

Permitting, Public Participation and Pretreatment Program Liability

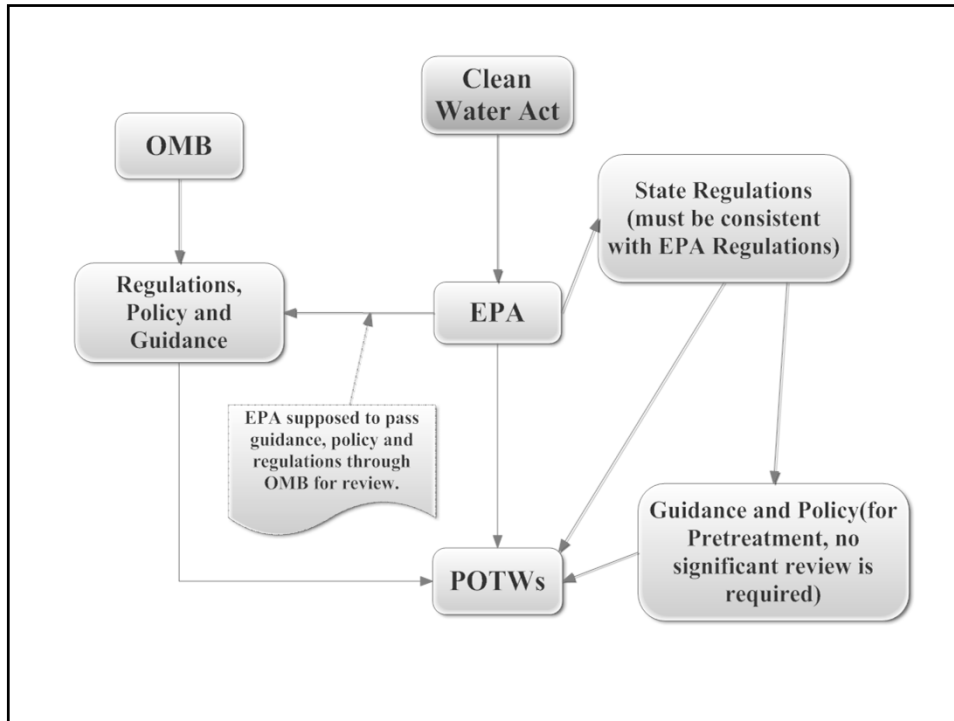
**Pacific Northwest Pretreatment Workshop
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Disclaimer

This talk includes discussion of legal concepts applicable to pretreatment programs. The area of Constitutional Law is complex. Terms used in this training reflect more common usage and not as may be used by attorneys in a Court or other legal setting. CWACS suggests that the POTW consult with their attorney to evaluate how the following presentation may apply to the municipal pretreatment program.



Public Participation
<u>Concept</u>
<p>A POTW cannot take someone’s property (through issuance of a penalty) for violation of a Pretreatment Standard or Requirement unless the Standard or Requirement was public noticed for at least a 30 day public comment.</p>
<p>If a POTW intends to enforce something that it has required through guidance or policy, the POTW should ensure that the enforceable requirements went through a public participation process (e.g. FOG programs, etc.).</p>

<u>Public Participation for Pretreatment</u>
Where Does it Occur?
1. The publication and readings through your City Council or Board (1 st and 2 nd reading and approval). This is a public process and allows at least 30 day for public comment.
2. Substantial modifications: The EPA/state provides a 30 day public notice.
3. Non-Substantial Modifications: While the EPA/state does not have to public notice these, the POTW is <u>strongly cautioned</u> to allow 30 days public comment for any new, enforceable standard or requirement (where a State/EPA approved as a Non-Substantial Modification).
If the POTW and SIU ends up in court, the POTW will likely be required to show that the underlying provision being enforced allowed for public comment.

Public Participation – Substantial Modifications
40 CFR 403.11(b)(1)(B)
<p>Publish a notice in a newspaper of general circulation within the jurisdiction served by the POTW that provides meaningful public notice and provide at least a 30 day period for interested persons to submit comments. The EPA/state shall retain all comments and considered submitted comments in the decision on whether or not to approve a modification.</p> <p>The EPA/state shall also provide for an opportunity to request a public hearing. A hearing shall be held if the POTW requests a hearing or if there is a significant public interest or there is doubt about interest and a hearing is requested.</p>

What Process has to be Used for Making These Limits Enforceable?

As discussed previously, limits must be public noticed in a paper of meaningful public notice for at least 30 days. The entire permit is not typically public noticed since other provisions already have gone through public notice (legal authority requirements, other local limits, Categorical Standards, etc.).

Alternatively: The limits can be taken to the City Council/Board process is usually 1st reading (2 weeks), 2nd reading (2 weeks) and then approval. This is usually at least a 30 day process.

Alternatively: The Approval Authority (state or EPA) may want to review and public notice. Often, for permit specific limits, they will allow the POTW to provide that notice since a MAIL is not being adopted (which would require a substantial modification).

Note: Public comment is to everyone, not just the affect industrial user.

Concept

We learn by error as much as we learn by success. Challenges to what we do provides much more value in our understanding of pretreatment program implementation and enforcement than unchallenged actions.

The Pretreatment Program offers the unique opportunity that allows the POTW to recognize an error in its process, stop and correct and then continue on. Don't let the opportunity to correct a problem pass you by.

Liability is Often Rooted in Constitutional Law

If a POTW finds itself in a legal challenge, it is often due to errors in due process or illegal search (inspection).

Other challenges are based upon legal or scientific errors or errors in the rulemaking process.

Where Are POTWs (and other regulators) Open to Liability?

The 5th and 14th Amendments to the Constitution each contain a Due Process Clause. Due process deals with the administration of justice and thus the Due Process Clause acts as a safeguard from arbitrary denial of life, liberty or property by the Government outside of sanction of law. Civil Due Process considerations are common when adopting POTW legal authority or issuing penalties.

4th Amendment of US Constitution protects against unreasonable searches:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizure shall not be violated and no warrant shall issue but upon probable cause..

Everyone has to Comply with Due Process!

**Iowa League of Cities vs. EPA
US Court of Appeals Case # 11-3412**

The Court found that EPA violated its Administrative Procedures Act (APA) when it bypassed public notice and comment procedures and announced new rules banning bacteria mixing zones in all waters designated for primary contact recreation. The EPA rule is vacated.

This case clearly indicates that public participation is a basic requirement when setting regulations.

POTW Legal Authority

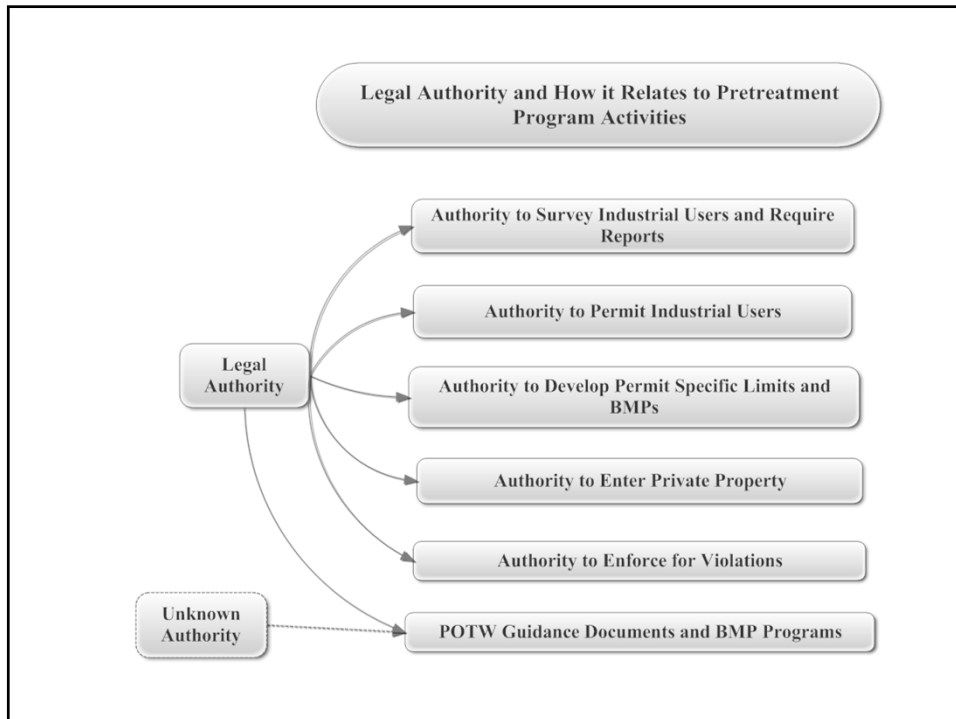
City = Ordinance
District = Rules and Regulations

Both are the same regarding enforceability and both require that administrative procedures are followed when adopting.

Diligence

In your program, you should do everything that a reasonable person would do in the same position.

This term is used a lot, but the bottom line is that it is your best defense when confronted with controversy. It is really nice when a judge makes that finding that you showed diligence in performing your job duties.



Type of Document	Enforceable?
Clean Water Act	Yes
EPA or state regulations	Yes
Policy	Yes: If public noticed for comment No: If no public participation
Strategy	No
Guidance	No
Approved Pretreatment Program	Yes: Public Noticed
POTW Legal Authority	Yes: Public Noticed
Local Limits	Yes: Public Noticed (EPA, state or municipal city council/board process)
Permit Specific Local Limits	Yes, if public noticed for comment
Industrial User Permits	Yes: Authority established in legal authority
Inspection Required Actions	Yes: If required actions are based upon enforceable requirements.
Inspection Recommended Actions (POTW, EPA, state)	No
Sector Control Programs (FOG, Mercury, Silver)	Yes, if public noticed for comment No, if there was no opportunity to comment

Public Participation
<p>Clean Water Act, Section 101(e): Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State under this Act shall be provided for, encouraged and assisted by the Administrator and the states.</p>
<p>The Administrator, in cooperation with the States, shall develop and publish regulations specifying the minimum guidelines for public participation in such processes.</p>
<p>40 CFR §403.5(c)(3): Specific effluent limits shall not be <u>developed and enforced</u> without individual notice to persons or groups who have requested such notice and an opportunity to respond.</p>

Public Participation

Changes that make it more stringent require you to provide specific notice and opportunity to comment by interested parties. This is because to “take” someone’s property (money) through enforcing regulations (penalties), you have to provide for an opportunity to comment on new Pretreatment Standards and Requirements.

When modifying your legal authority, follow the general concept:

If you are going to enforce something with the possibility of penalties for violations, make sure you have included a public participation process into the development of these requirements (i.e. City Council/Board readings and approval, EPA/state public notice, POTW newspaper public notice). Think about your FOG program if not included in your ordinance or rules and regulations.

Due Process

Public participation, the opportunity to comment and specific notice must follow established administrative procedures adopted by your municipality, the State and EPA. EPA, States and POTWs have an Administrative Procedures Act.

Failure to provide due process can result in Constitutional challenges to your program and compromise enforcement actions. This can result in significant personal liability.

Due Process

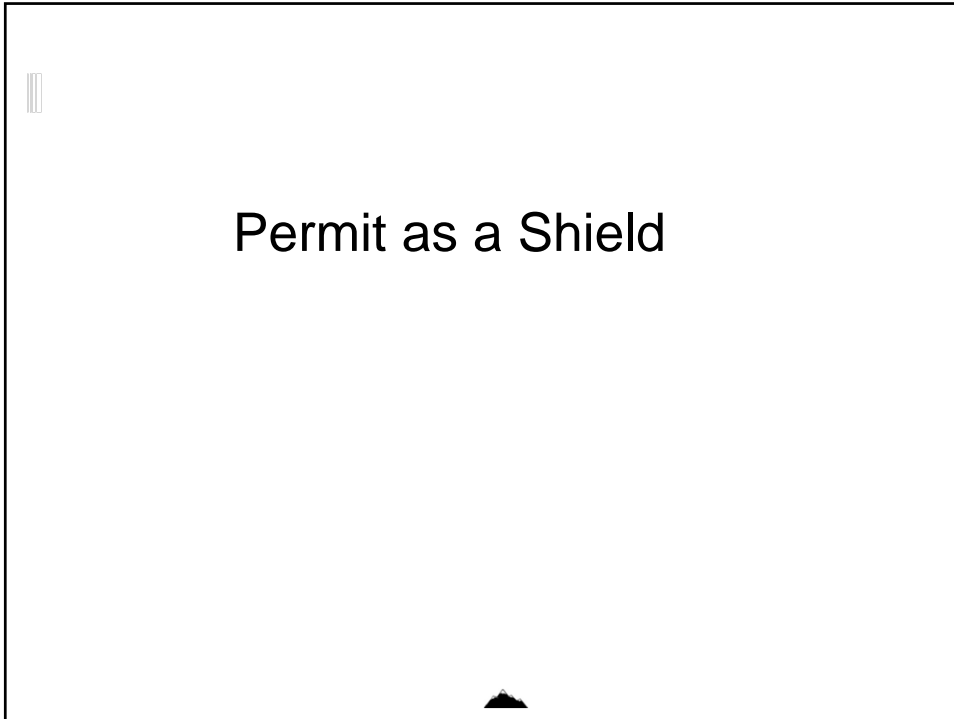
When a POTW issues administrative penalties, it is important to allow the alleged violator to have the right to appeal the penalty or violations through an administrative process so that the defendant can be heard. Civil actions already provide the opportunity for the Court to hear and rule on a case

Games that are Played


POTWs will sometimes want to use Emergency Authority when adopting changes to a legal authority to streamline adoption by not allowing public participation.

Do not rely on Emergency Authority to bypass public participation requirements unless you can demonstrate an emergency. If your attorney says its OK to bypass public participation, get a second opinion so the “patient does not die”.

The only place in your Pretreatment legal authority that refers to “emergency” is the part that is for imminent and substantial endangerment, so if changes to Ordinance/Rules is beyond addressing this, then it was likely not an emergency and intended to hide changes from public comment.



Permit as a Shield
<p>This is from court cases and a July 1, 1994 EPA Policy Statement. This concept is pretty complex and there are several current court cases that could modify EPA's Policy.</p> <p>This policy statement is available to you for download through September 30, 2013 at</p> <p>www.POTW.com/Downloads/TrainingRelatedDocuments/1994-EPA-Permit-as-a-Shield.pdf</p>



Permit as a Shield

Why is this important?

It protects your industrial users from POTW, State and EPA enforcement even if they caused a violation as long as the industrial user is in full compliance with the POTW issued permit.

There is a requirement that the POTW fully implements its permitting program and the permitted industrial user fully discloses information about its operations and discharge in a complete permit application.

Permit as a Shield

The permit, once issued, provides protection or a shield against enforcement if the Permittee is in full compliance with the permit. Compliance with the permit generally constitutes compliance with the Clean Water Act.

The CWA at 402(k) states: Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health.

This legal concept applicable to NPDES permits is referenced in the General Pretreatment Regulations at 40 CFR §403.5(a)(2)(ii).

Permit as a Shield - 40 CFR §403.5(a)(2)(ii)

For local limits, there is an affirmative defense where technically-based local limits are developed and the Industrial User was in compliance with the local limit directly prior to and during the Pass Through or Interference.

An Industrial User also has an affirmative defense where the POTW has not developed a technically-based local limit for the pollutant that caused the Pass Through or Interference and the IUs discharge directly prior to and during the Pass Through or Interference did not change substantially in nature or constituents from the IUs prior discharge activity when the POTW was regularly in compliance with the POTW's NPDES permit requirements and, in the case of Interference, applicable requirements for sewage sludge use or disposal. This is conditioned on the presumption that the Industrial User provided all permit application information.

Permit as a Shield

How does the Industrial User get a Shield?

1. The POTW Permit application needs to be complete and require the industrial user report on all discharges and operations.
2. Industrial users must fully and accurately complete the permit application and submit such other information requested during the application process.
3. The POTW must use the permit application information and other information contained in the permit file to issue an appropriate permit.
4. The industrial user must comply with all requirements to making timely notifications (e.g. change in discharge, 24 hour notification of a violation, hazardous waste discharge, etc.).

Pollutants Shielded

What pollutants are shielded?

1. Pollutants are specifically limited in the permit or identified in the permit fact sheet, or explicitly identified as controlled through indicator parameters. *If a pollutant is listed as present, at least include a monitoring/reporting requirement!*

2. Pollutants for which the POTW has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application processes. *Must have good permit applications!*

3. Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process. *This means you better understand the process!*

Pollutants Shielded

FROM PREVIOUS SLIDE:

3. Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process.

This criterion for a shielded pollutant is the best reason that a pretreatment program have a great permit application. This highlights the instance where a permit application does not have a specific pollutant listed for presence or absence, but the IU discloses its operations or processes. The POTW is expected to “know” the pollutants associated with a manufacturing operation or process if the POTW does not specifically ask.

Permit as a Shield

Where an industrial user makes changes to its permitted facility (if the changes are within the scope of operations identified in the permit application), the permit shield is also available for these pollutants provided all required notifications were made (e.g. change in discharge, etc.).

When an industrial user makes such notifications the POTW is cautioned to make appropriate changes to the IUs permit or take another action as appropriate.

Permit as a Shield

Impacts of Mistakes by a POTW

If the POTW creates an affirmative defense because of a poorly constructed IU permit, then EPA and the State may be interested in enforcing against the POTW for failure to implement its program.

If a pollutant or process was disclosed by the IU and the POTW fails to apply monitoring and/or limits or document why the pollutant is not a pollutant to be limited, the enforceability for IU violations for may be compromised.

POTW Procedures	
1.	Have a good, comprehensive permit application.
2.	Require IUs to provide a <u>complete</u> and accurate permit application (with signatory certification).
3.	Review the permit application in depth and follow-up on all information needed to understand the application.
4.	Translate the permit application into appropriate permit limits, monitoring, requirements, notifications, etc.
5.	Specifically prohibit the discharge of any pollutants associated with process, operations or wastestreams that existed at the time of permit application and were not clearly or completely disclosed (or do follow-up requests).

Pollutant	CAS No.	Known Absent at Facility	Known Present at Facility	Unknown Whether Present at Facility	Known Absent in Discharge	Known Present in Discharge	Unknown Whether Present in Discharge
Acenaphthene	83-82-9						
Acenaphthylene	208-96-8						
Acetaldehyde	75-07-0						
Acrolein	107-02-8						

Where unknown, require monitoring.

Recent Court Ruling: Permit as a shield for Pollutants not Specifically Identified

The US District Court for the Western District of VA (*So. Appalachian Mountain Stewards v A&G Coal Corp*) a permit shield does not protect a permittee from liability for discharging a pollutant that was not disclosed in the permit application. This is as previously discussed.

The Court found that this principle applies even where a permittee neither knew or had any reason to believe that it would discharge the undisclosed pollutant when it was completing the permit application (did not test for the pollutant).

In this case the pollutant was Selenium, a relatively common metal. The mining operation did not test for Selenium because it was not mining Selenium, though Selenium is in the ground it mines.

Court Ruling Expected: Permit as a Shield and General Permits for Pollutants not Specifically Identified

An appeal before the US Sixth Circuit, *Sierra Club v. ICG Hazard*, addresses whether an entity in compliance with a general permit under the Clean Water Act's NPDES program has a Permit Shield for discharges of any pollutants that are not explicitly covered by a general permit where the pollutants were fully disclosed during the application process.

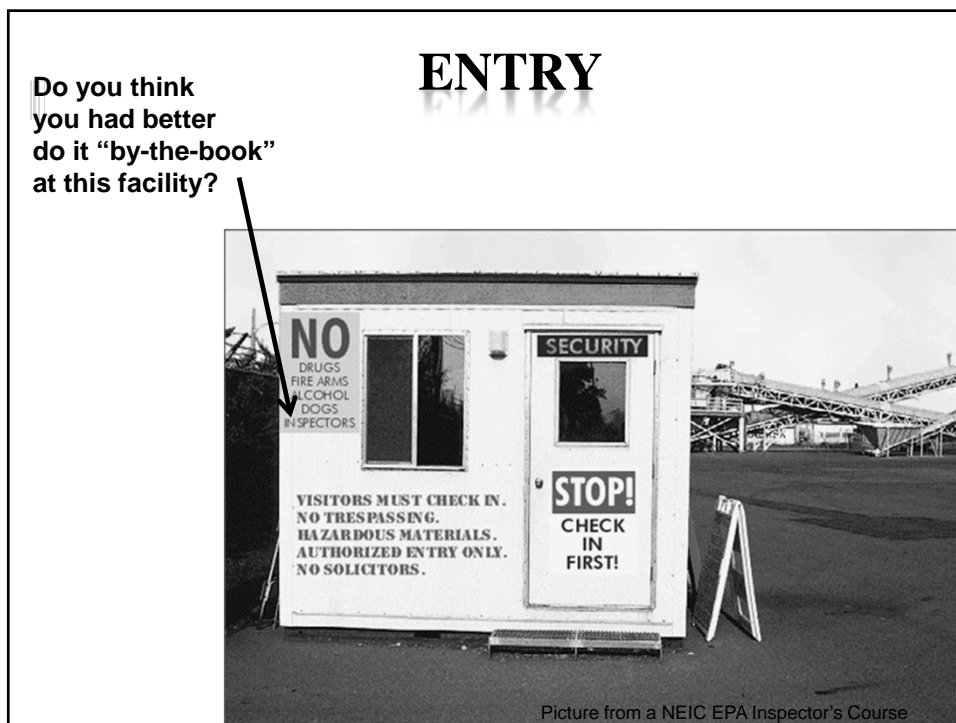
In the previous District Court ruling, the Court found that the permittee bears the burden in the individual permit application to “disclose all chemicals, wastestreams, and processes,” whereas, in a general permit “the permitting agency bears the burden for understanding the pollutants that might be discharged and writing the permit with appropriate limitations” and found that a Permit Shield exists.

Watch my newsletter for the ruling on this one!

Inspector Liability

Entry

Open Fields Doctrine



Don't Ever Sign These. No Exceptions.



VISITOR LOG

RELEASE AND CONFIDENTIALITY AGREEMENT

Release. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, including, but not limited to, being granted access to the Company's premises, the undersigned, for themselves and on behalf of their employees and agents, hereby voluntarily release, discharge, waive and relinquish any and all claims, demands, actions and causes of action whatsoever which the undersigned or their employees or agents now has or in the future may have, against ConAgra Foods, Inc., or its subsidiaries and affiliates (collectively, the "Company"), or any of its officers, agents, directors or employees, whether known or unknown, suspected or unsuspected, and whether the same be now anticipated or unanticipated, resulting from personal injury, death or property damage sustained by the undersigned or their employees or agents while on the Company's premises. The undersigned further agrees for themselves, and on behalf of their employees and agents that they shall not commence or maintain a suit against the Company, its officers, agents, directors or employees relating to any such claim. This Release shall be binding upon the undersigned, their employees and agents together with each of their successors, assigns, executors, administrators, personal representatives and heirs.

Confidentiality. The undersigned, for themselves and on behalf of their employees and agents, agrees to keep any and all information disclosed to them while on the Company's premises (either in writing, orally or otherwise) confidential, and shall not disclose such information to any third party for any purpose whatsoever.

Validity of Other Agreements. This Release and Confidentiality Agreement shall not be construed or otherwise interpreted as superceding any other agreement which is binding on the undersigned, or their employees or agents.

Acknowledgment. The undersigned acknowledges that they have carefully read this Release and Confidentiality Agreement, they understand they have given up substantial rights by signing it, and they have signed it voluntarily. The undersigned also acknowledges that they have read and will comply with all Safety Rules and Good Manufacturing Practices posted during their visit.

Date	Visitor Name	Visitor Company/Agency	Person To See	Time In	Time Out

Don't Ever Sign These. No Exceptions.



Returned
BADGE # 55220

Scottsdale Visitor Request Form

Name (Last, First, Middle Initial) HURD, BILL
 Company CITY OF SCOTTSDALE
 Company Street Address 8447 E. HUACAPAI DR
 City, State, Zip SCOTTSDALE, AZ 85255-0196
 Country USA
 Phone (include any applicable country codes) 480-312-8795
 Fax 480-312-8738

Are you a US Citizen? YES (please circle) NO
 Are you a Permanent Resident Alien? YES (please circle) NO
 If you answered "NO" to both of the above:
 Country of Citizenship _____
 Dates of expected Visit 8-19-10
 Purpose of Visit _____
 Microsemi Scottsdale employee sponsor RAY HEADINGS
 Sponsors phone # 480-941-6377

The City did not sign and was prepared to take an enforcement action for refusal of access. Important to carry a copy of your right of entry and confidentiality legal authority with you. This refusal was resolved.

By signing this form I am verifying that this individual has permission to visit Microsemi Scottsdale in compliance with our policies and procedures.

Sponsoring Employee Signature/Date: [Signature] 8-19-10

By signing this form I certify that the above data is true and accurate. I understand I am held to Microsemi's confidential business practices.

VISITOR Signature/date: _____

Visit Approved YES (please circle) NO By _____

Open Fields Doctrine

Public area generally is where:

- ✓ Access has not been denied
- ✓ Reasonable belief that entry is permitted

It is not private areas such as:

- ✓ Immediate vicinity of dwelling where there is an expectation of privacy
- ✓ Where there is an open demonstrated interest in privacy

Case: Ethylene Glycol recycler.

USA v Riverdale Mills and Riverdale Mills v Justin Pimpare, et. al. This occurred in the late 90's.

Industry Arguments: EPA inspector "over wrote" pH data, therefore data should be suppressed. EPA inspectors alleged to have violated industrial users 4th Amendment Rights on protection from illegal searches.

Outcome: pH data was suppressed. EPA inspectors are sued for \$17 million dollars. Industry wins. Jay is potentially bankrupt for life. First Circuit Court of Appeals decides EPA inspectors had qualified immunity and did not violate Constitutional Rights of Riverdale Mills and set aside the \$17 million judgment.

First Circuit Court Ruling

The EPA sampling was not a “search” for Fourth Amendment purposes because the IU had no reasonable expectation of privacy for its wastewater that was irrevocably flowing 300 feet to a public sewer.

Placing otherwise unprotected wastewater underneath a manhole cover does not create a reasonable expectation of privacy where one did not exist before.

USA v Luxury Wheels O.E. Plating, Inc. Franks Hearing to Suppress Data (October 2005).

Industry Arguments:

POTW put a sampler in a manhole at night without showing credentials on the Industrial User’s property without a warrant or notifying the IU because that would eviscerate their 4th Amendment rights.

The City’s Easement does not grant the City access to the manhole for sampling. The search by the POTW was to give EPA data for its criminal case and constitutes an improper use of City Administrative Procedures for a Federal Criminal Investigation.

Franks Hearing to Suppress Data (October 2005), continued.

Court Rules:

Industry does not have a reasonable expectation of privacy in their wastewater flowing irretrievably into a public sewer through a manhole.

Industry does not have the legal right to refuse consent to an inspection of the permitted sampling location or manhole.

Franks Hearing to Suppress Data (October 2005), continued.

The searches are by City regulators accessing their own equipment, lawfully installed, outside of any security perimeter or physical structure, to ascertain compliance.

The permit requires showing of credentials prior to entry on the property. The specific requirement in the Code seems to focus on showing of credentials where necessary for IU security personnel and procedures.

City Code states that the city may enter an easement for the purposes of “inspection, observation, measurement, sampling, repair and maintenance of any portion of the wastewater system lying within such easement. City was using easement lawfully.

Franks Hearing to Suppress Data (October 2005),
continued.

The City and EPA had a longstanding regulatory relationship. Grand Junction issued permits and required the installation of sampling box. Grand Junction and EPA had overlapping responsibilities. Grand Junction was not acting as EPA's agent in the criminal investigation.

Central Valley v Johnson Matthey, USA v Johnson Matthey
(2007-2008)

Industry Arguments: Selenium sludge standard was remanded in 1994. POTW continued to use old Selenium sludge standard in local limits. Even though the industry violated permit limits for Selenium, and hid those violations, the permit limits were not valid. Permit limits from 1995 to 2006 based upon remanded Selenium standards were not valid and therefore, all allegations of violations not valid.

Central Valley v Johnson Matthey, USA v Johnson Matthey (2007-2008), continued.

Outcome: Court rules that permit limits from 1995-2006 that were based upon remanded Selenium sludge standard were invalid and therefore never existed. The violations cited related to Selenium therefore never existed. It was “wrong” for Central Valley to use a Standard that was not a valid or applicable standard.

Impacted the number of violations alleged in the EPA Criminal case. EPA did get guilty pleas.

The End

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