

Summer 1995

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## Recommended Citation

David L. Markell, *Reinventing Enforcement: A Guide to DEC Compliance Options*, 1 *ALB. L. ENVTL. OUTLOOK* 44 (1995),  
Available at: <http://ir.law.fsu.edu/articles/90>

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Citation: 1 Alb. L. Envtl. Outlook 44 1995



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# Reinventing Enforcement: *A Guide to DEC Compliance Options*

By David L. Markell

Enforcement and compliance are an essential component of an effective environmental regulatory scheme. As former U.S. Environmental Protection Agency (EPA) Administrator William Reilly observed, "enforcement is 'at the very heart of our regulatory programs.'"<sup>1</sup> Current EPA Administrator Carole Browner has echoed this sentiment, characterizing enforcement as the "backbone of environmental protection."<sup>2</sup>

As the federal EPA seeks to "reinvent itself,"<sup>3</sup> and as the State of New York's Department of Environmental Conservation (DEC) pursues "regulatory reform,"<sup>4</sup> one of the items sure to be on their respective agendas is the challenge of devising strategies that will improve compliance with the environmental laws. As I point out in a recent article, "countless innovative approaches exist."<sup>5</sup> In this brief introduction to the presentations by the members of the panel on enforcement and compliance issues, I will identify three dimensions of this challenge. I will also touch on one related issue with which both DEC and EPA will need to grapple in the coming years.

Beginning at the most stringent end of the continuum, DEC needs to maintain the capacity to identify, and then successfully pursue and penalize, the relatively few parties that flagrantly violate the environmental laws. As I noted in a 1989 article,<sup>6</sup> for the past several years DEC has had an integrated capability to do this job effectively. The Department's uniformed and undercover peace officers, who work for the Division of Law Enforcement, have worked closely with a small group of attorneys in the Division of Environmental Enforcement (DEE) who spend most of their time developing cases for criminal prosecution,

and with DEC technical staff, including a small group of technical staff in DEE with special training and expertise in forensics and sampling, to ferret out, and then develop cases against, "outlaws" under the environmental statutes. Successful prosecutions against a wide variety of parties have resulted from this coordinated effort. One challenge, therefore, especially in these difficult budget times, is to preserve this integrated DEC capacity to identify, and build successful cases against, this faction of the regulated party universe. While the size of this faction is likely quite small, dismantling of this integrated effort, or any of its critical components, will ultimately lead to increased blatant lawlessness, and an increased lack of respect for our legal requirements.

A second "theme" in the area of compliance and enforcement involves government's likely expanded use of non-governmental parties to monitor compliance with the environmental laws. The confluence of two events – expansion in the size of the regulated community, and reduction in the size of government – are likely to make expanded use of non-governmental parties to monitor compliance a necessity. As I discuss in a recent article,<sup>7</sup> experiments in this area have begun to crop up around the country, with DEC having been a participant in, or originator of, some of these experiments. The new Administration should identify the experiments that have been conducted in other parts of this country, and in this area, and borrow from the successful (and avoid or discard the unproductive) in fashioning its own strategies.

A third compliance strategy is at the far end of the continuum from the need for an integrated capability to pursue criminal enforcement, with which I began. This strategy involves the idea of increased outreach to the public and to members of the regulated community as a means to enhance compliance. The

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notion of public education concerning releases to the environment, as embodied in the Toxics Release Inventory (TRI) program, is one example of a non-regulatory approach that has been widely credited with enhancing compliance. Technical assistance programs, in which government helps members of the regulated community, especially smaller companies that oftentimes cannot afford in-house environmental compliance staff, understand regulatory requirements, is another example of this increased outreach. Related is the notion that government should do a better job of serving as a clearinghouse for ideas

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on alternative approaches that regulated parties may use to comply with regulatory requirements. A fourth form of this type of activity to enhance compliance is government's use of positive reinforcement for companies that excel in the field. DEC's pollution prevention awards are an example of the idea that compliance can be improved by recognizing in a positive way those parties that do outstanding work in the compliance arena.

The menu of strategies available to DEC to improve compliance with the environmental requirements it is charged with administering contains many more choices than the few items listed above. The choices are also not mutually exclusive – DEC can use a variety of these options simultaneously. In fact, it seems obvious that the use of a variety of these strategies in tandem will prove the best approach.

I close this introductory discussion by raising a final issue that cuts across the spectrum of compliance options. This is the issue of trying to measure the efficacy of compliance efforts. Traditionally, EPA, and consequently DEC to some extent, has used a "bean counting" approach to measure the effectiveness of enforcement and compliance efforts. Thus, EPA and DEC have traditionally evaluated the success of their enforcement and compliance efforts in part by tracking statistics such as the number of inspections conducted, the number of enforcement actions initiated, and the

amount of penalties obtained. It is time to move at least partially beyond these traditional measures of enforcement and compliance performance. DEC needs to develop strategies to measure the impact of different enforcement and compliance strategies on the quality of the environment itself – for example, how many tons of pollutants did an enforcement action, or a technical assistance outreach effort, prevent from being released into the environment. DEC and EPA have begun to move in this direction and it will be interesting to follow their efforts.

Developments in the enforcement and compliance arena reflect the extraordinary dynamism of environmental law. The dynamic quality of our environmental legal framework, and of the administration of that framework, is especially apparent today, with the Clinton Administration's "reinventing government" initiative and the Republican Congress's "Contract with America" stirring the pot at the federal level, and an invigorated "regulatory reform" effort doing the same here in New York. For those people interested in government and public policy in general, and in environmental policy issues in particular, in short, we are living through a fascinating time period; we at Albany Law School hope that the conference that produced the papers in this second volume of the *Environmental Outlook* has contributed constructively to finding answers to some of the pressing questions we face, or at least has sharpened the thinking concerning these issues, including appropriate strategies to enhance compliance with the environmental laws.

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