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ENFORCEMENT CHALLENGES AND PRIORITIES FOR THE 1990s: A STATE PERSPECTIVE

David L. Markell

In recent years, both the United States Congress and state legislatures have acted to dramatically expand the number of companies that are subject to environmental laws. The agencies charged with implementing this legislation have promulgated regulations that similarly expand the size of the regulated community.¹ These new laws and regulations tighten the management of pollutants in our society, with the ultimate goal of further protecting our health and natural resources.

To seize this opportunity to protect our environment, we must meet an enforcement challenge. Notably, we must create incentives that convince this increasing number of regulated companies, many of which are small, unsophisticated, and which know little about the environmental laws, to comply with these requirements. Only with their compliance can we realize the environmental benefits intended by these laws.

A strong government enforcement presence is critical to creating the proper incentive structure. Without vigorous enforcement, firms will increasingly find the violation of environmental laws to be in their best interest. The costs of compliance are high. Without strong enforcement, companies will find it more profitable to ignore regulations and risk the occasional fine which will rarely exceed the compliance costs. This will not only prevent the realization of environmental benefits; it also will penalize those companies that comply in good faith and, perhaps, out of a sense of responsibility. They will, through their compliance, be placed at a competitive disadvantage.

Under the leadership of Commissioner Thomas C. Jorling, the New York State Department of Environmental Conservation (DEC) has developed three enforcement strategies that are designed to help the Department achieve both its immediate goal of

improving compliance with the environmental laws and its ultimate goal of producing environmental benefits.²

STRATEGY 1: CREATING A HEIGHTENED ENFORCEMENT PRESENCE

The first strategy developed by DEC is a heightened enforcement presence. This is a straightforward concept: if firms are to be convinced that it is in their self-interest to comply with the law, they must believe that they will be subject to aggressive enforcement if they do not. DEC is using the following methods to increase its presence.

A. Tougher Sanctions

To show its seriousness about environmental enforcement, New York is pursuing tougher sanctions that go beyond merely disgorging the economic benefit of non-compliance. To this end, DEC has strengthened and emphasized its criminal enforcement efforts. Criminal sanctions are the strongest deterrent government has against violations of the environmental laws—particularly when focused on individual liability.

Two years ago, DEC created a special unit of criminal enforcement attorneys in its Division of Environmental Enforcement ("DEE"). DEE emphasized the importance of this unit by making it directly responsible to the Deputy Director. The attorneys in this unit work closely with prosecutors, department technical staff and officers in the DEC's Division of Law Enforcement in order to uncover and prosecute environmental crimes.³

This criminal enforcement team has achieved unprecedented success. Last year, DEC obtained a record fifty-four convictions—an average of more than four per

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month. Included in these was the assessment of the highest fine ever for an environmental crime in New York (\$1,000,000). Furthermore, during the past year, the Department referred a record sixty-two cases to prosecutors—an increase of almost 200 percent.⁴ As part of this effort, DEC has worked hard to increase the pool of prosecutors by working with District Attorneys' offices to improve the prosecutors' expertise and interest in prosecuting environmental offenses.

As a second measure to strengthen environmental enforcement, DEC has sought higher civil penalties in appropriate cases. In the past nine months, total penalties collected approximately tripled those of the entire previous year. In fiscal year 1989-90, the Department secured approximately \$3.5 million in fines and penalties for its Environmental Enforcement Account. In the first nine months of fiscal year 1990-91, it collected more than \$10 million.⁵

Finally, the state has used its administrative enforcement tools more aggressively. In one case, for example, the Department issued a summary abatement order to shut down a company's maritime business, based in part on the company's pattern of violations of environmental laws.⁶ Subsequently, the Department conducted an administrative hearing in which it sought the continuance of the summary abatement order and the revocation of the company's maritime shipping license.

In a decision issued March 25, 1991, DEC Executive Deputy Commissioner Langdon Marsh held that the continued operation of the company's fleet of vessels posed a serious and imminent risk of harm. He therefore continued the summary abatement order and revoked the company's license to operate its barges.⁷

B. Use of "Enforcement Blanketing" Strategies

To complement these tougher sanctions, DEC has implemented several innovative "short form" compliance efforts that streamline the enforcement process for routine violations, thus enabling DEC to pursue a higher volume of enforcement cases. Streamlined enforcement initiatives increase the likelihood that violators will be caught

and punished; tough sanctions increase the deterrent value by ensuring that violators will be placed in a worse position than those who comply with the law.

In his August, 1990 Order on Consent Policy, Commissioner Jorling identified the types of routine cases for which short form procedures are appropriate: (1) either no or de minimis remedial action is required (for example, a company has failed to file its Discharge Monitoring Report, as required by its water discharge permit. Such a failure needs to be cured and warrants a penalty, but does not require any cleanup activity); and (2) the penalty is \$10,000 or less.⁸

The Department has used short form order initiatives as a part of several successful enforcement strategies. For example, in the air program, Stage II vapor recovery systems for gasoline stations are a critical component of New York's effort to control air pollution in the New York City metropolitan area. These systems involve the installation of new pump nozzles that reduce air pollution and conserve fuel. When fully implemented, it is estimated that the vapor recovery systems will not only save energy, but will also improve air quality in the New York City metropolitan area by reducing the amount of gasoline vapors released into the environment by 10,805 tons annually.⁹

DEC was faced with bringing a large number of gasoline stations into compliance with the Stage II Vapor Recovery System Requirements. To encourage rapid compliance, Department program and legal staff developed basic generic complaints, notices of hearing, and administrative orders on consent for use in resolving violations. The Department issued a Notice of Violation to a station when, at the time of inspection by Department staff, the facility lacked the required Stage II equipment. To resolve the case quickly, violators were offered a short form order on consent, which assessed a penalty and imposed a schedule for the station to follow in order to bring it into compliance. The Department resolved more than 150 cases through this short form approach and obtained more than \$400,000 in penalties.

A second component of this enforcement initiative involved the consolidation of cases. The Department pursued cases

against ten major retailers of gasoline, each of which operated numerous stations in the New York City metropolitan area. Through this streamlined enforcement approach, DEC succeeded in getting commitments from these companies to bring a total of more than 1,300 stations into compliance with the Stage II requirements within compressed time frames. It also collected penalties totaling more than \$460,000.

DEC recently initiated a similar effort in the water program against State Pollution Discharge Elimination System ("SPDES") permit-holders that failed to file their monthly Discharge Monitoring Reports ("DMRs") on time. The DMRs report the contents of permittees' discharges and thus are the key to ensuring compliance with permit conditions and regulations, as well as to the detection of harmful discharges.

As a pilot project to resolve this filing problem, the Department sent letters to the 375 permit-holders in one region reminding them of their obligation to submit complete, accurate and timely DMRs, and informing them of the new enforcement initiative. The Department followed up by sending Cease and Desist Directives to approximately fifty persistent non-filers. These directives ordered the firms to comply immediately with the DMR reporting requirements contained in their permits. This relatively informal enforcement action increased compliance dramatically: approximately one-third of the fifty non-filers subsequently submitted their DMRs. This effort increased compliance with DMR reporting requirements to ninety-seven percent. The remaining three percent are currently being targeted for formal enforcement actions, using generic enforcement documents developed specifically for this initiative. DEC will serve them with short form Complaints, Notices of Hearings, and proposed Orders on Consent which will contain penalties and require compliance. Continued failure to file will result in further sanctions, possibly including permit revocation. The Department plans to expand the initiative to the remainder of the state.

C. Improved Communication of Enforcement Successes

For enforcement to be effective, members of the regulated community must know

that they will be subject to penalties if they violate the law. To achieve deterrence, the government must broadcast this message. Similarly, to have public credibility, government must demonstrate that it aggressively pursues those who break the law. In short, it is essential for government to publicize the successes that result from a vigorous enforcement effort.

DEC will continue to focus on communicating that, on behalf of the people, it is aggressively pursuing violators and that those who break environmental laws do so at their peril. Recently, the Department has made this goal a priority and has held press conferences and issued press releases to announce significant enforcement initiatives and accomplishments.

STRATEGY 2: CREATIVE SANCTIONS

A second type of enforcement initiative pioneered by DEC involves using enforcement settlements as a tool to achieve New York's overall objectives, such as pollution prevention. The state has identified and implemented several creative sanctions that force companies to minimize future spills and other polluting activities. These sanctions go beyond penalizing noncompliance; they are designed to foster future compliance and to minimize potential environmental degradation.

A. Best Management Practices

DEC has required companies to conduct Best Management Practices ("BMP") reviews of their operations. These reviews include identifying potential sources of pollution. As part of the BMP process, companies are required not only to identify potential flaws in their operations, but also to develop and implement government-approved remedies for those problems. As part of the BMP process, the Department has required firms to apprise their local communities of their actions to avoid spills or other incidents. This communication reassures the public that corrective steps are being taken and ensures community preparedness in the event of a crisis.

BMP reviews may go beyond solely looking for potential flaws that could lead to spills or other incidents by requiring firms to

assess their manufacturing processes in terms of environmental dangers. The review process seeks to find ways to substitute less (or non-) toxic materials for those currently in use, to refine the processes in order to reduce the generation of toxic by-products, and to search for methods that enhance recycling opportunities.

The BMP process exceeds New York's recently enacted Hazardous Waste Reduction Act, which requires certain facilities to develop plans for reducing their hazardous waste generation.¹⁰ DEC's reviews establish similar commitments for facilities that are not legally bound to take such steps through the enforcement process.

B. Environmental Monitors

A second innovation in the campaign to minimize noncompliance involves the use of monitors. As a component of several settlements, firms have committed to pay for a DEC staff person to oversee their daily operations. To date, more than twenty-five monitor positions have been created through consent orders negotiated to resolve violations. Monitors lend the Department its own eyes and ears and provide it with a much clearer picture of the facility's operations. Monitors also create a strong incentive for the firm to comply with environmental requirements, because their presence increases the probability that violations will be discovered.

C. The CPA Analogue

A third approach, used by DEC in two recent settlements, involves the use of a Certified Investigative Auditing Firm (CIAF).¹¹ CIAFs can perform comprehensive audits of a company's environmental compliance. They bring in accountants and other financial experts to review the company's books and ensure that it is reporting accurately to the regulatory agency. They also hire engineers, hydrologists and other experts to monitor the firm's operations and its compliance with operating requirements.

For example, in one case the CIAF reports every six months to DEC. These reports include the CIAF's analysis of what, if any, aspects of the firm's operations make it likely to violate the law. They also include the CIAF's recommendations for curing

these defects. The Department retains the sole discretion to order the company to make changes addressing these concerns.

STRATEGY 3: TARGETING

In addition to a heightened enforcement presence and to the use of creative sanctions, the Department is in the process of implementing an innovative strategy that can be characterized as "targeting." This process can take several forms. In one situation, a particular natural resource can be isolated for enforcement and clean-up. For example, DEC has decided to target the Hudson River.¹² In so doing, the Department will first look at activities that endanger the river. The sources of these dangers could include airborne pollutants, direct dumping, water discharges that migrate to the river, or the illegal filling of wetlands, among others. The Department will then identify and pursue enforcement action against noncomplying facilities that contribute significantly to these dangers. Thus, some facilities might be pursued for air or water violations and some for the illegal filling of wetlands.

Targeting of this sort provides a mechanism for government agencies to break out of their respective historical media-specific modes of operation. State agencies such as DEC, as well as the federal EPA, consist largely of media-specific programs (water, air, etc.). Each program operates independently in the pursuit of its individual objectives. Targeting helps to integrate these programs so that they cooperate effectively with each other. Frequently, this produces a synergistic effect that accomplishes more for the environment than if each program works alone. Furthermore, enforcement efficiency will be improved by the integration of the permitting process and the training of inspectors to perform multi-media checks.

Targeting can also focus on particular substances. For example, if DEC decides that benzene is a particularly dangerous substance, it will focus an enforcement effort to reduce the exposure to benzene of those most vulnerable to its effects. As with resource targeting, this involves identifying the significant sources of benzene and the legal requirements governing benzene production, use, shipment and disposal. DEC will then target for enforcement those

sources of benzene that are in violation of the law and are contributing significantly to its presence in the environment.

CONCLUSIONS

In recent years, Congress and many state legislatures have enacted a wide variety of laws that restrict the use of chemicals in our society. These laws challenge regulatory agencies to provide for their effective implementation. Inconsistent implementation and enforcement will not only undermine the achievement of the legislation's goals, but also will penalize those firms that in good faith seek to comply with the expanded regulatory scheme.

At a time when budget deficits and resource constraints coexist with an expanding regulatory universe, government must be "smarter" in enforcing environmental laws. Tougher sanctions combined with streamlined enforcement initiatives that expand the scope of enforcement are needed to maintain respect for the law and to deter its violation. Innovative enforcement that targets resources in particular danger and pollutants that pose special risks need to be included in any effective enforcement mix. Much remains to be learned, and, in the course of our education, false steps will inevitably be taken. The government of New York recognizes these challenges and is acting to meet them.

1. See, for example, EPA's new toxic characteristic leaching procedure ("TCLP") rule which took effect in September 1990, and which is expected to bring 15,000 to 17,000 industrial facilities nationwide under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). 12 Hazardous Waste News 436 (November 5, 1990).

2. EPA has also given the issue of improved enforcement considerable priority and attention. See, for example, EPA Office of Compliance, *Enforcement Four-Year Strategic Plan: Enhanced Environmental Enforcement for the 1990's*, (June 1990) (internal agency report).

3. The Division of Law Enforcement of the New York State Department of Environmental Conservation ("NY DEC" or "DEC" or the "Department") has 305 sworn police officers. Of these, 265 are uniformed Environmental Conservation Officers. These provide DEC with a visible enforcement presence. The remaining 40 officers are investi-

gators who focus primarily on complex criminal investigations. The Department works with prosecutors from several agencies, including the State's Attorney General's office, District Attorney's offices throughout the state and the U.S. Department of Justice—including U.S. Attorneys' offices.

4. Nationally, EPA has never referred more than 65 criminal prosecutions in any year. EPA Office of Public Affairs, *Record Enforcement Numbers Usher in EPA's Third Decade*, EPA Environmental News (November 29, 1990) (press release).

5. These figures are from DEC's Environmental Enforcement Account, which does not include all of the Department's fines and penalties but is representative of the overall trend.

6. New York Environmental Conservation Law § 71-0301 authorizes the Department to order a person, *inter alia*, to discontinue any activity or abate any condition that "presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources...." The Department must provide the person an opportunity for an administrative hearing within fifteen days. NY Environmental Conservation Law § 71-0301 (McKinney, 1984).

7. *In the Matter of Berman et al.*, NY DEC Decision and Order No R2-3291-90-11 (March 25, 1991). Executive Deputy Marsh authorized staff to modify the order to allow certain sludge barges to operate, upon a showing that there is no reasonable alternative for transporting sludge.

8. See NY DEC Order on Consent Enforcement Policy (issued August 28, 1990).

9. NY DEC, *New York State Air Quality Implementation Plan: Control of Carbon Monoxide and Hydrocarbons in New York City Metropolitan Area, A-22* (as amended January 1984).

10. See Hazardous Waste Reduction Act, 1990 NY Laws 831.

11. See, for example, Agreement of NY DEC, NY Organized Crime Task Force, NY Dept of Tax & Finance, and CIAF representatives (Kroll Associates) with Defendant Main Street, Inc., and Defendant John N. Smith (executed October 1990) (on file with the author).

12. See NY DEC, Organization and Delegation Memorandum No 91-06: Hudson Valley Enforcement Workgroup (issued February 27, 1991).