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A Culture of Mismanagement: Environmental Protection and Enforcement at the New York City Department of Environmental Protection

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A Culture of Mismanagement: Environmental Protection and Enforcement at the New York City Department of Environmental Protection

ROBERT F. KENNEDY, JR.*

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Enforcement of Anti-pollution Regulations in the Watershed

Introduction

On January 21, 1997, representatives of thirty-eight towns,¹ seven counties,² three state agencies,³ the City of

1. The following towns joined the Watershed Agreement: Andes, Bovina, Colchester, Delhi, Deposit, Franklin, Hamden, Harpersfield, Kortright, Masonville, Meredith, Middletown, Roxbury, Sidney, Stamford, Tompkins, Walton, Ashland, Halcott, Hunter Jewett, Lexington, Prattsville, Windham, Carmel, Putnam Valley, Kent, Southeast, Patterson, Broome, Conesville, Gilboa, Jefferson, Fallsburgh, Liberty Neversink, Denning, Hardenburgh, Hurley, Kingston,

New York (City), the United States Environmental Protection Agency (EPA) and five private environmental groups⁴ signed an historic agreement intended to protect New York City's water supply from contamination.⁵ The Watershed Agreement (Agreement) was reached after more than two years of delicate negotiations. It requires New York City to invest \$1.2 billion to purchase land, upgrade sewage treatment plants and septic systems, implement stormwater management techniques, and foster environmentally benign economic development within the Watershed. In exchange, communities surrounding the Watershed agreed to drop litigation aimed at derailing the City's regulatory and land acquisition programs. Additionally, the Watershed Communities agreed to support promulgation of regulations designed to control pollution and development inside the 2000 square mile Watershed.

For its part, the EPA agreed to indefinitely waive a federal order under the Safe Drinking Water Act,⁶ which would have required the City to build a multi-billion dollar water

Marbletown, Olive, Rochester, Shandaken, Wawarsing, Woodstock, Bedford, Cortlandt, Harrison, Lewisboro, Mount Kisco, Mt. Pleasant, New Castle, North Castle and North Salem. The following Villages are also signatories to the Watershed Agreement: Andes, Delhi, Fleischmanns, Hobart, Margaretville, Stamford, Walton, Hunter, Tannersville and Brewster. See New York City Watershed Memorandum of Agreement, Jan. 21, 1997, Attachment A [hereinafter *NYC Watershed Memorandum of Agreement*] (on file with author).

2. All seven counties that contain portions of the Watershed signed the Agreement: Delaware, Greene, Putnam, Schoharie, Sullivan, Ulster and Westchester. See *id.*

3. The New York State Departments of Environmental Conservation, Health and State all signed the Watershed Agreement. See *id.*

4. The following environmental groups were parties to the Watershed Agreement: Hudson Riverkeeper Fund, Inc., New York Public Interest Research Group, the Catskill Center for Conservation and Development, Inc., Open Space Institute, Inc., and the Trust for Public Land. See *id.* at Attachment B.

5. See *id.*

6. Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994), amended by Act of Aug. 6, 1996, Pub. L. No. 104-182, §§ 101-501, 1996 U.S.C.A.N. 110 Stat. 1613-19 (1996) (codified at 42 U.S.C. § 300f et seq.). Under the Safe Drinking Water Act, the EPA promulgated what is commonly known as the Surface Water Treatment Rule (SWTR). 40 C.F.R. §§ 141.71 – 141.75 (1996). Under the SWTR, water suppliers such as New York City who rely upon reservoirs, lakes and rivers for their primary drinking water supply must either plan for

filtration plant.⁷ City officials praised the new regulations,⁸ predicting that the rules would empower the City to confine most new development to existing Watershed hamlets while protecting wetlands, and stream and reservoir buffers from disturbance and preserve vast stretches of open countryside critical to water quality. The regulations went into effect in April 1997, when the City made the first payments due under the Agreement for infrastructure improvements in upstate communities.

Although the new regulations provide the City with broad powers to control development, there is no requirement that the City actually exercise that power. Indeed, environmentalists and water consumers are concerned that after having successfully negotiated the highly celebrated Watershed Agreement, and thereby temporarily dodging the filtration bullet, the Department of Environmental Protection (DEP or department)⁹ will drift back into the century-old

filtration of that supply or design adequate watershed protection plans which meet filtration avoidance criteria set by the EPA. *See id.*

7. *See NYC Watershed Memorandum of Agreement*, *supra* note 1, attachment LL (Draft Filtration Avoidance Determination). The staggering cost of constructing a filtration plant for the Catskill/Delaware water supply system has been variously estimated at between six and eight billion dollars with an annual maintenance bill of between \$300 and \$500 million. *See Loft Corp. v. City of New York*, July 1, 1997, N.Y. L.J. 36 (Sup. Ct. 1997) (stating that although no precise estimate exists, it has been reported that the plant would cost \$6 to \$8 billion "plus a substantial amount for annual operation").

8. NEW YORK CITY, NY, THE RULES OF THE CITY OF NEW YORK, RULES AND REGULATIONS FOR THE PROTECTION FROM CONTAMINATION, DEGRADATION AND POLLUTION OF THE NEW YORK CITY WATER SUPPLY AND ITS SOURCES. v. 5, ch.18 (1997). Subchapter C of the new regulations enumerates Watershed activities over which the Department of Environmental Protection (DEP or department) has regulatory authority. Among other things, within the Watershed, the City may control the introduction of pathogens, prohibit new hazardous waste facilities, exclude the storage of radioactive materials or petroleum products, restrict home heating oil tanks, prohibit new sewage treatment facilities and place stricter effluent controls on existing plants, control the location, type and dimensions of new septic systems, require stormwater pollution prevention plans for virtually every new development, control pesticide and fertilizer use and manage snow removal and salt storage facilities. *See id.* at §§ 18-31 to 18-45.

9. NEW YORK CITY, N.Y., ADMIN. CODE AND CITY CHARTER tit. 24, § 302. This section of the City Charter sets out the duty of the Commissioner of DEP stating, "It shall be the duty of the Commissioner to preserve the purity of all

lethargy that allowed water quality to deteriorate in the first place.¹⁰ It remains clear to all of those who participated in the Watershed negotiations that the Agreement will only protect water quality if the DEP is vigilant in enforcing compliance with the new regulations. Indeed, the DEP, and the City as a whole, must formulate and pursue an entirely new vision—one that is singularly committed to Watershed protection through the preservation of open landscapes.

With this in mind, Riverkeeper wrote this Article about the DEP in the spring of 1996, and presented it to City officials in August 1996.¹¹ At that time, the DEP was in transition. Commissioner Marilyn Gelber was leaving and her successor, Joel Miele, had just been selected. Mayor Rudolph Giuliani's First Deputy Mayor, Peter Powers, who had guided the City's team through two difficult years and developed important relationships with upstate environmental groups, was leaving his position for the private sector. Perhaps most significantly, William Stasiuk, who was appointed Deputy Commissioner of the DEP in charge of the Bureau of Water Supply, Quality and Protection (Bureau), promised to recreate the Bureau in preparation for its new role as Watershed protector.

Riverkeeper delivered a copy of this Article to Deputy Mayor Peter Powers and to Elizabeth St. Claire, legal counsel to the DEP through the New York City Law Department. Both Powers and St. Claire took the Article seriously and expressed grave concerns regarding its allegations of criminal activity, malfeasance and examples of an institutional culture of mismanagement. Powers, who demonstrated that he

waters from which any part of the City Water supply is drawn, and to protect such supply and the lands adjacent thereto from injury or nuisance." *Id.*

10. The City did not enforce its archaic 1953 Watershed regulations, which affected such activities as the "deposit, storage and disposal of human excreta" until 1990, at which time Commissioner Al Appleton announced his intention to enforce the regulations. *Loft Corp. v. New York City*, July 1, 1997, N.Y.L.J. 36 at col. 5.

11. This Article is not intended to denigrate any person, but to serve an important function—to inform the public and hold public employees accountable for their actions. Riverkeeper's purpose is to hold this bureaucracy responsible, to recognize and applaud good behavior and expose the bad behavior.

had carefully read the Article with a detailed discussion of its contents, expressed that the Mayor was deeply concerned about the DEP failings. Powers characterized the DEP as the worst managed of all the City departments as well as the toughest to reorganize due to its size, funding structure¹² and myopic institutional culture as described by this Article. Powers informed Riverkeeper that in order to reform the DEP, Mayor Giuliani had appointed Joel Miele as the new commissioner of the City agency.¹³

The factual content of this Article has been carefully checked for accuracy by Riverkeeper. Copies of this Article have been provided to Commissioner Miele and Deputy Commissioner William Stasiuk with the request that they circulate the Article among the DEP staff, particularly those persons mentioned in the Article, and notify Riverkeeper of any factual inaccuracies. The report has been available to the DEP for over one year and has been widely circulated among water protection staff.¹⁴ Not a single factual inaccuracy has been reported to the author.¹⁵

12. The DEP is the only self-funded City department. Its budget comes from water rates rather than City taxes. Self-funding gives the department an independence and lack of accountability absent in other City departments.

13. Telephone Interview with Peter Powers, deputy mayor of the City of New York (September 1996).

14. The inaugural issue of Riverkeeper's new publication *Inside DEP*, unveiled simultaneously with the publication of this Article, assesses the DEP after eighteen months under Commissioner Miele's leadership. Riverkeeper will publish *Inside DEP* every six months. Our contact number is (914) 422-4343 for Mark Sullivan or Robert F. Kennedy, Jr. Confidentiality is assured. Riverkeeper will seek out and publish information that shows significant accomplishments of the DEP and its staff. The Riverkeeper staff is particularly interested in publishing accounts of improvements in staff members whose conduct has been criticized in earlier reports. In this way, we hope to encourage positive change at the DEP. We want to thank the many courageous DEP employees who contributed to this Article. These men and women understand and believe in their central mission—to assure safety of the drinking water of half the state's population. We earnestly hope that our next issue has nothing but praise for the DEP, its leadership and all of its employees.

15. On September 19, 1997, the author sent a letter to Dr. William Stasiuk, Deputy Commissioner of DEP and Director of the Bureau of Water Supply Quality and Protection, by FAX and by mail, seeking any comments that Dr. Stasiuk and the rest of the DEP may have had regarding this Article. This letter was followed up with a phone call by Riverkeeper staff informing Dr.

Executive Summary

Though weak regulations are frequently cited as a principle cause of the decline in New York City's water quality, a far larger problem is poor management and little sense of mission within the DEP, the agency responsible for safeguarding the supply. The Watershed's most notorious historical disasters—the sedimentation catastrophes caused by IBM in Somers, the Somers Golf Course and Pepsico in Katonah, the construction of the Westchester Airport on the banks of the Kensico Watershed, the issuance of permits allowing direct sewage discharges by Putnam County Hospital into the new Croton Reservoir, toxic discharges by Danbury Pharmacol into the Croton system, and untreated sewage and animal blood at the Kortwright Sludge Pit—all violated existing regulations at the time they occurred. Each of these was the product, not of weak regulation, but of poor administration. The same can be said about most of the less famous insults to water quality. Chronic noncompliance of one-third of the Watershed's sewage treatment plants is attributable to poor enforcement, inept management and lack of agency oversight—not inadequate regulations.

The DEP's management and mission problems flow from an institutional culture entrenched in ossified DEP power centers that emphasize civil engineering and water delivery to the detriment of water quality and enforcement. Successive DEP commissioners failed to segregate the agency's operational engineering (water delivery) and facility management functions from its often antagonistic enforcement and pollution prevention functions. This has assured the continued dominance of these units by hostile water delivery engineers and managers and, ultimately, the failure of environmental protection in the New York City Watershed. By the 1980s, once the proud figurehead of the DEP's engineering glory,¹⁶ upstate Sources Division (or Division)

Stasuik of the need for a response to this piece before it went to the publisher. No reply was ever made. See sources on file with author.

16. Construction of the last of the City's reservoirs, the Cannonsville, was completed in 1964. Since then, the reputation of the DEP for world class engineering has been based increasingly on historic laurels rather than on reality.

deteriorated into a termite riddled stage facade where appointments were no longer based on international engineering reputation or merit, but on seemingly political favoritism.

Institutional dry rot at the DEP escalated dramatically in the late 1980s when the last of the engineering giants – Edward Shaeder and Joseph Conway – both retired from the DEP leaving behind all of the arrogance and secrecy and little of the talent of the DEP's engineering glory days. At the same time, the most talented of the DEP's laboratory scientists, such as Gerald Iwan, a man with a national reputation, fled the DEP.

This Article deals principally with the DEP's Watershed police, inspectors and protection engineers and does not discuss the DEP's laboratory, the Division of Water Quality Control (DWQC). However, many of the same problems that effect the three protection and enforcement units also afflict DWQC. These problems began to surface in the late 1980s as the DEP managers began aggressively sidelining good science in favor of political expediency. The loss of Iwan and Collucio was a symptom of this sudden shift in emphasis. Iwan and Collucio left the DEP in direct response to the City's giveaways of a critical Watershed buffer zone.

In the past five years, the Division of Water Quality lab has succeeded in driving away the last of the DEP's world class laboratory talent, Eva Chen and Dr. Thomas Georgian. The stellar talent that distinguished the DEP as a world class engineering and water quality science mecca during its heyday is now gone. The DWQC has devolved into tiny fiefdoms, where individuals and supervisors pursue pet projects and research papers with little sense of mission or coordination other than to justify their jobs.

For example, DWQC recently spent several million dollars to create a redundant Global Information Survey system for the DEP's West of Hudson office in Ashokan when one already existed at the East of Hudson office in Valhalla. The information system was the product of a DWQC employee, Elliot Schneiderman. Mr. Schneiderman, who has no education in either GIS or hydrology, demanded the creation of a West of Hudson computer hydrology modeling program. This was a huge undertaking requiring a large amount of data that does not exist. Schneiderman hired four or five staffers to accomplish his project. When it became apparent that Schneiderman's group could not get the job done, he contracted it out, costing the DEP millions for a program of doubtful utility.

Among the many other questionable projects that DWQC has recently embarked upon is deep well drilling and monitoring around the Kensico Reservoir to search for polychlorinated biphenyls (PCBs) and bacteria. There could be no reasonable expectation of finding those organisms or chemicals at depth in bedrock around that reservoir.

DWQC staff arranged to have these and other similar projects mandated by suggesting them to the EPA to be included among the environmental requirements by which the City could qualify for filtration avoidance. The EPA then required them apparently without considering their value. (The EPA admitted to its complete lack of oversight procedures during the Kensico fence controversy. The fence was also an EPA mandated deliverable recommended to the EPA by the DEP's Sources Division).

A bold sense of mission and confidence was displaced by turf fights between warring feifdoms controlled by district engineers who have routinely given away little chunks of the Watershed to developers, contractors, and political leaders to gain favor and consolidate power. Furthermore, decision-making became increasingly secretive, competent workers were idled and incompetents promoted on what appeared to be the basis of fidelity to their superiors. As a result, an undisciplined, highly politicized agency, once known for spectacular engineering, is now plagued by the worst kind of crisis management, inept reporting, poor science, cost overruns¹⁷ and most surprisingly, poor engineering.¹⁸

17. One of the many examples is the new Croton Lake gate house which has experienced a \$50 million overrun and is experiencing severe operating difficulties including defective valves and alarms, honeycombing concrete, poor quality steel, and a leaking foundation. By way of explaining the latter, the New York City Department of Investigation (DOI) has received credible allegations of contracting corruption including millions of dollars of substandard rebar used in construction.

18. The bidding process is questionable. A few recent examples:

1) In 1993, three bids were received by Sources Division for a maximum \$1 million contract to find the source of high fecal coliform levels in a Kensico Reservoir tributary, Malcolm Brook. The low bid, \$600,000, was submitted by Weston Contracting whose "Regional Director", Joe McGough, was the former DEP Commissioner. (The two other bids were for \$1 million and \$800,000). Weston's bid won the contract, but cost overruns to date on the contract exceed \$1.3 million, and the source of the coliform was not found. The system thus creates the risk that private contractors with friends within the DEP can win lucrative contracts by submitting impossibly low bids and later count on their DEP allies to make up the difference with discretionary cost overrun allocations.

The same contract called for TV inspection of sewer pipes in the Kensico basin. The effort cost well over \$100,000 in staff time and produced a study that is utterly useless due to poor engineering design. See ROY F. WESTON OF NEW YORK, INC., DRAFT TASK 4 SUMMARY REPORT HAZARDOUS SPILLS: KENSICO RESERVOIR WATER POLLUTION CONTROL STUDY (April 11, 1994).

2) The 1995 Kensico Fence was installed in two frenzied weeks at a cost of \$850,000. See DEP memorandum from Thomas J. Hook, P.E. Acting Chief, Sources Division to Richard Gainer, P.E., Acting Director of Water Supply and Wastewater Collection (May 6, 1993). The effort cost the City an additional \$300,000 two weeks later when the fence was removed due to community objections and the DEP's inability to justify it on any scientific or rational basis. See letter to Gelber from John Siciliano, Environmental Watchdog Association, Westchester/Putnam/New York City.

3) The City's Kensico Reservoir waterfowl harassment program (designed to reduce goose induced fecal levels in the Kensico) was successfully conducted using the DEP Watershed inspectors at an estimated cost of \$200,000-300,000

The DEP's institutional culture is intensely antagonistic toward a strong independent enforcement effort which might interfere with relationships between district engineers, local developers and political leaders. The DEP's role as an environmental facilities manager and owner is in direct conflict with the DEP's interest in strong Watershed enforcement. The DEP's sewage treatment plants are among the worst polluters in the Watershed. Police and inspectors currently report to engineers who have strong interests in seeing that these plants and other Watershed polluters are not prosecuted for environmental law violations.

As a result of this conflict, the DEP managers have made certain that field enforcement is anemic. Prior to 1990, the City's two enforcement units, the Watershed inspectors and the Watershed police, were ordered by the DEP's water delivery engineers not to arrest or ticket polluters or otherwise enforce the City's anti-pollution regulations. The City never prosecuted any person or corporation for violating water pollution regulations despite thousands of oil spills, septic system failures and sewage treatment plant violations. Although New York City had a staff of 510 lawyers in the Corporation Counsel's office and another sixteen in the DEP, not one City attorney had ever been assigned to prosecute polluters. As a result, the City never tested its regulations or the Public Health Law in court. The absolute vacuum of anti-pollution enforcement prior to 1990 was so complete that Watershed polluters raised a *laches* defense when the City began enforcing Watershed rules during the Dinkins Administration. In effect the polluters argued that by failing to enforce its rules for half a century, New York City has forfeited its right to regulate Watershed pollution.¹⁹

annually. The program was recently contracted to an outside consultant for \$1 million annually.

19. Crosby Hill subdivision was one of several Watershed developers to raise this argument as a defense to an action by the DEP asserting authority over a development proposal. The defense was also raised by Swan Deli and by defendants in the Guillen tree cutting case.

The EPA's Filtration Avoidance Determination²⁰ requires the City to maintain an active "environmental enforcement unit." Although the unit operated briefly and successfully in 1993 and 1994, it has been quietly disbanded. Its members have either left the DEP or were reassigned to gate house security along with virtually all other police personnel. Only one officer is currently assigned to pollution patrol in the entire 2000 square mile Watershed.²¹

Meanwhile, the DEP's forty Watershed inspectors, once the front line in the City's pollution enforcement program, have been re-designated as Watershed maintainers (maintainers), a janitorial type classification, which precludes their ever receiving peace officer status. The maintainers have no power to issue tickets or order polluters to stop polluting.

The City's pollution prevention commitment is likewise toothless.²² The DEP managers, who tend to elevate civil or structural engineering over water quality engineering, have limited the hiring of qualified environmental protection engineers critical to project review in the Watershed. The DEP employs a tiny handful of multidisciplinary environmental engineers who are fully qualified to perform complex project review on the hundreds of proposed development projects in the Watershed each year. These few qualified environmental protection engineers are generally idled or diverted away from the most sensitive and important development projects.

Despite the sincere attempts of successive City governments to root out this institutional culture, each succeeding DEP Commissioner has faced the dilemma of an entrenched system where lower level bureaucrats have the power to sabotage the water delivery system simply by turning the wrong rusty valve. Since such an action could cripple the water supply and bring down the commissioner (as it nearly did Al Ap-

20. See ENVIRONMENTAL PROTECTION AGENCY, NEW YORK CITY FILTRATION AVOIDANCE DETERMINATION, Appendix LL to the Watershed Memorandum of Agreement.

21. See sources on file with author.

22. By "pollution prevention" we mean the DEP's responsibility to review projects proposed by Watershed developers to assure that they comply with regulations and will not result in damage to water quality.

pleton when he attempted to reform the DEP's bureaucracy) fear of the district and delivery engineers has been quietly, but earnestly acknowledged as a serious obstacle to reform by every DEP commissioner since Harvey Schultz. The threat has caused each of them to approach reform with utmost caution.

Despite the hope of other City officials and environmentalists that Marilyn Gelber, the first DEP Commissioner appointed by Mayor Rudolph Giuliani, would be able to change the institutional culture during her watch, two and a half years passed without any action to restructure Sources Division. When questioned by environmental groups, Gelber explained that she was "looking for the right person" whom she could bring in to make the changes.

In 1994, she tentatively appointed Donald Shlenger, an engineer who was formerly Vice President of the Hackensack Water Company in New Jersey. However, Shlenger's appointment evaporated following public disclosures of his involvement in the scandalous giveaway of New Jersey's Passaic Valley Watershed to a developer financially connected to Shlenger's company.

A. A New Upstate Director

In March 1996, Commissioner Gelber hired New York State Department of Health (DOH) Director of Environmental Health, Dr. William Stasiuk, as the DEP's Deputy Commissioner of the Bureau of Water Supply Quality and Protection. Stasiuk was hired for the express purpose of cleaning up "Sources Protection," the notoriously misnamed upstate division that manages the City's 2000 square mile Watershed.²³

23. Stasiuk told the author that Gelber "made me an offer I couldn't refuse." Stasiuk was hired as a \$107,000/year consultant. The City pays New York State which forwards the money to Stasiuk, allowing him to retain his benefits package from the DOH. Stasiuk would also be permitted to move the DEP's upstate headquarters (at a cost to the City of \$2 million) from Valhalla in the Croton Watershed to Kingston which was closer to his home in Albany.

B. Stasiuk's Environmental Record

Environmental leaders in and out of government viewed Stasiuk's appointment with trepidation. Over the years these leaders came to view Stasiuk as the principle opponent to strong Watershed protection within New York State government. During the Cuomo Administration, Stasiuk acted as the champion for development interests gutting stricter regulations proposed by the Dinkins and Giuliani Administrations. In 1994, Stasiuk removed the enforcement section from the City's draft regulations, dramatically weakening important controls on septic systems and eliminated City authority over road construction in the Watershed. At a meeting convened by Governor Cuomo to debate Stasiuk's proposed changes, Stasiuk astounded environmental and public health leaders when he offered an explanation for his actions by stating, "[t]here is no proof that construction of roads contributes to reduced water quality."²⁴ As a matter of philosophy, Stasiuk firmly opposed any controls on water pollution that were more stringent than existing DOH controls. During subsequent negotiations with the EPA over the federal Filtration Avoidance Determination, Stasiuk was a militant and vocal proponent of the states' rights view that the EPA should have no role in dictating water protection controls to New York. Environmentalists were also aware that Stasiuk carved out a special role for himself as a public apologist for the DEP's water quality managers, frequently speaking to the press to gloss over the regular revelations about the City's mismanagement of water resources.²⁵

24. Personal observations of the author.

25. For example, when vibrio cholera was found in the New York City water supply in 1994, Stasiuk's unit publicly dismissed the finds as insignificant, glossing over the disturbing fact that the cholera had survived the City's chlorination barriers and almost certainly entered the distribution system alive. See Douglas Kennedy, *Traces of Cholera Found in N.Y.'s Water Supply*, N.Y. Post, Sept. 9, 1994.

In January 1995, chemist Dr. Thomas Georgian, Operating Chief of the City's Water Quality Laboratory, reported that the DEP's lab had been falsifying samples to avoid public disclosure of water quality problems. See Alan Finder, *Former Chemist for the City Charges Manipulation of Drinking Water Tests*, N.Y. TIMES, Jan. 10, 1995, at B3. The lab's respected director, Eva Chen,

Environmentalists reacted negatively to the prospect of Stasiuk's appointment as chief of upstate water supply protection because of Stasiuk's aggressively championed philosophy against strong Watershed protection and his historic role in closing ranks with department bureaucrats to divert public scrutiny from DEP gaffs. However, the environmentalists faced a Hobson's choice, any attempts to block Stasiuk's appointment would result in additional delays, perhaps even years, in the reform of Sources Division's dysfunctional bureaucracy.

Desperate to see order imposed on the disarray at the Sources Division, environmentalists agreed to refrain from publicly challenging Stasiuk's appointment. Environmentalists recognized that Stasiuk was a talented and bright man with experience running a large state health bureaucracy. Environmentalists believed Stasiuk had engineering proficiency and close familiarity with the City's water supply which would make him less reliant on the district engineers, harder to intimidate and best able to manhandle a reform-resistant bureaucracy. Environmentalists hoped he would use his administrative talents to reorganize the Division, give it a renewed sense of purpose and break down an institu-

resigned over similar charges. When Stasiuk's agency was asked by the DEP to review the charges and data, he pronounced them baseless and gave the lab a clean bill of health. "In our view," Stasiuk told the *New York Times*, "the City's monitoring program is outstanding." Don Van Natta, Jr., *Albany Decides New York City's Water Tests for Bacteria Were Thorough*, N.Y. Times, Aug. 10, 1995, at B4.

In March 1995, when mercury was found in the Hillview Reservoir in Yonkers caused by a bad batch of caustic soda, Stasiuk rubber stamped a report by the DEP lab that erroneously attributed the mercury levels to a sampling error caused by contaminated bottles. (Similar mercury hits in Yonkers, which uses a different lab, show the metal was in the public water, not in the lab jars). See sources on file with author.

Stasiuk also waived a \$360,000 fine that the DEP was required to pay the state for violations of turbidity standards at the Kensico Reservoir that resulted when operators fell asleep and failed to respond to an alarm. Stasiuk's waiver was conditioned on these monies being used for Croton monitoring, a condition that the City has apparently never fulfilled.

In December 1995, a few months before his appointment, Stasiuk signed off on the two year postponement of the Croton filtration order sparing Commissioner Gelber the embarrassment of political fights with community groups opposed to siting proposals. See sources on file with author.

tional culture that bedeviled the upstate water supply for thirty years.

In pre-appointment meetings with Gelber and Stasiuk, Stasiuk earnestly acknowledged to skeptical environmental leaders his former role as an antagonist of Watershed protection. Stasiuk made the compelling case that he was capable of adopting the mission of his new agency with as much enthusiasm as he did his perceived mission at the DOH. He promised to strengthen the DEP's enforcement mission.

C. An Early Report Card

While Stasiuk's impact on the DEP is still too early to evaluate, his initial choices seem destined to perpetuate the institutional culture rather than break it up. In June 1996, Stasiuk announced that the Bureau would be divided into three organizational units. The largest grouping is the Division of Operations and Engineering Unit, now headed by Deputy Director Thom Hook. Despite his twenty-six years at the DEP, Hook has no background or education in sewage treatment plant operations, no experience in project review or SEQRA and a limited knowledge of upstate water supply operations. Prior to his assignment in Valhalla, Hook was in charge of the Hillview Reservoir in Yonkers and other intra-city reservoirs.²⁶

Hook named Edwin Polese the chief of engineering operations, a position that entails responsibility for all engineering east and west of the Hudson. Polese has only been with the DEP for three years. Polese spent those three years in a Katonah office working primarily on failed septic systems, during which time he often engaged in the dubious practice of approving septic systems without field inspections. Polese aggressively promotes his governing philosophy that the DEP's mission is not to protect the water supply but simply to enforce the rules and regulations. In the spring of 1995, Polese proved himself incapable of testifying as an expert witness. He was removed as the Town of Cortlandt's expert in

26. See Letter from Elizabeth L. Hook, wife of Thom J. Hook to Robert F. Kennedy, Jr. (Sept. 22, 1997).

Briarcliff Associates et al. v. Town of Cortandt,²⁷ a case involving the construction of a giant emory mine in the New York City Watershed.²⁸ After three months of intensive preparation, Polese could neither articulate nor defend the City's position. Three days before trial, Polese was replaced with DEP engineer, Jim Roberts, whose testimony plaintiff's attorney Michael Zarin commends without reservation²⁹ and credits for having won the case.

Hook named Lynn Sadosky, deputy chief of engineering for the east of Hudson, Croton district. Prior to her promotion, which places three sections directly under her supervision, Sadosky was in charge of facility compliance and review. Sadosky, who only recently became a licensed professional engineer in New York,³⁰ is well known for her hostility toward environmental enforcement units. As head of the wastewater treatment plant inspections, she refused to share incriminating data about reservoir polluters with the Watershed police. Recently, she authored and circulated a memo suggesting that the City's enforcement priority should be exposing environmental whistleblowers within the department.³¹ Currently, Sadosky is in charge of the project review and management personnel for the Croton district including the sewer plant inspectors. She has no prior experience in project review or sewer plant design.

Stasiuk's appointment of these three unqualified individuals, Thom Hook, Lynn Sadosky, and Ed Polese, to high positions of responsibility, and his retention of Joe Boek and Kevin Cloonan, two environmental law breakers³² openly hostile toward environmental protection in the powerful posi-

27. See *Briarcliff Associates, Inc. v. Town of Cortandt*, 534 N.Y.S.2d 215 (2d Dep't 1988).

28. Phone conversation between author and Michael Zarin, Esq.

29. See *infra* note 49.

30. June 14, 1996.

31. See Memorandum from Lynn Sadosky, Employees Who Become Environmental Liabilities, Spotting the Signs of a Problem Employee, Resolving the Issues in the Workplace to the Supervisory Personnel, Engineering Section, East of Hudson including Ed Polese, Thom Hook and Michael Collins (July 22, 1996) (on file with author).

32. See *infra* note 41.

tion of district engineers, seems destined to perpetuate the eye-winking cronyism and antagonism toward environmental enforcement that plagues the DEP's institutional culture.

Under the new reorganization, the Watershed police report to Stasiuk rather than the DEP commissioner, compounding direct conflicts of interest described later in this Article. This aspect of the proposed reorganization will only maintain the status quo and hobble pollution prevention and enforcement.³³ The failure to recognize and cure these conflicts in the current reorganization will condemn the DEP to a weak enforcement role at the time when a strong enforcement department is needed in the Watershed.

Additionally, an August 1, 1996 memorandum from Stasiuk ordered the consolidation of the DEP's enforcement activities into a single new "protection unit." Stasiuk's directive assigned all inspectors to the new unit headed by an engineer, Todd West, a protégé of district engineer, Joseph Boek.³⁴ The DEP police do not have the authority or control over this unit. According to Stasiuk, the unit's duties are to establish "consistent inspection protocols" and a "uniform enforcement program." However, since the unit is composed solely of engineers and inspectors, Stasiuk's new enforcement unit has no more enforcement power than any other civilian organization. The effect of the creation of this new unit is to further isolate the police from the vital information and intel-

33. The DEP police have been called off of at least two investigations (at the Cross River Dam and Danbury Pharmacol). Both investigations were subsequently turned over to engineering units. These instances are known to Riverkeeper because our group had a role in reporting illegal conduct at these sites. It is unknown whether other police investigations have also been turned over to engineering units by Stasiuk.

34. See Memorandum from William Stasiuk, Deputy Commissioner, NYC DEP Intra-department (Aug. 1, 1996) (on file with author). West has no enforcement experience and his inspectors have no enforcement authority. West's administrative skills were called into question in a recent audit of the DEP Watershed inspectors conducted by the New York City Comptroller's office in which the sternest criticism is directed toward management of West's Catskill Inspectors Unit. See Alan G. Hevesi, AUDIT REPORT ON THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION WATERSHED PROTECTION PROGRAM CATSKILL AND DELAWARE WATERSHED INSPECTORS at 5, June 27, 1996 (on file with author) [hereinafter 1996 COMPTROLLER'S AUDIT].

ligence gathering conducted by inspectors, district engineers, and facilities' compliance units. This aspect of the reorganization has all the signs of more shell game enforcement.

I. Water Delivery Engineers Versus Water Quality Engineers

The DEP's dismal enforcement history within the Watershed flows principally from a single administrative error—the failure to segregate the DEP's operational engineering and facility management functions from its often antagonistic enforcement and pollution prevention missions. The failure to recognize and cure that error in the current reorganization of the DEP will condemn the department to a weak enforcement and pollution prevention role at the very moment that a strong enforcement agency is needed in the Watershed. The DEP's Watershed police, Watershed inspectors and its handful of qualified environmental protection engineers have historically reported to the DEP facility managers/operations engineers whose expertise is water delivery and have been, at best, indifferent toward environmental protection or enforcement.

The institutional culture at the DEP consists of a collection of bureaucratic fiefdoms that evolved as the district engineers and their management allies consolidated power and gained political favor by giving away small chunks of the Watershed to benefit influential local developers and landowners.³⁵ Sewer and septic violations, incursions onto reservoir buffer zones and other insults to water quality have been routinely ignored or winked at in the name of “good community relations.” Managing engineers commonly overrule enforcers by granting extensions on compliance or waiving penalties, often granting second, third and fourth chances to repeat polluters.

35. Not only has DEP permitted land giveaways like allowing Pepsi Co. to encroach upon the reservoir buffer zone with its headquarters and permitting Putnam County Hospital an easement to cross buffer lands in order to discharge medical wastes into the Croton Falls reservoir, but it has also compromised water quality as well as its own authority by refusing to strictly enforce the Watershed regulations.

The last thing these engineers want is an independent enforcement body or environmental experts looking over their shoulders and interfering in cozy relationships with local political powers. To avoid this eventuality, they have maintained a tight choke hold on the DEP's pollution prevention and enforcement staffs and have taken responsibility for working out amicable settlements with environmental law breakers themselves.³⁶ Ordered not to do their jobs, demoralized inspectors, police and Watershed protection engineers have been reduced to performing errand services for the facilities/operations engineers.³⁷

This Article is not intended to fault the DEP's operational engineers, but to highlight the organizational flaw that gave facilities/operational engineers jurisdiction over Watershed enforcement and pollution-prevention and overrule the determinations of environmentally qualified engineers. New York City has a proud engineering history. The individuals who designed the New York City reservoir and aqueduct system were the most talented and innovative civil engineers of their time. They devised and constructed a water delivery system that instantly became the envy of the world. However, the skills that made them visionary engineers were not skills that would make them great enforcers. This was a responsibility for which they had neither training nor professional inclination.

A. Conflict of Interest³⁸

A primary conflict of interest is inherent in the dual mission of the agency. The DEP is a regulatory agency and an environmental facility manager.³⁹ These roles create a made-to-order conflict of interest that is one of the principle causes

36. See sources on file with author.

37. See sources on file with author.

38. As it is used in this Article, the phrase "conflict of interest" is not intended to imply a traditional financial or fiduciary conflict. The term conveys an inherent conflict of institutional objectives that can only be remedied by structural changes within the department to separate environmental enforcement from facilities maintenance and management.

39. See NEW YORK CITY, N.Y., ADMIN. CODE AND CHARTER ch. 57, § 1403. The Charter provides a mission statement for the DEP:

of the DEP's disastrous environmental record. In its role as environmental facilities manager, the DEP is one of the largest polluters in the Watershed. Seven of the 112 sewer plants that discharge into New York City's reservoir system are owned by New York City. The DEP's engineers (under ancient agreements with local communities) who operate the Watershed have historically been among the worst Watershed polluters.⁴⁰ These include the Tannersville, Mahopac and Margaretville plants, which continue to violate their permits. Inadequate enforcement against the City-owned plants should not come as a surprise, since the City's enforcement staff reports to the same engineers who are responsible for permit compliance at those plants. This conflict of interest must be eliminated if the City is to maintain an effective Watershed enforcement presence.⁴¹

The powers and duties of the commissioner shall include, without limitation, the following:

A. Water resources control.

(1) The commissioner shall have charge and control of:

(a) All structures and property connected with the supply and distribution of water for public use not owned by private corporations, including all fire and drinking hydrants and all water meters;

(b) Furnishing the water supply and maintaining its quality, and of the investigation for and the construction of all works necessary to deliver the proper and required quality of water with ample reserve for contingencies and future demands; and

(c) Making and enforcing rules and regulations governing and restricting the use and supply of water.

Id.

40. The City-owned plant at Tannersville had 2800 violations in a five year period.

41. The district engineers are among the Watershed's most notorious environmental lawbreakers. Their record of illegal conduct is not simply a matter of involuntary discharge exceedances. In 1994, Delaware District System Engineer Kevin Cloonan ordered the illegal dumping of at least 100,000 gallons of raw sewage into a woodland near the Margaretville sewer plant on lands draining into the Pepacton Reservoir. The DEP paid a \$10,000 penalty to New York State Department of Environmental Conservation (DEC) for the crime. The DEC officers also caught Cloonan illegally storing drums of PCB oil in the lower level of the Rondout chamber. In a separate incident, the DEC officers found drums containing hazardous waste illegally buried by Cloonan on New York City water supply lands. The same year the DEC officers caught Catskill District Engineer Joe Boek illegally storing leaking transformers suspected of housing PCB oil in a shaft building of the Catskill aqueduct where the oil could drain directly to drinking water.

The upstate Watershed communities are extremely resentful that the City is the worst polluter in the system. Local towns with non-complying sewage treatment plants or other environmental problems have not hesitated to address this dichotomy with the City and state officials when their own violations have attracted enforcement attention. The existence of this conflict is often cited as one of the principle reasons that New York City abdicated its enforcement authority in the Watershed prior to 1989. The conflict of interest raised by continuing violations at these plants hinders a strict enforcement in the Watershed by state and City agencies.

B. Water Supply Over Water Quality

Furthermore, the DEP's operational engineers have limited or no training in ecology. Historically, career advancement and professional recognition among the DEP's water delivery engineers was unlikely to result from ecological solutions. Throughout Watershed history, the engineers and facility managers have persistently exalted the issue of water delivery or water supply over water quality. Catskill district engineer, Joseph Boek, expressed this governing priority in a June 1994 memo to Sources Division's Deputy Director, Warren Neuberger. After drawing the distinction between water supply and water quality, Boek proclaimed:

Water supply concerns can be the only ones that drive us The credibility of the DEP in the [W]atershed, which is essential because we work closely with local governments, hinges on water supply issues as our only concern. (emphasis in original).⁴²

For many years, under leadership of the Watershed managers, the DEP almost completely abdicated its statutory authority to protect water quality, opting instead for

42. See Internal DEP Memorandum from Joseph M. Boek, P.E., Catskill District Engineer, to Warren J. Neuberger, Deputy Director, Sources Division (June 7, 1994), at 3 (on file with author) [hereinafter *Boek Memo*]. Boek opens his memo with the bold assertion that "*Sewage discharges do not threaten the water quality in the Catskill District.*" (emphasis in original).

construction and chemical solutions to solve the reservoirs' increasingly serious pollution problems. For example, before the practice was declared unlawful by a federal court in 1990,⁴³ the City's engineers periodically dosed upstate reservoirs with thousands of tons of toxic algacides and pesticides to control development-related pollution. The practice destroyed the natural assimilative capacity of the West Branch Reservoir and caused massive fish kills in the Cannonsville, Rondout and Kensico Reservoirs. The dosages were not only illegal, but any ecological expert would recognize the negative water quality impacts. Despite warnings from one DEP engineer,⁴⁴ the DEP refused to recognize the critical filtering capacity of natural systems and merely viewed the West Branch Reservoir as a holding tank for water and chemicals. Rather than controlling careless development in the Watershed, the facilities/operational engineers and their protégés trusted civil engineering ingenuity to cure the pollution caused by uncontrolled growth.⁴⁵

C. A Bias Toward Filtration

Many of the DEP's facilities/operational and district engineers continue to assert that the City should filter its drinking water supply—a contingency that has the potential to be extremely lucrative to any operational engineer working in the City water supply. It is an openly discussed eventuality among the DEP's facilities/operational engineers that a filtration order will provide an opportunity to take the City buy-out and accept generous consulting arrangements with engineering firms contracted to construct the plant. This is an-

43. *See Hudson River Fisherman's Assn. v. City of New York*, 751 F. Supp. 1088 (S.D.N.Y. 1990).

44. As early as 1985, environmental protection engineer Jim Roberts was warning the DEP managers of the dangers of regular pesticide/algacides dosings. Roberts was progressively ostracized for his ecology-based efforts.

45. The \$850,000 dollar fence erected by the DEP engineers in the Spring of 1995 and torn down a few weeks later, is another example where the obsession to build something displaced good common-sense Watershed management; Kensico's problems, according to the DEP's own studies, is not illegal dumping of trash but defective septic systems and poison run-off from the airport and other local users.

other conflict that might compromise the inclination of certain engineers toward aggressive enforcement.⁴⁶

D. The DEP's Pollution Prevention Engineers: An Enforcement Resource Ignored

The first line of enforcement is project review, the stage at which regulations are applied to achieve pollution prevention. The DEP has the authority and duty to review Watershed development proposals for compliance with the regulations and with the broad objective of water quality protection.⁴⁷ This important mission has been systematically sabotaged by the DEP facilities engineers who feel threatened by the DEP's new water quality mission.

There is an important distinction between the DEP's facilities/operational engineers and its qualified Watershed protection engineers. The former category consists of structural, mechanical, civil, hydraulic and so-called environmental (actually sewage treatment plant) engineers. This is the class of engineers that designs and builds the system and has expertise in water delivery. Although the last of the reservoir

46. Former Commissioner Albert Appleton, as well as others, have speculated that two incidents of high turbidity in the Kensico in 1992 were created by a certain District Engineer who inexplicably released dangerously turbid Ashokan Reservoir waters precisely timed to coincide with testing associated with the EPA's filtration avoidance assessment. Appleton believed that one more hit during that period would have automatically triggered filtration under the EPA's Surface Water Treatment Rule. *See* Surface Water Treatment Rule (SWTR), 40 C.F.R. §§ 141.71-.75 (1996); personal communication by Al Appleton with author (Feb. 1995).

47. *See* N.Y. PUB. HEALTH LAW §§ 1100-1105 (McKinney 1996). Section 1100 of the Public Health Law authorizes the New York State Department of Health (DOH) to issue rules and regulations to protect the drinking water supply of New York City and other municipalities and requires that the DOH approve any rules and regulations promulgated by the City of New York Department of Environmental Protection (DEP) for this purpose. The unique authority of the DEP to promulgate rules and regulations which affect land use within the watershed, comes from Chapter 723 of the Laws of 1905, which were enacted in response to the turn of the century water shortage in New York City. That crisis precipitated the construction of the Catskill system. *See* Act of June 1905, Ch. 723 1905 N.Y.LAWS 2022; *see also* Rules of the City of New York, Rules and Regulations For the Protection From Contamination, Degradation and Pollution of The New York City Water Supply and Its Sources, Ch.18 (1997).

and aqueduct engineering giants who built the system retired from the DEP in approximately 1989, their heirs continue to rule the department and jealously impede its transition to a new mission that emphasizes water purity.

The latter category (Watershed protection engineers) are engineering positions that require unique training for Watershed protection. The training includes civil, environmental or agricultural engineering combined with backgrounds in hydrology, limnology, biology, ecology, organic chemistry, soil mechanics, and advanced work in areas such as open channel flow and groundwater hydrology, hydraulic structures and sediment transport. These engineers evaluate development proposals within the Watershed, assessing and designing remediation to address water quality insults. They also serve an enforcement role, investigating polluters using forensic engineering and providing expert testimony. Traditionally, this category of engineers has shared pariah status within the DEP with the Watershed police and inspectors.

The DEP's handful of qualified Watershed protection engineers has fought the DEP managers and upstate developers over the years to implement strong Watershed protection requirements. Their efforts threatened the relationship between upstate developers and the DEP managers. The managers were reluctant to hire or share power with environmental protection engineers. In 1985, the department had only one qualified Watershed protection engineer.

Since then, the EPA's Filtration Avoidance Determination and other Watershed protection initiatives have mandated that the DEP occupy pollution prevention positions with qualified Watershed protection engineers. Many of the DEP managers filled these positions with unqualified personnel. Additionally, the new certified professional engineers (P.E.) do not have experience in water resources or Watershed protection. Most of the qualified environmental protection engineers who were hired in the past have left the department as a result of their treatment, the lack of opportunity and lack of agency commitment to water purity. At this time, only a few qualified environmental engineers (with multidisciplinary backgrounds or adequate sewage treatment

plant education and experience) are employed by the DEP and describe themselves as thoroughly demoralized. Their jobs entail reviewing hundreds of Watershed development proposals. Their determinations on water quality issues are frequently overridden by less qualified operational engineers or non-engineers. They are frequently removed from project reviews when their determinations offend politically powerful developers.⁴⁸ Managing personnel deliberately keep these qualified engineers away from meaningful Watershed protection assignments. For example, Jim Roberts, the City's most experienced protection engineer has not been given an assignment since November 1995. On that date, he was demoted from his position as a DEP supervisor without notice or explanation.⁴⁹

The unwillingness to hire or delegate important assignments to qualified environmental protection engineers is resulting in substandard engineering work as well as lost staff

48. For example, in 1994, Sources Division Chief Joe Landau removed Jim Roberts, P.E., then a supervisor, from project review of Campus at Fields Corner, the largest project in the Watershed. Campus was sponsored by a developer with powerful political connections. To fill Roberts' spot, Landau appointed Jim Benson, a non-engineer, to perform the non-point source pollution analysis for phosphorous loadings and to comment on other technical issues, jobs for which Benson was not qualified. Telephone interview conducted by author.

49. Certain local developers and Sources Division engineers had for many years conducted a vigorous campaign to have Roberts removed from his position of authority within the DEP due principally to his effectiveness as an advocate for Watershed protection. Roberts' effectiveness is attested to by Michael Zarin. Zarin, an attorney for Sive Paget & Riesel, is among the state's foremost environmental lawyers and has an extensive practice representing New York City Watershed developers and citizen groups. Zarin has fought both with and against Roberts acting in the roles of both engineer and expert witness. In 1995, Zarin represented the Town of Cortlandt in a case against a proposed emory mine. Zarin turned to Roberts as an expert witness when, after three months of preparation, another City engineer, Ed Polese, was unable to defend the City's position. According to Zarin, "Roberts was fantastic. With only a couple days of preparation, he gave compelling and passionate testimony on the negative impacts of flour dust, groundwater recharge, non-point source sediment transport and the inadequacy of the proposed retention lagoons. He was great. He is an asset to the City in the cause of Watershed protection." Telephone Interview with Michael Zarin (Winter 1996). Zarin, incidentally, was also the attorney for Campus at Fields Corner, a development which Roberts passionately and effectively opposed. See *supra* note 48.

time, money and opportunities. In 1996, for example, the DEP's non-engineer supervisor, Jim Benson,⁵⁰ commissioned TV inspections of sewers in the Kensico Watershed without first consulting in-house sewer experts on the protocols for the study. The City spent over \$100,000 in staff time on the study. After consulting environmental protection engineer Paul Aksoz in March of this year, the DEP realized that the entire study was ineffective. If the DEP had consulted Aksoz earlier, it would have saved money and lost staff time.

Another example: the sixty-day travel time engineering study⁵¹ mandated by the DOH was diverted from the protection engineers to Deputy Director, Mike Principe, Division of Water Quality Control, where results and data were inaccessible to protection engineers. The report⁵² was written by Principe's staffer Lorraine Janus, who is unqualified for that work. If that study had been correctly conducted by qualified engineers, it might have resulted in a greater portion of the Watershed being protected.⁵³

The DEP management's refusal to share responsibility or information with its qualified Watershed protection engineers is forcing the City to spend millions of dollars con-

50. See Amy Witko, *Benson's Town Board Appointment Now Official*, THE PAWLING NEWS CHRONICLE, Nov. 22, 1995, at A1.

51. A sixty-day travel time zone is the area from which it takes sixty-days or less for water to travel to intake points for distribution to New York City, which is also the point of disinfection. Cryptosporidium and other dangerous pathogens are expected to die off within that time. Therefore, areas of the Watershed within the sixty-day travel time area are prioritized for land acquisition under the Watershed Agreement. See *NYC Watershed Memorandum of Agreement*, *supra* note 1.

52. Source on file with author.

53. There are many other examples: the DEP's Pathogen Study Group does not include a single qualified engineer. (Though in 1992, an engineer was assigned to the group, he was never notified of a single meeting). As a result, the group was unaware of critical physical relationships including increased resistance of pathogens to disinfectants such as ultraviolet light and chlorine.

Another example, the DEP's critically important phosphorous Total Maximum Discharge Level study should have been performed by both scientists and qualified environmental protection engineers. Instead, the engineering portion was given to a non-engineer, Jim Benson to comment on. The most experienced engineers were not allowed to see it. The outcome was a study that failed to perform engineering analyses correctly. The result may be seriously detrimental to reservoir water quality.

tracting out tasks that could be more efficiently performed by in-house talent. For example, Dale Borchert, a non-engineer, was given the job of developing technical formulations for monitoring the effectiveness of non-point source pollution best management practices (BMPs). He was incapable of completing this, so a contract was put out to Cornell University. A qualified engineer has not seen the work.⁵⁴

Due to the result of the systematic ostracization of environmental protection engineers within the department, the DEP's capacity to protect water quality is neither asked nor answered by management. In 1994, environmental protection engineer, Paul Aksoz, presented the DEP management with a list of technical analyses that must be required by the DEP when reviewing major projects involving treated wastewater that discharges into the ground. The Aksoz memorandum shows that none of the critical analyses have been performed and no one in the DEP (with a few exceptions) has the ability to complete the work. To date, Askoz has not received a response from the DEP management regarding this memo.

Power and access to information and resources are so tightly guarded by the Division of Water Quality Control and Management that water protection engineers are presently not allowed to take water samples for testing—a situation that has resulted in the DEP's inability to bring Clean Water

54. There are many examples: James Benson, a non-engineering Project Manager, is currently contracting for an engineering firm, Hazen & Sawyer, to design stormwater detention basins for Malcolm Brook and another engineering firm to design stormwater best management practices for the Kensico Watershed. Benson is neither trained to design nor to evaluate the contracted designs for appropriateness or correctness. However, the DEP has several in-house Watershed protection engineers capable of doing both design and evaluation work.

Another example, Angela Cataldi, P.E., who is supervisor in Project Review, working under Ed Polese, is putting out a contract to bid to survey septic systems for the EPA required Septic System Siting Study. The surveying to be done is minor and simple. It does not require a licensed surveyor and could be performed by any civil engineer freshman and by any of the under-occupied environmental engineers now employed by the DEP. Sources on file with author.

Act cases.⁵⁵ In another recent case, a water protection engineer telephoned for a Watershed inspector to take samples and was forced to ask a favor to encourage the lab to run the sample. Since it took the inspector one hour to get to the site, the time of peak contamination had passed and the DEP's case against the polluter was thereby weakened.

During the 1996 Watershed negotiations, Riverkeeper representatives witnessed firsthand the lack of technical expertise that afflicts the agency because of ostracization of qualified environmental protection engineers. During a protracted debate on subsurface disposal systems that took place over several weeks, the DEP attorneys faced a battery of no less than five pro-development engineers from the Ulster, Putnam, and Westchester County Health Departments, and the State Departments of Health and Environmental Conservation. Confronting the City's opposition to the use of commercial galley septic systems,⁵⁶ these engineers were antagonistic to controls on commercial development and made statements that contradicted well-established laws of physics. The City attorneys could not rebut even the most absurd assertions because the City would not produce a single competent engineer to defend its position in this highly technical debate.⁵⁷ The DEP relied, instead, on a management official who is not an engineer.⁵⁸ Although this official did his best to defend the City's position, environmentalists watched aghast as, unable to cite published technical literature or to defend the most basic rationale in support of the City's proposed regulations, he withered before the snickering, eye rolling contempt of the professional engineers.⁵⁹ This failure clearly resulted in weaker septic regulations that are now part of the final Watershed rules.

55. For this reason, the DEP had to abandon potential sediment discharge cases against the construction site at Horsepound Ridge in the Town of Kent and Crosby Subdivision in the Town of Southeast.

56. Large subsurface septic systems used by mall, cineplex and corporate park developers which disperse, but don't treat sewage.

57. Personal observations of the author.

58. Personal observations of the author made during the course of the negotiations regarding the Watershed Memorandum of Agreement.

59. *See id.*

At another meeting, this same official's ineptitude was so obvious that City attorneys could be seen kicking him under the table to silence him. The irony is that Jim Roberts, a highly competent environmental engineer with a proven track record as a first-class expert witness was left out of the negotiating process where he could have invaluable assisted the City's position.⁶⁰ There can be no explanation for Roberts' exile other than the jealousy of the managing engineers.

The DEP's upstate management regularly overrides environmental protection engineers and removes them from projects when their scientific judgment causes inconvenience to powerful developers. In retaliation for strict controls Roberts routinely imposes on Watershed development projects, he has been permanently removed from all project review despite the fact that he has repeatedly confirmed his status as the DEP's most effective witness in court cases against polluters and developers.⁶¹ At the same time, the DEP's manag-

60. Personal observations of the author. The DEP manager who argued the City's position opposing the use of galley systems frequently cited a DEP report on galleys as the source of his opinions and data. Ironically, the author of this report, a superb piece of research, was Jim Roberts. Unfortunately, the DEP official lacked the confidence and depth to effectively defend its conclusions.

61. In addition to having been permanently removed from all Westchester and Putnam County cases, Roberts was regularly removed from individual cases where his determination displeased powerful developers. In each case, the DEP managers assigned more complacent personnel to review and approve the project. In many of these cases, Roberts' views were later vindicated when the developers caused severe environmental injury to the reservoirs.

In 1985, for example, the DEP inspectors and Jim Roberts were ordered to "stay away" from IBM's massive construction erosion project in Somers which Roberts had criticized. That project caused catastrophic erosion into the Muscoot Reservoir.

- *Brandywyne Development* In 1992, a construction firm proposed development on seventeen lots characterized by steep slopes, hydric soils, rocky soils and depth to bedrock. Roberts, originally approved ten of the seventeen sites in June 1994. Sources Division management, however, removed Roberts from the project and assigned Ed Polese in November 1994. Polese reversed Roberts' decision and approved an additional five lots.
- *Benetar Development* Roberts disapproved a subdivision in the Town of Southeast. The project was given to another DEP engineer and approved. The developer moved a stream and constructed a defective septic system causing heavy turbidity from the site into the Middle Branch Reservoir.
- *MLR Residential Subdivision* A Lewisboro developer proposed a thirty unit residential subdivision on wetland and sandy soil, which Roberts found to be

ers, together with a handful of local developers, have successfully branded Roberts as "difficult" or a "problem employee."⁶² Roberts' record is not consistent with this assessment.⁶³ Roberts is an intelligent and competent environmental engineer who is meticulous, popular with community groups, the public, environmentalists and many town

unsuitable for septic systems. Roberts was yanked from the project and replaced by Margaret Lloyd, who subsequently approved the project. Lloyd is not a professional engineer and is not an expert in analyzing soils for septic systems. Most of the lots were ultimately approved, including several whose septic systems will be located in inappropriate soils, and which will almost certainly fail.

- *Clearpool Camp* is a large overnight camp near the Boyds Corner Reservoir, reopened by New York City Schools Department in 1992 after several years of disuse. The DEP's experts, including Jim Roberts and Pat O'Hara, thought that the camp's vintage sewage treatment technology was unsafe for health reasons. When they asked the camp to upgrade to tertiary treatment, Sources Division management removed them from the project and assigned a new project engineer who approved the project without the upgrade.
- *Ice Rink, Town of Southeast* This may be the best example of how political considerations often displace good science and engineering in the Watershed. A commercial septic system was proposed by the developer to serve its proposed public ice rink. Investigation of the site revealed high groundwater levels, 24"-0" from the surface. A steep, thirty foot deep, excavation for the skating rink was to be dug less than 100 feet from the proposed septic system. Mr. Roberts and his staff concluded that partially treated organisms would be discharged to surface waters at the steep cut which would intercept the water table. The effluent from the septic system would end up in the Middle Branch Reservoir about 1,500 feet from a public water supply intake. When other configurations were considered, they generated new sets of problems.

County Supervisor Bondi and elected officials of the Town of Southeast petitioned the DOH and Commissioner Gelber to have the septic system approved. Though the authority for the system lay with the DEC, the DOH took the lead and suggested a design they said would work. The DOH engineers had never seen the site. Their "solution" ignored basic groundwater hydrology. The project was taken out of Roberts' hands and was handled by Joe Landau, Ted Simroe, and Dick Gainer, P.E., none of whom were qualified for the work. See DEP Intra-department Memorandum from Paul Aksoz, PhD., PE to Robert Lemieux, First Deputy Commissioner & Acting Director (Jun. 15, 1995). At a meeting in Valhalla on the project, Putnam County Executive Bondi told the DEP officials that, "[s]ometimes public relations outweigh other considerations." Following a secret meeting, the agency approved a slightly altered configuration that suffered the same environmental deficiencies. Fortunately, the delay caused the project owner to find another more appropriate location.

62. Personal interview conducted by author.

63. See *supra* note 49.

officials. He consistently wins court cases and hearings as an expert witness defending the scientific bases of the requirements he imposes on developers.

The DEP's policy of systematically removing its most qualified engineers from the decision-making process on important projects has meant that the DEP personnel rarely attend local planning meetings. Regular attendance at planning board meetings on Watershed projects is essential for the DEP to present important information and counter misinformation presented by developers and their experts. This participation is welcomed by community groups and towns looking for hard scientific data to bolster their arguments against destructive development. Developers and their consultants and attorneys routinely attend these meetings with an army of experts who are fully prepared to argue the developers' position. In the DEP's absence, developers' versions of science and events often stand unchallenged.

II. Watershed Enforcement: Toothless Enforcers

A. Why Strong Enforcement is Necessary

Watershed laws are intended to protect public health, safety and welfare, by ensuring high water quality, enhancing ecosystem health and reducing pollution by internalizing pollution costs into a discharger's activities. However, merely enacting the regulations will not accomplish any of these objectives alone; only widespread compliance with the law will achieve these goals.

Polluters have no incentive to comply with environmental laws since noncompliance results in economic benefits (the free use of water for waste disposal) while compliance exacts a financial cost. Unchecked by aggressive enforcement, these pressures will systematically undermine any system of environmental law. James Elder, the former director of the EPA Office of Water Enforcement and Permits, observed that "[w]e have found repeatedly that nothing is self-sustaining in the National Pollutant Discharge Elimination System (NPDES) program. If a state's vigilance or the EPA's regional vigilance

subsidies, their noncompliance and point source contribution [of pollution] increase."⁶⁴

Compliance is essential to the success of any environmental regulatory program because it is the only way that society will enjoy the benefits envisioned by environmental laws, regulations, standards and permits that legislatures have devised to protect the public. "The vast regulatory apparatus we have put in place to protect public health and the environment amounts to mere empty words without compliance."⁶⁵ Widespread compliance with environmental law only occurs where society enjoys the deterrent value of strict, sure enforcement.

According to Professor David Hodas:

To achieve compliance, an effective enforcement system must exist. Enforcement is the use of legal tools, formal and informal, to compel compliance by imposing legal sanctions or penalties. Effective enforcement is based on the theory of deterrence, which holds that a strong enforcement program deters that regulated community from violating in the first place, deters specific violators from further violations and deters the public from violating other laws. Effective enforcement accomplishes these goals by providing visible examples to encourage others in the regulated population to maintain desired behavior to avoid a similar fate [I]t is generally accepted that effective deterrence requires four elements: (1) significant likelihood that a violation will be detected; (2) swift and sure enforcement response; (3) appropriately severe sanctions; and (4) that each of these factors will be perceived as real.⁶⁶

64. James R. Elder et al., *Regulation of Water Quality*, 22 *Env'tl. L. Rep.* 10,029-37 (Jan. 1992).

65. CHERYL WASSERMAN, *FEDERAL ENFORCEMENT: THEORY AND PRACTICE INNOVATION IN ENVIRONMENTAL POLICY* 21, 22 (T.H. Tietenberg ed., 1992).

66. David R. Hodas, *Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can There Not Be a Crowd When Enforcement Authority is Shared by the United States, The States and their Citizens?*, 54 *Md. L. Rev.* 1552, 1603 (1995).

Unfortunately, none of these factors is present in the enforcement regimen which currently governs the New York City water supply.

In defending their enforcement practices, the DEP managers argue that tough policies would injure the DEP's genial relationships with Watershed communities.⁶⁷ However, recent experience has demonstrated strong community support for strict enforcement of the City's Watershed regulations.⁶⁸ This is not to say that there may be some important political or social rationale that calls for the exercise of prosecutorial discretion or some broader change in emphasis in the DEP's enforcement priorities. However, these decisions should be carefully considered and deliberately made by accountable public officials and not on a case-by-case basis by deputy commissioners or other lower level bureaucrats.

A better way to maintain good community relations is by utilizing careful screening and recruitment practices in hiring enforcement staffs, cultivating strong leadership capable of instilling high morale that one finds in a disciplined and professional police force and by aggressively outreaching to the community that involves the Watershed public in Watershed protection and enforcement. Additionally, the DEP can demonstrate sensitivity and build strong community ties while maintaining strict enforcement policies by affording preference to Watershed residents in hiring enforcement personnel. While the DEP should always remain sensitive to the feelings and traditions of local Watershed communities, it should not use "sensitivity" as an excuse to compromise its broad enforcement mission.

67. See, e.g., Joel A. Miele Sr., *DEP Vigorously Protecting Its Reservoirs*, REPORTER DISPATCH, Oct. 5, 1997.

68. In response to perceived public demand for tough Watershed enforcement, the Westchester County District Attorney has initiated a special environmental enforcement unit and is aggressively seeking Watershed cases from the DEP. The Putnam County D.A. has been even more aggressive than Westchester at prosecuting pollution violations in the New York City Watershed. DEP has repeatedly received glowing editorial support and laudatory stories in Watershed community newspapers, following pollution arrests by the DEP police. See *infra* note 86.

B. Professional Bias Against Enforcement

There are more subtle, but equally pervasive conflicts that make facilities/operational engineers poor enforcement officials. Facilities/operational engineers, by nature and training, are inclined toward problem solving rather than tough enforcement. Problem solving is best achieved through open communications with facility operators and developers' engineers. When engineers are charged with enforcing environmental laws, compliance strategy tends to be conciliatory.⁶⁹ Engineers within the DEP are often more concerned with bringing the specific violator into compliance with the law than with punishing violators or deterring future violations with civil penalties and other sanctions. They are averse to adjudication, preferring ongoing working relationships with violators over adversarial actions. They favor private negotiations with polluters that often result in long delays in compliance. Private negotiations minimize tensions with the regulated community by accommodating their economic and political interests. The Catskill district engineer, Joe Boek, described this approach in a June 7, 1994 memo to Sources Division Deputy Director, Warren Neuberger:

[I]t is more important to work with communities and individuals to solve problems than to fight. This is exactly how the districts have operated for years Barring an environmental disaster or intentional gross violation of our regulations, we prefer to speak with a violator and obtain quick mitigation voluntarily.

Boek advocates an enforcement policy where the DEP would avoid taking "the lead role, but rather to use the offices of the DEC and state and county health departments to achieve the same end."⁷⁰

Such an approach may seem like good engineering policy by a facility manager. However, it is disastrous from an enforcement standpoint. The impacts of these policies are compounded in the New York City Watershed by a similar hands-

69. See Hodas, *supra* note 66 and accompanying text.

70. See Boek Memo, *supra* note 42, at 2.

off attitude prevalent among the state's enforcement agencies. Enforcement agencies have been largely absent from the field of Watershed enforcement and point to the DEP as the agency with primary responsibility for Watershed protection. Nevertheless, the DEP management engineers still look to the DEC and DOH as the primary enforcement organs and are more likely to report serious Watershed crimes to the DEC than to their own Watershed police.

C. Another Conflict of Interest

Enforcement's low priority among the DEP's facilities/operational engineers is more deeply rooted than a mere philosophical inclination toward leniency. When a developer or a town constructs a polluting facility in the Watershed, recommendations made by the DEP engineers are often integrated into the project design. DEP engineering approval is required for many projects. Problems arise when these projects fail to perform as anticipated.⁷¹ There is no merit in arguing that the approving engineer can step into the shoes of the enforcement official and direct strict enforcement and prosecution of the violator, when that same engineer plays a critical role in designing the project to be approved.

An example of this conflict occurred in July 1996 when a DEP police officer, in response to a public complaint, attempted to issue a summons to Yonkers Contracting, a construction firm engaged in reconstruction of the Cross River Dam. The company's inadequate erosion control measures management practices (its BMPs) had resulted in discharges of thousands of tons of turbid sediment into the Muscoot Inlet over several weeks. The police officer was ordered by superiors at DEP not to issue the ticket. When the author of this Article questioned Deputy Commissioner Stasiuk about the order (during a meeting with Commissioner Gelber), Stasiuk explained the decision: "We [the DEP] designed the BMPs, if

71. These problems are more common than they ought to be due to the DEP's policy of allowing unqualified managers or engineers to review projects instead of using qualified Watershed protection engineers. *See supra* note 53 and accompanying text.

the BMPs don't work, then we should redesign the BMPs. But it wouldn't make sense for us to give them a ticket." Stasiuk is now in charge of all of the DEP's Watershed enforcement.⁷²

72. Recent Watershed history is a pantheon of tales about miscalculations and mistakes by DEP engineers and non-engineers exercising oversight of Watershed construction projects. When the projects go awry, the last thing the engineer wants is an enforcement action against the developer which might shine light on his own incompetence or inattention. Consider the following from the DEP's recent history. In each of these cases, the problems were caused when mechanical, structural and chemical engineers attempted to act as environmental engineers:

- *Hunter Brook—BJ's Wholesale Club* Sources Division engineers approved BJ's Wholesale Club in Yorktown in 1994. Construction began soon thereafter, and serious siltation problems immediately followed. The impact on Hunter Brook was so aggravated that the Town of Yorktown issued a stop work order and served a summons on BJ's. The DEP's Steve Marino, who is not a qualified protection engineer, visited the site and told the town engineer he would develop a remediation plan for the stream, but he failed to do so. Numerous citizen phone calls to Marino were ignored. The DEP brought no enforcement action and Marino received a promotion. Marino never developed the remediation plan.
- *Harrison Intake Construction* In 1994, Harrison began constructing an intake in Rye Lake to draw water from the aqueduct. Unqualified Sources Division engineers who were meant to carefully monitor the project dropped the ball. Harrison's contractor made a mountain of silt while dredging the bottom. The silt ran into the reservoir, causing a massive sediment cloud. No tickets were issued, no prosecution or investigation occurred.
- *Westchester Airport Extension* Rather than assigning a competent environmental engineer to review the stormwater plan for the Westchester County Airport extension, the DEP managers assigned Dale Borchert, a geologist. Borchert is neither an engineer nor qualified in hydrology. A stormwater retention basin on airport property that Borchert approved failed because it was improperly designed. An experienced engineer would have caught the design flaw. The basin's failure resulted in turbidity loading to the Kensico Reservoir.
- *Somers Golf Course* In 1992, Carl Picha, Head of East of Hudson District Engineers, inexplicably issued a septic permit to the developers of Somers Golf Course. Jim Roberts tried to stop this action but was removed from the project. Picha's fatal action had the effect of ending the DEP's involvement in the SEQRA process. Once the septic system was approved, the DEP had very little influence over other important issues, such as stormwater. The result of the DEP's blundering is a continuing catastrophic discharge of sediment into the Muscote and Amawalk Reservoir. In 1994 New York City Corporation Counsel belatedly brought a series of quixotic legal actions aimed at forcing the developer to remediate the site. Each of these failed because of the original mistakes Picha made in abdicating the DEP's authority under SEQRA.

The incidence of such conflicts of interest will worsen as unqualified City engineers increase their involvement with construction, design and operation of local sewage treatment plants. The new regulations require close DEP involvement in all Watershed sewage treatment plants. The DEP will be required to finance installation and maintenance of micro-filtration and phosphate removal at each plant. The DEP engineers will be involved in approvals of each project. The DEP's engineering approvals or failure to provide adequate financing is likely to be raised as a defense to almost any action against a Watershed sewage treatment plant for polluting. Therefore, it is critical that the DEP segregate its protection and enforcement functions from its facility engineering management function.

III. The Watershed Inspectors

A. Enforcers or Janitors?

Until recently, the Watershed inspectors reported to the district engineers. Under the DEP's proposed reorganization, inspectors will report directly to former chief of the Sources Division George Mekenian's protégé, Thom Hook, a man

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- *Patterson Village Condominiums* A sewage treatment plant serving this development was reviewed and approved by the DEP supervisor Paul Agarwall, P.E., a structural engineer unqualified to perform this work. The sewage plant has failed and the DEP is contracting an outside consultant to solve the problem.
 - *Fence at Kensico* In 1995, when Sources Division ordered the hasty construction of a fence around the Kensico, the fence contractor illegally disturbed stream beds and filled wetlands. No tickets were issued to the builder and no investigation resulted that could have further embarrassed the Sources Division managers who had ordered the construction without proper oversight or supervision.
 - *Spruce Hill Development* Ineptitude at Sources Division allowed the construction of the Spruce Hill Development in Mt. Pleasant. The developer who illegally and deliberately filled a principle Kensico Reservoir feeder stream with contaminated fill was never criminally prosecuted by the DEP.
 - Other recent examples where project review by unqualified DEP engineers or non-engineers resulted in environmental disasters include *Meadow Crest Development*, which caused major turbidity problems in the West Branch Reservoir and the *Westchester Airport Tree Cutting* and the *Malcolm Brook* sedimentation, which caused turbidity problems in the Kensico.

whose expertise lies in the area of water delivery, not Watershed protection.

Until recently, the inspectors' foremost duty was to provide a critical front line of defense for Watershed protection. New York City's Watershed inspectors patrol Watershed roads looking for illegal dumping, chemical spills, tree cutting and other sources of reservoir pollution. They investigate septic failures, examine proposed septic systems, conduct ambient water monitoring and routine inspection and effluent monitoring of the 112 sewage treatment plants that discharge into New York City's water supply. However, the inspectors' ability to *do* anything about pollution is increasingly tenuous. Although they are front line Watershed enforcers, the DEP has never petitioned to obtain peace officer status for the Watershed inspectors. When inspectors do encounter polluters, they lack the authority to make arrests, issue summonses, interview witnesses or make reports to a local District Attorney's office. "It's all done by bluff," said one of the older inspectors recently. "If anyone ever questioned us or checked on us, it would all fall to pieces. We have no more authority than any other citizen!"⁷³ The inspectors claim that the district and managing engineers withdrew their authority because of hostility toward enforcement. "The district engineers, Boek and Cloonan, didn't want us to have that power, they saw it as a challenge to their little fiefdom and they made sure we didn't get it."⁷⁴ Poor management and confusion about their mission has resulted in high levels of job dissatisfaction and constant turnover among the inspectors.

In 1992, the DEP reclassified its inspectors as maintainers. (The term "inspector" is now only an internal DEP designation). This reclassification was designed to institutionalize the authority of the district and managing engineers

73. Personal communication with author.

74. Peace officer status is obtained by act of the legislature. Peace officers are not required to carry weapons. (Dog wardens, meter readers, and building inspectors are examples of unarmed peace officers). Peace officer status would give the inspectors the authority to write tickets, issue summonses and to order Watershed polluters to cease and desist.

over the unit and will further erode the enforcement role of the inspectors. The maintainers' title may bar the inspectors from obtaining peace officer status. It immediately changed their status from enforcement to janitorial. Maintainers can be ordered to mow a lawn, paint buildings, or fix a door.

Without official enforcement agency status, the inspectors have been hindered by a confused mission and evolved into an errand service for the engineers. Under Thom Hook's management, inspectors frequently find themselves running trivial errands delivering mail, making coffee runs for the managing engineers, picking up payroll, and otherwise being "shanghaied for every stupid little job that comes up."⁷⁵ The perception that inspectors are gophers for the district and managing engineers has given rise to low morale and resentment and a considerable migration of the unit's most talented individuals to other units at the DEP.⁷⁶

What has become of vital ground level enforcement? Theoretically, an inspector who witnesses a pollution crime or violation can call in the police to handle enforcement. In practice, this is ineffective for two reasons. First, due to the ubiquitous nature of illegal pollution only the most serious criminal matters are addressed. As a result, many failing septs, broken construction berms and illegal hook-ups are left unattended. Second, the hostility toward enforcement and police by the engineers who oversee the inspection unit, means that there is inadequate coordination or communication between the police and inspectors. Thom Hook has directed the district engineers not to alert the police unless cleared through him.⁷⁷

A typical example occurred in June 1996, when the DEP inspectors finally closed the United States Post Office in the Catskill Hamlet of Denver. The inspectors evicted a number of other tenants after discovering that the building's landlord had illegally installed a sneak sewer pipe discharging directly into the nearby Batavia Kill Creek. This creek is a principle

75. Personal communication with author.

76. *See id.*

77. Personal interview conducted by author.

feeder tributary to the East Branch Reservoir. Instead of immediately notifying the police, closing down the discharge, and fining or jailing the violator, the district engineer allowed it to continue for months. The district engineer finally took action after the landlord ignored repeated notices of violation issued by Watershed inspectors and frequent public complaints about the stench.⁷⁸ However, the district engineer elected to keep the information from Watershed police who were never informed of the violations or the DEP action until they read news notices describing the incident.⁷⁹ Hostility is so great between engineers and police that upon discovering a serious pollution incident, district engineers are far more likely to notify the DEC rather than the department's own police.⁸⁰

B. Lack of Training

Neophyte inspectors are given no training in enforcement or environmental protection. Most of them are not environmentally trained or do not have the engineering background to make qualified determinations about septic systems that they are frequently called upon to make. Mainly because of their confused mission which waivers between the judicial and janitorial, new inspectors are typically put on the job without so much as a job description and are often paired with equally inexperienced colleagues. One freshman inspector described his training, "[o]n day one, I was put with another inspector who was hired one month before me. We drove around in a car and taught each other the job. Neither of us knew anything—we were given almost no instructions. We drove aimlessly and ran errands for the

78. Personal interview conducted by author.

79. Personal interview conducted by author.

80. In May of 1996, when an Ulster County commercial bakery, Bread Alone, was caught bypassing its treatment system and discharging illegally, Catskill Engineer, Joe Boek, called DEC Engineer Cesar Manfredi before notifying the DEP police.

engineers. When we asked our supervisors about training, they told us 'maybe later.' It was like a joke."⁸¹

C. Emergency Response: A Low Priority

The low priority assigned to the inspectors' pollution prevention mission by Thom Hook and the district engineers has jeopardized emergency services in the Watershed. Prior to Hook's promotion, key personnel on the inspectors' emergency response team were issued radio equipment and department vehicles that allowed emergency response personnel to maintain radio contact with Sources Protection *en route* to spill sites. Radio contact kept the team informed about spill status, traffic problems and other particulars that enhanced response. Hook reassigned those vehicles to nonessential personnel, forcing the inspectors to lose valuable time since they are now forced to use their own cars or go to the DEP offices to obtain emergency response vehicles.

IV. The Watershed Police

A. A Sad Enforcement History

The police are probably the most effective section of all the units involved in managing and protecting the upstate water supply. Over the past several years, the police have conducted hundreds of environmental investigations leading to criminal arrests. Since Watershed inspectors have no real enforcement authority and are controlled by the DEP managing engineers who are hostile to enforcement, most pollution enforcement is left to the Watershed police.

The DEP Watershed police force was established in 1908, as one of four independent bureaus that made up the Board of Water Supply. The first Chief of Patrol, Rhinelander

81. Personal communication with author. A recent audit by New York City Comptroller Alan Hevesi criticizes the Inspectors Unit for chronic lack of supervision. See 1996 COMPTROLLER'S AUDIT, *supra* note 34, at 5. Such lack of supervision accounted for a fifty million gallon discharge of unchlorinated water to New York City on May 26, 1996, when two Watershed inspectors neglected to change chlorine jars. The following day, the DEP's lab tests showed the presence of fecal coliform within the distribution system. The spill was covered up by Thom Hook.

Waldo (later appointed Police Commissioner for the City of New York) reported directly to the Water Board Commissioner. The police officers were charged with protecting the aqueducts and enforcing the New York City Watershed regulations issued under Public Health Law. In subsequent years, the police force lost its independence and was placed under the authority of Watershed engineers—a disposition which led to the cessation of all anti-pollution enforcement. Between 1960 and 1989, no polluters were issued tickets by the DEP Police.⁸² Citing fear of adverse reaction in the Watershed communities, the DEP's managing engineers largely abdicated its authority to prosecute reservoir polluters. A 1991 report by the City Department of Investigations (DOI) found that the Sources Division encouraged Watershed police to carry out activities outside the scope of their mission such as issuing traffic tickets. Police officers who initiated investigations of Watershed pollution were warned by their superiors to drop the investigations "or" Police Administrator Patrick Murphy, a licensed engineer, warned them, "you'll be sitting at a desk for the rest of your career."⁸³

In 1991, several DEP officers including Private Ron Gatto testified before a City Council hearing that they had been ordered by Sources Division Chief George Mekenian and Police Administrator Patrick Murphy to drop criminal and civil investigations of Watershed polluters including the Bedford Correctional Facility and Putnam Hospital.⁸⁴

As a result of the disclosures at that hearing, Murphy was transferred and Mekenian was forced out of the DEP.

82. In 1990, Riverkeeper sued the DEP under the State Freedom of Information Law to obtain arrest records for the DEP Watershed police. An examination of those records showed that there had never been a single arrest, summons or ticket issued to a polluter during the three previous decades.

83. Personal Interview with Captain Ronald Gatto, DEP police (January 1996).

84. On Oct. 9, 1991, New York City Council President Andrew Stein conducted public hearings on the DEP's enforcement policy against polluters in the New York City Watershed. Three Watershed police officers appeared at those hearings and testified that they had been repeatedly and consistently ordered by their superiors at the DEP to avoid arresting or ticketing polluters. Below is a typical exchange from the hearing transcript:

Enforcement finally became a reality only when the police were removed from oversight by engineers and allowed to report directly to the DEP Commissioner, Albert Appleton. Michael Collins was brought from outside the department to initiate a new enforcement ethic⁸⁵ and Gatto was promoted to lieutenant and personally conducted over 130 successful environmental arrests over the next three years. During the early days of the Giuliani Administration, the police found themselves again reporting to engineer Warren Neuberger. Worried about this development, New York City Public Advocate Mark Green sent a letter to the DEP Commissioner Marilyn Gelber on May 16, 1994, complaining,

I am concerned, in particular, that Watershed inspectors and police are supervised by DEP's Sources Division, which is staffed primarily by engineers and technical experts. I suggest that the Chief of Watershed Police should report directly to you.

Gelber wrote back promising that the police would report directly to her.

To the great surprise of many within Sources Division, the DEP police's aggressive anti-pollution campaign was greeted not with resentment, but rather with strong support within the Watershed communities. Many upstate papers published favorable articles about the Watershed police and

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- Officer Gatto:* . . . On three separate occasions, Mr. McKenyon [sic] and Mr. Murphy have ordered me not to make an arrest on three investigations I had conducted and found to be directly polluting New York City's water supply system
- Mr. Stein:* And they ordered you not to make arrests?
- Officer Gatto:* On three separate occasions.
- Mr. Stein:* When you knew that there were environmental violations that were taking place?
- Officer Gatto:* Not only knew, I had verified the violations by lab testing.
- Mr. Stein:* That's a very serious thing and a very serious charge and it's something that I will forward to the district attorney and the City Department of Investigations

85. See *City Appoints New Water Supply Police Director*, NYC DEP NEWS, Aug. 1, 1996.

pollution arrests received positive press attention.⁸⁶

86. See e.g., *Man Accused of Dumping Sewage From Katonah Café*, GANNETT SUBURBAN NEWSPAPERS, 1992; *Car Dealer Denies Toxic Dumping*, GANNETT SUBURBAN NEWSPAPERS, Aug. 4, 1993; *Pollution Crackdown*, GANNETT SUBURBAN NEWSPAPERS, 1993; *Cop Guards the Drink*, GANNETT SUBURBAN NEWSPAPERS, 1993; *Signs Posted to Protect Water Supply Areas*, NEW YORK POST, 1993; *Water Police Target Pollution*, GANNETT SUBURBAN NEWSPAPERS, 1993; *100 Fresh Faces*, DAILY NEWS, 1994; *Aerial Septic Survey Still Flies in the Face of Putnam*, GANNETT SUBURBAN NEWSPAPERS, Mar. 16, 1994; *Putnam Landowners Sue City for \$9 Billion Over Land Regs – Compromise Goal in Watershed Dispute*, NORTH COUNTY NEWS, Apr. 6-12, 1994; *Croton Aqueduct Shutdown Causes Water to Turn Brown*, GANNETT SUBURBAN NEWSPAPERS, Sept. 3, 1994; *Water Scare Shuts Down Key City Reservoir*, NEW YORK POST, Sept. 8, 1994; *Riverkeeper Threatens to Sue Yorktown – Sewage Discharge Into Water Issue*, NORTH COUNTY NEWS, Sept. 21, 1994; *Yorktown Accused of Polluting NYC Reservoir*, REPORTER DISPATCH, Sept. 22, 1994; *Crisis in the Water Zone*, THE OBSERVATORY, Sept. 26, 1994; *It's a Dumping Ground*, REPORTER DISPATCH, Oct. 24, 1994; *The Hero of the Watershed*, BEDFORD RECORD, Dec. 29, 1994; *Man's Body Found Near Cross River Reservoir*, REPORTER DISPATCH, 1994; *Contractor To Answer Charge of Installing Illegal Septic Tank*, REPORTER DISPATCH, 1994; *Runoff From Golf Course Worries Residents*, GANNETT SUBURBAN NEWSPAPERS, Nov. 6, 1995; *Oilman's Widow Axed For Larch Amount of Trouble*, NEW YORK POST, Jan. 5, 1995; *NYC Considers A Water Executive With a Murky Past*, NEW YORK OBSERVER, Jan. 9, 1995; *How Safe Is Our Water?*, NEW YORK MAGAZINE, Jan. 16, 1995, at 24; *NYC Swings \$1M Legal Ax Over Alleged Tree Removal*, GANNETT SUBURBAN NEWSPAPERS, Jan. 7, 1995; *Gatto Receives Environmental Award*, OUR TOWN, May 2, 1995; *Gatto Announces Supervisor Interest*, NORTH COUNTY NEWS, May 17, 1995; *Kennedy Backing of Gatto Centers on Water Concerns*, NORTH COUNTY NEWS, May 17, 1995; *Survey to Seek Failing Septics*, GANNETT SUBURBAN NEWSPAPERS, 1995; *Building Owner Cited in Connection With Leak of Sewage Into Reservoir*, REPORTER DISPATCH, 1995; *Sewage Often Dumped Into Reservoir Streams*, N.Y. POST, 1995; *Suit Says Towns Soil City Water*, DAILY NEWS, 1995; *Watershed Police Protect What New York City Drinks*, N.Y. TIMES, 1995; *Wily Coydog*, NEW YORK MAGAZINE, May 6, 1996, at 16; *Developer Is Ordered to Restore Stream*, NEW YORK TIMES, Jun. 2, 1996; *DEP's Gatto Honored for Saving Trout Stream*, *Enviro. Work Yorktowner Pursues Water Polluters*, NORTH COUNTY NEWS, Jun. 19, 1996; *Let the River Run*, INSTYLE MAGAZINE, July 1996; *Restaurant Owner Fined \$5G for Dumping Sewage*, GANNETT SUBURBAN NEWSPAPERS, Aug. 4, 1996; *Watershed Police Crack Down On Polluters*, REPORTER DISPATCH, Aug. 23, 1996; *Gov Thirsts for Passage of Clean Water Bond*, N.Y. POST, Sept. 9, 1996; *Civic & Citizens – New Idea, A Common Ground – Lt. Gatto Awarded Environmental Cop of the Year*, Nov. 1996, at 47; *Mattress Dumper Arrested Following Chase*, GANNETT SUBURBAN NEWSPAPERS, 1996; *Restaurant Cited After Sewage Flows Into Croton River*, GANNETT SUBURBAN NEWSPAPERS, May 1, 1997; *Letters to the Editor – State and Local Agencies Swiftly Address Fish Kill*, GANNETT SUBURBAN NEWSPAPERS, 1997; *Tom Anderson, Water Protection: Is the City Up to Job?*, REPORTER DISPATCH, Sept. 30, 1997, at 16A; *Joel A. Miele Sr., DEP Vigorously Protecting Its Reservoirs*, REPORTER DISPATCH, Oct. 5, 1997.

Although some upstate communities have organized to fight tougher Watershed regulations, *enforcement* of the anti-pollution laws has wide public support within those communities.

Today the largest threat to the DEP police, and in turn to a viable Watershed enforcement program, is a waning sense of mission as facilities/operational engineers reassert control over the DEP police force and complete the dismantling of the inspection program. After a brief flurry of aggressive enforcement in the early 1990s, the DEP appears to be wavering in its support of the police campaign of anti-pollution enforcement.

B. An EPA Deliverable Ignored

The EPA's Filtration Avoidance Determination required the creation of an Environmental Enforcement Unit by 1993. This unit is intended to investigate complaints and gather intelligence through sector patrols and target illegal dumping, sewage discharges, illegal storage of hazardous materials, spills and other environmental offenses. The unit, which operated briefly, has quietly disbanded. Although it still exists on paper, the unit does not exist in the real world.

The only officer currently assigned to pollution patrol of the City's 2000 square mile Watershed east and west of the Hudson is, once again, Ron Gatto. Most of the police have been removed from sector patrol and reassigned to security patrol or fixed security post at the gate houses.⁸⁷ The DEP

87. Personal communication with author. While gate house security is important to meet the heightened threat of terrorist attack, the assignment of these officers to gate house security does very little to reduce the system's vulnerability to terrorism. Current assignments have two officers, untrained in anti-terrorism, sitting on lawn chairs with .45 caliber pistols giving the system no more protection than did the private security company they relieved. The officers themselves are sitting targets and bored to tears. If the City is serious about confronting the terrorist threat, it should deliberately and systematically develop a genuine anti-terrorist security system including ten foot anchor-hockey fence with concertina wire, video surveillance and other appropriate measures around the gate houses and balancing reservoirs (Kensico and Hill-view). See also 1996 COMPTROLLER'S AUDIT, *supra* note 34. After noting an alarming incident where an inspector observed graffiti on a water chamber wall within the distribution system, indicating that trespassers have little

intends to assign all nine new officers to gate house duty at Hillview Reservoir to replace contract security guards.⁸⁸

C. A New Regime, An Old Story

Under the new reorganization, the police are again reporting to an engineer, Deputy Commissioner Stasiuk, at the Bureau of Water Supply Quality and Protection, instead of directly to the DEP Commissioner. Deputy Commissioner Stasiuk has no police or military police background. There is evidence that the DEP police's enforcement mission has already been compromised. Deputy Commissioner Stasiuk has made a series of statements to Riverkeeper representatives and others within the DEP indicating his personal and philosophical aversion to aggressive enforcement.⁸⁹ For example, efforts by Ron Gatto to conduct an investigation against Danbury Pharmacol, one of the reservoir system's few industrial polluters, was stymied by Stasiuk's delay in approving this investigation. On May 23, 1996, Gatto was ordered to drop the investigation and turn it over to the managing engineers. Gatto was subsequently ordered to drop his investigation of Yonkers Contracting, a City contractor engaged in sediment pollution of the Muscote Reservoir.⁹⁰

D. Lack of Training

Although police officers are trained in enforcement techniques by the State Police Academy, they receive no formal training in pollution control or investigation.

E. Deficient Salaries

Given the key role they play, the police are grossly underpaid. An officer's starting salary is \$23,000 a year. In contrast, the DEP recently advertised an opening for an as-

trouble gaining access to the facility, the Comptroller's audit makes specific recommendations for improved security. *See id.* at 18.

88. Based upon personal communication with author.

89. Based on various interviews and conversations with Dr. Stasiuk.

90. Riverkeeper is aware of the disposition in these cases due to its role in reporting them to the DEP police. There may well be other similar cases of which we are not aware.

sistant word processor with a starting salary of almost \$26,000. As a result of low pay,⁹¹ the police have lost at least twenty-five officers to other police departments during the past five years. The City spends almost \$6,000-\$8,000 per person to train officers at the Westchester County Police Academy, but loses the benefit of the officers' training to other police departments that are more than happy to employ a fully-trained officer.⁹²

Although the DEP's top salary for an officer is \$30,565, in reality, an officer's pay never advances beyond the bottom of the salary range.⁹³ Comparable police departments' starting salaries are around \$30,000 with frequent raises that typically have the officer achieving top salary of \$45,000 within three years, thus the DEP's top salary for an officer is lower than the starting salary in many police departments.⁹⁴ For these reasons, the DEP has a constant turnover of the best and brightest officers to other police departments. This "brain drain" has a detrimental effect on the Watershed since inexperienced officers form the bulk of the workforce.

V. Facility Compliance Group

A. Enforcement: A Low Priority

The DEP's Facilities Compliance Group is charged with monitoring and maintaining compliance at the 112 sewage treatment plants that discharge into the New York City water supply. Lynn Sadosky and Dave Rider lead the group on the east and west sides of the Hudson respectively. Though Sadosky is a civil engineer, she has no advanced was-

91. See 1996 COMPTROLLER'S AUDIT, *supra* note 34, at 21-23. The Comptrollers Audit found that 62% of officers who resigned during the ten year period between 1986 and 1996 became police officers for other county jurisdictions and that 51% of the officers who left the DEP worked there for less than two years. The audit states, "[t]he Director of the DEP police unit informed us that DEP police officers' low starting salaries and their lack of raises were the main reason for the high turnover rate." *Id.* at 21. Five DEP officers who had been on the force for over ten years were earning only \$23,563 per year. See *id.* at 22.

92. See *id.* at 23.

93. See *id.* at 21.

94. See *id.* at 22.

tewater treatment education.⁹⁵ This group inspects the sewer plants and conducts its own monitoring program sampling effluent from each plant four times a year. The DEP's own tests demonstrate that roughly twenty-five percent of the 112 Watershed sewage treatment plants violate their permits⁹⁶ in any particular month. Sadosky has preserved the institutional culture of antagonism toward the DEP's enforcement mission.⁹⁷ Sadosky and Rider are so hostile toward environmental enforcement that their unit has never turned

95. Although there are qualified engineers among them, none of this unit's managers or supervisors are qualified with an educational background in wastewater treatment. This discipline commonly, though not always, requires at least an M.S. in "environmental engineering," which is the modern term for sanitary engineering. It may be possible for a civil engineer to become proficient in sanitary engineering, but this requires substantial experience and study which neither Sadosky nor Rider have.

96. See, e.g., SEWAGE TREATMENT PLANT SUMMARY REPORTS, EAST OF HUDSON, May 23, 1996 (compiled by the "Environmental Programs, Facility Compliance Group" and listing the SPDES violations reported to DEP by sewage treatment plants within the Watershed). It is even more alarming that when material differences appear between the Discharge Monitoring Reports submitted by each sewage treatment plant and the DEP's own independent testing results, the DEP does not report these differences to the DEC, the primary enforcement authority for such plants. Despite the fact that the DEP's testing routinely indicates violations not reflected in DMR's submitted by the treatment plants, the DEP takes no action to assist the states efforts to enforce its SPDES permit limitations. See Alan G. Hevesi, AUDIT REPORT ON THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION REGULATORY COMPLIANCE AND INSPECTION UNIT at 26-28, June 30, 1997 (on file with author). The DEP responded indignantly to the Comptroller's audit, "[t]he report fails to state how this would improve the enforcement strategy for a facility or document DEP's obligation to do so promptly." *Id.* at 28.

97. Sources Division was so averse to strong enforcement that it allowed these plants to violate for years without paying fines or agreeing to comply with their permits. Yorktown's municipal sewage treatment plant has violated its permit consistently for twenty years. During a brief moment of bravado, the Dinkins Administration finally sued Yorktown in federal court. That bold move was followed by a hasty relapse into atrophy. The DEP's 1990 Clean Water Act lawsuit has languished in adjournment for five years while Yorktown continues to pollute. By its own admission, the Bedford Correctional Facility violated its permit 10,000 times between 1987 and 1991 with no enforcement response from the DEP whatsoever. Along with Yorktown's sewage treatment plant, Putnam County Hospital, Holly Stream Development, Patterson Village Condominiums, K'Hal Adas, Mahopac High School and others all regularly violate the Clean Water Act polluting the New York City reservoirs, yet none has been fined or agreed to comprehensive consent orders to achieve permit compliance. (A federal lawsuit by Riverkeeper forced the state to construct an \$11 million plant

any violators over to DEP police.⁹⁸ This is evident despite the fact that their own discharge monitoring records expose dozens of chronic environmental law breakers each quarter.⁹⁹

Sadosky outlined her enforcement priorities in a memo written July 22, 1996, to the DEP's supervising engineers, entitled "Employees Who Become Environmental Liabilities, Spotting the Signs of a Problem Employee, Resolving the Issues In the Workplace."¹⁰⁰ The memo reveals the DEP management's concern about rooting out whistleblowers rather than focusing on environmental protection.

Sadosky first warned her fellow supervisors of the "problem employee" who she says, "may subject [environmental] employees to liability for legal violations, and in some cases, criminal charges." She also wrote:

Because of the 'special' problems presented by these employees, it is important to detect problems and deal with them early on to avoid or reduce liability . . . The first step is dealing with these employees in recognizing them before they generate significant problems Problem environmental employees frequently have an inflated sense of self-righteousness—an attitude that they somehow care more about the environment than their co-workers do In addition, they are likely to inform other regulatory agencies or other outside groups (i.e. DEC, Riverkeeper, Trout Unlimited, etc.) about alleged violations at facilities where they work.¹⁰¹

The inescapable implication of the final sentence is that the "new" DEP under Stasiuk has not progressed very far from

renovation of the Bedford Correctional STP in 1991. That plant now complies with federal and state laws).

98. Personal interview conducted by author.

99. In contrast to the DEP's practices, New Jersey DEP levies fines for any violation at a sewer treatment plant and for failed septic systems. New York City DEP has never levied a fine against STP, no matter how egregious the violation!

100. See *supra* note 31. Sadosky's memo quotes from an article written for companies which might violate federal or state environmental standards, but she completely distorts the intended meaning by applying it to the DEP concepts intended for the regulated community.

101. See *id.*

the department's traditional paranoia about public exposure of illegal activities at its own sewer plants.¹⁰²

Sadosky's group continues the old traditions of secrecy and inaction. Instead of turning polluters over to the police, the unit "files and forgets" its monitoring reports after mailing a copy to state DEC engineers. Because the DEC lacks enforcement personnel and its internal policy guidelines require it to treat Watershed sewer plants as low priority "non-significant" violators, these polluters are assured that they will receive no enforcement attention.

B. Poor Testing Protocols

Nowhere is the DEP's anti-enforcement bias more evident than in the sewage treatment plant testing protocols. Each of the 112 sewage treatment plants, pursuant to a state/federal Clean Water Act State Pollution Discharge Elimination System (NPDES) permit, discharges into the Watershed. These permits allow the discharge of small quantities of several pollutants, and impose regular sampling and reporting protocols to be performed by the permittee to determine its compliance.¹⁰³ Under the Clean Water Act, the DEP has authority to prosecute violations.¹⁰⁴ However, under this law no discharge violation can be shown except by using the testing protocols prescribed in the permit. Instead of testing according to these permit guidelines, the DEP uses its own testing protocols which are useless in court cases. Sadosky and her predecessors have obstinately persisted in refusing to conform their protocols to federal and state standards (despite repeated pleas to do so). The DEP as an enforcement and regulatory body appears to be plagued by disinclination to prosecute even chronic violators.

102. See, e.g., Discharge Monitoring Reports for New York City owned sewage treatment plants (on file with author).

103. See Federal Water Pollution Control Act [Clean Water Act] (CWA) § 402, 33 U.S.C. §§ 1251-1387 (1994).

104. See *id.* § 301, 33 U.S.C. § 1311.

C. Failure to Investigate Reporting Discrepancies

Discrepancies frequently occur between test results reported by the DEP compliance personnel and sewage treatment plants' reported results. This could be the result of false reporting or other deceptive reporting practices that are not criminal. Due to the possibility of criminal activity, such reporting discrepancies, when discovered by the facilities compliance group, should be immediately turned over to the police for investigation. Furthermore, facilities compliance personnel do not systematically conduct their own investigation of reporting discrepancies. This omission allows false reporting, in some cases, to go on for years with no official response.

Immediate intervention by the DEP can help solve serious water quality problems. For example, its own records show that the Putnam County Hospital's sewer plant, which discharges into the new Croton Reservoir, is generally in compliance with its permit. However, the DEP's sampling results suggest that the hospital regularly violates permit standards. These discrepancies, which continued for years, were uncovered in 1995 when Riverkeeper compared the DEP's monitoring results with the hospital's own discharge reports. Riverkeeper also discovered that the hospital's regular violations were easily cured through small operating and maintenance improvements. If the DEP had routinely compared results and investigated discrepancies it could have promptly identified and corrected such problems. As it is, easily curable problems often continue for years.

Another example is Yorktown, where for many years, plant operators reported themselves in compliance with fecal coliform levels while the DEP's results for the same period showed excessive violations. Yorktown only confronted the issue in 1995, when Riverkeeper sued the plant and demanded a criminal investigation by Westchester District Attorney Jeannine Pirro. Prompted by the lawsuit, Yorktown conducted an internal investigation and announced that it had discovered that its contract lab had been collecting fecal samples in alcohol contaminated jars that killed the bacteria

before they were counted. Once Yorktown was aware of the problems, it addressed its fecal violations. The DEP's failure to engage in the simple exercise of comparing the plant's discharge monitoring reports to its own test results resulted in unnecessary harm to the Watershed that continued for years.

D. Contract Labs: A Lack of Vigilance

The Yorktown and Putnam examples also raise questions about the standards applied to contract laboratories and consulting operators retained by Watershed package plant operators. Routine comparisons by inspectors can expose these labs and consultants where incompetence is a cause of sewage treatment failure or misreporting. Again, the facility compliance group's failure to thoroughly investigate these inconsistencies indicates that such problems cannot be promptly solved.

E. Courtesy Calls

The DEP's facility compliance group routinely gives plant operators a "courtesy call" prior to visiting the plant to conduct effluent tests or for plant inspections.¹⁰⁵ Sadosky often gives plant operators as much as one week's notice before inspections occur. Such calls give the operators time to get their plants in order, thereby creating an inaccurate picture of Watershed sewage treatment plant compliance. This is not a technique employed by responsible enforcement agencies.

VI. General Enforcement Issues

A. Lack of Public Outreach

1. Telephone Tag

Inspectors and police rely on their own observations and patrols to uncover Watershed violations. Lack of public involvement makes enforcement much less efficient. Public involvement has been stymied because of the DEP's long history of actively discouraging participation in Watershed

105. Personal communication with author.

protection. Even today, people who call to report violations find it difficult to locate the inspectors unit's telephone number. Some DEP telephone operators at the headquarters in Lefrak are unaware of the DEP's office in Valhalla. A Watershed community resident calling telephone information to find the number of the New York City Watershed police or the Watershed inspectors in Westchester County will be told "they are not listed." Additionally, the DEP police (which operates a 24-hour communication command center) is not listed in any telephone book or in any police directories.

Those citizens with the ingenuity to find the inspector's telephone number may be discouraged from calling by the DEP's unsatisfactory response to the typical inquiry or complaint: unreturned phone calls, disinterested DEP personnel and lack of follow-up or of any indication that the complaint is being systematically logged and addressed.

2. Signs and Hotlines

Inspectors would be more efficient and community involvement would be enhanced if the DEP openly encouraged public participation in Watershed protection. The Watershed inspectors should spearhead a public outreach program including bag-a-polluter hotline, advertising and school and community lectures. In Massachusetts, Connecticut, and New Jersey, large highway signs inform drivers when they are entering a drinking supply Watershed. New York has tiny, virtually unreadable signs, on only a few roads. If the DEP has a pollution reporting hotline, it is unknown to the public and unlisted in the phone directory.

A pollution reporting hotline and sign inviting public participation and awareness would help Watershed residents feel that they are part of the partnership to protect the system. Such efforts would undoubtedly improve relationships between Watershed residents and City employees who are often viewed as aloof and invisible.

3. Sector Patrols

The inspectors and police should be required to participate not just in road patrols, but should conduct foot and canoe patrols and stream walks. Such "sector patrols" are required as a deliverable in the EPA Filtration Avoidance Determination, but have inexplicably been discontinued by police and inspection units. Most reservoir streams are inaccessible from the road; however, they are frequent vectors for pollution.¹⁰⁶ The banks of reservoir streams like the Beaver Dam Creek in Westchester County bristle with illegal drains from laundry machines, septic systems, drains from farming and feed operations, construction sites, and illegal dumps. Most residents, if informed of their violations by a uniformed inspector, would immediately correct them. In addition, inspectors conducting such foot patrols would encounter fishermen and other members of the interested public and have the opportunity to enlist them in the Watershed protection partnership.

B. Lack of Independence

Traditionally, law enforcement decision-making is segregated from control by political officials and civilian bureaucrats because of the rapidity with which law enforcement decisions become political decisions.¹⁰⁷ A disastrous experiment with civilian control of police activities in the early 1900s led to the general conclusion in the United States that civilian control of police work was an "either-or" proposition "either [civilian officials] control the police and politics influence law enforcement, or the police are left alone and politics do not affect law enforcement."¹⁰⁸ As a result of such experiences, virtually every community nationwide has eliminated civilian interference with police departments. Predictably, ci-

106. See Douglas Kennedy, *Sewage often Dumped into Reservoir Streams*, N.Y. POST, Sept. 10, 1994.

107. See R. FOGELSON, *BIG CITY POLICE* 13-15 (1977).

108. Gregory Howard Williams, *Police Discretion—Who is in Charge?*, 68 Iowa L. Rev. 431 (1983).

vilian control of the DEP police has introduced political consideration in almost all enforcement decisions.

Political influence and factors other than water quality preservation have always hindered the DEP's enforcement mission. For example, in May 1991, the DEP Sources Division leaders prevented Watershed police from issuing a summons against the Bedford Hills State Prison for dumping tons of sewage sludge on the banks of a Muscoot Reservoir tributary, even though the prison officials were caught.

Political sensitivity almost led to a disaster at the Yeshiva Farm Settlement in January 1996, when Hepatitis A was discovered in fifteen failing septic systems at the Settlement. Apparently, these septic systems had failed for at least two years, and continue to fail, but the Watershed inspectors and the DEP police were ordered not to take any samples of these systems.¹⁰⁹ The DEP only took action after an anonymous tip revealed that Hepatitis A may be detected in the septic systems. Meanwhile, these failing septic systems were contaminating the Kisco River and the City's drinking water supply.

VII. Recommendations

A. The Inspectors

1. The DEP should merge inspector units with the police force to form a single environmental enforcement unit as contemplated by the EPA Filtration Avoidance Order. The new division should be organized under a Director of Enforcement who reports directly to the DEP commissioner. This change would bring the DEP into conformance with other environmental agencies, like the DEC, which customarily maintains separate enforcement units.

2. In any case, the inspectors should be given peace officer status so that they can issue summonses when appropriate. The DEP requires a large team of ground level enforcement troops with training to recognize environmental violations (e.g. failing septic systems and improper erosion

109. Based on various interviews conducted by author.

controls at construction sites) and the authority to ticket violators. These peace officers should report more serious environmental crimes directly to the DEP police and not through intermediary managers. If this enforcement force cannot be created out of the existing maintainers unit, the DEP should create a new independent enforcement group responsible for monitoring compliance at sewage treatment plants and conducting field patrols and investigations. Enforcement staff should report directly to the DEP commissioner. To the extent inspectors are needed to perform non-enforcement tasks under engineering supervision (e.g. ambient water testing and percolation hole testing for determining permeability of proposed septic fields) these functions should be transferred to a separate protection unit working with Watershed protection engineers. Most importantly, due to an inherent conflict of interest, no enforcement staff should report to facility or district engineers.

3. Inspectors should be formally trained in pollution control law and investigation. Training should include instruction about how to recognize and detect illegal sewer hook-ups and broken septic systems. Inspectors should work closely with environmental protection engineers.

B. The Police

4. Police should be given environmental enforcement training including such basic pollution investigation techniques as dye and smoke tests, sampling analysis, federal, state and local environmental law and regulation, permit reading and basic subsurface engineering sufficient to allow them to recognize and detect illegal hook-ups, broken septic systems sump pumps in septic systems and proper construction of berms and sediment barriers. (Caveat: once an illegal activity is recognized, police officers and inspectors must consult with qualified environmental protection engineers).

5. At a minimum, the DEP's Environmental Investigations Unit (an EPA Deliverable) should have fifteen to twenty full time police detectives and the same number of inspectors as well as full time laboratory support and one full time engi-

neer. The unit should be independent and report directly to the DEP commissioner. It is unacceptable that police officers report to a managing engineer, whose job creates an inherent direct conflict of interest in many criminal and civil enforcement cases.

6. If the police are not allowed to report directly to the commissioner, the DEP should consider officially relinquishing responsibility for enforcement and transfer enforcement units over to another agency; e.g., New York City Department of Investigation, the new Watershed Inspector General or the New York City police department.

7. Watershed police officers should be paid salaries comparable to those at local law enforcement agencies.

8. All the DEP engineers and inspectors should be required to, as a matter of agency policy, make a record of all environmental violations that they observe or discover during the course of performing their duties and to report those violations to the police. The police should be required to log each reported violation and the response. This is standard operating procedure for other agencies. It is good professional practice to provide important data about environmental crimes in the Watershed.

C. Inspectors and Police

9. Inspectors and police should conduct sector patrols, including walking tributary creeks and waterways within their districts, searching for septic and other violations. The inspectors and police should systematically inspect each stream, wetland and shoreline within their assigned sectors. They should investigate new construction projects and other potential pollution sources. The DEP is currently in violation of the EPA Filtration Avoidance Determination for failing to implement sector patrols.

10. Ground level enforcement decisions should be insulated as much as possible from political meddling.

11. The DEP should give preference to Watershed community residents when hiring inspectors and police.

12. Police and inspectors should routinely log all complaints and their responses.

D. The Environmental Facilities Unit

13. The environmental facility unit should expand its testing frequencies at "problem" sewage plants and integrate NPDES permit testing methodologies for each of the 112 Watershed sewage treatment plants into their own sampling protocols. This should include installation of the DEP controlled composite samplers at each plant.

14. The environmental facilities unit should routinely compare their own effluent results with the discharge monitoring reports produced by each sewage treatment facility. When apparent discrepancies exist between the DEP test results and the facility's reports, the DEP should automatically report the discrepancy to the police for criminal investigation.

15. The environmental facilities unit should send copies of all reports showing discharge violations to the Watershed police.

16. The practice of giving "courtesy calls" to plant managers prior to inspection and testing should be permanently discontinued.

17. The DEP should routinely test sewage treatment plants for non-NPDES permit pollutants that are a threat to reservoir water quality, public health and filtration avoidance. These pollutants include *Giardia*, *Cryptosporidium*, cholera, typhoid, phosphorus, ammonia, radiation (barium from Putnam Hospital), metals, and pesticides, where appropriate. Most Watershed plants are not currently required to test for these parameters. Information about these parameters will be useful to the DEP in obtaining permit modifications from the DEC. These tests will also be useful in assessing reservoir pollution loading, and stream assimilation capacities, and will provide baselines to measure the real effectiveness of the regulations and new pollution control technologies. In addition, it will provide information about the real threats to public health and water quality posed by the 112 sewage treatment plants in the Watershed.

18. For sewage treatment plants that are chronic violators, the DEP should routinely collect upstream and downstream samples. These samples may be helpful in determining downstream impacts, in prosecuting the polluter in court, and in developing remediation plans during negotiations or litigation.

19. Contract laboratories that test and sample for the Watershed package plants should be certified by the state or the DEP.

E. Project Review: Pollution Prevention

20. The DEP should create a pollution prevention unit responsible for conducting project review, remediation and environmental protection engineering in the Watershed. This unit should report to the First Deputy Commissioner and work closely with the DEP's enforcement staff. The unit should be led by a qualified environmental protection engineer and be independent from the delivery and district engineer.

21. Watershed protection engineering should be reconstructed to eliminate under-qualified or unqualified staff and redefine duties. These engineers should be made public health engineers. Environmentally qualified engineers should manage this unit.

22. Watershed protection engineers should be permitted to take and order samples when appropriate to ongoing investigations and should be allocated necessary laboratory support.

F. Public Outreach

23. Highway signs on all state and federal highways should announce:

YOU ARE NOW ENTERING A WATER SUPPLY WATERSHED.
REPORT POLLUTION! TOLL-FREE HOTLINE #

This hotline should be answered by a public liaison with excellent communication skills. Public callers should be informed of follow-up steps where appropriate.

24. All the DEP Watershed vehicles should bear the hotline number, and the public should be educated about it so they will use it. The DEP should print the hotline numbers on the DEP fishing licenses, and post it in bait shops at fishing clubs such as Theodore Gordon Fly Fishers and Watershed chapters of Trout Unlimited, at train stations in the Watershed communities, and with the many environmental groups that are interested in the Watershed.