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MEMORANDUM FROM  
THOMAS C. JORLING, Commissioner

New York State  
Department of Environmental Conservation



February 20, 1992

TO: Executive Staff, Division and Regional Directors  
FROM: Thomas C. Jorling  
RE: ORGANIZATION AND DELEGATION MEMO #92 - 10  
Policy: On-Site Environmental Monitors  
(Supersedes #89-31 dated September 21, 1989)

I. Purpose.

The purpose of this memorandum is to revise and promulgate the department policy regarding on-site environmental monitors at facilities, sites or other regulated activities, which have a potential for causing damage to the environment and/or public health.

II. Policy Statement.

Certain types of facilities, sites or regulated activities permitted by the Department have the potential to cause damage to the public health and/or the environment if not properly constructed, operated or implemented. To ensure proper construction, operation or implementation of these facilities, sites and regulated activities and to guard against potential harm, the Department of Environmental Conservation ("DEC") may require DEC on-site monitors on a full or part-time basis to conduct monitoring and inspections beyond those routinely done by Department personnel and beyond the routine or enhanced self-monitoring done by the facility, site or regulated activity pursuant to DEC permits. Authority to require such monitors is based on Environmental Conservation Law ("ECL") Article 3, §27-0917 and §27-0920 and the overall responsibility of the DEC 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. DEC's enforcement authority is found in ECL Article 71; and DEC's powers to enter property and perform inspections are

found in ECL §§3-0301(1) (t), 3-0301(2) (g) and in various places throughout the ECL. See generally, C.I.D. Landfill, Inc. v. Department of Environmental Conservation, 167 A.D.2d 827 (4th Dept., 1990), motion for leave to appeal denied, 77 N.Y.2d 809 (1991). Application of this authority on a site specific basis should be accomplished by means of an express requirement established in a permit, consent order, contract or other legal document.

### III. Guidelines for Utilization of On-Site Monitors.

#### A. General Criteria

Facilities, sites or regulated activities which generally require on-site environmental monitors are those which, because of the nature of the operation, have a potential for causing environmental damage or pose a threat to the public health.

#### B. Specific Criteria

The following factors should be considered when determining if a facility, site or regulated activity will be required to fund an on-site environmental monitor:

The facility, site or regulated activity poses a potential hazard to human health or the environment because:

1. There is a potential of uncontrolled release of pollutants into the environment;

2. The material being handled at the site of the regulated activity is particularly hazardous, due to its characteristics or quantity;

3. The site of the regulated activity is a location which is particularly environmentally sensitive, due to its proximity to areas of human use or habitation, to drinking water supplies, to critical and sole source aquifers, to valuable ecological, recreational or natural resources or other circumstances justifying special concern;

4. The permittee, owner, operator or responsible party has a compliance record which reveals an inability or unwillingness to comply with all environmental and health laws and regulations; or

5. The activity could present a public nuisance in that it interferes with reasonable use and enjoyment of natural resources and the environment.

The factors listed above do not have the same level of significance, and all factors do not have to be present to require an on-site monitor in a given case. Certain facilities, sites or regulated activities because of the type of activity taking place, pose a significant potential for endangering the public health or environment, so that factor alone would require an on-site monitor.

Any of the factors considered together may determine that a facility, site or regulated activity needs an on-site monitor. As an example, considering the type of facility or site alone, a monitor may not be required for a temporary storage/transfer facility or site for hazardous waste. However, if that facility or site handled a large volume per day of pesticide manufacturing residue and was located over a sole source or primary aquifer, the decision would almost certainly be to require an environmental monitor.

The decision to require an environmental monitor is usually made by the Regional Director and the involved Program Director in consultation with the Project Attorney and the Director of Environmental Monitoring. However, requests for policy determinations or requests for technical support, standards, tasks, etc. relating to environmental monitors in unusual circumstances should be forwarded by the Regional Director and/or Program Director, to the appropriate program Deputy/Assistant Commissioner. The Deputy/Assistant Commissioner will provide the needed technical assistance.

#### IV. Specific Facilities, Sites or Regulated Activities Which Require or May Require Environmental Monitors.

A. Due to the significance of the activity, on-site environmental monitors will be sought for the following facilities or sites:

1. Commercial secure landburial of hazardous waste, see ECL §27-0917(4);
2. Commercial hazardous waste process incinerators;
3. Commercial processing/treatment facilities or sites which handle hazardous waste (as defined in 6 NYCRR Part 371).
4. Inactive hazardous waste sites undergoing cleanup or remediation by a private party, pursuant to a permit or an order of the DEC or a court.
5. Municipal landfills which, due to their size or other circumstances of concern, justify the presence of an environmental monitor;

6. Facilities having a compliance history which demonstrates that a more active DEC oversight role is appropriate.

B. Due to the type of activity, and other factors enumerated above, environmental monitors should be sought for the following facilities:

1. Land-based waste management facilities which accept significant quantities of industrial waste;

2. Waste management facilities which accept hazardous waste generated at the site of treatment or disposal; facilities or sites receiving more than one million gallons per year.

3. Waste landspreading facilities; and

4. Solid waste transfer stations and reprocessing facilities.

5. Facilities which meet one or more of the criteria set forth in Section III above.

C. In accordance with the criteria set forth in Section III above, other facilities, sites or regulated activities may require monitors, such as manufacturing, utility or mining operations with air and/or water pollution control facilities or sites or internal controls which must operate continuously, efficiently and successfully to protect the environment and/or public health, or projects located in critical or sensitive environmental areas. These facilities or sites may need an on-site monitor in situations of poor compliance with applicable permit limitations and/or as part of a consent order or a Commissioner's order following an enforcement action.

#### V. Administrative Responsibility.

A. The monitor program is administered through the Central Office by the Director of Environmental Monitors. If the involved Regional Director(s) and Program Director mutually agree that Central Office personnel should be used to perform the monitoring functions, the administrative responsibility still remains with the Director of Environmental Monitors. In the case of such monitors, substitute "Program Director" for "Regional Director" in these procedures.

The Director of Environmental Monitors will provide direction, policy, procedures and administrative support.

B. Whenever the Regional Director determines that the complexity of a facility, site or regulated activity requires technical assistance from the Central Office, the Director may request such assistance from the appropriate Deputy/Assistant Commissioner(s).

VI. Responsibilities and Procedures for Establishing On-Site Environmental Monitors.

A. Development Phase

1. Regional Engineer/Natural Resources Supervisor/Regional Director or designee/Director of Environmental Monitors in consultation with the Project Attorney:

a. Determines the need for a site-specific On-Site Environmental Monitor ("OSEM") at an environmentally sensitive facility, site or regulated activity in accordance with this O & D memorandum.

b. Develops, in consultation with the Regional Attorney and/or Project Attorney, the parameters to be monitored by the OSEM at the facility site or regulated activity, and the reporting requirements of the monitor, including, but not limited to, the requirements of ECL §27-0920(2).

c. Identifies the functions, responsibilities and tentative title and grade level of the OSEM and submits a request to establish the position including an approved ME-10 (Request Description) to the Bureau of Personnel.

d. Determines the percentage of each monitor's time on an annual basis to be devoted to monitoring for all programs.

e. Drafts a budget, for approval by the Director of Environmental Monitors, for the first year and an estimated budget for subsequent years of the permit or consent order and estimates the tentative starting date. (See Attachment, page 12 for standard language).

f. Provides the Director of Environmental Monitors with a draft monitoring agreement for review and approval.

2. Regional Attorney and/or Project Attorney

a. Indicates if a "Commercial Hazardous Waste Facility," as defined in ECL §27-0901, is involved.

6.  
b. Reviews for other problems or issues, particularly enforcement issues, and appropriate resolution of them before sign-off by Regional Director or Regional Director designee. Ensures legal defensibility of instrument that requires monitors.

3. Director of Environmental Monitors

a. Receives and approves draft proposals for an OSEM and reviews for administrative procedures and fiscal implications.

b. Provides the appropriate Time & Activity codes, sub-account and cost center.

c. Follows-up to assure timely approval of the draft proposal.

B. Negotiation Phase

1. Regional Engineer/ Natural Resources Supervisor/ Regional Director/Designee in consultation with the Project Attorney and Director of Environmental Monitors:

a. Negotiates in a timely manner with the party or parties involved, in consultation with the Regional Attorney and/or Project Attorney and Director of Environmental Monitors, using the approved standard language, a draft monitoring agreement which embodies payments procedures for the first year anticipated expenses for the on-site monitor(s) and the due date of said payments.

b. Obtains approval from the Director of Environmental Monitors of any negotiated changes in the standard language.

c. Advises the Director of Environmental Monitors of the final form of the monitoring agreement, the tentative start date for program implementation, any changes in the amount and/or timing of the payments, and when the initial payment will be received.

2. Director of Environmental Monitors

a. Approves all negotiated changes in the standard language agreement.

b. Maintains an active file of all proposals.

c. Upon receipt of the specifics of the OSEM program, the Director of Environmental Monitors apprises affected staff.

C. Implementation Phase

1. Regional Engineer/Natural Resources Supervisor/Regional Director/Designee/Project Attorney/Director of Environmental Monitors

a. As noted above, notifies the Director of Environmental Monitors of the final monitoring agreement, the amount of the initial payment and when the funds will be available.

b. Provides the Director of Environmental Monitors with a copy of the final signed monitoring agreement.

2. Fiscal Management will provide monthly fiscal status reports and quarterly statements to the Director of Environmental Monitors, the involved Regional Director, and the involved Assistant/Deputy Commissioner. This monthly report will reflect disbursements and receipts as recorded by the Office of the State Comptroller. The quarterly reports will cover the quarter just completed, and also provide fiscal year-to-date, and life-to-date profiles. Reporting will be done in as timely a manner as feasible (no more than 30 days past the report period for the monthly report and no more than 90 days past the report period for the quarterly statement), allowing for the receipt of quarterly time and activity reports. These Fiscal Management reports will obviate the need for regional fiscal reports and reconciliations. The quarterly statement will also provide the basis for Fiscal Management's quarterly billing to the permittees/monitored party(ies).

3. The following will apply to payments from the permittee, owner/operator or responsible party:

- Payments are to be made in advance of the period during which they will be expended.

- All permits and consent orders should contain language allowing the Department to revise the amount a permittee, owner/operator or responsible party pays, as needs change during the life of the permit. If permits do not contain such language, it should be added during the permit renewal or extension process, or in the course of processing of any modifications requested by the permittee.

- At the conclusion of the term of a permit or consent order, if there is to be no renewal or extension, any unexpended balance, including interest accrued, should be returned to the permittee, owner/operator or responsible party. If the permit or consent order is renewed or extended, the unexpended balance, including interest, may be applied to the payment schedule for the new permit.

- Any interest accrued on payments received while under State custody may be used for monitor expenses, thereby reducing the principal payment required of the permittee, owner/operator or responsible party. (The Office of the State Comptroller has advised that interest need not be deposited to the General Fund.)

4. Funding should be sufficient to cover:

- Direct personal service and fringe benefits of the monitors.

- Direct personal service and fringe benefits for full-time monitor supervisors.

- Direct non-personal service, including without being limited to purchase of a vehicle if necessary and its full operating costs, necessary equipment, supplies and materials, training, travel and any sampling and chemical analysis costs.

- Inflation increases and negotiated salary increases.

- Indirect support of monitors based upon annual indirect cost studies from which an indirect support rate (overhead) is calculated. Indirect support covers items such as telephone costs, office space, and mail. Secretarial services are also part of indirect support, as are support services furnished by other units of the Department. When certain costs that are normally part of the indirect cost rate are borne by the permittee, owner/operator or responsible party, the Division of Fiscal Management will consider a request for a reduced rate from the Regional Director. Any such reduced rate must be specified in the Monitoring Agreement and receive the approval of the Division of Fiscal Management through the Director of Environmental Monitors before it is agreed to by the Regional Director.

D. Maintenance Phase

1. Regional Engineer/ Natural Resources Supervisor/ Regional Director/Designee/Project Attorney and Director of Environmental Monitors:

a. Monthly - submits time and activity records of the environmental monitors, any Department personnel who perform monitoring activities in the monitor's stead, and monitor supervisors paid from monitor funds to the Director of Environmental Monitors for review and transmittal to Fiscal Management.

b. Quarterly - reviews the identified need (per original proposal) and assesses the OSEM program to determine how it meets the intended need. Recommends any changes through the appropriate Staff offices and the Director of Environmental Monitors.

c. Submits request(s) to the Bureau of Personnel through the Director of Environmental Monitors for extension of position(s).

d. Based upon the above regional experience, develops in a timely manner a draft proposal to be submitted to the Director of Environmental Monitors for approval prior to renegotiation of expiring agreement(s).

2. Staff Offices

a. Changes in title shall be submitted directly to the Director of Environmental Monitors.

b. Anticipated expenditure changes shall be submitted directly to the Director of Environmental Monitors.

c. Establishment of items and position extensions (ME-10's) and Requests to Fill (EX-341s) shall be submitted directly to the Director of Environmental Monitors from the Region or Central Office program.

d. Annual budget requests and annual February 1 update of those requests for OSEMs shall be submitted to the Director of Environmental Monitors.

E. Termination Phase

1. Any remaining balance, including interest accrued, will be returned by the Fiscal Office to the permittee, owner/operator or responsible party upon written notice of the expiration/termination of the agreement by the Director of Environmental Monitors.

2. Refunds will be withheld pending the liquidation of encumbrances and final payments of fringe benefits.

#### VIII. Types of On-Site Environmental Monitors

##### A. Operation and Maintenance Monitors

1. Full-time duty at one site: full-time, on-site (resident) monitors are required for some major facilities, site or regulated activities. Examples include large, commercial hazardous waste disposal facilities.

2. Part-time and/or temporary duty at single or multiple sites:

a. Where facilities, sites or regulated activities have a potential for creating damage but, because of their size or the nature of their activity, do not warrant full time on-site monitors, the individual facility operator shall be required to fund an appropriate fraction of one monitor's costs or a part-time monitor's costs for routine, periodic inspections of the facility, site or regulated activity. The Director of Environmental Monitors will provide the necessary procedures for establishing part time and/or temporary positions.

b. If several small to medium size facilities, sites or regulated activities in the same region are close together, the facilities, sites or regulated activities could be inspected by a "circuit rider" monitor who would spend the time at each facility, site or regulated activity in proportion to its sensitivity and needs. Municipal landfills on Long Island (Region 1), or in New York City (Region 2) are examples of sites which could be monitored in this way.

c. During certain high activity periods, additional temporary monitors may be assigned. Procedures for establishing temporary monitors will be provided by the Director of Environmental Monitors.

3. Construction phase or short term project monitors.

On an emergency basis, Departmental staff might receive temporary or part-time assignment as on-site monitors. Appropriate Time and Activity codes previously established for the specific project should be used in order to recoup all Departmental costs.

### B. Non-Inspector Monitors

In certain instances it may be possible to monitor activities through the use of monitoring equipment transmitting real-time data to the Department. Such mechanisms should be considered, where feasible.

### C. Civil Service Titles for Environmental Monitors

The Department will utilize any existing title series, as well as the those titles established specifically for the Environmental Monitor series, in order to match the responsibilities of a specific site monitor with an individual capable of fulfilling those responsibilities.

There should be no preconceived notion about the grade level of these monitors. They will, in many cases, be functioning alone with continuous pressure to refrain from "interference" with the operation which is being monitored. In many cases, professional level staff such as Engineers, Chemists or Biologists may be required to do the minimum acceptable level of work as a monitor at a particular site. Conversely, there will be certain facilities, sites or regulated activities which can be monitored adequately through routine visual inspections conducted by technicians or paraprofessionals.

It should be noted, however, that ECL §27-0917 requires that monitors who serve at commercial hazardous waste facilities that utilize secure landburial facilities as a primary disposal technique, must be expert in at least one of the following areas: geology, chemistry or engineering.

Attachment:

## ATTACHMENT

(Standard clause for the establishment and funding of an On-Site Environmental Monitor to be used in permits, consent orders, and other documents establishing monitoring programs.)

An account to fund the environmental monitor(s) shall be established with the Department as follows:

(a) The sum of \$ \_\_\_\_\_ shall be submitted to the Department with \_\_\_\_\_ days of the effective date of this permit (order). This sum is based on an estimate of the first year costs and is subject to quarterly revision. Subsequent quarterly payments shall be made for the duration of this agreement to maintain an account balance sufficient to meet the next nine months' anticipated expenses. Quarterly payments shall be made for the duration of this permit (order) in accordance with the following provisions.

(b) Costs to be covered by this fund include:

(1) Direct personal service costs and fringe benefits of the environmental monitor(s) and full-time monitor supervisor(s), including the costs of replacement personnel for the person(s) regularly assigned to these positions.

(2) Direct non-personal service costs, including without being limited to purchase or lease of a vehicle if necessary and its full operating costs, and any appropriate chemical sampling and analysis.

(3) Inflation increases and negotiated salary increases.

(4) Indirect support or overhead costs at the approved indirect support cost rate.

(c) As noted, the Department may revise the required payment on a quarterly basis to include all costs of monitoring to the Department. The quarterly revision may take into account factors such as inflation, salary increases, accrued interest to be applied to the balance, changes in operating hours and procedures and the need for additional on-site monitors and supervision of such monitors by full-time monitor supervisors.

(d) Within 30 days of written notice by the Department that a payment is due, payment shall be forwarded to the Department. Payment should be sent to the NYS Department of Environmental Conservation, 50 Wolf Road, Room ~~402~~ 608 Attention Director of Environmental Monitors, Albany, NY 12233-~~1510~~<sup>1510</sup>. Payments are to be in advance of the period in which they will be expended.

(e) Upon termination of this permit (order) and payment of any outstanding costs, the unexpended balance, including interest will be returned to the (permittee) (respondent).

(f) The Department may take appropriate action to enforce the payment provisions.