



November 5, 2004

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

Dear Mr. Hamilton:

It is indeed unfortunate that O&D Memo 92-10 is not available on DEC's website for the general public to review against DEC's currently proposed On-site Environmental Policy. The comparison made below between DEC's currently proposed On-site Environmental Policy (herein referred to as "DEC's Proposal") and what it would supercede ("render . . . null and void" - last sentence of Section III) delineates multiple instances where the proposed changes are less protective of the public health of the citizens and the environment.

DEC's Proposal redefines on-site environmental monitoring by limiting its scope and applicability. Not only does O&D Memo 92-10's Section III (Guidelines for Utilization of On-Site Monitors) contain both general (III-A) and specific criteria (III-B) for utilization of On-Site Monitors, Section IV lists twelve different specific categories of facilities, sites or regulated activities that either will require or may require On-Site Monitors. DEC's Proposal would replace these easily understood concrete criteria with loosely stated ones that are open to challenge. For instance, the term "clearly results in" used in the generic statements of Section II-2 & II-3 are undefined as to exact meaning.

Since DEC's Proposal Section II admits the broad circumstances identified for On-Site Monitoring are not all inclusive ("Such circumstances include, but are not limited to"), it should retain, not eliminate, the readily understood criteria of O&D Memo 92-10's Sections III and IV, as they have worked well for the last twelve years. In particular, even the catch-all criteria of O&D Memo 92-10 (Section IV-C) are clearer than Sections II-1, 2 & 3 of DEC's Proposal.

Besides ECL 27-0917 which requires environmental monitoring be performed by DEC staff, under the monitor provision for solid waste management facilities in Part 360, "funding shall be established with the department as follows" to pay for a DEC employee monitor. This is in 360-1.11(a)(2). According to the solid waste section of the Department's web site, a revision of Part 360 is being prepared. Are there plans to change the monitors section of Part 360? If so, how?

In addition, DEC's Proposal includes the possibility of using monitors in situations of "harvesting, handling or managing of natural resources by a regulated entity." O&D Memo 92-10 mainly concerns facilities regulated by the DEC's Environmental Quality Divisions, although mining is mentioned Section IV-C of O&D 92-10. How this policy will apply to harvesting, etc. of natural resources should be better explained and detailed.

The nebulous wording of DEC's Proposal appears to be written to allow for changes elsewhere in DEC's work that aren't clearly spelled out yet. Parts of Section II's first sentence could be used to extend privatization to things that go beyond the current monitor program. Namely, "On-site environmental monitoring here refers to examination, observation and inspection of a regulated entity's operations that is so ... intensive that the time and effort required are beyond ... the capability of the Department to perform using its own resources."

Therefore, DEC should explain how this proposed policy relates to DOB Budget Bulletin B-1170, which requires that "agency heads must analyze operations, assign priority rankings to activities and identify lower-priority functions that might be eliminated"; "restructuring programs and services where such changes might increase the level of Federal funding or other non-General Fund resources" and "continue their previously established controls to limit expenses to only those that are absolutely essential to delivery of core agency services."

In addition, DEC's Proposal allows for monitoring services to be provided in two ways, but doesn't give any indication why the decision would be made to use a DEC employee instead of a private monitor, except for the situation where DEC employee monitors are required by law (i.e., commercial hazardous waste facilities using secure landburial). Clear, easily understood criteria on how this choice will be made should be identified. In addition, since the responsible party pays additional cost associated with an On-Site Environmental Monitor, the choice should be based on protecting the public health. Therefore, DEC should also request that DEC staff doing On-Site Environmental Monitoring be exempted from the above referenced DOB Bulletin. Specifically, the "restrictions on personal service (continue the hiring freeze and minimize overtime and other personal service costs); travel (only necessary travel permitted); ...and other NPS costs (reduce or eliminate conferences, equipment purchases, . . .)" should not apply.

The term "independent" should be replaced by the word "private" since its current application in DEC's Proposal is misleading. Unintentionally, it implies that the professional judgments of DEC staff who are monitors may be suspect due to lack of independence compared to contractors. Also, since private environmental monitors would be employed by the responsible party while also reporting to DEC, they would in practice have two bosses and thus would appear to lack independence rather than possess it. How will the conflicted accountability of private environmental monitors to two bosses be dealt with?

DEC's Proposal's Section III lack's Section II of O&D Memo 92-10's multiple references citing DEC's authority to require on-site environmental monitoring. These should be included.

DEC's Proposal's Section IV indicates that DEC program staff would be responsible for overseeing and supervising private monitors, but has no requirement for funding being provided by the regulated entity to pay for this oversight and supervision work when a private monitor is used. Under O&D Memo 92-10, funding for supervision of monitors is explicitly included in Section VI-C-4. In fact, Section IV of DEC's Proposal seems to imply that environmental monitoring will not occur unless sufficient DEC supervisory personnel are already available ("The Assistant Commissioner for Administration is responsible for ensuring that the proposal of new or additional monitoring services, or new or additional OEM or IEM, is supportable by the Department's administrative support organizations.")

DEC is already severely understaffed for the existing projects, and stretching DEC's limited staffing even further will endanger the quality of current work output. It is not feasible for DEC to oversee, evaluate, and supervise the work of private monitors without additional staff. Further, it will take years of on-the-job training of private monitors to equal the experience and effectiveness of the existing DEC monitors. As employees-at-will, it is likely that many private monitors will find other employment long before achieving comparable competence to DEC's long-term civil servants.

The technical background, observations, experience, and resultant understanding of the existing environmental monitoring staff are vital to the accurate decisions that need to be made. In addition, project directors, close to these working staff, are in the best position to utilize this information. Unfortunately, DEC's Proposal's Section V begins, "Because of the extraordinary nature of on-site environmental monitoring, the decision to impose such a requirement upon a regulated entity is to be made at the Department's executive level." In contrast, O&D Memo 92-10 requires monitors routinely at certain types of facilities (92-10, Section IV), has more inclusive criteria for deciding whether a monitor should be required (92-10, Section III) and leaves decisions about this usually with the director level of the DEC structure (92-10, Section VI), not the executive level. Also, the reasons for deciding which kind of monitor to use are not identified in DEC's Proposal.

Therefore, Section V of DEC's Proposal suggests fewer facilities will have monitors than under O&D Memo 92-10. As DEC currently has more than seventy Environmental Monitors at hundreds of sites, why is this characterized as "extraordinary?" It appears that the intent of this proposal is not only to severely limit environmental monitoring by civil servants, but to limit environmental monitoring itself. If so, why? If not, how will the current level of environmental protection be maintained if the clear criteria of O&D Memo 92-10 are eliminated?

Section VIII-A of O&D Memo 92-10 discusses use of monitors who would spend full-time at one site, part-time duty, and temporary duty. DEC's Proposal doesn't get into this. Appendix A doesn't specify how much time the monitor would spend on site. Appendix B, Section A alludes to this ("specify minimum time") but gives no guidance on how to determine it.

Appendix A is the proposed standard language for DEC employee monitors. In the second section labeled (a) and section (b), there is nothing that specifies a dollar amount of the funding nor anything that says how this would be calculated. O&D Memo 92-10's Section VI-C-4 identifies the costs that monitor funding is required to cover much more specifically than the DEC's Proposal does. Appendix A mentions some things that may be taken into account in revising the required payment, but doesn't say what costs would be included to arrive at the required payment. Costs left out of what is mentioned in section (b) of Appendix A include equipment, vehicles, training, sampling costs and fringe benefits. Appendix A also doesn't require the permittee or respondent to provide office space, a phone, etc. although Appendix B can require these for private monitors. O&D Memo 92-10 includes funding for these as part of indirect support.

Neither Appendix A, nor the main body of DEC's Proposal, discuss the qualifications of the DEC employee monitors, in contrast to Section VIII of O&D Memo 92-10 which emphasizes having qualified monitors. While Appendix B gives generic qualification for the private environmental monitor, it deals with corporate entities. Now, a DEC staff monitor (a.k.a. "on-site environmental monitor") is a human being whose professional qualification are thus readily known. The private monitor (a.k.a. "independent environmental monitor") could be an individual, a partnership or a corporation. Although Appendix B requires that a business-entity monitor have on staff a person with

specified requirements (for example, PE license) who will be responsible for all monitoring at the site, Appendix B appears to allow for lower qualifications and credentials for the actual human being who will be doing the day-to-day on-site work than O&D Memo 92-10 requires. This is clearly inferior to O&D Memo 92-10 which requires proper professional credentialing through the Civil Service System (see O&D Memo 92-10, Section VIII-C) for the actual on-site monitor. Also, while DEC employees must undergo continuous performance evaluations, none is required of the private monitors. In addition, it appears that no appropriate review of private contractors or their sub-contractors personnel are required to insure that they have proper qualifications to maintain security of sensitive information, such as at chemical storage facilities, etc.

In addition, DEC employee monitors are subject to the Ethics Law's limitations on employment apart from their DEC job. Appendix B doesn't contain as broad limitations on private monitors. Business-entity monitors such as consulting firms might be monitoring one company's facility and preparing applications to DEC for other unrelated companies. Appendix B also does not contain any prohibitions concerning gifts, etc., which apply to DEC employees.

As noted above, although a monitor under Appendix B would report to the Department and be directed by the Department, Appendix B does not provide for the regulated entity to pay the costs of this supervision. Appendix B does contain a series of sentences attempting to have the private monitor appear to be under DEC control, rather than their employer. (See "The IEM must be available to DEC . . ." to end of unindented paragraph). However, the very existence of these sentences reveals the weakness of the private environmental monitoring approach. In particular, it admits that any permit violation will require that DEC become involved. Thus, DEC's Proposal removes DEC staff from being immediately available when the presence of DEC is most needed!

In conclusion, DEC employees are the ones most familiar with DEC rules and regulations and best able to enforce NYS environmental laws. It is important to keep at least the current level and high quality of environmental monitoring and not let it be eroded away. O&D Memo 92-10, which requires that on-site environmental monitors be DEC staff, has successfully protected the public health and well-being of New York State's citizen for over a dozen years and should not be replaced.

Sincerely,

A handwritten signature in cursive script that reads "Mike Keenan". The signature is written in black ink and is positioned below the word "Sincerely,".

Mike Keenan, PEF/encon Division Leader