

CP#64 / Environmental Monitoring Services

New York State Department of Environmental Conservation

DEC Policy

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I. Summary: This document describes the Department of Environmental Conservation (Department) policy and procedures to be followed regarding the environmental monitoring of facilities, sites or activities subject to the Environmental Conservation Law (ECL) and related regulations. It also describes procedures to be followed when adopting an environmental monitoring requirement with respect to a regulated facility, site or activity. For purposes of this Policy, environmental monitoring refers to monitoring services performed by individuals, not environmental monitoring performed by equipment. These monitoring services, based on the individual circumstances, may not always be performed at the regulated facility, site or activity but may include related work performed off-site. These monitoring services may include, but are not limited to, construction oversight, on-site inspections, oversight of day-to-day operational activities and review of plans and operating documents, etc.

II. Policy: Certain types of facilities, sites and regulated activities subject to the ECL and related regulations have the potential to increase risk to public health or the environment if statutes, regulations or permits are not properly implemented or enforced. To ensure proper implementation and enforcement, the Department may require an environmental monitor for such facilities, sites and regulated activities, to be paid for by the regulated entity on a full or part-time basis, to conduct monitoring and inspections that exceed the normal levels of review or oversight practices provided by Department staff and procedures.

This Policy does not create any rights enforceable by any party and does not restrict the authority or discretion of the Commissioner. The Department reserves the right to act at variance from the terms of this Policy.

A. Monitor Applicability: It is the policy of the Department to require environmental monitoring only in those instances where circumstances warrant an added level of oversight. Environmental monitors paid for by the regulated entity are not intended to replace Department staff and should be employed only in cases that meet the criteria below:

1. where environmental monitoring is required by law (e.g., Section 27-0917(8) of the ECL requires that on-site environmental monitors be placed at all commercial hazardous waste facilities which utilize secure land burial facilities as a primary disposal technique);
2. where the compliance history or past practices of the regulated entity over the past five years reveals an inability or unwillingness to comply with environmental laws and regulations or has included a conviction of an environmental crime or other criminal environmental violation, execution of an order on consent or consent decree, or the issuance of a Commissioner's decision or judgment finding one or more violations;
3. where past or current practices at the facility have resulted in conditions which pose a significant threat to public health or the environment, or indicate that significant adverse environmental or health

impacts may be likely to occur; or

4. where the Department determines the regulated facility, site or regulated activity needs additional oversight due to exceptional circumstances relating to its size, throughput, material handled or location (such as proximity to human use or habitation, to drinking water supplies, to critical or sole source aquifers, to endangered species, to other sensitive receptors or to environmental justice areas) or relating to the nature of its operations.

B. Monitor Types: Environmental monitoring services, paid for by the regulated entity, are to be provided in one of the following three methods with preference in descending order:

TYPE I by appropriately qualified Department employees who operate under Department supervision and oversight;

TYPE II by appropriately qualified individuals who are employed by another governmental agency or quasi-governmental entity approved by the Department, and who operate under Department supervision and oversight pursuant to a written agreement with the Department, and whose services are arranged for by the Department but who are funded directly by the regulated entity; or

TYPE III by appropriately qualified individuals or firms whose services are directly contracted by the Department and who operate under Department supervision and oversight. Any such individual or firm will owe to the Department the duties of maintaining exclusive confidentiality and avoiding conflicts of interest to the Department. All work product produced by such individual or firm as part of the environmental monitoring services will be considered property of the Department. The individual or firm must be available to support any related administrative, civil, criminal, or other legal action taken by the Department.

The determination of the manner in which environmental monitoring services will be provided and the need for short-term or long-term environmental monitoring will be made by the Department in its sole discretion. In the case of commercial hazardous waste facilities requiring environmental monitoring in accordance with the requirements of Section 27-0917 of the ECL, however, environmental monitoring will only be provided by Monitor Type I, (i.e., a Department employee or employees).

C. Monitor Legal Instruments: All future environmental monitoring services on or after the effective date of this policy will be required to be provided through the terms of an environmental permit, order on consent, Commissioner's order after hearing, judicial order or brownfield cleanup agreement (BCA) (together, permits, orders or BCAs). Use of a memorandum of understanding (MOU), memorandum of agreement (MOA), or cooperative agreement must be approved by the General Counsel and only used if the preferred means are not available. Any environmental monitoring service agreements provided through an MOU, MOA, cooperative agreement, or any other mechanism besides a permit, order or BCA, that are in existence as of the date of this policy, will be continued by the Department in full force and effect for the length of their current terms only. The Department reserves the right to modify any existing environmental monitoring services agreement.

The environmental monitoring language contained in all future permits, orders or BCAs must conform to the language in Appendices A or B of this Policy, based on monitor type, except where variation has been approved in advance by the General Counsel. The permits, orders or BCAs will be prepared jointly by the applicable program division, the Division of Management and Budget Services (MBS) and the Office of the General Counsel (OGC). The permits, orders or BCAs shall state that any work product produced by the individual or firm as part of the environmental monitoring services are the property of the Department, and that any individuals or firms retained for monitoring services owe to the Department the duties of maintaining confidentiality and avoiding conflicts of interest to the Department.

III. Purpose and Background: The use of environmental monitors began in the mid-1980s, when it was determined that some regulated entities required monitoring by the Department at levels that exceeded normal review and oversight practices. Conditions and/or past practices at the sites and facilities operated by these entities led the Department to determine that these entities required additional oversight to ensure the protection of public health and the environment.

Authority to require environmental monitoring is based on ECL Article 3, Sections 27-0917 and 27-0920, and ECL Section 3-0301, which sets forth the overall responsibility of the Department to carry out the environmental policy of the State to conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the State and their overall economic and social well-being. The Department's enforcement authority is found in ECL Article 71, and the Department's powers to enter property and perform inspections are found in ECL Sections 3-0301(1)(t) and 3-0301(2)(g) and various other sections in the ECL.

Section 27-0917 of the ECL, enacted in 1982 and subsequently amended, provides for environmental monitoring at hazardous waste facilities where the Commissioner determines that adequate protection of the public requires such monitoring. In addition, in 1986, Section 27-0917 was amended to require that on-site environmental monitors be placed at all commercial hazardous waste facilities which utilize secure land burial facilities as a primary disposal technique.

As a result, requirements were put in place through the terms of an environmental permit, an order on consent, a memorandum of understanding, or some similar legally binding document, whereby certain regulated entities would pay for environmental monitoring services so that the regulated entity's site, operations and activities would be provided enhanced monitoring by the Department.

In order to ensure clarity, establish uniformity and provide notice to the regulated community, the Department established a formal policy covering on-site environmental monitoring practices and procedures. Organization and Delegation Memorandum #82-09, adopted in 1982, outlined the Department's on-site environmental policy. This Organization and Delegation Memorandum was updated and superseded several times by Organization and Delegation Memoranda #85-19 adopted in 1985, #88-38 adopted in 1988 and #89-31 adopted in 1989. The policy was last revised in 1992 by the issuance of Organization and Delegation Memorandum #92-10. Although the 1992 policy name implied the monitor would be physically on-site performing monitoring activities, there are a number of activities (e.g., document reviews) that may appropriately be performed off-site in Department offices or other appropriate locations.

This Policy replaces and supersedes all previous policies and memoranda regarding environmental monitors.

IV. Responsibility:

A. Program Division and Region Responsibility: The division and region jointly responsible for a program are responsible for the following:

1. determination of the need for and level of (e.g., full time, part-time, etc.) monitoring required;
2. determination of the appropriate monitor type;
3. obtaining concurrence between the appropriate Regional Director and Division Director;

4. verifying with MBS funding and mechanism availability;
5. notifying the regulated entity of the Department's intention to require funding of environmental monitoring services;
6. establishing the scope of environmental monitoring services to be required at the facility/site through permit conditions or consent order requirements, through discussion with the regulated entity;
7. preparing the appropriate legal instrument in coordination with OGC;
8. preparing an annual facility/site monitoring work plan;
9. assisting MBS in preparing the annual budgets and bills based on the annual facility/site monitoring work plan;
10. ensuring that the environmental monitoring services described in the annual facility/site work plan are duly provided;
11. ensuring that environmental monitors are technically qualified, meet the minimum qualifications of the monitor equivalent job title and salary grade, attend appropriate health and safety training (including complying with all of the security measures and health and safety procedures required by the site owner/operator), and are provided the resources necessary to perform the environmental monitoring services;
12. ensuring that the environmental monitors are adequately supervised and assignments rotated where appropriate and practical;
13. ensuring that expenses associated with performing the work in the annual facility/site work plan do not exceed the established budget, or the funding limitations (e.g., revenue received, amount specified in the legal instrument);
14. assisting OGC with the collection of any revenue due (e.g., annual bills, regulatory fees, special assessment tax) and any enforcement associated with the regulated entity; and
15. determining when environmental monitoring services may be reduced or are no longer necessary, and obtaining concurrence between the appropriate Regional Director and Division Director of any reduction in environmental monitoring services whether initiated by the Department or in response to a request from the regulated entity.

B. MBS Responsibility: MBS is responsible for ensuring financial requirements are addressed. Tasks include the following:

1. ensuring appropriation authority is available;
2. providing guidance on the preferred monitoring method (e.g., transfer or hire staff, appropriate procurement method, governmental or quasi-governmental agency agreements);
3. facilitating the work planning process, preparing budget and annual bills, and providing routine financial reports to program divisions including information on allocations, expenditures, and revenue received;
4. establishing appropriate accounts and cost centers;

5. receiving, accounting for, and appropriately applying the funds received from the regulated entities; and
6. assisting program divisions and OGC as appropriate in environmental monitor-related issues including: collection of revenue, enforcement actions, procuring contracts and forwarding information on all overdue accounts to OGC for enforcement action/collection.

C. OGC Responsibility: OGC is responsible for ensuring legal requirements are addressed. Tasks include the following:

1. preparing the appropriate legal instrument in coordination with program divisions and MBS;
2. ensuring environmental monitoring language contained in all future permits, orders or BCAs conforms to the language in Appendices A or B of this Policy, based on monitor type, except where variation has been approved in advance by the General Counsel;
3. making any confidentiality determinations in response to a request from the regulated entity;
4. coordinating the collection of any revenue due (e.g., annual bills, regulatory fees, special assessment tax) and any enforcement associated with the regulated entity; and
5. assisting program divisions in determining when environmental monitoring services may be reduced or are no longer necessary.

D. Overall Policy Implementation: The Assistant Commissioner for Administration is responsible for ensuring the environmental monitoring services policy is implemented in a coordinated and consistent manner across program divisions and regions.

V. Procedure:

A. Division Director and Regional Director jointly determine the need for environmental monitoring services, scope of work and duration and type of monitoring preferred. Factors to consider in such determinations are specified in Section II.A. Where long-term environmental monitor services may be required, monitoring Type I (see Section II.B.) must be considered before monitoring Types II or III, in that order of preference.

B. MBS determines if appropriation authority and a monitoring method are available.

C. Program divisions and regions, in conjunction with OGC, prepare appropriate legal instruments or applicable permit conditions. This includes discussion with the regulated entity on the scope of environmental monitoring services to be required at the facility/site. In addition, if the proposed language of the legal instrument varies from that which is set forth in Appendix A for Monitor Types I and III or Appendix B for Monitor Type II of this Policy, MBS and the General Counsel must approve such proposed language.

D. Once the applicable permit, order or BCA is effective, the annual facility/site monitoring work plan, budget and bill will be prepared and sent to the regulated entity and the environmental monitoring services will be implemented in accordance with this Policy.

E. Program divisions and regions, in conjunction with OGC, annually review the continued need and scope of services for facilities/sites that include an environmental monitoring services requirement to determine if environmental monitoring services may be reduced or are no longer necessary and make a recommendation in a

report to the Division Director and Regional Director. Regulated entities may petition the Regional Director at any time for reconsideration of the scope of environmental monitoring services or the continued need entirely but will be acted upon by the Department on an annual basis. In consultation with OGC environmental monitoring services counsel, the Division Director and Regional Director will jointly determine the need for environmental monitoring services, scope of work and duration and type of monitoring preferred as specified in Section V. A. and subsequently the procedures specified in Section V. B- D will be followed.

VI. Related References: Environmental Conservation Law: Article 3, Section 3-0301; Sections 27-0917 and 27-0920; Section 3-0301; and Article 71.

Appendix A

Standard Language to be used for Monitor Types I and III – Department Employees or Department Contracted Individuals or Firms

Environmental Monitor

- A. The [Permittee; Respondent; etc.] shall fund environmental monitoring services to be performed by or on behalf of the Department. These monitoring services will include, but not be limited to, the scope of work in an annual environmental monitoring work plan which is incorporated by reference and enforceable under this [Permit/Order/BCA].
- B. The [Permittee; Respondent; etc.] shall provide to the Department on an annual basis the funds necessary to support the activities set forth in the annual environmental monitoring work plan. The sum to be provided will be based on the annual budgeted amount and is subject to annual revision. Subsequent annual payments shall be made for the duration of this [Permit/Order/BCA] or until the environmental monitoring services are no longer necessary, whichever comes first.
- C. The [Permittee; Respondent; etc.] shall be billed annually, prior to the start of each State Fiscal Year (SFY) (April 1). If this [Permit/Order/BCA] is to first become effective subsequent to April 1, the initial bill will be for an amount sufficient to meet the anticipated cost of the environmental monitoring services through the end of the current SFY.
- D. The Department may revise the required annual bill on an annual basis to include all of the Department's estimated costs associated with the environmental monitoring services. The annual revision may take into account such factors as inflation, salary increases, changes in the fringe benefits rate, changes in operating hours and procedures, changes in non-personal service costs (including travel, training, sampling and analytical, and equipment costs, etc.), an increase or decrease in the level of environmental monitoring services necessary, and an increase or decrease in the number of environmental monitors. Upon written request by the [Permittee; Respondent; etc.], the Department shall provide the [Permittee; Respondent; etc.] with a written explanation of the basis for any revisions.
- E. Prior to making its annual payment, the [Permittee; Respondent; etc.] will receive, and have an opportunity to review and request adjustment to, an annual environmental monitoring work plan that the Department will undertake during the year. The Department will provide a final annual work plan that the Department will undertake during the year.
- F. Payments are to be made in advance of the period in which they will be expended and shall be made in full within 30 days of receiving a bill from the Department. The bill from the Department to the [Permittee; Respondent; etc.] will provide information regarding to whom payments should be made payable and the address to which payments should be sent.
- G. Failure to make the required payments shall be a violation of this [Permit/Order/BCA]. The Department reserves all rights to take appropriate action to enforce the above payment provisions.
- H. The environmental monitor shall, when present at any of the [Permittee; Respondent; etc.] facilities, abide by all of the [Permittee; Respondent; etc.] health and safety and operational

requirements and policies, if such requirements and policies exist and provided they are not inconsistent with Department policies and labor management contracts, and further provided, however, that this shall not be construed as limiting the environmental monitor's powers as otherwise provided for by law and shall not result in the environmental monitor being afforded less protection than otherwise provided to the environmental monitor by State and Federal health and safety requirements.

- I. The environmental monitor shall receive from the [Permittee; Respondent; etc.] all general and site-specific safety training which is normally given to new facility/site employees for all areas of the facility or site. This training will be a supplement to the health and safety training that the environmental monitor routinely receives from the Department.
- J. Upon selection of the environmental monitor, the [Permittee; Respondent; etc.] shall immediately furnish to the environmental monitor any facility/site health and safety and operational requirements and policies. Within five (5) days of any revision to the facility/site health and safety and operational requirements and policies, the [Permittee; Respondent; etc.] shall furnish to the environmental monitor the health and safety and operational requirements and policies.
- K. The environmental monitor shall be permitted to use environmental monitoring and data collection devices (e.g., photo ionization detectors, cameras, video recording devices, computers, cell phones, etc.) deemed necessary by the Department to evaluate and document observed conditions. If the data or images are collected from areas where confidentiality is a concern to the [Permittee; Respondent; etc.], the [Permittee; Respondent; etc.] may request that the data or images be considered confidential information. The Department will consider any confidentiality requests and, if determined by the Department to be appropriate copies of the data or images collected from areas where confidentiality has been determined by the Department to be a concern shall be provided to the [Permittee; Respondent; etc.].
- L. It will remain the responsibility of the [Permittee; Respondent; etc.] to contact the Spill Hotline or any Division within the Department regarding any required notification of any spill, release, exceedances etc. Notification to the environmental monitor will not be considered sufficient to replace any required notifications.

Appendix B

Standard Language to be used for Monitor Type II – Environmental Monitors by: Non-Department Governmental Agencies or Quasi-Governmental Entities

Environmental Monitor

- A. The [Permittee; Respondent; etc.] shall fund environmental monitoring services to be performed by or on behalf of the Department by another governmental agency or quasi-governmental entity. Before commencement of activities under the [Permit/Order/BCA] the [Permittee; Respondent; etc.] must, at its own expense retain the services of a governmental agency or quasi-governmental entity to provide independent environmental monitoring services. These services shall be conducted in accordance with an Environmental Monitoring Service Agreement (Agreement) described in Paragraphs G - I, below.
- B. The selection of the governmental agency or quasi-governmental entity must be approved by the Department in its sole discretion. The governmental agency or quasi-governmental entity must have staff available that possesses the requisite educational background, certifications, licenses and/or experience necessary to perform the various tasks outlined in the Work Plan described in Paragraph H, below.
- C. It is permissible for the governmental agency or quasi-governmental entity to subcontract for specialized services such as [insert appropriate specialties] with prior written Department approval. The designated staff of the governmental agency or quasi-governmental entity that will be responsible for performing the environmental monitoring at the [Permittee-s; Respondent-s; etc.] facility must have [insert appropriate qualifications, licenses or certifications].
- D. The designated staff of the governmental agency or quasi-governmental entity shall have the right to access the facility during all normal hours of operation, and to review any [insert appropriate description of information] information located at the site that would otherwise be available to Department staff in the normal course of their duties. The designated staff of the governmental agency or quasi-governmental entity must be available to Department staff at all times while performing their environmental monitoring duties, either by telephone, cell phone, e-mail, or other similar means.
- E. **(WHERE DESIRED AND APPLICABLE)** The [Permittee; Respondent; etc.] must provide the designated staff of the governmental agency or quasi-governmental entity with adequate office space at the monitored facility or other Department-approved location to include, at a minimum: [insert applicable requirements].
- F. The governmental agency or quasi-governmental entity and their designated staff must report directly to, and be directed by, the Department in all matters relating to the environmental monitoring described herein. Copies of all documentation, inspection reports, logs, photos, and records developed, collected or generated by the governmental agency or quasi-governmental entity in connection with the monitoring of the facility(s) shall be supplied to the Department and are not subject to approval by the [Permittee; Respondent; etc.]. The governmental agency or quasi-governmental entity shall retain all monitoring materials or copies of the monitoring materials on site or at another Department-approved location, and these monitoring materials shall remain on site, or at another Department-approved location in the event that a new governmental agency or quasi-governmental entity takes over the environmental monitoring

responsibilities. All original environmental monitoring-related materials shall be transmitted to the Department in a manner and frequency to be determined by the Department.

The Agreement

- G. The Agreement between the [Permittee; Respondent; etc.] and the governmental agency or quasi-governmental entity must be approved by the Department prior to any activities authorized by this [Permit/Order/BCA]. All provisions of this [Permit/Order/BCA] regarding the governmental agency or quasi-governmental entity shall be incorporated into the Agreement by reference. The Agreement between the [Permittee; Respondent; etc.] and the governmental agency or quasi-governmental entity must specify the minimum time that the designated staff of the governmental agency or quasi-governmental entity is required to be on site and the activities to be performed. This schedule must be consistent with the work plan described in Paragraph H, below, to be developed by the Department. The Agreement shall include the name(s) of the designated staff of the governmental agency or quasi-governmental entity responsible for all facility environmental monitoring activities at the [Permittee's; Respondent's; etc.] facility.
- H. The Agreement shall incorporate a work plan developed by the Department after discussion with the [Permittee; Respondent; etc.] and the governmental agency or quasi-governmental entity.

Safety

- I. The designated staff of the governmental agency or quasi-governmental entity shall, when present at any of the [Permittee; Respondent; etc.] facilities, abide by all of the [Permittee; Respondent; etc.] health and safety and operational requirements and policies, if such requirements and policies exist and provided they are not inconsistent with Department policies and further provided, however, that this shall not be construed as limiting the governmental agency or quasi-governmental entity's powers as otherwise provided for by law and shall not result in the environmental monitor being afforded less protection than otherwise provided to the designated staff of the governmental agency or quasi-governmental entity by State and Federal health and safety requirements.
- J. The designated staff of the governmental agency or quasi-governmental entity shall receive from the [Permittee; Respondent; etc.] all general and site-specific safety training which is normally given to new facility/site employees for all areas of the facility or site.
- K. Upon approval of the selection of the governmental agency or quasi-governmental entity, the [Permittee; Respondent; etc.] shall immediately furnish to the designated staff of the governmental agency or quasi-governmental entity any facility/site health and safety and operational requirements and policies. Within five (5) days of any revision to the facility/site health and safety and operational requirements and policies, the [Permittee; Respondent; etc.] shall furnish to the governmental agency or quasi-governmental entity and its designated staff the health and safety and operational requirements and policies.

Miscellaneous

- L. The governmental agency or quasi-governmental entity shall be permitted to use environmental monitoring and data collection devices (e.g., photo ionization detectors, cameras, video recording devices, computers, cell phones, etc.) deemed necessary by the Department to evaluate and document observed conditions. If the data or images are collected from areas where confidentiality is a concern to the [Permittee; Respondent; etc.], the [Permittee; Respondent; etc.] may request that the data or images be considered confidential information. The Department will

consider any confidentiality requests and, if determined by the Department to be appropriate copies of the data or images collected from areas where confidentiality has been determined by the Department to be a concern shall be provided to the [Permittee; Respondent; etc.].

- M. It will remain the responsibility of the [Permittee; Respondent; etc.] to contact the Spill Hotline or any Division within the Department regarding any required notification of any spill, release, exceedances etc. Notification to the governmental agency or quasi-governmental entity or its designated staff will not be considered sufficient to replace any required notifications.
- N. Department staff shall have the right to seek any other information pertaining to environmental compliance activities from the governmental agency or quasi-governmental entity as needed and all such information shall be supplied to Department staff at a frequency to be determined by the Department. In the event that the designated staff of the governmental agency or quasi-governmental entity determines that a violation of the facility permit exists, the designated staff of the governmental agency or quasi-governmental entity must notify appropriate Department staff [insert appropriate time frame for notification] in accordance with procedures determined by the Department. The governmental agency or quasi-governmental entity and its designated staff shall assist the Department in any investigation or enforcement action that is taken against the [Permittee; Respondent; etc.] for any violation(s) relating to the facility.
- O. The continued retention, discharge, or replacement of the governmental agency or quasi-governmental entity shall be subject to the approval of the Department at its sole discretion. In the event that the [Permittee; Respondent; etc.] would like to replace the existing governmental agency or quasi-governmental entity with another governmental agency or quasi-governmental entity, the [Permittee; Respondent; etc.] must submit a written request to the Department at least 30 calendar days prior to the proposed termination date for the existing governmental agency or quasi-governmental entity. The request shall include information regarding the governmental agency or quasi-governmental entity being proposed as well as an explanation of the reasons for desiring the replacement of the existing governmental agency or quasi-governmental entity. The Department's written approval must be obtained prior to the termination of the existing governmental agency or quasi-governmental entity and the employment of a new governmental agency or quasi-governmental entity. The Department will consider any reasonable request to retain, discharge or replace a governmental agency or quasi-governmental entity. A continuity of monitoring services between the old governmental agency or quasi-governmental entity and the new governmental agency or quasi-governmental entity must be ensured during any transition period in order to ensure appropriate facility monitoring, unless otherwise approved by the Department.