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ATTORNEYS AT LAW

After the Panic Subsides – What Should You Do When the Inspector Leaves?

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Proceed Quickly But With Diligence

- The steps taken in the days and weeks after a bad inspection, be it environmental, OSHA, labor, or anything else, are often “outcome determinative.”
- IMPORTANTLY, the initial citations/fines received can be fairly categorized as an “opening offer,” and not a fait accompli. Many environmental actions begin with draft “consent assessments” rather than formal NOVs.
- BUT, what you do, who you select to handle it, and how it is done will all have significant impacts on whether fines can be reduced or eliminated, citations reduced in severity, or abatement program requirements kept at manageable levels.

First Common Option – Informal Conference and Settlement

- Obtain a better explanation of the violations cited;
- Obtain a more complete understanding of the specific standards that apply;
- Negotiate and enter into an informal settlement agreement;
- Discuss ways to correct violations;
- Discuss issues concerning proposed penalties;
- Discuss proposed abatement dates; and
- Obtain answers to any other questions you may have.
- **THIS WILL BE A DETAILED NEGOTIATION, YOU MUST COME PREPARED IF YOU WANT TO RESOLVE THE MATTER THAT DAY.**

Informal Conference and Settlement (cont'd)

- For example – If you agree that the cited violations exist, but you have a valid reason for wishing to extend the abatement date(s), you may discuss this with the area director in an informal conference.
- He or she may issue an amended citation that changes the abatement date prior to the expiration of the 15-working-day period without your filing a Notice of Intent to Contest if the matter is OSHA related. Environmental actions are typically 30 days, but the level of response required varies by state. As an FYI, EPA's appeals board practice manual is 115 pages, so formality matters at the federal level.
- Reaching that result requires you to have prepared your goals in advance, researched your legal basis for the request, and collected documentation to support it [manufacturer's letter indicated unavailability of abatement equipment instead of simply stating "you can't get it that fast."]

Informal Conference and Settlement (cont'd)

- Strategy is also very important to remember....
- We typically recommend requesting informal conferences for two reasons. First, it tests the resolve of the agency and lets you know whether a good settlement can be had. Second, even if a good deal cannot be reached, you will gain valuable knowledge about the basis for the fines, the violations, etc. All of this can be used to draft a better, more comprehensive and legally sound challenge if necessary.

How to Contest Citations

- Your contest must be made in good faith.
- A proper contest of any item suspends your legal obligation to abate and pay until the item contested has been resolved, for most statutes, in most jurisdictions. If you contest only the dates indicated on the citation or if you contest only some items on the citation, you must correct the other items.
- After you file a Notice of Intent to Contest or other formal appeal document, your case is officially in litigation. If you wish to settle the case, you may contact the OSHA/EPA area/regional director who will give you the name of the attorney handling your case for the government.

Petition for Modification of Abatement [Extension of Compliance Deadline]

- Steps you have taken to achieve compliance, and dates they were taken;
- Additional time you need to comply;
- Why you need additional time;
- Interim steps you are taking to safeguard your employees against the cited hazard(s) until the abatement; and
- A certification that the petition has been posted, the date of posting and, when appropriate, a statement that the petition has been furnished to an authorized representative of the affected employees (if necessary).

Watch for a “Double-Dip” Inspection

- If you receive a citation, a follow-up inspection may be conducted to verify that you have done the following:
 - Posted the citation as required,
 - Corrected the violations as required in the citation, and/or
 - Protected employees adequately and made appropriate progress in correcting hazards during multistep or lengthy abatement periods.



Operational Factors Mitigate Inspection Fallout

- Inform employees about hazards through training, labels, etc.
- Train employees in a language and vocabulary they can understand.
- Keep accurate records of work-related injuries and illnesses.
- Perform tests in the workplace, such as air sampling, as required.
- Provide hearing exams, PPE or other medical tests as required.
- Post citations and injury and illness data where workers can see them.
- Notify all appropriate agencies within applicable times of accidents, releases, failures, discharges, etc.

**Commonwealth of Pennsylvania
Department of Environmental Protection
Oil and Gas Management Program**

Civil Penalty Assessments in the Oil and Gas Management Program

DEP Technical Guidance Document ID No. 550-4180-001

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First Example – Consent Assessment Issued After Inspection Related to Discharge

- Client owned and operated several drilling mud mixing/manufacturing/recycling plants.
- Independent hauler was returning unused load for credit against future purchase when tanker truck seal suffered critical failure, and entire contents were discharged onto parking lot, embankment, and related ground.
- Client immediately called environmental remediation contractor, and promptly reported the release.

Ensuing Inspection

- Resulted in the issuance of a significant fine, and violations of both the Clean Streams Law and Solid Waste Management Act. Many items noted were technical in nature [height of berm surrounding parking lot to prevent spill discharge was insufficient, for example].
- Led us to believe that fine was, in part, politically driven [Marcellus is highly controversial in PA, and rank and file environmental officials ARE NOT aligned with Republican Administration's rapid expansion of drilling].

End Result?

- Voluntary Consent Assessment entered in lieu of formal NOV, and appeal therefrom.
- Accepted fines were less than 80% of what was originally requested.
- A variety of institutional controls were proposed by our clients in lieu of the fines, including inspection of sealing devices on tanker trucks over a certain age, installation of secondary containment beyond berm, etc.

How'd We Get There?

- First – don't be afraid to be creative. It was a good idea to propose “alternative” punishments to the fine, since all of the suggestions were improvements to the facility in any event.
- Second – be appropriate, but aggressive. We were able to successfully use the inspection documents against the agency. One inspector noted that the discharge failed to reach the tributary at issue, so agency was forced to take all CSL violations off the table.
- Third – Be aware of agency preferences. In this case, Owner called the “Cadillac” of environmental emergency responders to remediate the spill. Sometimes, simply asking for a recommendation on the engineer who might design the abatement mechanism scores major points.

How'd We Get There?

- Fourth, don't be afraid to ask for additional documents that might help you. You aren't bound by what the inspector provided, the citation, and the papers within your control.
- In this case, we requested copies [RTK Act] of similar incidents and the final resolution of the matter, as well as copies of agency internal guidance on things like fine calculations, etc.





COMMONWEALTH OF PENNSYLVANIA
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 OIL AND GAS MANAGEMENT PROGRAM

Civil Penalty Calculation Worksheet
 (for DEP use only)

eFACTS Enf ID
Date Initiated
Page of

Responsible Party (Violator)		ID or OGO #	Evaluator		Description of violations and applicable laws.	
Site / Well Name and #			Prior Related Enforcement Actions			
			Type:	Enf ID:		Date:
API # or Permit #		eFACTS PF Id #	Type:	Enf ID:		Date:
Location:	County	Municipality	Type:	Enf ID:		Date:
Inspection Dates:						

Penalty Calculation, Factors

\$	Endangering Public Safety or Health	Severe	Significant	Moderate/Low	None																										
\$	Damage to Natural Resources	<table border="1"> <tr> <td colspan="5">Not W.Q. related</td> </tr> <tr> <td>Severe</td> <td>Significant</td> <td>Moderate</td> <td>Low</td> <td>Negligible</td> </tr> </table>			Not W.Q. related					Severe	Significant	Moderate	Low	Negligible	<table border="1"> <tr> <td colspan="5">Water Quality Related</td> </tr> <tr> <td>Use:</td> <td>Special Protection</td> <td>High</td> <td>Moderate</td> <td>Low</td> </tr> <tr> <td>Damage:</td> <td>Severe</td> <td>Significant</td> <td>Moderate</td> <td>Low</td> <td>Negligible</td> </tr> </table>	Water Quality Related					Use:	Special Protection	High	Moderate	Low	Damage:	Severe	Significant	Moderate	Low	Negligible
Not W.Q. related																															
Severe	Significant	Moderate	Low	Negligible																											
Water Quality Related																															
Use:	Special Protection	High	Moderate	Low																											
Damage:	Severe	Significant	Moderate	Low	Negligible																										
\$	Willfulness	Deliberate	Reckless	Negligent	Accidental																										
\$	Commonwealth Costs	Samples \$	Photos \$	Mileage \$	Hours \$	Other \$																									
\$	Violator's Savings	Notes:																													
\$	Violator's History	Amount for violator's history, add % of the sum of amounts in the first five rows.																													
\$	Subtotal Amounts Above																														
- \$	Cooperation Discount	Subtract	% of subtotal.																												
\$	Total	Ratings and procedure reviewed / approved by:			Date:																										

**B. Damage from Violations Affecting Waters of the Commonwealth
(Clean Streams Law)**

The severity of violations impacting water quality, or with the potential for such impacts, is rated according to protected uses of the stream or water body as described in 25 Pa. Code Chapter 93.

1. **Special Protection** – Waters designated Exceptional Value or High Quality.
2. **High Use** - Public water supply sources and/or extensive use as private water supplies, game fisheries not identified as special protection, and waters of considerable recreational or economic value.
3. **Moderate Use** - Waters with significant use as private water supplies, non-game fisheries not identified as special protection waters, and waters of considerable recreational or economic value.
4. **Low Use** - No significant water supply use exists, no known recreational or economic use exists, or waters polluted by other sources.

Resource damage to waters of the Commonwealth is rated in one of five categories:

1. **Severe** - Extensive damage to the resource or extensive impairment of one or more water uses.
2. **Significant** - Considerable damage to the resource or considerable impairment of one or more water uses.
3. **Moderate** - Minor damage to the resource or impairment of one or more water uses to the extent that there is some inconvenience to water users.
4. **Low** - Minimal damage to the resource and minimal inconvenience to water users.
5. **Negligible** - Violations that did not result in any detectable damage or inconvenience, but are considered because of the preventative intent of the act.

From the water's designated use and the rating of resource damage, assess a penalty for the impact of the violation up to the maximum amounts shown in Table 1.

An OSHA Example....

- Total penalties were reduced from \$37,935 to \$10,050, a savings of \$27,885 was achieved (73.5% reduction) – inspection resulting from report of shattered ankle by forklift.
- Critical factors in defending a company in the event of citations issued include:
 1. Having an effective Injury and Illness Prevention Program (IIPP), which includes having documented records of Safety Committee meetings, employee safety training, facility inspections (with corrective actions), and disciplinary action administered to employees for violations of company safety policy.
 - a. This is critical in aiding in the reclassification, withdraw and “Affirmative Defenses” success.

OSHA Example (cont'd)

2. Respecting and cooperating with the Inspector throughout the inspection process.
 - a. This is instrumental in the Division considering maximum “Good Faith” discounting of 15%.
3. Having an experienced and knowledgeable counsel handling your case.
 - a. This is essential in understanding the technicalities and available defenses which may apply.

Remember the Focal Point of Inspection v. Negotiation

- Although any inspector, environmental, safety, or otherwise, will tell you that their job is to “verify compliance,” the reality is that they are looking specifically for “noncompliance.” If traffic cops don’t write speeding tickets, they put themselves out of a job.
- After the inspection, you have a chance to lessen penalties by demonstrating all of the things that you are doing correctly. But that will only succeed if those items are well documented, in compliance, and regularly practiced.

Case Study – Fallout From Historically Bad Practices, and Compliance Track Record

- The Office of Attorney General initiated an investigation based on two referrals from the DEP.
- The referral packages contained allegations that Company was illegally disposing of hazardous and residual wastes at various properties loosely connected as an operating unit.
- Facility processed over 180,000 tons of scrap material on an annual basis, and reclaimed used parts.

Status of Environmental Compliance

- The DEP did not issue a permit or license to the Owner, or to any person to operate a residual waste or hazardous waste storage, treatment or disposal facility or to use their land as a solid waste storage or disposal facility within the County.
- Fact verified by senior DEP officials, and comprehensive searches of relevant DEP and EPA databases.

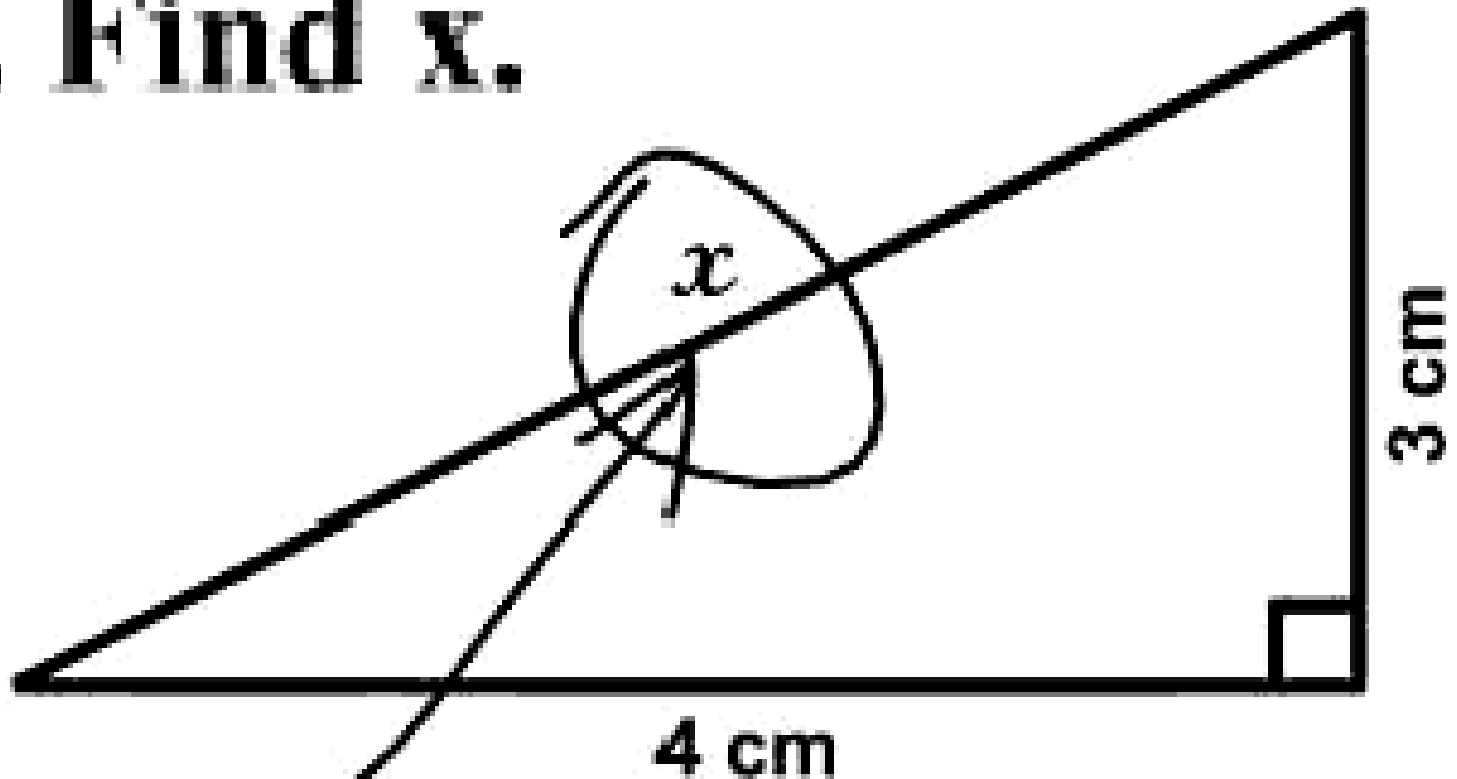
Despite That Fact....

- In less than 10 years, Facility purchased approximately 349,670 pounds of 1,1,1-trichloroethane (“1,1,1-TCA”);
- 63,635 gallons of mineral spirits; and
- A metal stripping solvent generated an estimated 400,000 gallons of liquid waste.

Plaintiff's Evidence – Brain Injury Cases

- General Intellectual Ability (IQ) (“hold tests”)
 - Educational Achievement
 - Language Functioning
 - Spatial, Attentional and Graphomotor Skills
 - Memory
 - Personality and Behavioral Functioning
- Neuroimaging Testing
- This type of evidence is very persuasive – but junk science. Nonetheless – courts typically let it in.

3. Find x .



Here it is

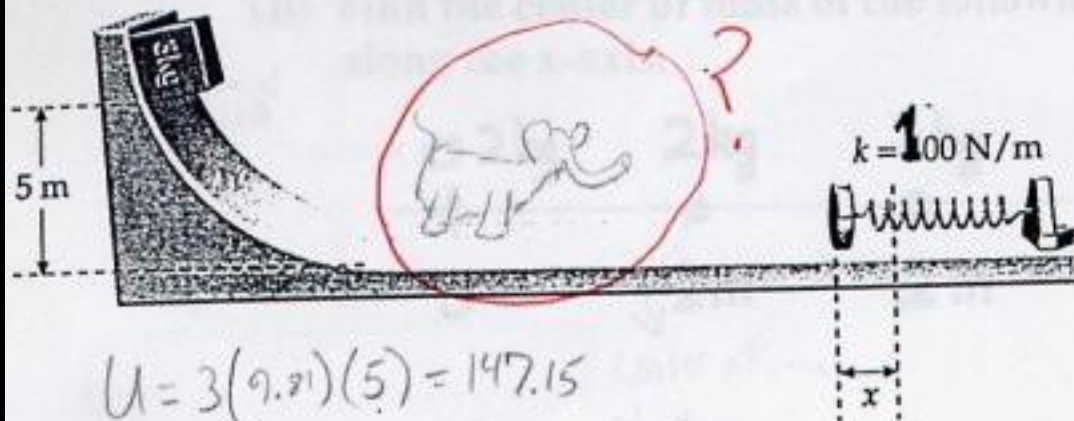
2. A 3-kg object is released from rest at a height of 5m on a curved frictionless ramp. At the foot of the ramp is a spring of force constant $k = 100 \text{ N/m}$. The object slides down the ramp and into the spring, compressing it a distance x before coming to rest.

10

(a) Find x .

5

(b) Does the object continue to move after it comes to rest? If yes, how high will it go up the slope before it comes to rest?

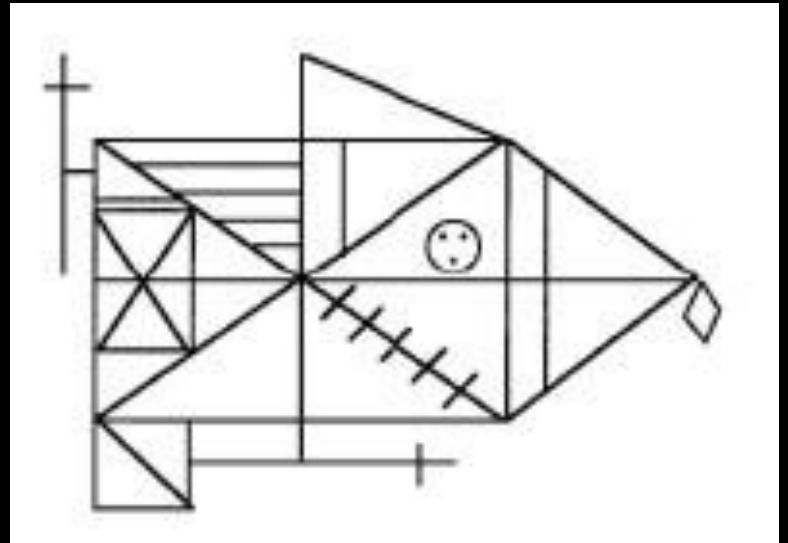


$$U = 3(9.81)(5) = 147.15$$

$$U_s = \frac{1}{2}(100)x^2 = 50x^2 \quad \dots?$$

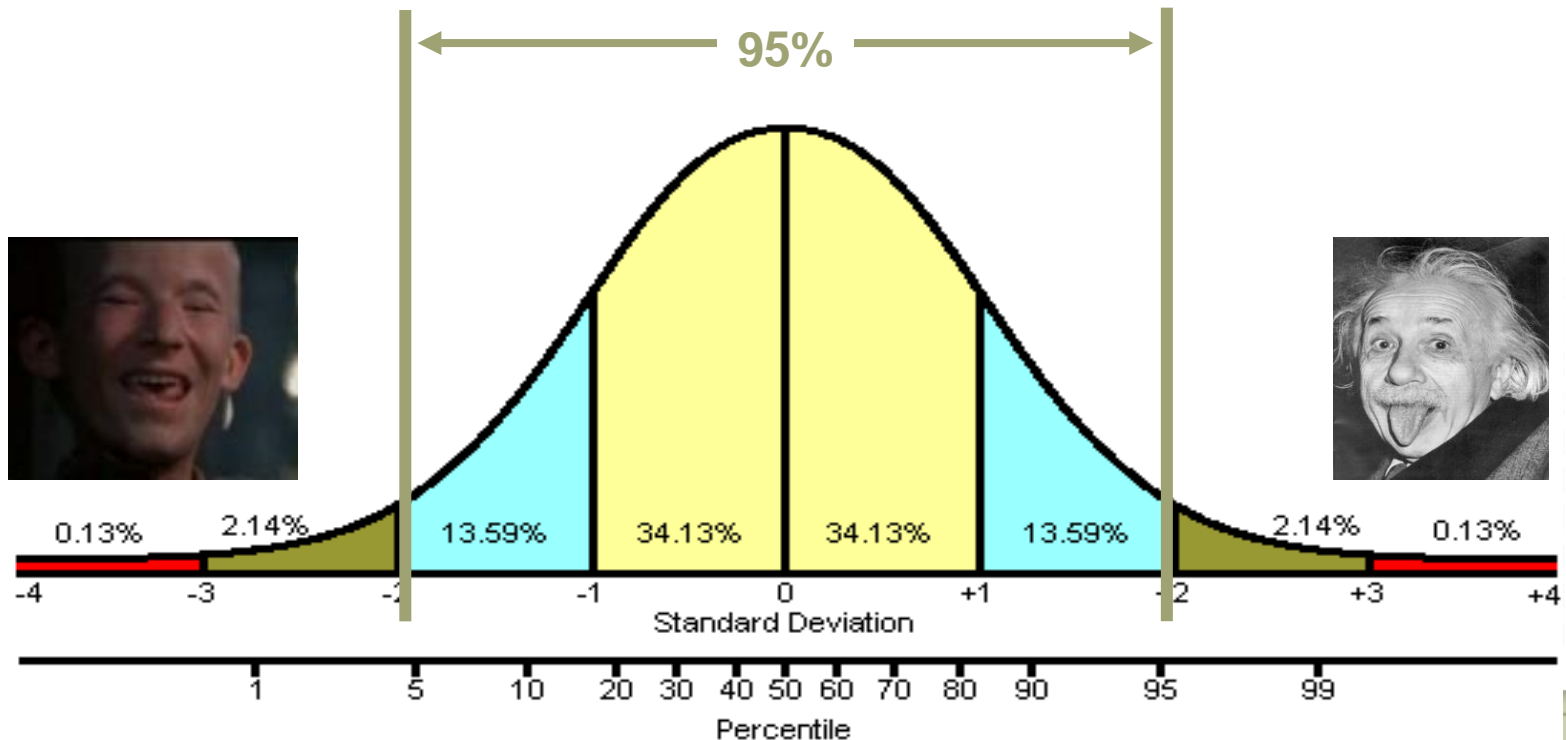
NO. there is an elephant in the way.





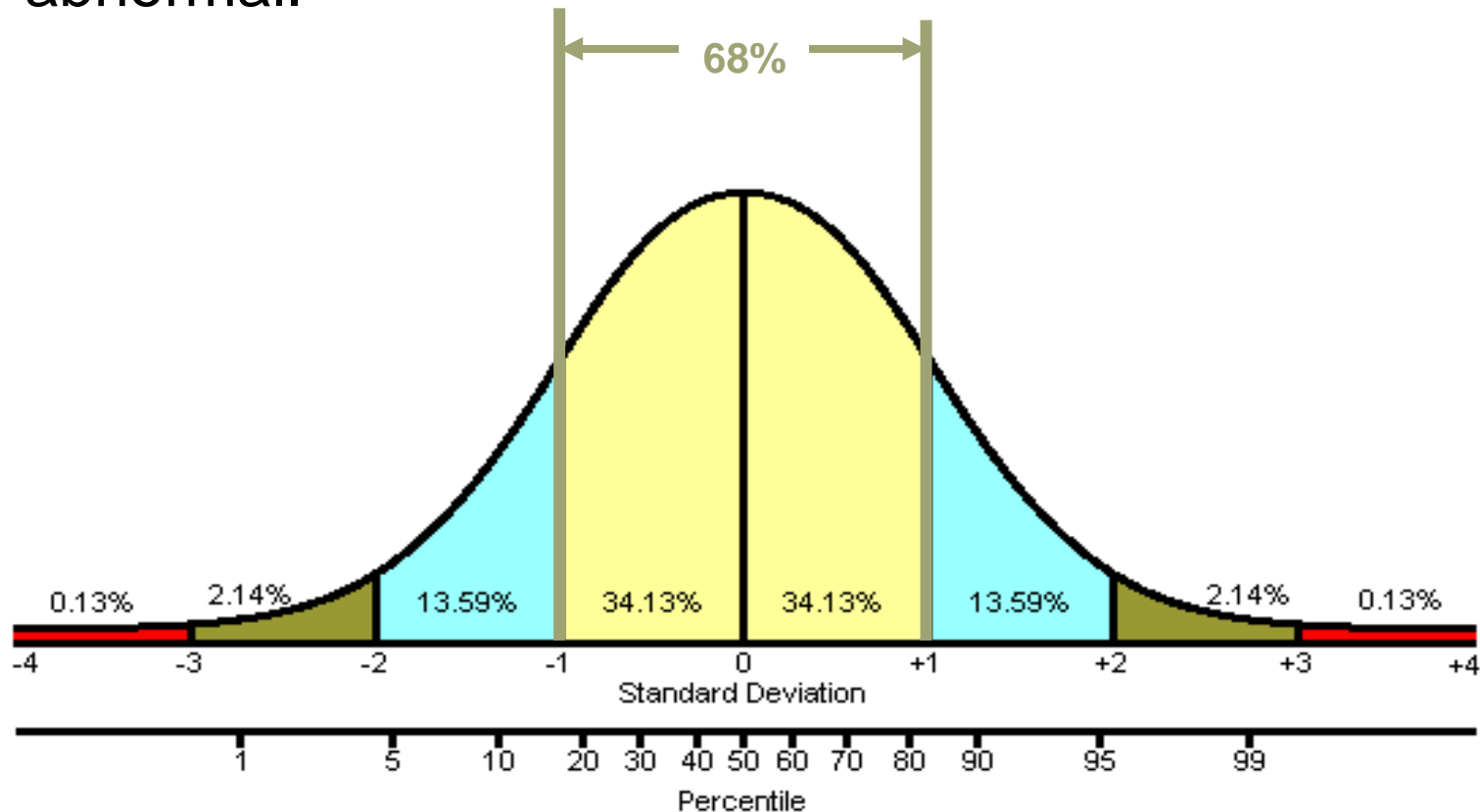
What is Normal?

- It is generally accepted that results within 2 standard deviations is normal (the middle 95%)
- Anything beyond 2 standard deviations is abnormal (the bottom 2.5% and top 2.5%)



What is Normal?

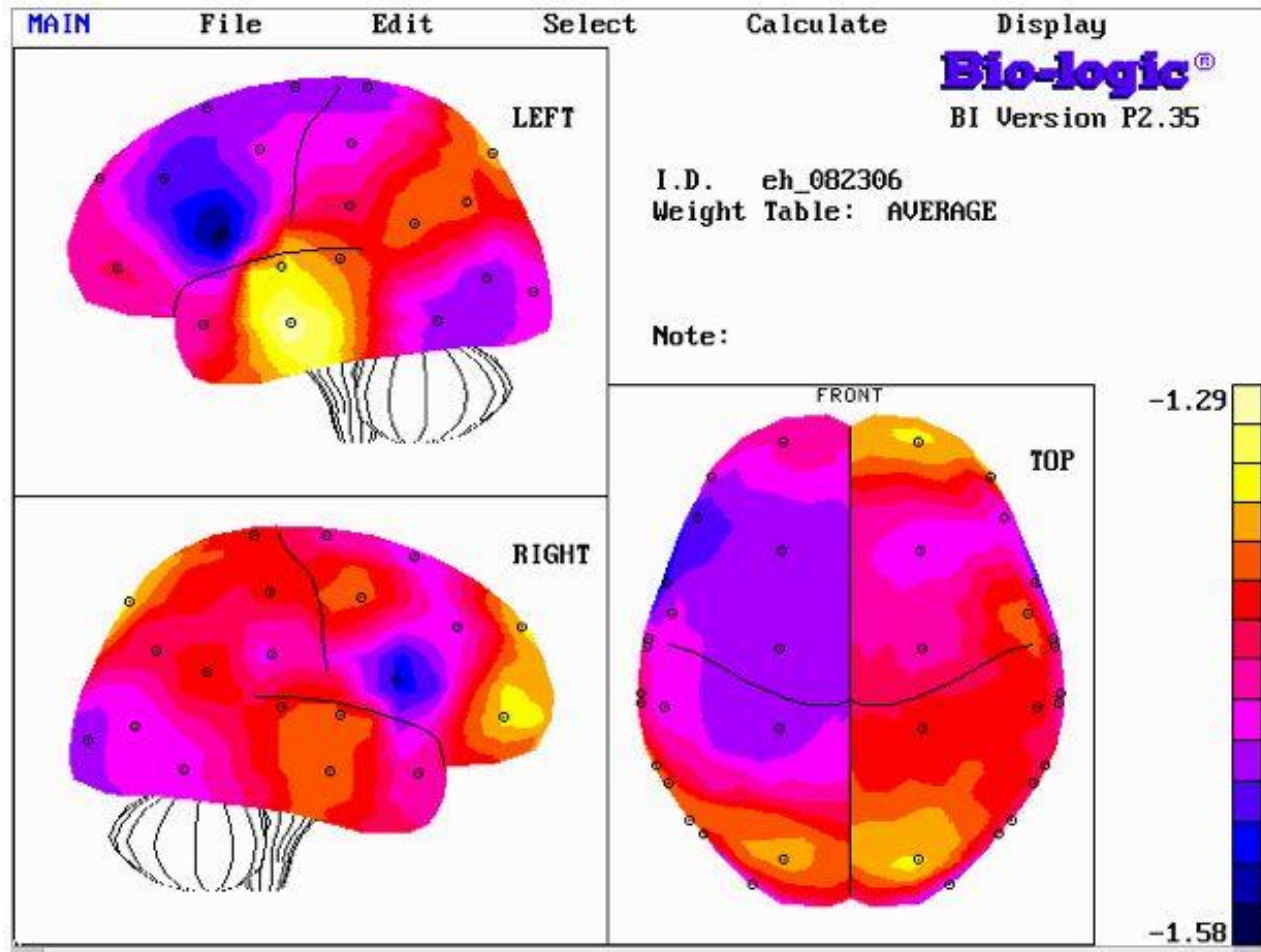
- Most neuropsychologists – use a 1 standard deviation cutoff. Under this definition 1/3 of all people are abnormal.



Neuroimaging



Behavioral Imaging Algorithm



The Challenge of Litigating Toxic Tort Cases

- Simple theories that most people are inclined to believe.
- Persuasive, easily manipulated images and science.
- Convincing “salesmen”
- Juries predisposed to believe 21st Century medical science can definitively answer causation questions.
- Complex subject matter – Judges considering excluding or limiting junk science proffered by Plaintiffs’ experts are often reluctant to invest the necessary time and effort to understand the science and issue appropriate ruling.

What's the Point?

- Remember that all corporate actions, over time, form a pattern. With environmental factors/employee exposure, patterns can equate to jury “proof” of liability. Companies with long histories of safety violations and poor environmental compliance get stamped as “bad actors.”
- So? Perhaps it isn't a good idea to accept “small” fines or “insignificant” NOVs if they can be properly challenged.
- And, if patterns begin emerging – such as longer inspections, repeat visits, etc., it may be very important to fundamentally resolve the reasons. Long term impacts to corporate financial well being may go outside the compliance area, and into exposure cases, by way of one example. The costs escalate radically if they do.



TIME FOR QUESTIONS