

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**



ADMINISTRATIVE INSPECTION GUIDELINES

Filed: January 3, 2003

Effective: January 23, 2003

AUTHORITY: These guidelines are adopted in accordance with Chapter 42-35 pursuant to Chapter 42-17.1-2 (t)(2)(A) of the Rhode Island General Laws of 1956, as amended.

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

ADMINISTRATIVE INSPECTION GUIDELINES

TABLE OF CONTENTS

I. PURPOSE.....	1
II. AUTHORITY	1
III. ADMINISTRATIVE FINDINGS	1
IV. APPLICATION.....	2
V. DEFINITIONS.....	2
VI. REASONS FOR NEEDING ACCESS TO PRIVATE PROPERTY	5
VII. GENERAL INSPECTION PROTOCOL.....	5
VIII. PROTOCOL FOR CONSENSUAL INSPECTIONS	7
IX. PROTOCOL FOR WARRANT INSPECTIONS	8
X. PROTOCOL FOR WARRANT-LESS INSPECTIONS.....	12
XI. PROTOCOL FOR COLLECTING SAMPLES.....	15
XII. SEIZURE & DISPOSAL OF SEIZED PROPERTY	15
XIII. ADMINISTRATIVE INSPECTIONS & CRIMINAL CONDUCT	16
XIV. PENALTIES	16
XV. SEVERABILITY	17
XV. NO PRIVATE CAUSE OF ACTION	17
XVI. EFFECTIVE DATE.....	17

ADMINISTRATIVE INSPECTION GUIDELINES

I. PURPOSE

The purpose of these guidelines is to describe the general procedures for administrative inspections undertaken by employees of the Rhode Island Department of Environmental Management (herein after referred to as “DEM” or “the Department”). These guidelines are promulgated to balance the State’s interests in protecting the environment and enforcing environmental laws and regulations with reasonable private property interests guaranteed by the Federal and State Constitutions and to promote awareness of DEM regulations involving private property. More specifically, these guidelines:

- explain expectations of privacy recognized and protected by law;
- explain the reasons for and degree of urgency associated with different types of inspections;
- explain how inspections of private property must be conducted to ensure that the rights and legitimate privacy expectations of the owners and occupants are protected;
- promote public awareness of DEM programs; and
- explain some of DEM's duties and responsibilities under state law and regulations.

II. AUTHORITY

These guidelines are promulgated pursuant to Chapter 42-17.1-2(t)(2)(A), Environmental Management in accordance with Chapter 42-35, Administrative Procedures, of the Rhode Island General Laws of 1956, as amended.

III. ADMINISTRATIVE FINDINGS

The Department is charged by law to protect, preserve and restore Rhode Island's natural resources and environment. The Department implements this Legislative mandate through a wide variety of regulatory programs. As a public regulatory agency, the Department has a responsibility to carry out its statutory and regulatory functions in the spirit of public service. This means that the Department's interactions with members of the public, including regulated persons and entities, should be courteous, respectful and responsive and minimize unnecessary confrontation.

To the extent that the law authorizes the Department to conduct inspections on private property, such inspections should be conducted with respect for the rights and privacy of property owners, consistent with the protections afforded by the United States and Rhode Island Constitutions, as interpreted and applied by the courts. Inspections are the primary method available to DEM to enforce and determine compliance with environmental statutes and regulations administered by DEM. Both announced and unannounced inspections are vital compliance assurance tools in the Department's ongoing effort to protect the environment. Because some parties may not fully understand the need for such inspections and may perceive such inspections as an unreasonable interference with their rights as property owners and as operators of various business activities, DEM will use best efforts to explain the reasons for the inspection and to conduct its inspections within the scope of these Guidelines.

DEM is authorized to conduct both consensual and non-consensual administrative inspections. Non-consensual administrative inspections may be lawfully performed with or without an administrative inspection warrant. Whether an administrative inspection warrant is required in order to perform a lawful, non-consensual administrative inspection will depend on the facts and circumstances surrounding the site, facility or activity to be inspected. It is the intent of these Guidelines to educate DEM personnel regarding the proper procedures for performing lawful administrative inspections via consent, administrative inspection warrants and established methods for warrant-less, non-consensual inspections.

IV. APPLICATION

The terms and provisions of these guidelines shall be liberally construed to allow DEM to fulfill the requirements of state law, regulations, and policies. DEM reserves the right to modify these Guidelines at any time. All modifications to these Guidelines shall be consistent with applicable state and federal law. These guidelines:

- A. apply to all administrative inspections completed by DEM after the effective date under the authority of the environmental statutes and regulations that DEM administers;
- B. do not create any rights, duties, or obligations, implied or otherwise, in any third parties;
- C. are not to be interpreted as changing existing laws and regulations and do not limit or expand DEM's existing legal authority to conduct regulatory inspections;
- D. are not intended to limit or expand the rights or privacy expectations of property owners already specified by law or declared by the courts;
- E. do not address, or propose that a criminal search warrant shall be required for regulatory inspections; and
- F. shall not limit or restrict the legal methods or procedures by which DEM may seek to secure access to private property for the purpose of conducting inspections.

V. DEFINITIONS

For the purposes of these guidelines, the following terms shall have the following meanings:

"Administrative inspection" shall mean any inspection, independent of a criminal investigation, that is conducted for the purpose of determining compliance with applicable federal or state laws and regulations. Administrative inspections may involve the examination of real or personal property, equipment, buildings, records, products, by-products, wastes, processes, activities, environmental conditions (i.e. air, soil and water quality), personnel or other property or activities. Administrative inspections may include, but are not limited to, the following activities: observation, sampling, measuring, photographing, coring, drilling and excavating; reviewing and copying records; and seizing equipment, products, materials or records. Administrative inspections may be performed by Department personnel or by private agents or consultants acting on the Department's behalf. The scope of an administrative inspection may be limited by consent, the terms of an administrative inspection warrant or other court order, or by circumstances surrounding a warrant-less inspection.

“Administrative inspection warrant” shall mean an order issued by a justice of the Rhode Island District or Superior Court, or such other magistrate as may be allowed by law, authorizing the Department to enter an otherwise constitutionally protected area to inspect, search and/or seize property or evidence of a possible violation of a law or regulation administered by the Department as may be described therein. An administrative inspection warrant may issue where:

- A. Sufficient evidence of a possible violation of a law or regulation administered by DEM or a potential threat to public health, safety, welfare or the environment exists to establish administrative probable cause; or
- B. The Department proposes to conduct the inspection in accordance with a neutral inspection scheme.

“Administrative probable cause” shall mean the standard used by the Courts to determine whether a proposed administrative inspection meets the constitutional mandate of reasonableness necessary for the issuance of an administrative inspection warrant. Administrative probable cause is not a standard that DEM must use to determine if it may or should conduct an inspection in situations where an administrative inspection warrant is not required (e.g. consensual inspections or inspections of areas that are not constitutionally protected). The standard for administrative probable cause is a more lenient standard than that which is required to establish criminal probable cause. Whether an administrative inspection is reasonable is determined by weighing the government’s interest in regulatory compliance against constitutionally protected privacy interests. Where an inspection: (i) is a reasonable method under the circumstances to evaluate compliance with laws or regulations designed to protect public health, safety, welfare or the environment; (ii) serves a valid public interest/reasonable governmental interest; and (iii) satisfies reasonable legislative or administrative standards for conducting inspections, then administrative probable cause exists for the issuance of an administrative inspection warrant.

"Closely regulated industry" means a business or business-related activity, facility, structure or property for which a permit, license or other approval has been issued by DEM, or a business or business-related activity, facility, structure or property that is otherwise subject to pervasive governmental supervision such that any person who chooses to engage in that business or activity is deemed to have voluntarily subjected him/herself to full regulation.

“Consent” means authorization given to conduct an administrative inspection that is:

- A. Informed as to the location, nature, scope or objective of the proposed administrative inspection;
- B. Voluntary;
- C. Given by an owner, operator or other person of suitable age, discretion and apparent authority to give consent to the inspection;
- D. Subject to any specified limitations of scope;
- E. Revocable at any time with or without justification, unless given as a part of an application for a permit, license or other approval issued by DEM.

“Criminal search warrant,” means an order issued in accordance with R.I. Gen. Laws ch. 12-5 or §8-3-6 to investigate criminal conduct.

“Curtilage” means that area of land and/or buildings, regardless of vegetative characteristics, fencing or signage, surrounding a home that is so intimately tied to the home and its domestic activities that it should be treated as part of the home itself.

“Department,” “Director” or “DEM” means the Rhode Island Department of Environmental Management.

“Inventory,” means the process of identifying and listing property, items or samples that are seized or removed from a site during the course of an administrative inspection and/or the list that results from that process.

“Neutral inspection scheme,” shall refer to a plan for inspecting a group of similarly situated sites, facilities or activities that have been identified for inspection based on a set of neutral criteria. The inspection scheme will include objectives for the inspections that are rationally related to assuring compliance with laws or regulations and that do not target a specific individual, facility or property.

“Person,” means any individual, corporation, limited partnership, partnership, trust, joint stock company, syndicate, governmental entity, quasi-governmental corporation or other incorporated or unincorporated association or any subdivision thereof.

“Plain view,” refers to any object, condition, activity or other evidence of a violation of law, regulation, permit, license or order (civil or criminal) that is visible by an inspector who is lawfully in position to make his/her observation.

“Sample,” means the process of taking a portion of a larger quantity of material for analysis.

“Split sample,” means taking multiple samples of the same material or dividing a sample for independent analysis by two or more parties involved in an administrative inspection.

“Warrant application,” means the formal written petition and supporting affidavit presented to a neutral magistrate or judge to request the issuance of an administrative inspection warrant.

VI. REASONS FOR NEEDING ACCESS TO PRIVATE PROPERTY

Apart from criminal investigations, inspections by the Department can be categorized as follows:

- A. Emergency Situations include those situations where there is reasonable evidence indicating that an imminent or serious threat to the environment or public health, safety, or welfare exists so as to warrant investigation, remediation or other immediate response by the Department. Examples include response to complaints of significant odors, oil spills, chemical releases or alterations to the environment that have or are likely to result in detrimental impacts or irreparable harm to the resource.
- B. Compliance Monitoring includes situations where a structure or activity on the property is subject to statutory or regulatory authority by the Department, and the Department, in response to a complaint or in the course of a regular compliance inspection program, needs to ensure compliance, but such need is not of an emergency situation. This will include facilities or activities where the Department has permitting or licensing authority (e.g., discharges, emissions, waste management/disposal, alterations of freshwater wetlands, or construction or repair of individual sewage disposal systems (“ISDS”)) as well as activities for which no individual permit is required but which are subject to environmental statutes and Department regulations (e.g., management of hazardous wastes or air emission controls).
- C. Field Activities such as sampling, monitoring and surveying for reasons other than responding to an emergency situation or ensuring compliance with regulatory requirements but that support the Department’s statutory mandate to evaluate and protect the natural resources of the State of Rhode Island. Examples include environmental assessments of hazardous contamination, water quality assessments, restoration projects, fish and wildlife surveys, forestry surveys, pollution prevention projects, freshwater wetland assessments, ISDS and educational activities.

VII. GENERAL INSPECTION PROTOCOL

The following inspection protocols should be followed to the maximum extent practicable for all inspections whether conducted after obtaining consent, under an administrative inspection warrant or other court order, or pursuant to a legal, warrant-less inspection as described in these Guidelines.

- A. Prior to entering the site an inspector should prepare for the inspection by: establishing the scope and objectives of the inspection; coordinating inspection activities with other regulatory or enforcement personnel as necessary; developing an understanding of the technical, regulatory, and enforcement aspects of the site or facility; developing a plan or strategy for conducting an inspection consistent with inspection objectives; and determining the health and safety requirements and equipment necessary for the inspection.

- B. Inspectors should only enter private property (including driveways) in compliance with these Guidelines and applicable law.
- C. When in the field, the inspector should make a reasonable effort to locate an owner, operator or other person having apparent authority or control of the property in order to identify himself/herself, explain the purpose, scope and legal authority for the inspection. "Reasonable efforts" shall be construed to mean those efforts that can be reasonably made at the time of the inspection such as knocking on doors at the site or approaching workers or people around the site. Reasonable efforts shall not include off-site research such as reviewing land evidence, tax or court records or entering a dwelling.
- D. An inspector should never agree to any conditions limiting an inspection or sign any documents without first obtaining prior authorization from a supervisor.
- E. While on-site inspectors should be constantly vigilant and observant. All observations made while lawfully on site (e.g. while accessing the property, requesting permission to inspect, conducting an unrelated site visit or inspection, or while leaving the property after permission to inspect has been denied), are entirely legal and should be carefully noted for the file in the event that they are needed to support the issuance of an administrative inspection warrant or other legal action to gain access to the site. (*See Section X. E. regarding plain view violations.*)
- F. If the person exercising control over the property denies access to the property, then the inspector should not attempt to continue the inspection without first contacting the office for further instructions and/or assistance. If a situation arises on-site that threatens the safety of an inspector, then all inspectors should leave the site and immediately contact the office. If access is denied in an emergency situation (*see Section X. B.*) and the inspector believes that an imminent or serious threat exists to public health, welfare or the environment, then the inspector should contact fire and/or police authorities for their assistance in stabilizing the situation. If access is denied in a non-emergency situation, then the inspector may only continue with an on-site inspection if an alternative basis for a warrant-less inspection exists. (*See Sections X. A. and C.*) Where an inspector is unable to obtain lawful access to a site, the inspector may make observations from adjacent public areas, open fields) or from abutting private property, provided the inspector has permission from the owner, operator or person having apparent authority or control of the abutting property. (*See Section X. D.*) Under some environmental statutes denying access for inspections is a criminal offense. In situations involving those statutes, the DEM Office of Criminal Investigation will be advised of the situation.
- G. If no owner, operator or other person having apparent authority or control over the property is present, the inspector should leave a calling card identifying the inspector and, when possible, should provide other information explaining the purpose and scope of the investigation.

VIII. PROTOCOL FOR CONSENSUAL INSPECTIONS

- A. When seeking consent to perform an administrative inspection the inspector must locate an owner, operator or other person having apparent authority or control of the property in order to identify himself/herself, explain the purpose, scope and legal authority for the inspection and request consent for the inspection. An inspector may enter onto private property and use reasonable efforts to locate a person from whom to obtain consent for the inspections. Consent need not be sought where other lawful means for access to the property in question exist under these Guidelines (*see Sections IX and X, herein*).
- B. Consent for inspections relating to an activity requiring a permit, license or other approval from the Department may be required and obtained by the Department in writing as part of the application process. Consent that is given as part of an application process may not be revoked on-site at the time of the inspection and may only be revoked by the applicant in writing by withdrawing the underlying application. The presence or absence of consent relating to an application shall not impair the Department's ability to perform inspections in accordance with any other section of these Guidelines. (*E.g. Section IX, administrative inspection warrants or Section X.B. closely regulated industries*).
- C. On occasion, person(s) may agree to consent to an administrative inspection if the inspector will agree to conditions or limitations on the nature and extent of the proposed inspection. In the past, inspectors have been asked to sign liability waivers and other legal documents as a precondition to consent to perform an inspection. An inspector should never agree to any conditions or sign any documents without first obtaining prior authorization from a supervisor. The Department may, on a case-by-case basis, accommodate reasonable requests for conditions or limitations in order to secure consent for an inspection provided that the requests will in no way jeopardize the quality or effectiveness of the inspection.
- D. The scope of a consensual inspection may not exceed the scope of the consent that was given. Consent may be revoked at any time during the inspection without justification, unless the consent was given as part of an application process (*see Paragraph B., above*). Absent discovery of evidence or conditions during the consented to inspection that give rise to a lawful warrant-less inspection pursuant to Section X of these Guidelines, an inspector may not exceed the scope of the consent given or continue with any inspection after consent has been revoked.
- E. If consent to perform an administrative inspection is denied, the inspector may make observations from adjacent public areas, open fields (*see Section X, herein*) or from abutting private property, provided the inspector has permission from the owner, operator or other person having apparent authority or control over such property.
- F. Unless the inspector requires additional time for research or consultation, prior to leaving the premises the inspector should advise the person that gave consent for the inspection of the inspector's preliminary findings and of potential follow-up actions by DEM. If violations

are discovered, then the inspector should explain the applicable legal requirements and inform the consenting party that the violations must be corrected. Upon request, the inspector may provide general guidance regarding the correction of violations; however, inspectors should not require or recommend specific methods, procedures or corrective actions. In the event that additional assistance, advice or information is requested, the inspector should direct that person to the appropriate compliance assistance or permitting office. Any preliminary findings, recommendations or other assistance offered by the inspector should be recorded in his/her inspection report.

- G. If no owner, operator or other person having apparent authority or control over the property is present, the inspector should leave a calling card identifying the inspector and, when possible, should provide other information explaining the purpose and scope of the investigation.

IX. PROTOCOL FOR WARRANT INSPECTIONS

Absent consent to conduct an inspection, all other administrative inspections shall require the issuance of an administrative inspection warrant or other legal process such as an injunction for access *unless* the inspection falls within one of the established exceptions for permissible, warrant-less searches described in Section X of these Guidelines. Conducting an inspection pursuant to a valid administrative inspection warrant will help insure that evidence gathered during the inspection is admissible in subsequent legal proceedings. Inspections conducted pursuant to a court-issued administrative inspection warrant should be conducted in accordance with the general protocol for administrative inspections to the extent practicable and consistent with the nature and terms of the administrative inspection warrant.

- A. Administrative inspection warrants can be used to obtain access to properties for a variety of reasons, including but not limited to situations where:
1. Consent for the inspection has been requested and either denied or granted subject to unacceptable conditions;
 2. The Department seeks to maintain the element of surprise;
 3. The Department wants to avoid the delay associated with a refusal to allow a consensual inspection;
 4. Multiple site visits would be inconvenient (i.e. the site is distant or difficult to reach);
 5. Past experience indicates that consent for the inspection is likely to be denied;
 6. The timing of the inspection is important to insure that certain conditions will exist or remain unaltered prior to the inspection; or
 7. The Department is unable to identify, locate or get a response from a party to consent to an administrative inspection.
- B. The requirement to obtain an administrative inspection warrant does not prohibit the Department from:

1. Applying for an administrative inspection warrant under circumstances where a warrant may not actually be required;
 2. Using alternative means to gain access to property or records, such as injunctive relief, or other court process; or
 3. Seeking an administrative warrant to inspect a property that may also be the target of a criminal investigation, *provided that* the Department has a valid and independent administrative basis for the issuance of an administrative inspection warrant.
- C. Preparing an Application for an Administrative Inspection Warrant - An application for an administrative inspection warrant includes two components: the application describing the basis for and scope of the intended search and one or more sworn affidavits detailing the evidence, observations or other basis (the administrative probable cause) justifying the issuance of the warrant.
1. The Warrant Application - The application for an administrative inspection warrant must be in writing and signed by the applicant. Because many Rhode Island judges or justices may be unfamiliar with DEM's authority to conduct inspections and the programs that the inspections are intended to support, it will be important for the application to educate the court on some of the fundamental aspects of the program. (*See "Appendix A," Warrant Application Form.*) The application should include the following:
 - a) The statutes or regulations authorizing the inspection;
 - b) A brief description of the neutral inspection program or regulatory scheme under which the inspection will be performed;
 - c) The name and affiliation of the owner, operator or occupant of the place to be inspected, if known to the affiant;
 - d) A description, set forth with particularity, detailing:
 - (1) the address, place, property, facility or structures to be inspected;
 - (2) the nature, scope, and purpose of the inspection to be performed;
 - (3) the conditions, items, materials, processes, property, records, information or equipment to be inspected;
 - (4) the type and kind of samples, records or other items to be taken or seized;
 - e) The hours of the day during which the administrative inspection warrant may be executed and the need, if any, for forcible entry. In general, a warrant must be executed during the daytime unless good cause is shown for execution at any time of the day or night;
 - f) The timeframe within which the administrative inspection warrant will be executed and/or returned to the issuing authority. The default timeframe is ten days, unless good cause is shown for a longer period;
- D. The Supporting Affidavit - The warrant application must be accompanied by one or more sworn affidavits detailing the observations, evidence or other circumstances describing the

administrative probable cause for the issuance of the administrative inspection warrant. (*See "Appendix B," Form Affidavit.*) The affidavit must identify:

1. The name, address, title and affiliation of the inspector-affiant;
 2. A description of the affiant's duties, experience and familiarity with the area to be inspected and/or with the subject matter of the proposed inspection;
 3. A description of the affiant's relevant education, professional certifications and/or job training relating to the subject matter of the proposed inspection;
 4. A description of the observations, analytical results or other evidence or facts within the affiant's own personal knowledge that support the need for the inspection;
 5. A description of any statements, observations or other information not within the affiant's own personal knowledge that support the need for the inspection accompanied by sufficient information to establish the reliability of the source of that information;
- E. The Warrant - The administrative inspection warrant shall be prepared by the applicant and submitted to the judge or justice along with the application and supporting affidavit(s). (*See "Appendix C," Warrant Form.*) The warrant should include:
1. The place to be searched or inspected;
 2. The items, materials, records, information or other property or articles to be searched for and the conditions, processes, equipment to be inspected;
 3. The name and affiliation of the owner, operator or occupant of the place to be inspected, if known to the affiant;
 4. The time within which the warrant will be executed and returned and the time of day during which the warrant may be executed;
 5. A return of service.

F. Presenting the Warrant Application

1. In order to secure an administrative inspection warrant, the inspector must present the judge or magistrate with sufficient evidence to satisfy the standard of administrative probable cause as defined herein.
2. In evaluating an application for an administrative inspection warrant, the magistrate or judge will apply an objective legal balancing test weighing the privacy interest of the person in question against the public interest justifying the intrusion and need for the search. The magistrate or judge will issue an administrative inspection warrant if he/she believes that a valid public interest or a reasonable administrative interest justifies the intrusion contemplated by the inspection. This balancing test generally requires the issuing magistrate to take judicial notice of the state's environmental laws and goals of the legislature in protecting the public health, safety and the environment.
3. An administrative inspection warrant, as defined herein, may be issued based on evidence of a condition or possible violation, or based on the existence of a neutral inspection

scheme. However, individualized suspicion of violation of a rule, regulation or permit condition or specific knowledge of a condition at a particular location is not required.

G. Executing the Administrative Inspection Warrant - The administrative inspection warrant must be executed or served in accordance with the requirements set forth in the warrant as to time, place, manner and scope. When required by the Court, a copy of the warrant and all affidavits supporting the warrant application must be served on the owner, operator or occupant of the place being inspected. If samples are taken, split samples shall be provided when practicable to do so if they are requested by the owner, operator or occupant. (*See Section XI on Sampling.*) The person(s) executing the administrative inspection warrant must keep a detailed, written inventory of all samples taken, split samples provided, records taken or duplicated and other property or items seized during the inspection.

1. The administrative inspection warrant shall be executed by an authorized DEM inspector who shall state his purpose and present his/her credentials to the owner, operator or occupant of the premises to be inspected. The inspector executing the warrant may be assisted by other DEM personnel, agents or contractors;
2. Unless otherwise specifically provided in the administrative inspection warrant, no warrant shall be executed by forcible entry, before dawn or after dark, or outside of DEM's regular business hours. In those situations where the execution of the administrative inspection warrant becomes, or is anticipated to become hostile or confrontational, the inspector should discuss the situation with his/her supervisor. In some cases it may be necessary to request the assistance of DEM's Office of Criminal Investigation or State or local police;
3. The administrative inspection warrant shall be executed as soon as is practicable after the issuance of the warrant and shall be completed with reasonable promptness and in a reasonable manner;

H. Return of the Administrative Inspection Warrant - The original administrative inspection warrant, affidavit and application must be returned to the clerk of the issuing court within ten (10) days (unless a longer or shorter time is specified in the warrant). The administrative inspection warrant itself must be signed and dated by the person who executed the warrant and accompanied by an inventory of all property, records, samples ... etc. taken during the execution of the warrant. When required by the Court, the return should identify the name and affiliation of the person upon whom the warrant and supporting affidavits were served when known.

I. Alternatives to Administrative Inspection Warrants - DEM reserves the right to petition the Courts for access to property by any method that is the functional equivalent to the process to obtain an administrative inspection warrant. Such court ordered access is usually sought in connection with matters that are in litigation and is generally subject to a full hearing before the Court on the merits of the Department's request for access. Such alternative, court-

ordered access may be pursued at the discretion of the Director as circumstances may require.

X. PROTOCOL FOR WARRANT-LESS INSPECTIONS

In addition to those situations where consent to inspect is properly obtained from an appropriate party, there are certain other limited circumstances where an inspection may be conducted without seeking an administrative inspection warrant or other court ordered access. These circumstances include inspections of closely regulated industries, emergencies, open fields, and conditions that are in plain view. In some instances the scope of the inspection that is allowed under these circumstances will be more limited than that which might be agreed to by consent or approved through an administrative inspection warrant. Warrant-less inspections should be conducted in accordance with Section VII of these Guidelines to the extent practicable and consistent with the circumstances under which the inspection is conducted. *Note:* Inspectors must be aware that performing an unlawful warrant-less inspection could prevent any evidence gathered during the inspection or any evidence that is later gathered as a result of information learned during the unlawful inspection from being used in any legal proceedings.

- A. Closely Regulated Industries - Closely regulated industries are subject to warrant-less administrative inspections without consent, court order or prior notification. Inspections of closely regulated industries should be limited in scope to those areas, structures, activities, conditions, items, materials, processes, property, records, information or equipment covered by DEM's license, permit or controlling environmental regulations. Industries, businesses or activities that are not closely regulated may still be subject to warrant-less inspections under one of the other categories of warrant-less inspections discussed in this Section (*e.g. the Open Fields Doctrine, below*). Some examples of closely regulated industries include, but are not limited to:
 1. Businesses or other activities that have obtained or are required to obtain a permit, license, or other approval from DEM that is necessary for them to conduct their activity, such as a wastewater discharge permit; air permit; hazardous waste treatment, storage or disposal permit; or solid waste license.
 2. Businesses that are authorized to operate without a permit, license, or other approval from DEM provided that their operations comply with applicable DEM rules and regulations, such as hazardous waste generators or facilities with equipment that produces air pollutants.
- B. Emergency Situations - An inspector may enter and inspect private property without prior notification, an administrative inspection warrant or consent when there is reason to believe that there are emergency conditions that warrant an immediate and reasonable administrative inspection. Where practicable, warrant-less inspections in emergency situations should be coordinated with other local, state or federal emergency response professionals that are on-scene (*e.g. police, fire, and rescue personnel; U.S. Coast Guard; U.S. Environmental*

Protection Agency (“EPA”) or Federal Emergency Management Agency (“FEMA”), or on-scene incident command personnel). These emergency conditions take two basic forms. In either case, the inspector’s right to conduct a warrant-less inspection in association with an emergency terminates when the emergency nature of the situation is resolved insofar as DEM’s legislative mandates and regulatory requirements are concerned.

1. **Environmental Emergencies** - environmental emergencies arise when there is an imminent or serious threat to the environment, public health, safety, or welfare. In determining whether an environmental emergency exists, the inspector should consider:
 - a) the degree of urgency or immediacy involved;
 - b) the severity of the threat to public health, welfare, safety or the environment;
 - c) the time that would be required to contact the office for further instruction or to obtain an administrative inspection warrant or criminal search warrant;
 - d) whether the possibility of danger exists at the site;
 2. **Investigational Emergencies** - investigational emergencies arise when two conditions exist: (i) there is administrative probable cause that a violation exists; and (ii) the circumstances are such that if the inspector does not act immediately evidence of the violation will be lost (also known as “exigent circumstances”). In determining whether an investigational emergency exists, the inspector should consider:
 - a) whether evidence is about to be removed, destroyed or lost;
 - b) the ready mobility, destructibility or perishability of the evidence;
 - c) whether information exists indicating the persons responsible for the alleged violation know the Department is aware of their activities; and
 - d) the time that would be required to contact the office for further instruction or to obtain an administrative inspection warrant or criminal search warrant.
- C. **Open Fields Doctrine** - The open fields doctrine permits the examination of property that is not within the curtilage of a home. The open fields doctrine extends not only to open, wooded and undeveloped areas of property, but also extends to other areas of developed property (residential and commercial) where there are no manifest expectations of privacy that society would consider to be reasonable. The open fields doctrine can even apply to the interiors of buildings where no expectations of privacy are evident (e.g. an unsecured garage, barn, shed or abandoned commercial facility).

1. In evaluating whether a property falls within the curtilage of a home or in an open field, factors to be considered include, but are not limited to:

- a) the proximity of the area to the home;
- b) whether the area is included within an enclosure surrounding the home;
- c) the nature of the use(s) to which the area is reasonably subject;
- d) the steps taken by the resident to protect the area from observation by other persons (e.g. neighbors or passers-by);
- e) other conditions appurtenant to the home that evidence reasonable expectations of privacy.

These factors represent subjective considerations, not objective black-and-white rules. For example, the mere presence of a fenced enclosure around a dwelling does not mean that everything within the enclosure constitutes curtilage. On the other hand, the absence of an enclosure, especially on a small urban-suburban residential lot, does not automatically mean that all or even part of the lot can be examined under this exception. If an inspector is in doubt about the application of the open fields doctrine to a specific property, the inspector should carefully record information relevant to the above-referenced factors and contact his/her supervisor for further instructions.

2. Although the open fields doctrine allows for on-site examination of areas outside the curtilage of a home, the open fields doctrine does not open the property to the full array of administrative inspection activities as that term is defined in these Guidelines. Rather, open field examinations are limited to non-invasive, on-site “sensory” observations.

D. Plain View Doctrine - The plain view doctrine permits an inspector to observe property, conditions or activities that are visible to the inspector from any place that he or she has a legal right to be. The plain view doctrine further allows an inspector to seize objects that are in plain view if the inspector has lawful access to the area where the objects are located and the objects are immediately recognizable to the inspector as evidence of an administrative violation. Observations made or evidence seized under the plain view doctrine may be used:

1. To obtain an administrative inspection warrant to enter the property;
2. As evidence in an administrative or civil proceeding;
3. As administrative probable cause for an emergency inspection (*see Subsection E., above*);
4. As administrative probable cause to exceed the stated scope of an inspection being conducted under a warrant or by consent for the limited purpose of inspecting the condition or activity observed.

E. No Other Constitutional Warrant Requirement - Non-consensual, administrative warrant-less inspections are also allowable at any other time that a warrant is not otherwise required under the United States or Rhode Island Constitutions for criminal or administrative searches.

XI. PROTOCOL FOR COLLECTING SAMPLES

Samples of air, water, soils or other materials may be taken for analysis if within the scope of the consent given for the administrative inspection, the terms of the administrative inspection warrant or the terms of a court order. Samples may also be taken as part of a lawful warrant-less inspection of a closely regulated industry or as part of an emergency situation where sampling is reasonably related to abating the emergency. The ability to take samples as part of an open fields or plain view warrant-less inspection will be dependant on the circumstances surrounding the inspection and inspectors should consult with a supervisor before taking samples during these types of inspections. When sampling is performed as part of an administrative inspection, DEM shall, upon request, provide split samples to the party or entity that is the subject of the search, provided that the conditions at the time of the sampling, the amount of material available to be sampled and the safety of DEM employees, are conducive to the request. If split samples are provided they will be turned over to the requesting party at the time that the sample is taken. DEM may require the party receiving the split samples to sign a release acknowledging their receipt of the samples and their responsibility to properly handle, store, and dispose of the sample materials. DEM may refuse to provide split samples if the inspector reasonably believes that: (1) the samples will not be properly, handled, stored or disposed of, (2) splitting the sample will not allow DEM to obtain the required amount of material for analysis, or (3) the time required to collect the split samples or the conditions under which the samples are being collected pose a threat to his/her safety and well being.

XII. SEIZURE & DISPOSAL OF SEIZED PROPERTY

Any property seized as part of an administrative inspection conducted pursuant to these Guidelines shall be logged into custody, and safely kept by the person effecting the seizure. The Department may retain seized evidence for that time which is reasonably necessary to prosecute any administrative actions or hearings. In the case of records, including computerized or other electronic records, the Department may retain the records or records storage and retrieval devices for a time reasonably necessary for the Department to inventory and duplicate the records. Property will be returned to the owner, if possible, once the use by the Department has been completed. Seized property such as wastes or other materials that present an environmental hazard may be confiscated and disposed of by the Department.

XIII. ADMINISTRATIVE INSPECTIONS & CRIMINAL CONDUCT

It is unlawful and unconstitutional to employ an administrative inspection warrant as a means of conducting investigation into criminal conduct. However, as long as there is an independent and objective need for an administrative inspection (e.g. to enforce administrative regulations), the existence of or potential for a criminal investigation should not prohibit the issuance of an administrative inspection warrant or the performance of a lawful consensual or warrant-less administrative inspection. The discovery or existence of incriminating evidence during a lawfully conducted administrative inspection is subject to the following conditions:

- A. If an administrative inspection warrant was validly issued and the subsequent inspection discloses evidence of criminal activity, then the evidence may be seized and used in a criminal prosecution;
- B. If an inspector discovers evidence of criminal activity during an administrative inspection, he or she may complete the inspection and report the discovery to the appropriate authorities for further investigation under a criminal search warrant.

If the inspector develops suspicion of criminal conduct during the course of the inspection, the inspector should complete his/her administrative inspection and immediately notify a supervisor of his/her concerns. All information of suspected criminal conduct should be forwarded to the Department's Office of Criminal Investigation. The DEM Office of Criminal Investigation in coordination with the Department of the Attorney General will determine if a criminal violation of the law has taken place.

XIV. PENALTIES

Any willful, and unjustified refusal of right of entry and inspection to Department personnel acting pursuant to an administrative inspection warrant, shall constitute a contempt of court and shall subject the refusing party to sanctions, which in the issuing court's discretion may result in up to six (6) months imprisonment and/or a monetary fine up to ten thousand dollars (\$10,000), per refusal pursuant to R.I. Gen. Laws § 42-17.1-2(t)(2)(D). In the event that a person attempts to prevent or obstruct the performance of an inspection authorized pursuant to a court-issued administrative inspection warrant or threatens the safety of the inspector, the inspector should immediately contact a supervisor and/or DEM's Office of Criminal Investigations, state or local police for assistance in executing the warrant. An inspector should not attempt to forcibly compel a person to submit to execution of an administrative inspection warrant without the assistance of law enforcement personnel.

XV. SEVERABILITY

If any provision of these Guidelines or application thereof to any person, place, or circumstance is held invalid by a court of competent jurisdiction, the validity of the remainder of the Guidelines shall not be affected thereby.

XVI. NO PRIVATE CAUSE OF ACTION

This document constitutes internal guidance for DEM staff engaged in the performance of administrative inspections. Any failure to comply with these Guidelines by DEM personnel shall be handled as an internal personnel matter. Nothing in this document shall be construed to create a private cause of action against the State of Rhode Island, DEM or its management or employees as a result of any failure to comply with these Guidelines.

XVII. EFFECTIVE DATE

The foregoing "Guidelines for Administrative Inspections", after due notice, are hereby adopted and filed with the Secretary of State this _____ day of January, 2003 to become effective twenty (20) days thereafter, in accordance with the provisions of Chapters 42-35 and 42-17.1-2 (t) of the General Laws of Rhode Island of 1956, as amended.

Jan Reitsma, Director
Department of Environmental Management

Notice given on: November 14, 2002

Public Hearing held: December 16, 2002

Filing Date: January 3, 2003

Effective Date: January 23, 2003