

IV. Inspections and Information Requests

- A. Introduction..
- B. Inspections.....
 - 1 Nature and Scope...
 - 2 Inspectors....
 - 3 Right to Inspect.....
 - a. Statutory Authorization..... IV-2
 - b. Consent to/Refusing an Inspection..... IV-2
 - c. Administrative Inspection Warrants..... IV-3
 - d. Criminal Search Warrants..... IV-4
 - e. Constitutional/Common Law Search and Seizure Issues..... IV-4
 - 4. Notice..... IV-5
 - 5 During an Inspection.
 - a. Initial Overview..... IV-6
 - b. Entry Interview..... IV-6
 - c. Checklists; Actual Inspection; Taking Samples..... IV-6
 - d. Exit Interview..... IV-7
 - 6. Post-Inspection Follow-Up.....
- C. Information Requests.....
 - 1 Statutes..... IV-8
 - 2. Rules... .. IV-8
 - 3. Permits.....
 - 4. Orders.
 - 5. Other Requests. IV-9

IV. Inspections and Information Requests

A. Introduction

As noted in Chapter I, the goal of ensuring compliance requires DES to undertake activities that support a determination of whether a person who is subject to environmental laws is in compliance. In many cases, an inspection of a site, facility, or activity is the key to an accurate compliance determination. An inspection may be a regular (*e.g.*, annual) visit to a facility, it may be part of a pre-determined targeting strategy, or it may be part of the response to a citizen complaint or other source of information which leads DES to believe that a violation may have occurred or be occurring. An inspection can include (but is not limited to) photographing or videotaping activities or conditions, sampling actual or suspected wastes and waste streams, and interviewing employees of the regulated entity or other potentially knowledgeable individuals. The circumstances surrounding the inspection (including the reason for the inspection) will determine what specific activities are needed.

Site/facility representatives should be aware that although DES is doing more multi-media inspections, most inspections are still single-media based. This means that an inspection by staff from one DES program (*e.g.*, NPDES/surface water discharges) probably will not cover compliance with requirements of other DES programs (*e.g.*, RCRA-C/hazardous waste), and it certainly does not preclude any other applicable DES program from doing an inspection of the same site/facility/activity. Also, an inspection by DES does not preclude an inspection by EPA under the same program or under a different one. Finally, site/facility representatives should be aware that they may be subject to regulation by more than one state agency (*e.g.*, Department of Labor, Department of Revenue Administration), and that information given to one state agency does *not* mean that all state agencies have the information.

In addition to conducting inspections, DES occasionally requests a regulated entity to submit information as part of a compliance determination. For example, such requests may be made for records that were not available at the time of an inspection (*e.g.*, records kept at the home office of a company that has more than one location) or for reports that are required by environmental laws to be submitted on a regular basis but that weren't received by DES on time.

Since DES typically does not know whether a site, facility, or activity is in compliance prior to doing an inspection, all field work must be conducted in such a way that an enforcement action can be supported if it is the most appropriate follow-up. Not only is it important for DES to gather all necessary information and properly document it, but it is also important for the work to be done in a safe manner that does not jeopardize anyone's health or well being.

B. Inspections

Nature and Scope

The nature and scope of an inspection depends, as noted above, on the reason for the inspection and what information is needed to make a compliance determination. This can vary widely from one DES program to another. For example, an inspection done under RSA 483-B, the Comprehensive Shoreland Protection Program, may involve comparing "before" and "after"

photographs of a site, counting the number of fresh-cut stumps on the site, or looking at building plans or staked areas on the property to determine the appropriate building envelope. This is quite different from an inspection of a wastewater treatment facility, where DES will observe the facility's operations, inspect daily laboratory records and other log sheets, and sample effluent. This in turn is quite different from an inspection of a hazardous waste transporter, which involves examining the vehicle in which hazardous wastes are being transported, inspecting the containers in which the hazardous wastes are being carried, and checking the transporter's registration papers and the manifests required to accompany the wastes during transport. A transporter inspection in turn is quite different from an inspection under RSA 482-A relative to dredging and filling in wetlands, for which DES will observe (and possibly sample) vegetation, hydrology, and soil types on disturbed and undisturbed areas of a property.

2 Inspectors

All inspections are done by trained DES staff. All DES staff carry photo-identification cards that clearly identify the individual as a DES employee, and most carry business cards. Most DES inspectors now also wear distinctive DES field apparel, which can help people to identify the individual as a DES inspector. DES staff will drive a state-registered vehicle (bearing a license plate of "ES##") to an inspection if one is available.

Occupational safety and health training is provided to all DES staff whose job tasks require such training. Staff members whose jobs require specific safety training, such as use of personal protective equipment, confined space entry, *etc.*, receive that training in accordance with applicable recommendations and requirements as set forth by OSHA, NIOSH, *etc.* All personnel are encouraged to be safety pro-active. Programs have identified the safety issues most likely to be encountered during a typical inspection and have tried to ensure that inspectors are equipped appropriately, *e.g.*, with safety glasses, steel-toed boots, high visibility/reflective vests, *etc.*

3. Right to Inspect

a. Statutory Authorization

Each statute underlying a regulatory program implemented by DES authorizes DES to inspect land and buildings on or in which the regulated activity may be occurring, subject to the requirements of the statute. A list of the statutory inspection authorities for DES programs and the text of the provisions can be found in **Appendix IV-1**.

b. Consent to/Refusing an Inspection

DES typically seeks consent for an inspection from the site/facility representative. Upon arrival at a site/facility, DES staff will identify themselves and present their credentials, and ask to see the site/facility representative to explain the reason for the visit.

The site/facility representative legally can refuse to allow a DES inspector to undertake an inspection if the inspector does not have a warrant. However, in such cases DES can (and usually will) obtain an administrative inspection warrant under RSA 595-B. If a DES inspector presents an administrative inspection warrant, the responsible person cannot legally refuse the inspection.

If the DES inspector does not have an administrative inspection warrant and an individual refuses to allow an inspection, the DES inspector usually will ask for the identity of the individual refusing entry and the reason for the denial. The inspector usually will explain the statutory authority for the inspection and provide a copy of the statutory provision. If the individual still refuses entry, the inspector has three options:

- Reschedule the inspection at a time that the individual agrees to;
- Negotiate entry, possibly with a more senior representative of the site/facility; or
- Seek a warrant (usually an administrative inspection warrant under RSA 595-B).

When negotiating entry, the inspector may suggest that the site/facility representative contact his/her attorney for advice. An attorney usually will recognize and understand statutory authority and advise the representative to allow the DES inspector to have access to the site/facility. Note that it is **not** an acceptable condition of entry for a DES inspector to sign a “confidentiality agreement” or other liability waiver offered by a site/facility that is about to be inspected. If a site/facility representative refuses entry to an inspector unless the agreement or waiver is signed, the inspector will leave and obtain a warrant for the inspection (see below).

c. Administrative Inspection Warrants

To obtain an administrative inspection warrant, DES must be prepared to show the specific basis for the belief that a violation exists or to present evidence that the site/facility/activity was selected for inspection on the basis of a general administrative plan derived from neutral sources (*e.g.*, statistics, environmental monitoring, or an objective targeting strategy). The AGO usually assists DES when an administrative inspection warrant is needed. An application for the warrant is prepared, together with a supporting affidavit. The affidavit is a sworn written statement that sets forth the particulars of the case and provides the required basis for the warrant, including the facts and circumstances surrounding the denial of entry or “reasonably justifying the failure to seek such consent.” RSA 595-B:2, I.

The application package usually is then presented to a district court judge. DES must be prepared to answer any questions the judge may have. If all is in order, the judge will sign the warrant. The warrant specifies, among other things, the time, date, place, and scope of the inspection.

A DES inspector usually will serve the inspection warrant once it is obtained and then conduct the inspection. If no one is present at the site, a copy of the warrant is left at the site in a location where the owner is likely to find it. The inspector may be accompanied by a law enforcement official while serving the warrant. The law enforcement officer may stay with the DES inspector during the inspection to ensure that there is no interference after service of the warrant and during the inspection.

Upon completion of the inspection, the warrant return will be completed and brought back to the court that issued the warrant. As part of this return, an inventory of the material seized or samples taken during the inspection will be completed. The inventory is signed by the DES inspector. A copy of the inventory must also be provided to the site/facility representative.

d Criminal Search Warrants

RSA 595-A provides for the issuance of criminal search warrants. This statute does not supersede or modify the standards of Part I, Article 19 of the NH Constitution and the Fourth and Fourteen Amendments of the United States Constitution. Because evidence seized in violation of an individual's constitutional rights may be excluded from trial, the procedures involved in obtaining and executing search warrants are of utmost importance.

The process described for administrative inspection warrants is also followed for criminal search warrants. Applications for criminal warrants are usually subjected to more scrutiny by a judge and are also more likely to be challenged later by the defense. The affidavit must specify what illegal activity is suspected and demonstrate a solid basis for that belief. The warrant will specify what materials or items can be seized and what activities can be conducted under the authority of the warrant. Items seized in a criminal search warrant must be one of the following (ref. RSA 595-A:1):

- property designed or intended for use, or which is being or has been used, as the means of committing a criminal offense.
- property which is evidence of the crime to which the probable cause upon which the search warrant is issued relates (*i.e.*, including "mere evidence").
- property which is stolen, embezzled or fraudulently obtained;
- property which is contraband.

e. Constitutional/Common Law Search and Seizure Issues

Part I, Article 19 of the NH Constitution and the Fourth Amendment of the United States Constitution protects people against "unreasonable" searches and from having evidence that was seized during such a search from being used against them. This more commonly arises in criminal cases rather than in civil cases, and usually is more of an issue in a warrantless search. (That is, if a warrant for the search has been properly obtained, the "unreasonable" issue usually is not present.) However, in addition to any statutory authority for warrantless inspections (such as noted above), there are several circumstances that enable certain inspections to be conducted without a warrant. Some of the exceptions that are most likely to be relevant in environmental enforcement are listed below. Please note that these are general guidelines only.

i. *Open Fields*

The open fields exception eliminates the warrant requirement for any unoccupied or undeveloped area except that zone or space immediately around an occupied dwelling (the "curtilage"). This exception is not (legally) eliminated by placement of "No Trespassing" signs. That is, courts have stated that there cannot be a reasonable expectation of privacy in such open areas, so the existence of such warnings cannot alter the government's ability to proceed if there is a legitimate basis for government inspectors to be there. Most courts have held that the concept of curtilage does not apply to non-residential properties. In those cases, courts consider whether the property owner's expectation of privacy is one that society is willing to recognize.

Plain View

The plain view exception provides that government officials may seize evidence falling within their view without a warrant so long as they have a legitimate reason to be in the position where they observe the evidence. Thus, an inspector properly making an inspection of a facility may examine drums, papers, *etc.* that the inspector notices while conducting the inspection, and take samples or photographs or make copies as needed.

iii. Abandoned Property

The abandoned property exception recognizes that there is no reasonable expectation of privacy for property that has been abandoned or discarded. Thus, it would not be an “unreasonable” search to examine drums of waste in a field or garbage dumped along the road.

iv. Closely-Regulated Industry

The pervasively- or closely-regulated industry exception allows warrantless entry into those businesses which are so subject to close governmental supervision that persons choosing to engage in such businesses can enjoy no reasonable expectation of privacy. The list of industries subject to such level of regulation is growing at both the federal and state level. It is sometimes enough that a permit is required for the facility or activity for the facility/activity to be deemed “closely regulated”.

v. Emergencies

Emergency entry onto a property to address an immediate threat to public safety or potential property damage usually is not unreasonable. Items observed in plain view during valid emergency responses are subject to warrantless seizure.

4. Notice

Prior notice is not required for an inspection under most federal environmental laws (*e.g.*, Clean Air Act, Clean Water Act, RCRA, CERCLA), and none of the statutes authorizing DES to inspect property or facilities requires DES to notify the site/facility representative in advance of a pending inspection. It thus is DES’s policy to conduct unannounced inspections to the extent possible. There are two main reasons for this. First, many activities which might violate environmental laws can be hidden or temporarily suspended if notice of an inspection is given in advance, and DES needs to see typical conditions in order to adequately protect public health and the environment. Also, with these kinds of potential violations, announced inspections actually are less fair to those who are in compliance anyway, since DES may not find a violation which is giving a competitor an unfair advantage. Second, many DES inspectors plan a full day of inspections in a general area, but can’t tell in advance when they might be at a particular site or facility. If one inspection lasts much longer (or much shorter) than originally anticipated, the inspector may have no way of getting in touch with the person to be met at the next site, resulting in wasted time for the site/facility representative (or the inspector). If the activity or condition can’t be easily hidden or suspended or if it is necessary to the purpose of the inspection to have the site/facility representative present during the inspection, DES will notify the site/facility

representative of the pending inspection and will, to the extent reasonable, accommodate the person's schedule.

5. During an Inspection

A typical inspection includes an initial surveillance, an entry interview, the actual inspection of the site/facility, and an exit interview. The length of each of these segments will vary depending on the type of inspection and the number of people involved.

a. Initial Overview

Upon arriving at the site/facility but prior to entering it, the DES inspector usually will observe the site/facility from its perimeter, if possible. The inspector will note any odors emanating from the site/facility and determine, if possible, the source or general area where the odors originate. The inspector will note whether there are any visible air or water emissions from any points, and whether any vegetation around the site/facility is stressed, especially near emission points. The inspector will also note the general condition of the site/facility, including the condition of any buildings on the site (*e.g.*, is there rust on stacks? is the building generally in decay?) and whether there are any obvious waste or burn piles. Any conditions observed will be documented and further investigated if possible during the inspection. The DES inspector will also try to evaluate the potential impact of the site/facility on the surrounding area, including receptors such as residences, schools, or hospitals.

b. Entry Interview

Once in contact with the appropriate site/facility representative, the inspector will explain the purpose of the visit and briefly outline the scope of the inspection. If possible, the inspector will give the site/facility representative an estimate of how long the inspection will take. Safety issues, policies on taking photos, and potential claims of confidentiality (if applicable) usually also will be discussed at this time with the site/facility representative. If the inspection is of a facility with one or more process lines, prior to actually doing the inspection the inspector usually will verify process descriptions and update them as necessary. Inspectors for some programs also will use this meeting to verify the applicability of program requirements and to review records related to scope and objectives of the inspection.

c. Checklists; Actual Inspection; Taking Samples

DES inspectors usually will use a checklist to keep the inspection organized and ensure that no areas of concern are missed. Most DES inspectors will offer a blank checklist to the site/ facility representative at the beginning of the inspection, to allow the person to understand what will be covered in the inspection and to provide a convenient way for the person to keep notes during the inspection. If a copy of the checklist is not offered, the site/facility representative may request one.

During the actual inspection, the inspector will observe any relevant processes, control equipment, operations, and site conditions. As appropriate, the inspector will take samples and photographs, and will obtain representative copies of relevant records. Samples must be taken in certified containers that are clean and appropriate to the material being sampled and the test(s) to

be done. DES inspectors may not rely on containers supplied by the site/facility representative. In some circumstances, it may be necessary to have a site/facility representative physically take the sample. If this is the case, the inspector must make sure that the sampling is done under direct DES supervision, using DES containers, and that proper techniques are used. If split samples are taken for the site/facility, identical DES containers will be used and the receipt or refusal of split samples will be documented.

d. **Exit Interview**

Many programs find that it is helpful to conduct an exit interview, or inspection review, with the site/facility representative(s) prior to leaving the site/facility at the end of the inspection. The exit interview usually will include the most senior site/facility personnel available. At this meeting, the DES inspector will review the facts that were observed during the inspection. Findings and concerns may be discussed in general to give the site/facility representatives the opportunity to collect and present additional information, or to correct any misrepresentations that may have been made.

If the inspector believes, based on the inspection, that a violation definitely occurred or is ongoing, the site/facility representative usually will be informed so that steps can be taken promptly to correct the violation. If it is not 100% clear that a violation occurred, the inspector usually will inform the site/facility representative of the basis for the concern, and indicate that DES will communicate with the site/facility after a complete compliance determination is made. Since DES inspectors do not make the final decision about what response DES will take to a violation, the inspector should **never** indicate what type of enforcement action will be taken based on the results of the inspection, although the inspector may inform the site/facility representative of the full range of options available to DES (as discussed in Chapter V). The inspector should emphasize that the final decision will be made by others back at the office.

It is also appropriate at the exit interview for the inspector to note any claims of confidential business information ("CBI") that relate to copies of documents which the inspector obtained during the inspection. If a site/facility representative wants to make a claim that the copies are or contain CBI, the inspector must make sure that the relevant pages are so stamped and that the claim is limited to information that is confidential under applicable environmental laws.

Prior to leaving the site/facility, the DES inspector will request any additional information that is known to be needed and will establish when the requested records will be provided and who will provide the records.

6. Post-Inspection Follow-Up

After the inspection, DES will evaluate the information collected during the inspection, plus any other information received, to determine whether there are non-compliance issues that must be addressed. The evaluation should ensure that:

All applicable requirements have been identified for the site/facility and all have been properly evaluated for applicability and compliance with those rules, within the scope of the inspection.

All discrepancies between the facts at the site/facility and the representations in the site/facility's permit or permit application (if any) have been thoroughly documented

All apparent violations have been thoroughly documented

All information needed to complete the inspection report has been obtained from the site/facility, and if not, the information has been requested and both the inspector and the site/facility representative know who is responsible for providing the information.

All copies of records and documents obtained from the site/facility during or after the inspection are on hand and properly identified.

At this time, DES may also identify additional information that is needed, and make an information request. Information requests are discussed in part C, below.

After reviewing the available information, DES will determine whether the site, activity, or facility was in compliance, and if violations are identified will proceed to determine (and take) an appropriate response, as discussed in Chapter I.

C. Information Requests

As noted in the Introduction to this chapter, DES occasionally requests a regulated entity to submit information as part of a compliance determination. Whether the regulated entity is required to submit the information may depend on the basis for the request.

Statutes

Certain statutes implemented by DES authorize DES to require the submittal of information. For example, RSA 125-C:4, II authorizes the Commissioner "to issue subpoenas requiring the attendance of such witnesses and the production of such evidence and to administer such oaths and to take such testimony as he may deem necessary." Similarly, RSA 485-A:18, II requires a person who is subject to pretreatment or surface water discharge requirements to provide information pertaining to the person's activities upon written request of DES, and RSA 485-A:20 authorizes DES to "subpoena witnesses and administer oaths in any proceeding or examination instituted before or conducted by it, and to compel the production of any ... documents ... necessary to the purposes of [RSA 485-A]." If a request for information is made pursuant to these authorities, the person is legally obligated to provide the information.

2. Rules

Many programs have developed rules that require certain records to be maintained. Some of the rules require that these records be submitted periodically to DES, while others only require the records to be made available upon request by DES. If DES requests records that are required by rule to be maintained, the regulated entity is legally obligated to provide the records upon request, and failure to do so constitutes a violation separate and distinct from any violation that may be shown by the information in the records.

3 Permits

If a site, facility, or activity is required by statute to have a permit, the permit itself may contain record keeping or reporting requirements. As with records required by rules, if DES requests records that are required by a permit to be maintained, the regulated entity is legally obligated to provide the records upon request, and failure to do so constitutes a violation separate and distinct from any violation that may be shown by the information in the records.

4. Orders

If DES issues an administrative order (or administrative order by consent), the order may contain a requirement to keep records not otherwise required to be kept (*e.g.*, logs of more frequent sampling than otherwise required) and to submit such records as provided in the order. If a regulated entity receives an order that contains a requirement to maintain or submit records, the regulated entity is legally obligated to provide the records, and failure to do so constitutes a violation of the order separate and distinct from any violation that may be shown by the information in the records.

5 Other Requests

DES may also request information in circumstances in which none of the above factors applies. For example, if DES sends a Notice of Findings to a regulated entity, the NOF will include a request for the regulated entity to respond to the NOF, which may include providing records not otherwise required to be maintained or submitted. In such cases, the regulated entity is **not** legally obligated to provide the records, and failure to do so does **not** constitute a violation.

However, even if the requested information shows that violations occurred, it usually is in the regulated entity's best interest to respond as promptly and completely as possible. DES always considers the regulated entity's degree of cooperation when considering how best to respond to a violation. Also, information usually can be obtained in the course of a civil lawsuit (initiated by the AGO after a referral from DES) even if DES couldn't otherwise compel its production -- but if DES refers the case, the regulated entity's costs almost certainly will be higher than if DES handles the case administratively, both in terms of penalties (because civil penalties are almost always higher than administrative fines) and transaction costs (because the regulated entity will almost always want a lawyer to deal with the AGO, but may feel comfortable dealing with DES directly without a lawyer).

An applicant may not be legally obligated to provide information beyond that specified in a rule to support an application. However, in the context of an application, if DES requests additional information it usually is because there is insufficient information in the file to support issuing the permit that has been applied for. In such a case, the applicant may not be legally obligated to provide the information, but probably won't get a permit if the information isn't provided. If the permit isn't issued but is required for the activity the applicant wants to undertake, the applicant can be cited for failing to have a permit if the activity is commenced anyway.