Legal Requirements for UIC Inspectors

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*Adapted from a presentation on the same subject by Mia Bearley, U.S. EPA Region 8

Legal Authority for Inspection: SDWA § 1445(b)

Representative of the Administrator

- upon presenting credentials, and
- written notice of inspection to any person subject to the UIC program

is authorized to enter and inspect a facility/property

- at reasonable times

Legal Authority Requirement
for SDWA § 1422 Primacy Programs

- "… State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with permit conditions and other program requirements..."
  - 40 C.F.R. § 145.12(c).

Legal Authority for Inspection: Fl. Stat. § 403.091

- "Any duly authorized representative of the department may at any reasonable time enter and inspect, for the purpose of ascertaining the state of compliance with the law or rules and regulations of the department, any property, premises, or place … on or at which . . . [a]ny facility. . . is located."

CONSTRAINTS ON ACCESS AUTHORITY

Fourth Amendment:

"The right of people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

THE RIGHT TO BE SECURE IN YOUR HOME

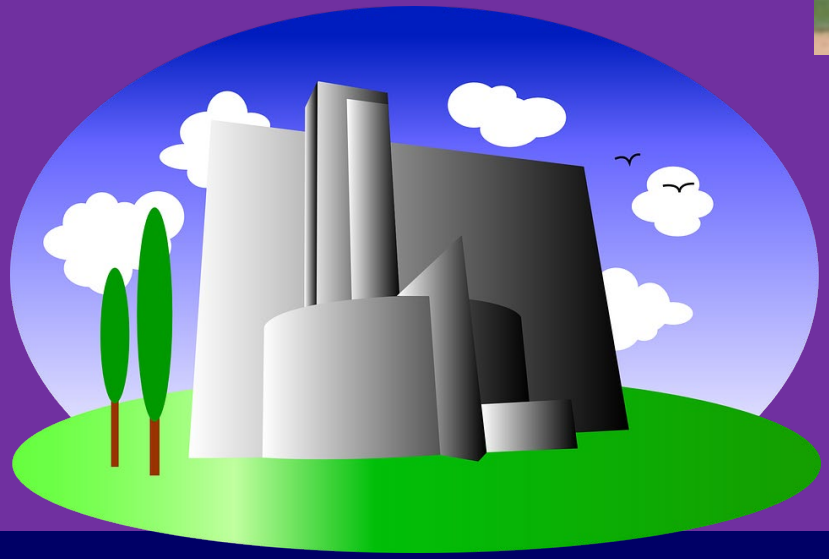
- "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement!“
  - William Pitt, 1st Earl of Chatham, 1763

Defining 4th Amendment Protections

- Expectation of privacy diminishes according to:
- The type of property where entry is sought
  - homes
  - residential yards
  - commercial facilities
  - fields; and
- The activities to be conducted
  - taking samples
  - using detection equipment
  - response action

COMMON LAW EXCEPTIONS TO THE 4th AMENDMENT

Open Fields/
Plain Sight



Pervasively
Regulated
Business

OPEN FIELDS

"The special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."

Hester v. United States, 265 U.S. 57 (1924)

OPEN FIELDS

Katz v. United States 389 U.S. 347 (1967). The court found that the 4th Amendment protects people, not places. There must be a "reasonable expectation of privacy," where:

- A person not only has a subjective expectation of privacy, and
- The person's expectation is objectively reasonable.

OPEN FIELDS

In Oliver v. United States, 466 U.S. 170 (1984), the Supreme Court held that a privacy expectation regarding an open field is unreasonable:

… open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.

PERVASIVELY REGULATED INDUSTRY

Marshall v. Barlow, 436 US 307 (1978):

- The Fourth Amendment covers commercial as well as private residences;
- There is an independent requirement for a warrant regardless of statutory authority to conduct inspections; and
- To obtain a warrant, "probable cause" in the criminal law sense is not required.

PROBABLE CAUSE IN CIVIL CASES:

More lenient standard for probable cause than in criminal cases.

Two ways to meet requirement:

- Neutral inspection scheme; or
- Specific evidence of an existing violation

PROBABLE CAUSE:
Neutral Inspection Scheme

Must be able to articulate a rationale for inspecting a particular facility.

- Inspection of all facilities in an industry on a regular cycle; or
- Industry-wide focus or “initiative.”

PROBABLE CAUSE:
Specific Evidence of a Violation

Affidavit by inspector of existing violation:

- Include specific facts indicating that a violation has occurred; and
- Provide a basis for knowledge of facts.
  - Cannot be solely based on information about a prior violation—must be combined with other evidence.
  - The scope of the search may be limited by the evidence of violation that can be presented.

ADMINISTRATIVE WARRANTS

"Oh EPA, I'm so happy to see you today, but can you come again another day?"

WHEN TO OBTAIN ADMINISTRATIVE SEARCH WARRANTS

- Upon denial of entry get the name of who denied access, and leave.
- Inspector should document any observations that can be made without entry.

Denials of Access

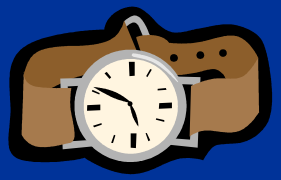
A facility has denied access if:

- There is an outright statement denying access;
- There are ANY safety issues;
- There are actions tantamount to a refusal to allow an inspection; or
- There are unacceptable conditions for entry (like no cameras, no samples, etc.).

  - Consider the risk that evidence of violations will be destroyed
    - If there is a risk, conduct inspection with the limitations, then, if needed, you can obtain a warrant later.

Denials of Access

- If outright denied, some cases merit persuasion
  - Ask why
  - Get information on person refusing access, time, date
  - State authority
  - Talk to supervisor
  - Do not threaten
  - Note any conditions that are suspicious



Affidavit and Warrant Application

- Description of the location of site or facility
- Statement of having provided written notice and shown credentials
- Identification of the owner or operator
- How and by whom access was denied
- Reason for inspection
  - Reasonable cause to believe violation has occurred, or
  - part of a normal inspection plan
  - Change of operations/possible destruction of evidence if given advanced notice
- Inspection details—the entirety of what we intend to do on-site:
  - E.g., take samples, check lines, gauges, pumps, wellheads
  - Time and date for inspection (be liberal)
  - All personnel who will be at the site

GETTING THE WARRANT

EPA Attorney will:

- Contact the US Attorney's office in Federal District having jurisdiction; and will
- Work with an AUSA to draft and review the warrant documents:
  - Warrant application;
  - Attached inspector affidavit; and
  - Warrant form for the judge to sign.
- The AUSA will sign the documents and seek to obtain the warrant from a Magistrate.

Goals of Inspections

1. Determine a facility's compliance with environmental laws and enforcement instruments; and
2. Identify and gather evidence of potential violations.

What is Compliance Assistance?

One definition, from EPA Guidance* is:

"Providing tools or assistance to the facility during an on-site compliance inspection to help the facility understand and comply with federal environmental regulations/requirements."

*"Role of the EPA Inspector in Providing Compliance Assistance During Inspections." June 25, 2003.

EPA inspectors are encouraged to provide:

- Appropriate GENERAL, and
- LIMITED site-specific assistance, consistent with the primary purpose of EPA's compliance determination, as time allows.

May I …?

N O

Provide, in the field

- Applicability determinations?
- Site-specific interpretive technical or legal assistance?

It is inappropriate to:

- Provide advice to the facility on how to deal with EPA/State/Tribe on a potential violation/enforcement action; or to
- State that no action will be taken if potential violations are corrected by the facility.

Inspection Reports

- Identify anyone you meet or talk to during inspection
- Specify all information sources, including any written documentation that you have or have observed
- Attach pictures or video if possible
- Make sure to record:
  - time, date, location, conditions
  - all steps in your inspection
  - all observations

- Retain all materials gathered
  - If you use field notes used to prepare your report, make sure to keep all your field notes and that your report is complete

Evidence: Chain of Custody

- Document:
  - Time, date, signatures
  - Personnel
  - Labeling of containers
  - Description of contents, reason for any changes
- Samples:
  - Immediately seal (tamper-proof)
  - Label
  - Transport in secure case with documentation
- Use standard forms and follow standard operating procedures
  - E.g, June 11, 2014 R8 SOP for digital cameras/video at http://8net.epa.gov/sites/default/files/resources/Digital%20Camera_R8-FQP-100%20R0%2006112014%20%28combined%29_0.pdf

Evidence: Confidential Information

- Personal liability for disclosure of known confidential information
- Require that submitter mark information as confidential

- “Confidential” includes certain personal information (SS#), trade secrets, other privileged information
- Not all information may be approved as confidential– submit to your Regional Counsel

Privacy Interest

Commonly found personally identifiable information:

- Name
- Address
- Phone number
- Date of birth
- Personal email addresses
- Financial information such as tax returns, bank account information
- Leave records
- Criminal history
- Medical history, health impacts, blood lead levels
- Social security number
- Familial relationships, marital status
- Names of potential witnesses
- Anonymous complainants' names, phone numbers, other contact information
- Conference phone numbers and access/passcodes

Discovery

- Administrative – Informal
  - Pre-hearing exchange, depositions if permitted*
  - Hearing before administrative law judge

- Civil – Formal
  - Federal rules of civil procedure and evidence
  - Depositions
  - Requests for production of specific documents
  - Interrogatories – answers to written questions
  - Timely cooperation is critical

Depositions

- Governed by rules of court
- Attended by all parties, court reporter, maybe consultants, experts, other observers
- Conduct
  - Take your time
  - Don't be tempted to fill in silence
  - Be alert and polite
  - Tell the truth

Testifying at Trial: Beforehand

- Know how your testimony fits into the case
- Review any depositions, answers to interrogatories, other testimony you have given in the past – if there are any inconsistencies, know why and be prepared to explain
- Review any exhibits related to your testimony
- Practice with your attorney or anyone else
- Anticipate cross-examination questions

Tips on Questioning

- Expect routine personal questions at the beginning
  - Uncomfortable? Tell your attorney
- Allow time for your attorney to hear the question and object
  - If your attorney objects, ***STOP*** until the objection has been resolved
  - Do not answer any question your attorney says not to
  - Do not give confidential or privileged information unless instructed by your attorney
- If you have any doubts about the question, ask for it to be rephrased
  - can point out any compound question that really requires two answers
- Do not guess! "I don't know" is okay
- Do not volunteer information not asked for
- No matter how temping, do not argue with the questioner
- Address the judge (or jury), not the attorney asking the question

Being a Witness

- Prepare, prepare, prepare
  - Review all evidence well in advance
  - Be organized and thorough
  - Know the theory of your case–what does your attorney want to prove?
  - Have “moot” (practice) sessions if possible
  - Preparation = confidence

Types of Witnesses

Fact witness

- First hand witness of facts
- No opinion or hearsay

Expert witness

- You give analysis and your subjective opinion
- Document your background: education, experience, expertise, knowledge
  - You may be cross examined on your qualifications
  - Expect your conclusions to be separated into component parts for questioning
  - May be asked if you've ever been wrong – if yes, be prepared how you want to answer that Q without yes or no.
  - If asked hypotheticals, pay careful attention to determine if all the facts have been included. Consider if additional facts might affect your opinion.
- Important to be simple and clear - avoid complicated answers
  - Decision makers don't enjoy the spectacle of one professional attacking another. Whenever possible, avoid a direct attack - but rather indirectly can Q along the lines of lack of personal knowledge, qualifications or subspecialties.
  - Can help attorney prepare to cross the other side

FANDANGO
MOVIECLIPS

DIRECT EXAMINATION

Attorneys don’t lead on direct examination, but rather ask that you tell what happened in your own words.

- The ideal is to sound natural, sincere rather than rehearsed – a little rough is ok adds badge of spontaneity.

CROSS EXAMINATION

During cross, the attorney does ask leading questions and tries to put words in your mouth by suggesting the desired answer in the question itself and getting you to agree.

Miscellaneous tips

- If you are asked on cross whether you have discussed your testimony with your attorney, it's ok to say so.
- Regardless of attorney's demeanor, stay tactful and respectful; it's their job to avoid letting you explain anything!

TESTIFYING AT TRIAL

- Be professional and keep cool
- Listen carefully to the question
  - Make sure you hear the question
  - Make sure you understand the question
  - Answer only the question asked
- Tell the truth no matter the question
- Take your time