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Regulatory Reform at the State Department of Conservation

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By David L. Markell

New York State Governor George E. Pataki's issuance of Executive Order # 2 on January 5, 1995,[2] within days after taking office, signals that the notion of regulatory reform is likely to be at the top of the New York State Department of Environmental Conservation's (DEC's) agenda for the next few years. This article discusses three issues that warrant further scrutiny in determining what the DEC's mission should be in the arena of environmental regulation, and how it best can accomplish its objectives. The first section urges a heightened focus on pollution prevention opportunities, suggesting that pollution prevention efforts hold great promise for identifying cost-effective strategies to protect the environment. The second section discusses the importance of approaching environmental problems from a comprehensive, rather than from a piecemeal, perspective. The final section offers some preliminary thoughts concerning ideas for innovating on the compliance end of environmental regulation in order to increase the degree of observance of the law.

A. Promoting Pollution Prevention

As the federal Environmental Protection Agency (EPA) and the federal General Accounting Office have recognized, unexplored opportunities exist to implement cost-effective measures that will significantly reduce pollution. As a result, the goal of protecting the environment while strengthening (and not undermining) the economy will be well served through a heightened focus on pollution prevention as a technique or strategy to control pollution. In its recently issued Five-Year Strategic Plan, the EPA determined that it must "pursue a new generation of environmental protection,"[3] with a renewed focus on pollution prevention serving as one of the "guiding principles" as it charts this new course:

> The Agency, and the nation as a whole, focus most of their efforts on solving environmental problems long after they have been created – when solutions are more likely to be costly and less likely to be effective. Yet pollution prevention – anticipating problems and stopping them before they occur – is far more cost-effective and protective of the environment. Consequently, pollution prevention should be the strategy of choice in all that the Agency does.[3]

Reinforcing the point, the EPA indicates that "[d]uring the next five years, EPA will lead the nation in reorienting efforts to reduce and eliminate pollution at the source. Pollution prevention will be the first strategy considered for all programs at EPA."[3]

Work done at Amoco's Yorktown refinery in Virginia, and activities at the DuPont Chambers Works plant in New Jersey, among other efforts, support the view that a focus on pollution prevention opportunities is likely to lead to discovery of cost-effective approaches to controlling and reducing pollution. At both of these facilities, sophisticated companies, working with and/or at the behest of the government, discovered previously unidentified source reduction opportunities that achieved significant reductions in pollution in a cost-effective way.

The Amoco refinery is an interesting case study. A joint U.S. EPA/Amoco Corporation case study of environmental regulation at the plant concluded that "about 97 percent of the release

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reductions that [environmental] regulatory and statutory programs require can be achieved for about 25 percent of today's cost for these programs."[4] The EPA/Amoco Report noted that "source reduction options were more cost-effective than most treatment and disposal alternatives."[3] This discovery of significant cost-effective opportunities to reduce pollution "signals that the potential exists to produce enormous improvements in our current [environmental regulatory] system."[5]

DuPont had a similar experience at its Chambers Works facility. DuPont apparently had invested significantly in pollution controls at the plant. Despite this, working with the EPA's Region II office, DuPont revisited its operation and discovered ways to retool or restructure several of its product lines in a way that was cost-effective (i.e., from a financial or return on investment standpoint, the changeovers made sense), and also would significantly reduce its loadings of pollution to the environment. In short, DuPont's invigorated focus on pollution prevention opportunities led it to discover "win-win" actions that improved its financial return and dramatically reduced pollution.

While as a society we have made enormous strides and spent enormous resources and energy in developing sophisticated technologies to control pollution at the "end of the pipe," we have not yet made a comparable investment in discovering or implementing cost-effective opportunities to prevent pollution.

It seems reasonable to conclude that if large, sophisticated companies like Amoco and DuPont, by focusing on source reduction opportunities (among others), are able to discover cost-effective strategies to reduce their generation of pollution by significant amounts, other large companies as well as smaller, less sophisticated companies could produce the same "win-win" results. Assuming that this assumption is accurate, the critical issue is how best to ensure that companies identify these opportunities and pursue them.

A wide variety of options exist. They range from the purely voluntary in nature (e.g., EPA's "33/50" program), to legislation requiring companies to investigate pollution prevention opportunities or, perhaps, achieve certain pollution prevention benchmarks. State policy makers will need to consider and resolve a host of issues in determining where to stop along the continuum in the search for a workable strategy. Among these issues are at least the following four: 1) what "carrots" should any strategy contain to induce regulated parties to look for ways to reduce their generation of pollution; 2) what "sticks" should any such strategy contain; 3) what types of information concerning their pollution prevention efforts should regulated parties be required to provide the government; and 4) in addition to being kept apprised of regulated parties' efforts, what other role, if any, should government play in this pollution prevention effort.

State policy makers will by no means be starting from scratch in addressing these issues. The federal government has been involved in a wide range of pollution prevention activities, especially since the enactment of the federal Pollution Prevention Act in 1990.[6] Further, more than a dozen states have enacted pollution prevention laws of various types. Finally, the DEC has gained invaluable experience in the hazardous waste reduction planning arena because of its administration of the State's 1990 Hazardous Waste Reduction Planning Act.[7] A review of federal experience, in tandem with an effort to evaluate other states' and New York's own experiences, undoubtedly will be of assistance in framing the questions listed above, and then formulating answers that build on the best of other experiences and avoid the pitfalls.

While as a society we have made enormous strides and spent enormous resources and energy in developing sophisticated technologies to control pollution at the "end of the pipe," we have not yet made a comparable investment in discovering or implementing cost-effective opportunities to prevent pollution. Accordingly, a significant opportunity to achieve substantial pollution reductions through cost-effective steps may exist and deserves to be explored. The challenge is for interested parties in the State, including representatives from government, industry, environmental groups, and the academic community, to fashion a strategy that will enable us to realize these opportunities. As Amoco and the EPA put

it in their joint report, "solving difficult environmental problems must draw on many of society's 'partners.'"[4]

B. The Importance of Pursuing Comprehensive Approaches to Environmental Issues

A second overarching theme in the area of environmental regulation that will continue to win support in the coming years is the importance of approaching environmental concerns from a comprehensive, rather than from a piecemeal, perspective. As I noted in a recent article,[8] a consensus among government regulators, industry representatives, and environmentalists already seems to have emerged over the past few years that: 1) traditionally, the environmental laws have taken a piecemeal approach in addressing environmental concerns; and 2) because the environment is an "interrelated whole, society's environmental protection efforts should be integrated as well."[9] Pursuing environmental concerns from a comprehensive rather than from a piecemeal perspective is likely to produce many benefits. Among the most significant, approaching problems comprehensively will better enable us to prioritize among competing concerns, so that we use our resources as effectively as possible. In addition, pursuing environmental concerns holistically is likely to heighten the focus on resolving pollution problems and on the *net* environmental impact of regulatory strategies, especially as compared to piecemeal approaches in which it is all too easy, and all too common, for sources of pollution to reduce pollution in one medium (e.g., water) by transferring it to another (e.g., air).

In recent years, the DEC has made significant strides towards dealing with environmental concerns from a comprehensive, rather than from a piecemeal or fragmented, fashion. Of greatest significance, in 1992 then-DEC Commissioner Jorling created a Pollution Prevention Unit whose function was to bring a much more comprehensive perspective to environmental concerns. In addition, the DEC's enforcement unit increasingly has brought a comprehensive or multimedia focus to its efforts. Over the past few years it has pursued a number of multimedia cases, and obtained a significant number of comprehensive, multimedia settlements.[10]

As the federal EPA has "reinvented" itself over the past couple of years, one of its changes has been to restructure the agency so that form (the Agency's structure) more closely follows the Agency's intended function (notably, EPA's goal of addressing environmental issues from a comprehensive perspective). This holds true in terms of the reorganizations at both the EPA headquarters level and in the EPA regional offices. In both the headquarters reorganization and in the restructuring of at least one of the regions in Boston, Massachusetts, EPA appears to have shifted staff from single program-oriented offices into multimedia-oriented offices to enhance the Agency's ability to approach problems comprehensively.

A significant weakening of DEC multimedia-oriented units, or any other diminution in the Department's capacity (or interest) in approaching problems comprehensively, will work to the detriment of New Yorkers, our environment, and our economy.

The DEC's ongoing downsizing obviously poses significant challenges to the Department's future effectiveness. An important issue will be whether the DEC is able to manage its downsizing in a way that minimizes the diminution of the Department's ability to address problems comprehensively. Creation of a DEC multimedia Pollution Prevention Unit, and the enforcement unit's multimedia focus, both contributed to an enhancement in the Department's capacity to address issues comprehensively. A significant weakening of either of these DEC multimedia-oriented units, or any other diminution in the Department's capacity (or interest) in approaching problems comprehensively, will work to the detriment of New Yorkers, our environment, and our economy.

C. Innovating on the Compliance End

A final issue involves the need to identify and implement strategies to strengthen compliance with the environmental laws. The State faces a special challenge

in this area during a time when government resources are likely to shrink. One obvious partial solution is to craft strategies that encourage regulated parties to "take ownership" of their responsibility to comply with their legal obligations by, among other things, taking steps to monitor their own compliance. The Environmental Law Institute has concluded that "gatekeeping" (i.e., non-governmental auditing) mechanisms are a potentially valuable compliance tool:

> Gatekeeping mechanisms offer many potential benefits. The use of gatekeepers enhances achievement of regulatory objectives, promotes competent compliance through professional performance of required actions, and minimizes government resources necessary to achieve regulatory objectives. Environmental programs are among the regulatory programs that could take advantage of these benefits.[11]

The issue of how best to encourage self-auditing in the environmental arena to lead to improved compliance is currently being debated on the national stage as well as in numerous state capitols throughout the country. The federal EPA recently issued its *Interim Revised EPA Supplemental Environmental Projects Policy*,[12] in which it addressed this issue. Several states as well have recently adopted legislation covering this issue.[13]

In moving to increase incentives to self-audit, the State needs to consider and resolve at least the following five issues: 1) the scope of the audits that the State wants to encourage; 2) the follow up the State should want the regulated party to perform; 3) the information the State should want the regulated party to provide; 4) the steps needed to enhance the credibility or integrity of the audit process; and 5) the incentives the State should offer to parties to encourage the types of audits that the State concludes are beneficial. A sixth issue involves the extent to which audits should be voluntary or mandatory in nature.

State efforts to address each of these issues, among others, will benefit from including all of the "stakeholders," to borrow an EPA phrase, in the process. The DEC's Enforcement Advisory Group had initiated such a process prior to the election. It is beyond the scope of this article to provide an exhaustive analysis of each of these issues. Instead, I offer the following observations in an effort to identify some of the critical questions that will need to be addressed.

1. Regarding the scope of audits, should they focus solely on compliance issues or, in some cases, should the government encourage parties to evaluate the extent to which their management structures help or hinder the effort to promote compliance?

2. Concerning follow up, what requirements to correct any violations that the audit uncovers should be inherent in the audit process?

3. With respect to providing information to the State, what types of information should regulated parties disclose to the State? This is one of the critical issues that is currently being debated nationally, with some industry representatives urging that a privilege should attach to information generated during audits.

4. Concerning steps needed to ensure the integrity or reliability of an audit, there is the question of whether regulated parties inherently are capable of rigorous self-policing, and whether independent auditors are needed to guarantee the reliability of the audit process. A related question concerns the appropriate training that should be required of auditors, and the need for professional certification or similar professional recognition.

5. In terms of an incentive to conduct audits, one suggestion that some have made is that government should change its enforcement policies to make it clear that the government will give substantial weight to such audits in deciding whether to initiate enforcement action at all, and what the appropriate sanction should be if the government determines that an enforcement action is appropriate. For example, some form of amnesty may be appropriate in certain cases (e.g., for minor violations that are promptly discovered and corrected), while enforcement action will continue to be appropriate in other cases despite a company's maintaining a rigorous auditing program (e.g., if the violations are committed in bad faith or cause significant environmental harm). An additional incentive might involve the DEC's considering companies' use of auditing processes in establishing the government's overall compliance priorities. Conducting more frequent inspections of facilities that do not rigorously audit their own operations, compared to the facilities that conduct such audits, is one example of such an approach. The "other side of the incentive equation" is obviously that government must be vigilant, and pursue aggressive enforcement actions against violators in appropriate circumstances.

The final issue I raised above involves whether auditing should be voluntary or mandatory. The Clean Water Act discharge monitoring reporting requirements[14] represent an example of mandatory self-reporting. One issue to consider involves the extent to which similar schemes are appropriate elsewhere.

The DEC needs to think creatively about how to encourage regulated party compliance with the environmental laws. One tool to promote compliance involves having members of the regulated community routinely conduct rigorous audits of their operations and correct violations that they uncover.

As a practical matter, a carefully considered strategy that includes regulated parties' "taking ownership" of their responsibility to meet their environmental obligations will help to offset the reduced government capacity likely to result from the ongoing reduction in DEC resources.

To summarize, while the DEC and the State Senate have taken the first steps down the road of regulatory reform in New York State, three "thematic" strategies that fit within the rubric of regulatory reform and deserve particular attention from the DEC policy makers and others are: 1) establishing a heightened focus on pollution prevention opportunities as a strategy to identify previously undiscovered cost-effective measures that will protect the environment; 2) continuing, and perhaps accelerating, (and certainly not reversing) the shift to a "regulatory paradigm" of approaching environmental concerns comprehensively, rather than from the piecemeal, single-program-oriented approach we have traditionally used; and 3) identifying strategies on the compliance end of environmental regulation that encourage regulated parties to take greater "ownership" of their obligation to comply with the environmental laws through practices such as routine, rigorous auditing, and timely correction of violations uncovered through such audits. Failure to 1) move towards a pollution prevention paradigm from the traditional approach of focusing on end-of-the-pipe controls; 2) shift to a multimedia approach to regulation from a single-media approach; and 3) increase regulated parties' incentives proactively to identify and correct violations, would represent an unfortunate lost opportunity.

Because of the dynamism that characterizes environmental regulation today, New York is at a crossroads. The State has the opportunity to lead the nation in shifting to a new regulatory approach that embodies these guiding principles. Its failure to act will likely cause it to fall behind other states. In this author's view, a failure to examine and ultimately pursue these new strategies to environmental regulation is likely to lead to a diminution in both environmental protection and economic competitiveness.

As a final point, it is important to acknowledge that part of New York's challenge, and part of its opportunity, will be to gain the EPA's financial and other support for these reforms. Based on recent reports out of the nation's capital, the ideas for reform articulated above should win favor with EPA. Far from having the federal government be a barrier or impediment to making these changes, New York's effort to recast its approach to environmental regulation should receive a boost from the EPA's support for this new direction.

References

1. This is an updated version of an earlier published article. Copyright © 1995 by Matthew Bender & Co., Inc. Reprinted with permission from ENVIRONMENTAL LAW IN NEW YORK (M. Gerrard, ed.). All rights reserved. Portions of this article are taken from testimony that Professor Markell gave during a February 8, 1995 hearing on the issue of regulatory reform sponsored by the New York State Assembly Standing Committee on Environmental Conservation and the Administrative Regulations Review Commission.

2. Executive Order No. 2, N.Y. St. Reg., Jan. 25, 1995. In this Executive Order, Governor Pataki established a partial moratorium on new rulemaking for ninety. days and required agencies to review their existing regulations. The Governor kept the moratorium in place until June 30, 1995 through the issuance of Executive Order No. 7, N.Y. St. Reg., Apr. 26, 1995.

3. U.S. ENVTL. PROTECTION AGENCY, PUB. No. 200-B-94-002, THE NEW GENERATION OF ENVIRONMENTAL PROTECTION: EPA's FIVE-YEAR STRATEGIC PLAN 2 (1994).

4. AMOCO CORP. & U.S. EPA, AMOCO - U.S. EPA POLLUTION PREVENTION PROJECT: YORKTOWN, VIRGINIA at v, 9-10 (May 1992).

5. David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 353 (1994).

6. 42 U.S.C. §§ 13101 - 13109 (Supp. III 1991).

7. N.Y. ENVTL. CONSERV. LAW § 27-0908 (McKinney Supp. 1995).

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