"Responding to the Execution of an Environmental Search Warrant and Beyond: Practice Tips"

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INTRODUCTION

The focus of this presentation is not specific procedures in the Criminal Procedure Law applicable to search warrants, or procedural steps available to you after a search has been conducted, and criminal charges are filed. Rather, the intent here is to give you practical things to think about that may be helpful to your client if an environmental criminal search warrant issues for your client's place of business.

The specific topics that will be discussed are: (1) What can you do if you learn of the execution of a search warrant in time to get to the property before the search is completed; (2) Are there things you can do after the search warrant is executed to avoid criminal charges from being filed altogether, and (3) If criminal charges are filed, is there a mechanism for successfully arguing to the court that the charges should be dismissed in the interest of justice. "2" and "3" are only applicable if the alleged environmental misconduct did not create seriously adverse environmental conditions, and your client does not have a history of violations.

You may think that such cases do not frequently arise, but you would be mistaken. At least in Region 1 of the DEC, the majority of criminal cases that start with the execution of a search warrant by Environmental Conservation Officers ("ECOs") are cases that should have been handled administratively in the first instance, and never should have been brought criminally at all. In the author's opinion, this occurs because ECOs go to prosecutors to get search warrants, and the prosecutors are not familiar with all the alternative options that are available. Police Officers dealing with Penal Law violations rightfully think simplistically: is there probable cause to believe that a crime has been committed, and that the person or persons that are the target of their investigation are responsible. Environmental crimes arise whenever it can be shown that any provision of the ECL or the DEC's regulations are violated with any of the criminal intents set out in the Penal Law, including criminal negligence. Thus, while virtually any violation of the DEC's regulations CAN be treated as a crime, someone in charge needs to ask, is it appropriate to do so under the facts of the specific case presented? There is

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always the option of treating the violation administratively, not criminally, but ECOs do not seem to consider this option. There is nothing that compels them to bring the facts of their investigation to the Regional Attorney to get his or her opinion as to how the case should be handled. Prosecutors, who are not well trained when it comes to handling environmental crimes, are left with cases which should not have been given to them in the first place. It is your job, as the attorney for the accused, to try and persuade the prosecutor to consider the option of not prosecuting, and to simply leave it to the DEC to handle administratively.

HELPING A CLIENT THOUGH AN ENVIRONMENTAL SEARCH WARRANT

It may happen in your career that a client who owns a manufacturing facility calls you one day to announce that Environmental Conservation Officers, State Troopers, and a hoard of support folks such as laboratory technicians, have shown up as the doors opened for business with a search warrant. Your client asks you to come to the facility. Unless you are too far away to make a trip reasonable, you should assume that the folks carrying out the search warrant will be there for at least a half day, and probably longer. Go to the facility if you can.

1. Upon arrival, talk with your client, presumably, the president of the company, and get a copy of the search warrant if one was provided to your client. If a copy was not provided, find out who the officer in charge of the warrant is, introduce yourself as the attorney for the corporation, and request a copy of the warrant. This is very important because the warrant will define the scope of the search. Don't assume the officers will stick to the specifics spelled out in the warrant.

   A. For example, I frequently see officers come in and immediately dismantle internal surveillance cameras and DVRs that record what the cameras capture. The reason is obvious – they do not want to have their actions recorded. This is not likely to be authorized by the warrant. Just make note of it for later use.

2. Find out from your client where the employees are, and whether the officers will permit them to leave, or have ordered them to stay together in one or more rooms, or outside the building, until they are interviewed.

   A. Unless the warrant authorizes seizure of employees, which is very unlikely, it is improper for the officers to require the employees to remain until interviewed.

   B. Since no work is going to take place anyway, suggest to your client that he or she permit you to announce to the employees that they should shut down any machinery they were operating, and go home.

   C. You should then talk to the officer in charge about the employees. Tell the officer that the head of the company is authorizing the employees to leave. Further, tell the officer that you would like the opportunity to speak with the employees for the purpose of advising them of their rights, specifically, that they may talk with the officers if they wish to do so, with or without an attorney present, but that they need not do so and can insist on leaving. It is very unlikely that the officer will detain the employees at that point because the Fourth Amendment violation comes so clearly into focus.

D. Why not simply instruct the employees that they should not talk with the officers? You should avoid taking any action that can be construed with interfering with the execution of the warrant, and with the investigation of the officers.[2] They do not have the right to insist that employees talk with them, but they definitely do have the right to talk with anyone willing to do so voluntarily. You are not the employees' attorney. Nevertheless, if you wish, you may advise the employees that if any of them wish to talk with the officers, and would like to have an attorney present, you can sit in if the employee likes. You should make clear, however, that you are representing the corporation and, most likely, the owner, and not the employee. You should also inform the employees that, if they would like to have counsel present before talking with anyone, you can arrange to have separate counsel come to the facility to represent them, and answer any questions they may have. You should ask the owner of the company to pay for such representation, at least during the execution of the search warrant.

E. It is not unusual for officers who participate in the execution of a search warrant to go to the homes of employees late at night to try and coerce them into talking to the officers without an attorney. At the first opportunity presented, usually the day following the search warrant, it is advisable for you to have the owner of the company give a written statement to every employee informing them that officers may go to their homes to talk with them, and to remind them that they may speak with the officers if they want, but that they also have the absolute right not to talk with these officers. In addition, the owner should advise the employees that, if they wish to talk with the officers, but to have an attorney present, arrangements will be made to provide an attorney for the employee (other than the attorney for the company and owner).

F. As a practical matter, employees almost never want to talk with the officers, and will take the opportunity to go home early. They also will be relieved to learn that they need not talk to officers who go to their homes, regardless of what the officers may say to try and persuade them otherwise.

3. At the outset, you should ask the officer in charge whether an Assistant DA or an Assistant Attorney General is working with the officers. Request the name and telephone number of the attorney, and contact that person to introduce yourself. Get the attorney's email, and then, if any misconduct is observed during the execution of the warrant, you should promptly email your complaint to the attorney supervising the officers. Even if it does no good, you have begun to create a record of the conduct of the officers.

4. Meanwhile, the officers are going through file cabinets and computers pursuant to the warrant. Typically, they are authorized to seize hard drives from computers, along

[2] New York Penal Law § 195.05 defines obstructing governmental administration in the second degree as follows: "A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act ...." The elements of the offense are: 1) intent; 2) obstruction or impairment of a government function, or preventing or attempting to prevent the performance of that function by 3) physical interference. *People v. Stumpp*, 129 Misc.2d 703, 493 N.Y.S.2d 679, 680 (1985). Probable cause to arrest for a violation of § 195.05 may be predicated on, amongst other things, obstructing a lawful search. Id.

with a broad category of documents. This of course can be a disaster for the company, which thereafter may have none of the computer and hard files needed to run the business.

A. While it is too late once the search warrant is being executed, you may wish to suggest to your clients in heavily regulated businesses that generate regulated waste that they not only scan all documents, and save everything both on hard drives and external discs, but they also save everything on the cloud. This will permit the business to be up and running quickly after the search warrant is over.

5. The officers are required to leave the owner a receipt "itemizing the property taken". CPL §690.50(4). Frequently, this requirement is honored in the breach, but the information is critical to the ability of the owner to know what must be reproduced. You may request the officer in charge's permission to photograph the folder label on everything taken, and to also photograph the actions of the officers in carrying out the warrant. If you are denied the right to do so, you may have an issue for later because some courts have ruled that the right to photograph or video the actions of peace officers is protected by the First Amendment.[3] However, it is not clear that you are free to record conversations between officers in New York unless you are participating in the conversation. You may wish to advise the officers that you will be recording video only and not audio.[4]

6. Environmental Search Warrants almost always have provisions authorizing the officers to take samples. It is critical that you be able to observe samples being taken to make certain they are being taken properly. You should request the officer in charge's permission to have someone present when samples are taken, and to photograph or videotape or otherwise record each sample. You should discuss how far back the person must be, and you should assure the commanding officer that the person or persons taking pictures or video will not do anything to interfere with the execution of the warrant. If you are able to get a consultant to the site of the warrant fast enough, you may also request permission to take "split samples" so that you can have your lab analyze the same sample that the officers will have analyzed.

A. The commanding officer may well deny you the right to view what the officers are doing, and to take your own samples, and you should record exactly what took place leading up to the refusal to permit you protect your client. In addition, you

[3] *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (Illinois wiretapping statute "likely violates the First Amendment's free-speech and free-press guarantees" when applied to private citizens who videotape police officers performing their duties in public.); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (Recording law enforcement officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern.); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (There is "a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct.").

[4] New York's wiretap statute makes it unlawful for a person to engage in "mechanical overhearing of a conversation" without the consent of at least one party. N.Y. Penal Law § 250.05. The definition of "mechanical overhearing" expands the scope of the statute by applying to instances where electronic devices can eavesdrop on "face to face" conversations. *People v. Basilicato*, 64 N.Y.2d 103, 114 (1984), and the term "devices" extends to cellphones. *See, e.g.*, *People v. Badalamenti*, 27 N.Y.3d 423, 432, 54 N.E.3d 32, 37 (2016) (finding that recording a phone conversation with the voice memo application constituted "mechanical overhearing").

should email the prosecutor in charge your objection to being denied the right to observe where samples were taken from, and how they were taken. What you should not do is to interfere with the execution of the search warrant (*see* footnote 2, *supra*)..

AFTER THE WARRANT IS EXECUTED, IF THE FACTS WARRANT A PROACTIVE DEFENSE, DON'T WAIT FOR THE PROSECUTOR TO ACT

After the warrant has been executed, your work, as attorney and counselor, really begins.

1. Contact the prosecutor in charge of the case. Typically, this will be an Assistant Attorney General but it could also be a local Assistant District Attorney. Advise the prosecutor that you represent the corporation and its owner, and that, prior to the case going to a Grand Jury and before any felony or misdemeanor complaints or informations (CPL § 100.05) are filed, you would like to discuss an appropriate disposition with the prosecutor. The prosecutor typically will agree to do so as soon as the laboratory results come back. Confirm your request in writing.

2. Interview the owner of the company to determine if he or she has any idea what the focus of the search warrant is – what was going on that led to the search? Ascertain the regulatory history of the site – were there prior inspections, consent orders, notices of violation, or the like that would have placed your client on notice what was wrong and requiring that the problem be corrected. Get copies of everything the company has and review everything carefully.

3. As quickly as possible, file FOIL requests with all appropriate regulatory agencies for information about actions taken at the site of the search warrant (e.g., US EPA, NYS DEC, County Health Departments, and Fire Marshals). You may wish to also order a report from a company like EDR (http://edrnet.com/) that can provide you with a report of available regulatory information about your site and surrounding properties, frequently within 24 hours or less. However, you should not rely exclusively on such reports, and must check the records of the key regulatory agencies yourself.

4. Have the owner notify employees that its attorney would like to interview all employees who were present for any stage of the search warrant, and that, while they are under no obligation to talk with you, they may do so on company time in a private room on the premises. With the consent of the owner, advise the employees that anything they tell the attorney will not be discussed with the owner. Ascertain whether any employees were "seized" by officers and told they could not leave until they are interviewed, and get as many details as you can as to what was said, and by whom. Ask what they observed throughout the execution of the search warrant in terms of where the officers went, and what was taken, including any physical samples of any kind (e.g., liquid or sludge samples from storm drains). Ask each employee if they are aware of any conduct at work by anyone that they did not believe was proper and get as much information as you can about any such knowledge.

5. Persuade your client that a qualified environmental consultant and engineer should be retained as quickly as possible to perform an investigation of the property to determine if unpermitted discharges caused contamination of soil. The consultant/engineer should be retained by the attorney, and the agreement should be clear that the consultant is retained to assist the attorney to defend the company, and its officers and employees, should criminal charges arise. Note that, if your client owns the property, there may be reporting requirements which arguably the owner of the property will be required to report to the DEC. (*See* 6 NYCRR §§ 613-2.4, 613-3.4, and 613-4.4, effective October 11, 2015). The decision whether to release the results of your investigation should be made by the attorney, and the agreement with the consultant should reflect this.

6. If storm drains and the like are contaminated, you must discuss with your client whether to immediately arrange for remediation, knowing that the results likely will be available to the prosecutor. If heavy contamination was found, so that each day it rains more contaminants will leach towards the water table, you may wish to move ahead with remediation anyway. Depending on your client's history regarding past violations, your recommendation may be that you intend to give the prosecutor all the information that is found, along with all actions taken to bring the company into compliance. Assuming your client agrees to this approach, arrange to have the contaminants pumped out by licensed companies so the waste is taken to a proper facility for disposal. After storm drains and leaching pools are cleaned out, take end-point samples to make certain levels of contamination are within acceptable range.

7. Concurrently with sampling obvious areas of concern, the consultant/engineer should conduct an environmental audit of practices and procedures. The goal here is to identify any potential regulatory violations, and to make changes as quickly as possible to make certain going forward that the client is fully compliant with environmental laws and regulations. During the course of this audit, instruct the consultant/engineer to look for all waste streams that are generated, and how changes in procedures might result in the reduction of the quantity of waste that is generated. Have the consultant/engineer work with the owner to prepare an SOP (Standard Operating Procedures) for the company, and arrange for employee training so they fully understand how to operate without violating laws and regulations. The goal is to bring the company into full compliance, if possible, before the prosecutor is ready to discuss the case.

8. Once you have all the information you need, prepare a list of arguments why this case should be handled administratively by the DEC rather than criminally by the Attorney General or District Attorney. If your client is a bad actor, do not bother, but you may find that your client wants to do the right thing, and no one previously inspected his or her operation to identify areas where correction is required.

A. The regulatory history is most important. You may find that your client has been operating for many years without ever being inspected by a regulator. Argue that, as your client did in this case, had an inspection been done, your client would have promptly done whatever was necessary and more to bring the facility into compliance.

B. Assuming the client was not inspected previously, or that the client was inspected but the areas of concern identified as a result of the search warrant were not identified by the previous inspector, look at the impact of your client's actions. Did it cause soil contamination? If it did, but your end point samples demonstrate that the soil below the levels of contamination is within acceptable limits, there is a good argument that the contamination never moved down to groundwater.

C. Now your discussion becomes philosophical: what is the purpose of our administrative system, compared to the purpose of the criminal enforcement system?

(1) The primary goal of administrative regulations is to bring the regulated community into compliance. This is done through inspections, Consent Orders which set out the violations and define specifically what the regulated entity must do in order to come into compliance, and by imposition of penalties. The DEC need not show that regulations or statutes were violated with any particular intent. The primary goal of criminal enforcement, particularly as applied to environmental crimes, should be punishment and deterrence, and should be reserved for the most egregious bad actors.

D. This is the time to discuss any misconduct by the ECOs who executed the search warrant:

(1) Did they violate the Fourth Amendment rights of all employees by requiring them to remain in one or two rooms until they were interviewed, not letting them make calls or even to go to the bathroom, or even worse, did the ECOs keep the employees outside in cold weather until interviewed?

(2) Did they dismantle the surveillance system so their actions would to be recorded, even though the search warrant does not authorize this to be done?

(3) Did the ECOs, potentially in violation of the First Amendment, refuse to permit the actions of the officers during the execution of the search warrant to be photographed or videographed, even though the ECOs were assured that the people taking pictures or video would not interfere in any way with the movement or actions of the ECOs?

(4) Did the ECOs seize documents which the warrant did not authorize them to seize?

(5) Did the ECOs refuse to permit anyone to be present, with our without photography or videography equipment, when samples were taken from around the property? Did they refuse to allow a qualified consultant retained by the owner to take split samples when they were taken?

(6) Is the type of misconduct identified in your case repetitive of the same conduct by these same ECOs on other cases? If so, inform the prosecutor that you are not just looking to quash the evidence obtained during the search, but to have the entire case thrown out in the interest of justice as the only way that the ECOs will be deterred from violating constitutional rights of employees when they execute search warrants.

E. Finally, be prepared to discuss each and every factor a Judge must consider when presented with a motion to dismiss in the interest of justice pursuant to CPL§ 170.40. The factors to be considered on such motion are:

(a) “The seriousness and circumstances of the offense”;

(b) "[T]he extent of harm caused by the offense;

(c) "[T]he evidence of guilt, whether admissible or inadmissible at trial;

(d) "[T]he history, character and condition of the defendant;

(e) "[A]ny exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant";

(f) [T]he purpose and effect of imposing upon the defendant a sentence authorized for the offense”;

(g) "The impact of a dismissal on the safety or welfare of the community”;

(h) “The impact of a dismissal upon the confidence of the public in the criminal justice System”;

(i) "[A]ny other relevant fact indicating that a judgment of conviction would serve no useful purpose”.

F. If you are unable to persuade the prosecutor to decline prosecution in favor of referring the case to the appropriate regulatory agency to proceed with administrative enforcement, you can still make a motion to dismiss pursuant to CPL § 170.40 once criminal charges are filed. Hopefully, the prosecutor will view the case as more trouble than it is worth, and will conclude that not proceeding with criminal charges is the best way to achieve justice in your client’s case.