

## **Lesson 6.**

### **SOURCES & SCOPE OF LEGAL AUTHORITY**

#### **Introduction:**

In the lesson we have briefly discussed the practice of environmental health and the evolution of our legal system and laws. With this background, as a referent, we will now turn to a more specific and detailed examination of the sources, scope and limits of governmental powers as they apply to the practice of environmental health. Since this is a relatively extensive topic, we have divided it into two parts. In this lesson we will focus our attention on the classifications of law which provide the legal bases for the exercise of governmental powers and on how these laws are translated into governmental authority. In lesson 4 we define the scope and boundaries of, or limits to, that authority. These, however, are arbitrary divisions made for the sake of convenience. In practice, and as will be evident from the material presented in this lesson, it is difficult to discuss one without the other.

#### **Lesson Objectives:**

The objectives for this lesson are for you to be able to:

1. Discuss the source of the powers of a regulatory agency in terms of its constitutional and statutory mandates;
2. Discuss the basis of environmental health actions involving a public nuisance;
3. Determine the specific source authority for a given regulatory program.
4. Determine the specific source of authority for a given regulatory program; and,
5. Describe the scope and limits of the specific regulatory authority granted for a given environmental program.

#### **Key Points:**

##### **I. Sources:**

Professor Grad, in discussing the legal basis of regulation in the field of public health, asserts that environmental health regulation rests on the inherent police powers of the state to make and enforce rules and regulations (administrative law), and on the doctrines of nuisance and trespass (common law).

## A. Administrative Law

Administrative law consists of: statutes (enacted by federal and state legislative bodies); ordinances (enacted by units of local government; and, rules and regulations (promulgated by administrative agencies and boards). These laws are a response to the increasingly complex nature of government and society. Early statutory language attempted to include in the written statute considerable detail regarding the problem to be regulated. The complex and changing nature of scientific, technical and economic developments often results in the passing of enabling legislation which addresses the subject in general terms.

### 1. General Powers:

a. The ability of a government agency to set and enforce environmental health rules and regulations rests on the inherent police powers of the state. Each state in the United States has these plenary and inherent powers by the very nature of their formation and existence.

b. The exercise of these powers is manifested in the passage of laws by the state legislature. These laws may provide for the regulation of individual behavior in order to preserve or protect the public health and welfare.

c. The state legislature also has the ability to delegate power to state and local agencies. The powers delegated may be:

1) Ministerial Authority - Delegation of administrative and enforcement authority to a new or existing agency to carry out the terms of the statute.

2) Discretionary Authority - The ability of authorized officials to use professional judgment in making decisions and in carrying out the terms of the legislative mandate.

3) Rule Making Authority - Gives power and responsibility to formulate rules, regulations and standards necessary to carry out the statute. All such administrative rules and regulations, when properly formulated and not inconsistent with existing laws of the state or nation, have all the force and effect of law (legislation, statutes).

### 2. Types of Administrative Laws:

a. Statutes. The legislature delegates to the administrative agency power to either enforce a particular administrative code or the ability to develop and enforce rules and regulations covering an appropriate area.

Police powers are delegated by legislative bodies (the U.S. Congress and state legislatures) to administrative agencies or units of local government. Usually, there are two types of statutes involved: a general one authorizing the formation of the agency, and one or more specific statutes which authorize or require the agency to prevent or control a particular problem. A third type of legislation (statute) is the appropriations act which provides the funding to carry out the programs authorized in the other statutes.

The general, or enabling, statute sets up, or authorizes a local government to set up, the administrative agency necessary to carry out the intent of the act. The statute may contain a mandate that the agency protect the public health and welfare and grant to it discretionary powers. These powers include the ability to promulgate (make and enforce) rules and regulations, set standards, establish a system of permits and licenses and fees, and/or perform other activities as necessary, consistent with the mandate. [Appendix B.6, RCW 70.05 is an example.]

In addition, most enabling legislation for health departments, and often other agencies as well, will contain a provision that the department take whatever action is necessary to protect the public health and welfare. This language does not specifically require the agency to do anything. In practice, however, a significant part of a health department's enforcement effort may be devoted to the investigation of health hazards associated with rats, pigeons, noise, odors, sewage, etc. In some cases, the agency may have established specific rules and regulations which adequately cover these problems. In other cases, enforcement must fall back on the common law doctrine of public nuisance and the agency's statutory authorization to act in this area may rest on this general authorization clause. We will examine nuisance law below.

Example: RCW 70.05, Local Health Departments, provides local health departments with the authority to "enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide enforcement thereof" (Rule Making Authority).

The second, or specific, type of statute is designed to control a particular problem or class of problems of concern to the legislators, e.g., air pollution, water pollution, hazardous wastes, childhood lead paint poisoning, and rats. Whatever the subject, the typical statute will include the following items.

- 1) A statement of the legislature's findings concerning the problem;
- 2) A statement of the legislature's intent in passing the act;
- 3) A delineation of the conditions, situations or activities covered by the act;
- 4) Delegation of authority to enforce the provisions contained in the act;
- 5) Either specific standards or criteria which are to be enforced (e.g., banning as a food additive "any substance found to cause cancer in laboratory animals"), or authorization (or a requirement) for the designated agency to establish such rules and regulations, and standards, as necessary to carry out the intent and provisions of the act, or both;
- 6) Procedural provisions requiring certain activities or compliance with certain other statutes (e.g., all actions must be in compliance with the state's administrative procedures act, freedom of information act, environmental policy act, etc.);
- 7) A penalty clause which provides for the prosecution of violators of the act;

8) A provision for funding the activities required by the statute. (Note, however, that specific appropriation legislation must be passed in order to actually fund these activities.)

In addition, there may be other clauses addressing special concerns of the legislative body, such as a requirement for the establishment of a citizen's advisory board.

Examples:

1) PL 94-469. Toxic Substances Control Act is a typical federal statute of this type.

2) RCW 18.20. Boarding Homes is a Washington state statute which authorizes local health departments to enforce the state's rules and regulations (WAC 248-16) governing boarding homes (ministerial authority).

b. Ordinances. These are laws passed by units of local government -- cities, counties, etc. They may resemble statutes, or in many instances they be more closely akin to the rules and regulations promulgated by an administrative organization.

In some cases a model ordinance or code may be adopted by reference, i.e., the city or county passes an ordinance in which the current version of a nationally recognized model code is adopted by the jurisdiction and enforced by the agency. In other cases, the model is adopted by copying the provisions of the model code word for word. And, in other cases, the model code is adapted to local needs by copying some provisions and modifying others as desired locally in drafting the wording of the ordinance.

Examples:

1) APHA-CDC Recommended Housing Maintenance and Occupancy Ordinance is an example of a code developed by a professional association and adopted by many health departments.

2) Food Service Sanitation Manual contains a model food protection code developed by the FDA and adopted by many departments.

c. Rules and Regulations. Rules and Regulations may be promulgated by local boards of health or by the agency itself depending on where the rule making authority has been vested for a particular program. The content of a specific rule and regulation may be drafted by the agency, in conjunction with its legal counsel, or it may be taken from existing codes -- those used in other state or local agencies, or from model codes promulgated by professional associations, or state or federal agencies. The King County Rules and Regulation No. 2 governing food [Appendix B.10] and No. 8. Solid Waste [Appendix B.11] are typical of the rules and regulations passed by local boards of health.

## **B. Common Law**

1. Nuisances: One of the common law areas with which the environmental health practitioner deals is nuisance law, especially in a complaint based program. Nuisance law is derived from English Common Law and has been defined as "the class of wrongs that arise from

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unreasonable, unwarrantable or harmful use by a person of his own property either real or personal, or from his own unlawful conduct working an obstruction of or injury to the right of another or of the public and producing material annoyance, inconvenience, discomfort, or hurt".<sup>1</sup>

a. Authority. Grad discusses the legal issues which surround the problem of public health nuisances. Note that while the health officer generally has broad discretionary powers to deal with nuisances, the preferred course of action is through expressed statutory authority. This is primarily due to the difficulty which exists in defining exactly what constitutes a public nuisance and under what conditions.

b. Types of Nuisances. There are two types of nuisances -- private and public. And, although everyone in the legal profession acknowledges that the distinction between public and private nuisances is vague and shifting, it is important for the practitioner to make the distinction because only public nuisances are within the jurisdiction of the health department.

1) Public Nuisances.

a) Definitions - several statutory definitions of public nuisances are included in the reading assignment for this lesson.

b) Enforcement - Once a determination is made that a condition is a public nuisance, the next question is what to do about it. The answer is simple -- except in the most extraordinary of circumstances -- follow the code or ordinance exactly and completely.

2) Private Nuisances.

2. Trespass: A trespass is an unlawful interference with one's person, property or rights. Under common law, trespass was a form of action brought to secure damages for any injury to one's person, property or relationship with another. Nuisance is generally distinguished from trespass. A nuisance consists of a use of one's property so as to cause injury, while a trespass involves a violation of the property rights of another.<sup>2</sup>

The most effective use of the doctrine of trespass in environmental health related programs was during the early days of the modern environmental movement. Many of the air and water pollution cases tried in the early 1960's were based on trespass, as well as on nuisance. "In an action for trespass . . . , entry upon another's land need not be in person. It may be made by causing or permitting a thing to cross the boundary of the premises. (See *Martin v. Reynold's Metal Co.* [221 Ore 86, 342 P 2d. 790 (1959), 362 U.S. 918 (1960)].)

In recent years, some courts have used private nuisance and trespass almost identically with the result that the distinction is somewhat clouded.<sup>3</sup>

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1 Black's Law Dictionary

2 Arbuckle, J. Gordon, et al., *Environmental Health Law Manual* [6th ed.], Government Institutes, Inc., Washington DC, 1979, pp. 46-53.

3 Ibid

## II. Scope:

Authority, without the means of exercising or enforcing it, is meaningless. In our system, the mechanism for putting that authority into operation lies within the government. We will first look at the basic structure of government in our society and then focus our attention on the distribution of power, or authority, within that structure

### A. Institutionalization of Legal Authority

The manner in which legal authority is structured and used in this country is a reflection of both English jurisprudence and the distrust in which early leaders of the country held government -- any government. While recognizing the need for a minimum of government in order to ensure order and commerce in society, they were fearful of the accumulation of unchecked power with any group of individuals. Hence, through the Constitution legitimate police power was divided both horizontally and vertically. (See figures 4-1 and 4.2.)

Figure 4.1 Matrix of Government



(Source: Adapted from William J. Gore, University of Washington Department of Political Science)

## 1. Federal Government:

a. Division of Powers - Under the concept of federalism governmental powers are split into levels. The logic of the federal system and the division of powers inherent in it, is that there is a safeguard against the concentration of power in any level of government as well as provision of flexible response to a variety of public needs and wants.

1) National Government -- Carries on certain activities that are inherently national in scope. The first of these was national defense; it was followed by establishment of a mint to provide a common "coin of the realm"; this was quickly followed by the establishment of a postal system that allowed any citizen to send a letter to any other citizen, at a reasonable cost.

2) State Governments -- carry on activities that are geared more to a region or section of the country. It is expected that there shall be some quite different emphases in programs between sections, and that this is necessary in a nation as large and extensive as ours has become, i.e., industry in the northeast and agriculture in the Midwest.

3) Local Governments -- The Constitution provides that the powers of the sovereign people are to be divided between two levels of jurisdiction, however, through legislation and tradition this has come to mean that there are three organic levels, for local governments have been added.

b. Separation of Powers - Federalism also provides for power to be split among three branches of government. The power designated to a jurisdictional level is subdivided so that the capacity to initiate legislation is set off from the capacity to implement it, and both of these are set off from the capacity to review and assess the legitimacy of the use of the power to govern according to the dictates of the Constitution

1) Legislative - Exercises the power to formulate laws and articulate policy; this is the arena where there is opportunity to contemplate a range of alternatives and then to consider the relative advantages of each in relation to others. The legislative branch consists the U.S. Congress, the state legislatures, or city and county councils, etc. -- depending upon of the level of government.

2) Executive - Exercises the power to carry out the law, once it has been set down as formal policy of the government by the legislative branch. Allocates resources and establishes, and carries out, plans of action. The executive branch consists of the President, governors, mayors, etc. and their administrative agencies (e.g., the U.S. Environmental Protection Agency, the Centers for Disease Control and the Dept. of Labor at the federal level)

3) Judicial - The so called "reactive branch" in that it has no power to initiate, only the power to assess the legitimacy of actions proposed (by legislative) or of actions taken (executive) in relation to the powers assigned within the Constitution. The judicial branch, at the federal level, includes the U.S. Supreme Court, the 11 Circuit Courts, the many federal District Courts, and a number of specialized courts.

c. Checks and Balances - The principle of checks and balances is sometimes thought of as applicable to either of these principles, but usually it applies to the later.

2. State Government: Most state government mirror the organization of the federal (national) government, and have incorporated the principle of the separation of powers. Legislative power is also divided between two houses (i.e., bicameral legislatures) in most states. (Nebraska is an exception in that it only has one house in its legislative branch.)

3. Local Government: Local governments come in a wide variety of sizes and forms, including:

- Municipalities (cities, towns, boroughs, villages, etc.);
- Counties (which are administrative units created by the state); and,
- Special purpose districts (fire protection, school, health, etc.).

Local governments have become the most expensive and most extensive level of government operation. As agriculture and rural centers have been abandoned for urban places, the number and level of services has increased exponentially. It is at this level that the services which undergird our way of life are provided.

Figure 4.2 The Matrix of Government within its Situational Framework



(Source: Adapted from William J. Gore, University of Washington Department of Political Science)



With regard to the police powers of units of local governments it is important to understand that they:

- 1) Are wholly a creation of the state; and,
- 2) Are delegated power and authority by the state;

## **B. Delegation of Governmental Powers**

### 1. Nature of governmental powers:

- a. Power resides in the people (state). It is delegated through the state legislatures which are representatives of people.
- b. Legitimate power is the police power of government which is necessary to safeguard the safety, health, welfare, morals, etc. of the people.

### 2. Sources of Governmental Powers:

- a. National Government - The powers of the federal government have been delegated by the people of the individual states to the federal government.
- b. State Government
  - 1) State governmental powers are inherent (i.e., they come about by the very nature and existence of the state) in the states since, at the time of the founding of this country, they were 13 sovereign and independent states (nations) which agreed through their ratification of the Constitution to give up certain, limited powers to form a federal government.
  - 2) State government powers are also plenary, i.e., they are complete, absolute and unqualified.

### 3. Delegation of Powers:

- a. To executive and administrative agencies (ministerial or rule making).
- b. To units of local government.
- c. To the national government in the U.S. Constitution, principal authority lies in:
  - 1) Ability to tax and spend for public welfare;
  - 2) Regulate interstate commerce.

## **III. Limits to Delegated Powers**

The exercise of police powers by state and local agencies is not unbridled. All enforcement activities, including inspections, must be conducted within the constraints of the U.S. and state

Constitutions. For example, in lesson 6 we will devote considerable attention to the attempts which have been made to clearly draw the line between the proper exercise of governmental powers and unwarranted invasion of privacy and unlawful search and seizure with regard to the administrative inspection.

In addition, to the restraints imposed on state and local agencies, federal regulatory activities, at least in theory, are restricted to those which are specifically authorized by the U.S. Constitution. Traditionally these are activities which can be covered by the Interstate Commerce Clause.

### **A Constitutional Boundaries:**

1. Federal powers are delegated to national government by the states. This implies that they are limited powers, and powers which, at least theoretically, the states could take back. However, the Civil War established once and for all that the national unity is based on the will of the people, and not of the states.

a. Article VI of the Constitution is the so-called Supremacy Clause which prohibits states from passing laws which contradict or impede constitutional provisions or federal laws based on the Constitution.

b. Bill of Rights (the first ten amendments to the Constitution) guarantee certain personal and states rights. The most important of these are:

- 1) Due Process, and
- 2) Equal Protection.

2. State powers. The delineation of the scope of and limits to state powers are contained in the state constitution, and are absolute within these limits so long as they do not infringe on areas delegated to the federal government or protected by the U.S. Constitution.

### **B. Statutory Limits:**

Statutes enacted by the legislatures define the amount, nature and limits of the powers delegated to an agency with regard to the concern specified in the act.

1. Ministerial powers are a limited delegation of authority which restricts the agency employees to merely enforcing or carrying out the statutory provisions.

2. Discretionary powers are a broader delegation of authority and provide agency employees with the ability to use professional judgment as long as decisions are not arbitrary or capricious.

3. Rule making powers permit, sometimes require, the agency to establish and enforce rules, regulations and standards.

### **C. Common Law Boundaries:**

1. Nuisances - The major difficulty for the administrative agency in dealing with nuisances is in making the determination as to whether a particular nuisance condition constitutes a public or

private nuisance. If the problem is of a private nature then, the administrative agency does not have jurisdiction.

2. Harassment - While the investigation and control of nuisances can consume a great deal of energy and time on the part of a public health agency, situations rarely occur in which the work of an administrative agency is impaired because someone brings a suit against the agency alleging that the agency's actions constitute a nuisance. It is much more likely that a party aggrieved in this manner will bring suit based on harassment rather than on nuisance. Harassment is the continual and unwarranted exercise of police power against a particular party.

3. Trespass - An employee of an administrative agency may not enter onto the private property of a business or private citizen (with certain exceptions) without permission any more than can any other person. Observations or evidence collected while an agency employee was trespassing on private property is likely to be challenged and rendered unusable to the agency. We will spend considerable time addressing the issue of lawful entry onto private property for the purpose of conducting an inspection or investigation in lesson 6.

4. Tort liability - A tort is a harm or wrong done to some individual. Government officials, are not immune from lawsuits if they commit an actionable wrong while they are performing their duties. Therefore, agency employees need to exercise reasonable care that their actions do not result in someone suffering some harm.

#### **D. Judicial Limits:**

1. Judicial Review - Chief Justice John Marshall in an early Supreme Court decision established the Court's right to review legislative and executive practice.

2. Due Process - requires that whatever actions are taken by a government agency be consistent with existing laws and the usual practice.

3. Equal Protection - prohibits an agency from treating one individual in a manner different from the way it treats all other individuals within a particular class. For example, a health department may not impose restrictions or fees on a particular restaurant which it does not impose on all similar restaurants.

#### **Lesson Assignment:**

1. Read:

- a. Reading #4 -- Fletcher, Robert L., "Sources of Public and Environmental Health Law in Washington.
- b. Statutes & Regulations<sup>4</sup>:
  - \* Resource Conservation and Recovery Act (42 USCA §§ 6901 - 6902)
  - \* U.S. Food, Drug and Cosmetic Act (21 USCA §§ 301 - 331)
  - \* Washington State Board of Health (43 RCW §§ 20.025 - 20.050)

- \* Local Health Departments (70 RCW §§ 05.010 - 05.030)
- \* Solid Waste Management (70 RCW §§ 95.010 - 95.020)
- \* Solid Waste Handling (173-304 WAC § 010)
- \* Food Service Sanitation (246-215 WAC § 001)
- \* King Co. Food Code, Parts I & II.
- \* King Co. Solid Waste Regulations, Part I
- \* Nuisances (7 RCW § 48)
- \* Nuisances (Idaho Code [1979], §§ 18-5901, 18-5903, 52-201 & 52-206.)

- c. Reading #5 -- *Huntington v State Water Commission*, 73 S.E.2d 833 (1953).
- d. Reading #6 -- *Philadelphia v New Jersey*, 437 U.S. 617 (1978).
- e. Reading #7 -- *Rollins v Iberville Parish*, 317 So.2d 11 27 (1979).
- f. Reading #8 -- *Dept. of Environmental Quality v Chemical Waste, Storage and Disposal, Inc.*, 19 Ore 712 (1974).
- g. Reading #9 -- *Carey v Town of Westmoreland*, 415 A.2d 333 (1980).
- h. Reading #10 -- *Yaffe v City of Ft. Smith*, 178 Ark 406 (1928).

## 2. Suggested Readings:

- a. Pickett GE, Hanlon J. "Law and Public Health", Chapter 9 in *Public Health Administration and Practice* [9th Ed.], The C. V. Mosby Company, St. Louis, 1990, pp. 157-182.
- b. Hanlon J, Pickett GE, "Government and Public Health", Chapter 9 in *Public Health Administration and Practice* [7th Ed.], The C. V. Mosby Company, St. Louis, 1983, pp. 142-170.
- c. Summers, Robert S. and Charles G. Howard, *Law: Its Nature, Function, and Limits* [3rd. Ed.], Prentice-Hall, Englewood Cliffs, 1972, pp. 23-67.
- c. McCarthy, David J., Chapter III.B. Regulation of Land Use, *Local Government Law in a Nutshell* [2d. Ed.], West Publishing Co., 1983, pp 155-199.
- d. Currie, David P., Chapter 1. Congress, the Courts and the Constitution, *Federal Jurisdiction in a Nutshell* [2d. Ed.], West Publishing Co., 1981, pp. 4-44.
- e. *U.S. v. New York*, 436 U.S. 617 (1978).

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<sup>4</sup> Read the sections indicated of the following statutes, ordinances and rules and regulations to get a sense of the contents of each paying particular attention to the wording of the preamble, if present, and the authority sections of each.

NOTE: The Revised Code of Washington (RCWs) and the Washington Administrative Code (WACs) are available on-line. However, both sites use a search engine process to retrieve the requested section(s) of the codes. Therefore it is not possible to provide a URL that directly links to the chapter and sections of interest to the students in this course. Instead, click on the appropriate buttons below and they will take you to the table of contents for the respective codes. From there you can easily go to the specific chapter and section you need.

### Study Questions:

1. For each of the cases you were asked to read for this lesson, think of the issues raised in terms of the basic issue of governmental powers. Specifically, see if you can answer the following questions.
  - 1) What is(are) the major argument(s) in this case?
  - 2) What type(s) or class(es) of law are involved?
  - 3) On what basis did the judge make his/her decision?
  - 4) How does this case relate to the activities performed in your agency?
  
2. Select an agency, preferably one for which you are familiar, and find the statute or other legislative authorization which initially established the agency and/or provided it police powers, and:
  - a. Provide its correct citation; and
  
  - b. List the specific regulatory duties, responsibilities and activities which are authorized and/or mandated.
  
3. Assume that you are a sanitarian in an area that has a large pig farm. Fifty years ago when this farm was started there were no homes nearby. However, during the past several years a neighboring city has annexed land within a quarter mile of the farm and people have built home that close. These people are now complaining about the odors and flies even though the owner of the farm is careful about his operation.
  - a. Is this farm operation a public nuisance, a private nuisance or neither? Why?
  
  - b. Does a person who performs a certain activity for a long period of time have a right to continue doing it? If so, how many years does it take to acquire this "right"? Is this "right" an effective defense against a charge of being a public and/or private nuisance?
  
  - c. How would you, as the sanitarian with jurisdiction for this area, handle this problem?