



## Water Resources Division

# Part 91 Inspection Considerations for County and Municipal Agencies

**Disclaimer: The information below provides general information regarding possible access opportunities; it is not meant to provide any legal guidance to Part 91 agency staff nor does it create any rights or privileges hereunder. Contact your legal counsel for more definitive guidance regarding when you may or may not enter private property.**

Section 9113(2) of Part 91, Soil Erosion and Sedimentation Control (SESC), of the Natural Resources and Environmental Protection Act, 1994, Public Act 451, as amended states that “At any reasonable time, a county enforcing agency, or a municipal enforcing agency may enter upon any private or public property for the purpose of inspecting and investigating conditions or practices that may be in violation of this part. However, an investigation or inspection under this subsection shall comply with the United States Constitution and the State Constitution of 1963.” Does the above language provide county and municipal agency staff unlimited authority to enter private property to conduct inspections? **No, check with your respective county or municipal legal counsel for specific legal advice and/or guidance regarding this matter.**

Both the Michigan and United States Constitutions prohibit unreasonable searches (inspections). If a search is authorized by a warrant or is based upon a legally recognized exception as outlined below, access is considered reasonable and does not violate constitutional search and seizure protections. The following brief summary is provided to assist county or municipal enforcing agency staff and the agency’s legal counsel in determining when it may be legal to enter private property to conduct SESC inspections.

### Inspections without a Warrant:

#### 1. Consent Given by Property Owner or Owner’s Authorized Representative:

##### a. Verbal Consent:

Staff should ask for and receive verbal consent from the owner or owner’s representative prior to entry. The owner or owner’s representative can revoke consent at any time; if this happens, vacate the premises. If further access is necessary, contact your legal counsel.

##### b. Written Consent:

Staff should ask for written consent to access property in high profile or contentious cases. Be prepared to obtain a warrant from the appropriate court should consent be denied or subsequently revoked.

#### 2. Permit Application Authorization:

County and municipal permit applications often include an access provision, which the owner gives permission to inspect the permitted activity as part of the application process. If the county or municipal application does not include access provisions, consideration should be given to revising the application form to provide access. **Note:** Although the consent given by virtue of signing the application may suffice in most cases, the applicant may challenge the legality of the “forced” consent.”

3. Observations Made From a Legally Obtained Vantage Point:

a. Open Field Exception:

Staff may make observations or take photos of private property from any legally authorized location such as a public road, easement, or from neighboring property where you have obtained legal access. **Note:** Under the Open Field Exception, staff may technically be able to enter open fields beyond the “curtilage” of a home, office, or industrial complex to make observations or collect evidence. “Curtilage” means the ground normally used and associated with a residence (i.e., yard area and associated buildings); it does not include field or wooded lands beyond the yard area. Although the evidence you collect by going on land without permission under the Open Field Exception would most likely be admissible in court, the Open Field Exception **may not protect you from a being prosecuted for trespass although government employees have qualified immunity from tort liability while performing a governmental function.** Staff should seek advice from their legal counsel regarding going on land without permission. Every site has its unique characteristics and circumstances and what may be acceptable for one site may not be acceptable for another site with similar but slightly different characteristics or circumstances.

b. Plain View Exception:

This exception applies when staff has obtained legal access to the property, either by consent or pursuant to a warrant, and a violation is discovered that is neither part of the original subject of the inspection, nor contemplated at the time the warrant was obtained. Any violations observed in “plain view” may be recorded for follow-up action as appropriate.

4. Pervasively Regulated Business: Does not apply to earth work permitted under Part 91.

5. Exigent Circumstances Exception:

In the situation of an imminent and serious threat to public health, property or the environment, there is an expectation, perhaps even a duty, to take steps to protect life, property, and the environment. In most situations, the discharge of sediment will not be severe enough to meet the requirements of this exception.

**Access Granted by the Courts:**

1. Court Ordered Access:

This authority is obtained from a circuit court as part of its injunctive relief powers. Court ordered access allows an agency to undertake specific corrective actions that may alter or “damage” the owner’s property within specified time frames. Working under a court order protects the agency from being sued for damage and trespass for those activities authorized in the order. Any deviation from the court order may subject staff to possible legal actions.

2. Administrative Inspection Warrants:

This type of judicially obtained access is used when staff is denied consent to enter, yet needs access for the purpose of conducting an inspection or investigation that is short-term (generally less than six (6) months) and somewhat limited in scope. Administrative inspection warrants are generally authorized by statute; however, the courts will usually recognize that this type of access authority exists even when not expressly provided by statute. These warrants are generally issued by the district court or magistrate and used for inspecting the property, obtaining photographs, and collecting samples as deemed necessary.