



October 28, 2004

Mr. Henry Hamilton  
NYS DEC  
Office of Environmental Monitors  
625 Broadway  
12<sup>th</sup> Floor  
Albany, N.Y. 12233-1510

Dear Mr. Hamilton:

The new Commissioner Policy concerning Environmental Monitors marks a sad day for the environment of New York as well as the health and safety of the State's residents. The policy is a significant step backward. The policy is less protective of the environment as well as public health and safety than the policy it is proposed to replace. The new policy changes the State's long-standing, logical approach from one that clearly spells out criteria and types of facilities where monitors **will** and should be required to a nebulous policy that may never require another monitor. The former policy was based on the state's responsibility to protect public health, safety and the environment. This new policy not only abandons this responsibility but also abandons the many hard-won court decisions that confirmed NYSDEC's authority and responsibility to require NYSDEC monitors where facilities have a significant potential to negatively impact the public's and/or the environment's well-being.

PEF/encon is extremely disappointed that NYSDEC attempted to quietly give public notice about this draconian policy shift without so much as a press release or public hearing. This is further compounded by the short 30 day comment period. PEF/encon hopes that this administration has not already decided to give this policy gift to industry at the public's expense without providing an adequate forum for the public to voice our concerns. PEF/encon urges you to abandon this new dangerous policy and reissue NYSDEC's former monitor policy embodied in NYSDEC Organization and Delegation Memo # 92-10. If DEC is unwilling to abandon this damaging new policy, then the agency should:

- 1) Provide a minimum of 90 days for public comment.
- 2) Fully publicize its intent to implement the policy in a way that compares the new policy to the old policy.
- 3) Complete an Environmental Impact Statement.
- 4) Hold public hearings at numerous locations throughout the state.
- 5) Make changes to the policy that are genuinely responsive to issues raised by the public.

Under the State Environmental Quality Review Act (SEQR) definitions, actions include agency planning and policy making that may affect the environment and commit the agency to definite course of future decisions. Actions also include adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment. Proposing this new policy is clearly an action under SEQR. DEC must make a significance determination. Further, the action has a significant potential to negatively impact the environment that it can only be considered for implementation after public hearing and the preparation of an Environmental Impact Statement. PEF/encon believes this because the elimination of the clear criteria for requiring monitors and the reduction in the number of types of sites requiring a monitor from six to one from the old policy to the new one, will result in fewer on-site monitors. This will result in less compliance with the ECL and related regulations and therefore more environmental degradation.

Further, the use of so-called "Independent" Environmental Monitors (IEMs) whose allegiance is to their corporate managers instead of the public will result in unreported non-compliance. Again, this increased non-compliance equates to increased environmental degradation and will create a hazard to human health. The proposed changes to the NYSDEC's Monitor Policy will result in substantial adverse impacts to the environment including but not limited to: adverse changes in air quality, ground and/or surface water quality, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems.

DEC's mission is to protect the public health of its citizens and the environment of New York State. Employees of the DEC implement the ECL policy of New York State to "enhance the health, safety and welfare of the people of the State and their overall economic and social well being." Under the new monitor policy, polluters would be able to hire a consultant in lieu of qualified DEC staff to monitor their facilities and ensure compliance. These so called "Independent" Environmental Monitors or IEMs would be paid directly by the polluter and would have no allegiance to the public and no responsibility to protect the health and welfare of the citizens of New York. "Independent" is a misnomer, is offensive and highlights the flaw in this approach. A person paid by the polluter is anything but independent. The private environmental monitors would owe their very livelihood to the polluter they are being paid to watch. Private environmental monitors are not subject to the Ethics Law and Civil Service Law and would create an inherent conflict of interest that cannot be resolved. "IEMs" are not going to document every incident of non-compliance (law breaking) committed by their paymaster. PEF questions that any environmental non-compliance will be recorded under this scenario. The most troubling aspect of this "fox watching the henhouse" approach is that the approach will appear to document perfect or near-perfect compliance while the State's environmental quality is eroded and degraded.

Unfortunately, by removing daily on-site **DEC staff** oversight, the State's ability to initiate enforcement actions and subsequently levy fines will be hindered. Is this the intent of this change? The "IEM" must contact a DEC staff person so that the staff person can then address any non-compliance with the polluter who hired the "IEM." No funding for supervision of a private monitor by a regulated entity is provided. O&D 92-10 specifically states that funding should include direct personal service and fringe benefits of the monitors and full-time monitor

supervisors.

A DEC environmental monitor is a human being. An "IEM" could be an individual, a partnership or a corporation. A private monitor may employ an individual with specified requirements, but the human being who works on site may not be qualified. Many engineering/consulting firms("IEMs") are based out-of-state and do not employ New York State residents on staff or pay State sales or income tax. Therefore, this administration's privatization plan will not only jeopardize public health, the policy will also result in a loss of New York State jobs and revenue at the very time when the State crucially needs both.

The former policy contained in O&D Memo 92-10 states that Environmental Monitors **will** be required at the following facilities:

- 1) Commercial secure hazardous waste landfills.
- 2) Commercial hazardous waste process incinerators.
- 3) Commercial processing/treatment facilities or sites which handle hazardous waste.
- 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) Facilities having a compliance history which demonstrates that a more active DEC role is appropriate.

O&D Memo 92-10 further states that due to the type of activity, and other factors enumerated above (criteria for requiring monitors) Environmental Monitors **should** be sought for the following facilities:

- 1) Landfills that accept significant quantities of industrial waste.
- 2) Waste management facilities which accept hazardous waste generated at the site of treatment or disposal; facilities receiving more than one million gallons per year.
- 3) Waste land spreading facilities.
- 4) Solid waste transfer stations and processing facilities.
- 5) Facilities which meet one or more of the criteria set forth in Section III of the O&D memo.

Nine of these ten facility types, as well as clear criteria, have been eliminated from the new policy. Only commercial hazardous waste landfills are retained in the new policy. Does DEC believe that the other nine types of facilities are less dangerous to public health and the environment? Clearly, many of these types of facilities, such as hazardous waste incinerators are more dangerous than a landfill. Does DEC plan to only require monitors where statute (27-0917 instead of 24-0917 as the policy states on page 2) absolutely dictates? In either case, this change implies that DEC intends to require fewer monitors regardless of how much potential for harm the facility in question represents. This new nebulous approach is much less protective and should not be used.

For example, while statute 27-0917 explicitly requires DEC staff as on-site environmental monitors (OEMs) at commercial land-based disposal facilities, it seems reasonable to conclude that OEMs should also be required at any large-scale or commercial hazardous waste incinerator. An incinerator typically involves spraying the hazardous waste into air as part of the combustion

process. If there is a problem with the combustion process, the aerosolized waste is vented to the atmosphere. So, this type of unit potentially poses a more significant threat to its neighbors than a land burial facility. Since the statute requires OEMs at hazardous waste land burial facilities, it is a reasonable expectation that the DEC policy should require OEMs at any large-scale or commercial hazardous waste incinerator. It should also be recognized that the land disposal restrictions (LDRs) that have been enacted dictate that the materials for land burial must be relatively innocuous due to pretreatment/stabilization requirements, as well as dictated waste treatment provisions in the LDRs. For these reasons, DEC staff as OEMs should be required at all hazardous waste incinerators. A similar logic also can be extended to the other sites delineated in O&D Memo 92-10. Therefore, all of these on-site monitoring situations should be performed exclusively by DEC staff as OEMs, rather than by company consultants.

Currently, facilities with monitors pay the DEC salary, fringe benefits, vehicles, and training as well as a substantial administrative overhead fee. Unless the program was mismanaged by this administration, the Monitor Program clearly paid its own way under the old policy. In short, under the former policy, the public got much from a DEC Monitor program that cost the New York State taxpayers nothing. Under the new policy that allows the polluter to hire their own "monitor," the public will get little and the cost of overseeing the program will be left to the State taxpayer. Additionally, the "IEM" approach will actually cost the regulated community more than they are currently paying for DEC staff. Only if one accepts the premise that the regulated facility will save cost associated with not having to fully comply with environmental regulation does the IEM concept save industry money. This is an unacceptable false savings that the environment and public health cannot afford!

The new policy pushes the decision making for requiring monitors up the ranks at DEC to the Executive. PEF believes that this change unnecessarily politicizes the process and limits involvement of DEC staff familiar with the facilities and their associated hazards.

The new Commissioner Policy concerning Environmental Monitors is one that will likely destroy this successful program. The policy turns a program that clearly states when monitors will be required into a program that may never require another monitor. The new policy establishes an Environmental Monitor Program that is designed to fail. PEF/encon urges DEC to forgo this cynical attempt to eliminate the monitor program and return to a program that will require monitors and will continue to be successful in protecting the public and the environment.

Sincerely,

*David J. Persson*

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