



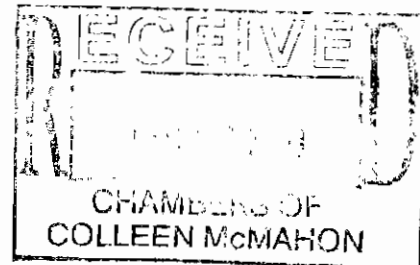
U.S. Department of Justice

United States Attorney
Southern District of New York

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December 23, 2009



Hon. Colleen McMahon
United States District Court Judge
United States District Court
for the Southern District of New York
500 Pearl Street
New York, New York 10007

docket as letter 1/5/10

Re: United States v. The New York City Department of
Environmental Protection 01 Cr. 0836 (CM)

Dear Judge McMahon:

As reflected in the Court's "Notice of Expiration of Probation," dated December 22, 2009, the New York City Department of Environmental Protection's term of probation is scheduled to end on December 31, 2009. The record in this case, including the twenty-fourth report of the Court-appointed Monitor (the "Monitor's Report"), makes plain that the Department ("DEP") has in many respects succeeded in developing and implementing an effective compliance program, as required by the Judgment in this case. At the same time, the Monitor's Report describes troubling, persistent weaknesses in DEP's program, most notably in the areas of contract management and consent decree compliance, and concerns relating to infrastructure maintenance. Despite those weaknesses and concerns, in light of the progress made and because of commitments made to this Office by and on behalf of DEP relating to work to be done in the future, we are not seeking an extension of probation. The purpose of this letter is to advise the Court of that decision and of the reasons for it, which are explained below.

A. Background

As this Court is aware, DEP plead guilty to two environmental crimes in August of 2001. Those crimes were a violation of the Clean Water Act, relating to the discharge of

mercury-contaminated water into a tributary of a reservoir in upstate New York which feeds the New York City water system, and a violation of the Toxic Substances Control Act, relating to the unauthorized use of flow-controlling equipment situated directly above the drinking water and with which DEP employees came into contact, that was contaminated with polychlorinated biphenyls ("PCBs") in a Westchester County water supply facility. The investigation leading to the filing of those charges revealed not only that DEP had violated applicable environmental laws for decades, but also that DEP employees had been working without appropriate protective equipment in facilities contaminated with hazardous substances. More fundamentally, the investigation revealed that DEP's violations had occurred as a result, largely, of a culture that failed to place a priority on compliance, failed to educate its employees about applicable laws, and failed to make the capital improvements necessary to ensure compliance. In addition, the investigation revealed a climate of fear and intimidation that discouraged employees from taking action to ensure compliance.

In accordance with a plea agreement between the parties, DEP was sentenced, most importantly, to a term of probation under the oversight of a Court-appointed Monitor, A. Patrick Nucciarone, Esq., and ordered to develop and implement an effective program to prevent and detect violations of laws, regulations, administrative orders and requirements, permits, and consent decrees protecting or restoring the environment and/or the health and safety of its employees. Among the measures required by DEP's probation were the establishment of a permanent environmental compliance office and a permanent educational program relating to environmental laws and worker health and safety laws. In addition, DEP was required to take steps to prevent retaliation against employees for reporting compliance issues. Initially, both the Monitor's oversight and the mandated compliance program were restricted to DEP's water supply operations. In early 2006, DEP admitted to a violation of probation relating to its failure to maintain the emergency electrical system at one of its in-City sewage treatment plants, as required by its Clean Water Act permit. DEP was re-sentenced to an additional term of probation, subsequently extended to December 31, 2009. DEP's obligation to develop and implement an effective compliance program was extended to include the entire agency, and the Monitor's oversight jurisdiction was expanded to include DEP's wastewater treatment operations. In addition, for reasons discussed below, DEP was specifically required to develop and implement procedures to ensure that contracts necessary to correct or prevent violations of law are awarded promptly.

The conditions of probation outlined above were intended to change DEP's culture and institute permanent and reliable systems that would function to ensure future compliance.

B. The Development and Implementation of DEP's Compliance Program

The development and implementation of DEP's compliance program has been a massive undertaking, the scope and magnitude of which, it is fair to say, have exceeded both parties' understanding of what was required when the process began. An initial slow start led to active intervention by the Court, including the issuance of numerous orders based on recommendations by the Monitor for the accomplishment of tasks both broad and narrow. That process laid the groundwork for the program that exists today and a catalogue of substantial accomplishments, including the following:

1. the establishment and staffing of a compliance office;
2. the drafting and implementation of scores of standard operating procedures designed to ensure compliance with applicable laws and regulations;
3. the establishment of a system of facility audits, designed to identify instances of non-compliance with applicable environmental and worker health and safety laws and regulations;
4. the establishment of a system of tracking and accountability designed to ensure correction of violations identified during facility audits;
5. the correction of approximately 45,000 deficiencies identified during facility audits;
6. thousands of modifications to DEP facilities to achieve compliance with applicable legal requirements;
7. the establishment of a tracking system relating to permit requirements; the obtaining and issuance of permits governing many previously unpermitted discharges and the discontinuation of other discharges;
8. the adoption of measures to enhance adherence to EPA and OSHA rules relating to the bulk storage of chlorine;
9. extensive training of DEP's workforce on environmental and worker health and safety laws;

10. training of DEP management, including training designed to prevent retaliation against employees who voice concerns about environmental or health and safety compliance issues;

11. the establishment of a hotline for reporting environmental and health and safety violations and concerns, and the establishment of a mechanism for investigation and follow-up of calls to the hotline;

12. an increase in the number of violations of environmental and worker health and safety rules on the docket of DEP's disciplinary office;

13. the establishment of an awards program to recognize environmental compliance accomplishments;

14. the development and implementation of a program to assess DEP facilities for hazardous substances including mercury, PCBs, lead and asbestos and the correction of hazardous conditions;

15. the identification and correction of certain deficiencies in laboratory procedures; and

16. the establishment of an executive-level environmental, health and safety oversight committee that meets monthly to track progress and discuss needed improvements.

Notwithstanding these significant accomplishments, as the Monitor's Report illustrates, there are ongoing issues and concerns relating to a number of the program components listed above.¹ Nonetheless, as the Monitor's Report concludes, with the exception of certain program components discussed in the Monitor's Report and addressed below, DEP "appears to have in place the components of an effective EH&S [environmental and worker health and safety] regulatory compliance program." Monitor's Report, p. 25. Particularly in light of the size of the agency, the complexity of its infrastructure and operations,

¹ For example, the program to evaluate DEP wastewater treatment facilities for hazardous substances and remediate where necessary has been stalled for some time while its scope is re-assessed. Particularly in light of the facts and circumstances that led to this criminal prosecution in the first place, described above, getting this program moving again should be a priority.

and its history, this is truly a remarkable and significant achievement.

Moreover, given some of the same factors identified above - namely, the size of the agency and the complexity of its infrastructure and operations - perfection would be an unrealistic goal. Mishaps and even misconduct will no doubt occur in the future, in some instances resulting in violations of legal requirements. The goal of probation was not perfection, but the establishment of programs and systems to ensure compliance through the prevention and correction of non-compliance. For that reason, the Government reviewed the Monitor's Report not with the object of identifying particular instances of non-compliance but with a focus on assessing whether systemic and/or cultural weaknesses that seem likely to result in future non-compliance remain. From that perspective, there are areas of ongoing concern, discussed at some length in the Monitor's Report and addressed below.

As noted above, DEP was required as a specific condition of probation to develop and implement procedures to ensure that contracts necessary to correct or prevent violations of law are awarded promptly. The record in this case, including the Government's memoranda filed in connection with the initial sentencing proceeding in 2001 and the re-sentencing in 2006, explains the necessity of this program component. Time and again, DEP's failure to procure contracts in a timely manner has resulted in violations of law and created unsafe conditions for its workforce. This condition of probation was intended to prevent that pattern from being replicated in the future. The facts set forth in the Monitor's Report raise substantial doubt about whether DEP has achieved compliance with this condition of its probation. Similarly, the discussion in the Monitor's Report about the lack of a clear management system to ensure compliance with the requirements of consent decrees and administrative orders raises substantial concerns about whether DEP has developed and implemented an effective program component relating to such decrees and orders, as required by its probation. Other areas of concern noted by the Monitor include inadequate staffing and infrastructure maintenance, insufficient discipline for dishonesty in connection with internal inquiries, and cultural deficiencies in the Distribution Water Quality Operations laboratory. Each of these areas of concern - contract procedures, management of compliance with decrees and orders, resource and maintenance issues, integrity controls, and lingering cultural problems - could, potentially, be the source of future non-compliance.

In addition to the foregoing concerns, discussed in the Monitor's Report, there is another concern that emerges from the record in this case. All too often, problems and deficiencies have been identified not by DEP, but by others: the Monitor, a regulatory agency, or this Office. Although there has been improvement in this regard, lack of initiative within DEP to identify and correct weaknesses remains a concern.²

This Office has carefully considered whether these remaining concerns necessitate an extension of probation to ensure full compliance with its conditions and achievement of its goals. As part of that process, we have met with DEP counsel and with both the Acting Commissioner of DEP and his recently-appointed replacement, due to assume office on January 1, 2010. We discussed the issues noted above. DEP has committed to placing a priority on the efficient operation of its contracting process, and to focus on the remaining issues. In addition, DEP has committed to continuing to place a high priority on its overall compliance program going forward. We are persuaded that these commitments were made with sincerity and conviction, and with an understanding of the adverse consequences that would result from a failure to continue and complete the sweeping reforms that have enabled the agency to make such meaningful progress. We have relied on these commitments in determining this Office's position with respect to the termination of probation.

In light of the record of substantial achievement outlined above, and in light of DEP's commitment to addressing outstanding issues and prioritizing compliance in the future, we concluded that the better course is for this Office not to seek an extension of probation.

Respectfully submitted,

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² One example of this may be found in the Monitor's Report, p. 15, in the discussion of the delay in renewal of a contract and DEP's ignorance of that delay until a status report was requested by the Monitor.

cc: Paul Shechtman, Esq.
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Victor Jeffrey