

Legal Requirements for UIC Inspectors

EPA Region 8

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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



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!"

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
 - ◆ **activities** to be conducted
 - ◆ response action
 - ◆ taking samples
 - ◆ using detection equipment
 - ◆ mere presence

COMMON LAW EXCEPTIONS TO THE 4TH AMENDMENT

Open Fields/
Plain Sight



Pervasively
Regulated

OPEN FIELDS

A landscape photograph of a rolling green field with a line of trees in the background under a grey sky. The field is a mix of green and yellowish grass, suggesting it might be a pasture or a field of wildflowers. The trees in the background are mostly green, with some showing signs of autumn. The sky is overcast and grey.

“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, but also
- ❖ the person’s expectation is objectively reasonable.

Open fields are not ... intimate!

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.

Specifies 2 ways to meet probable cause:

- ◆ Neutral inspection scheme, or
- ◆ Specific evidence of an existing violation

PROBABLE CAUSE:

Neutral Enforcement

Must articulate a rationale for inspecting a particular facility.

- ◆ Focus on a particular industry based on an “initiative; or it is sufficient to show that
- ◆ We are inspecting all facilities in an industry on a regular cycle.

PROBABLE CAUSE: 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.
- We would only use information about a prior violation when combined with other evidence.
- Also, we should keep in mind that the scope of our search may be limited by the evidence of violation that we can present.



ADMINISTRATIVE WARRANTS



“Oh EPA, I’m so happy to see you today, but can you come again another day.”

Consent?

A facility has denied access if:

- ANY safety issues;
 - an outright statement;
 - actions tantamount to a refusal to allow an inspection; or
 - the facility creates 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





True
or
False

?

WHEN TO OBTAIN ADMINISTRATIVE SEARCH WARRANTS

Upon denial of entry
get the name of who
denied you access,
• and leave.



Inspector should document any
observations that can be made without
entry.

Affidavit and Warrant Application

- Detailed 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:
 - eg., 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.

2 Goals of Inspections

1. The main purpose of EPA conducting inspections is to determine a facility's compliance with environmental regulations and enforcement agreements, as well as to 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.

Mother may I ...?

N

Provide, in the field

- applicability determinations?
- site-specific interpretive technical or legal assistance?

O



It is inappropriate to:

- ❖ provide advice to the facility on how to deal with EPA/the state 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
 - For all evidence (including from o/o or 3rd parties) document how obtained
- 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 SOPs
 - eg, 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



2 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





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!

https://youtu.be/_T24IHnB7N8

In Sum, 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 Q, what you were prepared to say or what may go wrong
- Take your time

