

NPDES Compliance Inspection Manual

Appendix G



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Appendix G – EPA's Memorandum On Entry Procedures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

OFFICE OF ENFORCEMENT

TO: Regional Administrators
Surveillance and Analysis Division Directors
Enforcement Division Directors

FROM: Assistant Administrator for Enforcement

SUBJECT: Conduct of Inspections After the Barlow's Decision

I. Summary

This document is intended to provide guidance to the Regions in the conduct of inspections in light of the recent Supreme Court decision in *Marshall v. Barlow's, Inc.*, U.S., 98 S. Ct. 1816 (1978). The decision bears upon the need to obtain warrants or other process for inspections pursuant to EPA-administered Acts.

In Barlow's, the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant.

In summary, Barlow's should only have a limited effect on EPA enforcement inspections:

- Inspections will generally continue as usual;
- Where an inspector is refused entry, EPA will seek a warrant through the U.S. Attorney;
- Sanctions will not be imposed upon owners of establishments who insist on a warrant before allowing inspections of the non-public portions of an establishment.

The scope of the Barlow's decision is broad. It affects all current inspection programs of EPA, including inspections conducted by State personnel and by contractors. The Agency's procedures for inspections, particularly where entry is denied, were largely in accord with the provisions of Barlow's before the Supreme Court issued its ruling. Nevertheless, a number of changes in Agency procedure are warranted. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this document.

This document focuses on the preparation for and conduct of inspections, including (1) how to proceed when entry is denied, (2) under what circumstances a warrant is necessary, and (3) what showing is necessary to obtain a warrant.

II. Conduct of Inspections

The following material examines the procedural aspects of conducting inspections under EPA-administered Acts. Inspections are considered in three stages: (1) preparation for inspection of premises, (2) entry onto premises, and (3) procedures to be followed where entry is refused.

A. Preparation

Adequate preparation should include consideration of the following factors concerning the general nature of warrants and the role of personnel conducting inspections.

(1) Seeking a Warrant Before Inspection

The Barlow's decision recognized that, on occasion, the Agency may wish to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. Such a warrant may be necessary when surprise is particularly crucial to the inspection, or when a company's prior bad conduct and prior refusals make it likely that warrantless entry will be refused. Pre-inspection warrants may also be obtained where the distance to a U.S. Attorney or a magistrate is considerable so that excessive travel time would not be wasted if entry were denied. At present, the seeking of such a warrant prior to an initial inspection should be an exceptional circumstance, and should be cleared through Headquarters. If refusals to allow entry without a warrant increase, such warrants may be sought more frequently. (For specific instructions on how to obtain a warrant, see Part D.)

(2) Administrative Inspections v. Criminal Investigations

It is particularly important for both inspectors and attorneys to be aware of the extent to which evidence sought in a civil inspection can be used in a criminal matter, and to know when it is necessary to secure a criminal rather than a civil search warrant. There are three basic rules to remember in this regard: (1) If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, and administrative inspection (civil) warrant may be used; (2) if the inspection is in fact intended, in whole or in part, to gather evidence for a possible criminal prosecution, a criminal search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; and (3) evidence obtained during a valid civil inspection is generally admissible in criminal proceedings. These principles arise from the recent Supreme Court cases of Marshall v. Barlow's, Inc., supra; Michigan v. Tyler, U.S. 98 S.Ct. 1942 (1978); and U.S. v. LaSalle National Bank, U.S., 57 L. Ed: 2d 221 (1978). It is not completely clear whether a combined investigation for civil and criminal violations may be properly conducted under civil or "administrative" warrant, but we believe a civil warrant can properly be used unless the intention is clearly to conduct a criminal investigation.

(3) The Use of Contractors to Conduct Inspections

Several programs utilize private contractors to aid in the conduct of inspections. Since, for the purpose of inspections, these contractors are agents of the Federal government, the restrictions of the Barlow's decision also apply to them. If contractors are to be conducting inspections without the presence of actual EPA inspectors, these contractors should be given training in how to conduct themselves when entry is refused. With respect to obtaining or

executing a warrant, an EPA inspector should always participate in the process, even if he was not at the inspection where entry was refused.

(4) Inspections Conducted by State Personnel

The Barlow's holding applies to inspections conducted by State personnel and to joint Federal/State inspections. Because some EPA programs are largely implemented through the States, it is essential that the Regions assure that State-conducted inspections are conducted in compliance with the Barlow's decision, and encourage the State inspectors to consult with their legal advisors when there is a refusal to allow entry for inspection purposes. State personnel should be encouraged to contact the EPA Regional Enforcement Office when any questions concerning compliance with Barlow's arise.

With regard to specific procedures for States to follow, the important points to remember are: (1) The State should not seek forcible entry without a warrant or penalize an owner for insisting upon a warrant, and (2) the State legal system should provide a mechanism for issuance of civil administrative inspection warrants. If a State is enforcing an EPA program through a State statute, the warrant process should be conducted through the State judicial system. Where a State inspector is acting as a contractor to the Agency, any refusal to allow entry should be handled as would a refusal to an Agency inspector as described in section II.B.3. Where a State inspector is acting as a State employee with both Federal and State credentials, he would utilize State procedures unless the Federal warrant procedures are more advantageous, in which case, the warrant should be sought under the general procedures described below. The Regions should also assure that all States which enforce EPA programs report any denials of entry to the appropriate Headquarters Enforcement Attorney for the reasons discussed in section II.B.4.

B. Entry

(1) Consensual Entry

One of the assumptions underlying the Court's decision is that most inspections will be consensual and that the administrative inspection framework will thus not be severely disrupted. Consequently, inspections will normally continue as before the Barlow's decision was issued. This means that the inspector will not normally secure a warrant before undertaking an inspection but, in an attempt to gain admittance, will present his credentials and issue a notice of inspection where required. The establishment owner may complain about allowing an inspector to enter or otherwise express his displeasure with EPA or the Federal government. However, as long as he allows the inspector to enter, the entry is voluntary and consensual unless the inspector is expressly told to leave the premises. On the other hand, if the inspector has gained entry in a coercive manner (either in a verbal or physical sense), the entry would not be consensual.

Consent must be given by the owner of the premises or the person in charge of the premises at the time of the inspection. In the absence of the owner, the inspector should make a good faith effort to determine who is in charge of the establishment and present his credentials to that person. Consent is generally needed only to inspect the non-public portions of an establishment i.e., any evidence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

(2) Withdrawal of Consent

The owner may withdraw his consent to the inspector at any time. The inspection is valid to the extent to which it has progressed before consent was withdrawn. Thus, observations by the inspector, including samples and photographs, obtained before consent was withdrawn, would be admissible in any subsequent enforcement action. Withdrawal of consent is tantamount to a refusal to allow entry and should be treated as discussed in section II.B.3. below, unless the inspection had progressed far enough to accomplish its purposes.

(3) When Entry is Refused

Barlow's clearly establishes that the owner does have the right to ask for a warrant under normal circumstances.²⁴ Therefore, refusal to allow entry for inspection purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of warrant and one of the exemptions discussed in Part C does not apply. If the owner were to allow the inspector to enter his establishment only in response to a threat of enforcement liability, it is quite possible that any evidence obtained in such an inspection would be inadmissible. An inspector may, however, inform the owner who refused entry that he intends to seek a warrant to compel the inspection. In any event, when entry is refused, the inspector should leave the premises immediately and telephone the designated Regional Enforcement Attorney as soon as possible for further instructions. The Regional Enforcement Attorney should contact the U.S. Attorney's Office for the district in which the establishment desired to be inspected is located and explain to the appropriate Assistant United States Attorney the need for a warrant to conduct the particular inspection. The Regional Attorney should arrange for the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided in the appendix to this document.

(4) Headquarters Notification

It is essential that the Regions keep Headquarters informed of all refusals to allow entry. The Regional Attorney should inform the appropriate Headquarters Enforcement Attorney of any refusals to enter and should send a copy of all papers filed to Headquarters. It is necessary for Headquarters to monitor refusals and Regional success in obtaining warrants to evaluate the need for improved procedures and to assess the impact of Barlow's on our compliance monitoring progress.

C. Areas Where a Right of Warrantless Entry Still Exists

(1) Emergency Situations

In an emergency, where there is no time to get a warrant, a warrantless inspection is permissible. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Supreme Court states that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." Nothing stated in Barlow's indicates any intention by the court to retreat from this position. The Regions will always have

²⁴ FIFRA inspections are arguably not subject to this aspect of Barlow's. See discussion, p. 5 and 6.

to exercise considerable judgement concerning whether to secure a warrant when dealing with an emergency situation. However, if entry is refused during an emergency, the Agency would need the assistance of the U.S. Marshal to gain entry, and a warrant could probably be obtained during the time necessary to secure that Marshal's assistance.

An emergency situation would include potential imminent hazard situations, as well as situations where there is potential for destruction of evidence or where evidence of a suspected violation may disappear during the time that a warrant is being obtained.

(2) FIFRA Inspection

There are some grounds for interpreting Barlow's as not being applicable to FIFRA inspections. The Barlow's restrictions do not apply to areas that have been subject to a long standing and pervasive history of government regulation. An Agency administrative law judge held recently that even after the Barlow's decision, refusal to allow a warrantless inspection of a FIFRA regulated establishment properly subjected the owner to civil penalty. N. Jones & Co., Inc., I.F. & R Docket No. III-121C (July 27, 1978). For the present, however, FIFRA inspections should be conducted under the same requirements applicable to other enforcement programs.

(3) "Open Fields" and "In Plain View" Situations

Observation by inspectors of things that are in plain view, (i.e., of things that a member of the public could be in a position to observe) does not require a warrant. Thus, an inspector's observations from the public area of a plant or even from certain private property not closed to the public are admissible. Observations made even before presentation of credentials while on private property which is not normally closed to the public are admissible.

D. Securing a Warrant

There are several general rules for securing warrants. Three documents have to be drafted: (a) an application for a warrant, (b) an accompanying affidavit, and (c) the warrant itself. Each document should be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document.

The application for a warrant should generally identify the statutes and regulations under which the Agency is seeking the warrant, and should clearly identify the site or establishment desired to be inspected (including, if possible, the owner and/or operator of the site). The application can be a one or two-page document if all of the factual background for seeking the warrant is stated in the affidavit, and the application so states. The application should be signed by the U.S. Attorney or by his Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial documents. Each affidavit should consist of consecutively numbered paragraphs, which describe all of the facts that support warrant issuance. If the warrant is sought in the absence of probable cause, it should recite or incorporate the neutral administrative scheme which is the basis for inspecting the particular establishment. Each affidavit should be signed by someone with personal knowledge of all the facts stated. In cases where entry has been denied, this person would most likely be the

inspector who was denied entry. Note that an affidavit is a sworn statement that must either be notarized or personally sworn to before the magistrate.

The warrant is a direction to an appropriate official (an EPA inspector, U.S. Marshal or other Federal officer) to enter a specifically described location and perform specifically described inspection functions. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, and any articles to be seized, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge. The draft warrant should be ready for the magistrate's signature at the time of submission via a motion to quash and suppress evidence in Federal District court. Once the magistrate signs the draft warrant, it is an enforceable document. Either following the magistrate's signature or on a separate page, the draft warrant should contain a "return of service" or "certificate of service". This portion of the warrant should indicate upon whom the warrant was personally served and should be signed and dated by the inspector. As they are developed, more specific warrant issuance documents will be drafted and submitted to the Regions.

E. Standards or Bases for the Issuance of Administrative Warrants

The Barlow's decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of traditional criminal probable cause, 2) of civil probable cause, or 3) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme.

(1) Civil Specific Probable Cause Warrant

Where there is some specific probable cause for issuance of a warrant such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the U.S. Attorney in detail the basis for this probable cause.

The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.

(2) Civil Probable Cause Based on a Neutral Administrative Inspection Scheme

Where there is no specific reason to think that a violation has been committed, a warrant may still be issued if they Agency can show that the establishment is being inspected pursuant to a neutral administrative scheme. As the Supreme Court stated in Barlow's:

"Probable cause in the criminal law sense is not required. For purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular (establishment)." A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various type of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

Every program enforced by the Agency has such a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. Also, a scheme in which one out of every three known PCB transformer repair shops is inspected on an annual basis is satisfactory, as long as neutral criteria such as random selection are used to select the individual establishment to be inspected. Headquarters will prepare and transmit to the Regions the particular neutral administrative scheme under which each program's inspections are to be conducted. Inspections not based on specific probable cause must be based on neutral administrative schemes for a warrant to be issued. Examples of two neutral administrative schemes are provided in the appendix. (Attachments II and III)

The Assistant U.S. Attorney will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The Assistant U.S. Attorney will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or Federal district court judge.²⁵

²⁵ The Barlow's decision states that imposing the warrant requirement on OSHA would not invalidate warrantless search provisions in other regulatory statutes since many such statutes already "envison resort to Federal court enforcement when entry is refused". There is thus some question as to whether the existence of a non-warrant Federal court enforcement mechanism in a statute requires the use of that mechanism rather than warrant issuance. We believe that the Barlow's decision gives the Agency the choice of whether to proceed through warrant issuance or through an application for an injunction, since the decision is largely based on the fact that a warrant procedure imposes virtually no burden on the inspecting Agency. In addition, any Agency could attempt to secure a warrant prior to inspection on an ex parte basis, something not available under normal injunction proceedings. Several of the acts enforced by the EPA have provisions allowing the Administrator to seek injunctive relief to assure compliance with the various parts of a particular statute. There may be instances where it would be more appropriate to seek injunctive relief to gain entry to a facility than to attempt to secure a warrant for inspection, although

(3) Criminal Warrants

Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector and the Regional Attorney should request that the U.S. Attorney seek a criminal warrant under Rule 41 of the Federal Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered. Agency policy on the seeking of criminal warrants has not been affected by Barlow's. The distinction between administrative inspections and criminal warrant situations is discussed in Section II.A.2.

F. Inspecting with a Warrant

Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal when he goes to serve the warrant on the recalcitrant owner. The inspector should never himself attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the Assistant to the U.S. Attorney and the designated Regional Attorney. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. Thus, if refusal or threat to refuse occurs, the inspector should abide by the U.S. Marshal's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

G. Returning the Warrant

After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant, (i.e., whoever performs the inspection), must sign the return of service form indicating to whom the warrant was served and the date of service. He should then return the executed warrant to the U.S. Attorney who will formally return it to the magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

at this point we cannot think of any. However, since the warrant process will be far more expeditious than the seeking of an injunction, any decision to seek such an injunction for inspection purposes should be cleared through appropriate Headquarters staff.

III. Conclusion

Except for requiring the Agency to formalize its neutral inspection schemes, and for generally ending the Agency's authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections, Barlow's should not interfere with EPA enforcement inspections.

Where there is doubt as to how to proceed in any entry case, do not hesitate to call the respective Headquarters program contact for assistance.

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