



Bar News - September 17, 2014

Environmental, Telecomm, Utilities & Energy Law: Environmental Enforcement: This Large Risk Still Lurks

By: **George Dana Bisbee**

New Hampshire attorneys who represent companies regulated under state and federal environmental statutes or anyone undertaking activities requiring permits under those laws need to remember two things. First, environmental enforcement still happens, and it can happen in a big way. And second, there are agency policies and procedures that offer ways to avoid or mitigate the severity of enforcement sanctions.

Any client facing the possibility of a significant state enforcement action must immediately appreciate – and take to heart – that environmental statutes authorize the state to assess enormous penalties (both civil and criminal) against violators.

The number of inspections conducted by the NH Department of Environmental Services may have leveled off at a lesser frequency than in years past, due principally to resource restrictions. But the possibility of your client facing an inspection, investigation and subsequent enforcement action is real, and the potential sanctions remain as significant as ever. Remember, just for starters, under the state's hazardous waste management statute, the Attorney General's Office may seek civil penalties in the amount of \$50,000 per day (RSA 147-A:17,I). Violations of the air permitting requirements are generally subject to a civil penalty of \$25,000 per day (RSA 125-C:15,II), and wetlands violations at \$10,000 per day (RSA 482-A:14,III). Especially considering that many violations are penalized as multi-day penalties, the total amount sought by the state in an enforcement action can quickly rise to many hundreds of thousands of dollars.

In conjunction with DES, the AG's Office continues to prosecute civil penalty actions under this enforcement authority, in addition to the many smaller (but still substantial) administrative fines pursued by DES on its own. The US Environmental Protection Agency is not as likely to pursue enforcement actions in New Hampshire, but that threat – with even larger penalties at stake – is still present.

Moreover, non-governmental organizations like the Conservation Law Foundation are now actively pursuing enforcement actions in New Hampshire under the "citizen suit" provisions of the Clean Water Act. (Under 33 USC §1365, a non-governmental party that establishes standing may bring an action in federal court to enjoin violations of the Act and to seek civil penalties payable to the US Treasury.) Also, in case these civil sanctions weren't enough, most of the significant environmental regulatory enabling statutes also subject violators in the right circumstances to criminal sanctions, including felonies.

The best way to avoid an enforcement action – and Rule #1 for our clients – is, of course, to maintain full compliance with regulatory requirements. Periodic auditing of regulatory compliance is one way of promoting compliance. As such, a self-reported violation discovered is considered by EPA and DES as a potentially substantial mitigating factor in any enforcement case.

See EPA's self-audit policy, [Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations](#), and DES's [Compliance Assurance Response Policy](#).

In the face of a DES inspection, most companies opt to allow DES to conduct the inspection without insisting on a warrant or delaying it until the company's legal counsel or other advisors can be contacted.

DES will always conduct an exit interview after an inspection, and the company should take careful note of – and question – DES's initial observations. If the state is going to bring an enforcement action, DES will in almost all cases have first issued Letters of Deficiency and Notices of Violation, including requests for additional information, concerning alleged violations stemming from an inspection.

It is extremely important for the company to respond in a timely, complete and constructive way to any follow-up questions from the agency. (A DES request for information on the possible economic benefit realized from what the state alleges as violations is an obvious tip-off that a significant enforcement action is in the works.) If legal counsel has not yet been brought into the matter, this is a crucial time for the company to seek advice from a seasoned practitioner.

DES and the AG's Office are deliberate in their consideration of enforcement cases, and it can take a long time for the state's enforcement process to unfold. It is not surprising for a company to hear many months after an

Online Court Bonds

Broad Range of Bonds

- Probate
- Court Bonds
- Last Instrument

We Offer

- 24-Hour Turnaround Time
- Competitive Rates
- Expert Underwriting

Anytime. Anywhere.

• Click to apply online or call 877-553-6376

NHBA Insurance Agency, Inc.

NEED A LAWYER?

Click here for a Referral

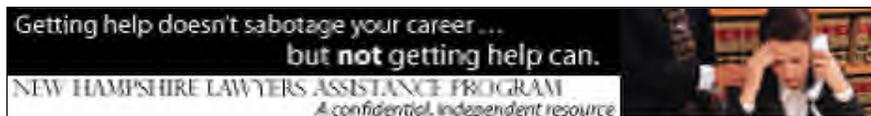
inspection (and, not uncommonly, more than a year later) that DES is seeking administrative fines, or the Attorney General's Office is proposing to file a complaint for civil penalties in Superior Court.

Rather than simply wait for the enforcement shoe to drop, the company should continue communicating and working with DES as the agency is formulating its enforcement options. During this deliberative phase of the enforcement process, it is a mistake to miss an important opportunity to address the state's allegations and intentions, and to present a full picture of the company's compliance record and actions.

Dana Bisbee chairs Devine Millimet's Environmental Practice Group. He has a broad practice in environmental and land use permitting, energy facility siting, compliance and enforcement assistance, and government relations. He is a former deputy attorney general, and assistant and acting commissioner of DES.



Dana Bisbee



[Home](#) | [About the Bar](#) | [For Members](#) | [For the Public](#) | [Legal Links](#) | [Publications](#) | [Online Store](#)
[Lawyer Referral Service](#) | [Law-Related Education](#) | [NHBA•CLE](#) | [NHBA Insurance Agency](#) | [NHMCLE](#)
[Search](#) | [Calendar](#)

New Hampshire Bar Association
2 Pillsbury Street, Suite 300, Concord NH 03301
phone: (603) 224-6942 fax: (603) 224-2910
email: NHBAinfo@nhbar.org
© NH Bar Association [Disclaimer](#)