

/ Staff Access to Property or Premises

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Alison H. Crocker

Title: Deputy Commissioner &
General Counsel

Date Issued:

Latest Date Revised:

I. Summary: This policy is intended to address program staff's need for guidance as to how and when they may enter property for the purpose of carrying out their official duties. Entry may be needed to conduct inspections in connection with permit applications, to conduct inspections in connection with determining compliance with permits or other regulatory requirements, to undertake enforcement, or for their programmatic activity. Entry on to private property without the appropriate authority can result in adverse consequences for staff. As such, this document will serve as General Counsel Policy with respect to the entry by staff on to private property to carry out their regulatory responsibilities. All program staff should consult with their Central Office or Regional program attorneys for explanation and advice with respect to the details of their specific statutory and/or regulatory program authority.

II. Policy: It is the Policy of the Office of General Counsel (OGC) that program staff shall enter private property only under the procedures set forth herein. In recognition of a person's Constitutional right of privacy and protection against unreasonable searches and seizures, this Policy establishes procedures to ensure that program staff possess appropriate authority to enter private property while carrying out their official duties.

III. Purpose and Background: The right to privacy and the right to be protected against unreasonable searches or seizures of one's person or property, is guaranteed by both the 4th Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution. Criminal trespass is defined as knowingly entering or remaining unlawfully in or upon premises (NY Penal Law §140.05). Unlawful inspections can result in the suppression of evidence obtained as a result of illegal entry. In addition, unlawful entry onto property can result in civil litigation or even criminal trespass charges. The procedures set forth in this policy are intended to protect program staff from the potential adverse consequences of entering private property without the necessary legal authority.

To avoid having to face civil litigation or criminal trespass charges, DEC program staff should enter private property only upon proper authority. That authority may arise from one or more of the following circumstances:

1. **Consent:** a business or property owner may consent to entry. Consent may be verbal or in writing, but it may only be granted by a person who has the authority or ownership rights to grant access. Consent may be withdrawn at any time, and once withdrawn, staff must leave the property. Consent may also be present under the terms of a permit or administrative order on consent. If a permit or administrative order is the source of authority relied upon for access, it is advisable for program staff to have a copy of that document in their possession, with the access provision clearly noted.

2. **Plain View:** Violations in plain view may be observed and recorded from off-site, as there is no expectation of privacy when a violation is in plain view. Recording may be accomplished through such means as notes, photos, and/or videotape. Off-site observation may take place from adjoining public or private property, or through the use of State planes or helicopters. However, if staff uses adjoining private property that is not generally open to the public, that property owner must first have consented to entry on to their

property for that purpose. Parking lots, shopping centers, and cemeteries are all examples of private property that are generally open to the public. Even in the case of private property generally open to the public, however, staff should be careful not to undertake any activity that interferes with the movement of other members of the public, or with the ordinary activity that occurs on that property.

3. **Search Warrants:** Staff may work with their Central Office or Regional program attorney to obtain a civil or criminal search warrant. Search warrants are limited in time, duration and scope, and DEC staff must adhere to all restrictions and requirements set forth in the warrant.

4. **Exigent Circumstances:** This refers to entry on to property or into premises under emergency circumstances. An emergency situation is one that presents an immediate substantial or serious threat to public health, safety or welfare. If faced with what they believe is an emergency, staff should first contact the appropriate Environmental Conservation Officer or the police, and immediately consult with their Central Office or Regional program attorney.

Note that under New York law, any property that is posted, fenced or gated, no matter how secluded, is protected private property. The unauthorized entry on to such property by anyone, including DEC staff, will constitute trespass. It should also be noted that regulatory inspections should be conducted in a manner that is reasonable. Under the holding of *Flacke v. Onondaga Landfill Sys.* (127 Misc2d 984 [Sup. Ct. Onondaga County 1985], *aff'd* 177 AD2d 992 [4th Dept. 1986] *rev'd on other grounds* 69 NY2d 863 [1987]), overly frequent inspections of the same site may be deemed unreasonable and give rise to claims of harassment.

IV. Responsibility: This policy shall be maintained in OGC. It should be the responsibility of the OGC Central Office and Regional attorneys to interpret this policy, along with the statutory and regulatory provisions that are specific to each Department program, to determine the authority of program staff to enter private property for regulatory purposes, and the limits of that authority. It shall be the responsibility of program staff who need to access private property as part of their program responsibilities, to adhere to the general procedures set forth in this policy and to consult with their Central Office and/or Regional Attorney to ascertain the details of their access authority under their program-specific ECL provision(s) and implementing regulation(s).

V. Procedure: With these principles in mind, staff should follow this general guidance in gaining access to property. Each program's access authority may differ depending on the program's specific statutory and/or regulatory provisions. Staff should work with their Central Office and Regional attorneys for advice with respect to the details of their authority and issues that may be unique to their program.

1. **Routine inspections under the terms of a permit, order or consent form:**
 - a. Before leaving the office, staff should confirm the identity and contact information for the facility owner or listed facility contact. As previously stated, it is advisable that staff obtain a copy of the permit or order to take with them to the inspection.
 - b. Staff should inform their supervisor of their inspection plans and should be equipped with necessary safety equipment (such as steel-toed boots, safety helmets, and eye or ear protection).
 - c. Routine inspections should generally be carried out Monday through Friday between the hours of 7 a.m. and 7 p.m., or if the facility has other regular business hours, during those regular business hours. Note that there may be valid reasons for conducting an inspection outside normal business hours. Under those circumstances staff should obtain either the property owner/operator's consent, or a warrant.

- d. At the facility entry point staff should present their identification and describe their purpose for entering. If no one is present, in the absence of an emergency staff should contact the facility owner or operator before entering, unless a permit, court order or warrant, or prior written consent authorizes the inspection without the necessity of having facility staff present.
- e. The inspection should be conducted within the scope of the permit or order. Staff should inspect only those areas that are open to the public and/or are relevant to the regulated activity.
- f. If access is denied, staff should present a copy of the permit or order, and politely explain that the failure to provide access could result in enforcement, which can include revocation of the facility's operating authority. Staff should not engage in any confrontations. If after explaining the possible consequences of doing so, access is still denied, staff should contact their Central Office or Regional Attorney for advice.

2. Access to private property not covered under the terms of a permit or order:

- a. Staff should present identification and ask to speak to a person who owns or leases the property, or someone in charge (a plant manager, for example).
- b. Staff should explain the purpose of their presence (i.e., inspection, complaint investigation, etc.) and request consent to enter the property.
- c. Staff should document the identity of the person granting access, their status with respect to the property, the date and time that access is granted, and the identity of any witnesses to the conversation.
- d. If at any time during such an inspection consent is withdrawn, staff should leave the premises and contact their Central Office or Regional attorney for advice.
- e. If access is denied staff should contact their Central Office or Regional attorney for advice.

3. Access to property for other than regulatory purposes, such as mapping or scientific studies.

Staff who conduct such work should consult with their Central Office or Regional program attorney to determine their authority to enter private property for these purposes, and the limits of that authority if it exists.

Staff should immediately leave any property where they feel their safety may be jeopardized by entering or remaining.

VI. Related References:

1. A list of relevant program-specific statutory provisions is attached. This list is for general information only and should not be interpreted by program staff, in the absence of guidance from their regional or central office program attorney.
2. Access to Property - Important Reminders form. This form may be used by program staff as a summary of key provisions of the DEC Staff Access to Property or Premises Policy. It includes a place for staff to fill in the names and phone numbers of Office of General Counsel and Division of Law Enforcement contacts.
3. Sample Attorney Affirmation in support of administrative search warrant application. *See* CPL § 690 *et seq.* for the form and procedure for search warrant applications.

RELEVANT STATUTORY PROVISIONS

Article 3 Department of environmental conservation

§3-0301(2)(g) General functions, powers and duties

Article 11 Fish and wildlife

§11-1901(6) Breeding of domestic game birds

§11-1903(8) Shooting preserves

§11-1905(5) Breeding of domestic game animals

§11-1913(7) Fishing preserves

Article 15 Water resources

§15-0305 Access to property for inspection or investigation

§15-0507(2) Structures impounding waters, etc. (authorizes department to inspect)

§15-0511(4) Alterations to watercourses and lakes, etc.

Article 17 Water pollution control

§17-0303(6) General powers and duties applicable to portions of [article 17]

§17-0829 Inspection and entry

§17-1011 Access to records and facilities

Article 19 Air pollution control

§19-0304(8) Burning of hazardous wastes

§19-0305 Commissioner; enforcement power

Article 24 Freshwater wetlands

§24-1301(2) Miscellaneous

Article 27 Refuse and other solid waste

§27-0915 Inspections and general reporting

§27-1305(2) &(3) Reports by the department; registry of sites (authorizes investigations)

§27-1309 Access to records and sites

§27-1313(8) Remedial programs

§27-1431 Access to sites

Article 40 Bulk Storage Act

§40-0109 Access to records ad facilities

Article 43 Lake George Park

§43-0107 Powers

Article 49 Beauty Protection

§49-0305 Conservation easements

Article 56 Clean Water/Air Bond Act

§56-0515 Access to sites

Navigation Law §178 Oil spill prevention

ACCESS TO PROPERTY - IMPORTANT REMINDERS

1. *Make sure management is aware of your inspection itinerary.
2. *Confirm proper address or location prior to conducting an inspection.
3. *Keep a phone list of important regional or central office phone numbers in your vehicle.
4. *Inspection should generally be conducted during normal business hours.
5. *Notify facility or site owner or agent (such as a manager) of your presence.
6. *Do not enter facilities or sites without consent or other authority, such as a search warrant.
7. *Access can be properly denied if you lack proper safety equipment.
8. *Leave immediately if access is denied or you feel your safety is at risk.
9. *Leave immediately if access is withdrawn after you begin your inspection.
10. *Record all access incidents on your inspection form and seek guidance from your regional or central office program attorney.
11. *Never engage in a confrontation.

Important Contacts

Regional Attorney: _____ Phone: _____

Central Office Attorney: _____ Phone: _____

ECO Captain: _____ Phone: _____

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

In the Matter of Alleged Violations of Article _____
of the New York State Environmental Conservation Law
and Part(s) _____ of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State
of New York ("NYCRR"), and (Permit/Registration)
Number _____,

- By -

FACILITY NAME,

Respondent.

AFFIRMATION OF
(Agency Attorney)

DEC Case No.

STATE OF NEW YORK)
) SS:
COUNTY OF _____)

_____, Esq., being duly sworn, deposes and says:

1. I currently serve as an _____ in the Office of General Counsel for the New York State Department of Environmental Conservation ("DEC"). Unless otherwise stated, this affirmation is based on personal knowledge. I submit this affirmation in support of an application for a warrant to inspect the premises of Respondent _____ and to seize certain property on such premises.

2. The source of my information consists of: (1) my review of DEC records pertaining to _____, including but not limited to permit and enforcement files dating back to _____; (2) correspondence between DEC and _____, including _____ lawyers, personnel, and consultants; (3) my conversations with DEC staff who have permitted and inspected the _____ facility; (4) my review of records received from _____ through a discovery process that is underway in a current administrative enforcement proceeding.

Background

3. _____ is the owner/operator of a facility located at _____ in the Town of _____, _____ County. The facility manufactures _____.

4. The plant's neighbors have long complained about _____.
DEC staff have personally observed these conditions on several occasions.

5. As part of my responsibilities with DEC, over the last five years I have been involved with the investigation of _____, and the commencement in _____ of an administrative enforcement proceeding against _____, for repeated and persistent violations of certain air quality requirements of the Environmental Conservation Law ("ECL"). These violations include a history of (noncompliance) dating back to at least _____, which have continued to the present time.

Air and Water Compliance Framework

6. As is more fully set forth herein, DEC has a historically regulated _____ air and water emissions.

7. Based on _____ history of noncompliance with applicable clean air requirements, in _____ DEC issued a Notice of Hearing and Complaint to _____ seeking to revoke _____ eligibility to operate under a DEC-issued (permit or registration or other operating authority).

8. In _____, _____ answered DEC's Complaint and discovery ensued. In _____, _____ provided documentation to DEC (attached hereto and incorporated herein as Exhibit A) in which _____ admitted to a _____ facility expansion. Among other things that expansion (increased the facility's operations).

9. Since _____ DEC air staff have inspected _____ on an annual or semi-annual basis (*see* DEC Air Facility System Inspection List printout, attached hereto and incorporated herein as Exhibit B). DEC's last inspection was conducted in _____ and the facility is therefore due for a regular air compliance inspection. Such an inspection would be particularly timely since DEC staff were unaware of the facility expansion prior to the disclosure of this information in the enforcement discovery process. Except for the documents provided in discovery, DEC staff have little information about the scope of the _____ expansion and whether it has generated additional air compliance obligations.¹

10. With respect to the facility's water compliance obligations, _____ is subject to the requirements of the State Pollutant Discharge Elimination System (SPDES) program. _____ last SPDES permit limited the facility's discharge to non-contact cooling water to the _____ (water body) via the City of _____ Wastewater Treatment Plant (WWTP) effluent discharge line.² It prohibited the discharge of any other wastewater such as process water, floor washings, sanitary sewage or contact cooling water.

¹A _____ stack test conducted at pre-expansion levels of operation reflected that _____ was operating out of compliance with applicable (specific emission limits). As a result of the _____ facility expansion, the _____ stack test is no longer representative of _____ operations. (Additional details re history of stack testing and noncompliance).

²SPDES permits for discharges to the waters of the State other than to groundwater are limited by Federal law to a five year term (*see* 33 USC § 1342 [b] [1] [B]; *see also* ECL § 17-0817 (1); 6 NYCRR 750-1.15).

11. A review of the DEC file on the City of _____ WWTP pre-treatment program has led DEC staff to understand that in or around _____ installed a recycle system for the facility's process water. Subsequently, _____ was required to provide semi-annual certification to the City of _____ that the facility does not discharge process water to the City of _____ WWTP. DEC staff need to substantiate the current status of the pre-treatment program through an inspection of the facility (*see generally* ECL § 17-0825 [“(p)ersons discharging industrial waste to a publicly owned treatment works shall comply with toxic effluent standards and pretreatment standards and to monitoring, reporting, recording, sampling and entry requirements provided by the [Clean Water] Act or adopted pursuant thereto”).

DEC's Authority to Enter and Inspect, and to Obtain Documents

12. Numerous provisions of the ECL and its regulations confer explicit authority on DEC personnel to enter and inspect property or premises for the purpose of ascertaining the status of compliance with environmental laws and regulations. This includes the right to inspect required records and to undertake sampling (*see e.g.* ECL §§ 3-0301 [g]; 17-0303 [4] [g], [6], [7]; 17-0829; 19-0305 [2] [a], [1]; *see also* [cite to applicable regulations]). Statutes and regulations such as these prescribe that DEC staff may enter a regulated facility during normal operating hours for the limited purpose of inspecting for compliance with the Environmental Conservation Law and/or the terms of a facility's operating authority. The regulations that govern _____ (the permit or registration or other operating authority) specifically prescribe the records a facility is required to keep (*see* _____), and concurrently with DEC's right of access, provide that the facility must produce required records upon request (*see* _____).

13. Administrative inspections further the purposes of the Environmental Conservation Law and are not intended to uncover evidence of a crime (*accord, People v Scott*, 79 NY2d 474, 498-499 [1992]). Rather, these statutes and regulations are “part of a comprehensive program that is unrelated to the enforcement of the criminal laws” and therefore constitute “a constitutionally adequate substitute for a warrant” (*Id.*, 501-502).

14. Under well settled principles of administrative law, therefore, DEC does not need an administrative warrant to enter and inspect _____, to take necessary samples, or to obtain and/or review the records_____ is required to maintain to establish compliance with the terms of the Environmental Conservation Law (*see e.g. People v Quackenbush*, 88 NY2d 534, 541 [1996] [authorizing warrantless administrative searches “where the activity or premises sought to be inspected is subject to a long tradition of pervasive regulation and the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted”]; *see also People v Scott, supra*, 499).

The Court Should Issue the Proposed Administrative Warrant

15. DEC staff respectfully requests that this Court grant DEC staff’s application for the proposed administrative warrant. The proposed warrant comports with the standards for the issuance of administrative warrants.

16. It is without question that _____ operations have historically been subject to the type of “detailed government standards” that the Court of Appeals has held are necessary to establish the requisite “pervasive regulation” (*see People v Quackenbush, supra*, 542). As such, under normal circumstances DEC staff would simply appear at the facility and request entry for an

inspection. However, given the existence of the current enforcement proceeding your deponent is concerned that _____ may not cooperate fully, or possibly at all, with an inspection by DEC staff.

17. Under the standard applicable to administrative searches, probable cause exists for the issuance of a warrant, as there is both a valid public interest and reasonable administrative standards for conducting an inspection (*see e.g. Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 538-539 [1967]). In addition, _____ has recently submitted documents to DEC admitting that the facility has expanded its level of operations beyond those at which it was already operating out of compliance with certain air regulations (*see Exhibit A*). Neighborhood complaints over _____ nuisance air emissions have persisted despite prior enforcement proceedings for this and other violations of the ECL. DEC staff suspect that recent complaints may be associated with the _____ facility expansion, but have no information upon which to base a response to those complaints.

18. In addition, and as has been previously set forth herein, DEC water staff need to inspect the facility to ascertain the status of its pretreatment program, and to review the facility's water discharges.

19. DEC staff therefore seek an administrative warrant to assure that they are given access to the facility when they appear for an inspection. The scope of the inspection will include a full review of the _____ manufacturing process, the details of the recent _____ expansion, _____ water process(es) and discharge(s), and any records that _____ is required by regulation to maintain on site and provide to DEC staff upon request.

20. With respect to records required by 6 NYCRR _____ to demonstrate compliance with the facility's (permit or registration or other operating authority),³ DEC staff respectfully request that the warrant direct _____ personnel to provide access to those records during the inspection. DEC staff plan to have one person whose role it will be during the inspection to examine required records of _____ production and other data. That person will take a computer with him to enable him to copy any electronic files containing required information, that are not available for reproduction and/or review in paper form.

21. The basis for this request is that on more than one prior occasion when DEC staff have inspected and requested access to required records, your deponent has been informed by DEC staff that _____ personnel have told them that the individual responsible for the records is not present and/or that the information is either in computer format and inaccessible, or that the information is not on site. On the occasions when this has occurred, _____ personnel have offered to provide the requested through the mail at a later date. These records have sometimes been provided through counsel and have not always been provided in a complete or timely manner.

22. Among other things DEC staff will seek to take samples of _____ raw materials and product, including but not limited to (the facility specific) raw material, and product series _____. Other sampling may include water samples for pH levels, and sampling of discharges and/or effluent. DEC staff will also photograph various aspects of the inspection, which technical staff have informed your deponent is a normal part of the inspection procedure.

³ Among other things, _____ is required to keep and maintain information with respect to maximum design throughput, emission control information, [quoting the applicable regulatory provisions and including their citations]). (Additional information was inserted here with respect to specific noncompliance with respect to these regulatory provisions.)

23. The inspection is necessary to achieve the enforcement objectives of the Environmental Conservation Law. The inspection will be limited to the _____ manufacturing process and related operations (such as the delivery and storage areas for raw materials) and the facility's compliance with applicable air and water regulations. DEC staff do not seek to intrude into any area of the facility that does not either pertain to the manufacturing process and its emissions or discharges, or contain records that _____ is required to maintain pursuant to applicable air or water regulations.

24. DEC staff are prepared to bring all protective equipment necessary for the inspection, including hard hats, steel-toed boots, and protection for eyes and ears. In addition, the Environmental Conservation Officers who will accompany staff to the site to execute the warrant will file a Site Safety Plan that contains, among other things, information regarding the chemicals used by _____, the Material Safety Data Sheet ("MSDS") for each of those chemicals, and information regarding the proximity of medical facilities.

DATED: _____
Albany, NY

_____, Esq.
(Title)