



When Can the Government Enter Your Farm?



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Farmers are challenged daily by a variety of external factors: fluctuating markets, the unpredictability of Mother Nature, and perhaps the most challenging of all: the vast, ever changing array of local, state, and Federal laws. Every new law has the potential to bring a new government inspector out to the farm to ensure the farmer is in compliance. But when can this stranger enter, and when can they be turned away? Most of us understand that the police cannot enter our homes without a warrant. But how does this translate when an inspector drives up the farm lane?

The rights of a private property owner to protection from unreasonable inspections can be found in the Fourth Amendment to the U.S. Constitution and Article 26 of the Maryland

Declaration of Rights which protect citizens from unreasonable searches and seizures without a warrant issued upon probable cause.

A person claiming Fourth Amendment protection must prove an expectation of privacy in the area searched by the government and that this expectation is a reasonable one.¹ This protection prevents warrantless searches and seizures of private homes, and does generally extend to commercial businesses. However, the Supreme Court has held that the expectation of privacy in a commercial setting is less than in the sanctity of one's home.² In determining whether an expectation of privacy is reasonable, a court may consider, among other factors, whether the commercial area contains any evidence of the claimed

privacy expectation such as a fence, gate, or “No Trespassing” sign. Although generally commercial enterprises are protected from unreasonable searches, there are exceptions to the rule which permit warrantless searches.

Open Field Exception to Fourth Amendment Protection

Inspection of an open field, such as a pasture, which would otherwise be a search which required a warrant, is not considered a search for Fourth Amendment purposes. The courts have found it is unreasonable for a landowner to have an expectation of privacy in an area subject to public view like an open field, even when that area is bounded by a fence.³ The term open field has been interpreted broadly to include wooded areas and outdoor areas between buildings in an industrial site.⁴ If the public is not barred from viewing an open field, then there is no reasonable expectation of privacy

that can be violated by a warrantless government search.⁵

The U.S. Supreme Court has specifically held there is no societal interest in protecting the privacy of cultivation of crops in open fields.⁶ The open field exception has provided state and Federal inspection authorities, such as the Environmental Protection Agency (EPA), with the legal authority to conduct warrantless searches. But what about seizures? Can the EPA enter an open area of your property and take samples of your soil or water without a warrant? This area of the law is unclear. In *Reeves Brothers, Inc. v. EPA*, a District Court judge in the Western District of Virginia found that EPA investigators who entered a locked gate without permission or knowledge of the owner, and then jumped the fence of a second fenced impoundment to collect soil samples did violate the Fourth Amendment.⁷ The *Reeves* Court concluded that the Fourth

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Amendment was applicable to environmental investigations, and that the EPA investigation violated the constitutional rights of the landowner. This decision appears to be the only one of its kind to date, and the future of the open fields exception is unclear.

It is important to note that an open area associated with a home, i.e. a yard, is not subject to the open field exception. A person’s yard and the area immediately surrounding one’s home are extensions of the home itself and protected from a warrantless search. This exception has not been expanded in a commercial setting to protect the areas around commercial buildings because there is no reasonable expectation of privacy in that setting. Additionally, Federal courts have held that an aerial search of a commercial enterprise by a government entity such as the EPA from public air space does not intrude into areas protected by the Fourth Amendment because there is no reasonable expectation of privacy in that air space.⁸

Closely Regulated Business Exception to Fourth Amendment Protection

The Supreme Court has also long recognized an exception to the warrant requirement for a



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While the open field exception provides state and Federal inspectors with the legal authority to conduct warrantless searches, a person’s yard and the area immediately surrounding one’s home are extensions of the home itself and protected from a warrantless search.

government agency conducting an administrative search or inspection of a closely regulated business.⁹ Examples of businesses found by the U.S. Supreme Court to be closely regulated include auto junkyards, mines, the firearm industry, and the liquor industry. A business is closely regulated if the “regulatory presence is sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”¹⁰ Typically, a closely regulated business is one regulated by a law or regulatory scheme specific to that industry.

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Importantly, a warrantless inspection of a closely regulated business is only reasonable if three conditions are met. First, there must be a substantial governmental interest that informs the regulatory scheme under which the inspection is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the statute’s inspection program, in terms of certainty and regularity of application, must provide a constitutionally adequate substitute for a warrant. In particular, the regulatory scheme “must perform the two basic functions of a warrant: it must advise the owner of the

commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.”¹¹

For example, in *New York v. Burger*, the U.S. Supreme Court found that warrantless inspections could be made to enforce a New York junkyard law because the law adequately advised junkyard operators that inspections would be made regularly and the inspectors would be limited to inspect only records, vehicles, and vehicle parts during the regular and usual business hours.¹² In Maryland, many animal feeding operations are covered by the General Discharge Permit which contains inspection language clearly intended to permit a warrantless search. The language specifically provides that a government inspector has the right of entry, at reasonable times, to inspect production and land application areas and records and to sample certain items related to the discharge of pollutants. Importantly, inspectors have the obligation to follow biosecurity measures during the inspection.

Inherent in the “closely regulated business” exception to the Fourth Amendment warrant requirement is a test balancing the strength of the federal regulatory interest with the reasonable expectation of privacy of the commercial entity.¹³

Unfortunately, due to the many state and Federal laws applicable to agriculture, it is not as easy as either qualifying agricultural as a closely regulated industry or not. Instead, an analysis of the specific regulation seeking to be enforced through a search must be considered on a case by case basis.



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For example, in *Perez v. Blue Mountain Farms*, the U.S. District Court for the Eastern District of Washington recently considered the legality of a warrantless search of a commercial farm building by a government agent seeking to investigate a violation of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) § 512(a), 29 U.S.C.A. § 1862(a).¹⁴ The Secretary of Labor argued that the closely regulated business exception of the Fourth Amendment should apply because Blue Mountain Farms, a blueberry growing operation employing migrant workers, operated a closely regulated business and had no reasonable expectation of privacy in its commercial structures.

The Court disagreed, finding that the MSPA and its related regulations failed to provide the type of limitations on searches needed to satisfy the third requirement for a warrantless search of a closely

regulated business. The Court explained that laws which establish regular inspections during usual business hours, and limit searches to records or certain pieces of equipment, as opposed to a broad authority to inspect, are needed to justify a warrantless search. Interestingly, the Court ruled in favor of the Labor Department's request to conduct interviews of the migrant workers while they were working in the field based on the open field exception to the Fourth Amendment.

Consent and Administrative Search Warrants

Without an exception to the warrant requirement of the Fourth Amendment, most administrative searches are done pursuant to property owner consent or an administrative search warrant. In most instances, upon arriving at a farm, a government agent, even with the statutory authority to conduct an inspection, will normally identify himself and ask for permission to enter and conduct the inspection. Ideally this question will be asked of the property owner but in many instances it will simply be asked of the person present who may be a tenant or employee. Therefore, it is important for not only farm owners but also farm employees to understand the legal repercussions of granting or denying an inspector the right to enter. If an inspector is granted consent to enter and conduct the inspection, the results of the inspection may result in a finding of compliance or may form the basis of a civil or even criminal violation and result in civil penalties. Once granted permission to enter, a farmer will have little legal recourse to exclude any evidence of non-compliance found by an inspector.

If a government inspector requests and is denied access to a property, the inspector can then apply with a local court for an administrative search warrant. To obtain an administrative search warrant, an inspector must show they have attempted and failed to acquire consent for the search and have specific evidence of an existing violation of a regulatory scheme as opposed to a mere allegation of a violation.¹⁵ By contrast, if a government agent suspects a criminal violation, he must acquire a criminal search warrant based upon cause that it is more probable than not that a crime has been committed and that the instrumentalities of the crime are located in the place to be searched. There are certain instances, defined in the law, when the Maryland Department of Agriculture may obtain an administrative search warrant to enter a farm, such as to determine compliance with the regulation and prevention of infectious and contagious livestock and poultry disease. For the most part, however, the legal authority for a warrant is determined on a case by case basis.¹⁶ Once an administrative search warrant has been issued, the government agent has the legal authority to enter onto the farmland and conduct the search pursuant to the terms and conditions of the warrant. ■

¹ Minnesota v. Carter, 525 U.S. 83, 88 (1998)

² Donovan v. Dewey, 452 U.S. 594, 598-599 (1981)

³ Oliver v. U.S., 466 U.S. 170, 179 (1984), U.S. v. Rapanos, 115 F.3d 367, 373 (6th Cir. 1997)

⁴ United States v. Carasis, 863 F.2d 615, 617 (8th Cir. 1988), Dow Chemical v. U.S., 476 U.S. 227, 239 (1986)

⁵ Shafer v. U.S., 229 F.2d 124, 128-129 (4th Cir. 1956)

⁶ Oliver v. U.S., 466 U.S. 170, 180 (1984)

⁷ Reeves Brothers, Inc. v. EPA, 956 F. Supp. 676 (W.D. Va 1996)

⁸ Dow Chemical Co. v. U.S., 476 U.S. 227, 238-239 (1986)

⁹ 86 Opinions of the Maryland Attorney General 33 (2001)

¹⁰ New York v. Burger, 482 U.S. 691, 705 (1987)

¹¹ Id. at 676

¹² Id. at 711

¹³ Dow Chemical Co. v. United States, 749 F.2d 307, 311 (1984)

¹⁴ Perez v. Blue Mountain Farms, 96 F. Supp. 2d 1124 (E.D. Wash 2013)

¹⁵ Donna Musso, Drawing the Line Between Administrative and Criminal Searches: Defining the “Objection of the Search” in Environmental Inspections, 18 B.C. Env'tl. Aff. L. Rev. 185 (1990)

¹⁶ Md. Code, Agriculture Article, § 3-105.1

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