Information Gathering

Lesson No. 5

ENV H 471
Environmental Health Regulation
Winter Quarter 2004

Lesson Overview

- What Information?
- Legal Issues with Obtaining Information
- Methods

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
Lesson Objectives (Continued)

- Describe the proper usage of the *subpoena ducem tecum* and the procedures for obtaining one

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.

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.
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.

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.

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
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).

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)

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.
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.

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.

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.
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
        - the reports are complete
        - the data is reliable;
      - Be able to verify the data through periodic inspections or other methods.

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.

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.
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.

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.

Questions


Assignment for Lesson 6

- Grad: Chapter 7 -- Searches and Inspections
- Statutes: Various sections pertaining to information gathering
- Case Briefs Due: February 3, 2004
  - Reading #14 - Frank v. Maryland (Group A)
  - Reading #15 - Camara v. San Francisco and See v. Seattle (Group B)
  - Reading #16 - United States v. Thriftmart, Inc. (Group C)

Assignment for Lesson 6

- Case Briefs Due: February 5, 2005
  - Reading #18 -- Northwest Airlines, Inc., [Group B]
  - Reading #19 -- California v. Salwasser, [Group C]
  - Reading #20 -- Seattle v. McCready, [Group A]

Cases

- U.S. v. Ouelette, 11 ERC 1350 (1977)
- General Motors Corp. v. Director of NIOSH, 636 F.2d. 163 (1980).
Inspections & Investigations