


Environmental Health Policy & Practice



Lesson 9.
Information

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Announcements

❖ **DEOHS Seminar:**

- **Title:** *Climate Change and Human Health in the Northwest*
- **Speaker:** Michael Yost, PhD
Professor, DEOHS
University of Washington
- **Date:** Thursday, 19 April 2012
12:30 - 1:20 p.m.
Room T-435, HSB

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Lesson Overview

- ❖ **What Information?**
- ❖ **Legal Issues with Obtaining Information**
- ❖ **Methods**
- ❖ **Case Records**
- ❖ **Retention and Management**
- ❖ **Disclosure of information contained in agency files**

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Lesson Objectives

- ❖ Know the types of information required to document a problem or condition
- ❖ Be able to explain the major techniques and processes routinely used by environmental health practitioners to obtain information
- ❖ Describe the proper usage of the *subpoena duces tecum* and the procedures for obtaining one

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Lesson Objectives (Continued)

- ❖ Understand the requirements for the control of information contained in official records;
- ❖ Understand the concepts of privileged and confidential information; and,
- ❖ Discuss the legal issues surrounding the application of freedom of information to agency records.

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What Information?

- ❖ **Required Records/Information**
 - Those items required by enabling legislation, i.e., statutes, codes and rules and regulation often specify that certain records must be maintained by a regulated industry and made available to the administrative agency.
 - They may also require that the administrative agency establish and maintain certain records.

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What Information?

❖ **Evidence**

- Information which may be used at some point as evidence in an administrative, criminal or civil proceeding should adhere to the Rules of Evidence.
- These, plus certain legal precedents, govern not only what kind of information is needed, but also how it may be obtained and kept.

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What Information?

❖ **Evidence**

- At a minimum, it is usually necessary to have the following information:
 - ✓ Location of the Property;
 - ✓ Owner of Record;
 - ✓ Legal Rationale for action; and
 - ✓ Facts of the Case/Incident.

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What Information?

❖ **Inappropriate Information**

- Certain types of information should not be contained in a case file.
- The "rules of evidence and relevance" may be helpful in judging whether a specific item should be included.
- As a rule of thumb: any information which would be clearly judged by the courts as inadmissible in a legal action probably does not belong in a case file

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Obtaining Information

- ❖ **Voluntary Disclosure**
 - Information may be obtained in a variety of ways and still be considered voluntary.
 - Grad states that the voluntary disclosure of information "creates no legal problems."
 - However disclosure by the agency may

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Obtaining Information (Continued)

- ❖ **Compulsory Disclosure**
 - It may not be possible or practical for an agency to commit the resources necessary to continuously monitor the operation of an industry or site.
 - The owner/operator of the regulated activity can be required to maintain records of key items, conditions or processes (e.g., records of chlorination, BOD levels, and food temperatures).

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Methods

- ❖ **Observations**
 - The principal means of identifying and documenting a problem is for the inspector to see it.
 - ✓ He/she must be able to recognize the problem (deviation from code or standard, unsafe practice, etc.).
 - ✓ He/she must be able to describe it in terms that will later be understood by each of the parties concerned (industry, supervisor, courts, etc.).
 - ✓ He/she must document its existence -- date, time, place, circumstances and persons present. (photographs can be invaluable)

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Methods (Continued)

❖ **Tests and Samples:**

- Time, temperature, light and noise levels are common physical factors which can be measured on site.
- So can a number of situations involving chemical concentrations, e.g., CO levels, chlorine concentration in water, and certain other gases in air.
- Most biological, and certain physical and chemical, problems require the collection and laboratory analysis of samples.

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Methods (Continued)

❖ **Tests and Samples:**

- **In Situ Tests.** For tests conducted at the site of an investigation, the legal requirements include:
 - ✓ The test used be accepted --
 - by common sense (e.g., a thermometer for temperature),
 - by testing and practice (e.g., Standard Methods for the Examination of Water and Wastewater), or
 - by theoretically consistent design;
 - ✓ The tests must be conducted under proper circumstances;
 - ✓ Any instrumentation must be properly calibrated;
 - ✓ The tests must be carried out in accordance with accepted practice; and,
 - ✓ The results must be recorded.

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Methods (Continued)

❖ **Tests and Samples:**

- ✓ The further a test is from an obvious common sense standard, the more likely it is to be challenged, and
- ✓ therefore, the greater is the degree of documentation of its appropriateness, reliability and accuracy that will be required.

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Methods (Continued)

❖ **Tests and Samples:**

- **Sample Collection and Analysis:**
 - ✓ All of the above requirements are equally true.
 - ✓ In addition there is **chain of custody** requirement
 - the results in the record are the results of the sample collected, and further
 - that the sample was indeed analyzed (within the proper limits of time, temperature, accuracy, procedures, etc.) and
 - that it was not contaminated, tampered with or otherwise made unsuitable for use as evidence.

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Methods (Continued)

❖ **Industry Records**

- **Requiring Industry to Maintain Records**
 - ✓ Constitutional Challenges
- **Program Requirements.**
 - ✓ Know what information is needed;
 - ✓ Be able to collect it, i.e., the industry must be able to supply the data;
 - ✓ Be able to monitor the reports to ascertain:
 - all the regulated industries are reporting
 - that the reports are complete
 - the data is reliable;
 - ✓ Be able to verify the data through periodic inspections or other methods.

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Methods (Continued)

❖ **Industry Records**

- **Failure to Report.** The simple act of failing to file a required report should be immediately obvious to the regulating agency and permits the agency to choose from several enforcement options, e.g., revocation of the license, obtain a search warrant, subpoena of records, etc.
- **Reliability of Required Records/Reports.** A more difficult problem for the agency is identifying inaccurate or unreliable information. This requires close scrutiny of all submitted reports and considerable experience with the regulated industry

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Methods (Continued)

❖ **Subpoena duces tecum**

- Most regulated industries, businesses or other activities maintain records of their operation.
- In some cases the administrative agency can/ should require that certain records be kept and made available to it.
- The *subpoena duces tecum* is a court order to produce the specified documentary material.

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Methods (Continued)

❖ **Subpoena duces tecum**

- **Nature/Authority.** The *subpoena* should not be considered as a routine investigatory tool.
 - ✓ In the first place it is usually not needed, and in the second,
 - ✓ not all administrative agencies have the legal authority to use it.

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Methods (Continued)

❖ **Subpoena duces tecum**

- **Requirements/Use.** The material must be relevant to the purpose of the agency, i.e., it can not be used as a "fishing expedition",
 - ✓ must be confined to certain specified data concerning an operation which the agency has specific authority to regulate.
 - ✓ However, you do not have to wait until you have filed a legal action before you can use the *subpoena duces tecum*.
 - ✓ An agency may use it to discover and produce information necessary to determine whether further legal action is warranted.

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Cases

- ❖ **Group A:**
U.S. v. Tivian Laboratories, Inc., 589 F. 2d. 49 (1978).
- ❖ **Group B:**
U.S. v. Ouelette, 11 ERC 1350 (1977)
- ❖ **Group C:**
General Motors Corp. v. Director of NIOSH, 636 F.2d. 163 (1980).

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U.S. v. Tivian Laboratories

- ❖ **Facts & Arguments**
 - Who's suing whom, for what?
- ❖ **Court History**
- ❖ **Legal Issues**
 - Why?
- ❖ **Decision**
- ❖ **Concurrence and/or Dissent**
- ❖ **Application**

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U.S. v. Ouelette

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GMC v. Director of NIOSH

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Next Lesson



Group Projects

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