



NEW MEXICO ENVIRONMENT DEPARTMENT

Office of the Secretary
POLICY AND PROCEDURE 07-08

SUBJECT: Inspection Policy

PURPOSE: To provide guidance to New Mexico Environment Department ("NMED") personnel regarding the protocol for on-site inspections and sampling in order to protect human health and the environment, implement NMED's inspection and sampling authority, and safeguard the rights of regulated entities subject to inspection and sampling.

APPLICABILITY: This policy applies to all employees of NMED. In addition to this policy, any applicable statutory or regulatory requirements pertaining to inspections shall be followed by NMED employees. NMED Bureaus may supplement the applicable statutory and regulatory requirements and this policy with their own guidelines so long as those guidelines are consistent with such requirements and this policy. Failure to follow this policy shall not invalidate an otherwise valid finding, citation, violation or penalty assessment by NMED.

POLICY: All NMED personnel engaged in inspections or sampling activities shall conduct themselves in accordance with this policy.

AUTHORITY: NMSA 1978, § 74-1-13.C; NMSA 1978, § 74-2-13; NMSA 1978, Section 74-9-33; NMSA 1978, § 74-4-4.3; NMSA 1978, § 74-6-9.E; NMSA 1978, §§ 74-1-7.A(3), 74-1-8.A(3), 74-1-12.B and 74-1-13.C; NMSA 1978, § 74-6B-5; NMSA 1978, §§ 25-1-4.C, 25-1-8, 25-1-10; NMSA 1978, §§ 50-9-10 and 50-9-11; NMSA 1978, § 84-1-6.H; 20.6.2.3107.D NMAC; 20.6.2.4107 NMAC; 20.9.1.111 NMAC; 20.7.10.504 NMAC; 20.7.3.204 NMAC; 20.7.3.300 NMAC; 20.7.3.901 NMAC; 7.6.2.8 NMAC; 11.5.1.21 NMAC.

APPROVAL: _____

Ron Curry, Cabinet Secretary

DATE: _____

4/6/06

I. DEFINITIONS

A. "Credentials" means the NMED picture badge, NMED business card, or other credential authorized by NMED that identifies an NMED employee by name, Bureau or Division, title, address, and telephone number.

B. "Investigative techniques" are reasonable investigative tools that an inspector may utilize during an inspection. Such reasonable investigative tools include but are not limited to examination of records, visual evaluation, taking samples, source testing, physical examination, mechanical evaluation, monitoring, surveillance, using exposure measuring devices or dosimeters, taking or obtaining photographs, and questioning privately any employer, owner, operator, agent or employee of an establishment.

C. "Regulated entity" means an employer, owner, operator, permittee, or other entity or person who is subject to regulation or inspection by NMED pursuant to any of the statutes or regulations cited in the authorities above. "Regulated entity" includes the regulated entity's premises, site, facility or business on which activities subject to regulation or inspection by NMED occur.

D. "Sampling" means the taking of a substance, or assessing a condition such as noise, odor, or radiation, in whatever form (liquid, solid, gas, air, energy) to measure or identify the substance taken. Sampling may be performed in a variety of ways for different reasons including but not limited to measuring environmental or workplace exposure levels, ascertaining pollutant levels, identifying unknown or suspected pollutants, taking or identifying olfactory evidence, and evaluating hazardous or unsafe employment, environmental, mechanical or operating conditions or equipment.

E. "Trade secret" or "confidential business information" means the whole or any portion or phase of a scientific or technical information, design, process, procedure, formula or improvement that is confidential and of value to the regulated entity. Whether information identified by a regulated entity as a trade secret or as confidential business information is to be treated as such shall be determined in accordance with the applicable law by the NMED Office of General Counsel ("OGC").

F. "Administrative search warrant" or "warrant" means an order issued by a court that allows NMED inspectors to enter and inspect the premises of a regulated entity without the consent of the regulated entity.

G. "Warrantless administrative search" or "warrantless search" is an exception to the administrative search warrant requirement and allows an inspector to proceed to search all or part of a regulated entity without obtaining its consent or a warrant. A warrantless search may be permitted if exigent circumstances exist, or the open fields exception applies.

II. PREPARATION, PURPOSE, CONDUCT AND SCOPE OF INSPECTION.

A. Purpose and Conduct of Inspection. NMED has a statutory mandate to protect human health and the environment. NMED employees shall conduct themselves in their inspection activities with professionalism and courtesy. Inspectors:

1. Permission to enter, inspect, review records or question any employee of the regulated entity shall not imply or be conditioned upon a waiver of NMED authority to conduct inspections or to cite violations or assess penalties;
2. May not unreasonably interfere with the regulated entity's operations during an inspection;
3. Shall comply with the regulated entity's reasonable safety and health rules and practices, including using appropriate protective clothing and equipment.

B. Scope of Inspection. Inspections will vary considerably in scope and detail depending upon the type of inspection, the business being inspected, and the circumstances of each inspection. Generally, NMED inspectors may:

1. Inspect and investigate the regulated entity and all pertinent conditions, including but not limited to air, water, land, waste, chemicals, liquids, solids, structures, machines, apparatus, devices, equipment and materials therein;
2. Sample, test, monitor, photograph, tape record, and use other reasonable investigative techniques to conduct the inspection;
3. Interview the owner, operator, employer, employees, and other persons present;
4. Request records which are related to the purpose of the inspection; and
5. In conjunction with NMED management, pursue a shut down order or cease and desist order in accordance with applicable statutory and regulatory authority.

A. Entry

1. Right of Entry. Pursuant to applicable statutory and regulatory authority, NMED inspectors may enter and inspect any regulated entity at reasonable times and without delay during regular working hours or at other reasonable times and in a reasonable manner.
2. Consent to Entry. Prior to making entry and conducting an inspection of the premises occupied by a regulated entity, NMED personnel shall obtain consent to do so from a representative of a regulated entity. However, NMED personnel may enter private property that is open to entry and not locked or fenced to obtain consent.
3. Denial of Entry. NMED shall not proceed with an inspection or enter the regulated entity's premises if:
 - a. the regulated entity's representative denies entry or otherwise fails to give consent to entry, or
 - b. no one is available to give consent, including when the premises are locked, fenced or otherwise labeled to prohibit trespassing and no one is available to give consent.

If entry is denied, the inspector should record the time and date, the name and position of the individual denying entry, and any reason given for denial of entry.

4. Administrative Search Warrant.

- a. Denial of entry and inspection. In the event the inspection is denied, the NMED inspector should contact his or her supervisor. The supervisor should determine whether to contact OGC to obtain an administrative search warrant. OGC will determine whether to obtain a warrant.
- b. Obtaining warrant prior to inspection. Under some circumstances, the Bureau may want to obtain an administrative search warrant prior to inspection, e.g., if the regulated entity has previously denied NMED entry or advised NMED that entry will not be permitted without a warrant or other court order; the inspector has reasonable grounds to believe that entry will be denied; or the Bureau has reasonable grounds to believe that the regulated entity will tamper with records, information or evidence if a warrant not obtained prior to inspection. In such cases, the Bureau should contact OGC, and OGC will determine whether to obtain a warrant.

c. Compliance with warrant. In the event an administrative search warrant is obtained, the inspection should be conducted in accordance with the terms of the warrant.

5. Exceptions to the Administrative Search Warrant Requirement. A warrantless search may be conducted if the "open fields exception" applies or if exigent circumstances exist. In the event that the inspector determines that either of the exceptions applies, the inspector must confer with his or her supervisor or Bureau Chief to determine whether to proceed with the inspection. The supervisor or Bureau Chief should make every effort to confer with OGC to determine whether to proceed with the inspection without an administrative search warrant. Warrantless searches without consent should be approved by OGC prior to the inspection. Exceptions to the warrant requirement are:

a. The "open fields" exception occurs when there is an unoccupied, undeveloped area of land outside a residence or place of business that the regulated entity has knowingly exposed to the public and therefore has no legitimate expectation of privacy for the activities conducted therein. An "open field" may be an open field viewable from a public place, a heavily wooded area, or outdoor portions of a plant viewable only from the air. The exception does not include an open area immediately surrounding a home or place of business. If the undeveloped land is fenced or marked by no trespassing signs, this exception may not apply.

b. "Exigent circumstances" exist when an emergency situation requiring swift and immediate action:

i. to prevent imminent danger to life or serious damage to property or the environment or

ii. to prevent the imminent destruction of evidence.

6. Plain View. If NMED staff are conducting a valid inspection or are otherwise validly on the premises of the regulated entity, NMED staff may inspect, sample and gather evidence if there is readily apparent incriminating evidence of a violation in plain view. This provision applies whether or not NMED staff have an administrative search warrant.

B. Inspection Procedure.

1. Presentation of Credentials. At the outset of the inspection, inspectors

should present their credentials to the regulated entity representative and, if appropriate, conduct an opening conference with the regulated entity's representative.

2. Opening Conference. During the opening conference, the inspector should:

- a. Explain the purpose and scope of the inspection;
- b. Request any records to be reviewed or copied; and
- c. Explain that an exit conference may be held at the conclusion of the inspection.

If appropriate, the regulated entity may designate a representative to accompany the inspector during the inspection. The inspector should record the name and contact information of any representative that accompanies him or her on the inspection.

3. Physical Examination. In accordance with the inspector's Bureau's regulatory authority, inspectors may inspect, physically examine and investigate the regulated entity's premises and all pertinent conditions, equipment, structures, machines, source emissions, source operating parameters, apparatus, devices, land, water, and air.

4. Sampling, Testing, Photographs, Monitoring.

a. Inspectors may sample, test, take or obtain photographs, monitor, measure, or employ other reasonable investigative techniques. Pursuant to these activities, inspectors shall take reasonable precautions to insure that such actions with flash, spark-producing or other equipment will not be hazardous.

b. NMED inspectors may offer the regulated entity representative a reasonable opportunity to obtain split or replicate samples, measurements or photographs. This provision does not require NMED to give advance notice of on-site inspections or to require NMED to submit to unreasonable delays while the regulated entity representative attempts to locate or bring to the site its own representative for the purposes of taking split or replicate samples. Nothing herein shall be construed to require NMED inspectors to provide sampling or measurement supplies, training or equipment to the regulated entity representative. A determination of "unreasonable delay" shall include but not be limited to consideration of the size and character of the facility, its geographic locations, and the availability of facility personnel or consultants.

- c. Upon request or if required by regulation, NMED shall provide a copy of the results of NMED's sampling, testing, measurement or photography to the regulated entity within a reasonable time after such results are in final form and in NMED's possession, provided that NMED may charge the requestor for the reasonable costs of reproducing such results and of providing them to the requestor.
5. Regulated Entity Interference with Inspection. If the regulated entity interferes with the inspection, the inspector should determine in accordance with Bureau or OGC guidance whether to terminate the inspection and seek an administrative search warrant or to continue the inspection. Examples of interference include but are not limited to the regulated entity's obstruction of or refusal to permit the inspection of certain areas; to obtain a facility representative to escort; to produce relevant records for inspection; to permit relevant photographs; to permit relevant testing, sampling, or monitoring; to allow certain physical examinations, or to allow any other reasonable investigative tool or request by the inspector. In addition, inspectors are authorized to refuse to allow any person whose conduct interferes with an inspection to accompany the inspector.
6. Closing Conference. If appropriate, the inspector may conduct at the conclusion of the inspection an exit conference. During this conference, and in accordance with the procedure of the inspector's Bureau, the inspector may, if appropriate: 1) summarize the preliminary inspection or field results, 2) state whether the potential or suspected violations specified in the entry conference remain under investigation, 3) identify additional violations identified during the inspection, 4) indicate that further review may result in identification of additional violations; 5) encourage the immediate abatement of any violation found during the inspection and, if possible, outline long-term abatement, 6) provide the best estimate as to when the NMED inspector expects to conclude its consideration of any potential or suspected violations, or issuance of a notice of citation(s) or violation, and 7) briefly respond to any questions or concerns that the regulated entity may have.
7. Inter-bureau Referrals. If an inspector identifies a potential violation in an area regulated by NMED that is not within the inspector's scope of duties, the inspector should contact the appropriate NMED bureau regarding the potential violation.

IV. TRADE SECRETS AND NATIONAL SECURITY.

- A. Entry Conference. At the commencement of an inspection, the regulated

entity may identify areas in the establishment which contain or which might reveal a trade secret, confidential business information, or compromise national security.

B. Handling Trade Secret or Confidential Business Information Claim(s). If the inspector has no clear reason to question such identification, in accordance with NMED's statutory authority, information obtained in such areas should be initially treated as and labeled "Confidential Business Information," "Trade Secret" or similar designation. A final determination of whether information is confidential business information or trade secret will be made by OGC.

C. Handling National Security Claim. In the case of a national security claim in which the facility will not allow NMED to enter an area for inspection, take photographs, or make copies of documents, the inspector should contact his or her supervisor to determine whether OGC should be consulted. If the facility will take pictures or copy the documents after a security review, the inspector should ask for the photographs or documents to be produced in a timely fashion.

V. **IMMINENT DANGER.**

Whenever and as soon as an inspector discovers that conditions or practices exist at a regulated entity that could reasonably be expected to cause death, serious harm to individuals, or serious harm to the environment, the inspector shall inform the regulated entity and affected employees of the imminent danger and the inspector's recommended action to be taken. Appropriate violations, citations and notices of proposed penalties may be issued with respect to an imminent danger even though the regulated entity takes steps to abate such danger.