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Regulatory Reform in the Department of Environmental Conservation

JOHN P. CAHILL*

Thank you, Professor. It is certainly an honor to be back at Pace on this side of the podium. It certainly doesn't seem too long ago that I was sitting out there listening to Professor Robinson¹ extol the writings of Rachel Carson, Thoreau, and all the rest. It was always an important component of Professor Robinson's, Dean Ottinger's,² and the others here at Pace

* John P. Cahill was named Acting Commissioner of the New York State Department of Environmental Conservation (DEC) in December 1996. He is now the Commissioner, and as such, oversees a department of 3700 employees dedicated to protecting New York State's environment and natural resources. Prior to becoming Commissioner, Mr. Cahill served as General Counsel to the DEC for approximately one year. In that position, Mr. Cahill advised the Commissioner on legal issues and oversaw the Divisions of Legal Affairs and Environmental Enforcement as well as the Department's regional attorneys. He also played a major role in the formulation of the Clean Water/Clean Air Acts. Prior to joining the DEC, Commissioner Cahill was a partner in the New York City law firm of Plunkett & Jaffe, P.C., where his practice focused on environmental and municipal issues.

Commissioner Cahill is a graduate of Pace University School of Law where he earned his JD and LLM in Environmental Law. He holds a bachelor's degree in economics from Fordham University.

1. Professor Nicholas Robinson has aided in the development of environmental law since 1969 when he was named to the Legal Advisory Committee of the President's Council on Environmental Quality. As former General Counsel of New York State DEC, he drafted New York's wetlands and wild bird laws. He is currently Chairman of the Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources, engaged in drafting UN treaties and counseling different countries on the preparation of their environmental laws. He founded Pace's environmental law program, edited the proceedings of the UN's Earth Summit in Rio de Janeiro, and is author of six books and numerous articles.

2. Dean Ottinger came to Pace University when he retired from Congress in 1984. As a professor, he taught in the environmental law program. As co-director of the Center for Environmental Legal Studies, he started an Energy Project, which raises \$900,000 per year, advocating utility investment in conservation and renewable energy resources in six states. In his sixteen years as a member of the United States House of Representatives, he authored a sub-

to get a background in environmental philosophy even before you tackle the issues of environmental law. Because I had the benefit of listening to Professor Robinson and Dean Ottinger, that is the reason why I find myself here today. I am forever grateful. Thank you.

Let me talk a little bit about regulatory reform. As someone once mentioned, in dealing with the issues of regulatory reform, first you have to identify what the role of government is, and then how the government goes ahead and fulfills that role. Under Governor Pataki,³ it certainly has been a challenge to feel our way through the complexes of regulatory reform. We now have a Governor in the State of New York who is clearly an environmental activist. He is also committed to reducing the size of government and making it work more efficiently. Many people would say those two components are not compatible, but I think in looking back at the Governor's two years you can say he has had some tremendous successes; from tackling the complex issues of the Watershed Agreement that had been bothering the state for over one hundred years, to actively campaigning for the Environmental Bond Act which is going to ensure New York State's environmental infrastructure through the year 2000.

So we are faced with a complicated task of minimizing regulatory burdens on business while at the same time maximizing environmental protection. Historically, environmental regulations, both on the federal and state level, have grown piecemeal. I think we all can agree to that. This piecemeal introduction of laws and regulations has often resulted

stantial body of energy and environmental laws. He was one of the earliest environmentalists in Congress in 1965. As Chairman of the Energy Conservation and Power Subcommittee, Energy and Commerce Committee, he was instrumental in adopting key energy and environmental legislation. Dean Ottinger was a founding staff member of the Peace Corps, serving it during 1961-1964. He was appointed Dean at Pace University School of Law in December 1994.

3. Governor George E. Pataki, the 53rd Governor of New York State, was elected on November 8, 1994. Before becoming Governor, Mr. Pataki served as the Mayor of Peekskill from 1981-1983. He was elected to the State Assembly in 1984. While in the Assembly, Governor Pataki co-sponsored the Hudson River Estuary Act, the Solid Waste Management Act of 1988, and Hudson Valley Greenway Council.

in simply moving pollution from one medium to another. When the Governor took office in January of 1995, he executed Executive Order Number 2, and subsequently Number 20. Those Orders began the detailed process within the Department of Environmental Conservation (DEC or Agency) to review our regulatory structure. The Agency began reviewing its regulations by soliciting recommendations from the people who knew best – that is, the staff at the Agency. Thirty teams examined more than one-hundred-fifty regulations to identify redundancies, increase efficiency, eliminate unnecessary requirements, and streamline regulatory processes. Many people in the Agency, who had been there for many years, claim it was really the first time that they had a relationship with other divisions. The Division of Water, for instance, very seldom if at all, spoke to the Division of Fish and Wildlife, even though many of the responsibilities were very much related. These teams, which were established at the DEC, proposed reforms including repeals, revisions, consolidations, and interagency program transfers. From these proposals, we developed a series of reform initiatives, several of which I will discuss.

The regulatory review was guided by some important principles. All regulations should facilitate compliance and avoid duplication of state and federal requirements. All regulations must be grounded in good science and sound professional judgment. The DEC's goal in this process is to focus on priorities and results, reduce duplication at all levels, streamline the permitting process when appropriate, improve our information system, and expand compliance assistance. Throughout the process, we must continue, however, to be keenly aware of the importance of maintaining an effective enforcement program, to ensure that regulatory flexibility does not deteriorate into opportunities for non-compliance.

There is much that New York can still do to streamline the regulatory process in ways to allow us to focus on our resources more efficiently. A good example of this is the Envi-

ronmental Benefit Permit Strategy for SPDES⁴ wastewater discharge permits that we developed almost a year ago. Our SPDES permit system was originally designed so that businesses would reapply for a permit every five years. This is an expensive process, costing businesses at times over \$10,000 per application. Compounding this problem was that the state, the DEC, historically never had the personnel to expeditiously review these applications. We developed a two year backlog of applications, and when we finally got around to reviewing them, the information that the applicant had submitted was outdated. So we sent them back to the company to start the process all over, without adding any benefit to the environment, and simply increasing cost to the regulated community. We saw this was not working. To fix the problem, the DEC developed a priority ranking for all SPDES permits in the state based upon their environmental impact. Every year, we choose the most significant permits that are up for renewal, send the applicants a long form application detailing the possible impacts of renewal, and we review them in a timely and orderly fashion. For the rest of the permit renewals, if there is no change to the project, as is normally the case, we administratively renew them every five years. The result is that we have eliminated a backlog of all permits, significantly reduced the regulatory burden on businesses, and maintained our high standards of environmental protection.

Another important innovation we found successful is the limited use of general and standardized permits. The regulated community needs timely decisions and consistent and understandable permit requirements. For routine actions that have no significant environmental impact, general permits can provide an effective and predictable administrative procedure that ends multiple permit applications and redundant reviews.

By using general permits for routine administrative projects, more staff time can be dedicated to the more envi-

4. State Pollutant Discharge Elimination System. See 8 N.Y. Env'tl. Conserv. Law § 17.0817 (McKinney 1997).

ronmentally significant projects. Minor and routine activities that are environmentally compatible when carried out in accordance with proven conventional standards are good candidates for general permits and standardized permits. We have issued general permits to the Port Authority for New York and New Jersey for maintenance repair of waterfront properties, to the Long Island Lighting Company for minor insulation and maintenance activities, and to local public works departments for routine road and bridge maintenance work. We have also issued standard activity permits for combating zebra mussels in the Finger Lakes, Lake Champlain, and the Great Lakes regions. General permits allow us to focus our attention on the highest environmental priorities. There are also special circumstances that require immediate responses, and general permits can enable us to meet that end.

In emergencies it is essential that we respond quickly and efficiently to restore the natural resource and mitigate damage. An example of that was in the Watershed this past year. We issued emergency permits to restore and protect the natural resources in the Catskills. However, emergency permits have to be closely watched to make sure that when the emergency expires, so does the emergency permit. General permits are effective ways of allowing routine projects to proceed. However, it is essential that the personnel available to oversee adherence to permit conditions be available and that the personnel be trained in advance regarding proper techniques.

Another area where we found ways to reform our permitting process is in our air program. In particular, we have done important work in revising and implementing Part 201.⁵ Part 201 streamlines the previous state program by easing many requirements for small sources of air contamination. The new regulations meet federal mandates that require states to implement an air contamination source permitting program consistent with federal rules and regulations. Our new 201 regulations eliminate unnecessary bur-

5. See 6 N.Y.C.R.R. § 201 (1996).

dens on certain aspects of the old state permit system. Specifically, it combines construction and operation phases that formerly were permitted separately into a single approval process. It also provides for general permits for an entire category of sources, and for the registration of other types of minor sources which simplify application and paperwork requirements. The new system also allows applicants to submit their applications on computer disk, further simplifying and expediting the application process.

Similarly, the Environmental Protection Agency (EPA) has recently approved our new permit program for major air pollution sources. This new program allows us to issue a single permit rather than requiring both federal and state permits for a major stationary source. The DEC is committed to minimizing federal and state duplication of regulation. Such common sense reforms are essential for not only protecting the state's environment, but maintaining the state's viability economically.

Another way we have made important progress is by encouraging the rapid development and implementation of new environmental technologies. Because it takes time to pass laws and adopt regulations, oftentimes technologies that are in place are outdated by the time regulations and laws have taken effect. Environmental technology is a rapidly changing field, and it is essential that we develop ways to encourage new technologies, rather than hamper them. The Interstate Technology and Regulatory Cooperation work group has been a driving force behind this issue. Bringing together representatives from twenty-two states to work with government organizations involved in innovative technologies and environmental regulations, this work group led to a signing of a Memorandum of Understanding (MOU) between Massachusetts, Pennsylvania, California, Illinois, New Jersey and New York to promote the interstate use of innovative technology for cleanups. The MOU established a pilot program aimed at developing common data and review protocols that can be shared by all states, facilitating our ability to conduct this research and incorporate that information in policy decisions.

New York State is committed to working cooperatively with other states and federal agencies wherever possible. This morning we heard Administrator Browner⁶ speak about Project XL,⁷ a program that provides waivers to regulate a community if it is going to exceed environmental standards. The DEC has anticipated Project XL and has pursued a project addressing the way public utilities handle hazardous wastes generated at remote locations. We are working with the EPA in defining this proposal to make it of national significance.

Another effort in which we are seeing some federal assistance is in approving our electronic system of permitting. This year, we applied to the EPA for a \$500,000 grant to support our one stop reporting initiatives, expand our Environmental Benefit Permitting strategy, and to implement strategies to consolidate all permitting and recording. New York already has invested significantly in our reporting structure with the EPA, but federal assistance would allow us to build upon these efforts.

Another regulatory reform group that has been working with the EPA is the Performing Partnership Program, which seeks to establish performance standards and provide states the regulatory flexibility to develop optimal means of achiev-

6. Carol M. Browner became the Administrator of the United States Environmental Protection Agency in January, 1993. As head of the EPA, Administrator Browner is charged with protecting the Nation's air and water from harmful pollution, overseeing the disposal of garbage and hazardous waste, cleaning up contaminated sites under the Superfund law, and establishing rules for pesticide use and food safety. In her first year at the EPA, Administrator Browner launched the agency in an important new direction by promoting a firm commitment to environmental goals, along with common sense, innovation, and flexibility in reaching those goals.

From 1991 to 1993, Administrator Browner was Secretary of the Department of Environmental Regulation for the State of Florida. There, she earned praise for building innovative partnerships to protect public health and the environment while also promoting economic growth. From 1986 to 1988, Administrator Browner worked for then Senator Lawton Chiles, now Governor of Florida. She also served as Legislative Director for then Senator Al Gore, Jr. Administrator Browner is a graduate of the University of Florida and its School of Law.

7. See Regulatory Revinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995).

ing these goals. In other words, to get away from a “command and control” approach to a more flexible approach. The DEC is in the second year of a Performance Partnership Agreement covering our Watershed protection system. This program has significant potential, but we need the attention of the EPA to get it on board and to get it working. We are committed to working with the EPA to make this program a success and ultimately expect to produce an important cost saving innovation.

Let me just mention the issue of command and control and the idea of getting away from that to a more flexible approach. As I said in the beginning, Governor Pataki has an environmental activist streak in him. He does believe in a flexible approach to regulation, but he also believes in pushing the envelope with respect to major industry in this country. I think that is clearly reflected in his stance on the possibilities of zero emission vehicles (ZEV). New York State is standing behind the ZEV program. We recently got sued by the major automakers. The Governor is insistent that the auto industry can do more in producing more efficient, more effective zero emission vehicles.

An important aspect of regulatory reform is cooperation. Certainly the state has done an awful lot in producing major environmental agreements between different state and local governments. New York State negotiations and settlements in major areas, including the New York City Watershed, as I mentioned before, New York’s harbor dredging with New York and New Jersey, and the federal government, and several hydropower licensing settlements, demonstrate the best way of regulatory reform. That is, bringing in the stakeholders at an early point, identifying the issues, discussing the issues with them, and working to build a consensus. This represents the best area of regulatory reform in my opinion.

An important but sometimes overlooked aspect of regulatory reform does not involve change to regulations. It simply means working with the regulated community and giving them a better understanding of what the regulations demand. A very successful example of this is our outreach to operators of municipal solid waste landfills. A key component

to the state's landfill regulations is the water quality monitoring program. Part 360⁸ of our regulations allows flexibility to tailor the monitoring of landfills on a case by case basis. Utilizing this provision, and working with local governments, requests for variances have been granted, adjusting the frequency and scope of sampling, and producing significant savings, but maintaining environmental integrity. Another important part of our landfill efforts has been encouraging the use of landfill waste as alternative daily cover materials and for landfill closure and capping. The DEC has done a great deal to assist landfill operators in this regard producing significant cost savings and conserving natural resources.

A major effort is under way within our Agency to evaluate where New York State's hazardous waste management regulations, Part 370,⁹ differ from federal regulations. These differences are being reviewed to ensure they are necessary, and to consider ways to minimize economic burdens. We are looking, for instance, at facilities that hold polychlorinated biphenyls (PCBs) on site, which are regulated both by state and federal law. New York State regulates PCBs as a hazardous waste as defined by the federal Resource Conservation and Recovery Act (RCRA),¹⁰ for which New York State has received delegated responsibility. The federal government regulates PCBs under the Toxic Substances Control Act (TSCA).¹¹ The regulated community, therefore, must comply with both, and we are examining ways that we can come to a more comprehensive approach in dealing with the maintenance of PCBs. Through a careful review of the regulations, we are identifying changes that not only will improve our environment but improve our economy.

Another example of regulatory reform is the proposed regulatory changes for pesticide regulations. In particular, New York's current regulations for termiticides are ten years old and are simply outdated. They were based upon a pesticide that is no longer legal in this state, and the regulations

8. See 6 N.Y.C.R.R. § 360 (1996).

9. See 6 N.Y.C.R.R. § 370 (1996).

10. 42 U.S.C. §§ 6901 to 6992k (1994).

11. 15 U.S.C.A. §§ 2601 to 2692 (1994).

are inappropriate for modern technologies. The new regulations the DEC has developed, and which are currently out for public comment, are significantly more rational and cost effective while giving greater protection to human health.

One final topic I would like to address briefly are some of the practical difficulties of regulatory reform. We cannot get into the issue of regulatory reform by giving the responsibility to one agency and not providing the appropriate resources. There needs to be a recognition that along with the need for regulatory reform is the need to properly monitor and enforce our environmental regulations. Our regulatory reform must address environmental protection. We have been working quite closely with the Governor's Office of Regulatory Reform, I know Director King is here, which has been very cooperative in coming to a common sense approach to environmental protection.

We are working actively on interagency agreements to consolidate environmental reviews. We recently signed one with the Department of Transportation, to improve efficient reviews of highway projects. The delicate system of checks and balances that exists must be maintained. For instance, when I mentioned the merits of using general permits for many activities, it is worth emphasizing the importance of devoting resources to inspecting these permittees to ensure proper compliance. Absent a visible field presence on general permit activities, compliance may deteriorate.

Again, Governor Pataki has recognized the balancing of regulatory reform with environmental enforcement. He recently announced an additional thirty day amendment to give our Agency greater support to insure that we are out there enforcing the law and making sure that businesses are in compliance. We have always maintained that with respect to enforcement versus compliance, compliance is our goal, but certainly environmental enforcement is an essential component of ensuring environmental compliance.

Another important aspect of environmental reform is public input. We need to have public involvement, hopefully at the early stages of developing regulatory reform, to make it successful. We look for your participation in public comment.

We now have legislation that requires guidance to be published in the EMV, notice availability of guidance to be published in the EMV, which I think is a great step of allowing the public to be informed and making sure that they participate in the process.

That wraps it up. Again, I thank you for having me. I look forward to speaking with you on a panel discussion after Director King speaks. So again, thank you very much.