

/ Environmental Monitoring Services

New York State Department of Environmental Conservation

DEC Policy

Issuing Authority:

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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 or firms, 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 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 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 material being handled at the facility or site is of particular concern due to its characteristics or quantity;
3. where the compliance history or past practices of the regulated entity has included significant or repeated violations of applicable federal, state, or local laws or regulations, has resulted in conditions which pose a threat to public health or the environment, or indicates 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, or location (such as proximity to sensitive receptors or proximity to environmental justice areas) or relating to the nature of its operations.

B. Monitor Types: Environmental monitoring services are to be provided in one of the following four methods with preference (except in the case of brownfield cleanups) 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;

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; or

TYPE IV by appropriately qualified individuals or firms whose services are directly contracted by the regulated entity, subject to the Department's initial and continued right of approval, 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), not through a memorandum of understanding (MOU), memorandum of agreement (MOA), cooperative agreement, or other mechanism. 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. In the case of BCAs, environmental monitoring will only be provided by Monitor Types III or IV (i.e., individuals or firms whose services are directly contracted by the Department or individuals or firms whose services are directly contracted by the regulated entity).

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 implied the monitor would be physically on-site performing monitoring activities, there are a number of activities (e.g., document reviews) that may be performed off-site in Department offices.

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. preparing the appropriate legal instrument in coordination with OGC;
7. preparing an annual facility/site monitoring work plan;
8. assisting MBS in preparing the annual budgets and bills based on the annual facility/site monitoring work plan;
9. ensuring that the environmental monitoring services described in the annual facility/site work plan are duly provided;
10. 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;
11. ensuring that the environmental monitors are adequately supervised and assignments rotated where appropriate and practical;
12. 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);
13. 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
14. 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.

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. 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
4. assisting program divisions in determining when environmental monitoring services may be reduced or are no longer necessary.

D. Overall Policy Implementation: The Deputy 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, type of monitoring preferred and estimated cost. 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, III or IV, 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. 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 Types II and IV 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.

Draft Policy

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

Number to be
assigned
upon approval

Appendix A

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

Environmental Monitor

- Draft Policy**
- Number to be assigned upon approval**
- 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, an annual environmental monitoring 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 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. Copies of the data or images collected from areas where confidentiality is a concern shall be provided to the [Permittee; Respondent; etc.] upon their request. The [Permittee; Respondent; etc.] may request the data and images be considered confidential information if appropriate.
- 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 Types II and IV– Independent Environmental Monitors by: Non-Department Governmental Agencies; Quasi-Governmental Entities; Engineering, Consulting, or Other Type of Firms; or Individuals

Independent Environmental Monitor (IEM)

- A. The [Permittee; Respondent; etc.] shall fund environmental monitoring services to be performed by or on behalf of the Department by: another governmental agency; quasi-governmental entity; engineering, consulting or other type of firm; or individual. Before commencement of activities under the [Permit/Order/BCA] the [Permittee; Respondent; etc.] must, at its own expense retain the services of an IEM to provide independent environmental monitoring services. These services shall be conducted in accordance with an Independent Environmental Monitoring Service Agreement (Agreement) described in Paragraphs G - I, below. The IEM(s) may be a governmental agency, quasi-governmental agency, individual, partnership or corporation.
- B. The selection of the IEM(s) must be approved by the Department in its sole discretion. Engineering, consulting, and other type firms and individuals who are performing consulting or contracting work for the [Permittee; Respondent; etc.] in any other capacity at any facility owned by the [Permittee; Respondent; etc.], its parent, subsidiary, or affiliated corporations or business entities, are precluded from functioning as the IEM. The IEM(s) 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 IEM to subcontract for specialized services such as [insert appropriate specialties, if applicable, e.g., geologic, liner installation, etc.] with prior written Department approval. The IEM, if an individual, must be [insert required licenses or certifications, e.g., “a New York State licensed professional engineer”] and if a governmental entity, a quasi-governmental entity, partnership, corporation, or other type of business entity, must have [insert appropriate qualifications, e.g., “a New York State licensed professional engineer”] on staff who will be responsible for all environmental monitoring activities at the [Permittee’s; Respondent’s; etc.] facility.
- D. The IEM shall have the right to access the facility during all normal hours of operation, and to review any [insert information, e.g., “landfill-related,” or other appropriate description] information located at the site that would otherwise be available to Department staff in the normal course of their duties. The IEM must be available to Department staff at all times while on site, either by telephone, cell phone, e-mail, or other similar means.
- E. **(WHERE DESIRED AND APPLICABLE)** The [Permittee; Respondent; etc.] must provide the IEM with adequate office space at the monitored facility or other Department-approved location to include, at a minimum: [insert applicable requirements, e.g., a lockable desk, chair, lockable file cabinet, telephone service, electricity, lights, heat, air conditioning, etc.].
- F. The IEM and the IEM’s 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 IEM 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.]. An IEM shall retain all monitoring materials or copies of the monitoring materials on site or at other Department-approved location, and these monitoring materials shall remain on site, or at another Department-approved location in the event that a new IEM 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 IEM must be approved by the Department prior to any activities authorized by this [Permit/Order/BCA]. All provisions of this [Permit/Order] regarding the IEM shall be incorporated into the Agreement by reference. The Agreement between the [Permittee; Respondent; etc.] and the IEM must specify the minimum time that the IEM is required to be on site and for what activities. This schedule must be included in the Work Plan described in Paragraph H, below. The Agreement shall include the name(s) of [insert appropriate, e.g., the IEM's New York State licensed professional engineer(s) responsible for all facility environmental monitoring activities].
- H. The Agreement shall require submission of a Work Plan, for DEC approval. The Work Plan must be developed by the [Permittee; Respondent; etc.] and the IEM, and approved by the Department. The Work Plan must include, but not be limited to, a detailed description of the following:
1. [insert appropriate requirement(s), e.g., The monitoring of the facility during construction to ensure the facility is constructed in accordance with the design plans and the requirements of the permit;"The monitoring of soil borings, the installation of all monitoring wells or any other subsurface investigation conducted at or in proximity to the facility site;" "The monitoring of the facility during operation to ensure compliance with the requirements of the permit;" "The monitoring of sampling in accordance with the requirements of the permit or as deemed necessary by the Department or the IEM in response to site conditions or circumstances;" "The conducting of daily inspections of the facility and the completion of a Department approved daily inspection report noting all major activities that occurred during the day, and documenting any violations of the permit;" "All reports or other written materials that will be produced by the IEM along with the schedule of submission to the Department;" "The monitoring of the facility during closure activities to ensure the facility is closed in accordance with the closure plans and the requirements of the permit;"]
- I. The Work Plan required in paragraph H must provide for submission of an [insert report type, e.g., Quarterly/Bi-Annual/Annual] Report to the Department detailing the activities conducted by the IEM over the last reporting period, and the activities expected to be conducted during the next reporting period.

IEM Safety

- J. The IEM 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 IEM'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 IEM by State and Federal health and safety requirements.

- K. The IEM 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.
- L. Upon selection of the IEM, the [Permittee; Respondent; etc.] shall immediately furnish to the IEM 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 IEM the health and safety and operational requirements and policies.

Miscellaneous

- M. The IEM 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. Copies of the data or images collected from areas where confidentiality is a concern shall be provided to the [Permittee; Respondent; etc.] upon their request. The [Permittee; Respondent; etc.] may request the Department consider the data and images confidential information if appropriate.
- N. 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 IEM will not be considered sufficient to replace and required notifications.
- O. Department staff shall have the right to seek any other information pertaining to environmental compliance activities from the IEM 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 an IEM determines that a violation of the facility permit exists, the IEM must notify appropriate Department staff [insert appropriate requirement, e.g., "before the close of business the same day that the violation was discovered"] in accordance with procedures determined by the Department. The IEM 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.
- P. The continued retention, discharge, or replacement of the IEM 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 IEM with another IEM, 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 IEM. The request shall include information regarding the IEM being proposed as well as an explanation of the reasons for desiring the replacement of the existing IEM. The Department's written approval must be obtained prior to the termination of the existing IEM and the employment of a new IEM. A continuity of monitoring services between the old IEM and the new IEM must be ensured during any transition period in order to ensure appropriate facility monitoring, unless otherwise approved by the Department.