

## **Lesson 11.**

# **INSPECTIONS & INVESTIGATION**

### **Introduction**

This lesson explores the legal basis for conducting inspections and investigations in the practice of environmental health. It will also explore some of the legal ramifications of specific actions. The materials and discussion are intended to show how environmental health practitioners conduct inspections in a legally authorized manner, consistent with their department's mandate, and using tactics and procedures which will ensure the collection and admissibility of evidence.

Earlier, we discussed the legal basis of government regulation, the powers of an agency and something of the nature and function of the regulatory agency, i.e., the enforcement of applicable statutes, ordinances, codes, rules and regulations. However, in order to regulate some behavior or activity, it is first necessary to ascertain what is the behavior of the particular individual or establish of concern. In other words, you need to know what is going on; you need to have data. It is essential that you have sufficient, accurate information on which you can base your assessment of the degree of compliance or noncompliance with the appropriate health standards. The principal means by which an agency gathers this kind of information is the inspection or investigation.

The inspection is the functional backbone of the regulatory agency. Environmental health specialists devote a significant, if not a major, portion of their time and efforts to conducting inspections and investigations. Yet, in spite of, or perhaps because of, the routine nature of many inspections, few practitioners bother to consider the inspection in the context of its legal definition, powers and limitations. The inspection is a legal tool which helps the practitioner carry out his/her primary obligation to protect the public health. Like any tool, the inspection has an intended function and is useful only when it is used in its intended manner and setting.

The function of the inspection is, quite simply, to obtain data — through observations, sampling and testing — which will permit the regulatory agent to evaluate a particular circumstance in terms of its degree of compliance with the applicable standards.

One of the most important points regarding the inspection concerns the inspectors right to enter on private property in order to make his/her investigation. In most instances, in order to make the necessary observation or measurements, to collect samples, it is first necessary to enter onto someone's private property. In this lesson we will examine the legal basis for, and the scope and limits of, the sanitarian's legal ability to enter upon private property for the purpose of conducting an inspection.

## Lesson Objectives

This lesson is intended to provide the student with the information and materials necessary to be able to intelligently discuss:

1. The concept of an "inspection" as a legal tool used in environmental health programs;
2. The general statutory and constitutional considerations involved with the inspector's right to conduct regulatory investigations;
3. The powers, and the statutory and constitutional limits to those powers, delegated by some of the major statutes and rules and regulations enforced by environmental health practitioners; and,
4. The legal issues surrounding the use of the inspection in the investigation of public nuisances.

## Key Points

The role and function of a regulatory agency is to enforce the provisions of applicable statutes, rules and regulations. In order for the agency to regulate some behavior, it is first necessary for it to know what is the behavior, i.e., it must have information on which to base its decision concerning the degree of compliance with health standards. The principal means by which an agency obtains this kind of information is the inspection.

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Environmental health specialists perform two types of inspections: those which are conducted in a planned program of scheduled inspections of a regulated industry; and those which are conducted in response to complaints alleging the existence of a health hazard. In either case, the inspection has certain legal requisites. These are: A Legal Basis. There must be some legal basis in statute or an administrative code, which gives an agency the right to regulate activities (including the right to inspect) in a particular instance, e.g., a food protection program.

**Standards.** There must exist, or be established, some criteria for assessing the risk to the health of the employees and/or the public of a particular situation or event.

**Observations, Tests and Samples.** These are the activities which you perform in order to determine the degree of compliance of a condition or event. What you observe, and record, forms the base on which you make the finding of compliance or non-compliance. It also constitutes 'evidence' should it later be necessary to take the case to legal action.

**Records and Reports.** These are the forms, letters and records which you, other employees, laboratory personnel, etc., write to document your findings. They can also be records which a regulated industry is required to keep and make available to appropriate regulatory authority.

From both an administrative and a legal point of view the inspection has three basic components or phases:

- Entry , i.e., the legal ability of the regulatory agent to enter private property;
- Gathering information; and
- Recording and maintaining information.

### **A. Legal Basis**

The authority of a government agency to conduct inspections has been the subject of continuing legal debate and litigation. And, as the readings in this unit demonstrate, the legal requirements for conducting an inspection have been fundamentally altered by this litigation. The basic legal authority of the administrative agency has already been discussed in previous lessons. The legal ability of the practitioner to conduct inspections and investigations rests on:

- a. Properly delegated police powers;
- b. Specific wording of the statutory authorization; and-
- c. Broad authority to abate public nuisances.

### **B. Entry**

One of the most important points regarding the inspection concerns the inspectors right to enter on private property in order to make his/her investigation. In most instances, in order to make the necessary observation or measurements, to collect samples, it is first necessary to enter onto someone's private property. In this lesson we will examine the legal basis for, and the scope and limits of, the sanitarian's legal ability to enter upon private property for the purpose of conducting an inspection.

**Inspection Authority:** The purpose of an inspection is to collect information--usually information regarding the degree of compliance with some standard of protection of the public's health. The government has inherent and constitutional authority to regulate private activities for the public good. At the same time, there is a strong constitutional prohibition against unreasonable searches.

There are four readings in this lesson which are examples of the delegation of inspection authority and responsibility to administrative agencies. The APHA-CDC Recommended Housing Maintenance and Occupancy Ordinance is typical of the regulations enforced at the state and local level. The Toxic Substances Control Act (PL 94-469), on the other hand is a federal statute which seeks to control the health hazard of toxic chemicals. The Occupational Safety and Health Act and the Federal Food, Drug and Cosmetics Act are two additional examples of federal statutes concerned with two well established, but different types, of environmental health programs.

In each case, the law establishes certain basic requirements or obligations for the enforcement agency. One of the most important of these requirements is that the agency oversee the activities or conduct of certain industries. Explicitly or implicitly, this oversight requirement necessitates that the administrative agency have the ability to conduct inspections. Each of these laws establish this authority. Notice the similarities and differences in the wording of the authority grant in these four laws.

**Inspection vs. Search:** A problem has developed in recent years concerning the use of the inspection authority. It has been challenged in a number of court cases as violating constitutionally guaranteed rights or freedoms. The basic problem concerned the issue of whether or not an administrative inspection is a search. In a series of U.S. Supreme Court decisions, the court has decided that it is, and therefore is covered by the constitutional safeguard against unlawful searches and seizure. (The first three cases listed in the suggested readings section are the primary cases involved in this sequence of decisions.) However, the court also recognized that legitimate government objectives would be hampered or rendered impossible if the same degree of "probable cause" were required for an administrative search warrant as for a criminal search warrant. This issue is discussed below and is dealt with at length in the readings for this lesson.

**Consent Inspections:** No such problem exists when the inspector has been voluntarily granted permission to conduct an inspection or investigation. There may be, however, some problems in determining whether or not consent was freely given, and over the issue of who may give consent.

The three cases listed below helped to delineate the basic parameters surrounding the issue of consent. In each, the court found that consent had been given and that the inspection findings were therefore valid. However, each is concerned with a slightly different aspect of consent. U.S. v. Thriftmart - The issue in this case is whether the informal consent given by the warehouse is sufficient for a "waiver of their constitutional rights" for an administrative inspection.

Milliken v. OSAHRC - Continued the examination of the type of consent necessary for a warrantless inspection, i.e., what burden does an inspector have to inform a person of the constitutional right to refuse an inspection, and what constitutes coercion.

Marshall v. Western Waterproofing - Raised several issues.

- 1) Who may give consent?
- 2) Can agency rules assist or hamper the inspector's ability to make an inspection?
- 3) What constitutes prejudice?

A pattern emerges from studying the readings in each of these cases. An inspector, as a general rule, must have either consent or a search warrant in order to conduct an inspection.

The requirement for consent for an inspection is not strict as for a police search, i.e., consent may be informal.

Consent may be given by any adult individual who has charge, care or control (partial or whole) of a place.

## C. Warrants

Inspections may also be conducted with a warrant. The U.S Constitution says "warrants shall issue, but upon probable cause, supported by oath or affirmation...". But what is "probable cause" in order to obtain an inspection warrant? The following cases should stimulate consideration of some of the important aspects of this question which will have a direct bearing on how the inspection function is performed.

In the case of *Marshall v. Barlow's*, an inspection was made, without a search warrant, and over the objection of the owner. In this case the court held that the inspection was not valid because it violated the Fourth Amendment protection against warrantless searches and prohibited the agency from enforcing any violations found as a result of the illegal inspection.

### 1. Requirements:

a. *Northwest Airlines* - Establishes the two grounds for an administrative search warrant: "(1) specific evidence of existing violations, or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment."

The decisions rendered in this case should provide useful guidance in two aspects of any routine inspection program. The first is -- what are the necessary elements which should be incorporated in the description of an inspection program? And, the second is how much and what kind of information is needed on the affidavit for a search warrant?

b. *California v. Salwasser* - further attempts to define the requirements necessary for an inspection warrant. Like many of the cases which have set precedents concerning the rights and requirements for an inspector to conduct his/her investigations, this case concerns an OSHA inspection.

c. *Marshall v. Horn Seed Co.* - is another OSHA case involving an application for a warrant. The judge in this case noted that there are two grounds for seeking a warrant; (1) as part of a regulatory compliance program in which establishments are routinely selected for inspection and regulation, and (2) as a result of a complaint. In regard to the later, the judge listed the general types of information the court would like presented on an affidavit. These are:

- 1) The affidavit should state whether or not the complaint was received personally or by some other specific official known to the affiant.
- 2) While the name of the complainant need not be given, the magistrate should be informed as to the source of the complaint (employee, competitor, customer, visitor, etc.)
- 3) The magistrate must be informed of the underlying facts and surrounding circumstances which the complainant has provided.
- 4) If the complaint is in writing, it should be attached to the affidavit, although the name of the complainant may be deleted.
- 5) The affiant should specify the steps he/she or other officials took to verify the information on the complaint.
- 6) The affiant should relate any personal observations he/ she has made of the premises and the establishments past

7) The affidavit should include the number of prior entries, or attempted entries, the scope of the search, the time of day when it is proposed to be made, and other relevant factors. The judge does not say all of it must be presented, but rather the agency must present what data it does have in each of these areas.

**2. Exceptions to the Warrant Requirement:** While, as a general rule, an inspector needs to secure a warrant in order to enter an establishment without the owner's or manager's consent, there are exceptions. The three most important exceptions are discussed below.

a. The 'Open Fields' or 'Plain View' Doctrines -- These related doctrines state that a situation which may be generally seen by the public, e.g., an open field viewed from a public road, is not covered by the protection of an individual's privacy under the Fourth Amendment. This means that if an event or situation can be observed from an area normally open to the public, an inspector need have neither consent nor a warrant in order for his/her observations to be legally valid. This obviously opens up a new set of questions about what criteria defines what is normally open to the public.

In *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp*, the Supreme Court dealt with this question and presents the legal reasoning of the court in allowing warrantless inspections in these situations.

b. Pervasively Regulated Industries -- Two exceptions to the warrant requirement have already been covered -- the liquor industry and the firearms industry. In *Donovan v. Dewey* the U.S. Supreme Court provides some additional guidance as to what constitutes an industry which has been 'historically' and 'pervasively' regulated.

c. Emergencies -- In *U.S. v. Syncon*, the Supreme Court again deals with the Fourth Amendment privacy protection -- this time permitting a warrantless inspection and collection of samples based on the existence of an emergency condition. The greatest difficulty with emergency inspections is determining what is an emergency. Though the power to make inspections without a warrant and without consent if an emergency exists, is well defined in the law, the specifications of what actually constitutes an emergency are somewhat vague. Clearly any situation or event which threatens human life or property is an emergency. Thus, there is very little question about conditions involving a fire, flood, or similar occurrences. However, what about a toxic spill which may result in the contamination of groundwater used for drinking? Here the existence of an emergency may depend on when the spill is discovered and/or the toxic properties of the chemical.

d. The Effect of Licensing -- It is important to recognize the implications which the "conditions of licensure" may have on the necessity to obtain a special warrant. This subject will be explored in the next lesson.

## **D. Inspection Procedures**

**Complaints:** In a sense complaint inspections are the easiest from a legal perspective. The inspector receives a complaint and verifies that it falls within his/her legal authority to investigate. If the inspector does not have legal authority (statutorily delegated or involving a situation falling within the general powers delegated to the agency, e.g., local health

departments) then the complaint should be forwarded to the appropriate agency for investigation. If the inspector does have jurisdiction over the subject of the complaint, then he/she, conducts the inspection or investigation according to established policies and procedures. (See 3 below.)

**Compliance Programming:** This concept involves the development of a plan which details the inspection activities involved, i.e, it spells out how the premises are to be selected and the frequency of the inspections.

One defense used against the administrative agency is the argument that a particular establishment has been singled out unfairly for inspection (in violation of the equal protection and due process requirements). The existence of a plan which details the purpose, requirements and inspection selection criteria and process are necessary to protect the agency against this defense as well as being good administrative practice.

**General Procedures:** The OSHA Field Operations Manual represents a policy and procedure manual for field investigators in an enforcement program based on specific statutory authority (OSHAct). A portion of the manual [ Reading #22 ] has been included in the assignment for this lesson. The Field Operations Manual has been well tested in the courts. One reason for this is the nature of the penalty provisions of the Occupational Safety and Health Act. The Act requires that an industry be in compliance with the standards established under its provisions, thus the inspector is looking for non-compliance. Any situation which is not in compliance is a violation and subject to the imposition of a penalty in the same manner as a traffic ticket issued by a uniformed police officer.

Most other environmental health programs, by contrast, look for compliance. If a situation is not in compliance, the responsible party is ordered to bring the situation into compliance within a specified time. The penalty provision takes effect only if there is failure to comply with a lawful order. Reading #23 from the FDA Food Service Sanitation Manual is a typical example.

### Study Questions:

1. Compare and contrast the "administrative inspection", as it is authorized by the OSHAct in the OSHA Field Operations Manual, with the inspection as it is authorized by the FDA in the Food Service Sanitation Manual.
2. The U.S. Supreme Court did not become concerned with the administrative inspection until 1959.
  - a. Why do you think it took so long for someone to challenge the right of an agency to conduct an inspection without a warrant? How did the public, until that time, view such intrusions into their privacy?
  - b. In 1959, in *Frank v. Maryland*, the Court upheld inspections as being reasonable under the fourth amendment to the Constitution. This has now changed. What is the current stance of the court with regard to the right of a government agency to conduct inspections?
3. An inspection conducted with consent is valid.

- a. What is consent? If a person says "yes" to a request to inspect, does that always make it free? How could an official take away a person's freedom to consent?
  - b. Another important question is whose consent is valid. For instance, if you were inspecting a restaurant:
    - 1) Would the owner's consent be valid?
    - 2) What if the restaurant is owned by a corporation?
    - 3) What if the owner lived in Montreal, Canada?
    - 4) Would the restaurant manager's consent be sufficient?
    - 5) What if the manager does not speak English?
    - 6) If the owner and manager are not at the restaurant, would you accept the permission to inspect from the chief cook?
    - 7) How about from the head waiter?
  - c. On the other hand, if you were to inspect an apartment complex:
    - 1) Do you need the owner's consent?
    - 2) Who can consent to the inspection of an apartment?
    - 3) Who can consent to the inspection of the apartment's boiler room?
    - 4) What if the apartment renter had complained about rats in the boiler room, can the renter consent to inspect there?
    - 5) If there is more than one person occupying an apartment, do you need all the occupant's permission to inspect?
    - 6) Can one occupant consent for all the others?
4. The question of when, and on what grounds, a warrant should be sought is not always clear-cut. Why?
- a. If you wanted to inspect a restaurant would a warrant likely be granted:
    - 1) If the place had not been inspected for 2 years?
    - 2) If there had been an anonymous complaint about the cleanliness of the restaurant?
    - 3) If you had inspected it 2 weeks ago and found it grossly unsanitary and wanted to

- re-inspect the place?
- 4) If the restaurant was in a blighted area?
  - 5) If you just felt that this was a good day to inspect that restaurant?
- b. Do you have to seek consent from the person at the premises to be inspected before a judge will issue you a warrant, or can you get a warrant for a surprise inspection?
- 1) What would be some of the factors, or grounds, on which a judge would base his/her decision?
  - 2) In view of the material in this lesson, how would you handle the following situations?
    - What should you do if it is a private home which you need to inspect?
    - If it is a business establishment?
    - If there is an imminent public health hazard?
    - Should you ever "force" your way into the place to be inspected? Why or why not?
    - Should you ever take the police along with you?
5. Once you have a warrant, can the person at the premises refuse you access?
- a. If you do not inspect the place because the person there refused to allow you to enter, should you report back to the judge? What can the judge do about getting you into the premises? Is the judge helpless once the person has refused? If you do conduct the inspection, do you still need to report back to the judge? When can you use the warrant? How long is the warrant valid?
  - b. Could another sanitarian execute the warrant you obtained or could you use another sanitarian's warrant? Do you have to take the warrant with you when you go to inspect? How big of an area can you inspect under a warrant? An entire factory? Only the sewage treatment plant? Only the toilet rooms?
6. Neither consent nor a warrant is necessary to view something which a member of the general public could see. This is the essence of the plain view inspection.
- a. Which of the following are areas would normally constitute a "plain view" exception to the warrant requirement?
    - The dining area of a restaurant?
    - The restrooms of a restaurant?
    - The parking lot of a restaurant?
    - The kitchen of a restaurant?

- The employee lockers?
- b. Once you are where you may lawfully be, then you can view all things reasonably within sight. You can peer across counters, over fences, and through windows. Why?
- 1) Can you use binoculars?
  - 2) Can you climb a ladder?
  - 3) Does a plain view inspection give you any right to enter the property? What if a neighbor invited you onto his property, could you stand there and inspect the adjacent property?
  - 4) Could you climb a tree?
  - 5) Is a plain view inspection as valid as a regular inspection by consent or a warrant?
7. Regarding emergency inspections, does a complaint constitute an emergency?
- a. Does a complaint about rats present an emergency?
  - b. How about a complaint about a food-poisoning?
  - c. Does it make a difference if the suspected food-poisoning is botulism or *Clostridium perfringens*?
  - d. Is a toxic chemical spill an emergency?
  - e. What if no one is threatened by the spill?
  - f. Would suspected burial of hazardous wastes in a landfill be an emergency?
8. The Federal exemptions to the warrant requirement for alcohol, firearms, and mine safety inspectors is a legislative action. The sanitarian needs to know that such an exemption is possible and if he has it.
- a. Why were these exemptions permitted?
  - b. Shouldn't the Fourth Amendment apply equally to alcohol, firearms, and mine safety inspections? Why or why not?
  - c. Could a state also create such an exemption?
9. Assuming a state statute established a comprehensive and predictable inspection scheme for a program, which of the following environmental programs deal with operations which are so pervasively regulated that they may qualify for the exemption? Explain why you answered the way you did for each program area.

- a. The food service operations at restaurants?
- b. Sanitary landfills?
- c. Mobile home parks?
- d. Day care centers for children?
- e. Sewage disposal plants?
- f. Stationary air pollution sources?
- g. Swimming pools?
- h. Nursing homes?