

## Lesson 39. ADMINISTRATIVE ACTIONS

### INTRODUCTION

Before we turn to the courts to help us resolve an environmental health problem, we should be sure that we have tried everything within our power and authority. As we have seen in the previous lessons the administrative agency has been given considerable power and discretion in dealing with public health problems. In this lesson we will look at some of the more common instruments and procedures for ensuring that the requirements of the code are met.

### LESSON OBJECTIVES

At the completion of this lesson you should:

1. Know the administrative options generally available to resolve environmental health problems;
2. Be able to determine which of these options are available for a given program; and,
3. Be able to select the most appropriate course of action to resolve a given problem.

### KEY POINTS

#### A. Rule-Making

As Professor Gellhorn notes in *Administrative Law and Process in a Nutshell* that one of the most significant developments in administrative law during the 1970s has been the growing importance of agency rule-making as a means of formulating policy. While the federal Administrative Procedures Act (APA) of 1946 contained several provisions related to agency rule-making, the number and significance of the rules being promulgated by administrative agencies has forced the courts and the APA to adapt to a changed environment. (Gellhorn, pp. 237-2740)

"In most instances, the characteristic features of rules are their general application to all parties and fact situations which fall within their ambit, and their prospective effect. They are designed to establish future standards of conduct rather than to assess past acts or practices under an existing standard. Some common characteristics of rules are that (a) they apply to groups rather than to named individual respondents . . . (b) they result in sanctions against an individual party only after an adjudicative proceeding, and (c) they are based upon general, "legislative" facts rather than on specific, "adjudicative" facts. In other words, rules are the administrative equivalent of statutes." (Gellhorn, pp. 240-241)

One aspect of this proliferation of agency rules is the impact of due process on the rule-making process. Prior to the 1970s, the due process requirements on agency rule-making were relatively light. However, that situation is now changing. The APA's procedural requirements for rule-making vary depending upon of type of rules that an agency is promulgating. The APA recognizes a basic distinction between legislative (or substantive) rules and interpretive rules. Gellhorn discusses the difference in these and then focuses his attention on the rule-making procedures. There are different due process implications inherent in whether informal, formal or hybrid rule-making procedures are used.

### **B. Compliance Procedures**

Compliance procedures are those regulatory actions which an administrative agency may take against a person, business or other party to enforce compliance with applicable statutes, ordinances, rules and regulations, and standards. Within the statutory delegations of power, there are a variety of regulatory compliance options generally available to the administrative agency. As we have said repeatedly, the specific options available, and the amount of discretion permitted in their use, are dependent upon the intent and the wording of the actual delegation. Some of the more common compliance procedures available to the agency are listed below.

- a. Revocation of Permits/Licenses. (This topic was discussed in lesson 7)
- b. Seizure of goods/products. (This topic was discussed in lesson 9)
- c. Condemnation of property. (This topic was also discussed in lesson 9)
- d. Assessment of Penalties. The direct assessment of penalties by an administrative agency is occasionally authorized by statute. OSHA is one example of an environmental health program area where this has occurred. More often, criminal or civil penalties are assessed against party by the agency taking appropriate action through the courts.

### **C. Summary Abatement of Nuisances**

In previous lessons we have dealt with the subject of nuisances and nuisance law, including the special problems of conducting investigation of nuisances. We have seen that there may be problems in determining exactly what constitutes a public nuisance, and in conducting investigations of nuisances.

Once a condition has been determined to be a nuisance, it is further necessary to determine whether summary abatement of the situation is appropriate. First the health officer must determine whether or not he has the authority to summarily abate a nuisance. Professor Grad points out that discretion is vested in the legislature to determine what conditions constitute a nuisance. A finding by the legislature that certain conditions constitute a public nuisance is sufficient to protect the health officer and his/her department or municipality against liability if he/she abates such a condition -- provided, of course, that he/she observes the procedures prescribed by the statute. Grad further points out that the health officer is also protected against personal liability for the abatement act if he/she acts under orders from a board of health. Since here, as in other situations, orders of the board of health are to be considered just and legal unless the person who attacks them is able to show their unreasonableness.

Usually the health officer is not required to wait to abate a nuisance until it actually becomes a major hazard. He/she may take steps to abate a condition which can reasonably be expected to become dangerous if the situation is allowed to continue unabated. Nevertheless it must be remembered that by abating public nuisances, the health officer's powers are far from and absolutely are unchecked. He/she always acts at his/her peril and must be ready to prove that the condition abated was in fact a nuisance or a hazard and that summary abatement without prior hearing was justified in light of the existing danger to the public health. In view of the many problems and limitations of the health officer's authority to summarily abate a nuisance on private property a number of state statutes provide for alternative remedies in lieu of summary abatement. Some states provide that instead of proceeding by summary abatement the health officer must first give notice to the property owner and must request the owner to abate the nuisance. If the property owner fails to abate the nuisance, he/she may be found guilty of a misdemeanor.<sup>2</sup> Some statutes provide for the issuance of a court order which is then to be served on the owner ordering him/her to abate the nuisance on the property. Whether or not such statutory remedies exist, the health officers should try to employ other available remedies prior to attempting to summarily abate the nuisance.

Each of the cases in the assigned readings emphasize a different aspect of the legal problems and concerns in summarily abating a public nuisance.

#### D. Administrative Hearings

Administrative hearings are becoming more common in environmental and health agencies at both state and local levels. Properly used, hearings may be of great assistance to the administrative agency in achieving compliance, but an inadequate or improper hearing may deny a person due process rights and be counterproductive.

**1. Nature and Types of Hearings:** Professor Grad first discusses the nature and types of administrative hearings and the legal basis on which they rest. He covers both the quasi-judicial hearings related to enforcement of regulations and the quasi-legislative hearings related to the adoption of new rules, regulations or procedures.

The assigned section from the FDA Model Food Code (as well as the similar section of APHA-CDC Housing Code) are typical examples of provisions requiring the agency to hold hearings in certain circumstances.

**2. Procedures and Legal Issues:** The federal government, and most states, have adopted an administrative procedures act. Generally they prescribe procedures for the promulgation of all agency rules for conducting hearings.<sup>1</sup> Sometimes they also apply to hearings conducted by local government agencies. For the affected agencies, these acts usually apply in the absence of specific, overriding procedures. The importance of the administrative procedures acts cannot be overemphasized. Every sanitarian, industrial hygienist or environmental protection specialist should be knowledgeable of their state act and its applicability to their position.

#### STUDY QUESTIONS:

1. If a health agency is trying to revoke a license, what is the agency's burden of proof?

- a. Is this burden greater or lesser than the burden in civil proceedings?
  - b. Why is it so important for the agency to develop a full record of the proceedings and the decision?
  - c. How does the exhaustion of the "administrative remedies" principle assist an agency and its hearing?
2. What is the source of power for a sanitarian to abate a nuisance?
- a. What power does a local government have to declare and abate a nuisance?
  - b. Where would you look to determine if smoke or rats or flies are nuisances which can be abated?
  - c. Is everything which may be a health hazard a nuisance which a sanitarian can abate?
  - d. How does due process apply to abatement of a nuisance?
3. When is summary abatement appropriate?
- a. What steps should you follow to summarily abate a suspected nuisance?
  - b. If time is not of the essence, who should be contacted before you act?
  - c. What are the advantages of a court order of abatement?
  - d. What steps are necessary for you to obtain the order?
4. What are the purposes of holding hearing before an agency promulgates rules and regulations?
- a. Should these quasi-legislative hearings be formal or informal?
  - b. Does due process protection apply to the proceedings?
  - c. Does a formal record and decision have to be prepared?
5. Discuss the difference between quasi-judicial and quasi-legislative hearings. Which type of hearing would be held to determine whether a restaurant owner's food service license should be revoked?

6. When must a hearing be provided in your jurisdiction to revoke a restaurant, landfill or sewage discharge license?
- a. Who holds the hearing?
  - b. How much time does a person have to file for a hearing?
  - c. Does a person have a right to:
    - notice?
    - counsel?
    - cross examine witnesses?
    - appeal?
  - d. Do decisions have to be written and served by mail?