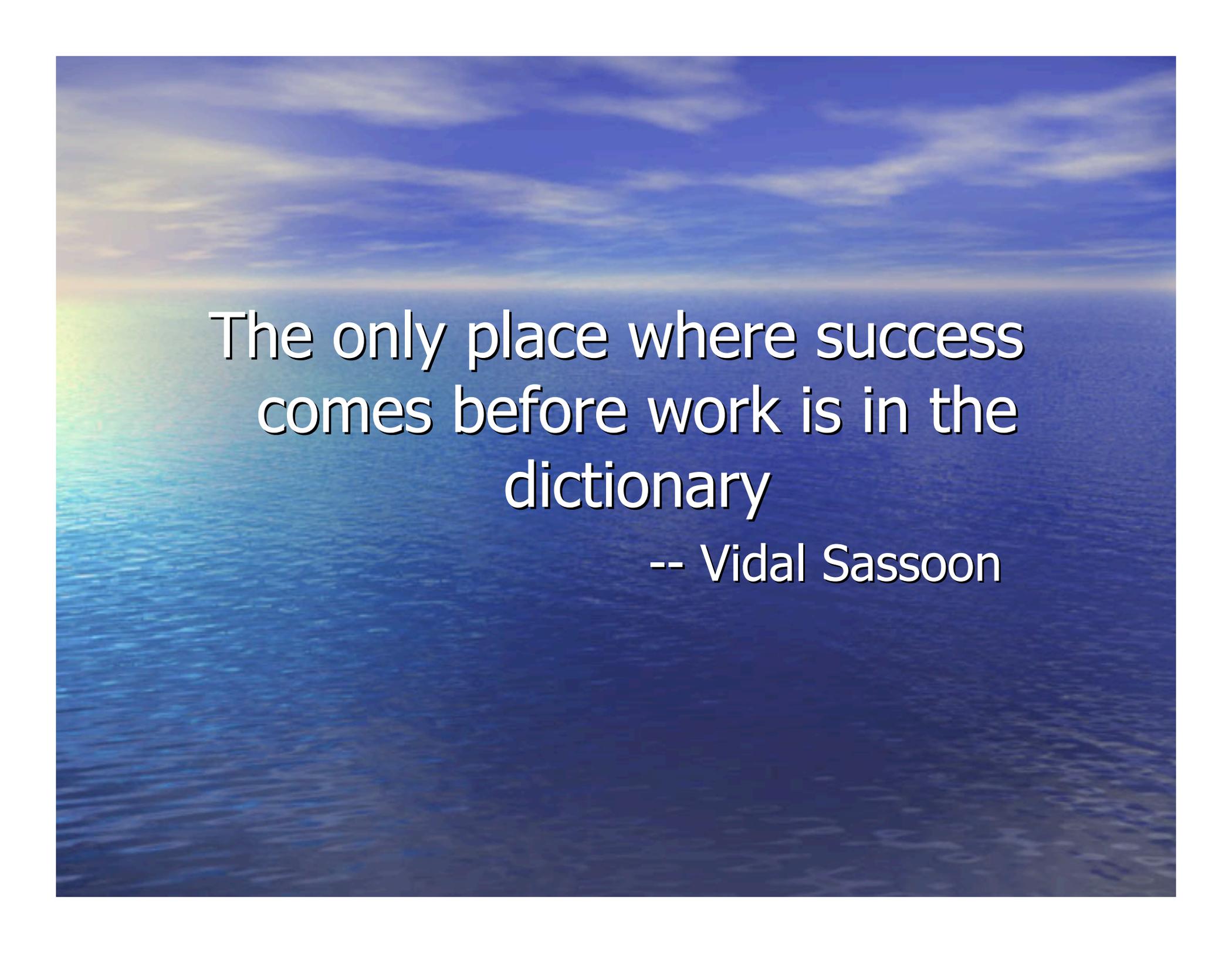
- For digital photos must also:
 - Follow SOP
 - Create archival original ASAP
 - Establish Chain of Custody for photos

Real Evidence: Physical Samples You Gather or They Gather Three Critical Components

- Is it **REPRESENTATIVE**? Is the sample representative of what you need to evaluate or determine compliance?
- Is the correct **METHODOLOGY** being used?
 - Does the methodology ensure that the sample was taken properly for the substance in question? [Quality Assurance (QA)]
 - Was the proper analytical method used to make an accurate evaluation of its presence? [Quality Control (QC)]

Real Evidence: Physical Samples You Gather or They Gather Three Critical Components

- Is the sample being **TRACKED** properly?
 - Chain of Custody: Can you prove where it came from, where it went, what was done with it, and that there was NO opportunity to compromise that sample along the way.



The only place where success
comes before work is in the
dictionary

-- Vidal Sassoon

Post Inspection Activities: Convey, Review and Refer

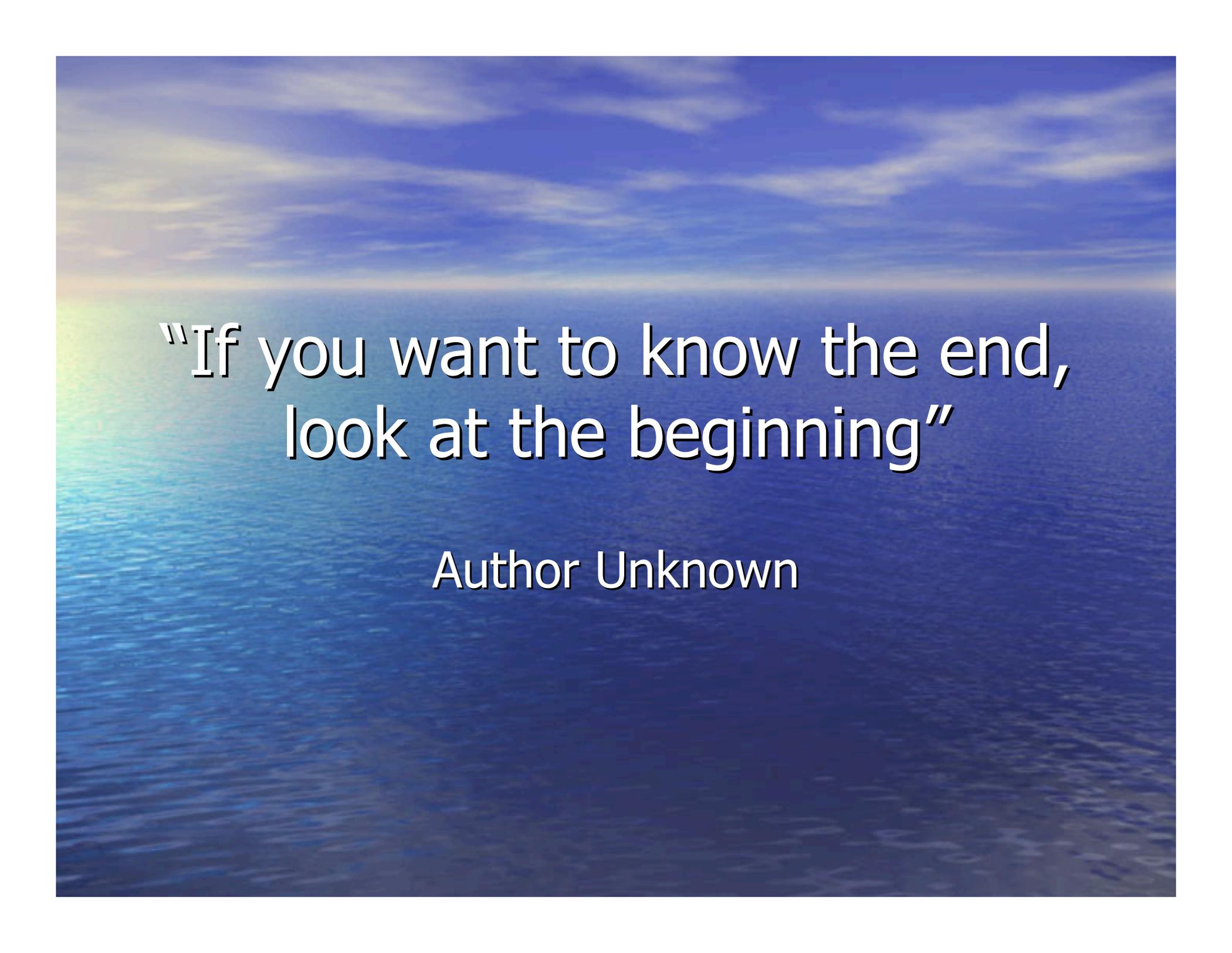
- Purpose of inspection report:
 - Clear, concise, complete, accurate, factual, well supported record of your inspection
 - organizes all information gathered
 - May become evidence - a reflection of you
- “Near in time:” The report should be written as close to the inspection date as possible
- Identify all sources of information

Post Inspection Activities: Convey, Review and Refer

- Any conclusions you want to express should be done in a separate memo clearly identified as “enforcement confidential”
- Have someone proof read your report
- Write the report so that it paints a picture and allows the reader to draw conclusions

Conclusion

- Inspections and Inspectors are the key
- Your credibility is king!
- Prepare ahead of time
- Know your authority
- Interview effectively
- Document



“If you want to know the end,
look at the beginning”

Author Unknown

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- Thank you!