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Gubernatorial Office of Regulatory Reform and the Environmental Regulated Community

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Thank you very much, I am honored to be here. First, I am by design in the Governor's cabinet a generalist, not a specialist, and in the course of my remarks I think you will understand what I mean by that in real terms. Second, I brought with me some books which I would recommend to all of you if you have any interest in the subject of regulatory reform generally. They range from what was a very popular best seller about a year and a half ago, "The Death of Common Sense"[1] written by a lawyer from New York City by the name of Phil Howard. The second is a book on risk assessment called "Breaking the Vicious Circle"[2] written at the time by a circuit court judge, Steven Breyer, now a Clinton appointee to the Supreme Court. The third is probably a less well known book called "Power without Responsibility,"[3]

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* As Director of the Governor's Office of Regulatory Reform, Mr. King serves as one of Governor Pataki's principle architects for designing state policies that promote private-sector job growth in New York. Part of the Executive Chamber, the Office of Regulatory Reform has broad powers to review regulations, current and proposed, that hamper the growth of business and jobs in New York State. The Office scrutinizes mandates which often result in higher local property taxes. The Office has established new standards for all agencies of state government involving the ways they regulate activity, whether it is for business, local governments, or nonprofit organizations.

Mr. King assumed his post in January of 1995, stepping down as Monroe County Executive. There, he led a number of statewide efforts to eliminate unfunded state mandates and reform the state welfare system. Before that, Mr. King served as a state Assemblyman from the Rochester area and became known as an outspoken advocate for lower taxes and less regulation. Mr. King is a graduate of Vanderbilt University School of Law.

1. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994).
2. *See* STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE (1993).
3. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).

written by David Schoenbrod. David is a law professor in New York City who was very active in the environmental movement in the early 1970s and was one of the authors of the original Clean Air Act. All three, from obviously different perspectives and different political points of origin, reach fairly common conclusions about the need for reforming the way we exercise this rather enormous government power granted to regulators by both the federal and state legislatures.

My office, called the Office of Regulatory Reform (Office), is really constructed under the auspices of Executive Order Number 20, issued by the Governor in 1995. What the order did, in addition to creating the Office, is establish a new paradigm not previously in existence for the executive branch of the government, to formulate its plans to exercise regulatory power and to meet specific criteria that are set forth in the order. The order does nothing to interfere with the established statutory requirements in the State Administrative Procedure Act.[4]

Let me just give you a quick rundown of how that works. Typically the legislature in its wisdom makes certain statements of public policy contained in statutes – we will have clean air or clean water or preserve certain species of animals by putting them on an endangered species list. Apart from setting those relatively broad parameters of policy, the legislature typically delegates to an agency of the government responsibilities to formulate the rules to actually implement the policies. So it is the regulations that actually become the law, not whatever the legislature said in some lofty statute that received a lot of public attention.

To that extent, the State Administrative Procedure Act says that an agency can go off into the bowels of one of its buildings and spend as much time as it wants formulating whatever it thinks is the right way to fulfill that legislative mandate. When it has its proposal in place, it is obligated to publish that in the state register, which is a legal document of the state. It is also required to allow some public comment.

4. N.Y.A.P.A Ch. 82 § 100 et seq. (1995).

Now, depending on the nature of the proposal and also the nature of the agency, that comment could be a thirty day, sixty day, or an even longer period of time, and the comment could be limited to just written comments or it could require public hearings. In any event, once those comments are received and the public hearing process has been completed, the agency is then free to either adopt the proposal as originally made or amend it in some way. However, if the amendments are *substantial* in response to the public comment, you may have to actually go through a second or third public comment period until you are satisfied that there has been sufficient input and notice of what the agency intends to do. Then the agency simply issues a notice of adoption and that regulatory proposal becomes the law.

What the Governor has done in Executive Order 20 is that he has interposed our Office and the criteria that our Office applies to the exercise of this authority prior to the point of time where an agency publishes its proposal in the state register. I will give you an example of what we do, something that we are working on right now. The federal government passed a law a number of years ago generally known as the Great Lakes Initiative.[5] This is an effort to reduce certain types of point source pollutants into the Great Lakes basin and it affects thirteen or fourteen states that border on the Great Lakes. The part of the New York State DEC that is working on the state's obligation to do a rulemaking in support of the federal statute has sat down with our staff and said, "Look, here are the things that we need to regulate and here are the issues that we need to address." What we do is take and implement the criteria in the Executive Order. I will share some of them with you. We are responsible enough to be sure that at appropriate points in the regulatory process and for certain types of regulations, a cost-benefit analysis is taken. There needs to be a relationship between the costs to the regulated community and the benefits derived, for example, the dollar value if you can apply that or some other value. There also has to be, in certain instances, a risk assessment.

5. *See* 40 C.F.R. §§ 122, 123, 131, 132.

Are we dealing with risks that are either hypothetical or anecdotal or are these risks worthy of the kind of response that is contained in the regulatory proposal? Are the risk assessment and the cost-benefit analysis that have been undertaken recognized as valid ways to do these measurements? In other words, we have the right to demand a peer review of the kind of analysis that has been undertaken.

To give you an example, I have one such review that was a study done of the cost-benefit analysis undertaken by the United States Environmental Protection Agency for the Great Lakes Initiative which is very critical, by the way, of its assessment. The point is that we have that ability as well. If the state government is going to impose standards that are of greater regulatory impact than the federal law requires, which has been a long tradition of New York's, the Executive Order says that before an agency can do so, it needs to be able to demonstrate what makes us so unique or what other factors would justify this greater exercise of regulatory authority that is required. If the agency can do that, we allow it to proceed. If the agency cannot, then we have the capacity to say, "No, you can only regulate up to the standard set in the federal statute."

In any event, we use the criteria in the Executive Order to evaluate the regulatory proposal. Assuming that the criteria has been fulfilled and that the data collected supports the approach in the regulation proposed, we recommend and approve it going forward, being published in the state's register and then being subject to all of the provisions in the state Administrative Procedure Act.[6] If, however, the homework has not been done, we send it back and say, "Go do your homework and develop the data that will support what you have been doing." If the data does not support the proposal being undertaken in the proposed regulation, we have the authority to say to the agency, "No, we are not going to let you proceed in this way." On occasion, we have had disagreements and when those disagreements arise, if we cannot re-

6. *See supra* note 4.

solve them on our own, we take them to the boss and he resolves them.

The important thing from this process, in my view, is that we are more routinely developing data that allows the policymakers, in this case the legislature, the governor, and even the commissioner, to make good, sound exercises of regulatory judgments. We believe that through this process we are getting better results and better prices for the people of our state.

Thank you.