

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	STATUS: Effective	POLICY NUMBER: MP-009-NPD	
<b>AGENCY NONRULE POLICY DOCUMENT</b>  SUBJECT: Inspection Right of Access	AUTHORIZED: Bruno L. Pigott, Commissioner		
	SUPERSEDES: New	ISSUING OFFICE(S): Office of Legal Counsel Offices of Air, Land, and Water Quality	
	EFFECTIVE DATE: December 13, 2019	RENEWED/REVISED:  N/A	

**Disclaimer:** This Nonrule Policy Document (NPD) is being established by the Indiana Department of Environmental Management (IDEM) consistent with its authority under IC 13-14-1-11.5. It is intended solely to provide guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate State Environmental Board, and may be put into effect by IDEM 30 days afterward. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM also will submit the policy to the Indiana Register for publication.

### 1.0. PURPOSE

This purpose of this policy is to recite the agency's authority for its inspectors, while conducting agency business, when gaining access to private or public property for inspection. It serves to notify the regulated community, including site owners, operators, and their representatives, of agency staff's right of access and the scope of that right, pursuant to Ind. Code § 13-14-2-2.

### 2.0. SCOPE

This policy applies to agency staff conducting agency business during an inspection of private or public property, including a site or other areas related to a site or its operations, pursuant to Ind. Code § 13-14-2-2. There are other statutes governing access under certain circumstances for which some or all of the guidance provided hereunder may not apply. See Ind. Code § 13-23-13-12; Ind. Code § 13-24-1-6; Ind. Code § 13-25-4-6; Ind. Code § 13-20-13-6; Ind. Code § 13-18-3-9.

### 3.0. SUMMARY

This policy discusses the scope of agency staff's right to gain access to private or public property, including a site or other areas related to a site when conducting agency business, including inspections, pursuant to Ind. Code § 13-14-2-2. This policy does not contemplate agency staff site visits made at the request of an owner or operator or otherwise coordinated for purposes other than an inspection.

#### 4.0. DEFINITIONS

- 4.1. “Agency” – The Indiana Department of Environmental Management (IDEM).
- 4.2. “Agency staff” – Any employee or representative of the agency. This includes full or part time employees, temporary employees, contractors hired by the agency to conduct agency business, and interns.
- 4.3. “Agency business” – Actions conducted onsite by agency staff at the time of an inspection of private or public property, including but not limited to routine compliance inspections and/or compliance investigation and surveys.
- 4.4. “Credential” – A document issued by the agency stating that a particular agency staff member is authorized under IC 13-14-2-2 to enter upon any private or public property to inspect for and investigate possible violations of laws under Title 13 of the Indiana Code, and to view confidential business information.
- 4.5. “Employee ID” – The State Employee Identification Badge issued by the Indiana Department of Administration.
- 4.6. “No Liability Waiver” – Any release, agreement, assumption of liability, or similar document in which the signor disclaims the right to seek liability damages from the persons or entities named in the document.
- 4.7. “OLC” – IDEM’s Office of Legal Counsel.
- 4.8. “OSHA” – Occupational Safety and Health Administration.
- 4.9. “Site” – Property subject to inspection by the agency pursuant to Ind. Code § 13-14-2-2.
- 4.10. “Supervisor” – The agency manager to whom agency staff reports.

#### 5.0. ROLES

- 5.1. The commissioner (or designee) will establish an approved policy for agency staff to follow in accessing facilities for performing agency business.
- 5.2. Assistant commissioners (or designees) will:
  - A. Ensure that any standard operating procedures (SOPs) developed in their respective program area(s) are consistent with this policy.
  - B. Ensure that agency staff and supervisors in their respective program area(s) follow related policies and standard operating procedures.
  - C. Provide each program staff conducting agency business at facilities with a copy of an Inspection Information Letter explaining the agency’s authority and policies.
- 5.3. Supervisory staff will:

- A. Identify those staff that are responsible for conducting agency business at a facility and need to obtain Inspector Credentials from State Personnel Department (SPD) – IDEM Human Resources.
  - B. Ensure agency staff conducting agency business at a facility have and maintain Inspector Credentials issued by the agency and/or U.S. EPA.
  - C. Ensure agency staff conducting agency business at a facility have executed a Confidentiality Agreement for State Employees 329 IAC 6.1, 327 IAC 12.1 or 326 IAC 17.1.
  - D. Ensure that agency staff follow related policies and standard operating procedures.
  - E. Discuss with agency staff whether to pursue an enforcement action when agency staff are denied entry at a site.
- 5.4. Agency staff conducting agency business at a site will:
- A. Understand the right of access statutes, rules, and procedures.
  - B. Execute a Confidentiality Agreement for State Employees 329 IAC 6.1, 327 IAC 12.1 or 326 IAC 17.1.
  - C. Maintain Inspector Credentials issued by the agency and/or U.S. EPA.
  - D. Show their credential or Employee ID.
  - E. Maintain a copy of an Inspection Information Letter explaining the agency's authority and policies.
  - F. Refer any conflicts resulting from implementation of this policy to the appropriate supervisory staff and/or OLC as appropriate.
  - G. Review and comply with this policy.
- 5.5. State Personnel Department (SPD) – IDEM Human Resources
- A. Provide Inspector Credentials for all agency staff conducting agency business at a facility
  - B. Maintain a copy of executed a Confidentiality Agreement for each IDEM employee.

## 6.0. POLICY

- 6.1. **Pursuant to Ind. Code § 13-14-2-2, agency staff have the authority to enter public or private property to perform an inspection upon the presentation of proper credentials.** Upon arriving at a site to perform an inspection, agency staff shall present their credential at the first possible opportunity to staff at the site. Agency staff will record the name, title, email, and phone number of the person giving access for the inspection. If the circumstances lead the agency staff member to believe that the company representative does not have the authority to control access, they shall further inquire into that person's authority and, if warranted, present their credential to a company representative with such authority.
- 6.2. If asked to provide a second form of identification, agency staff may provide their Employee ID.
- 6.3. Agency staff may only sign visitor logs or passes that do not impose legal conditions, such as a No Liability Waiver, on the visit.

- 6.4. Under no circumstances are agency staff allowed to sign or otherwise agree to a No Liability Waiver or confidentiality agreement as a precondition to the right to enter and inspect the site. If a company representative preconditions entry on signing a No Liability Waiver or confidentiality agreement, agency staff may do any or all of the following:
- A. Explain to the company representative that Indiana law provides for their right to inspect upon the showing of proper credentials and nothing more and that the agency does **not** allow its agency staff to sign a No Liability Waiver.
  - B. Explain to the company representative that Indiana law provides for their right to claim information as confidential under Ind. Code § 5-14-3-4 and that the agency does not allow its agency staff to sign a confidentiality agreement.
  - C. Inform the company representative that a refusal to allow entry for not signing a No Liability Waiver or confidentiality agreement shall constitute a denial of entry, which is a violation subject to agency enforcement action.
  - D. Provide the company representative with a copy of this NPD and/or the Inspection Information Letter explaining the agency's authority and policies for their ease of reference.
- 6.5. Agency staff shall not, under any circumstance, allow their credentials to be retained or photocopied by a representative at a site.
- 6.6. If the company representative denies entry, agency staff may do any or all of the following:
- A. Remind the company representative of any related requirements contained in their operating permit issued by the agency (if applicable).
  - B. Contact or have the company representative contact supervisory staff or OLC.
  - C. Document the denial of entry and, after discussion with supervisory staff, initiate an enforcement action against the company for denial of entry. See Ind. Code §§ 13-30-3.
  - D. Work with IDEM OLC to obtain an administrative search warrant and serve it within a reasonable time. Agency staff should work with State Police, County Sheriff, or other law enforcement to serve the warrant and conduct the inspection.
- 6.7. Agency staff will wait a "reasonable" amount of time to be admitted to a site. If the agency staff member believes that they have waited a reasonable amount of time and are effectively being denied entry, they should first restate their intent to enter for the purpose of conducting the inspection and authority to do so and ask directly whether they are being denied entry. If the company representative continues to refuse entry, the agency staff member may proceed pursuant to Section 6.6. What constitutes "reasonable" will vary on a case-by-case basis. Considerations include:
- A. The purpose of the visit to the site, i.e., is it a routine inspection, a complaint investigation, a spill response, etc.

- B. The credibility of the reason given for the delay;
  - C. Whether the nature of the site operations are such that actions could be taken to mask noncompliance issues and/or cease non-compliant activities; and
  - D. The length of time that it will take to obtain an administrative warrant.
- 6.8. Agency staff shall abide by company policies pertaining to health and safety that conform to state and federal OSHA requirements.
- 6.9. Agency staff shall abide by the agency's Biosecurity Policy while conducting agency business at an animal feeding operation. The Biosecurity Policy establishes three biosecurity levels based upon the degree of potential for disease transmission.
- 6.10. While at the site, agency staff shall be given access to any area relevant to the inspection, including any relevant files. Agency staff may take photographs or videos of the conditions at the site.
- 6.11. Agency staff will provide the property owner with an oral report of any specific matters discovered during the inspection that they believe may be a violation of a law or of a permit issued by the agency, unless the property owner is not available to receive the oral report. Agency staff will also send a written summary of their report not later than forty-five days following the inspection. Agency staff are not required to disclose any facts indicating intentional, knowing, or reckless violations of statutes, rules, or permits in their oral reports or written summaries.
- 6.12. A company may make a claim of confidentiality regarding information tendered during an inspection pursuant to Indiana Statute and Rule. See Ind. Code § 13-14-11-3; 326 IAC 17.1-4-1; 327 IAC 12.1-4-1; 329 IAC 6.1-4-1.
- 6.13. Agency staff access rights are subject to the U.S. Constitution's Fourth Amendment prohibition against unwarranted searches and seizure, as well as the exceptions to the warrant requirement, including the:
- A. Open fields doctrine;
  - B. Pervasively regulated business exception; and
  - C. Licensed business operations exception.
- 6.14. Agency staff may enter onto the property without first presenting credentials or obtaining an administrative warrant if they are responding to or otherwise observe "exigent circumstances" necessitating an emergency situation. Exigent circumstances include:
- A. A reasonable belief of risk of bodily harm or death.
    - i. Example: Severe toxic release into waters of the state.
  - B. A person in need of assistance.
  - C. A need to protect private property.
  - D. An actual or imminent destruction or removal of evidence before a search warrant may be obtained.

- 6.15. Surveillance of a site from adjoining private property is legally permissible. Before doing so, agency staff shall obtain the consent of the adjoining property owner.

## 7.0. REFERENCES

- 7.1. [Indiana Code \(IC\) § 13-14-2-2 Right of Entry](#)
- 7.2. [IC § 13-14-5 Inspections](#)
- 7.3. *Inspection Information* signed by the Commissioner (attached).
- 7.4. [IDEM Biosecurity Policy A-058-AW-16-P-R2](#), available on the IDEM extranet, but inaccessible to the public from that location
- 7.5. [Oliver v. United States, 466 U.S. 170 \(1984\)](#) (holding that the search did not implicate the Fourth Amendment based upon the Open Fields Doctrine).
- 7.6. [New York v. Burger, 482 U.S. 691, 701-703 \(1987\)](#) (holding that the search did not implicate the Fourth Amendment based upon the Pervasively Regulated Business exception).\
- 7.7. [State v. Tindell, 272 Ind. 479, 482-483, 399 N.E.2d 746, 747-748 \(1980\)](#) (holding that the search did not implicate the Fourth Amendment based upon the Licensed Business Operations exception).

## 8.0. ATTACHMENTS

- 8.1. Inspection Information Letter.

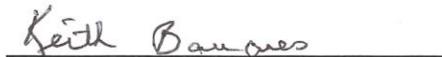
**9.0. SIGNATURES**

  
\_\_\_\_\_  
Bruno L. Pigott, Commissioner  
Indiana Department of Environmental Management

9/4/19  
Date

  
\_\_\_\_\_  
Nancy King, Assistant Commissioner  
Office of Legal Counsel and Criminal Investigations

8/26/19  
Date

  
\_\_\_\_\_  
Keith Baugues, Assistant Commissioner  
Office of Air Quality

9/3/19  
Date

  
\_\_\_\_\_  
Peggy Dorsey, Assistant Commissioner  
Office of Land Quality

9/3/19  
Date

  
\_\_\_\_\_  
Martha Clark-Mettler, Assistant Commissioner  
Office of Water Quality

9/4/19  
Date

This policy is consistent with Agency requirements.

  
\_\_\_\_\_  
Quality Assurance Program, Office of Program Support  
Indiana Department of Environmental Management

9-6-2019  
Date