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States as Innovators: It's Time for a New Look To Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation

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STATES AS INNOVATORS: IT'S TIME FOR A NEW LOOK TO OUR "LABORATORIES OF DEMOCRACY"* IN THE EFFORT TO IMPROVE OUR APPROACH TO ENVIRONMENTAL REGULATION

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* *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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I. INTRODUCTION

In its September 1993 report on "reinventing government," the Clinton administration observed that federal government programs today have a dismal reputation among the nation's citizens:

> It is almost as if federal programs were *designed* not to work. In truth, few are "designed" at all; the legislative process simply churns them out, one after another, year after year. It's little wonder that when asked if "government always manages to mess things up," two-thirds of Americans say "yes."[1]

The United States' existing system for controlling pollution is no exception. It is currently under attack from many quarters.[2] For example, even environmental leaders such as former EPA Administrator William Reilly, while giving credit to our environmental laws for the improvements they have produced, question the basic structure of the existing regime for its failure to view problems

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[1] AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 1 (1993) [hereinafter NATIONAL PERFORMANCE REVIEW]. In his recent book *Demosclerosis*, Jonathan Rauch contrasts the current level of confidence in government with the level of confidence that existed in the late 1950s. The contrast is not encouraging.

> In 1958, 75 percent of the public said it trusted the government in Washington to "do what's right" always or most of the time. . . . [I]n February 1993 it [the trust level] reached a new low, with only one in five Americans expressing trust in government to do the right thing.

JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 9 (1994). Mr. Rauch cites other evidence for the decline of confidence in government: "Other data tell the same story of disillusionment. Seven in ten Americans say that the government creates more problems than it solves, rather than vice versa." *Id.* at 9-10; *see also* Paul A. Gigot, *103rd Congress: Pass the Balloons and Party Hats*, WALL ST. J., Oct. 7, 1994, at A10 (citing "Beltway weathervane" Bill Schneider of CNN for the propositions that "[v]oters . . . profoundly doubt government can do anything well" and "[t]he biggest change in public opinion in the last 30 years is the collapse of confidence in government").

[2] *See* Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061, 1061 (1994) (noting that "[a]fter almost a quarter century of federally centered environmental regulation, the existing regulatory system satisfies almost no one. Indeed, if the goals at stake were not so important, the criticism directed at federal environmental law has become so regular that it seems almost wearisome."); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 314 (suggesting a "pathological cycle" of public and institutional distrust of the EPA); Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, at A1 (noting that "[a] generation after the United States responded to poisoned streams and filthy air with the world's first comprehensive strategy to protect the environment, many scientists, economists and Government officials have reached the dismaying conclusion that much of America's environmental program has gone seriously awry").

comprehensively or to prioritize among them.[3] Local governments have also launched a broad scale assault on our environmental laws, with a particular focus on the issue of unfunded environmental mandates.[4] And, as a third example, other observers of the environmen-

[3] *See, e.g.*, William K. Reilly, *The Future of Environmental Law*, 6 YALE J. ON REG. 351 (1989); Schneider, *supra* note 2, at A30 (quoting an interview with former EPA administrator William K. Reilly: "We need to develop a new system for taking action on the environment that isn't based on responding to the nightly news. . . . What we have had in the United States is environmental agenda-setting by episodic panic."). Former Administrator Reilly's criticism is widely shared. Former EPA General Counsel Donald Elliott noted that:

> This country is long overdue for a national debate on our policies toward environmental risk. . . . We cannot maintain forever the fiction that we are rich enough (or foolish enough) to spend whatever it takes to eliminate all risks, even trivial ones, instantly from our environment. We must set rational priorities based on the best science available and devote our limited resources first to the areas where the opportunities for risk reduction are greatest.

E. Donald Elliott, *Superfund: EPA Success, National Debacle?*, 6 NAT. RESOURCES & ENV'T, Winter 1992, at 11, 48; *see also* AL GORE, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: IMPROVING REGULATORY SYSTEMS 3, 55 (1993) [hereinafter IMPROVING REGULATORY SYSTEMS] (suggesting that "agencies concentrate their regulatory resources on the most serious environmental, health, and safety risks and engage in long-term regulatory planning," and recommending that "[h]eads of regulatory agencies involved in the regulation of environmental, health, or safety risks should direct their agencies to rank the seriousness of those risks to permit better prioritization of their regulatory agendas"); U.S. GAO, GAO/OCG-94-1, REPORT TO CONGRESSIONAL REQUESTERS, MANAGEMENT REFORM: GAO'S COMMENTS ON THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS 55 (Dec. 1993) [hereinafter GAO COMMENTS] (also finding a place on the bandwagon favoring prioritization, noting: "We concur with the need for measurable environmental goals. . . . These goals . . . are critical for [the] EPA to ensure that (1) the most pressing environmental needs are addressed in an era of limited resources and (2) progress in these efforts can be tracked and assessed."); U.S. EPA, SAB-EC-90-021, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 6 (Sept. 1990) [hereinafter REDUCING RISK]; *cf.* AMOCO CORP. & U.S. EPA, AMOCO—U.S. EPA POLLUTION PREVENTION PROJECT: YORKTOWN, VIRGINIA at v (May 1992) [hereinafter AMOCO STUDY] (noting that "[c]urrent [EPA] administrative procedures discourage . . . the analysis of tradeoffs in risks, benefits, and costs of managing residual pollutants in different media").

[4] *See generally* ENVIRONMENTAL LAW REVIEW COMM., ENVIRONMENTAL LEGISLATION: THE INCREASING COSTS OF REGULATORY COMPLIANCE TO THE CITY OF COLUMBUS 12 (May 13, 1991) [hereinafter COLUMBUS STUDY]; U.S. EPA, EPA 230-R-93-007, LOCAL GOVERNMENT IMPLEMENTATION OF ENVIRONMENTAL MANDATES: FIVE CASE STUDIES 15 (Aug. 1993) [hereinafter EPA FIVE CASE STUDIES]; David L. Markell, *The Role of Local Governments in Environmental Regulation: Shoring Up Our Federal System*, 44 SYRACUSE L. REV. 885 (1994).

A 1990 General Accounting Office report notes that state and local officials cite the expansion of federal regulation of states and localities as "the most negative trend of the past decade" and that "tensions between the federal and state and local governments are mounting." U.S. GAO, GAO/HRD-90-34, REPORT TO CONGRESSIONAL COMMITTEES, FEDERAL-STATE-LOCAL RELATIONS: TRENDS OF THE PAST DECADE AND EMERGING ISSUES 2-3 (Mar. 1990) [hereinafter FEDERAL-STATE-LOCAL RELATIONS].

A recent *New York Times* article suggests that this issue, among others, is likely to be raised "whenever Congress debates an environmental bill." John H. Cushman, Jr., *E.P.A. Critics Get Boost in Congress*, N.Y. TIMES, Feb. 7, 1994, at A1, A15. This article also notes that another

tal regulatory scheme, including the U.S. General Accounting Office (GAO), have criticized efforts to secure compliance with the environmental laws.[5]

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proposal is to "force the environmental agency [EPA] to demonstrate that every new regulation [is] worth its cost." *Id.* at A1.

State and local government officials have not limited their criticisms of the existing environmental regulatory scheme to the issue of unfunded mandates. These officials seem to share the concern voiced by former Administrator Reilly and others that a need exists to prioritize environmental issues. The National Governors' Association urged that "[f]ederal environmental laws and regulations must recognize the need to set priorities and focus on the most important environmental objectives at the national, state, and local levels." *Governors' Association Approves Policy Calling for Federal Funding of Mandates*, 24 Env't Rep. (BNA) 1726, 1726 (Feb. 4, 1994) (quoting National Governors' Association policy). Nevada Governor Bob Miller, commenting on the policy, stated that instead of using environmental mandates in which everything is of equal importance, "[t]he time has come to set realistic priorities among environmental programs so that we can focus on the most important environmental objectives at the national, state, and local level." *Id.* (quoting Governor Miller). Taking the opposite position are people such as Ralph Nader and Linda Greer, a senior scientist with the Natural Resources Defense Council. Both have challenged the "morality" of prioritizing among risks because "choosing which risk to pursue as a policy decision [is] immoral in a society as affluent as ours." *Risk Hits Primetime*, COMP. RISK BULL. (Northeast Ctr. for Comparative Risk, Vt. Law Sch.), May-June 1994, at 1.

[5] *See, e.g.* U.S. GAO, GAO/IMTEC-92-58BR, BRIEFING REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE, WATER POLLUTION MONITORING: EPA'S PERMIT COMPLIANCE SYSTEM COULD BE USED MORE EFFECTIVELY 25 (June 1992) [hereinafter WATER POLLUTION MONITORING]; U.S. GAO, GAO/RCED-90-101, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, HOUSE OF REPRESENTATIVES, WATER POLLUTION: IMPROVED MONITORING AND ENFORCEMENT NEEDED FOR TOXIC POLLUTANTS ENTERING SEWERS 36-38, 44-45, 48 (Apr. 1989); U.S. GAO, GAO/RCED-92-107, REPORT TO CONGRESSIONAL REQUESTERS, ENVIRONMENTAL ENFORCEMENT: ALTERNATIVE ENFORCEMENT ORGANIZATIONS FOR EPA 30 (Apr. 1992) [hereinafter ALTERNATIVE ENFORCEMENT]; U.S. GAO, GAO/RCED-91-166, REPORT TO CONGRESSIONAL REQUESTERS, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS 14-16 (June 1991); U.S. GAO, GAO/RCED-90-155, REPORT TO THE CHAIRMAN, SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, AIR POLLUTION: IMPROVEMENTS NEEDED IN DETECTING AND PREVENTING VIOLATIONS 30, 41 (Sept. 1990); U.S. GAO, GAO/RCED-89-65, REPORT TO THE HONORABLE ARLEN SPECTER, U.S. SENATE, INLAND OIL SPILLS: STRONGER REGULATION AND ENFORCEMENT NEEDED TO AVOID FUTURE INCIDENTS 2-3 (Feb. 1989); Charles L. Grizzle, *EPA—An Agency in Need of Strategic Realignment*, 2 CORP. ENVTL. STRATEGY 49, 51 (1994) ("[The] EPA must make a fundamental shift from quantitative enforcement to qualitative enforcement. . . . Regulatory enforcement is often a numbers game and we have now unleashed a bean-counting frenzy. The results are inspections yielding picayune violations, the correction of which often lead to little environmental gain."); *cf.* Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle To Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 34-35, 38 (1993) (noting that while the EPA's enforcement program has been producing record numbers of enforcement actions and penalties, enforcement has "largely been an uncoordinated, piecemeal effort," and discussing the "inefficiencies of the EPA's fragmented enforcement system").

Other critics of the existing regulatory scheme include the following: (1) "[E]nvironmental justice" advocates, who challenge the fairness of the existing regulatory scheme. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental*

The jury is still out concerning how successfully the federal government will respond to these challenges. At this juncture, Congress and the Clinton administration have acknowledged that concerns exist with respect to our environmental laws and practices.[6] In fact,

Protection, 87 Nw. U. L. REV. 787 (1993) (discussing the thesis that minority groups, among others, bear a disproportionate amount of environmental burdens); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 397-400 (1991) (noting that minority communities are exposed to higher levels of pollutants than whites). *But see* Mary Bryant, *Unequal Justice? Lies, Damn Lies, and Statistics Revisited*, SONREEL NEWS, Sept.-Oct. 1993, at 3 (suggesting that the data does not support the "environmental justice" movement); Larry E. Ruff, *The Economic Common Sense of Pollution*, *in* ECONOMICS OF THE ENVIRONMENT: SELECTED READINGS 20, 29 (Robert Dorfman & Nancy S. Dorfman eds., 3d ed. 1993) (indicating his view that environmental regulatory agencies should not have the responsibility "to change the distribution of welfare in society; this is the responsibility of higher authorities"). (2) Some economists, among others, who dispute the efficiency of our approach to environmental regulation. *See, e.g.*, PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION (Paul R. Portney ed., 1st ed. 3rd prtg. 1992); Ruff, *supra*, at 22. (3) Various representatives of regulated industry, who long have complained about the high cost of environmental regulation. *See, e.g.*, IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 7 ("Everyone running a business has his or her own illustration of unnecessary regulation."); Vernon R. Rice, *Regulating Reasonably*, ENVTL. F., May/June 1994, at 16, 21 ("Industry has been saying this [that "the costs of some environmental programs exceed their benefits"] for years."). A 1993 U.S. Bureau of the Census study finding that "productivity was reduced by the equivalent of 3 to 4 dollars per dollar of pollution abatement costs," rather than the dollar per dollar reduction that traditionally had been assumed, undoubtedly will add fuel to these criticisms. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SB/93-13, STATISTICAL BRIEF: MEASURING THE PRODUCTIVITY IMPACT OF POLLUTION ABATEMENT 1, 2 (Nov. 1993).

[6] Current EPA Administrator Carol M. Browner offered the following testimony before Congress concerning the issue of mandates, among other things, on March 31, 1993:

> State, tribal and local governments feel overwhelmed by the breadth, complexity and cost of existing environmental needs, mandates and expectations, and must get some relief. If States, tribes, and local governments fail in their environmental management efforts, and they *are* in danger of failing, then EPA fails. . . . Responsible stewardship of the nation's environmental agenda requires exercising the utmost leadership in bring [sic] together the best of Federal efforts and State, tribal, and local efforts.

Taking Stock of Environmental Problems: Hearings before the Senate Comm. on Environment and Public Works, 103d Cong., 1st Sess. 169 (1993) (statement of Carol M. Browner, Administrator, U.S. EPA).

U.S. Senator Daniel Patrick Moynihan recently noted the increasing tendency of local governments to question the legitimacy of regulatory objectives:

> Obviously, we are seeing a new trend. Federal environmental laws are being questioned by state and local governments, which say they can't afford to comply with all environmental laws. . . . An editorial in the January 8, 1993, issue of *Science* magazine alerts us to the "growing questioning of the factual basis for federal command-and-control actions," all because of concerns over regulatory costs. The message is clear. State and local governments will hold Congress and the EPA more accountable in the future about obligating them to spend their resources on federal requirements. They will want "proof" that there is a problem and confidence that the legislated solution will solve it. California's threat to return enforcement of its drinking water program to the EPA last spring speaks volumes. The most environmentally advanced state in the Union close to rebellion—a sobering prospect. The *Science* editorial suggests we are seeing the "beginning of a revolt."

some members of Congress have concluded that flaws exist in the current environmental regulatory scheme and that they personally (or at least institutionally) deserve some of the blame.[7] Such candor is useful. As William F. Pedersen aptly put it:

> The complexity of environmental issues and the short attention span of the media allow fake claims of victory and disaster to be taken—all too often—at face value. Here, as in other walks of life, candor about our failings . . . will be the indispensable prelude to progress in the future.[8]

It would be nice if the question of what strategies we should adopt at the federal level to improve our environmental regulatory structure and the administration of our environmental laws were only a "$64,000 question,"[9] but it has far greater financial implications than that.[10] The importance of trying to find answers to this ques-

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Daniel P. Moynihan, *A Legislative Proposal: Why Not Enact a Law That Would Help Us Set Sensible Priorities?*, EPA J., Jan.-Mar. 1993, at 46-47.

[7] *See, e.g.*, *Environmental Mandates*, 24 Env't Rep. (BNA) 1727 (Feb. 4, 1994) (summarizing Senator Baucus's "pledge" to reform "excessive mandates" and his statement that "Congress needs to find the balance 'between environmental protection, and reasonableness, and common sense,' " which impliedly acknowledges that Congress's legislative efforts in the 1980's paid little attention to the latter two factors); Keith Schneider, *Second Chance on Environment: Opportunity To Redefine Core of American Policy on Pollution*, N.Y. TIMES, Mar. 26, 1993, at A17 (reporting:

> Several members of Congress said that one lesson of environmental policy-making in the 1980's was that acting on the basis of being safe rather than sorry had unintended consequences. Not the least of them has been many costly rules that are not producing measurable improvements in public health or the environment.).

Mr. Schneider further stated that "[s]everal leading members [of Congress] said that too often Congress has moved from panic to panic and not developed a uniform approach to consider risks." *Id.* Finally, the author summarized the views of Representative Mike Synar, the Chair of the House Subcommittee on the Environment: " 'Costs are out of sight,' and the benefits from many recent environmental programs are not apparent." *Id.*

Several commentators have similarly argued that Congress bears a considerable portion of the blame for problems in the current scheme. *See, e.g.*, Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Costodes (Who Shall Watch the Watchers Themselves)?*, LAW & CONTEMP. PROBS., Autumn 1991, at 205, 210-18.

[8] William F. Pedersen, *"Protecting the Environment" - What Does That Mean?*, 27 LOY. L.A. L. REV. 969, 978 (1994).

[9] "The $64,000 Question," a game show created by Merton Y. Koplin in 1955, featuring figures such as Dr. Joyce Brothers, was the most popular show of its time and the origin of the now-common phrase "the $64,000 question." *M.Y. Koplin Had Role in Quiz Scandal*, WASH. POST, Feb. 18, 1992, at B5.

[10] *See, e.g.*, David L. Markell, *Internalizing the Costs Of Pollution: Trends in US Environmental Policy*, 1 CORP. ENVTL. STRATEGY 43 (1993) [hereinafter Markell, *Internalizing the Costs of Pollution*] (noting that "the U.S. economy spends more than $170 billion per year on environmental protection"); Rice, *supra* note 5, at 16 (indicating that "[c]urrent estimates put environmental spending at about $150 billion per year in the United States").

One aspect of this issue that this Article does not address in detail concerns the respective roles that federal, state, and local governments should play. For a general discussion of this

tion is highlighted by the remarkable conclusion in a recent U.S. EPA/Amoco Corporation case study concerning environmental regulation of Amoco's Yorktown, Virginia oil refinery. The study concluded that "about 97 percent of the release reductions that [environmental] regulatory and statutory programs require can be achieved for about 25 percent of today's cost for these programs."[11] This finding signals that the potential exists to produce enormous improvements in our current system of regulating pollution.

What strategies should we adopt at the federal level to address concerns about (1) the piecemeal nature of our existing regulatory regime and our resulting failure to prioritize in a rational way, (2) unfunded mandates, and (3) the efficacy of current strategies to promote compliance with the environmental laws? The short answer is that a threshold strategy should be initiated to invest resources in learning from and encouraging innovative state efforts that address these problem areas. Today, state governments, Justice Brandeis's "laboratories of democracy,"[12] are "making a reality of this textbook description."[13] As Professor Evan Ringquist observes in his recent book, while:

> the EPA was created and . . . [the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and other flagship] pieces of federal [environmental] legislation passed largely because states had failed to protect environmental quality on their own prior to 1970[,] . . . many states

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issue, see ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT 8 (1992) (noting that "[t]he argument about which functions should be exercised by the federal government and which by the states has been going on for more than two hundred years"). For a discussion of this issue in the context of the cleanup of toxic waste sites, see David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1, 3-4 (1993) [hereinafter Markell, *The Federal Superfund Program*] ("Controversy concerning the appropriate division of responsibility and power between the federal government and the states has a long history in the United States, extending back at least to the eighteenth century. . . . This historical dispute encompasses the debate over the appropriate locus of authority for environmental regulation.").

[11] AMOCO STUDY, *supra* note 3, at v. The study found that "[t]he cost-effectiveness of the flexible option [i.e., a more flexible, results-oriented approach to environmental regulation] is about $600/ton compared with the cost-effectiveness of $2,400/ton for [current] regulatory requirements." *Id.* at 16.

Recently, DuPont's Vernon Rice stated that "regulatory-driven initiatives cost three times more for the same environmental benefit." Rice, *supra* note 5, at 21.

[12] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[13] U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, PUB. NO. A-98, THE QUESTION OF STATE GOVERNMENT CAPABILITY 23 (1985) [hereinafter ACIR REPORT] ("Long called the 'laboratories of democracy,' states today are making a reality of this text-book description . . . .").

> have tossed away their recalcitrant stance toward strong environmental programs, and in many instances state governments, not "the feds," are at the forefront in efforts to protect the environment.[14]

Other commentators have similarly noted that states occupy an increasingly prominent role in environmental regulation and that considerable innovation has occurred at the state and local levels, making these governmental efforts especially rich mines to explore.[15] In his book *Public Policies for Environmental Protection*, Paul Portney of Resources for the Future notes that "[o]ver the past decade or so some of the most interesting environmental initiatives have arisen at the state level."[16] J. William Futrell, President of the Environmental Law Institute, makes the same point in a recent article, stating that "[t]he prospects for early innovation and experimentation on the state level are better than in Washington."[17]

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[14] EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION at xiii (1993) (suggesting that states are becoming increasingly valuable as "laboratories" because they have become increasingly sophisticated); *see* ACIR REPORT, *supra* note 13, at 386; FEDERAL-STATE-LOCAL RELATIONS, *supra* note 4, at 3 ("States have increased their prominence . . . and now stand at the threshold of the 1990s as highly visible leaders in a broad range of domestic policies. In part, this is due to the increased institutional and administrative capacity of states."); *Id.* at 32 ("[S]tates have progressed . . . to a period in which they are touted as key innovators.").

[15] *Management Deficiencies in Environmental Enforcement: "Forceless Enforcement": Hearing Before the Senate Comm. on Governmental Affairs*, 102nd Cong., 1st. Sess. 93-94 (1991) (testimony of James M. Strock, Secretary, Office of Environmental Protection, California); *Environmental Issues and Avtex Fibers, Inc.: Hearing Before the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development of the Senate Comm. on Environment and Public Works*, 101st Cong., 2nd. Sess. 29 (1990) [hereinafter *Avtex Fibers Hearing*] (statement of David Bailey, Director of Environmental Defense Fund, Virginia); JAMES M. MCELFISH, JR. & JOHN PENDERGRASS, ENVTL. LAW INST., RESEARCH BRIEF NO. 2, REAUTHORIZING SUPERFUND: LESSONS FROM THE STATES 4 (Dec. 1993). In a recent column, commentator George Will noted that there is a "national tendency [that] almost anything done by government at the local level is apt to be more interesting than almost everything done by government at the national level." George Will, *A Johnson Who's No LBJ*, TIMES UNION (Albany), Mar. 24, 1994, at A10.

[16] Paul R. Portney, *Overall Assessment and Future Directions*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION, *supra* note 5, at 275, 283.

Recommendation number two in Vice President Gore's *Improving Regulatory Systems* is entitled *Encourage More Innovative Approaches to Regulation*. IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 23. It recommends creation of a "Deskbook" to "improve understanding of the full range of alternative approaches by providing both policymakers and staff with ready information about the range of regulatory approaches. . . . The *Deskbook* should also provide an in-depth survey of how innovative approaches have been used in both federal and state governments." *Id.* at 26.

[17] J. William Futrell, *Law of Sustainable Development*, ENVTL. F., Mar.-Apr. 1994, at 16, 20.

Congress contemplated that states would administer many of the federal environmental laws. *See generally* Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1993); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993);

A recently reported anecdote makes the point well: In June 1993—in a much touted initiative—President Clinton signed Executive Order No. 12,852, creating a Council on Sustainable Development to develop policy recommendations for sustainable development.[18] According to a report in a recent environmental newsletter, a group of community leaders told members of this Council that "the best way to achieve goals was to make sure that the federal government does not 'get in the way' of their sustainable development projects."[19] A co-chair of the Council said that " '[t]he message we kept getting was that there was an enormous amount of activity at the community level. . . . [W]hat the council is trying to do at the federal level is already being done at the community level.' "[20]

In sum, innovations at the state level are likely to hold a great deal of promise as potential strategies for addressing concerns about federal approaches to environmental regulation.[21]

The emergence of state governments as central actors in the environmental arena should not be unexpected. It also should not be unwelcome. Concerning the former, the existence of fifty state governments, as well as many more local governments, within our federal system inherently creates both numerous "innovation centers"[22] and the opportunity to try a wide variety of approaches simultaneously or within short periods of time.[23]

Clean Air Act, *Id.* §§ 7401-7671q; Portney, *supra* note 16, at 282-83. States also act independently to protect their citizens from environmental threats. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). This is true both in terms of states' actions in implementing these federal environmental laws and in states' actions independent of these federal laws to protect the health of their citizens and the quality of their environment. More than one commentator has suggested that the current federal system discourages state innovations and that the system needs to give states greater flexibility to structure their programs so as to maximize environmental results. *See, e.g.*, McElfish & Pendergrass, *supra* note 15, at 4.

[18] Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (1993).

[19] *Sustainable Development Leaders Ask for Independence, Federal Flexibility*, Envtl. Pol'y Alert, Feb. 2, 1994, at 42.

[20] *Id.* at 43. This member of the Council also stated that local sustainable development leaders "asked that the federal government not be prescriptive and allow local communities the flexibility to develop programs." *Id.*

[21] *See* Environmental Law Inst., Report to the Office of Technology Assessment, New State and Local Approaches to Environmental Protection at iv (Aug. 1993) [hereinafter ELI/OTA Report] ("Many environmental laws and programs originate with state and local governments. These include innovative approaches to environmental regulation as well as other approaches used in lieu of, or as supplements to, regulatory mechanisms."); McElfish & Pendergrass, *supra* note 15, at 4 (discussing state innovations in the Superfund arena).

[22] *See* Markell, *The Federal Superfund Program*, *supra* note 10, at 73.

[23] Commentators have noted that "[u]nsuccessful state programs are nearly as important" as successful ones for the lessons they teach. Daniel A. Farber, *Environmental Protection as a*

In addition, there also appears to be some merit to the view that state and local governments tend to be more nimble and receptive to change than the federal government. As Professor Stenzel notes in a recent article in discussing "right to act"[24] laws:

> The process of starting on the state or local level seems to work well politically, because the public seems more willing to accept new approaches on a local or state level rather than at the national level. Individual states can choose varying mechanisms as the tools for achieving their goals. Then, those laws can be examined to see which options have proven to be the most effective.[25]

Third, looking to state and local governments is likely to pay dividends because ideas developed there will have been "reality-tested."[26] Despite the fact that the bulk of scholarly attention and environmental courses in the nation's law schools have traditionally

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Learning Experience, 27 LOY. L.A. L. REV. 791, 801 (1994); *see* MCELFISH & PENDERGRASS, *supra* note 15, at 4. For a discussion of this issue in the context of Congress's efforts to reauthorize Superfund, see David L. Markell, *"Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994's Approach To Intergovernmental Relations*, 24 LEWIS & CLARK ENVTL. L.J. 1055, 1090-94 (1994).

Several commentators have noted that the federal government sometimes unnecessarily impedes such creativity. *See, e.g.*, MCELFISH & PENDERGRASS, *supra* note 15, at 4; Fontaine, *supra* note 5, at 94-95; Markell, *supra* note 23, at 1093.

Rigidity in the system is particularly unfortunate and counterproductive, both as a theoretical matter because of the inconsistency of such an approach with the reinventing government principles, and because, as Professor Ringquist noted, state governments are "closer to many environmental problems; and after twenty years of federal policy leadership we have learned that flexibility in response to local conditions is a necessary (though not sufficient) feature of successful environmental programs." RINGQUIST, *supra* note 14, at xiii.

[24] Professor Stenzel describes right to act (RTA) laws as "legislation . . . designed to give workers and community residents the power to prevent, or at least avoid exposure to, workplace hazards. . . . RTA legislation empowers workers and community residents to take preventative measures against workplace hazards or, at least, to avoid exposure to present hazards." Paulette L. Stenzel, *Right To Act: Advancing the Common Interests of Labor and Environmentalists*, 57 ALB. L. REV. 1, 3-4 (1993).

[25] *Id.* at 37; *cf.* Richard A. Merrill, *Congress as Scientists*, ENVTL. F., Jan.-Feb. 1994, at 21 (noting that "[Because of scientific developments, the Delaney clause created a rule that] was quickly outdated and increasingly dysfunctional. Yet, only now, 35 years later, does it appear likely that Congress will revisit its earlier decision."). Speaking more generally, but reaching the same conclusion that the federal government is reluctant to revisit earlier approaches, Vice President Gore's report notes: "Despite more than a decade of high-level support, innovative approaches are not widely used by agencies. . . . It is always easier to model a new program after an old one." IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 26.

Legitimate questions have been raised concerning state and local government competence to address certain issues. *See, e.g.*, RINGQUIST, *supra* note 14, at 43; Mary C. Wood, *State Over Its Head As Spill Decision-Maker*, THE OREGONIAN (Portland, Or.), Aug. 4, 1994, at B9; *cf. supra* note 15 and accompanying text (noting that states are very able to address certain issues).

[26] *See* ACIR REPORT, *supra* note 13, at 400-01.

focused on federal environmental regulation,[27] many commentators have begun to recognize that the majority of the real work in implementing and administering the environmental laws actually occurs in state and local governments. One commentator notes:

> Most environmental law in the United States is *state* law. . . . These laws affect more people, more decisions, and more interests than the oft-discussed federal laws. . . . State law must be viewed as a major functional program in order to understand the breadth and scope of environmental law. As environmental law reaches maturity, practitioners and scholars have recognized that much of the "action" is really occurring in state law.[28]

Consequently, strategies borne at these levels will have been battle-tested and are more likely to have been refined and made workable than those hatched far from the front lines.

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[27] 1 ENVIRONMENTAL LAW INST., LAW OF ENVIRONMENTAL PROTECTION § 6.01[1] (Sheldon M. Novick et al. eds., 1994) [hereinafter 1 LAW OF ENVIRONMENTAL PROTECTION] (noting the almost total emphasis on federal environmental law found in treatises, law review articles, and popular publications); David L. Markell, *A How-To Guide to the Practice of Environmental Law*, 2 N.Y.U. ENVTL. L.J. 360, 364 (1993) (book review) (noting that the same is true for environmental casebooks including, by way of example, JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION (2d ed. 1992); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW: CASES AND MATERIALS (3d ed. 1992); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY (1992)). Professor Ringquist identifies the same phenomenon among political scientists: "[R]esearch into state politics, government, and policy receives too low a priority and too few resources in political science." RINGQUIST, *supra* note 14, at 9.

[28] 1 LAW OF ENVIRONMENTAL PROTECTION, *supra* note 27, § 6.01[1]. The importance of state environmental regulation is demonstrated by the fact that states initiate far more enforcement actions and conduct far more inspections than the federal government. *See, e.g.*, E. Donald Elliott, *Keynote Address*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,010, 10,011 (Jan. 1992) (noting that

> about 70 percent of environmental enforcement cases are brought by the states. . . . EPA provides only about 30 percent of the enforcement cases.
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> . . .
>
> When you look at a measure such as the numbers of inspections conducted, the balance is even more stark. The numbers for fiscal [year] 1988 reflect that over 200,000 inspections were being performed by the states. EPA performs 10,000, and its contractors perform another 12,000. The states are performing 90 percent of the inspections.).

Professor Ringquist observes that "over the past fifteen years, many states have been far more active in controlling pollution than the federal government. By focusing most of our attention on federal efforts at environmental protection, we are missing some of the nation's most important and innovative efforts at pollution control." RINGQUIST, *supra* note 14, at 4.

This reality suggests the limited relevance of one rationale for centralizing authority, a presumed lack of expertise at "lower levels." *See* Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 889 (1994); Markell, *supra* note 23, at 1077-79 (stating that Congress should delegate more responsibility to those states that have shown they are competent to handle such delegation).

Because the damage resulting from innovations "gone awry" is less significant, or at least more localized, if the innovations occur at the state level rather than at the federal level, the federal government should welcome and indeed actively encourage state innovations. As Justice Brandeis pointed out in his famous dissent in *New State Ice Co. v. Liebmann* in 1932, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[29]

Tied in with many of the reasons listed above, there is a final reason why the federal government should pay special attention to state and local governments' efforts in determining how best to "reinvent" itself in terms of environmental regulation. The conservative nature of bureaucracy, combined with the reality that the nature of innovation is inherently problematic, counsels in favor of looking for what works, rather than reinventing the wheel at the federal level. Traveling through uncharted territory without a roadmap makes it difficult to find one's way, and the fact that innovation and risk taking tend to be discouraged, not encouraged, in large bureaucratic organizations such as the EPA exacerbates this problem.[30]

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[29] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). While, as previously noted, this Article does not focus directly on the issue of the appropriate shape of our federal system, see *supra* note 10, Justice Brandeis's sentiments argue for a strong bias towards "delegating down" authority from the federal government to the states. In a recent article, Professor Daniel Farber urged the same result for a different reason. He urged that we need to shift from conceptualizing environmental problems in static terms to viewing them using a more dynamic model because of, *inter alia*, the enormous lack of information that affects our thinking. Farber, *supra* note 23, at 798. Professor Farber recommended greater decentralization of authority based on the idea that such a structure will be more adaptable and better able to change. *Id.* Creating or fostering state capability to handle such responsibility obviously is a key step. *Cf.* Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991) (requiring the EPA to promulgate Total Maximum Daily Loads (TMDL), under the Clean Water Act, water pollution limits in Alaska, when Alaska failed to fulfill its statutory duty to do so over a ten year period), *aff'd* 20 F.3d 981 (9th Cir. 1994); Wood, *supra* note 25, at B9 (asserting that the State of Oregon is incompetent to fulfill its duties under the Clean Water Act).

[30] JAMES Q. WILSON, BUREAUCRACY 221 (1989) (noting the resistance of bureaucratic institutions to innovation); Farber, *supra* note 23, at 798 ("Large hierarchies are not famous for their ability to respond quickly and effectively to change."); Lazarus, *supra* note 2 at 311, 313 (noting that "combinations of institutional forces have . . . seriously frustrated from the outset the . . . [EPA's] development and implementation of federal environmental protection policy"). In addition to its immense size, a number of flaws in our federal government counsel against relying too much on the federal government to determine, on its own, how best to reshape our environmental regulatory scheme. Among others, Vice President Gore's report, *National Performance Review*, notes, "Distrust between executive and legislative branches is one of the major reasons for legislation that is overly restrictive, too detailed or poorly conceived or drafted." IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 66. This complaint is

For all of these reasons, as the federal government embarks on its effort to "reinvent government" (to borrow Vice President Gore's phrase) in terms of improving the environmental regulatory paradigm, a fundamental tenet of its strategy should be to look to state experience for guidance on which path it should take.[31] The federal government should be investing in, encouraging, and learning about the states' experiences in developing strategies to address these issues. As a final note, a side benefit of a federal government decision to acknowledge clearly the value of state experiences in this way is that doing so will inevitably help to improve the state/federal relationship. Such improvement would be welcome and beneficial. As the EPA's current Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) put it after summarizing a state offical's compliment concerning a recently developed EPA Clean Air Act enforcement policy: "Most of us would agree that such praise from a state official to a federal official is as rare as it is picturesque! However, that is exactly the kind of state/federal cooperation I want to encourage for the future."[32]

Looking primarily to New York's experience, the remainder of this Article discusses several specific innovative approaches that states recently have pioneered or developed to strengthen environmental regulation in three of the areas that many have targeted in criticizing the federal regime. Section II discusses experiments focused on

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echoed by the National Academy of Public Administration, which recently concluded that "[t]he outright confrontation and increasingly competitive relationship between the two branches has a high cost: a political system more and more unresponsive to national problems and unaccountable to the American people for addressing those problems." PANEL ON CONGRESS & THE EXECUTIVE, NATIONAL ACADEMY OF PUBLIC ADMIN., BEYOND DISTRUST: BUILDING BRIDGES BETWEEN CONGRESS AND THE EXECUTIVE 2-3 (1992). Another systemic problem derives from Congress's structure. Lazarus, *supra* note 7, at 211 (noting the unwieldy nature of congressional oversight of the EPA activity: "Most committees can find a nexus between their assigned jurisdiction and an aspect of EPA's work. At present, at least eleven standing House and nine standing Senate committees and up to 100 of their subcommittees share jurisdiction over EPA.").

One issue that this Article does not address is the extent to which EPA's regional offices act as "laboratories." Recent developments suggest that research into this area might prove fruitful. *Two EPA Regions Plan Multimedia Restructuring for Early 1995*, ENVIRONMENTAL POL'Y ALERT, Oct. 26, 1993, at 37 [hereinafter *Multimedia Restructuring*].

[31] NATIONAL PERFORMANCE REVIEW, *supra* note 1, at ii. The federal government should do so in addition to, and in many cases instead of, "inventing the wheel" itself in terms of improving environmental regulation, as it sought to do in the Amoco oil refinery study. The total cost of the Amoco project was $2.3 million and it took two years to complete. AMOCO STUDY, *supra* note 3, at ii. While such studies have their place, they clearly should not be the EPA's primary strategy for determining what is wrong with contemporary environmental regulation.

[32] Steven A. Herman, *CAA Section 507 Enforcement Response Policy*, NAT'L ENVTL. ENFORCEMENT J., Sept. 1994, at 10, 12.

helping the government to prioritize among environmental concerns and to understand and address environmental issues comprehensively. This section covers, among other experiments in this arena, New York's effort to fundamentally revamp the organizational structure, and change the culture, of its environmental regulatory agency, the Department of Environmental Conservation (DEC). By creating a multimedia Pollution Prevention Unit, the DEC has sought to heighten the focus it gives to high volume polluters and to enhance the agency's interaction with such polluters in a comprehensive, rather than a piecemeal, fashion.[33] Section III covers the creative mechanisms that New York has developed to address the unfunded mandates issue by sharing funding responsibility with local governments to address "environmental infrastructure" needs, such as remediation of toxic waste sites.[34] Finally, Section IV covers a series of innovative programs that New York has developed to improve compliance with the environmental laws by (1) strengthening the pool of permittees in terms of their commitment to compliance,[35] (2) improving the State's compliance monitoring,[36] and (3) opening up or democratizing the front end of the enforcement process.[37] The federal government should carefully review these experiments as it continues its effort to reinvent itself.[38]

II. Efforts To Prioritize and View Problems Comprehensively[39]

In its 1990 report *Reducing Risk: Setting Priorities and Strategies for Environmental Protection*,[40] the Science Advisory Board made

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[33] *See infra* notes 39-202 and accompanying text.

[34] *See infra* notes 203-14 and accompanying text.

[35] *See infra* notes 229-83 and accompanying text.

[36] *See infra* notes 284-325 and accompanying text.

[37] *See infra* notes 326-34 and accompanying text.

[38] The need to strengthen the federal government's partnership with state and local governments, suggested in this paper, is complemented by the need for the federal government to learn from as many groups as possible—to be as "inclusive" as possible—in identifying flaws in the existing environmental regulatory regime and in fashioning cures for these flaws. As the forward to the combined EPA/Amoco Corporation innovative pollution prevention project undertaken at Amoco Oil Company's Yorktown, Virginia refinery notes: "[A] central belief of this Project [is] that developing effective solutions to complex environmental management problems will take the best efforts of the many 'partners' in our society." Amoco Study, *supra* note 3, at ii.

[39] An earlier version of Sections II and II.A appears as *Shifting from "Mono-Media" to "Multi-Media" Environmental Regulation in New York State*, Environmental L. N.Y., Nov. 1994, at 1.

[40] Reducing Risk, *supra* note 3.

two criticisms of the current federal environmental statutory regime: (1) it addresses environmental problems from a fragmented, piecemeal perspective, and (2) it addresses environmental problems in a reactive way rather than based on a systematic effort to prioritize among issues and tackle the worst problems first.[41] The Board also criticized the media-specific bureaucratic structure that has grown up around this balkanized statutory structure.[42]

The following statement in the Board's report captures the first two concerns:

> As different environmental problems were identified, . . . new laws were passed to address each new problem. However, the tactics and goals of the different laws were neither consistent nor coordinated, even if the pollutants to be controlled were the same.
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> . . . .
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> The environment is an interrelated whole, and society's environmental protection efforts should be integrated as well. Integration in this case means that government agencies should assess the range of environmental problems of concern and then target protective efforts at the problems that seem to be the most serious.[43]

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[41] *Id.* at 1. As *Reducing Risk* reflects, environmental laws were traditionally enacted on a piecemeal basis to address specific problems. For example, the Clean Water Act was enacted in 1972 to address certain causes of pollution of the nation's waters. 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1993). The Clean Air Act was adopted in 1970 to regulate air pollution. 42 U.S.C. §§ 7401-7671q (1988 & Supp. 1993).

[42] REDUCING RISK, *supra* note 3, at 1. Media-specific or program-specific bureaucratic structures were created at both the national and state levels to administer these focused statutory schemes. At the national level, for example, the EPA created an Office of Water and an Office of Air and Radiation. The same is true at the state level. The New York DEC has a Division of Water and a Division of Air Resources.

[43] *Id.* The ICMA Environmental Mandates Task Force has voiced similar concerns about the EPA's failure to prioritize among risks:

> Too often EPA targets enforcement actions without regard to other sources of pollution that may be causing equal or greater harm to the environment. Under Superfund, a small town in Wisconsin faces the prospect of paying over $50 million to clean up two landfills that may be contaminating a creek. Yet even after those sites are cleaned up, the creek will still be contaminated by pollution from three other landfills, a golf course, airport, and agricultural lands that drain into the creek. A regional plan would evaluate all of these sources and decide what priority to give each instead of spending extraordinary amounts on two sources while ignoring the others.

Letter from the International City/County Management Association to Carol Browner, Administrator, U.S. EPA (Mar. 5, 1993), *reprinted in* INTERNATIONAL CITY/COUNTY MANAGEMENT ASS'N, ENVIRONMENTAL MANDATES TASK FORCE MEETING 5 (Mar. 5, 1993) [hereinafter MEETING NOTES].

The Board described the evolution of the current balkanized bureaucratic structure as follows:

> The Environmental Protection Agency (EPA) was established as the primary Federal agency responsible for implementing the nation's environmental laws. EPA then evolved an administrative structure wherein each program was primarily responsible for implementing specific laws. Consequently, the efforts of the different programs rarely were coordinated, even if they were attempting to control different aspects of the same environmental problem.[44]

Many other commentators have echoed the Board's three criticisms of the current environmental statutory regime and the bureaucratic structure for administering it. As William Futrell, President of the Environmental Law Institute, put it in a recent article:

> In the last quarter century, Congress has passed scores of statutes piecemeal in reaction to highly publicized crises . . . , with insufficient regard for how the specific . . . response[s] melded into a coherent environmental management system. As a result, many environmental laws express different—and sometimes conflicting—goals, without clear priorities. . . .
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> This "piecemealism" has resulted in a checkerboard pattern of conflicting, confused overregulation for some activities and gaps where major environmental insults go unchecked by the law . . . .
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> . . . .
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> . . . After a generation of intense legislative and judicial activity, environmental law is more fragmented than ever.[45]

In fact, in recent years, a rare consensus seems to have emerged among environmental professionals in government, the private sector, and the environmental and academic communities that U.S. environmental legislation has historically been fragmented rather than comprehensive and that we need to change this fragmented structure and approach problems more systematically and comprehensively.[46] In a recent *Loyola Law Review* symposium on the past twenty-five years of environmental regulation, several commentators identified the fragmentary nature of environmental law as an

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[44] REDUCING RISK, *supra* note 3, at 1.

[45] Futrell, *supra* note 17, at 17. For a discussion of the fragmented nature of environmental policy making in terms of the division of responsibility among the various federal actors, see Lazarus, *supra* note 28, at 876.

[46] *See supra* notes 41-45 and accompanying text; *infra* notes 70-76 and accompanying text.

impediment to effective regulation of pollution.[47] For example, Professor Kenneth Manaster of Santa Clara University discussed the balkanized nature of environmental law and quoted with approval a statement by two other authors that the " 'EPA must break out of its monomedia myopia, adopting instead a true cross-media focus.' "[48]

Among the multitude of problems stemming from the traditionally fragmented approach to environmental legislation and regulation, three warrant mention: (1) such a legislative structure greatly complicates the effort to prioritize among problems and to target the worst problems first;[49] (2) it often gives inadequate attention to transfers of pollution from one medium to another;[50] and (3) this structure has produced fragmented organizational structures in the regulatory agencies charged with implementing these laws, leading to inefficiency on the part of the regulator and the regulated alike. The EPA has acknowledged the flaws inherent in such a balkanized approach: "Media-specific approaches often create duplication among program offices. . . . The need to tackle more complex issues through prevention and control, in a more 'holistic' fashion, appears to require a new organizational approach. As EPA strives to solve more complex issues, its current structure works to inhibit or impede success."[51]

Two EPA employees similarly criticized the EPA's current organizational structure and its impact on regulated parties:

> Is there a better way to organize the EPA? The agency has long been structured according to media—air, water, land—often limiting individual programs to a specific environmental problem. The result—isolated, sometimes fragmented, programs—often leads to cases where an industry is subject to repetitive or even competing regulations from various EPA offices.[52]

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[47] *See, e.g.*, Lazarus, *supra* note 28, at 876; *see generally* Symposium, *Twenty-Five Years of Environmental Regulation*, 27 LOY. L.A. L. REV. 785 (1994).

[48] Kenneth A. Manaster, *Ten Paradoxes of Environmental Law*, 27 LOY. L.A. L. REV. 917, 939 n.51 (1994) (quoting Daniel A. Mazmanian & David L. Morell, *EPA: Coping with the New Political Economic Order*, 21 ENVTL. L. 1477, 1481 (1991)).

[49] *Id.* at 938.

[50] *See* AMOCO STUDY, *supra* note 3, at iv, 9, 18.

[51] U.S. EPA, EPA-210/R-93-004, CREATING A U.S. ENVIRONMENTAL PROTECTION AGENCY THAT WORKS BETTER AND COSTS LESS, PHASE I REPORT NATIONAL PERFORMANCE REVIEW 7 (Dec. 1993) [hereinafter PHASE I REPORT].

[52] Wendy Cleland-Hamnett & Joe Retzer, *Crossing Agency Boundaries*, ENVTL. F., Mar.-Apr. 1993, at 17, 17. The EPA's institutional position is much the same. PHASE I REPORT, *supra* note 51, at 7.

There are signs that environmental regulators at the federal level have begun to respond to this call for coordinated and prioritized, rather than piecemeal, approaches. An August 1994 article reports that the "EPA is, for the first time, organizing its budget around a set of environmental goals rather than statutory mandates"[53] in order to gain the flexibility needed to approach environmental issues comprehensively. The EPA's recently announced "Common Sense Initiative," which is, in EPA Administrator Browner's words, "a fundamentally different system of environmental protection,"[54] is intended to shift the EPA's perspective towards environmental regulation from a media-specific approach to a more comprehensive approach, at least as to the six industries that the initiative will cover.[55] Quoting from Administrator Browner again, the initiative will "replace[ ] the pollutant-by-pollutant approach of the past with an industry-by-industry approach of the future."[56]

According to one report on the Common Sense Initiative, both environmental and industry groups have applauded the EPA's decision to shift its focus toward a more comprehensive and less piecemeal approach. The president of the Chemical Manufacturers Association is quoted as saying, "We think it is well worthwhile to explore holistic approaches to environmental policy making."[57] An Environmental Defense Fund official is also cited as approving of the EPA's change in focus, although he apparently qualified his endorsement by "acknowledg[ing] that the effort could result in little more than rhetoric."[58]

Despite this relatively positive gloss on progress toward moving from mono-media to multimedia approaches at the national level, the consensus appears to be that the federal government is at an early stage of the learning curve and much remains to be done. Ac-

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Other observers and participants feel the same way. *E.g.*, Markell, *supra* note 4, at 730 (describing local governments' views). Professor Richard J. Lazarus describes the fragmented nature of environmental policy from a different perspective, notably the different perspectives that different actors at the federal level such as the EPA and Congress have maintained towards environmental issues, and the problems that fragmentation of this variety has caused. Lazarus, *supra* note 7, at 230.

[53] *EPA To Write First 'Goals-Based' Budget for Fiscal Year 1996*, ENVTL. POL'Y ALERT, Aug. 3, 1994, at 41. The article continues that the EPA's plan "will likely run into opposition in Congress," quoting a House source as saying that the new plan "could be a big problem." *Id.*

[54] *Browner Says Six Industries To Participate in New Approach to Environmental Regulation*, 25 Env't Rep. (BNA) No. 967, at 525 (July 22, 1994).

[55] *Id.* The six industries are: (1) automobile manufacturing, (2) computers and electronics, (3) iron and steel, (4) metal finishing and plating, (5) petroleum refining, and (6) printing. *Id.*

[56] *Id.*

[57] *Id.* at 526.

[58] *Id.*

cording to one EPA official, even in the enforcement area in which the EPA has made considerable efforts to integrate its activities, "institutional and cultural barriers" have frustrated the EPA's achieving success.[59] This EPA official notes that "progress has been slow in implementing a permanent cross-media enforcement planning process."[60]

A recent article reports that the EPA has also encountered significant problems in "making multimedia rulemaking a standard practice."[61] The article cites a member of the EPA's Effluent Guidelines Task Force as stating that "a lot of barriers" exist to multimedia regulations.[62] Among other problems, the article identifies "procedural differences among various offices."[63] The article also quotes the Task Force member as saying that "[e]verybody is pumped" about pursuing multimedia approaches, but "there needs to be a lot of fixing."[64]

A recent report in an environmental newsletter makes the same point regarding the EPA's pollution prevention efforts.[65] This newsletter reports that both "[e]nvironmentalists and industry represent-

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[59] Fontaine, *supra* note 5, at 37.

[60] *Id.* at 86. Even in the area of enforcement, states have been in the vanguard of seeking integrated ways to approach problems. The Massachusetts Blackstone project is one example. Manik Roy & Lee Dillard, *Toxic Use Reduction in Massachusetts: The Blackstone Project*, 40 J. AIR & WASTE MGMT. ASS'N 1368 (1990) (integrated compliance effort, in which Massachusetts used cross-program inspection teams to inspect 26 metal-intensive manufacturing facilities in the Worcester, Mass. area operating in the Blackstone River basin). Nevertheless, through multimedia enforcement screening and other strategies, the EPA has begun to make some progress in this area. Fontaine, *supra* note 5, at 63. Further, in June 1991, the EPA's Enforcement Headquarters office created a multimedia coordination team. *Id.* at 37, 80. And the EPA has created a number of "cluster" committees which "consist of teams of staff and managers from relevant EPA program offices that meet on a regular basis to integrate formally separate activities with respect to specific industries, environmental resources, and other significant areas that are a concern of the EPA's regulatory programs." *Id.* at 81.

[61] *Pollution Prevention, Multimedia Key to Future Effluent Guidelines*, ENVTL. POL'Y ALERT, Aug. 31, 1994, at 15, 15.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *EPA Pollution Prevention Efforts Critized for Lack of Coordination*, ENVTL. POL'Y ALERT, May 25, 1994, at 35. In a recent publication, an EPA official makes the same point:

> By virtue of EPA's program organization, the regulatory process is virtually always focused on developing single statute or media-specific rules. The Agency is simply not well positioned to look at regulations along industry or sector lines. Thus, at any given time, the air, water, and waste programs all may be in various stages of regulatory development with respect to a given industry (such as pulp and paper) or with respect to a specific pollutant (such as lead or nitrogen). Yet, the various program offices are not working together.

Nancy B. Firestone, *Practice Before the EPA*, *in* ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW 1, 31 (Michael B. Gerrard ed., 1994).

atives are expressing growing concern that EPA's broad-based pollution prevention initiatives lack coordination."[66] It states further that "[i]ndustry sources say that contrary to EPA's rhetoric, they have seen little evidence that EPA is committed to addressing pollution prevention from a multimedia standpoint."[67] According to the newsletter, the EPA officials "reject this charge, contending it is premature to judge the agency's efforts at this time."[68]

While the EPA moves through this transitional period in its effort to prioritize among environmental concerns and approach environmental issues comprehensively, a look inside Justice Brandeis's "laboratories of democracy"[69] reveals that the states are conducting extensive experiments on these fronts. For example, between 1989 and 1992, twenty-six states enacted legislation aimed at toxics use reduction (TUR) across all media.[70] The Massachusetts Toxics Use Reduction Act (MTURA),[71] in one commentator's view, "perhaps the strongest of such laws," was enacted to "reduc[e] toxic waste generated by fifty percent by 1997, relative to 1987 levels, while sustaining and promoting the competitive advantages of Massachusetts's businesses."[72] The MTURA requires large quantity toxic users to develop a toxics use reduction plan and file a summary of the plan with the Massachusetts Department of Environmental Protection.[73]

The New York "laboratory" has also been busy conducting experiments. The remainder of this section discusses three changes that New York State has made in its approach to regulating pollution in an effort to improve its ability to prioritize among environmental

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66 *Id.*

67 *Id.*

68 *Id.* The newsletter also notes that some EPA sources believe that pollution prevention efforts within single media offices have been largely successful. *Id.* at 36.

69 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

70 Stenzel, *supra* note 24, at 13.

71 MASS. ANN. LAWS ch. 21I, §§ 1-23 (Law. Co-op. Supp. 1994).

72 Stenzel, *supra* note 24, at 14.

73 *Id.* The MTURA also requires the Massachusetts Department of Environmental Protection to: "(1) conduct all compliance enforcement work for all environmental statutes on a multi-media basis, (2) make source reduction the preferred approach to compliance with *all* environmental regulations, (3) identify and eliminate barriers to source reduction, and (4) eliminate any duplicative or contradictory reporting requirements." ELI/OTA REPORT, *supra* note 21, at 80.

Texas's Natural Resource Conservation Commission (TNRCC) recently adopted a program that uses voluntary means to reduce generation of multimedia waste. *Id.* at 108-10. According to the ELI/OTA report, while Texas is early in the life of the program, "initial results look promising, with 76 of the top 100" Toxic Release Inventory (TRI) reporters participating and pledging to reduce hazardous waste generation by 57% and "toxic releases by 62% by the year 2000." *Id.* at 110.

concerns and address such concerns comprehensively. First, it discusses the DEC's multimedia pollution prevention initiative which addresses the three concerns discussed above.[74] This initiative charts a course of addressing environmental issues in a comprehensive rather than a piecemeal fashion; it establishes criteria for prioritizing among the environmental issues that warrant attention; and it revamps the DEC's organizational structure in order to "break down organizational barriers" and change the agency's "institutional culture" to facilitate a comprehensive approach to issues. Second, the section discusses an innovative effort within one media program that is designed to improve prioritization.[75] Finally, the section discusses a program which would create greater flexibility in the regulatory regime as a strategy for improving prioritization.[76]

A. Multimedia/Pollution Prevention (M2P2).

Perhaps the most significant innovation the DEC has undertaken in recent years in its administration of the environmental laws involves its effort both to prioritize among and to approach environmental issues from a holistic, rather than a piecemeal perspective. While these efforts are reflected in a wide variety of the DEC activities, the Department's recent "institutional makeover" through, *inter alia*, its creation of a Pollution Prevention Unit best demonstrates this commitment to changing its orientation.[77]

As noted above,[78] one problem stemming from the traditional, balkanized organizational structure is a failure to view environmental problems holistically or comprehensively.[79] A wide variety of commentators have highlighted this problem and urged the need for improving the integration of the environmental regulatory scheme.[80]

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[74] *See infra* notes 77-124 and accompanying text; *supra* text accompanying notes 41-42 (listing the three concerns).

[75] *See infra* notes 125-55 and accompanying text.

[76] *See infra* notes 156-202 and accompanying text.

[77] Then Commissioner Thomas C. Jorling authorized establishment of this unit in July 1992. *See* NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, ORGANIZATION AND DELEGATION MEMORANDUM NO. 92-94: POLLUTION PREVENTION INITIATIVE 2 (July 23, 1992) [hereinafter O & D MEMORANDUM NO. 92-24].

[78] *See supra* text accompanying notes 40-52.

[79] Among other problems, this structure has complicated "horizontal coordination," i.e., coordination between and among programs. *See* Cleland-Hamnett & Retzer, *supra* note 52, at 21.; Futrell, *supra* note 17, at 19-20; *cf. Avtex Fibers Hearing*, *supra* note 15, at 22-23 (statement of R. Claire Guthrie, Deputy Attorney General, Office of Attorney General, Commonwealth of Virginia).

[80] *See, e.g.*, REDUCING RISK, *supra* note 3, at 1 (noting that the EPA's efforts have been fragmented and inconsistent); WATER POLLUTION MONITORING, *supra* note 5, at 18; ALTERNATIVE ENFORCEMENT, *supra* note 5, at 21; Clarence Davies, *Some Thoughts on*

The importance of this structural flaw is captured by the fact that, as the Amoco study concluded, "[p]ollutant release management frequently involves the transfer or conversion of pollutants from one form or medium to another."[81] The Amoco study goes on to make the obvious, but often ignored, point that "[s]ince human health and environmental consequences vary from one medium to another, viewing a release problem in the context of *net* environmental effects is essential to developing more sound solutions."[82]

Environmental regulators in New York, as in the rest of the country, have begun to shift from a piecemeal approach to regulation to approaching environmental problems and their sources more comprehensively. In July 1992, New York's DEC altered its institutional structure with the aim of approaching environmental concerns in a more comprehensive manner. Among other actions, the Department created a multimedia Pollution Prevention Unit whose function is to help the Department approach environmental challenges from an integrated, comprehensive perspective.[83] Through this revamping of its institutional structure, the DEC has begun to break out of the somewhat narrowly focused, media-specific approach to addressing environmental problems that characterized government environmental regulation at the federal and state levels in the 1970s and 1980s. Further, through the Department's decision to focus multimedia regulatory attention on the major sources of air, water, and land-based pollution in the State, the "400/95" facilities,[84] the DEC appears to be responding to the concern that the traditional piecemeal regulatory approach failed to prioritize among environmental concerns and ignored transfers of pollution.

Implementing Integration, 22 ENVTL. L. 139, 140 n.2 (1992) (citing the second draft of the Conservation Foundation's proposed Environmental Protection Act).

[81] AMOCO STUDY, *supra* note 3, at iv.

[82] *Id.* at 18. The EPA makes the same point in its recent report, *Deposition of Air Pollutants: First Report to Congress*: "EPA recognizes that pollutants are transferred continuously between air, water, and land and that, to adequately address pollution problems, multimedia, multiagency approaches must be explored." OFFICE OF AIR QUALITY PLANNING & STANDARDS RESEARCH, U.S. EPA, EPA-453/R-93-055, DEPOSITION OF AIR POLLUTANTS TO THE GREAT WATERS 74 (May 1994).

[83] *See* O & D MEMORANDUM No. 92-24, *supra* note 77, at 2.

[84] The "400/95" facilities, discussed in more detail below, *infra* notes 92-97 and accompanying text, are so named based on TRI data that "reveals that approximately 400 existing facilities produce nearly 95% of the hazardous waste generated and 95% of the toxic discharges to air and water in New York State." NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, ORGANIZATION AND DELEGATION MEMORANDUM No. 92-13: POLLUTION REDUCTION AND INTEGRATED FACILITY MANAGEMENT 1 (Mar. 30, 1992) [hereinafter O & D MEMORANDUM No. 92-13].

In a July 1992 memorandum, then DEC Commissioner Thomas C. Jorling expressed his view that the Department could become more efficient and produce improved environmental protection "if review[s] of pollution sources are coordinated with respect to their effects on all environmental media."[85] The Commissioner revamped both the agency's headquarters and its regional organizational structure to facilitate the DEC's ability to pursue such coordinated approaches. In the July 1992 memorandum he announced the creation of a Headquarters Multi-Media Pollution Prevention Unit that would include up to 17 staff members.[86] He placed the Unit under the direction of the Deputy Commissioner for the Office of Environmental Quality.[87] Placement of the Unit within the Office of Environmental Quality was important because this office contains the DEC's major regulatory divisions—i.e., those divisions with responsibility for the air, water, and Resource Conservation and Recovery Act (RCRA)[88] programs.

Commissioner Jorling also directed that each of the DEC's nine regional offices refine its structure to ensure institutional support for multimedia or "inter-program" coordination. The July 1992 memorandum instructed the nine regional directors to "develop an organizational structure . . . that achieves the goals of pollution prevention, inter-program coordination and increased efficiency. This structure should incorporate a senior-level staff person who will integrate and coordinate program activities."[89]

In sum, by changing its organizational structure, the DEC has taken a large step to facilitate its pursuit of a multimedia approach. Though these structural changes are significant, they do not represent a truly radical solution. On either end of the continuum, possible organizational structures either: (1) retain the traditional, existing, media-specific structure but require additional coordination between and among ultimately single program-oriented staff; or (2) discard the single media programs and completely restructure the agency. The DEC has done neither. Instead, it has apparently recognized that merely requiring coordination among staff who are accountable for single media responsibilities is unlikely to be enough to produce a change in focus.[90] As a result, the DEC has institution-

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[85] O & D MEMORANDUM No. 92-24, *supra* note 77, at 1.

[86] *Id.*

[87] *Id.*

[88] 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993).

[89] O & D MEMORANDUM No. 92-24, *supra* note 77, at 2-3.

[90] Commissioner Jorling's decision to do more than require coordination among existing programs presumably stemmed in part from his view that the DEC needed a "cultural" as well

alized a multimedia perspective at both the headquarters and regional levels. Perhaps to avoid likely confusion and disruption, the Department has chosen not to turn the agency's structure on its head by disbanding the program divisions.

It is impossible to know at this point whether the DEC's ongoing experiment with its "middle of the continuum" restructuring is the ideal organizational framework, or even if such an ideal framework exists. Further analysis of the appropriateness of the changes that the DEC has made to its organizational structure will have to await evaluation of the progress that the agency makes through its multimedia efforts. This section will now turn to the details of these efforts.

In addition to creating the Pollution Prevention Unit and refining the regional offices' structure to facilitate approaching environmental issues from a multimedia perspective, the DEC has established criteria for determining which sources of pollution should receive priority multimedia attention. In an October 1993 guidance memorandum, the Department's Pollution Prevention Unit provided "criteria to assist regions in selecting and ranking facilities targeted under the multimedia pollution prevention initiative."[91]

The DEC's guidance memoranda reflect that the key criterion the DEC plans to use to select facilities warranting multimedia treatment is the toxics release inventory (TRI) data on the volume of pollution generated and released in the state.[92] This information is collected and compiled pursuant to the 1986 federal Emergency Planning and Community Right-to-Know Act (EPCRA).[93] As the first comprehensive database of releases of toxic substances, the TRI represents an important first step in inventorying the pollution that is being created in the State and determining the relative contribution of various sources to this pollution loading.[94]

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as an "organizational" change to make the transition from a single media piecemeal approach to one that is more holistic in its approach to environmental regulation. O & D MEMORANDUM No. 92-24, *supra* note 77, at 1-2.

[91] POLLUTION PREVENTION UNIT, NEW YORK STATE DEP'T ENVTL. CONSERVATION, TECHNICAL AND ADMINISTRATIVE GUIDANCE MEMORANDUM No. 8010-93-02: GUIDANCE AND CRITERIA FOR SELECTION OF MULTI-MEDIA FACILITIES 1 (Oct. 13, 1993) [hereinafter TAGM No. 8010-93-02].

[92] *Id.* at 2.

[93] 42 U.S.C. §§ 11001-11050 (1988). A recent EPA/Amoco study observed that "[t]he TRI data has become the *de facto* national release inventory." AMOCO STUDY, *supra* note 3, at 6.

[94] Although useful, the TRI has limitations as a planning tool. AMOCO STUDY, *supra* note 3, at 6-7. Among other things, it does not cover all significant sources of pollution located in the state. The Amoco study indicates that for the Virginia facility, the TRI report "covers only 9 percent of the total hydrocarbons released, and only 2.4 percent of the total releases to all media." *Id.* It also does not cover all chemicals of concern. *See, e.g., id.* at iv ("The Toxic

Using its TRI database, the DEC has determined that in New York State, 400 existing facilities produce nearly 95% of the hazardous waste generated and 95% of the toxic discharges to air and water in the state.[95] The Department's plan is to conduct multimedia reviews of each of these 400 facilities by the year 2000.[96] The October 1993 guidance memorandum indicates that in the Department's initial effort during 1993-94 (the first year of the multimedia initiative), "each Region selected a minimum of 10% of the number of facilities that appear on their portion of the 400/95 list"[97] for review from a multimedia perspective.

The October 1993 guidance memorandum makes it clear that facilities other than the TRI "top 400" may warrant multimedia attention as well, providing that "[f]acilities that do not appear on the 400/95 list may be proposed [for multimedia action] if they rank highly using the criteria provided below."[98] The guidance memorandum lists, *inter alia*, the following additional criteria for identifying such facilities: (1) the extent to which the facility engages in activities that are regulated under more than one program; (2) quantities of toxics generated and/or released; (3) environmental and public health impacts; (4) compliance history and enforcement issues; (5) known and potential remediation problems; (6) corporate attitude and commitment; and (7) receipt of hazardous waste or substances from off-site for recycling, treatment, or disposal.[99] The DEC has indicated its commitment to conduct multimedia pollution prevention (M2P2) evaluations of "all facilities of concern" by the year 2000.[100] Such "facilities of concern" appear to include all 400 of the

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Release Inventory database does not adequately characterize releases from this Refinery."). In addition, TRI data merely provides "an approximate inventory" of specified chemicals released to the environment. *Id.* at 7. Finally, TRI data is not a basis for a meaningful evaluation of risks because, as the Amoco report points out, "it does not define the facility's relationship to nearby populations and ecosystems." *Id.*

95 O & D MEMORANDUM No. 92-13, *supra* note 84, at 1; *see supra* note 84.

96 TAGM No. 8010-93-02, *supra* note 91, at 1; Langdon Marsh, Introductory Speech: An Integrated Approach to Pollution Prevention, *in* PROCEEDINGS OF THE NEW YORK STATE SIXTH ANNUAL POLLUTION PREVENTION CONFERENCE 9, 10 (New York State Dep't Envtl. Conservation ed., 1994).

97 TAGM No. 8010-93-02, *supra* note 91, at 1.

98 *Id.*

99 *Id.* at 2-4.

100 *Id.* at 1. In this Article "M2P2" means the Multimedia Pollution Prevention Initiative which is designed to implement and coordinate multimedia pollution prevention activities at the "400/95 list of facilities" within New York State. POLLUTION PREVENTION UNIT, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, TECHNICAL AND ADMINISTRATIVE GUIDANCE MEMORANDUM No. 8010-93-01: THE MULTI-MEDIA POLLUTION PREVENTION PROCESS - HOW IT WORKS 2 (Oct. 3, 1993) [hereinafter TAGM 8010-93-01].

400/95 facilities, as well as any other facilities that warrant multimedia attention based on health and environmental concerns and the other criteria listed above.

One final salient point concerns the DEC's implementation strategy for regulating parties in a multimedia fashion. To facilitate the regions' management of their multimedia workloads as efficiently as possible, the regions were directed to select facilities with an eye toward ensuring an overall balance of responsibilities among different programs "so as not to overload any one area."[101]

In sum, the DEC's overall strategy seems to be a sensible one. The agency has established a clear ultimate objective of evaluating all significant facilities in the state within a relatively short time frame, by the year 2000. Further it has established a systematic approach to prioritizing its treatment of such facilities based on both external factors (e.g., the degree of risk that such facilities pose) and internal factors (e.g., the Department's own resource constraints).

The issue of identifying external factors that will provide the basis for selecting facilities for multimedia review deserves one comment. Many states have conducted comprehensive "comparative risk" analyses to rank or prioritize environmental concerns.[102] The DEC effectively has used the TRI data as a proxy for this process. The benefits and disadvantages of comparative risk analysis are currently the subject of some debate.[103] To the extent that a consensus exists that major TRI pollution sources are within the universe of facilities that deserve multimedia attention, one clear benefit of New York's decision essentially to dispense with process in establishing priorities has been the rapid start-up of its multimedia review effort. As noted above, the DEC's multimedia program was "operationalized" almost

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[101] As noted below, the selection of the DEC facility coordinator is based on the program that has the primary responsibility for the facility. *See infra* notes 105-06 and accompanying text. Accordingly, the different regions were also given the common sense advice to avoid selecting facilities for which a single program (e.g., air) had the major regulatory responsibility. TAGM No. 8010-93-01, *supra* note 100, at 3.

[102] For a list of state projects with completed comparative risk rankings, see *Projects with Completed Rankings*, COMP. RISK BULL. (Northeast Ctr. for Comparative Risk, Vt. Law Sch.), May-June 1994, at 8.

[103] *Compare* Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 565-75, 629-33 (1992) (arguing that, although comparative risk analysis might be broadly valuable, it does little to address "such noncommodity values as human health, aesthetics, and responsibility toward nonhuman species and ecosystems") *with Risk Heading to the Supreme Court? A Closer Look at Breyer's* Breaking the Vicious Circle, COMP. RISK BULL. (Northeast Ctr. for Comparative Risk, Vt. Law Sch.), May-June 1994, at 4-5 (critiquing Supreme Court Justice Stephen Breyer's views of environmental law and comparative risk analysis, and his argument that current techniques lead to "tunnel vision" and irrational priorities).

immediately,[104] with the nine DEC regions collectively being charged with pursuing multimedia reviews of approximately 40 of the major TRI sources during the first year of the program. In short, the availability of and the decision to use the TRI data enabled the Department to begin its multimedia initiative once it made the decision to move its regulatory efforts in that direction.

Under the October 13, 1993 guidance memorandum, once a DEC Regional office identifies the local facilities to be evaluated under the multimedia initiative, the regional multimedia pollution prevention coordinator selects a facility manager/coordinator for each covered facility as well as a DEC team for that facility, based on the "primary regulatory and environmental issues associated with the facility."[105] For example, as the guidance memorandum points out, "if the majority of releases causing environmental concerns are through wastewater discharges, the facility manager/coordinator should be selected from the Water program."[106] The DEC's next steps include (1) notifying the targeted facility that it intends to address the facility from an integrated, multimedia perspective; (2) developing an action plan for the facility that includes scheduling activities such as a pre-inspection meeting, the inspection itself, and postinspection follow up, along with technical support for any subsequent enforcement; and (3) inspecting the facility.[107]

The October 13, 1993 guidance memorandum[108] and January 19, 1994 guidance memorandum[109] both elaborate on the Department's strategy for conducting multimedia inspections. In terms of inspection objectives, "[t]he overall goal of the multi-media inspection program is to examine the entire facility at one point in time or within a confined time frame employing good communications among programs to develop a comprehensive integrated strategy."[110] The guidance memoranda explain the benefits that the DEC expects to realize by conducting multimedia inspections:

> Traditionally, programs have established single medium/ program inspection schedules. This resulted in comprehen-

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[104] *See supra* notes 96-97 and accompanying text.

[105] TAGM No. 8010-93-01, *supra* note 100, at 2-3.

[106] *Id.* at 3.

[107] *Id.*

[108] TAGM No. 8010-93-01, *supra* note 100.

[109] POLLUTION PREVENTION UNIT, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, TECHNICAL ADMINISTRATIVE GUIDANCE MEMORANDUM No. 8010-93-06: THE MULTI-MEDIA INSPECTION MODEL (Jan. 19, 1994) [hereinafter TAGM No. 8010-93-06].

[110] *Id.* at Attachment 1, at 2; *see* TAGM No. 8010-93-01, *supra* note 100, at 2-4 (emphasizing the need for planning and coordination during facility inspections).

> sive inspections within each program. Although, inspectors generally performed inspections with an eye to programs other than their own, there was no formal procedure for multi-media observations. . . . The [multi-media inspection] program is intended to result in several important advantages:
>
> No significant problems are overlooked.
>
> The relationships among releases become well understood.
>
> Releases into one medium are not shifted to another with little or no overall environmental improvement.[111]

The DEC has made several policy judgments concerning how these inspections should be conducted. First, the DEC has rejected the notion of creating "super inspectors" who would be completely knowledgeable about every regulatory program.[112] Instead, it has developed checklists for inspectors to use. The agency notes in the guidance memorandum that "[t]he emphasis for multi-media inspections is on overall familiarity with program goals and procedures, and accurate and complete observation and recording of conditions."[113] Second, such inspections may be unannounced "as appropriate," or, if announced, "[g]enerally, facilities should receive no more than 24 hours advance notice."[114]

In terms of the nature of follow up when multimedia inspections uncover significant violations, the DEC has not finalized a multimedia enforcement guidance memorandum. The October 1993 guidance memorandum states that the DEC intends to develop such a document.[115] The DEC's Fourth Annual Enforcement Report, issued in December 1993, indicates that the DEC's enforcement program already has shifted from single-media approaches to multimedia approaches to a considerable extent:

> The Department has recognized the increasing need to develop a more integrated, holistic approach to natural resource management and environmental protection. Specifically, the Department is shifting from a medium specific oriented regulation to a comprehensive approach which considers all avenues of release and exposure. The Department has fundamentally changed its approach to enforcement by sup-

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111 TAGM No. 8010-93-06, *supra* note 109, at Attachment 1, at 1-2. This guidance memorandum lists several other advantages as well. *Id.*

112 *See id.* at Attachment 1, at 3 ("The Department inspectors are not expected to reach or maintain an expert level of competence for all DEC programs.").

113 *Id.*

114 TAGM No. 8010-93-01, *supra* note 100, at 3.

115 *Id.* at 1.

> plementing its traditional single-media method and increasingly building a multimedia approach into all phases of enforcement. The Department is bringing a multimedia perspective to bear on all appropriate facets of its enforcement process from priority setting and inspection planning to case prosecution and settlement.[116]

Finally, to close the loop concerning the multimedia effort, the DEC's regional offices are required to submit status reports on each facility covered by the M2P2 effort as part of the region's monthly reporting to the DEC Commissioner.[117] Further, the Pollution Prevention Unit is required to prepare an annual report to the Commissioner on all M2P2 facilities.[118] Thus, while it appears that much of the multimedia work will occur in, and be directed from, the DEC's nine regional offices, the agency has created at least two mechanisms to provide headquarters with both a timely and comprehensive picture of the status of the program.[119] Presumably, any necessary adjustments can be made in response to the regions' reports.

The DEC's effort in recent years to adopt an "integrated and comprehensive facility specific multimedia environmental management approach"[120] has proceeded on two parallel tracks. On track one, as the preceding discussion reveals, the DEC has both identified the facilities to which it plans to give priority multimedia attention, and significantly revamped its own institutional structure to facilitate the agency's pursuing multimedia approaches to environmental issues.

Track two is the DEC's initiative to promulgate regulations that will create a multimedia pollution prevention planning process. In August 1993, the DEC proposed multimedia regulations in proposed Part 378, which recently expired on September 24, 1994 without being finalized.[121] Nevertheless, because the DEC is likely to "try again" at some point, and because these regulations ultimately will play a central role in the Department's multimedia efforts, I briefly summarize their proposed contents below.

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116 NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, FOURTH ANNUAL REPORT TO GOVERNOR MARIO M. CUOMO ON ENVIRONMENTAL ENFORCEMENT (F.Y. 1992-1993) 1 (Dec. 1993) [hereinafter FOURTH ANNUAL REPORT].

117 TAGM No. 8010-93-01, *supra* note 100, at 4.

118 *Id.*

119 Additionally, headquarters has a "consultation" role in the regions' selection of M2P2 facilities. *Id.* at 2.

120 *Id.* at 1.

121 N.Y. St. Reg., Aug. 4, 1993, at 18-22; N.Y. St. Reg., Mar. 9, 1994, at 46.

Based on their draft form, the final regulations are likely to require facility plans to include at least the following six features: (1) an evaluation of the "technical feasibility" and "economic practicability" of reducing the volume of waste and discharges; (2) waste reduction goals based on this evaluation; (3) a description of the program that the facility will implement to achieve technically feasible and economically practicable reductions; (4) a time schedule for implementing the reductions; (5) appropriate training to achieve the goals; and (6) a method of measuring progress in waste reduction.[122] As noted, while the initial draft regulations likely provide some sense of the ultimate content of Part 378, final analysis obviously must await final promulgation.

As Justice Brandeis no doubt would have expected, New York State's DEC appears to be somewhat more nimble than the federal government, having restructured itself two years ago to improve its ability to address environmental issues more comprehensively.[123] Whether the DEC's "institutional makeover" is a model worthy of emulation at the federal level or by other states will depend on the results of this experiment. The critical point for purposes of this Article is that the federal government should study how states such as New York are approaching these difficult and challenging "transformation" or "transition" times in environmental regulation, and identify what works and what does not. The importance of the federal government's need to evaluate these issues is highlighted by the DEC view that change in the "regulatory culture" must occur at the federal level if relatively "localized" efforts, such as those the DEC has undertaken, are to succeed.[124]

B. Improved "Single Media" Prioritization

The EPA's reinventing government report recommends, *inter alia*, that the EPA improve prioritization in its permitting processes.[125] This issue no doubt will be among many that a recently established

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[122] *See id.* at 18.

[123] In 1992, the DEC began moving "from a media-specific focus toward an integrated and comprehensive approach to environmental management." O & D MEMORANDUM No. 92-24, *supra* note 77, at 1.

[124] See *id.* at Attachment, at 1 ("We must work to refocus EPA's medium specific mind-set, ..."). In its "reinventing government" report, the EPA recognized the need for an internal "cultural" change, concluding that "the Agency's current culture must change," including "support[ing] cross-Agency and multi-disciplinary perspectives." PHASE I REPORT, *supra* note 51, at RD-4.

[125] *Id.* at PS-1, PS-4.

EPA "Task Force,"[126] known as the "Permits Improvement Team,"[127] will address. The purpose of the Task Force is to " 'examine means to improve permit processes, while maintaining high quality enforceable permits.' "[128]

New York's State Pollutant Discharge Elimination System (SPDES) permitting program for discharges of wastewater offers one example of an effort to prioritize within the context of a single media program.[129] The DEC has made a systematic effort to modify its permitting process so its resources are allocated to the issues of highest priority.[130]

In 1992, the DEC's Division of Water adopted an "environmental, benefit permit strategy" (EBPS) that enables the DEC to prioritize its work more effectively by treating truly significant and less significant discharges of wastewater differently.[131] As the DEC put it:

> The Division of Water has begun using an Environmental Benefit Permit Strategy ("EBPS") to manage the workload of renewing existing SPDES permits. This new strategy represents a shift from reviewing permits in chronological order, as they expire, to establishing priorities for reviewing permits based on the environmental benefit that will be gained by modifying the permit.[132]

Under the Clean Water Act, permits expire and must be renewed every five years.[133] Prior to the development of the EBPS strategy, the DEC comprehensively reviewed every permit when it came up for renewal. This occurred regardless of whether the permit was for

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126 *EPA Establishes Task Force To Improve Permitting Process*, ENVTL. POL'Y ALERT, Aug. 3, 1994, at 44 [hereinafter *Task Force*].

127 *More Public Involvement, Speedier Review Considered Key To Improving Permit Programs*, 24 Env't Rep. (BNA) 1271, 1271 (Oct. 28, 1994); *Multimedia Restructuring*, *supra* note 30, at 36.

128 *Task Force*, *supra* note 126, at 44 (quoting a memo from EPA Administrator Carol Browner).

129 SPDES is New York's counterpart to the federal National Pollutant Discharge Elimination System (NPDES) permitting program. The NPDES program requires that point source discharges of pollutants into navigable waters must be permitted. 33 U.S.C. § 1342 (1988).

130 For a summary of California's efforts to streamline its permitting scheme for hazardous waste under the RCRA, 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993), see ELI/OTA REPORT, *supra* note 21, at 83-86.

131 *New York State Dep't Envtl. Conservation, Environmental Benefit Permit Strategy: DOW Reworks Process for Renewing SPDES Permits*, WATER BULL., Sept. 1992, at 1 [hereinafter *Environmental Benefit Permit Strategy*].

132 *Id.* The New York State legislature adopted a law this summer endorsing this New York experiment. Act of Aug. 2, 1994, ch. 701, 1994 N.Y. Laws 1716 (McKinney 1994).

133 33 U.S.C. § 1342(b)(1)(B) (1988); N.Y. ENVTL. CONSERV. LAW § 17-0817 (McKinney 1984).

a facility like Kodak Park, whose permit contains requirements for approximately 63 pollutants in a discharge of more than 28.3 million gallons per day,[134] or a facility such as a restroom that discharges 2000 gallons per day of sewage. According to the DEC's article summarizing the EBPS, for each renewal application it "typically took about a year to complete this process and renew a permit."[135] Because of the DEC's resource constraints,[136] among other factors, the DEC "accumulate[d] a backlog of permits that it was unable to complete in a given year."[137] As of 1992, this backlog was about 350 permits.[138] As the DEC put it:

> This meant that some permits that sorely needed to be modified to protect the waters of the state were stuck at the bottom of the chronological review pile. Other permits that needed only renewals, not modifications, were being subjected to the same rigorous technical review as those requiring major modifications, which seemed to be an inefficient use of staff time.[139]

The DEC found, in short, that its traditional, calendar-dictated "queuing" approach resulted in a misallocation of its limited resources.[140] The DEC was spending far more resources processing some renewal applications than they deserved from an environmental and public health standpoint. By the same token, the DEC was not getting to some permits that needed to be modified in order to protect public health and the environment because of this chronological approach to processing permits. A quote from one of the DEC's water program officials makes the point well: "We had to find a better way to do business. Work kept piling up because we simply did not have the staff to grind out extensive technical reviews every five years for all SPDES permits. The way we did business in 1972 was not working well for us now."[141]

Four features of the fifteen criteria the DEC has developed in its EBPS to help prioritize wastewater discharge permit renewal applications warrant special mention. First, the DEC has established criteria designed to facilitate the DEC's addressing significant

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134 ANGUS EATON, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, SPDES PERMIT FACT SHEET FOR EASTMAN KODAK CO. 1,2 (Feb. 1994) (on file with the *Albany Law Review*).

135 *Environmental Benefit Permit Strategy*, *supra* note 124, at 1.

136 According to the DEC's September 1992 *Water Bulletin*, "staffing levels relative to the workload" have fallen in recent years. *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 1-2.

140 *Id.*

141 *Id.* at 2 (quoting Dan Halton, Director of the Division of Water, Bureau of Wastewater Facilities Design).

polluters in a comprehensive way. That is, these criteria appear to reflect a DEC effort to fashion program-specific priorities that are mutually reinforcing or complementary, rather than inconsistent. The DEC accomplished this by giving considerable weight in the prioritization decision-making process to whether facilities will be addressed under other DEC regulatory schemes as well.[142]

Second, the DEC's work to identify criteria for prioritizing among wastewater discharge permittees in terms of their environmental and health impact may be valuable to other environmental regulatory agencies that are seeking to establish priorities in this area. Some of the DEC's criteria are relatively obvious. For example, the DEC is likely to give a permit application high priority if modification of the permit "is likely to cause a major improvement to Water Quality; will eliminate a water quality standards violation; eliminate a water use impairment; or correct other important environmental problems."[143] Other agencies, however, might benefit from learning how the DEC incorporates combined sewer overflow, antidegradation, and pre-treatment issues into its wastewater discharge permit prioritization process.[144]

Third, the prioritization scheme is structured to avoid low priority permits remaining at the back of the "priority queue" indefinitely. In order to ensure that no permit is ignored, one criterion for priority is the length of time the permit is on the priority list.[145]

Fourth, the prioritization scheme expressly recognizes the importance of public concern and interest in the issuance of wastewater discharge permits.[146] One of the factors that the DEC considers in setting priorities is the degree of public concern relating to various permits.[147] Thus, the EBPS strategy significantly enhances the public's opportunity to participate in the renewal process. Among the information made available for public inspection, the Department includes the applicant's "priority ranking score" in the notice it provides for SPDES permit applications.[148] The DEC makes available

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142 DAN HALTON, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, SUPPLEMENTAL INFORMATION ON PERMIT PRIORITY RANKING FACTORS, at attachment 6, at 1 (Undated) [hereinafter EBPS Memorandum] (regarding the Environmental Benefit Permit Strategy (EBPS)) (on file with the *Albany Law Review*).

143 *Id.* at Attachment 6, at 1.

144 *See id.* at Attachments 6-8.

145 *See id.* at Attachment 6, at 2 (indicating that five points are added to the priority ranking score for each year that the application remains on the list).

146 *See id.*

147 *Id.*

148 Act of Aug. 2, 1994, ch. 701, 1994 N.Y. Laws ch. 1716, sec. 4, § 17-085(1)(a)-(b) (McKinney 1994).

the backup documentation for the priority ranking it has assigned, and it accepts comments on the merits of that priority ranking.[149] Finally, the 1994 legislation creates a formal process for public review and comment concerning the merits of the priority ranking scheme itself.[150] The legislation requires the Department to consider public comments and to make any appropriate changes to the system.[151] In sum, among other features, the EBPS helps to make the DEC's permitting process more democratic by ensuring that interested citizens have an opportunity to help shape the DEC's priorities up front.

In its July 1994 report, *Improving Our Environment, Improving Our Economy: Regulatory Reform at the Department of Environmental Conservation*,[152] the DEC touts the benefits of its EBPS strategy. The Department indicates that the EBPS has "allowed the Department to make progress in reducing the backlog of expired SPDES permits."[153] It notes that the EBPS has enabled the Department to "simplify and streamline administrative processes" and to "insure that technical/professional processes are accomplished according to environmental priority."[154] In short, the DEC views the EBPS program, approximately two years after its initiation, as successful. As the EPA's Permit Improvements Team Task Force embarks on its effort to improve the EPA's permitting processes, it should evaluate innovative efforts such as the New York EBPS strategy that already are in place and being utilized.[155]

C. *Improved Prioritization Through More Precise Targeting of and Flexibility in Regulatory Approaches*

A third strategy for improving governments' prioritization of their environmental protection efforts involves diagnosing and curing cases of "demosclerosis," as Jonathan Rauch puts it in his April 1994 book.[156] Rauch defines "demosclerosis" as "government's progressive

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149 *See* EBPS Memorandum, *supra* note 142, at Attachment 1.

150 Act of Aug. 2, 1994, ch. 701, 1994 N.Y. Laws 1716, sec. 5, § 17-0817 (McKinney 1994).

151 *Id.*

152 N.Y. STATE DEP'T OF ENVTL. CONSERVATION, IMPROVING OUR ENVIRONMENT, IMPROVING OUR ECONOMY: REGULATORY REFORM AT THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (July 1994) [hereinafter IMPROVING OUR ENVIRONMENT].

153 *Id.* at 9.

154 *Id.*

155 ELI's August 1993 report identifies at least two other state permit program initiatives that also warrant careful scrutiny: a "streamlined permitting" effort in California and an experiment in facility-wide permitting that New Jersey has initiated. ELI/OTA REPORT, *supra* note 21, at 83, 111.

156 *See generally* RAUCH, *supra* note 1.

loss of the ability to adapt . . . like hardening of the arteries, which builds up stealthily over many years."[157] He suggests that because of demosclerosis, "with rare exceptions, *we are stuck with everything the government ever tries*,"[158] in part because programs create constituencies, which then lobby to maintain the programs.[159]

The federal government has recognized the importance of revisiting existing regulatory regimes to determine whether they are fulfilling their objectives and, if not, considering changes that should be made to improve them.[160] The federal government's efforts in this

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[157] *Id.* at 123.

[158] *Id.* at 135; *see also* Alan Ehrenhalt, *Government Needs Its Arteries Unclogged*, TIMES UNION (Albany), Feb. 20, 1994, at B1, B3.

[159] RAUCH, *supra* note 1, at 131-37.

[160] This issue has been especially hot in the context of the current debate concerning unfunded mandates. See Markell, *supra* note 4, at 885 (discussing the long history of the unfunded mandates issue). As ACIR notes in a recent report, "By 1981, mounting concern over the 'mandate problem' had produced a surge of regulatory relief and reform efforts on the part of all three branches of the federal government to address the problems posed by regulation." U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, PUB NO. A-126, FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980'S 1 (July 1993) [hereinafter ACIR FEDERAL REGULATION]. Congress's actions include its enactment of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1988), the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1988), and the State and Local Government Cost Estimate Act, 2 U.S.C. § 653 (1988). In terms of activity in the executive branch, President Reagan established a "Task Force on Regulatory Relief" early in his first term. He also issued three Executive orders designed to (1) institutionalize Presidential control over the regulatory process (Exec. Order No. 12,498, 3 C.F.R. 323 (1985)), (2) restrain the issuance of costly mandates (Exec. Order No.12,291, 3 C.F.R. 187 (1981)), and (3) require that agencies consider the federalism implications of their regulatory actions (Exec. Order No. 12612, 3 C.F.R. 252 (1987)). *See also* ACIR FEDERAL REGULATION, *supra* at 1 (discussing generally executive branch activity in the area of regulatory reform).

Despite these executive branch efforts, however, "federal regulation of state and local governments continued to increase during the 1980s." ACIR FEDERAL REGULATION, *supra* at 24. In fact, "[b]etween 1981 and 1990, the Congress enacted 27 statutes that imposed new regulatory burdens on state and localities or significantly expanded existing programs." *Id.* at iii. This record of regulatory expansion was comparable to, and in some respects surpassed, the unprecedented pace of intergovernmental regulation compiled in the 1970s, when 22 such statutes were enacted. *Id.* Further, the "[m]ore prescriptive regulations added programmatic requirements and compliance costs." *Id.* at 24. The ACIR Report describes this situation as "a continuing increase in intergovernmental regulation during the same time the federal government mounted the most direct attack ever on federal mandates." *Id.* The report also contrasts the 1970s and 1980s with earlier decades: "[T]he 1970s and 1980s stand out from earlier decades in their reliance on regulating state and local governments, rather than providing financial subsidies to these entities, to influence their actions." *Id.* at 55.

In sum, the federal government has made efforts to address the issue of regulatory reform in general and environmental mandates in particular, with apparently little success. As one commentator notes, while the issue of unfunded governmental mandates imposed on local governments has been important since the 1960s, it now is the number one intergovernmental issue in the United States due to the cumulative impact of state and federal mandates. MEETING NOTES, *supra* note 43, at 3; *see also* Shelley Emling, *Mandates Drying Up County Funds Enough*, ATLANTA J. & CONST., Aug. 24, 1993, at B1 (stating that "[g]ripes about

area have an extensive history.[161] The current administration's work in reinventing government adopts this theme as one of its primary areas of focus in its search for ways to "make government *work better* and *cost less*."[162] In determining how best, systematically, to approach the task of reinventing government by reforming existing regulatory schemes, the federal government should consider two significant institutional approaches that New York State has created to address this issue.

New York State first embarked on the path of revisiting regulatory approaches with Governor Cuomo's issuance of Executive Order 108 in January 1988.[163] This executive order established a regulatory reform program which involved reevaluate regulations to ensure that they adequately protected public health, safety, and welfare, but also did not create undue regulatory burdens.[164] The state's first full-scale experiment in the field of environmental regulation concerned New York's process and requirements for closing solid waste landfills.[165] This experiment appears to have won widespread acclaim.[166] Participants in the process endorsed the experience as a prototype and recommended its use in other contexts.[167] According to the director of the state's Office for Regulatory and Management Assistance (ORMA), who coordinated the effort, the success stemmed, in part, from the lessons the state learned from its previous forays into the regulatory reform process.[168] She identified

unfunded mandates are not new, but they're growing louder as the demands grow more costly").

161 *See, e.g.*, EPBS Memorandum, *supra* note 142, at Attachment 6, at 2; *see also* Lazarus, *supra* note 7; *supra* note 160 and accompanying text.

162 NATIONAL PERFORMANCE REVIEW, *supra* note 1, at i; *see also* Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (replacing Exec. Order No. 12,291, 3 C.F.R. 187 (1981), President Reagan's regulatory reform order).

163 Exec. Order No. 108, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.108 (1993).

164 *Id.*

165 *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 360-2.15 (1993). In his 1992 State of the State address, Governor Cuomo directed that his Office of Business Permits and Regulatory Assistance (OBPRA), now known as the Office for Regulatory and Management Assistance (ORMA), lead an effort to review the DEC's solid waste closure regulations. *See* OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, LOCAL GOVERNMENT REGULATORY RELIEF INITIATIVE: REPORT OF THE WORKING GROUP ON NEW YORK STATE LANDFILL CLOSURE REGULATIONS 1 (Nov. 1992).

166 Letter from Ruth Walters to Governor Mario Cuomo (Nov. 1994), *reprinted in* OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, *supra* note 165, at Appendix IV (Nov. 1992). Governor Cuomo has issued two executive orders to address the issue of regulatory reform as well, Executive Order No. 108, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.108 (1988), and the superseding Executive Order No. 108.1, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.108 (1993).

167 OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, *supra* note 165, at 3.

168 Interview with Ruth S. Walters, Director of the Office for Regulatory and Management Assistance, in Albany, N.Y. (Sept. 16, 1994).

the two requisite ingredients for success in such efforts as "targeting, targeting, targeting"—i.e., keeping the review effort narrowly focused—and "inclusivity."[169]

The state's regulatory reform effort concerning the solid waste landfill closure requirements had three significant components. First, it did not rely solely on the affected regulatory agency to review its own regulations. Instead, it introduced into the process an additional player which had an ability to influence the process in a meaningful way, ORMA.[170] In fact, the Governor explicitly designated ORMA to lead the review of the DEC's landfill closure regulations.[171] The state's regulatory agency, the DEC, also played an integral role in the discussions. As ORMA's director noted, the regulatory agency's participation was, as a practical matter, absolutely essential for several reasons. In addition to the technical expertise it brought to the discussions, the agency charged with implementing the revised approach had to have a role in shaping the approach for there to be the agency buy-in, which the director characterized as indispensable for successful follow-up or implementation.[172]

Second, ORMA made its review an inclusive one. It created a work group comprised of multiple constituencies, including "State agencies, local governments, environmental groups, academia and local government associations" to conduct the regulatory review.[173] ORMA's director characterized the work group's efforts as involving a "rigorous discussion and analysis among a diverse cross section of representatives from . . . [the Governor's] office, State agencies, local governments, environmental groups, academia and local government associations."[174]

Third, the New York experiment took an incremental, rather than a radical, perspective in its deliberations. That is, in revisiting the landfill closure regulations, the work group was not looking to revise the underlying environmental objectives. Instead, it was seeking the more incremental and modest result of changing the process and its requirements to save money without relaxing environmental requirements. As the work group noted: "As a result of our deliberations, we have identified instances where landfill capping procedures may be modified and the costs to local governments reduced without

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169 *Id.*

170 *See supra* note 165.

171 *See* OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, *supra* note 165, at 1.

172 Interview with Ruth S. Walters, *supra* note 168.

173 Letter from Ruth Walters to Governor Mario Cuomo (Nov. 1992), *supra* note 166, at 1.

174 Letter from Ruth S. Walters, *supra* note 166.

harming the environment or jeopardizing public health and safety."[175]

The work group concluded that by identifying these changes, it had accomplished its mission—that the work group's "central objective has been achieved."[176] It concluded that the "collaborative process used in analyzing these [landfill closure] issues . . . [provides] a model process for other State agencies together with local government and citizen groups to develop additional regulatory reforms."[177] In endorsing this effort, the 21st Century New York Project notes that through such successes the state "now [has] a working group process that can be applied generically to any regulatory issue."[178]

Governor Cuomo recently created a more comprehensive approach to regulatory reform, which bears close attention. In January 1994, he directed in his State of the State Message that "[t]his year we will adopt a radical new change in our philosophy: a 'zero-based' regulatory system under which I will direct every appropriate agency to examine its existing regulations top to bottom to see if they make sense—individually and as a system."[179]

On March 14, 1994, ORMA issued a *Zero-Based Regulatory Reform Program Outline* ("Program Outline") to implement the Gover-

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175 OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, *supra* 166, at ii. The effort also took an incremental approach in that its focus was narrow. The working group focused only on a small part of the solid waste landfill regulatory scheme, and it concentrated its efforts on landfills located in upstate New York. Interview with Ruth S. Walters, *supra* note 168.

176 OFFICE OF BUSINESS PERMITS & REGULATORY ASSISTANCE, *supra* note 165, at 2.

177 *Id.* at 3,5.

178 RUTH S. WALTERS, 21ST CENTURY NEW YORK PROJECT, THE NEW YORK PERFORMANCE REVIEW 42 (1994). The members of the 21st Century New York Steering Committee are: Ruth S. Walters, Chairperson (who also serves as head of ORMA, as noted above); Robert B. Adams, Commissioner, Office of General Services; Patricia B. Adduci, Commissioner, Department of Motor Vehicles; Joseph M. Bress, Director, Governor's Office of Employee Relations; Candice T. Carter, Executive Deputy Commissioner, Department of Civil Service; John Ewashko, Deputy Secretary to the Governor, Executive Chamber; John J. Feeney, Deputy Comptroller, Office of the State Comptroller; Thomas A. Maul, Commissioner, Office of Mental Retardation and Developmental Disabilities; Frederick Meservey, Executive Director, Council on Children and Families; Rudy F. Runko, Director, Division of the Budget; and David Wright, Deputy Secretary to the Governor, Executive Chamber. The purpose of the New York Performance Review was to compare New York's accomplishments with the "reform agenda set forth by the Federal government by Vice President Gore's *National Performance Review*." Letter from Ruth S. Walters, Special Assistant to the Governor for Regulatory and Management Assistance, to Governor Cuomo (Mar. 1994), *reprinted in* WALTERS, *supra*, at i.

179 OFFICE FOR REGULATORY & MANAGEMENT ASSISTANCE, ZERO-BASED REGULATORY REFORM, PROGRAM OUTLINE i (1994) (reprinting Governor Cuomo's January 5, 1994 message to the Legislature).

nor's directive contained in his State of the State message.[180] ORMA directed five agencies—the Departments of Health, Labor, Taxation and Finance, and Environmental Conservation, and the Workers Compensation Board—to "conduct an objective review of their existing regulations and regulatory practices, top to bottom."[181]

ORMA structured this objective review to contain the first two of the three elements discussed above: it includes in the process an additional agency that has the opportunity to influence the regulatory reform process in a meaningful way,[182] and it directs the agencies to conduct outreach to their constituencies in conducting this effort.[183] ORMA, however, appears to contemplate that these top-to-bottom reviews may lead to more radical change than the incremental approach of not revisiting substantive standards followed in the landfill closure regulations effort. One of ORMA's charges to the agencies is that they assess "excessive standards."[184]

ORMA's Program Outline suggests that the governor has included some strong inducements to act on his directions. In particular, the Program Outline (1) lists specific goals for the regulatory review;[185] (2) requires each agency to develop a plan to accomplish the review; (3) establishes a deadline for the agency to complete the plan; (4) gives ORMA an opportunity to review the plan; (5) authorizes ORMA to assume oversight of the agency's regulatory review, or retain an outside consultant to do so, if the plan is inadequate or if the agency is not making sufficient progress in its review; and (6) establishes time frames for reports on initiatives resulting from the review.[186]

In July 1994, the DEC issued its first report on its efforts to reform its regulatory scheme.[187] The agency's initial report is significant in several respects. First, it makes clear that the Department intends

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180 *Id.* at 1.

181 *Id.*

182 ORMA creates a role for itself in the Program Outline. Among other roles, ORMA will review the agency's plan to conduct the regulatory review. *Id.* at 2. ORMA also indicates that it may assume oversight of the review if the agency does not lessen regulation. *Id.* at 1.

183 *See id.* at 1 (directing the agencies to ensure "[i]nput from the business community and affected interest groups, both early in the process when selecting areas for reform and during the reform and implementation process").

184 *Id.*

185 The goals of regulatory review are to simplify and reduce paperwork, regulations, and permits; assess duplicative or excessive standards; streamline regulatory practices; and reduce time frames for permit issuance. *Id.*

186 *Id.* at 1-3.

187 IMPROVING OUR ENVIRONMENT, *supra* note 152. This report appears to be the product of the DEC's regulatory reform work that predated the governor's January 1994 State of the State message and ORMA's March 14, 1994 Program Outline. *Id.* at 1. The Report notes that

to listen to interested parties in deciding what regulatory reforms are appropriate, noting that the initial report is "only the first in a series of reports detailing DEC regulatory reform efforts," and that a "major objective of the report is to seek the comments of the legislature, the regulated community, local officials, . . . environmental groups and others on DEC's regulatory reform efforts."[188]

Second, the report identifies nine express action steps for improving environmental regulatory approaches, many of which themselves include several specific actions.[189] Thus, the DEC has made public a list of specific regulatory improvements that it intends to make. Presumably, this should increase the likelihood that such changes will occur in a timely way.

Third, virtually all of the changes appear to be process improvement changes. For example, the DEC plans to eliminate unnecessary reviews in order to accelerate the permit process[190] and also plans to expand programs "to help businesses comply with regulatory requirements."[191] Further, the DEC intends to "work[ ] to eliminate duplication between state and federal permit programs,"[192] and plans to "eliminat[e] unnecessary reporting requirements."[193]

The DEC's focus on process improvements in its nine action steps appears to be deliberate. In the introduction to its report, the DEC indicates that its regulatory reform efforts are "guided by . . . three main themes,"[194] all of which are process-oriented: (1) "[r]egulatory redirection" (with the DEC providing two examples of such redirection: "eliminating unnecessary reporting requirements and lessening or eliminating reviews of activities that are unlikely to have a negative impact on the environment"[195]); (2) cost effectiveness, which the DEC defines as "[a]ssessing where and how specific environmental . . . goals . . . can be achieved more cost-effectively";[196] and (3) lower transaction costs, which the DEC defines as "[r]educing transaction costs by making the environmental regulatory . . .

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the agency "accelerated" its regulatory reform efforts after receiving the governor's direction in his 1994 State of the State message. *Id.*

188 *Id.* The report indicates that the DEC solicited public input in developing the report as well. *Id.* at vi.

189 *Id.* at iii-vi.

190 *Id.* at iii, iv.

191 *Id.* at iv.

192 *Id.* at v.

193 *Id.* at vi.

194 *Id.* at 1.

195 *Id.*

196 *Id.*

processes . . . 'leaner' and speedier."[197] In summary, none of the changes the DEC has identified in its nine action steps appears to focus on changing substantive environmental requirements.[198]

To sum up, New York State appears to have completed a successful experiment in the area of regulatory reform that seems to hold considerable promise for use at the federal level. The narrowly focused experiment in the area of landfill closure produced a consensus among regulators, environmental groups, and regulated parties on specific, concrete steps for refining the regulatory scheme to create additional flexibility without undermining protectiveness.

More recently, the state has embarked on a more radical and more comprehensive experiment in the area of regulatory reform. It is premature to speculate whether the Governor's zero-based regulatory initiative will succeed in producing meaningful reevaluations of existing regulatory schemes and then actual changes to these schemes in light of the reevaluations.[199] The very comprehensiveness of the ongoing effort, and the fact that it at least contemplates possible relaxation of environmental standards, makes its ultimate success, in this author's opinion, somewhat less likely than the solid waste landfill closure experiment. Nevertheless, the DEC's initial effort to identify strategies for regulatory reform offers promise. It suggests that agencies may be capable of identifying such strategies when their charge to do so is comprehensive, as well as when their marching orders are much more narrowly focused, as in the landfill closure context.[200] This appears to be especially true with respect to process improvements.

The fundamental point is that both experiments at the state level warrant close attention from the federal government.[201] The opportunity to compare and evaluate these two very different approaches

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197 *Id.*

198 *Id.* at iv-vi. One possible exception is action step number nine, which involves "[d]eveloping resource management plans as a way to establish environmental goals within whole natural systems, ecosystems or areas." *Id.* at vi. Also, while not included among the nine action steps, DEC identifies a pilot project that has the potential to revisit underlying environmental standards themselves. This pilot project will evaluate whether the DEC should shift from classifying all fresh groundwater in the state for use as drinking water to allowing some groundwater to be below drinking water quality. *Id.* at 4.

199 The recent election, in which Governor Cuomo lost his office to George Pataki, raises additional questions on the future of this effort. This author's impression is that this change of administrations will heighten the priority that the DEC gives to "regulatory reform."

200 The DEC is currently holding a series of public meetings throughout the state concerning its regulatory reforms. IMPROVING OUR ENVIRONMENT, *supra* note 152, at 27. The reaction of the DEC's various constituencies to these changes is not yet clear.

201 *See* MCELFISH & PENDERGRASS, *supra* note 15, at 4 (stating that "state programs provide useful lessons for federal legislators"); Farber, *supra* note 23, at 801 (stating that

adds to their value. The federal government should maintain a watchful eye over New York's experiment with piecemeal and comprehensive institutional regulatory reform for lessons on how we can best "reinvent ourselves" at the national level.[202]

III. Addressing the Cost Allocation Issue

Over the past two or three years, local governments have increasingly claimed that their share of the environmental infrastructure costs, in both absolute and relative terms, is too high and that the federal government has increased environmental mandates while reducing financial support.[203] New York State has taken several steps to share the funding load for such environmental infrastructure costs. This section discusses one such step.[204]

Under New York's Superfund Law,[205] the state legislature tempers its making local governments liable for their ownership or operation of solid waste landfills by obligating the state to pay seventy-five percent of the municipality's share of liability for such sites.[206] Among other reasons for this approach was the legislature's view that local governments had historically provided a public service to their communities by owning and operating solid waste landfills, and the view that it was not fair to require local governments to

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"[u]nsuccessful state programs are nearly as important, since observing them may save us from making costly errors on a national scale").

202 In a recent article, the New York Times quoted Robert Hahn, an economist at the American Enterprise Institute, for the proposition that the federal government has had limited success itself in revisiting the federal environmental laws: "I can think of no instance in which Congress has relaxed environmental regulations. . . . It's just not politically correct." Peter Passell, *Disputed New Role for Polls: Putting a Price Tag on Nature*, N.Y. Times, Sept. 6, 1993, at A1, A36. *But cf.* Keith Schneider, *U.S. Set To Open National Forests for Strip Mining*, N.Y. Times, Sept. 28, 1992, at A1, B6 (stating that "[f]or the past 15 months, President Bush has pressed for changes in environmental regulations, and he succeeded in relaxing restrictions on filling wetlands, cutting timber, exploring for oil, and mining copper, uranium and other minerals on Federal land").

203 *See generally* Markell, *supra* note 4, at 885.

204 In addition to providing municipalities with funding support in the Superfund arena, *see infra* notes 205-14, the state also provides financial support in other areas, including landfill closure and wastewater treatment plant construction. *See, e.g.*, David S. Liebschutz, *The Environmental Facilities Corp.*, Envtl. L. N.Y., June 1994, at 81, 81. The federal government also contributes to the state's revolving fund to help local governments pay for the construction of their wastewater treatment plants. *Id.* at 94.

205 N.Y. Envtl. Conserv. Law §§ 27-1301 to -1321 (McKinney 1984 & Supp. 1994).

206 *Id.* § 27-1313(5)(g) (McKinney 1984). Other states, including Minnesota, also have taken steps to share municipalities' exposure for some of these sites. *See Minnesota Passes Law Eliminating Liability for Closed Landfills*, 8 Inside EPA's Superfund Report (Inside Washington) 15-16 (June 1, 1994); *Superfund Alternative Signed into Law, Allows Cleanup of More than 100 Landfills*, 8 Toxics L. Rep. (BNA) 1460 (May 25, 1994).

shoulder the entire governmental share of the financial burden associated with addressing these landfills.[207]

The federal approach has been far different. Far from sharing the cost with local governments, the federal government, before it will contribute to the cost of cleaning up a municipally owned or operated solid waste landfill, insists on an even greater cost share from local or state government than it requires for nonmunicipal sites.[208] The federal government's approach does not contribute to a good relationship between the various levels of government in connection with the remediation of such municipal sites.[209] As suggested above, such statutory impediments to good relations should be revisited.[210]

One commentator from private industry has suggested that a state which sweetens the pot, such as New York, creates a strong bias toward global settlements that include the private responsible parties as well.[211] As a result, that commentator strongly encouraged this action elsewhere to promote early settlements and expeditious cleanups.[212] A municipal official echoed this view.[213]

The EPA should analyze the New York experience to test whether these views have been borne out by experience. If they have, the EPA should consider innovative ways to generalize from this approach at the federal level. Similarly, it should look to the plethora of state Superfund and other environmental programs that create a shared financial responsibility for environmental infrastructure needs, identify innovative features, and then evaluate the experi-

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207 *See* Governor's Memorandum approving 1985 N.Y. Laws ch. 35, *reprinted in* 1985 N.Y. STATUTES 2641, 2642 (Consol. 1986).

208 *Compare* CERCLA § 104(c)(3)(C)(ii), 42 U.S.C. § 9604(c)(3)(C)(ii) (1988) (requiring that the state pay 50% of federally funded cleanups at state or municipally owned or operated sites) *with* CERCLA § 104(c)(3)(C)(i), 42 U.S.C. § 9604(c)(3)(C)(i) (requiring that the state pay 10% of all cleanup costs at all other sites).

209 *See* Markell, *The Federal Superfund Program, supra* note 10, at 59-63 (arguing that the current cost-sharing structure leads to conflict rather than to cooperation).

210 *See supra* note 30 and accompanying text.

211 Norman W. Bernstein, *To Clean Up Landfills, the Leader Should Be Municipalities Using Economic Incentives To Settle*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10012, 10012 (Jan. 1989).

212 *Id.*

213 *See* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 50 (1993). Some support for such an approach is provided by cases holding that local government operators of landfills that are on the Superfund list should bear all of the costs that the local government would have incurred to close the landfill under solid waste management requirements. *See, e.g.*, City of Seattle v. Amalgamated Servs., No. C92-792D, 1994 U.S. Dist. LEXIS 9761 (W.D. Wash. Mar. 4, 1994).

ence with these innovations to determine whether to adopt them at the federal level.[214]

IV. Creating a More Credible Compliance Scheme

Several commentators have emphasized the important role that compliance and enforcement activities play in ensuring an effective environmental regulatory scheme. EPA Administrator Browner, for example, has characterized enforcement as the "backbone of environmental protection."[215]

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214 For additional information on the various state Superfund programs, see McElfish & Pendergrass, *supra* note 15; Office of Emergency & Remedial Response, U.S. EPA, Pub No. 9375.6-08C, An Analysis of State Superfund Programs: 50-State Study, 1993 Update (1993) [hereinafter 50-State Study, 1993 Update]. This is the most recent of four editions of the 50-state study. The three earlier versions are Office of Emergency & Remedial Response, U.S. EPA, Pub No. 9375.6-08B, An Analysis of State Superfund Programs: 50-State Study, 1991 Update 15 & fig. III-2 (1991) [hereinafter 50-State Study, 1991 Update] (discussing staffing levels in state Superfund programs); Office of Emergency & Remedial Response, U.S. EPA, Pub No. EPA/540/8-91/002, An Analysis of State Superfund Programs: 50-State Study, 1990 Update (1990) [hereinafter 50-State Study, 1990 Update]; Office of Emergency & Remedial Response, U.S. EPA, Pub No. EPA/540/8-89/011, An Analysis of State Superfund Programs: 50-State Study (1989) [hereinafter 50-State Study, 1989].

Minnesota recently created an entirely separate program to address remediation or closure of solid waste landfills. The state made the policy decision to fund the cost of closure of these landfills. *See Amendment Seen as Protecting States' Rights at Federal Sites*, 8 Inside EPA's Superfund Report (Inside Washington) 14, 15-16 (June 1, 1994); *Superfund Alternative Signed into Law, Allows Cleanup of More than 100 Landfills*, *supra* note 206.

The author is aware that the EPA has invested considerable time in evaluating various strategies for funding environmental infrastructure issues. *See, e.g.*, Administration & Resources Management, U.S. EPA, Pub No. 20M-2004, Paying for Progress: Perspectives on Financing Environmental Protection (1990).

215 *'Reconsolidation' of Authority Would Lead to Stronger EPA Enforcement, Browner Says*, 24 Env't Rep. (BNA) 547 (July 30, 1993); *see* New York State Dep't. of Envtl. Conservation, Annual Report to Governor Mario M. Cuomo on Environmental Enforcement (F.Y. 1989-1990) 3 (1990) [hereinafter First Annual Report]; New York State Dep't of Envtl. Conservation, Enforcement Directives: Civil Penalty Policy 1-2 (1990); New York State Dep't. of Envtl. Conservation, Third Annual Report to Governor Mario M. Cuomo on Environmental Enforcement (F.Y. 1991-1992) 1 (1992) [hereinafter Third Annual Report] ("The goals of the Department's enforcement program are to maximize compliance with the environmental laws [ ] [and to] ensure that those who comply with the environmental laws are not penalized economically compared to violators of these laws who avoid the cost of good environmental citizenship. . . . A fundamental DEC objective is to use enforcement as a tool to create a level playing field for complying companies."); U.S. GAO, Alternative Enforcement Organizations for the EPA 33, (1992); *Agency To Reconsolidate Enforcement Offices, Streamline Operations*, 7 Inside EPA's Superfund Report (Inside Washington) 27 (July 28, 1993) (stating that the creation of separate enforcement offices throughout the EPA was an "effort to break the back of [the EPAs] enforcement activities"); Michael C. Blumm, *A Primer on Environmental Law and Some Directions for the Future*, 11 Va. Envtl. L.J. 381, 395 n.129 (1992) (citing William K. Reilly, *The Future of Environmental Law*, 6 Yale J. on Reg. 351, 354 (1989) ("enforcement is 'at the very heart of

Contemporary government compliance efforts face a special challenge due to the dramatic increase in the size of the regulated community in recent years.[216] For example, in one statute alone, the RCRA,[217] the number of generators of hazardous waste subject to RCRA subtitle C regulation grew from under 100,000 to more than 211,000.[218] The government's compliance and enforcement resources have not kept pace with this growth.[219] One point is clear: the government lacks the resources to have its own staff oversee the operations of the hundreds of thousands of facilities regulated under the environmental laws, either continuously or even on a relatively frequent basis (e.g., annually).[220]

Therefore, the question is what strategies should the government adopt to maximize regulated parties' incentives to comply with their obligations under the environmental laws given the impracticality of actual government oversight of the regulated parties on a regular basis. The answer is that countless innovative approaches exist. On the volunteer, or carrot, end of the continuum are approaches such as trying to create a "culture of compliance" among the regulated community by offering rewards for particularly progressive companies.[221] Another example on this end of the continuum is providing

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our regulatory programs' "); F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How To Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10478 (Dec. 1987); David L. Markell, *Enforcement Challenges and Priorities for the 1990s: A State Perspective*, 1 DUKE ENVTL. L. & POL'Y F. 30 (1991); David L. Markell, *Enforcement Trends at the DEC*, N.Y. ST. B. ASS'N ENVTL. L. SEC. J., Aug. 1989, at 4.

216 *See* Fontaine, *supra* note 5, at 31, 32 ("the universe of sources subject to environmental regulation has vastly expanded" in recent years); Hubert H. Humphrey, III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal For A More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 32 (1990) (noting the dramatic expansion in the number of regulated parties); Markell, *Enforcement Challenges and Priorities for the 1990s: A State Perspective*, *supra* note 215; Leroy C. Paddock, *Environmental Enforcement at the Turn of the Century*, 21 Envtl. L. 1509, 1509-15 (1991); Charles W. Burson et al., *State Environmental Enforcement Organizations*, NAT'L ENVTL. ENFORCEMENT J., Aug. 1993, at 3, 3; David L. Markell & Dolores A. Tuohy, *Some Thoughts on Running a Superfund Program: A State Perspective*, NAT'L ENVTL. ENFORCEMENT J. (Nov. 1990).

217 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993).

218 PERCIVAL ET AL., *supra* note 27, at 226; Paddock, supra note 216, at 1510 ("In the early 1980's, a few thousand facilities were subject to regulation in Minnesota under the major federal and state environmental laws. Today close to 100,000 facilities are covered by state laws alone.").

219 PERCIVAL ET AL., *supra* note 27, at 119.

220 *Id.* At some point technology may progress sufficiently to better serve as the government's eyes and ears. We are not yet at that point, although we are moving in that direction. *See, e.g.*, 42 U.S.C. § 7511a (Supp. 1994) (requiring certain major air pollution sources to conduct "continuous emissions monitoring" or CEM).

221 Governor Cuomo recently announced the creation of an awards program for companies that excel in the area of pollution prevention. NEW YORK STATE DEP'T OF ENVTL.

initial technical assistance to help regulated parties learn what they need to do to comply and how to do it.[222] Both the DEC and the EPA have made initial attempts to use these positive reinforcement and educational approaches to encourage compliance.[223]

At the penal, or stick, end of the continuum, both the federal and state governments have, among other actions, significantly strengthened their criminal enforcement programs in recent years.[224] Increased numbers of criminal investigators and other criminal enforcement personnel and a growing number of criminal prosecutions for violations of the environmental laws send a strong message that members of the regulated community may be exercising the better part of valor by complying with the environmental laws.[225]

Each of these initiatives has its place, and governments should continue to use them in appropriate circumstances. This Article discusses below three other innovative approaches that New York State has taken—and in some cases pioneered—to improve compliance with the environmental laws that warrant careful review by the EPA and by other states: (1) "operationalizing" the adage that an ounce of prevention is worth a pound of cure by investigating the "fitness" of applicants for permits in certain industries and other specific situations, and then granting permits only to those parties that appear likely to comply with their legal responsibilities;[226] (2) supplementing traditional government oversight of facility activities

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CONSERVATION, NEWS RELEASE: SIX NYS COMPANIES HONORED (1994). One feature of the EPA's recently proposed "Environmental Leadership Program" is the agency's intent to "publicly recognize . . . facilities that demonstrate outstanding environmental management practices." Environmental Leadership Program: Request for Pilot Project Proposals, 59 Fed. Reg. 32,062 (1994).

222 IMPROVING OUR ENVIRONMENT, *supra* note 152, at 11-13.

223 *Id.* at iii-iv.

224 Between 1989 and 1991, for example, the number of criminal convictions obtained by the New York State Department Of Environmental Conservation jumped from 39 to 56. *Compare* THIRD ANNUAL REPORT, *supra* note 215, at 19 *with* FIRST ANNUAL REPORT, *supra* note 215, at 7. *See also* U.S. EPA, EPA 300-R-94-0032, ENFORCEMENT ACCOMPLISHMENTS REPORT (F.Y. 1993) 1-1, 2-2 (Apr. 1994).

225 *See, e.g.*, 1990 Pollution Prosecution Act, 42 U.S.C. § 4321 (Supp. 1990); NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, SECOND ANNUAL REPORT TO GOVERNOR MARIO M. CUOMO ON ENVIRONMENTAL ENFORCEMENT (F.Y. 1990-1991) 1 (1991) [hereinafter SECOND ANNUAL REPORT]; U.S. EPA, EPA 300-R-94-003, ENFORCEMENT ACCOMPLISHMENTS REPORT (F.Y. 1993) 1-1, 2-2 (Apr. 1994); Markell, *Enforcement Challenges and Priorities for the 1990s: A State Perspective*, *supra* note 215, at 30. The federal government contractor listing and debarment sanctions are other particularly onerous tools which address noncompliance. *See* 42 C.F.R. §§ 32.300 - .335 (1993); Edward E. Reich, *Contractor Listing: Powerful Sanction for Encouraging Environmental Compliance*, NAT'L ENVTL. ENFORCEMENT J., Nov. 1991, at 5, 6.

226 *See infra* notes 229-83 and accompanying text. With the degree of self-reporting and the shortage of government enforcement staff, it is very difficult for the government to supervise closely every permittee, or even every significant permittee. Arguably, the best way to ensure

by increasing the number of people serving as the government's "eyes and ears" at a facility through a variety of creative approaches;[227] and (3) opening up the enforcement process to citizens' groups and various segments of the regulated community during the formulation of enforcement policies.[228]

A. *"Fitness" as a Guidepost for Permit Issuance, or "Keeping the Bad Apples out of the Barrel."*

Over the past twenty-five years, Congress and state legislatures have established a set of environmental laws that is designed to limit the risks associated with the use and disposal of pollutants by

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compliance in some instances is to use the environmental laws to prevent a party from entering a regulated industry.

227 *See infra* notes 283-325 and accompanying text.

228 *See infra* notes 328-34 and accompanying text. New York has initiated several other creative approaches to improving compliance. First, the state has created a truly integrated infrastructure in at least two respects. The state has consolidated or integrated its environmental quality and natural resource protection functions, unlike the federal government. As a result, fish and wildlife biologists, for example, work in the same institution and, indeed, often in the same building and on the same floor as remediation engineers. Based on this author's experience, a unified or integrated organizational structure greatly facilitates interdisciplinary coordination and a comprehensive approach to issues. Further, the state has built a regulatory agency that includes a large in-house peace officer unit. As of November 1990, the DEC had approximately 305 sworn peace officers, including 265 uniformed officers and 40 undercover investigators. FIRST ANNUAL REPORT, *supra* note 215, at 2. Again, at least intuitively such a structure seems to facilitate the interdisciplinary coordination that is essential to effective compliance and enforcement work.

Second, the state (intentionally or not) has structured its environmental enforcement authorities in a way that advances the "reinventing government" principles of "empowering front lines personnel" and minimizing duplication to a far greater degree than has the federal government. *See* NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 7 (stating that these principles, among others, should be utilized in "reinventing" the federal government). State law empowers the DEC to pursue violations of the environmental laws administratively or judicially, without creating artificial barriers to its proceeding administratively. Several federal environmental laws create such barriers to administrative enforcement. Markell, *supra* note 23, at 1060, 1088-90.

Third, the DEC has "blanketed" the regulated community through a "cops on every corner" approach in an effort to maximize its enforcement presence and demonstrate the agency's consistency in identifying and pursuing violations. Markell, *supra* note 215, at 31-32. The Department used this approach to substantial benefit in both a Clean Air Act enforcement initiative and a petroleum bulk storage initiative. *Id.*; FOURTH ANNUAL REPORT, *supra* note 116, at 14; THIRD ANNUAL REPORT, *supra* note 215, at 10-11.

Finally, the DEC has "blanketed" the regulated community in a different sense by systematically pursuing "outliers,"—i.e., parties that are subject to the environmental laws and have not been brought within the regulatory system. The DEC used this strategy extremely effectively in pursuing facilities that had failed to file discharge monitoring reports (DMR's) under the Clean Water Act. THIRD ANNUAL REPORT, *supra* note 215, at 10; SECOND ANNUAL REPORT, *supra* note 225, at 8; Markell, *supra* note 215, at 32.

limiting the rights of users and disposers of such pollutants.[229] The centerpiece of the entire Clean Water Act, for example, is that parties interested in discharging pollutants into navigable waters must first obtain a permit authorizing such discharge.[230] Absent such a permit, parties are barred from discharging pollutants into our nation's waters.[231] Parties are potentially subject to criminal as well as civil liability if they ignore this limitation on their freedom of action.[232] In sum, no inherent right exists to pollute our environment. Instead, polluting our environment is a privilege that the government has the authority to grant or deny.[233]

As a former head of the EPA's Office of Enforcement and Compliance Assurance (OECA), James M. Strock observed in a 1991 article that the EPA traditionally has focused narrowly on the potential technical capability of the applicant to control pollution emissions in deciding whether or not to issue a permit.[234] Strock stated, "The EPA bases its decision to issue a permit almost exclusively on the technical capability of the applicant's plant, equipment, and personnel, and the applicant's ability to control pollution emissions at the level mandated by the permit."[235] Mr. Strock also stated that the federal government's inquiries traditionally have not included an analysis of the applicant's track record to determine whether the applicant is likely to meet its obligations, and concluded that "[t]he federal environmental protection program does not assess corporate or individual integrity in the decision to issue a permit; thus, . . . bad actors . . . [can]not be denied permits on this ground."[236]

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[229] *See, e.g.*, Clean Water Act, 33 U.S.C.A. §§ 1251-1376 (1988 & Supp. 1993); Resource Conservation & Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993); Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1993). As noted previously, *see supra* notes 45-75 and accompanying text, because of the piecemeal nature of the different laws that make up this overall environmental statutory regime, it is by no means clear that the whole equals the sum of its parts.

[230] *See* 33 U.S.C. § 1311 (1988 & Supp. 1993); *Id.* § 1362(7) (defining navigable waters as: "waters of the United States, including the territorial seas").

[231] *Id.* § 1311 (the few exceptions to this bar are not relevant here).

[232] *Id.* § 1319.

[233] *See* Berman Enters., Inc. v. Jorling, 793 F. Supp. 408, 410 (E.D.N.Y. 1992) (stating that the DEC could allow, as a public policy decision, respondents' sludge barges to operate only if proof could be produced that their activity "is not threatening to the people or environment of the state").

[234] James M. Strock & Brian A. Runkel, *Environmental Bad Actors and Federal Disqualification*, 15 HARV. ENVTL. L. REV. 529, 538 (1991) (at the time of the article the OECA was known as the Office of Enforcement).

[235] *Id.* at 532.

[236] *Id.*; *cf.* 42 U.S.C. § 7503(3) (1988 & Supp. V 1993) (requiring denial of a permit application for certain types of applicants if they are violating the law and not meeting an agency-approved compliance schedule). Even this Clean Air Act provision is limited in at least

This former EPA enforcement official seemed to attribute the EPA's narrow focus to limitations in its legal authority. He indicated that the EPA "lacks a sufficient mandate to deny benefits to bad actors,"[237] noting that, with the exception of PCB disposal regulations (which Mr. Strock labelled as "ineffectual"),[238] "no federal environmental statute or regulation requires a permit applicant to inform the EPA of any past or current non-compliance with environmental laws."[239] Obviously frustrated by this state of affairs, he called on the federal government to take action to "deny key governmental benefits to environmental bad actors."[240]

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three important ways. It only applies to permits for new or modified major stationary sources, located within the same state, which are in a nonattainment area. *Id.* § 7503(3), (4).

237 Strock & Runkel, *supra* note 234, at 530.

238 *Id.* at 538 (stating that "serious deficiencies in the current PCB disposal permit regulations reflect a sad truth: the sole EPA permit program providing for background disclosure and disqualification is ineffectual"). For PCB application requirements, see 40 C.F.R. § 761.65(d)(3) (1993).

239 Strock & Runkel, *supra* note 234, at 533. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988 & Supp. IV 1992), administered by the U.S. Department of the Interior (DOI) rather than the EPA, provides the DOI with some authority in this area. The SMCRA includes an Applicant Violator System (AVS) that, in the words of one DOI attorney, is "a unique and ambitious computer system designed to block owners and controllers of violators from obtaining new permits." Courtney W. Shea, *Coal Mining and the Environment: Does SMCRA Give Regulators Appropriate Enforcement Tools?*, NAT. RESOURCES & ENV'T, Spring 1994, at 17, 17. As indicated previously, the Clean Air Act requires that the EPA deny permit applications submitted by "bad actors" under certain limited circumstances. *See supra* note 236.

240 Strock & Runkel, *supra* note 234, at 530. The EPA does have somewhat related authority under the Federal Acquisition Regulation and under its contractor listing program that warrants attention. EPA has authority to "debar" entities—to prohibit them from contracting with the federal government. 33 U.S.C. § 1368 (1988); 42 U.S.C. § 7606 (1988 & Supp. V 1993); 40 C.F.R. §§ 15.1 to 15.41 (1993); 48 C.F.R. §§ 9.400-.409 (1993). As one commentator recently noted, this authority obviously has major implications for any company "that does business with the government or benefits from non-procurement government transactions, such as loans and loan guarantees." David M. Sims, *Suspension and Debarment: Potent Government Tools*, SONREEL NEWS, Jan.-Feb. 1994, at 1, 1. "Grounds [for debarment] include fraud in connection with securing or performing a public or private agreement; . . . embezzlement, theft, forgery, bribery, falsification . . . of records . . . ; poor performance or violations of the terms of a public agreement or contract . . . ; or a history of unsatisfactory performance." *Id.* at 13. As this commentator notes, "[a]n environmental offense may provide cause where there is a reasonable connection between the misconduct and the business integrity or performance of a potential contractor or participant." *Id.*

Mr. Strock expresses his view that the federal environmental permitting system has two fatal flaws: "(1) the EPA's inability to investigate and gather background information on an applicant's integrity and compliance record; and (2) the EPA's inability or refusal to act on background information in its possession." Strock & Runkel, *supra* note 234, at 534. The DEC's policy, discussed *infra* notes 253-283 and accompanying text, addresses both issues. THOMAS C. JORLING, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, RECORD OF COMPLIANCE ENFORCEMENT GUIDANCE MEMORANDUM 9-11 (Aug. 8, 1991, rev. Feb. 1993) [hereinafter ENFORCEMENT MEMORANDUM].

Governments have historically evaluated the "bona fides" of prospective permittees or licensees in a wide variety of settings. "Fitness" is an issue in such diverse contexts as the issuance of drivers' licenses,[241] auctioneers' licenses, barbers' licenses, and bowling alley operation licenses.[242]

In a 1959 case, the New York State Court of Appeals upheld administrative agencies' authority to review the fitness of applicants in determining whether or not to issue a license.[243] In that case, the court reviewed whether the Commissioner of Licenses had authority to consider the character of an applicant for a cartman's license.[244] The court's rationale was based on the "general proposition that the power to grant a license necessarily implies power to withhold it for good cause,"[245] as well as the fact that the licensing provisions of the City Charter and the Administrative Code implicitly gave such authority to the Commission.[246]

The New York Court of Appeals upheld the DEC's authority to deny permits on the ground that the applicant was "unfit" in a 1985 case, *Bio-Tech Mills, Inc. v. Williams*.[247] In that case, a paper mill obtained a DEC permit in 1977 to discharge wastewater from its operations into the Battenkill Creek.[248] The permit was issued for a five-year term and was due to expire on March 1, 1982. In February 1982, the paper mill filed an application with the DEC to renew its permit. The DEC denied the application, in part because of the paper mill's "flagrant and recurring breaches of the standards called for in its present [1977] permit and its inability or unwillingness to

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241 Kemp v. Hults, 216 N.E.2d 592 (N.Y.), *cert. denied*, 385 U.S. 17 (1966) (upholding denial of driver's license for past murder conviction and failure to fully disclose all criminal convictions); *see also* Funaro v. Hults, 226 N.Y.S.2d 618 (App. Div. 1962) (upholding denial of driver's license for fraudulent application and criminal record).

242 *See* Barton Trucking Corp. v. O'Connell, 165 N.E.2d 163, 167-69 (N.Y. 1959) (citing relevant case law).

243 *Id.* at 166.

244 *Id.* at 165.

245 *Id.* at 166.

246 *Id.* at 166-67.

247 484 N.Y.S.2d 292, 295 (App. Div.), *aff'd*, 482 N.E.2d 1223 (N.Y. 1985). The DEC has denied or revoked permits on similar grounds in several other cases as well. *See, e.g.*, Berman Enters., Inc., No. R2-3291-90-11 (N.Y. Dep't of Envtl. Conservation, Mar. 25, 1992) (permit denied); Frontier Chem. Waste Process, Inc., No. C9-5194-03-93 (N.Y. Dep't of Envtl. Conservation, Apr. 6, 1994) (permit denied); America Transfer Co., No. 2-6006-00005/000001-0 (N.Y. Dep't of Envtl. Conservation, Dec. 24, 1991) (permit denied).

248 The permit is known as a SPDES permit, the acronym for New York's permitting program under the Clean Water Act, the State Pollution Discharge Elimination System. Under certain circumstances, the Clean Water Act authorizes the federal EPA to delegate to states the authority to implement the permit program required by the Act. 33 U.S.C. § 1342(b) (1988).

even substantially comply with the environmental laws."[249] The DEC denied the application even though the mill had committed to improve its treatment process because the mill's "persistent [permit] violations outweighed any reassurances . . . that a new treatment system would be operated within the confines of a renewed SPDES permit."[250] The mill challenged the DEC's denial, and both the Appellate Division and the New York Court of Appeals upheld the DEC's decision.[251]

Approximately three and one-half years ago, then DEC Commissioner Jorling issued his Record of Compliance Enforcement Guidance Memorandum.[252] This Enforcement Memorandum launched the DEC's effort to systematically evaluate and consider the "bona fides" or "fitness" of permit applicants on a statewide basis.[253] In February 1993, the DEC issued an updated version of this Enforcement Memorandum.[254] The Department's policy objective in establishing this statewide strategy was to improve its regulatory scheme by increasing the reliability and integrity of the permittees—those individuals and companies that are permitted to operate under the environmental laws—by ensuring that bad actors (that is, unsuitable persons) are not authorized to carry out responsibilities under Department permits, certificates, licenses, or grants.[255]

A review of the DEC's Record of Compliance Enforcement Guidance Memorandum reveals that the DEC grappled with four primary issues in formulating and refining its "record of compliance" policy: (1) defining the types of conduct that are relevant; (2) determining how best to investigate applicants' backgrounds; (3) identifying which industries deserve priority attention; and (4) developing a menu of sanctions for applicants whose records raise concerns.[256]

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249 *Bio-Tech Mills*, 484 N.Y.S.2d at 295.

250 *Id.* at 294.

251 *Id.*

252 ENFORCEMENT MEMORANDUM, *supra* note 240.

253 *Id.* at 1-2. In this Enforcement Memo, the DEC cites two cases for the proposition that "the environmental compliance history of a permit applicant is a relevant consideration regarding qualification for permitting." *Id.* at 3 (citing Bio-Tech Mills, Inc. v. Williams, 484 N.Y.S.2d 292 (App. Div.), *aff'd*, 482 N.E.2d 1223 (N.Y. 1985); Olsen v. Town Bd., 557 N.Y.S.2d 633 (App. Div. 1990)).

254 *Id.* One commentator calls the current policy "the latest in a series of re-writes and revisions in the last 2 1/2 years." Clarence D. Bassett, *"Bad Actor" Policy Revised*, N.Y. BUS. ENV'T, Mar. 24, 1993, at 3.

255 ENFORCEMENT MEMORANDUM, *supra* note 240, at 2, 4-6; THIRD ANNUAL REPORT, *supra* note 215, at 4.

256 ENFORCEMENT MEMORANDUM, *supra* note 240, at 1-4.

To assist the staff in implementing this policy, the DEC attempted to provide concrete guidance concerning the types of past conduct that are relevant in evaluating the applicant's fitness. To provide some examples, the DEC's enforcement memorandum states that

> [o]n a case by case basis, the following events, any of which have occurred within ten years of the date of completion of the record of compliance form, should be considered a basis for . . . denying, suspending, modifying or revoking a permit in order to protect the environment and preserve the natural resources of the state as the circumstances may warrant.[257]

1. An applicant's "convict[ion] of a crime related to the permitted activity under any federal or state law."[258]
2. A "determin[ation] in an administrative, civil, or criminal proceeding" that an applicant has violated the environmental laws, and "in the opinion of the Department, the violation that was the basis for the action posed a significant potential threat to the environment or human health, or is part of a pattern of non-compliance."[259]
3. A denial of a permit to the applicant for the same or a similar activity by the State of New York or by any other state or federal authority.[260]
4. An applicant's having "engaged in conduct that constitutes fraud or deceit" or having "made materially false or inaccurate statements in the permit application or supporting papers or in the conduct of the permitted activity."[261]
5. An applicant's having been "convicted of the crime of filing a false instrument or making a false statement to the Department or any other agency regarding compliance with the laws of any state or the United States."[262]

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257 *Id.* at 4-5.

258 *Id.* at 4.

259 *Id.* at 4-5.

260 *Id.* at 5.

261 *Id.*

262 *Id.* In *Barton Trucking Corp. v. O'Connell*, the Court of Appeals offered its guidance concerning the types of conduct that agencies permissibly may consider in reviewing the fitness of applicants. 165 N.E.2d 163, 167-71 (N.Y. 1959). The court discussed the need to focus on the nature and locale of the offense—in that case the fact that the conviction was for a felony, specifically for the crime of extortion was important. *Id.* at 170. The court held that

> [w]hen one considers that the licensing ordinance regulates the rates chargeable by public cartmen for the apparent purpose of preventing price gouging and related abuses, and hence is specifically directed against a class of offenses comprehending extortion, the relationship between the statutory design and the integrity and trustworthiness of the proposed licensee is apparent.

Furthermore, the Enforcement Memorandum provides that these criteria for considering the suitability of an applicant are relevant "not only to the immediate entity but to any other corporation, partnership, association or organization in which the permittee or applicant holds or has held a substantial interest or in which it has acted as a high managerial agent or director."[263]

The DEC's Enforcement Memorandum appears to contemplate that the Department will obtain information in two primary ways: (1) through the addition of a "record of compliance section" on appropriate permit application and renewal forms;[264] and (2) through background reviews of appropriate applications by various Department staff, including the Department's Divisions of Law Enforcement and Environmental Enforcement.[265]

The DEC's Enforcement Memorandum further appears to contemplate that, at least initially, the Department does not intend to apply its "fitness" review across the board. Instead, the Department is targeting specific industries.[266] Department managers, including the DEC's Regional and program directors, "identify specific areas within their jurisdictions that warrant use of the ROC form."[267] The

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Id. Further, the court noted that "the conviction was not for criminal activities remote from the licensed business but was linked to the very industry in which petitioner seeks licenses to pursue its calling—an industry which, as both courts below have emphasized, has been infiltrated by criminal elements." *Id.*

263 ENFORCEMENT MEMORANDUM, *supra* note 240, at 5; *see also Barton Trucking Corp.*, 165 N.E.2d at 170 (supporting the position that the character of an applicant's controlling entities is a relevant factor in determining that applicant's status). On the other hand, the Enforcement Memorandum "[e]xempt[s] publicly traded companies from providing background data on boards of directors." ENFORCEMENT MEMORANDUM, *supra* note 240, at 11. However, the Memorandum does require disclosure of "the names of all stockholders who own 10% or more of the stock in the applicant company." *Id.*

264 ENFORCEMENT MEMORANDUM, *supra* note 240, at 4.

265 *Id.* As noted above, the DEC's Division of Law Enforcement included 265 uniformed peace officers and 40 undercover officers as of 1990. *Supra* note 228. According to a recent article, New Jersey's approach involves the state police and the Attorney General's office as well as New Jersey's environmental regulatory agency, in contrast to the DEC's largely in-house review. Strock & Runkel, *supra* note 234, at 544.

The communication of information within the agency is not automatic. Strock and Runkel identify "turf" and other barriers to effective communications between governmental actors as a major impediment to successful screening of applicants at the federal level. *See Id.* at 533-35. In the DEC's case, the agency's ultimate goal is to create "a unified Department-wide information system by which all program and enforcement data can be accessed." ENFORCEMENT MEMORANDUM, *supra* note 240, at 2. Its current division of responsibility for compiling and transmitting information is intended to be an interim step. *Id.*

266 ENFORCEMENT MEMORANDUM, *supra* note 240, at 10.

267 *Id.*

final decision to use the form for specific companies or industries rests with the DEC Commissioner.[268]

Finally, the DEC's policy seeks to retain flexibility concerning the proper disposition of permittees or applicants whose records are problematic, providing that they should be treated on a case-by-case basis and noting that three options exist: (1) revoking existing permits or denying new permits;[269] (2) conditioning the permits, perhaps through "strict reporting or monitoring conditions," to increase the likelihood of compliance;[270] or (3) determining that the applicant or permittee has rehabilitated itself, "such that . . . the entity can carry out activities in a responsible manner."[271]

The DEC's efforts to create a consistent strategy for evaluating "fitness" have not met with universal approval at the state level. A recent New York State Senate report criticizes the DEC's practice of conducting background checks of permit applicants on three grounds.[272] First, it claims a lack of legislative authorization for the DEC's comprehensive approach.[273] The report contends that the DEC is authorized to conduct such " 'fitness' checks . . . in only two areas, medical waste transporters and hazardous waste transporters,"[274] although the report concedes that courts have upheld the DEC's authority to do so with respect to other programs as well.[275] It recommends that the DEC cease conducting such checks until it obtains legislative authority to do so.[276] Second, as an apparent "fallback" criticism, the report criticizes the Department's creation of this policy through internal guidance.[277] It indicates that "[b]y establishing the fitness policy in this manner, the Department has bypassed the rulemaking process and input from the public and the

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268 *Id.* The Enforcement Memorandum suggests, for example, that "fixed, longstanding local permittees" may not be subject to the policy. *Id.* at 1.

269 *Id.* at 1.

270 *Id.*

271 *Id.*

272 MAKING ENVIRONMENTAL REGULATIONS WORK FOR NEW YORK'S ECONOMY AND ENVIRONMENT: REPORT ON HEARINGS OF THE SENATE ENVIRONMENTAL CONSERVATION COMMITTEE, LEGISLATIVE COMMISSION ON TOXIC SUBSTANCES AND HAZARDOUS WASTES, LEGISLATIVE COMMISSION ON SOLID WASTE MANAGEMENT 5, 24-25 (Mar. 1994) [hereinafter SENATE REPORT].

273 *Id.* at 5, 24.

274 *Id.*

275 *Id.* at 24 (*citing* Barton Trucking Corp. v. O'Connell, 165 N.E.2d 163 (N.Y. 1959)).

276 *Id.* at 5, 24. Further, the Senate report criticizes the DEC's approach on the basis that it is inconsistent in terms of the amount of time it goes back. *Id.* at 24-25 (noting that DEC looks back ten years while the statutory period for violations is only five years).

277 *Id.* at 24-25.

regulated community."[278] Finally, the Senate report criticizes the DEC's approach on the basis that it inappropriately treats parties in an inconsistent manner.[279]

In sum, this author shares former EPA Assistant Administrator for Enforcement James M. Strock's view that it is time for the federal government to evaluate, and consider emulating, the efforts that states such as New York, New Jersey, Ohio, and others have taken to investigate the "bona fides" of prospective permittees before granting authority to pollute.[280] New York's experiment reveals that it would be worthwhile for the federal government to address a series of threshold questions, including: (1) the appropriate process for adopting such an approach, including whether legislative or regulatory authority is needed and also including strategies for obtaining public input in developing an approach; (2) the parameters of such a policy, including what types of facilities it should cover (i.e., whether certain types of industries are more likely than others to violate the law, whether certain compliance schemes rely more heavily than others on the honesty of the permittee, etc.); (3) the scope of the fitness check, including what time period it should cover, who in the corporate family and hierarchy it should cover, what types of violations it should consider, etc.; and (4) how to implement any policy that the federal government adopts.[281] The DEC's experience has pointed the way to consider these and other issues.[282]

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278 *Id.* at 25.

279 *Id.* at 24-25.

280 Strock & Runkel, *supra* note 234, at 542 (commenting that New Jersey has "establishe[d] a system of background investigations to exclude individuals or companies from participating in the waste industry if they cannot demonstrate 'sufficient reliability, expertise and competency' ") (citing N.J. STAT. ANN. § 13:1E-133(a) (West 1991 & Supp. 1994)); *see also* OHIO REV. CODE ANN. §§ 3734.41-.47 (Anderson 1992 & Supp. 1993) (permit denied if applicant does not meet criteria set out in Background Investigation Law); PA. STAT. ANN. tit. 35, § 6018.503(c) (1993) (violation of any state or federal environmental law authorizes permit denial); TENN. CODE ANN. § 68-212-218 (1992) (requiring denial of hazardous waste permits if a shareholder owning 10% or more of stock has been criminally convicted of unlawful storage, treatment, or disposal of hazardous waste).

281 As IBM's Louis Gerstner, Jr. said soon after becoming Chairman of the Board, "[W]hile strategy was important, it was action, not plans, that really counted. . . . 'The fundamental issue . . . is execution . . . . Strategy is execution'." Steve Lohr, *I.B.M. Chairman Lays Out Catch-Up Plan*, N.Y. TIMES, Mar. 25, 1994, at D3.

282 The government will need to evaluate a series of constitutional issues in establishing the parameters of any "fitness" review scheme. While such schemes clearly can be designed to pass muster constitutionally, they do raise significant concerns, and obviously need to be tailored carefully to satisfy privacy, associational, confidentiality, and vagueness concerns, among others. *See* Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 233-39 (3d Cir. 1985); Strock & Runkel, *supra* note 234, at 559-62.

B. Expanded Use of In-House and Out-House "Gatekeepers" To Improve Compliance

As discussed above,[283] the government relies to a significant extent on self-reporting to monitor compliance.[284] In fact, it is increasingly moving in this direction.[285] It is doing so with the recognition that self-reporting creates data reliability concerns, as the GAO has found.[286]

In a 1991 report, the Environmental Law Institute (ELI) concluded that "gatekeeping" mechanisms involving third party oversight of facility operations are a potentially valuable compliance tool.[287] It stated that "[g]atekeeping mechanisms offer many potential benefits. The use of gatekeepers enhances achievement of regulatory objectives, promotes competent compliance through professional performance of required actions, and minimizes government resources necessary to achieve regulatory objectives. Environmental programs are among the regulatory programs that could take advantage of these benefits."[288]

In the same report, the ELI also noted that the use of gatekeepers is relatively new and that both continued experimentation and the sharing of information concerning these experiments is critical for governments to learn how to best use this compliance tool:

> The report concludes that since many of the most innovative and expansive environmental gatekeeping mechanisms are still in the experimental phase, State environmental regulators must continue to experiment with these programs and share with each other information on their successes and failures. Environmental gatekeeping shows a strong potential to enhance environmental protection efforts.[289]

This section discusses New York's use of "gatekeepers" to promote compliance. The author defines "gatekeepers" more broadly than the ELI to include any actors that governments enlist to supplement the traditional governmental regulatory compliance presence for the

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283 *See supra* notes 220-29 and accompanying text.

284 *See, e.g.*, 40 C.F.R. 122.41(l)(4) (1994) (containing requirement that permittees submit discharge monitoring reports (DMR)).

285 42 U.S.C. § 7414 (1988 & Supp. 1993) (authorizing the administrator to establish self-reporting requirements under the Clean Air Act).

286 *See* GAO COMMENTS, *supra* note 3, at 2-4.

287 ENVIRONMENTAL LAW INST., U.S. EPA, ENVIRONMENTAL GATEKEEPING IN STATE LAWS i (Jan. 1991) [hereinafter ENVIRONMENTAL GATEKEEPING].

288 *Id.*

289 *Id.* at ii.

purpose of assuring "that regulated entities properly perform under a regulatory scheme."[290]

1. "In-House" Gatekeepers

One approach that the DEC has used to heighten its presence at facilities involves requiring facilities to fund the DEC's hiring of additional staff who will supplement existing government staff.[291] The DEC calls such people "environmental monitor[s]."[292] The primary function of such monitors is to "examine, on an ongoing basis, the operation of [regulated] facilities."[293]

New York has three primary objectives in requiring facilities to fund monitors to oversee facility operations much more frequently than otherwise would be possible. First, the mere presence of monitors (i.e., the DEC staff) is intended to encourage compliance with the environmental laws.[294] Second, through their presence the DEC has "a much clearer picture of the facility's operations."[295] This "clearer picture" presumably facilitates the DEC's conducting any follow-up at a facility should the need arise to take action. Finally, monitors potentially serve as "ombudsmen" between the facility and the local community.[296]

The DEC has developed a formal policy for determining when to require regulated parties to fund environmental monitors for their facilities.[297] This formal policy articulates the DEC's belief that monitors are useful:

> Certain types of facilities, sites or regulated activities permitted by the Department have the potential to cause damage to the public health and/or the environment if not properly

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290 *Id.* at i. The ELI defines the term more narrowly to include only independent third parties, not government employees. *Id.*

291 *See, e.g.*, FOURTH ANNUAL REPORT, *supra* note 116, at 3-4, 15 (citing the imposition of monitor requirements on two companies, Anitec and Bristol-Myers, and on the City of New York's Housing Authority as terms of the consent orders).

292 *Id.* at 3.

293 SENATE REPORT, *supra* note 272, at 16; *see also* N.Y. ENVTL. CONSERV. LAW §§ 27-0917(8), 27-0920(2) (McKinney Supp. 1994) (authorizing on-site monitors for commercial hazardous waste management facilities that use land burial methods on the basis that such monitors would ensure proper facility management and foster good relations among the facility, the DEC, and the local community).

294 NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, ORGANIZATION AND DELEGATION MEMORANDUM NO. 92-10: ON SITE ENVIRONMENTAL MONITORS 1 (Feb. 20, 1992) [hereinafter O & D MEMORANDUM # 92-10] (describing the policy behind requiring environmental monitors on site).

295 THIRD ANNUAL REPORT, *supra* note 215, at 1.

296 *See* N.Y. ENVTL. CONSERV. LAW § 27-0920 (McKinney Supp. 1994).

297 *See* O & D MEMORANDUM #92-10, *supra* note 294.

> constructed, operated or implemented. To ensure proper construction, operation or implementation of these facilities, sites and regulated activities and to guard against potential harm, the DEC may require DEC on-site monitors on a full or part-time basis to conduct monitoring and inspections . . . beyond the routine or enhanced self-monitoring done by the facility, site or regulated activity pursuant to DEC permits.[298]

The DEC's policy lists, *inter alia*, the following four criteria for Department staff to consider in determining whether to require a monitor for a particular site:

1. There is a potential of uncontrolled release of pollutants into the environment;
2. The material being handled at the site . . . is particularly hazardous, due to its characteristics or quantity;
3. The site . . . is particularly environmentally sensitive . . .;
4. The permittee . . . has a compliance record which reveals an inability or unwillingness to comply with all environmental and health laws and regulations.[299]

In addition to providing its staff with specific criteria to use in determining whether to require monitors, the Department identifies particular types of facilities for which Department staff will seek monitors; other types of facilities for which Department staff should seek monitors; and further types of facilities for which Department staff may seek monitors.[300]

According to a recent New York State Senate Report, the DEC's use of its monitor program has increased significantly in recent

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[298] *See* O & D MEMORANDUM #92-10, *supra* note 294, at 1. According to DEC's Fourth Annual Enforcement Report, covering the 1992-1993 fiscal year, DEC's solid waste task force, focusing on violations of the solid waste laws on Long Island, had negotiated 47 consent orders by April 1993, with one form of sanction being a total payment of $431,000 to fund environmental monitors. FOURTH ANNUAL REPORT, *supra* note 116, at 18. The Report describes several of the 47 orders, including the amount each defendant was required to pay as a penalty, and the amount of money it was required to contribute to the DEC's monitor fund. *Id.* at 18-23.

California has developed a program requiring polluters to pay the cost of their regulation, *see* ELI/OTA REPORT, *supra* note 21, at 18-23, as has New Jersey, *see* Markell, *Internalizing the Costs of Pollution: Trends in US Environmental Policy*, *supra* note 10, at 44.

[299] O & D MEMORANDUM # 92-10, supra note 294, at 2.

[300] *Id.* at 3-4. Commercial facilities for the land burial of hazardous waste and commercial hazardous waste process incinerators are two types of facilities that the DEC lists in the first category. Land-based waste management facilities that dispose of significant quantities of industrial waste and waste landspreading facilities fall into the second category. Under the second category, facilities located in "sensitive environmental areas" may warrant monitors. *Id.*

years.[301] The Senate's report indicates that the DEC's use of on-site environmental monitors has nearly tripled since 1990, with the agency currently employing approximately 100 such monitors, and with an additional twelve monitors to be added during the 1994-1995 fiscal year.[302]

As might be expected, reactions to the DEC's environmental monitor program are mixed. The DEC has found that monitors produce the benefits anticipated, notably "increased compliance and better community relations."[303] Certain members of the business community have complained about a perceived lack of legal authority for the program, as well as what they perceive to be its excessive costs.[304] A recent court decision upholding the DEC's requirement of an on-site monitor[305] may moderate criticisms relating to legal authority. Nonetheless, the recent New York Senate report indicates that "[d]espite the court's ruling, it is apparent that questions still exist regarding the Department's authority for, and implementation of, increasingly broad use of on-site environmental monitors."[306]

In terms of the cost issue, the Senate report indicates that larger facilities "have as many as five or six monitors on premises" and that "[t]his costs each of these facilities as much as $500,000 annually."[307] The report cites testimony that the DEC's current management of the program creates the potential for overuse and a lack of accountability because it "contains no provision for caps on the number of monitors imposed, no ceiling on the costs a facility must sustain in order to fund on-site environmental monitors, and no provision for terminating the need for monitors at a site."[308] As would be expected based upon these criticisms, the Senate report recommends legislation to "ensure the parameters and costs of the monitor program are properly prescribed."[309] It concludes that "[w]ithout such provisions, the potential for overuse or misuse of the program exists."[310]

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301 SENATE REPORT, *supra* note 272, at 4.

302 *Id.* at 4, 16.

303 *Id.* at 18.

304 *Id.* at 4, 16-18 (noting that industry representatives also contend that the cost of monitors is burdensome and that there is a "lack of commensurate environmental benefits").

305 C.I.D. Landfill, Inc. v. New York State Dep't of Envtl. Conservation, 561 N.Y.S.2d 936 (App. Div. 1990), *appeal denied*, 575 N.E.2d 398 (N.Y. 1991).

306 SENATE REPORT, *supra* note 272, at 17.

307 *Id.* at 18.

308 *Id.* at 17-18.

309 *Id.* at 17.

310 *Id.* at 18.

Economists and others have long promoted the use of environmental laws to "internalize" the costs of pollution by mandating that regulated parties which require heightened oversight pay for the cost of such oversight.[311] This view has gained popularity in recent years.[312] Environmental monitors are one manifestation of this philosophy. In this particular manifestation, the regulated party must actually fund the regulatory agency's hiring of additional, dedicated staff whose sole function will be to routinely oversee the facility's operations.[313]

It is clear that the use of "environmental monitors" increases the level of governmental oversight at affected facilities. While New York has not yet compiled statistics or performed a detailed analysis of the value which monitors add in terms of improved compliance or enhanced community relations, the state's conclusion that the environmental monitor program has produced these positive results seems intuitively plausible.[314] New York's experience reveals that, in addition to the question of legal authority, the primary questions likely to be raised by the regulated community in particular (if other regulatory agencies seek to repeat this New York experiment) relate to the appropriate scope and cost of the program, and to whether it is administered fairly and consistently. Resource-constrained regulatory agencies tempted to follow New York's lead should seriously consider wrestling with, and addressing, questions of this sort at the outset. The DEC's environmental monitor policy provides a starting point for such an evaluation.[315]

2. "Out-House" Gatekeepers

A second strategy to compensate for governments' inability to oversee facility operations closely is to use outside experts to conduct such oversight.[316] The DEC already has experimented with several

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311 *See* Markell, *Internalizing the Costs of Pollution*, *supra* note 298, at 43.

312 *See generally* ELI/OTA REPORT, *supra* note 21, at 87-98 (offering examples of states, such as New Jersey, whose programs incorporate this approach).

313 *See, e.g.*, THIRD ANNUAL REPORT, *supra* note 215, at 1.

314 *See* SENATE REPORT, *supra* note 272, at 18.

315 *See generally* O & D MEMORANDUM # 92-10, *supra* note 294 (outlining the DEC policy on environmental monitors).

316 *See supra* text accompanying notes 284-87. This is more what the ELI had in mind when it discussed gatekeeping in its 1991 report, rather than agencies hiring additional staff to perform this gatekeeping function. ENVIRONMENTAL GATEKEEPING, *supra* note 287, at i (defining a gatekeeper as "an independent third party . . . who is enlisted by the government to assure that regulated entities properly perform under a regulatory scheme").

different variations on this theme.[317] In an approach that is in some ways similar to the environmental monitor concept discussed above[318] but used when necessary to ensure compliance in particularly egregious cases, the DEC has ordered violators to hire DEC-approved Certified Investigative Auditing Firms (CIAFs) to oversee and audit every aspect of the violator's operations on an ongoing basis.[319] The DEC required the hiring of a CIAF by the Orleans Sanitary Landfill in Orleans, New York after an investigation uncovered "systematic under-reporting of waste."[320] Among other duties, the CIAF reviews the ongoing operations of the facility and reviews the company's paperwork submissions to ensure accurate reporting.[321] As the Department's Second Annual Report on Enforcement noted in summarizing the role of the CIAF, "[the Department] required the hiring of a Certified Investigative Auditing Firm (CIAF) to serve a CPA-type role in overseeing and auditing the company's operations to ensure compliance with operating requirements."[322]

The DEC described the CIAF program positively in its Third Annual Enforcement Report:

> DEC's enforcement program has pioneered the use of innovative settlement conditions that together with penalties help to foster future compliance and minimize potential environmental degradation. . . . [One] approach[ ] involves the use of a Certified Investigative Auditing Firm ("CIAF"). CIAFs perform comprehensive audits of a company's environmental compliance. They ensure that the company is reporting accu-

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317 In addition to this use of outside professionals to oversee facility operations on an ongoing basis, the DEC has required facilities to conduct facility-wide audits of their operations, much like EPA has done. THIRD ANNUAL REPORT, *supra* note 215, at 1 (describing the use of certified investigative auditing firms); *see also* EPA, OPPE-FRL-3046-6, Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986) (indicating facility audits may be required as an enforcement tool).

ELI's Environmental Gatekeeping report identifies several gatekeeping initiatives that other states have adopted, including the following: (1) Massachusetts's use of "certified toxic use reduction planners" to review and certify toxic use reduction plans under the State's Toxic Use Reduction Act; and (2) California's use of hydrogeological assessments prepared by a "qualified person" required under its hazardous waste program. ENVIRONMENTAL GATEKEEPING, *supra* note 287, at 10, 25-6.

318 *See supra* notes 287-306 and accompanying text.

319 THIRD ANNUAL REPORT, supra note 215, at 1.

320 SECOND ANNUAL REPORT, supra note 225, at 2.

321 David L. Markell, *New York State Department of Environmental Conservation Enforcement Priorities and Strategies*, N.Y. ST. B. ASS'N ENVTL. L. SEC. J., May, 1992, at 8, 9.

322 SECOND ANNUAL REPORT, *supra* note 225, at 2.

> rately to the regulatory agency and monitor compliance with operating requirements.[323]

To date, the DEC has required a party to fund an independent third party to oversee facility operations on an ongoing basis in targeted situations, principally where the facility's compliance record reveals that such heightened oversight is needed.[324] The DEC appears to be pleased with its experience with this limited use of independent auditors.

The DEC's experiments with supplementary oversight personnel also raise a more fundamental question stemming from governments' clear inability to closely oversee facility operations with traditionally available government resources. While beyond the immediate scope of this Article, the governments need to investigate the systematic integration of third-party auditors into the environmental regulatory scheme as a tool both to promote compliance in an absolute sense and to add credibility to the compliance effort. The Securities and Exchange Commission's integration of Certified Public Accountants (CPAs) offers a possible model for such a regime.[325] Further investigation of such possibilities has the potential to pay positive dividends.

C. Opening Up the Process

Another experiment or innovation in the area of environmental enforcement that New York has initiated involves "opening up" the enforcement or compliance strategic planning process. One of the overriding objectives of enforcement is to ensure that the environmental laws are implemented consistently and fairly.[326] It is perhaps equally important that members of the regulated community, as well as concerned citizens, *perceive* that the government enforces the environmental laws fairly and consistently. Unfortunately,

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323 THIRD ANNUAL REPORT, *supra* note 215, at 1 (emphasis omitted) (highlighting the CIAF approach as an innovative enforcement mechanism).

324 *Id.* at 2 (giving an example of a situation in which a CIAF was required).

325 *See* ENVIRONMENTAL GATEKEEPING, *supra* note 287, at 5-9 (suggesting that environmental regulators look to the federal securities regime "for a time-tested model of the gatekeeper mechanism"). The criteria that the DEC has established to help it determine when in-house monitors are appropriate would be a valuable starting point for a more incremental move in this direction. O & D MEMORANDUM #92-10, supra note 294, at 2-3; *see also* note 293 and accompanying text.

326 *See* NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, ENFORCEMENT DIRECTIVES, CIVIL PENALTY 1 (Jun. 20, 1990) (stating that "[t]he primary purpose of the policy is to articulate the Department's policies for assessing and collecting penalties in a manner that will assist [the] DEC in efficiently and fairly deterring and punishing violations").

critics have evinced considerable skepticism concerning whether the government's enforcement efforts have been fair and consistent.[327] The final DEC innovation that I address in this Article focuses on this credibility issue.

Approximately three years ago, then DEC Commissioner Jorling took steps to improve the Department's credibility by opening up the compliance and enforcement planning process to members of the regulated community and citizen groups.[328] In 1991, the DEC established an Enforcement Advisory Committee (EAC).[329] According to the DEC, "[t]he purpose of the Committee is to provide a forum in which the DEC enforcement staff and representatives of New York's environmental groups and business community can discuss [the] DEC's enforcement strategies and their impact upon the regulated community."[330] The Department believes this step of opening the lines of communication has proven highly effective, noting "the Committee's activities have been applauded by all involved."[331]

The federal government and other state environmental regulatory agencies should consider creating such groups. Members of the regulated community and interested citizens are uniquely positioned to offer invaluable insights concerning both how enforcement or compliance needs should be prioritized and how best to structure implementation of enforcement and compliance strategies so that they are of maximum effect. To return full circle to a point made in the introduction of this Article and to again quote from the Amoco/EPA pollution prevention study:[332] "developing effective solutions to complex environmental management problems will take the best efforts of the many 'partners' in our society."[333]

V. Conclusion

The federal government is currently engaged in a mission to reinvent government in which it seeks, among other things, to

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327 Senate Report, *supra* note 272, at 3 (suggesting that the DEC employs "arbitrary enforcement policies").

328 Third Annual Report, *supra* note 215, at 5.

329 *Id.*

330 *Id.*

331 *Id.* In addition to the creation of the EAC, the DEC has begun to publish for public comment draft Enforcement Guidance Memoranda to improve the DEC's outreach to regulated parties and other members of the public. It also has provided public notice of significant consent orders and orders issued after hearing. *Id.*

332 *See supra* note 40 and accompanying text.

333 Amoco Study, *supra* note 3, at ii.

identify new ways of doing business that will "make government work better and cost less."[334] The nation's environmental regulatory scheme has been the focus of some of this "good government"-related work.[335] While the environmental laws have accomplished a great deal in terms of environmental protection,[336] a consensus seems to exist that revisiting basic features of our environmental regulatory scheme has the potential to be extremely worthwhile.[337]

The key point of this Article is that while many commentators remain preoccupied with environmental developments in Washington, D.C., an enormous amount of creative activity is occurring in our "laboratories of democracy."[338] As the federal government seeks to learn how best to reinvent itself to address the concerns discussed above and others, it will benefit enormously from carefully studying the experiments in environmental regulation that New York and other states have conducted and in which they are currently engaged.[339] This Article describes and analyzes several such experiments and identifies some of the other work that has been done to identify innovative state activity in the environmental arena. The federal government would be performing an important service for itself and others affected by our environmental laws by (1) making it a priority to encourage such state experiments;[340] (2) developing a systematic approach to evaluating carefully the experiments that states have undertaken; and (3) sharing the fruits of these experiments in

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334 NATIONAL PERFORMANCE REVIEW, *supra* note 1, at i.

335 *See generally* GAO COMMENTS, *supra* note 3; IMPROVING REGULATORY SYSTEMS, *supra* note 3; and REDUCING RISK, *supra* note 3.

336 *See* Reilly, *supra* note 3 at 352 (stating that the "experience of environmental improvement . . . is one of the great success stories of American life and history").

337 *See supra* notes 2-5 and accompanying text.

338 *See supra* notes 28-29 and accompanying text.

339 *See* sources cited *supra* note 28 (noting that states conduct 90% of the inspections and about 70% of the enforcement cases). The role of the states as laboratories currently is a matter of great interest in the welfare arena as well. As a recent article notes, one of the interesting challenges for the federal and state governments is to encourage experimentation in a way that will make it possible to determine what works and what does not. Too many variables, to quote a Brookings economist on the welfare issue, leaves us with "a laboratory in which all results are inconclusive." Eliza Newlin Carney, *Test Drive*, 50 NAT'L J., 2893, 2896 (1994).

340 This should also include an evaluation of instances in which the existing federal-state relationship impedes creativity at the state level. *See supra* note 17 and accompanying text.

terms of both what works and what does not work with federal and other state decision makers.[341]

[341] Further, there is little question, as several commentators have noted, that with systematic encouragement for review and communication of state innovations, successful initiatives "can ripple across the states." Thad L. Beyle, *The Governor as Innovator in the Federal System*, PUBLIUS: J. FEDERALISM, Summer 1988, at 131, 134; *see also* Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 897 (1969) (noting that states may respond to programs adopted in other states given sufficient interstate communications); Robert L. Savage, *Diffusion Research Traditions and the Spread of Policy Innovations in a Federal System*, PUBLIUS: J. FEDERALISM, Fall 1985, at 1 (noting that diffusion research could "significantly add to our knowledge of . . . [how] decisions are made in the federal system").