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November 5, 2004

Mr. Henry L. Hamilton
New York State Department of Environmental Conservation
Office of Environmental Monitors
625 Broadway, 12th Floor
Albany, NY 12233-1510
Sent via email: hhamilt@qw.dec.state.ny.us

Re: Proposed DEC Policy: On-Site Environmental Monitoring
Comments of the American Ref-Fuel Company

Dear Mr. Hamilton:

On behalf of the American Ref-Fuel Company (Ref-Fuel), I offer the following comments on the Department's proposed policy concerning environmental monitors (proposed policy). Ref-Fuel owns and operates two waste-to-energy (WTE) facilities in New York; one in Niagara Falls and one in Hempstead. Both facilities are monitored by a full-time DEC employee in accordance with their permits. At the Niagara Falls plant, the DEC on-site environmental monitor's (OEM) time is fully dedicated to Ref-Fuel's facility, and Ref-Fuel reimburses the DEC for all personnel costs. At Hempstead, about three-quarters of the OEM's time is dedicated to the facility, and Ref-Fuel pays the DEC for that proportion of his time. Overall, the DEC has in place a fully-funded program for day-to-day monitoring of the compliance of Ref-Fuel's two WTE facilities with full-time DEC personnel. This program has worked for several years.

Ref-Fuel disagrees with the Department's proposal to now switch to independent environmental monitors (IEM) that are contracted directly by the facility for the following reasons:

1. The quality of monitoring would likely decline.
2. The change would not save the DEC or the State any money, yet it would substantially increase the cost to the monitored facilities.

Quality of Monitoring

Based on Ref-Fuel's experience, the full-time DEC OEMs at our facilities are knowledgeable about the various aspects of WTE facilities and, with that knowledge, they are effective and efficient DEC representatives. In addition, they know DEC regulations, policies and practices, and as DEC employees they have the State's resources available to them. They are able to make informed assessments quickly and accurately, and can answer regulatory questions. In some cases, they have the authority to make on-site decisions on behalf of the DEC. These capabilities are unlikely to be found in an independent contractor.

It is understood that only qualified contractors could be hired by the facility under the proposed policy, and that the DEC would have to approve them. However, there are still several potential problems with hiring an IEM. First, it would frankly be difficult to find an independent contractor with the same familiarity with WTE facilities that the DEC monitors develop. WTE is a relatively specialized field, and many companies that have knowledge of the industry are already engaged professionally with Ref-Fuel, ruling them out as potential IEMs. Second, turnover with engineering or consulting companies tends to be relatively high, and one can expect having to regularly familiarize a new IEM with the facility. At a minimum, a company would probably rotate various people through the monitor position, since consultants would probably not want to indefinitely be assigned to only one project. Third, Ref-Fuel is concerned about the potential for release of confidential information. DEC's OEMs currently have broad access to our facilities, and to any facility operational information that they want. We would be concerned about providing such detailed access to private contractors who could have Ref-Fuel competitors as clients.

Cost

The current program of DEC-employed monitors is fully funded by the monitored facilities. The monitors are DEC employees, and each facility pays the full cost of their employment as part of its regulatory obligations. The DEC is therefore able to continually monitor facilities with its own employees at no cost to the state. If a facility were required to hire and pay an IEM instead, there would be no change in the DEC's finances.

However, it is virtually certain that the cost to the monitored facility would substantially increase. Any for-profit contractor or company will have to charge more than it costs to simply cover personnel costs for a non-profit entity such as DEC. The result would be higher costs for the regulated companies with no change in cost to the DEC.

In conclusion, Ref-Fuel does not agree with the concept of shifting from DEC-employed on-site environmental monitors (OEMs) to privately-employed independent environmental monitors (IEMs). The main result for WTE facilities would be an increase in cost to our company with a decrease in the effectiveness of the monitoring. The DEC would not save money, since the current program is fully funded.

Please feel free to contact me at 860-889-4900 x135 if you have any questions or comments.

Sincerely,

Derek Grasso
Manager of Regulatory Affairs

cc: A. Szurgot
K. Armellino
B. Gleason
S. Wheeler
S, King

November 5, 2004

Mr. Henry L. Hamilton
New York State Department
of Environmental Conservation
Office of Environmental Monitors
625 Broadway, 12th Floor
Albany, NY 12233-1510

Re: Proposed Commissioner Policy; On-Site Environmental Monitoring

Dear Mr. Hamilton,

I am writing on behalf of Waste Management of New York, LLC (WMNY) regarding the referenced proposed policy. WMNY operates a hazardous waste facility (CWM Chemical Services, LLC), three solid waste landfills, and a number of transfer stations that are included in the NYSDEC Environmental Monitoring program. Our comments on the proposed policy are outlined below:

- WMNY believes that the existing OEM program staffed by NYSDEC employees has several benefits. Primarily, having NYSDEC staff with first hand knowledge of our facilities and operations is valuable in facilitating communication with NYSDEC office staff. In addition, we often hear that the direct oversight by NYSDEC is important to the community. We support the specification of an OEM for the hazardous waste facilities, and suggest that this be extended to include the solid waste landfills.
- Our concerns with the IEM approach specific to the proposed Standard Language include the following:
 - Ineligibility of firms working for Waste Management (problematic for a company of our size, employing a large number of consultants);
 - We suggest that the Work Plan should govern the IEM's activities and that the language should be removed regarding "IEM's staff must report directly to, and be directed by, the Department. . .";
 - We are concerned with the language regarding notification and reporting of violations of permit conditions, regardless how minor the violation might be (labeling/paperwork errors, etc.). Any notes regarding violations

should also include notes on any corrective/preventive actions taken by the facility. We would suggest that the reports be prepared on a weekly basis, highlighting "Areas of Concern" and "Areas of Progress". We would also suggest that a distinction between monitoring and investigative/enforcement personnel be made (IEM's would "cooperate" with any enforcement activities).

- We are also concerned with the lack of detail on NYSDEC oversight expenses that would be charged to the facility. Our current experience with the OEM billing procedures implemented in 2004 is that our costs have increased significantly in some locations with relatively little support for the charges as compared to the previous procedure.

We appreciate your consideration. I can be reached at 716-754-0279.

Sincerely,

Waste Management of New York, LLC

Rebecca P. Zayatz
Market Area Engineer

cc: K. Pokalsky - Business Council of NYS
D. Tooley - WMNY
D. Balbierz - WMNY
J. Kocian - WMNY
T. Lewis - WMNY
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Lloyd M. Young
 Solid State Cooling Systems



KENNETH J. POKALSKY
 Director of Environmental
 and Regulatory Programs

The Business Council of New York State, Inc.

November 5, 2004

RECEIVED

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DEC
 OFFICE OF INTERNAL AUDIT

Mr. Henry L. Hamilton
 Office of Environmental Monitors
 New York State Department of
 Environmental Conservation
 625 Broadway
 Albany, New York 12233

Dear Mr. Hamilton:

RE: Proposed Policy on On-Site Environmental Monitors

I am submitting these comments on behalf of The Business Council and our member companies. The Business Council represents approximately 3,400 businesses and business associations across New York State. Our membership includes many industrial, waste management, and other businesses that have been subject to the Department's on-site environmental monitor program. These comments have been developed through input from affected companies and from our experience with the program over the past several years.

The Business Council believes that the DEC has been increasingly judicious in its imposition and extension of on-site environmental monitor requirements over the past several years. We appreciate the Department's efforts in this regard, and urge the Department to use its policy modification process to help assure that monitor requirements are only imposed where there is a clear and convincing need for significantly enhanced agency oversight of a regulated facility or activity, and where such oversight will likely result in improved environmental compliance and/or protection.

Unfortunately, we believe that the draft monitor policy fails to adequately address this objective, and fails to achieve the principal purpose of policy documents - to provide DEC staff with clear guidelines on implementation of statutory and regulatory provisions.

In addition, Business Council members have expressed concerns about the increasing costs of existing monitor conditions, and the reduced financial accountability of DEC's monitor program. We urge the Department to address these concerns through this policy modification process as well.

Toward these goals, The Business Council respectfully offers the following recommendations.

Legal Authorization for Monitor Requirements - The Business Council strongly believes that policy documents can only be used to provide non-binding guidance on the implementation of statute and regulations. Policy and/or guidance documents cannot be used to broaden the scope of underlying statutory or regulatory authority.

Therefore, we believe that this policy document should clearly identify explicit statutory and regulatory authority for imposition of on-site monitors.

In our view, these opportunities are somewhat limited. The state Environmental Conservation Law gives DEC explicit authority to require on-site monitors in permits for commercial land burial facilities, and to require those permitted facilities to bear the cost of such monitors. Likewise, DEC regulations give DEC authorization to require on-site monitors at facilities with solid waste management permits (e.g., landfills, incinerators, transfer stations) and for low level radioactive waste landfills. Finally, the DEC has discretion to include on-site monitor requirements as part of negotiated consent orders settling alleged violations or remediation requirements. We believe the policy should include these specific references in its Section II discussion of legal authority.

Further, we oppose inclusion of any language that suggests broader authority than what is provided for in applicable statute and regulation. The Business Council is particularly concerned with language in Section II and Appendix A stating that OEM/IEMs can be imposed on "volunteers" and be required for the duration of "agreements" - terms suggesting a Departmental intent to extend monitor requirements to participants in the state's brownfield program (ECL Article 27, Title 14). That statute contains specific provisions regarding appropriate DEC oversight costs that can be recovered from participating parties. We see no need - or statutory authorization - to extend the on-site monitoring program to Title 14 projects.

Criteria for Imposing Monitor Conditions – The Business Council agrees with the reference in the draft monitor policy to "the extraordinary nature of on-site environmental monitoring," and the statement that on-site monitors should be required "only in those instances where circumstances warrant this level of monitoring."

We support the draft policy's process for approval of monitor requirements, requiring that written requests justifying OEM/IEM conditions be prepared by Division or Regional Directors, and approved by the appropriate Deputy Commissioner for Environmental Quality. We recommend that the policy should clearly apply this executive level review process to any renewal or extension of pre-existing monitor requirements, and any DEC proposals to modify existing monitor requirements, in addition to the initial imposition of monitor requirements.

We are very concerned, however, that Section II proposes extremely vague, extremely broad criteria for imposing monitor conditions.

Specifically, the draft policy says that monitors may be justified when "the compliance history of the regulated entity demonstrates a need for on-site environmental monitors." This vague language provides no substantive guidance to DEC staff. The Business Council recommends that the criteria refer instead to instances where a history of environmentally significant and/or systemic non-compliance raises concerns about the facility's ability or commitment to maintaining future compliance, and where such compliance concerns can be effectively addressed through more intensive on-site DEC supervision. It should be recognized, however, that on-site monitors may not be the most effective or efficient response. For example, air compliance issues may be more appropriately addressed through emissions monitoring and reporting than on-site DEC staff presence.

Likewise, the draft policy states that monitors may be justified in instances where "the nature of the operations at a regulated entity's site or facility clearly results in conditions which could pose a threat to public health or the environment." In our view, potential threats to public health and the environment is the fundamental basis for environmental regulations, and that this proposed criteria is so broad that it could be applied to every facility or activity regulated by the DEC. The Business Council recommends that, for each category of permitted facilities where monitors are authorized in statute or regulation, the policy cite specific circumstances (e.g., potential impact on highly sensitive receptors) or activities (e.g., construction activities) that may warrant more intense DEC oversight.

Finally, we object to the statement in Section II that on-site monitoring may be required if the DEC oversight of a facility is "beyond the capability of the Department to perform using its own resources." DEC resources are determined as part of state's budgetary process, and regulated facilities pay significant program and permit fees to supported DEC activities. Including this language in the monitor policy could support or justify the reduction of legislative appropriations directed toward DEC staff, pushing this financial burden onto the regulated community without legislative approval for increased regulatory fees or other general revenue measures.

Duration of Monitor Requirements - One of the regulated community's major concerns regarding the monitor policy is the lack of criteria or procedures for the removal of monitor conditions. While the Department has been willing to reassess monitor requirements on a case-by-case basis, we believe that its program policy should include specific provisions governing the duration of monitor requirements.

Specifically, we recommend that the policy require that staff-developed monitor proposals identify the activity or activities that would be subject to monitor requirements, the specific reasons why such activities may require enhanced Departmental overview, and specific criteria for evaluating the continued need for monitor requirements at that facility.

Further, the policy should include a process by which the regulated entity can petition the Department for the reduction or elimination of monitoring requirements, pursuant to the factors discussed in the preceding paragraph.

Financial Accountability - Business Council members have raised concerns about the increasing costs of existing monitor requirements. In some cases, these cost increases are attributable to higher level DEC staff being assigned to monitor posts. They are also attributable to significant increases in staff, fringe benefit and overhead costs being billed by the Department. In either case, these rising costs are of particular concern given ongoing economic conditions, and growing competitive pressures on industrial and waste management facilities in New York State.

Likewise, our members have expressed concern about the lack of opportunities for input into the design of monitor work plans, and the lack of detailed accounting on how monitor funds are spent by the state.

To address these concerns, the Business Council recommends that:

- specific funding requirements for on-site monitors should be established in permits, orders and/or agreements, and should not be subject to unilateral increases by the Department. At minimum, specific cost factors, such as the appropriate grade/title of DEC monitors, should be established in the permit, order or agreement, and not be subject to Departmental modification without cause.
- facilities should be given detailed expense statements for disbursements made from their monitor accounts.
- the Department should provide the affected facility with an opportunity for input into the development of annual work plans for on-site monitors, rather than an opportunity to review the work plan at the time that annual invoices are received.
- the monitored entity should be able to provide input regarding the performance of the environmental monitor and monitoring program and to make suggestions for improvement. While an on-site environmental monitor can provide valuable insight into the compliance requirements, challenges and issues at a facility, the regulated entity also may have a tremendous amount of useful information and input regarding the facility, its process and procedures, and suggestions for improving the on-site monitoring program. The policy should be revised to indicate that input by the monitored entity will be accepted and considered by the Department regarding the performance, effectiveness and other issues surrounding the environmental monitor and the monitoring program.

Further, in Sections II and III, the policy discusses the need for the monitored entity to pay for on-site environmental monitoring because the level of oversight is beyond what can normally be provided by Department staff and resources. The policy should be modified to include procedures to modify payment if the converse is true (i.e. the budget for the on-site monitor should not be paid by the monitored entity for "typical" Department activities performed by the on-site environmental monitor). Where the monitor is used to conduct activities that would be carried out as part of the Department's normal oversight of all similar regulated facilities, the monitored entity should not be required to bear the cost of such activities. These activities are not tied to the concerns that led to the appointment of the monitor. By requiring the entity to pay for such activities, the Department is essentially funding its normal statutory functions through the monitor assessments.

Independent Environmental Monitors - The Business Council believes that there limited instances where use of private sector monitors may help advance the Department's regulatory goals and at the same time provide potential benefits to the regulated community.

For example, the use of independent monitors may be appropriate when the need for enhanced DEC oversight is for a limited duration, or requires specialized experience or skills not readily available within existing Departmental resources. In these instances, an *ala cart* approach - buying just the amount and/or type of monitoring services necessary - may provide benefits to the Department, the facility, and better serve the interests of the public at large.

On the other hand, by eliminating current budgetary and personnel restrictions on the Department's ability to impose monitor conditions, the authorization of independent monitors could lead to more frequent, less judicious imposition of monitor requirements. For this reason, it is essential that any final policy that includes an IEM option also establish clear criteria and guidance for the Department's imposition of monitor requirements.

Further, based on a review of existing monitor billings and our members' experience in contracting for environmental engineering services, we believe that for permanent, year-round on-site monitors, the independent monitor option will often be considerably more expensive for the affected facility. We strongly recommend against the use of the IEM option for such monitor requirements.

For these reasons, The Business Council also recommends that the final policy require that the relative cost of an OEM versus and IEM to the regulated facility be a major consideration in both the development of DEC monitor proposals, and in the Deputy Commissioner level decision-making process.

We have three other comments on the independent monitor proposal.

First, the proposed criteria for "independent" monitors may be unworkable in many instances. The Appendix B "standard IEM language" states that any firm that is performing work at any facility owned by the owner of the target facility, its parents, subsidiaries or affiliate corporations, is precluded from serving as a IEM at that facility. For a large corporation, this language may preclude most if not all of the most qualified consulting/engineering firms. A more appropriate standard may be to exclude firms currently with a contractual relationship with that facility, or other in-state entities related to that facility.

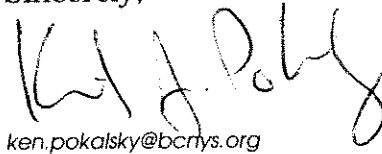
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Second, the process for selecting an IEM is unclear. The policy states that the subject facility shall "retain the services of an IEM," but that "the selection of the IEM must be approved by the Department in its sole discretion." It is unclear whether the subject facility is required to vet and recommend potential IEMs to the Department, if the DEC intends to develop lists of, or "standby contracts" for, acceptable IEMs, or use some other process. Any final policy that includes an IEM option should make the selection process more clear.

Third, we certainly recommend that - notwithstanding the cost issues - member companies have experienced benefits through the on-site environmental monitors. These include provisions allowing the on-site monitor to make expedited determinations on compliance issues and provide certain regulatory approvals. It is unclear whether these types of functions could be delegated to an IEM. If not, these beneficial services provided by an OEM would be lost to facilities subject to an IEM requirement.

Again, we appreciate the opportunity to review and comment on this draft policy, and the one-week time extension to submit comments. Please feel free to contact me if you would like to discuss these comments in detail, or if I can answer any questions you have regarding our comments and concerns.

Sincerely,



ken.pokalsky@bcnys.org

kp
Enclosure
Copy to James Ferreira