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**THE THIRTEENTH ANNUAL
GILBERT AND SARAH KERLIN LECTURE**

**The Executive and the Environment:
A Look at the Last Five Governors in New York**

PATRICIA E. SALKIN*

I. INTRODUCTION

Gubernatorial leadership is the single most important indicator of how sustainable New York will be when it comes to issues of environmental protection and conservation. In preparing for the Kerlin Lecture, one of the things that struck me is that New York governors for at least the last thirty years have consistently identified the critical economic, social, and environmental challenges facing this state. Is it simply political rhetoric to decry that the state is in terrible fiscal shape, that programs need to be funded to help those in need, and that we must pay attention to stewarding the environment today to secure tomorrow? The fact remains that these are the three major legs of the sustainability stool and the measure of gubernatorial leadership is not in the lofty goals that were set forth, but rather in what was actually accomplished. This Kerlin Lecture focuses on the broader theme of gubernatorial leadership and sustainability rather than per-

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haps the narrower reference to the environment, to reflect what in my opinion has enabled the global community to address core environmental challenges by forming alliances with other interest groups that might not have necessarily believed there was a logical affinity to strengthening environmental protections.

A. Background

Having returned just three weeks ago from an international conference on national and state/nation spatial planning — what we refer to in the United States as land use planning — it was clear from listening to the presentations from Ireland, the Netherlands, Denmark, England, and France; and from the states of Oregon, Delaware, New Jersey, California, and Maryland — what brings us together on sustainability is a common goal formed from a sincere belief that we have a shared responsibility to protect our environment so that we can plan for the future. There are many ways to accomplish movement towards progress on the underlying principles of sustainability, and a key consideration is to remember that there is not one necessarily right way to proceed. We live in a political society with many stakeholder interests at play. Perhaps Governor Mario Cuomo summed it up well in the opening of his very first Annual Message to the Legislature when he stated, “[t]he real challenge before us is to balance our books the way a family would — without abandoning the weak, without sacrificing the future of our young, and without destroying the environment that supports us.”¹

We must consider how their work, and all of our work together, can be more meaningful through the lens of understanding the political environment within which reform, protection, and leadership must emerge. This is critical to our future success in continual movement towards sustainability. Where the power lies at different levels of government, and how to tap into that power to shape and advance an agenda, is the key. Focusing on New York, we must consider the roles of the different levels of the government and the legal power vested in each to determine which level of government is best suited to move us farther in the direction of realizing a more sustainable tomorrow. Leadership begins at the

1. See MARIO M. CUOMO, Governor of N.Y., *Annual Message to the Legislature (Jan. 5, 1983)*, in PUBLIC PAPERS OF GOVERNOR CUOMO 17 (1983).

top, thus the focus should be on governors. Governors have unique powers and authority that other branches of government do not possess, and because there is only one governor to laud or blame for successes and unrealized potential — as compared to 211 members² of the New York State Legislature,³ and seven judges on the Court of Appeals. Columbia law professor and leading environmental scholar Professor Michael Gerrard recently wrote:

New York began the modern era as a vigorous and innovative leader in environmental protection measures, but since the early 1990s, the paralyzing partisanship in the legislature and inconsistent leadership in the governor's office have moved the state considerably further back in the national pack on many environmental issues.⁴

New Yorkers have always been interested in environmentalism. For example, in 1698 the Earl of Belmont restricted the cutting of certain trees in New Amsterdam,⁵ and in 1868 the state's first environmental agency was established — the Fisheries Commission — tasked with studying the impact of logging on fish and water.⁶ In fact, by 1920 there were almost two dozen commissions in New York focusing on some aspect of the environment, leading to continuing reorganization efforts with the creation of the Conservation Department in 1927,⁷ and ultimately the establishment of the modern Department of Environmental Conservation in 1970 by Governor Nelson Rockefeller.⁸

2. Elizabeth Kolbert, *Legislature Is in Session — All 2 of Them*, N.Y. TIMES, June 12, 1997, <http://www.nytimes.com/1997/06/12/nyregion/legislature-is-in-session-all-2-of-them.html>.

3. See Michael Gerrard & Claire Woods, *The Environment in New York State*, in OXFORD HANDBOOK OF NEW YORK STATE GOVERNMENT AND POLITICS 792, 796 (Gerald Benjamin ed., 2012) (commenting, “[t]he environmental movement in New York remains vigorous . . . but it is perpetually frustrated over the failure of the legislature to enact significant new environmental laws”).

4. *Id.* at 823.

5. *See id.*

6. *Id.* at 795.

7. *Id.*

8. *Id.* (noting that “[i]n addition to absorbing the functions of the Conservation Department (with the exception of the Division of Parks), the DEC assumed the duties of the Water Resources Commission and the Air Pollution Control Board, took over responsibility for water pollution control and solid waste man-

Gubernatorial leadership is the single most important indicator of how sustainable New York will be when it comes to issues of environmental protection and conservation. For the last thirty years, New York governors have consistently identified the critical economic social and environmental challenges facing the state. This is reflected in every single State of the State Annual Message to the Legislature. However, the true measure of gubernatorial leadership is not in the lofty goals that were set forth but rather in what was actually accomplished.

In his address at the Eighth Annual Kerlin Lecture in 2007, John Cahill, former secretary and chief of staff to Governor George Pataki, who also served as general counsel and then commissioner to the New York State Department of Environmental Conservation, noted up front in his talk that environmental law and policy in New York is really made by the executive through the exercise of executive orders, control of regulatory agencies under the domain of the governor, and the use by the governor of market powers to effect change.⁹ By way of example, he explained the four years it took for the state legislature to come to an agreement on a superfund law, yet how the Governor swiftly used his executive powers to advance an environmental agenda that included a bond act, a watershed agreement, the reduction of energy usage by state agencies, as well as an agreement with the governors of seven states to create a northeast cap-and-trade program.¹⁰ In fact, Mr. Cahill went so far as to assert that in the modern structure of executive and legislative power — where the power of the legislature is used more often to stop the agenda of the executive — “governors and executives need to find a way to go around the legislature to keep the ball rolling on important issues.”¹¹ To put his into perspective, in 2011 there was a record breaking \$220,000,000 spent on lobbying New York State government officials — most of this targeted at legislators to either advance or, more likely, to stop certain legislative items.

agement from the Department of Health, and absorbed the pesticide control functions of the Department of Agriculture and Markets”).

9. See generally John P. Cahill, *Environmental Law in New York State: The Past as a Prologue to the Future*, 25 PACE ENVTL. L. REV. 441 (2008).

10. *Id.* at 444, 446.

11. *Id.* at 448.

Among other things, governors possess the power to issue executive orders. Governors can use this authority to accomplish many things, including creating task forces and study commissions. Executive orders may also direct state agencies to take certain actions to carry out an agenda. The governor gets to appoint the commissioners and the general counsel and other top positions at agencies that can impact sustainability such as: the Department of Environmental Conservation, the Office of Parks Recreation and Historic Preservation, the Department of State, Empire State Development Corporation, the Department of Transportation, the Department of Health, the Public Service Commission, the New York State Energy Research and Development Authority, and the Environmental Facilities Corporation. There are many different state agencies that form pieces in the puzzle to environmental control, regulation, and policy in New York State, and these are all inextricably intertwined with the Governor's Office.

B. Constitutional and Statutory Powers of the Governor

To understand the powers of the executive and legislative branches of government, we have to start with the New York State Constitution. Article IV vests the executive power in the governor,¹² and charges the governor with the responsibility to “communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient.”¹³ The governor has the constitutional power to call both houses of the legislature into special session where the governor defines the agenda; following the actions of the legislature, the governor is required to “expedite all such measures as may be resolved upon by the legislature[;]”¹⁴ and although there is an executive veto power over bills passed by the legislature, that veto may be overridden by a two-thirds vote of the members of each house.¹⁵

12. N.Y. CONST. art. IV, § 1.

13. N.Y. CONST. art. IV, § 3.

14. *Id.*

15. N.Y. CONST. art. IV, § 7.

While the executive power under the New York Constitution has been challenged in court and has evolved over time,¹⁶ the governor has budgetary power, has the authority under the executive law to organize and reorganize the executive department,¹⁷ and may issue executive orders to respond to emergencies (which often encompass significant environmental challenges).¹⁸ The next section examines the environmental agenda and key outcomes of the last five New York governors.

II. GOVERNOR MARIO M. CUOMO: 1983-1994

In his first Annual Message to the Legislature more than thirty years ago in 1983, expounding on the beauty of the natural environment in New York, Governor Mario Cuomo commented that “[t]he protection and management of the environment are essential to the [s]tate’s economic health and our own physical well-being,”¹⁹ but that “[t]he commitment to the environment so visible in New York is not necessarily shared by either the federal government or by other states.”²⁰ He noted that, “[d]uring the last decade, New Yorkers learned that their economic future was closely tied to the cost and availability of energy,”²¹ and stated that “[e]nergy conservation will continue to form the cornerstone of state energy policy,” and that he would focus on containing energy costs.²² Among other things, he announced an energy agenda that would include ensuring that the Public Service Commission (PSC) assure that the utilities deliver stable energy at a reasonable cost; and funding to finance programs at the Energy Research and Development Authority for a then new focus on biomass research and development.²³ Governor Cuomo also announced his intention to address and fund the proper handling

16. *See, e.g.*, *Bourquin v. Cuomo*, 85 N.Y.2d 781 (1995); *Oneida Cnty. v. Berle*, 49 N.Y.2d 515 (1980); *Rapp v. Carey*, 44 N.Y.2d 157 (1978).

17. *State Government Structure*, N.Y. STATE DIV. OF THE BUDGET, <http://www.budget.ny.gov/citizen/structure/structure.html> (last visited Apr. 24, 2014).

18. N.Y. EXEC. LAW § 28 (McKinney 2014).

19. CUOMO, *supra* note 1, at 54.

20. *Id.*

21. *Id.* at 31-32.

22. *Id.* at 32.

23. *Id.* at 32-33.

and disposal of hazardous waste, the clean-up of hazardous waste sites, and the enforcement of hazardous waste laws against violators.²⁴ He reaffirmed his commitment to the continued implementation of the State Environmental Quality Review Act,²⁵ the State Hazardous Waste Superfund Act,²⁶ and the Bottle Bill,²⁷ which had been enacted the year before.²⁸ Lastly, in his first term, Governor Cuomo announced his natural resources agenda, which included protecting the state's water resources through the development of a groundwater protection plan and restrictions on the discharge of toxic wastes into waterways; protecting air quality through control and reduction of sources of acid rain; and creating a Natural Resources Fund.²⁹

Governor Mario Cuomo was not initially embraced as an environmental governor.³⁰ In fact, he started his second term with efforts to improve his environmental record.³¹ Among his successes were approval of the largest environmental bond act in history (approved by the voters by a 2-1 margin, \$1.2 billion for toxic waste clean-up and \$250 million for land acquisition)³² and a solid waste disposal plan.

III. GOVERNOR GEORGE E. PATAKI: 1995-2006

Some believed early on that when Governor Pataki was running for office, he was not going to be a friend of the environment. That was far from true; in fact, he was probably among the best

24. *Id.* at 54-55. The Governor also announced he would establish a State Hazardous Waste Siting Task Force charged with, among other things, "recommending a [s]tate policy and process for developing any needed treatment capacity." CUOMO, *supra* note 1, at 54-55.

25. *Id.* at 54.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 55-56.

30. Elizabeth Kolbert, *Cuomo and the Environment: After Criticism, Governor Seeks to Improve Record on Protection of Natural Resources*, N.Y. Times, Feb. 17, 1987, <http://www.nytimes.com/1987/02/17/nyregion/cuomo-environment-after-criticism-governor-seeks-improve-record-protection.html> (stating, "[p]rivately, some say the administration recognized the need for, as one advisor put it, 'some remedial work' on Mr. Cuomo's environmental record").

31. *Id.*

32. *Id.*

governors New York has had when it comes to environmental protection and sustainability issues. In 2006, the New York Times noted, immediately after he had left office, that:

[m]ost politicians are fortunate they are remembered for one good thing. In the case of Governor George Pataki, that will almost surely be his work for the environment. Mr. Pataki has earned his badge as an environmental governor by protecting wilderness, adding riverside parks, creating coalitions for cleaner air and alternative fuels, and, most recently, announcing the fulfillment of his pledge to add one million acres of land to the public estate.³³

It is fair to conclude that Governor Pataki wanted his legacy to reflect his reputation as the environmental governor. His current biography reads in part:

Widely known for his protection of over one million acres of open space, the most in New York State's history, Governor Pataki balanced his pro-business philosophy with award-winning, cutting-edge policies in the renewable energy and environmental fields. He implemented the first integrated strategy for creating clean, renewable transportation networks utilizing alternative fuels, including tax and other incentives for both consumers and manufacturers, grants for alternative fuel distribution systems, and the exemption of renewable fuels from all state and local taxes.

Governor Pataki also established New York's leading brownfield program, spurring development in cities across the state by creating a \$200 million fund to support the redevelopment of contaminated sites and instituting a \$135 million tax credit program to encourage public private investment in brownfields. He instituted the nation's green buildings tax credit incentive program, which led to the first building of the first high-rise green office building in the world, the first high-rise green residential building in the United States[,] and a host of other green projects currently under development. Most notably, through his determined leadership Governor Pataki ensured that the redeveloped World

33. Editorial, *The George Pataki Era*, N.Y. TIMES, Dec. 31, 2006, available at http://www.nytimes.com/2006/12/31/opinion/nyregionopinions/CIpataki.html?pagewanted=all&_r=0 (last visited Apr. 24, 2014).

Trade Center site will be a global example of green building design.³⁴

Governor Pataki also created public-private partnerships for clean energy generation.³⁵ This led to the largest industrial solar power arrays in the country and largest wind farm in the eastern United States.³⁶ Pataki also pushed for net metering to increase alternative energy in residences.³⁷ The biography mentions nanotechnology and renewable energy,³⁸ as well as some of his achievements, “among numerous other awards.”³⁹ When you are a governor, you get awards from all kinds of organizations; yet the ones that he chose to put on his website are few. Business Week named Governor Pataki one of the top twenty individuals who stand out for their effort to cut gasses that cause global warming in the world.⁴⁰

A. New York City Watershed Memorandum of Agreement (MOA)

In describing the New York City Watershed Agreement and the processes used to achieve and enforce it, the New York Times stated, “every once in a while something happens to demonstrate the power of firm political leadership coupled with the good will of ordinary citizens.”⁴¹ In his State of the State Address, Governor George Pataki stated:

This year, we concluded a historic Watershed agreement that safeguards the drinking water for more than nine million people in and around New York City, and preserves the property rights of the people of the Hudson Valley and the Catskills. And in do-

34. *Governor George Pataki*, PATAKI-CAHILL GROUP, <http://www.patakicahillgroup.com/theTeam.aspx> (last visited Apr. 24, 2014).

35. *Governor George Pataki*, *supra* note 34.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Michael C. Finnegan, *New York City's Watershed Agreement: A Lesson in Sharing Responsibility*, 14 *PACE ENVTL. L. REV.* 577 (1997) (citing *At Last a Watershed Agreement*, N.Y. Times, Nov. 3, 1995, at A28, available at <http://www.nytimes.com/1995/11/03/opinion/at-last-a-watershed-agreement.html>).

ing so, we removed from the people of New York City the potential burden of building an incredibly expensive filtration plant, while protecting the rights of people to drink clean water and to own property.⁴²

New York City's watershed is one of the world's most impressive ecosystem services because it provides pristine drinking water to one of the largest cities with minimal purification, allowing the city and state to save billions of dollars.⁴³ In 1992, New York City was faced with impending federal drinking water regulations that would affect how they purify their water.⁴⁴ In order to avoid an expensive water purification system, which most cities have, New York City had to find a way to control the use of land and certain land use activities within their watershed.⁴⁵ The New York City watershed consists of surface water from three upstate New York regions that, while close in proximity to each other, are 125 miles away from the city.⁴⁶ The three watershed districts are: (1) the Croton water supply, (2) the Catskill water supply, and (3) the Delaware water supply.⁴⁷ Development within these regions would increase pollution to the streams and reservoirs that are vital to the city's pristine water supply.⁴⁸

The necessity to avoid a water filtration system was originally recognized by New York Governor Mario Cuomo.⁴⁹ The city's watershed protection program was initiated in the early 1990s

42. GEORGE PATAKI, Governor of N.Y., *State of the State Address* (Jan. 8, 1997), available at <http://www.c-span.org/video/?77741-1/new-york-state-state-address>.

43. Alice Kenny, *Ecosystem Services in the New York City Watershed*, ECOSYSTEM MARKETPLACE (Feb. 10, 2006), http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=4130§ion=home; see also Keith Hirokawa, *Driving Local Governments to Watershed Governance*, 42 ENVTL. L. 157 (2012).

44. Michael Spector, *New York City Feels Pressure to Protect Precious Watershed*, N.Y. TIMES, Dec. 20, 1992, at 1, <http://www.nytimes.com/1992/12/20/nyregion/new-york-city-feels-pressure-to-protect-precious-watershed.html>.

45. See *id.*

46. Mark D. Hoffer, *The New York City Watershed Memorandum of Agreement: Forging a Partnership to Protect Water Quality*, 18 U. BALT. J. ENVTL. L. 17, 19 (2010).

47. See generally *New York City Watershed*, EPA, available at <http://www.epa.gov/region2/water/nycshed/> (last visited Apr. 24, 2014).

48. Hoffer, *supra* note 46, at 18.

49. See *id.* at 38.

and consisted of draft proposed Watershed Rules and Regulations that placed strict land use limitations on the upstate watershed regions, allowing New York City to meet the federal criteria needed to avoid filtration.⁵⁰ Responding to these proposed regulations, the affected upstate communities formed the Coalition of Watershed Towns (COWT).⁵¹ Included on the COWT agenda was to focus on the city's ability to acquire land within the watershed region and the city's ability to promulgate such regulations.⁵² In 1993, COWT sought to disturb the land acquisition process and fight the state's approval of the city's permit to acquire land in the watershed region.⁵³ After they opposed actions taking place at the Department of Environmental Conservation (DEC), COWT brought a lawsuit in state court in 1994 challenging the developments occurring in the Watershed Protection Program.⁵⁴

Sparked by the conflict occurring between COWT, New York City, and state agencies, Governor Mario Cuomo decided to initiate a series of meetings and negotiations to find a resolution.⁵⁵ In 1994, seasonal meetings were held in the spring and summer where the interested stakeholders focused on the land acquisition program as well as the proposed regulations.⁵⁶ No agreement was reached during these meetings; however, each side was able to identify the concerns of parties that sat across the table.⁵⁷

The atmosphere changed in 1995 when Governor Pataki was elected and he decided to use certain state powers to force the stakeholders to come to an agreement.⁵⁸ Governor Pataki was:

mindful of the financial implications for the [c]ity and the [s]tate if the [c]ity was forced to spend billions of public dollars in filtering those supplies. Finally, having been elected by both upstate

50. Hoffer, *supra* note 46, at 28.

51. *Id.*

52. *Id.* at 37.

53. *Id.* at 37.

54. *Id.*

55. *Id.* at 39.

56. Hoffer, *supra* note 46, at 38.

57. *Id.* at 39.

58. *Id.* Governor Pataki instead decided that the state had to take charge of the issue and guide the parties to a negotiated resolution, even if it meant stepping on toes and using the state's not-inconsiderable powers of persuasion to force a compromise. *See generally id.*

and downstate voters, Governor Pataki knew it was his responsibility to help fashion a solution that would protect the interests of the watershed communities, while at the same ensuring that federal regulators would not force the [c]ity to filter its water supplies.⁵⁹

With these forces now in control of watershed agreement negotiations, the Governor's Counsel Office took charge of the proceedings. The Counsel's Office decided in the beginning all day meetings should be held at least twice a week. As negotiations progressed, the quantity of meetings increased to every day at some points.⁶⁰ The Counsel's Office further laid down ground rules to encourage working relationships that stayed focused on the task at hand.⁶¹

First, there was to be no negotiating in the press. The parties agreed not to answer substantive questions from reporters, but were free to talk about the process. Second, the parties were told to prioritize their issues. Prioritization made it possible to achieve consensus because it structured meetings in a way that addressed bridgeable differences at the beginning and end of meetings, thereby avoiding parties walking away with a bad taste in their mouth. Third, meetings were conducted at neutral locations, the locations were moved frequently, and casual dress was urged in order to reduce the formality. Fourth, the parties agreed that issues discussed and agreements reached could not be used against a party in later negotiations. By insisting on adherence to these simple rules, tension was reduced, the beginnings of trust were established, and substance began to triumph over rhetoric.⁶²

Furthermore, after the MOA was signed, Executive Order No. 51 was signed by Governor Pataki mandating that all activities of the state departments, agencies, boards, and commissions comply with the Watershed Rules and Regulations.⁶³ In addition, pursuant to the MOA Governor Pataki created the New York City Watershed Protection Council, where he had the authority to ap-

59. Hoffer, *supra* note 46.

60. Finnegan, *supra* note 41, at 624.

61. *Id.*

62. *Id.*

63. Exec. Order No. 51, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.51 (2012).

point various provisions.⁶⁴ The MOA states that that Watershed Protection and Partnership Council shall:

. . . aid in the protection of drinking water quality and the economic vitality of the Watershed communities. The Council will represent a broad-based diverse group of interests that share the common goal of protecting and enhancing the environmental integrity of the Watershed and the social and economic vitality of the Watershed communities.⁶⁵

Also pursuant to the MOA, Governor Pataki implemented Executive Order No. 86 setting the guidelines and appointment of the Watershed Inspector General.⁶⁶ The governor and the attorney general shall jointly appoint the inspector general, who shall be an assistant attorney general.⁶⁷ Furthermore, the executive

64. Exec. Order No. 51, *supra* note 63; *see also* New York City Watershed Memorandum of Agreement art. IV (Jan. 21, 1997), *available at* <http://www.nysefc.org/Default.aspx?TabID=76&fid=389>.

65. New York City Watershed Memorandum of Agreement art. IV (Jan. 21, 1997), *available at* <http://www.nysefc.org/Default.aspx?TabID=76&fid=389>.

66. Exec. Order No. 86, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.86 (2012).

67. *Id.* The powers of the inspector general include

(a) to conduct and supervise investigations of alleged violations of the MOA, any statute, rule or regulation of the State, and any permit or order issued by the State; (b) to subpoena witnesses, administer oaths or affirmations, take testimony and compel the production of such books, papers, records and documents as the Watershed Inspector General may deem to be relevant to an investigation undertaken pursuant to this Order; (c) to commence, prosecute and settle proceedings relating to civil and criminal violations; (d) to coordinate with the New York City Watershed Program Coordinator within the Executive Chamber; (e) to cooperate with any agency or department possessing regulatory authority relating to the use, operation and protection of the Watershed; (f) to apply for search warrants pursuant to article 690 of the Criminal Procedure Law; (g) to report, on an annual basis, to the governor and the Attorney General, a listing of enforcement actions completed and activities undertaken; (h) to recommend legislative, regulatory and management practice changes; (i) to undertake any other investigations and enforcement actions, or enter into civil, administrative or criminal orders or settlement agreements, pursuant to the authority otherwise vested by law in the position of an Assistant Attorney General; (j) to have full and unrestricted access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to all agencies and departments over which the Governor has executive authority, and all public benefit corporations the heads of which are appointed by the Governor, for the purpose of carrying out this Order; and (k)

order states that, “[e]very agency and department over which the Governor has executive authority, and all public benefit corporations the heads of which are appointed by the Governor, shall provide all reasonable assistance requested by the Watershed Inspector General for the purpose of carrying out this Order.”⁶⁸

B. Regional Greenhouse Gas Initiative (RGGI)

Governor Pataki initiated RGGI, the Regional Greenhouse Gas Initiative.⁶⁹ The renewable portfolio standard (RPS) came out under his tenure and he launched the “quality communities” initiative.⁷⁰

Governor Pataki led seven northeastern states to put in place the first regional market-based program to reduce greenhouse gas emissions in American history.⁷¹ This mandatory cap-and-trade program was established in 2005 when the governors of seven northeastern and mid-Atlantic states created RGGI.⁷² A Memorandum of Understanding was signed by these governors requiring each participating state to enact regulations to establish a cap-and-trade system, also known as “emissions trading.” This system is a market-based approach to control pollution according to which the state sets a maximum or cap, and the pollu-

to request such information, assistance and cooperation from any Federal, State or local government department, board, bureau, commission, authority or other agency or unit thereof for the purpose of carrying out this Order.

Exec. Order No. 86, *supra* note 66.

68. *Id.*

69. Luis Martinez, *Pioneering New York RGGI Rules Need Your Support*, NRDC SWITCHBOARD (July 16, 2013), http://switchboard.nrdc.org/blogs/lmartinez/pioneering_new_york_rggi_rules.html.

70. *Large Purchases of Green Power*, U.S. DEPT OF ENERGY (last updated Dec. 10, 2012), <http://apps3.eere.energy.gov/greenpower/buying/customers.shtml?page=1&companyid=236>; *Pertinent Statistics about Trends in Sprawl*, CORNELL U., <http://cardi.cornell.edu/cals/devsoc/outreach/cardiprograms/land-use/sprawl/statistics.cfm>.

71. George Pataki, Governor of N.Y., State of the State Address (Jan. 4, 2006), *transcript available at* <http://worldcat.org/arcviewer/1/AO%23/2007/01/12/0000057321/viewer/file60.html>.

72. JOHN R. NOLON & PATRICIA E. SALKIN, *CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT LAW 75* (West Publishing, 2011).

tion polluters are required to hold “allowances” to offset their emissions.⁷³

C. Tax Credits

In an effort to attract companies from around the world, engaged in developing clean, renewable energy sources, Governor Pataki created a tax free zone for the growing industry.⁷⁴ The Governor also proposed “a plan to jumpstart a new era of statewide availability and use of renewable fuels.”⁷⁵ The plan “begins with an initiative to make renewable fuels available at service stations all across the state, starting with the New York State Thruway.”⁷⁶ The plan then went “a step further, by making that renewable fuel tax-free throughout the entire State of New York.”⁷⁷

IV. GOVERNOR ELIOT SPITZER: 2007-2008

During his first State of the State Address, Governor Spitzer emphasized updating and encouraging investments in strong infrastructures.⁷⁸ Governor Spitzer noted that infrastructure development also meant investment in our energy scheme making sure it is available at competitive prices.⁷⁹ He stated, “[i]n order to lower the second highest energy costs in America, we must implement an aggressive conservation strategy led first and foremost by an effort to reduce the state’s own energy consumption.”⁸⁰ Additionally, Governor Spitzer noted that the state must increase its ability to produce clean and renewable energy by passing a new Article X power plant siting law, and encouraging

73. NOLON & SALKIN, *supra* note 72.

74. Pataki, *supra* note 71.

75. *Id.*

76. *Id.*

77. *Id.*

78. Eliot Spitzer, Governor of N.Y., State of the State Address (Jan. 3, 2007), transcript available at <http://worldcat.org/arcviewer/1/AO%23/2008/03/17/0000083244/viewer/file443.html>.

79. *Id.*

80. *Id.*

the PSC to build new power generating plants or to re-power older plants.⁸¹

Aside from energy, Governor Spitzer stated “. . . New York means a state that preserves its land, while allowing for growth. That is why our policy in the Adirondacks and Catskills must recognize that those two goals are not mutually exclusive.”⁸² In his 2008 Message to the Legislature, Governor Spitzer paid homage to Henry Hudson, noting that 400 years ago he had sailed up the Hudson River “on a wooden ship powered only by wind, and guided only by a sense of possibility,” and that today New Yorkers are “dreamers, visionaries, environmentalists, and builders of the first order.”⁸³ He announced the first major investment in New York parks in 400 years, proposing \$100 million in capital spending, stating that “[o]pen space – clean, safe, attractive parks – are a third building block for livable communities.”⁸⁴

A. Smart Growth, Climate Change, and Energy

In 2007, Governor Spitzer signed Executive Order No. 20, which established the Governor’s Smart Growth Cabinet.⁸⁵ The executive order was motivated by the need to reexamine how state government actions can have “unintended effect[s] of encouraging sprawl, development of open space, shifting investment away from developed areas and abandoned areas, adverse environmental impacts, and inefficient use of scarce resources.”⁸⁶ Furthermore, the executive order identified the need for the state

81. Spitzer, *supra* note 78; see *Article 10 Law*, BOARD ON ELECTRIC GENERATION SITING & THE ENV’T, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/D12E078BF7A746FF85257A70004EF402?OpenDocument> (last visited May 8, 2014); see also BRYAN CAVE LLP, NEW YORK LEGISLATURE ENACTS POWER PLANT SITING LAW (2011), available at [http://www.bryancave.com/files/Publication/b03ff613-d188-440a-bd0b-01f498b4e1bc/Presentation/PublicationAttachment/f8e28986-f958-4912-91e0119d5dccc6e0/New%20York%20Power%20Plant%20Siting%20Article%20X%20Client%20Alert_v7%20\(AP\).pdf](http://www.bryancave.com/files/Publication/b03ff613-d188-440a-bd0b-01f498b4e1bc/Presentation/PublicationAttachment/f8e28986-f958-4912-91e0119d5dccc6e0/New%20York%20Power%20Plant%20Siting%20Article%20X%20Client%20Alert_v7%20(AP).pdf).

82. Spitzer, *supra* note 78.

83. Eliot Spitzer, Governor of N.Y., State of the State Address (Jan. 9, 2008), transcript available at <http://worldcat.org/arcviewer/1/AO%23/2008/03/17/0000083244/viewer/file706.html>.

84. *Id.*

85. Exec. Order No. 20, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.20 (2007) (re-voked by Andrew Cuomo, Exec. Order No. 12).

86. *Id.*

to grow in a responsible manner and link economic development, land use, and environmental protection together during the decision-making processes.⁸⁷

The executive order determined that the Smart Growth Cabinet would be composed of high level executive officers and various commissioners that would “. . . oversee a comprehensive review of state statutes, regulations, policies, practices, and capital programs that impact economic development and land use. The Cabinet would also advise and make recommendations to the governor on the most effective mechanisms to promote ‘smart growth’ and related priorities.”⁸⁸ The Cabinet was charged with examining smart growth barriers, government funding opportunities, and the effectiveness of current state programs, and recommending state and local initiatives.⁸⁹

During Governor Spitzer’s short tenure in office, the NYS Office of Climate Change was created within DEC in 2007.⁹⁰ The purpose of the Office is to “. . . lead the development of programs and policies that mitigate statewide GHG emissions and assist municipalities and individuals to adapt to the effects of climate change.”⁹¹ The office consists of two bureaus: (1) Climate Science and Technology, and (2) the Climate Programs and Partnerships.⁹² The Climate Science and Technology Bureau focuses on the use of sound science, engineering, and economic principles to lower the greenhouse gas concentrations that exist.⁹³ The bureau is also designed to support a climate impact analysis and state energy planning.⁹⁴ The Climate Programs and Partnership Bureau is designed to assist “state agencies, local governments,

87. Exec. Order No. 20, *supra* note 85.

88. *Id.* § 5.

89. *Id.*

90. N.Y. STATE BAR ASS’N, TAKING ACTION IN NEW YORK ON CLIMATE CHANGE: REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON GLOBAL WARMING 18 (2009), *available at* [http://www.nysba.org/Sections/ Environmental/Task_Force_on_Global_Warming/FinalGlobalWarmingTaskForceReport Updated_COVER_pdf.html](http://www.nysba.org/Sections/Environmental/Task_Force_on_Global_Warming/FinalGlobalWarmingTaskForceReportUpdated_COVER_pdf.html).

91. *Id.* at 18-19.

92. *Id.*

93. *Id.*

94. *Id.*

NGOs, institutions, businesses, and individuals in reducing carbon emissions and adapt [sic] to unavoidable impacts.”⁹⁵

Governor Spitzer announced that New York State should have the most aggressive energy conservation policy in the nation and should cut its power demand by 15% by 2015.⁹⁶ In line with this, the PSC implemented the Energy Efficiency Portfolio Standard (EEPS) in 2008.⁹⁷ The EEPS was designed to further the energy goals laid out by Governor Spitzer to reduce electricity use by 15% by 2015.⁹⁸ To meet these objectives, the state’s utilities were mandated to report energy efficiency programs; the New York State Energy Research and Development Authority (NYSERDA) and other independent companies were encouraged to propose energy efficiency programs subject to the PSC’s approval.⁹⁹ The PSC noted that the goal is to “moderate expected increases in average bills and the [s]tate’s energy costs over time; enhance system reliability; ease wholesale prices and transmission and distribution.”¹⁰⁰

The New York State Environmental Board approved final regulations to implement a cap-and-trade program for nitrogen oxide and sulfur dioxide.¹⁰¹ Governor Spitzer then signed into law an amendment to the Public Authorities Law to enable authorities to enter into contracts that allow for more energy efficient refrigerators provided that no costs associated with these

95. N.Y. STATE BAR ASS’N, *supra* note 90.

96. See Nicholas Confessore, *NY Governor Unveils Energy Efficiency Initiatives*, N.Y. TIMES, N.Y. REGION, Apr. 20, 2007, http://www.nytimes.com/2007/04/20/nyregion/20spitzer.html?fta=y&_r=0.

97. *Energy Efficiency Portfolio Standard*, N.Y. PUB. SERV. COMM’N, <http://www3.dps.ny.gov/W/PSCWeb.nsf/0/06F2FEE55575BD8A852576E4006F9AF7?OpenDocument> (last visited Apr. 24, 2014); James M. Van Nostrand, *Energy and Environmental Justice: How States Can Integrate Environmental Justice into Energy Related Proceedings*, 61 CATH. U. L. REV. 701, 707 (2012).

98. *Id.*

99. *Energy Efficiency Portfolio Standard*, *supra* note 97.

100. Order Establishing Energy Efficiency Portfolio Standard and Approving Programs, Case 07-M-0548 (June 23, 2008), *available at* <http://www3.dps.ny.gov/W/PSCWeb.nsf/0/06F2FEE55575BD8A852576E4006F9AF7?OpenDocument>.

101. Michael G. Mahoney, *The Pfizer Climate Change and Energy Program: Understanding Climate Change Risks and Opportunities*, 18 ENVTL. L. N.Y., no. 12, 2007, at 4, *available at* LEXIS.

replacements are passed on to consumers.¹⁰² In addition, he signed a law requiring the mayor of New York City to develop and submit a plan to: reduce traffic congestion, reduce greenhouse gas emissions and local air pollution from the energy sector, improve New York's energy security, and create clean energy jobs for New Yorkers.¹⁰³

The New York Sea Level Rise Task Force was established in 2007.¹⁰⁴ The task force was created to analyze the impacts that climate change and sea-level rise would have on New York coastlines and make recommendations for protective measures.¹⁰⁵ The purpose of the task force was to "evaluate ways to protect New York's remaining coastal ecosystems and natural habitats, and increasing coastal community resilience in the face of sea level rise," applying the best available science as to sea level rise and its anticipated impacts.¹⁰⁶ The task force was charged with producing a report by 2009 with findings and recommendations for consideration by the Governor.¹⁰⁷ The report was ready in 2010, after Governor Spitzer left office. The report was finalized under the leadership of Governor Paterson.¹⁰⁸

The task force found that sea level rise and coastal flooding from storm surges are already affecting New York State from the Battery to the Troy Dam. Its findings included the following aspects: (1) a strong likelihood that powerful storms will hit the coastline in the future; (2) the natural features that protect against flooding are expensive to replace with man-made structures; (3) ecosystems will become more frequently flooded; (4) New York is developing in high risk areas; (5) the long term cumulative environmental and economic costs with human built protective measures are more costly than implementing sustain-

102. 2007 N.Y. Assembly Bill A5177; N.Y. PUB. AUTH. LAW § 1005 (10-a) (2014), available at <http://www.nyls.org/?id=7>.

103. See *Energy Efficiency Portfolio Standard*, *supra* note 97.

104. N.Y. STATE BAR ASS'N, *supra* note 90, at 20.

105. See *id.*

106. *Id.*

107. *Id.*

108. N.Y. STATE SEA LEVEL RISE TASK FORCE, REPORT TO THE LEGISLATURE 9 (2010), available at http://www.dec.ny.gov/docs/administration_pdf/slrftfinalrep.pdf.

able land use practices; and (6) there are low cost actions that can be taken that will yield large benefits.¹⁰⁹

The task force recommended that official projections of sea level rise be adopted and that sea level rise considerations be included in the decision-making processes of all applicable agencies. Other recommendations for the state to implement were to: (1) classify current and future high risk areas; (2) support natural protective measures; (3) amend laws and adopt regulations to cope with sea level rise; (4) provide financial support for community vulnerability assessment reports, raise public awareness, fund research, and monitoring; and (5) seek federal funding and federal assistance.¹¹⁰

Governor Spitzer was also responsible for creating the New York State Renewable Energy Task Force in 2007, which was later led by Lieutenant Governor David Paterson.¹¹¹ The task force was charged with the following goals:

- (1) identify barriers in New York State to wider deployment and installation of renewable energy;
- (2) recommend policies, including financial incentives to overcome those barriers to attract clean industries to economically depressed regions of the state; and
- (3) identify future market areas where additional research and development investment is necessary.¹¹²

Recommendations of the task force included, among others, the following aspects: (1) raising the percentage renewable share of all energy generated in New York to 25% by 2013; (2) developing the amount of solar generation by 2011 and expanding New York's net metering laws; and (3) investing in clean tech businesses, and creating incentives to attract technology companies to the state.¹¹³ The report noted that \$575 million had been committed to the RPS Program and will produce over \$1 billion in economic benefits over twenty years, not including the gains from

109. N.Y. STATE SEA LEVEL RISE TASK FORCE, *supra* note 108.

110. *Id.*

111. RENEWABLE ENERGY TASK FORCE, CLEAN, SECURE ENERGY AND ECONOMIC GROWTH: A COMMITMENT TO RENEWABLE ENERGY AND ENHANCED INDEPENDENCE (2008), available at http://www.aceny.org/files/RETFReport_Feb2008.pdf.

112. *Id.*

113. *Id.*

enhancing environmental protection.¹¹⁴ The report also stated that tens of thousands of new jobs would be created in New York, building up the state's "Green Collar" workforce.¹¹⁵

In response to the report and its recommendations, Governor Spitzer stated that, "[i]ncreasing the use of clean renewable energy is good for the economy, the environment[,] and public health. Renewable energy sources, such as wind, solar, hydroelectric, and fuel cells, can help to re-charge our [u]pstate economy while reducing greenhouse gas emissions."¹¹⁶

During Governor Spitzer's tenure, New York joined the Climate Registry in 2007.¹¹⁷ Furthermore, in 2007, New York enacted legislation that required all automobile manufactures, starting in 2010, to affix a "global warming index" sticker to new cars and passenger trucks.¹¹⁸ The index shall include easy-to-read quantitative information that compares the global warming gases from the vehicle with the average projected emissions from all vehicles in that model year, as well as an identification of the emissions from the vehicle with the lowest emissions of global warming gases.¹¹⁹

B. The Environmental Protection Fund

Governor Spitzer, while in office for a short period, had a large impact on the preservation of the Environmental Protection Fund (EPF). In 2007, the Governor signed legislation that increased the revenue going to the EPF from \$225 million to \$250 million in 2008-2009, and then to \$300 million in 2009-2010 and

114. RENEWABLE ENERGY TASK FORCE, *supra* note 111.

115. *Id.*

116. Press Release, Dep't of Agric. & Mkts., Paterson Convenes Renewable Energy Task Force (June 26, 2007), *available at* <http://www.agriculture.ny.gov/AD/release.asp?ReleaseID=1629>.

117. Richard M. Walka, *The U.S. EPA Region 2 Facility Audit Agreement: Opportunity or Albatross?*, 18 ENVTL. L. N.Y., no. 8, 2007, at 4, *available at* LEXIS. The Climate Registry is a non-profit collaboration that "sets consistent and transparent standards to calculate, verify[,] and publicly report greenhouse gas emissions into a single registry. The Registry supports both voluntary and mandatory reporting programs and provides comprehensive, accurate data to reduce greenhouse gas emissions." *See Mission*, THE CLIMATE REGISTRY, <http://www.theclimateregistry.org/about/mission/> (last visited May 8, 2014).

118. *See* N.Y. ENVTL. CONSERV. LAW § 19-1103(1) (McKinney 2014).

119. *Id.* § 19-1103(2)(a).

beyond.¹²⁰ Governor Spitzer stated that “[t]he Environmental Protection Fund is a pivotal funding source for the state’s premier environmental programs.”¹²¹

The EPF supports various environmental programs for the State of New York, including “. . . recycling, landfill closure, urban parks, farmland preservation, smart growth, open space, water quality, [and] pollution prevention.”¹²² Furthermore, the money will provide support for many other programs that are managed by the environmental agencies of the state.¹²³ Commissioner Grannis stated that “[t]he Environmental Protection Fund has been an invaluable tool, helping to preserve open space and working farmland, close landfills and sustain recycling programs. Governor Spitzer’s decision to expand the EPF is great news for New Yorkers and underscores his green credentials.”¹²⁴

C. Water Protection, Hazardous Waste, Air Quality, and More

A few steps were taken under the Spitzer administration to ensure the quality of New York water. For example, in 2007 DEC Commissioner Grannis adopted regulations to prevent the spread of Viral Hemorrhagic Septicemia (VHS) to New York Waters.¹²⁵

Furthermore, the New York Environmental Board strengthened the state water quality standards.¹²⁶

In 2007, the DEC approved \$7.9 million in grants from the Environmental Restoration Program to be used to the remediation and investigation of contamination sites in New York.¹²⁷ Also, in 2007 Governor Spitzer signed legislation to improve air quality by phasing out creosote. The Environmental Conserva-

120. Press Release, N.Y. State Office of the Governor, Governor Signs Environmental Protection Fund Bill (July 19, 2007), *available at* <http://worldcat.org/arcviewer/1/AO%23/2008/03/17/0000083244/viewer/file3770.html>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Walka, *supra* note 117, at 4.

126. Philip E. Karmel et al., *Mitigation of Environmental Impacts Under SEQRA*, 19 ENVTL. L. N.Y., no. 2, 2008, at 4, *available at* LEXIS.

127. Charles M. Pratt, *Electric Regulation in the State of New York*, 18 ENVTL. L. N.Y., no. 7, 2007, at 4, *available at* LEXIS.

tion Law now states that “after January first, two thousand eight, creosote or products containing creosote shall not be manufactured, sold, or used in this state.”¹²⁸ However, wood-treated creosote is exempted from these provisions.¹²⁹

Additionally, the DEC and the City of New York have been taking enforcement action to curb the effects of polluting diesel trucks and boilers that are being felt disproportionately in some neighborhoods.¹³⁰ The neighborhoods include East Harlem, from 96th Street to 116th Street, and from FDR Drive to 5th Avenue.¹³¹ In these areas of New York City, it is reported that asthma hospitalization rates are above the national average.¹³²

Governor Spitzer addressed many environmental issues in his 2008-2009 executive budget proposal, including:

- \$2 million for smart growth programs
- \$5 million increase over last year to preserve farmland
- A commitment of 25% of funding for local parks and waterfront redevelopment to go to underserved communities
- \$300 million to ESDC for an upstate New Investment Fund, which would provide support for green industry, renewables, and clean technology
- \$500,000 in the agriculture and markets budget to open a NYC wholesale market using locally grown food . . .
- Bolstering the capacity of DEC, OPRHP, and the Adirondack Park Agency by restoring 166 staff positions.¹³³

128. N.Y. ENVTL. CONSERV. LAW § 27-2503(1) (McKinney 2014).

129. *Id.* § 27-2503(2).

130. Karmel et al., *supra* note 126, at 4.

131. *Id.*

132. *Id.*

133. *Statewide: Governor Spitzer Advances League's 100-Day Agenda*, N.Y. LEAGUE OF CONSERVATION VOTERS, http://www.nylcv.org/newsletter/2007/jan/articles/statewide_governor_spitzer_moving_forward_on_league_s_10 (last visited Apr. 25, 2014).

On March 7, 2008, Governor Eliot Spitzer, Assembly Speaker Sheldon Silver, and Senate Majority Leader Joseph L. Bruno announced they would sign an agreement to help rebuild blighted areas and spur economic growth by providing more than \$7.25 million to fund projects under the state's Brownfield Opportunity Area Program.¹³⁴

V. GOVERNOR DAVID A. PATERSON: 2008-2010

David Paterson became Governor on March 17, 2008 upon the resignation of Governor Eliot Spitzer.¹³⁵ In his first Message to the Legislature in January 2009, Governor Paterson said that, “we need the vision to create New York where we all breathe clean air and use clean energy and leave our planet as unspoiled as when we inherited it.”¹³⁶ He noted that while “in New York, our lives, our families, and our economy all depend upon energy, energy has become too expensive, too unpredictable[,] and can be damaging to our environment.”¹³⁷ He announced the “45 by 15” program, which is an ambitious clean energy goal — that New York would meet 45% of its electricity needs through improved energy efficiency and through clean and renewable energy by 2015.¹³⁸ To meet this “45 by 15” goal, Governor Paterson stated that New York will have to create a clean energy economy that includes retrofitting homes and businesses.¹³⁹ The PSC and other public authorities will have to set in place investment opportunities for energy efficiency and renewable energy to lower the costs to the consumer and meet the energy needs.¹⁴⁰ In addition, Governor Paterson called for New York to lead the way in plug-in hybrid electric cars as a way to stimulate the economy in western

134. Frederick R. Fucci, *Making Buildings More Energy Efficient Through Energy Performance Contracting*, 19 ENVTL. L. N.Y., no. 6, 2008, at 4, available at LEXIS.

135. *David A. Paterson*, INFOPLEASE, <http://www.infoplease.com/biography/var/davidapaterson.html> (last visited Apr. 21, 2014).

136. David A. Paterson, Governor of N.Y., State of the State Address (2009), transcript available at http://blog.syracuse.com/indepth/2009/01/transcript_of_gov_david_paters.html.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

New York with research and manufacturing.¹⁴¹ He also expressed an intention to invest in clean water and wastewater systems.¹⁴²

A. Energy, Sustainability, and the Environment

*“Responding to climate change is an imperative for government.”*¹⁴³

Early on in his administration, Governor Paterson signed Executive Order No. 2, establishing a State Energy Planning Board and implementing a state energy plan.¹⁴⁴ In addition, legislation was adopted to establish the State Energy Planning Board and to codify the State Energy Plan’s purpose.¹⁴⁵ The board will consist of high-level executive members from the relevant agencies to develop a plan outlining the state’s energy policy objectives and strategies to increase the energy supply and reduce the energy demand.¹⁴⁶ The plan will also provide an analysis of costs, impacts, environmental policies, greenhouse gases, alternative transportation measures, environmental justice concerns, and recommendations for additional research.¹⁴⁷ Governor Paterson stated, “New York will lead the nation in the clean energy economy, and this state energy plan will help us get there[.]”¹⁴⁸

However, as with many other state government reports the State Energy Plan was met with criticism. Many environmentalists and other supporters of environmental lofty goals state that that the report:

. . . fell short on setting specific targets, and some were skeptical about how much of it would end up being implemented . . . [in

141. Paterson, *supra* note 136.

142. *Id.*

143. Press Release, N.Y. State Office of the Governor, Governor Paterson Releases Climate Act Plan (Nov. 9, 2010), http://www.governor.ny.gov/archive/paterson/press/110910climate_action_plan.html.

144. Exec. Order No. 2, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.2 (2008).

145. 2009 N.Y. Senate-Assembly Bill S02501-B, A05877-B.

146. Exec. Order No. 2, *supra* note 144.

147. *Id.*

148. Mireya Navarro, *State Energy Plan Promotes Clean, Efficient Alternatives*, N.Y. TIMES, Dec. 16, 2009, A-39, available at http://www.nytimes.com/2009/12/16/science/earth/16energy.html?_r=0.

fact it was noted that] 10 months after the Governor announced his '45 percent by 2015 goal,' the State Public Service Commission has yet to take specific action to help finance some of the programs that would help meet that goal.¹⁴⁹

Governor Paterson sought to change the way state government operates. However, instead of focusing on human resources, he turned his attention green practices. For example, Governor Paterson put forth the Green Building Construction Act, which "requires that the construction and substantial renovation of state buildings comply with 'green' building standards established by the office of general services."¹⁵⁰ Originally enacted in 2008, it was repealed and re-enacted in New York's Public Buildings Law in 2009.¹⁵¹ In a 2009 press release, Governor Paterson stated that "the State of New York is committed to integrating sustainable design principles and energy efficiency into its building design and construction projects. The goal is an optimal balance of environmental, public[,] and human benefits for meeting the state's construction needs . . ." ¹⁵²

Additionally, in 2008, Governor Paterson signed Executive Order No. 4, which established the State Green Procurement and Agency Sustainability Program.¹⁵³ The Governor realized that the state is a major consumer of services, materials, commodities, and energy, and these resources all have an impact on the environment.¹⁵⁴ As such, the State Green Procurement and Agency Sustainability Program requires state agencies to reduce the level of consumption, as well as require state entities to utilize environmentally friendly commodities and technologies to allow them to develop sustainable programs.¹⁵⁵ Similarly, in 2010 Governor Paterson passed legislation that eliminates wasteful artificial

149. Navarro, *supra* note 148.

150. 2009 N.Y. Senate-Assembly Bill S05779, A7246-B; *see also* N.Y. PUB. BLDGS. LAW §§ 82-83 (McKinney 2014).

151. Paul Selver et al., *RLUIPA and Land Use: An Overview and a Closer Look at the "Equal Terms" Provision and the Southern District's Third Church Decision (Part 2 of 2)*, 20 ENVTL. L. N.Y., no. 12, 2009, at 4, *available at* LEXIS.

152. Press Release, N.Y. Office of Gen. Servs., Governor Paterson Signs the State Green Building Construction Act; OGS to Develop Green Building Standard (Sept. 2, 2009).

153. Exec. Order No. 4, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.4 (2008).

154. *Id.*

155. *Id.*

lighting in state buildings in an effort to cut down on electricity used.¹⁵⁶

Under the umbrella of sustainable state offices and facilities, Governor Paterson signed Executive Order No. 18, which restricted the use of bottled water at state offices and facilities that are under the executive's control by May 1, 2010.¹⁵⁷ The plan is to eliminate the use of state funds to purchase bottled water for executive agencies.¹⁵⁸

Governor Paterson's sustainability initiatives did not merely focus on state buildings. In 2008, the Green Residential Building Grants Program was signed into law, amending the Public Authorities Law to authorize NYSERDA to develop green building standards and criteria (in consultation with the standards of the U.S. Green Building Council), and develop and establish other standards and criteria that are necessary for the administration of the program (e.g., eligibility, training, procedures, applications, inspections, etc.).¹⁵⁹ The law also provides that the amount of grants will be based on size and type of residential structure, but may not exceed \$7,500 for one-family and two-family homes, \$11,250 for residential buildings with three to six dwelling units, and \$15,000 for residential buildings with more than six dwelling units.¹⁶⁰ In addition to these limitations, no single owner, such as a developer of multiple qualified residential buildings who is a qualified owner, may receive more than \$120,000 in incentive payments during any calendar year.¹⁶¹

Again with sustainability in mind, New York amended the State Urban Development Corporation, which has a mission of building state subsidized housing projects, particularly in urban areas.¹⁶² The 2009 amendment defined various types of energy efficiency projects in an attempt to encourage energy conserva-

156. 2010 N.Y. Senate-Assembly Bill S04920, A05655.

157. Exec. Order No. 18, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.18 (2009), available at http://www.governor.ny.gov/archive/paterson/executiveorders/eo_18.html.

158. *Id.*

159. See 2008 N.Y. Senate-Assembly Bill S08134-B, A10684-B.

160. *Id.*

161. *Id.*

162. Selver et al., 20 ENVTL. L. N.Y., no. 12, *supra* note 151, at 2.

tion.¹⁶³ Projects defined include energy audits, insulation, projects to increase efficiency of windows and doors, computer control systems, heating and ventilating modifications, solar energy systems, etc.¹⁶⁴

While seeking out more sustainable and green practices, New York State has authorized the New York Power Authority (NYPA) to develop high performance and sustainable building programs.¹⁶⁵ When setting up these programs NYPA is authorized to consult standards, guidelines, rating systems, and criteria from other organizations (e.g., the U.S. Green Building Council LEED Program, the Green Building Initiative's Green Globes Rating System, and the American National Standards Institute).¹⁶⁶

On April 22, 2008, Governor David Paterson announced that the state would launch a project that would create the largest source of solar power in New York.¹⁶⁷ To support business leaders and organizations in developing and implementing new operating practices, on October 7, 2008, the DEC Commissioner announced a new program called "New York Environmental Leaders."¹⁶⁸

Governor Paterson was also responsible for signing the Plastic Bag Reduction, Reuse, and Recycling Act.¹⁶⁹ The law mandates that operators of retail stores that are in excess of 10,000 square feet, retail stores with five or more branches over 5000 square feet, or retail stores in excess of 50,000 square feet that are located within a shopping mall must all have programs set in place for consumers to return their plastic bags.¹⁷⁰

Turning to transportation, in 2008 the New York State Department of Transportation (NYSDOT) started the Green Leadership in Transportation and Environmental Sustainability (Green

163. See N.Y. UNCONSOL. LAW § 6253(30) (McKinney 2014).

164. *Id.*

165. 2009 N.Y. Senate-Assembly Bill S06050, A09040.

166. *See id.*

167. Fucci, *supra* note 134, at 4.

168. John D. Echeverria & Michael E. Kenneally, Jr., *Noghrey v. Town of Brookhaven: How Far is "Too Far" in a Regulatory Takings Case*, 20 ENVTL. L. N.Y., no. 1, 2009, at 4, available at LEXIS.

169. 2008 N.Y. Senate-Assembly Bill S08643-A, A11725.

170. *Id.*

LITES), the first of its kind in the nation.¹⁷¹ The certification program is designed

to integrate sustainability principles into transportation using the building industry's LEED system as a model. The program is used on a continuous basis and formally ranks capital projects, operations/maintenance work on a sub-regional basis, and all region-wide investments made (and not made) on an annual cycle for internal review and comparison.¹⁷²

Later, in 2009, Governor Paterson, announced a new technology consortium called New York Battery and Energy Storage Technology, or "NY BEST," to research and develop energy storage technology, such as plug-in hybrid vehicle batteries.¹⁷³

Also, in 2009 Governor Paterson signed Executive Order No. 24, which established a goal to reduce greenhouse gas emissions by 80% by the year 2050 and the creation of a Climate Action Plan.¹⁷⁴ The order recognizes the need for these policies as a result of the growing science and research on climate change and the damage that unmitigated affects can have on New York's communities, economy, and environment.¹⁷⁵ The plan would inventory greenhouse gas emissions within the state, identify short and long-term goals, identify anticipated reductions, identify anticipated life cycle consequences, identify how this would support New York's economy, coordinate activities with the State Energy Planning Board, identify legal and policy constraints, and establish timelines.¹⁷⁶

On November 9, 2010 when the Climate Act Plan was released, Governor Paterson stated:

171. Philip E. Karmel & Margaret Barry, *Mitigation of Environmental Impacts Under SEQRA*, 19 ENVTL. L. N.Y., no. 12, 2008, at 4, available at LEXIS.

172. N.Y. DEPT OF TRANSP., GROWING GREEN LITES 1, available at <https://www.dot.ny.gov/programs/greenlites/repository/GreenLITES-sustainability%20flyer-handout.rtf>.

173. Dwight E. Kanyuck & Robert S. Berger, *Great Lakes Offshore Wind Power: A New York Strategy for Energy and Economic Development*, 20 ENVTL. L. N.Y., no. 8, 2009, at 4, available at LEXIS.

174. Exec. Order No. 24, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.24(1) (2009).

175. *Id.*

176. *Id.* § 7.24(4).

The global race for clean energy economy is on. We can buy solutions to our energy and environmental challenges from others. Or we can take the initiative and develop clean energy industries right here in New York State . . . We must make the investment in our future prosperity now by implementing the strategies and policies that will enable us to meet our aggressive clean energy and environmental goals.¹⁷⁷

At the time that Executive Order No. 24 was signed, New York had already taken important steps in combating climate change. The notion of smart growth was apparent in his administration and a principle that he held strong from his days as New York's lieutenant governor under Governor Spitzer's administration. While Executive Order No. 20 under Governor Spitzer created the Governor's Smart Growth Cabinet, Governor Paterson saw its mission through with the enactment of legislation and policy goals.¹⁷⁸

For instance, Governor Paterson sought the passage of the State Smart Growth Public Infrastructure Act, which guides the state in making more sustainable infrastructure investments.¹⁷⁹ The bill requires state agencies to create Smart Growth Advisory Committees to examine public infrastructure investment and make decisions guided by certain smart growth principles.¹⁸⁰

In 2010, Governor Paterson signed three bills that seek to advance his clean energy goals. First, an amendment to the state energy law authorizes the Secretary of State to establish energy efficiency performance standards for light fixtures, bottle-type water dispenser, commercial hot food holding cabinets, portable electric spas, and residential pool pumps.¹⁸¹ Secondly, the Public

177. Press Release, N.Y. Office of the Governor, Governor Paterson Releases Climate Act Plan (Nov. 9, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/110910climate_action_plan.html.

178. Exec. Order No. 20, N.Y. COMP. CODES R. & REGS. tit. 9, § 6.20 (2007).

179. 2010 N.Y. Senate-Assembly Bill S05560-B, A08011-B; *see also* Press Release, N.Y. State Office of the Governor, Governor Paterson Highlights Smart Growth Investment for Upstate (Oct. 12, 2010), *available at* <http://www.governor.ny.gov/archive/paterson/press/101210SmartGrowth.html>.

180. *Id.*

181. 2010 N.Y. Senate-Assembly Bill S8070, A10881; *see also* Press Release, N.Y. State Office of the Governor, Governor Paterson Signs Three Bills to Advance Clean Energy Agenda and Forty Five Other Bills into Law (July 21,

Service Law was amended to encourage investment in energy efficiency measures. The Gas On-Bill Recovery Bill allows for consumers to invest in efficiency measures and then repay the loans through their utility bill.¹⁸² Lastly, the Public Service Law was amended to add kinetic energy storage devices to the definition of “alternate energy facility.”¹⁸³ The effect of the change will exempt projects of less than 80 MW from the PSC’s jurisdiction and ease the regulatory burden.¹⁸⁴ These bills were enacted in furtherance of Governor Paterson’s “45 by 15” program. They allow for the more efficient use of energy as well as easier access to energy efficient technologies.

One of the most significant bills passed in furtherance of the administration’s renewable energy goals was a net metering bill, which allows consumers to sell back the energy created from their personal renewable energy system. The net metering laws of New York originated in 1997 and were enhanced by Governor Paterson and the legislature.¹⁸⁵ On August 5, 2008, several changes were made to the net metering laws in New York.¹⁸⁶ Legislation was signed that allowed for more consumers to utilize net metering by allowing residential solar systems up to 25 kW, non-residential systems less than 2 MW, or the customers’ peak load from the prior twelve months.¹⁸⁷ Other bills similarly signed increase the ability of farm-based anaerobic digesters to 500 kW,¹⁸⁸ and allow residential wind systems of up to 25 kW, wind farms up to 500 kW, and non-residential wind generation of up to 2 MW to be interconnected and net metered.¹⁸⁹

2010), available at <http://www.governor.ny.gov/archive/paterson/press/072110PatersonSignsThreeBills.html>.

182. 2010 N.Y. Senate-Assembly Bill S3712, A07736; see also Press Release, N.Y. State Office of the Governor, *supra* note 181.

183. 2010 N.Y. Senate-Assembly Bill S7145, A10216.

184. Press Release, N.Y. State Office of the Governor, *supra* note 181.

185. *New York: Incentives/Polices for Renewables & Efficiency – Net Metering*, DSIRE, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NY05R (last updated July 15, 2013).

186. See *State and Local Climate Change and Energy Program, New York, Interconnection Standards—Net Metering*, EPA, <http://www.epa.gov/statelocalclimate/state/tracking/individual/ny.html> (last updated Apr. 2, 2014).

187. *Id.*

188. 2008 N.Y. Senate-Assembly Bill S8415, A11597.

189. 2008 N.Y. Senate-Assembly Bill S8481, A11705.

In 2010, Governor Paterson amended the net metering laws in New York to eliminate the peak load limitation on the size of a non-residential solar or wind generation system that is eligible to participate in net metering.¹⁹⁰ This made it possible for businesses and farms in New York to install larger sized equipment.¹⁹¹ The amendments also allow non-residential solar and wind systems to interconnect with 25 kW capping their charges at \$350 (solar) and \$750 (wind).¹⁹² Systems above the 25 kW threshold (but under the 2,000 kW cap) are responsible for all calculated interconnection charges.¹⁹³ These amendments were set in place with the “45 by 15” program in mind and to encourage businesses to produce their own renewable energy and sell the excess to the grid.¹⁹⁴

Showing his dedication to emerging technologies Governor Paterson offered his support for an advanced coal power energy plant in Jamestown, New York.¹⁹⁵ The Jamestown advanced coal plant was described by the Governor’s Office as “the first of its kind in the world” and would have the capabilities to capture the carbon dioxide emissions and sequester them underground permanently.¹⁹⁶ The technology would create jobs and help New York meet their energy demands.¹⁹⁷

Clean and Green jobs are in the minds of many Governors and, as such, Governor Paterson helped pass the Green Jobs Green New York Act of 2009.¹⁹⁸ The act was intended to:

190. 2010 N.Y. Senate-Assembly Bill S06700, A07557-A; *see also* Press Release, N.Y. State Office of the Governor, Governor Paterson Announces Passage of Bill to Help Businesses Produce Their Own Renewable Energy (Feb. 23, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/press_02231001.html.

191. Ross Gould & Jackson Morris, *How Reducing Greenhouse Gas Emissions Strengthens New York Businesses (Part 1 of 2)*, 21 ENVTL. L. N.Y., no. 10, 2010, at 4, *available at* LEXIS.

192. 2010 N.Y. Senate-Assembly Bill S06700, A07557-A; *see also* Press Release, N.Y. State Office of the Governor, *supra* note 190.

193. *Id.*

194. *Id.*

195. Press Release, N.Y. State Office of the Governor, Governor Paterson Announces Support For New Advanced Coal Power Plant for Jamestown — First of Its Kind in the World (June 10, 2008), *available at* http://www.governor.ny.gov/archive/paterson/press/press_0610081.html.

196. *Id.*

197. *Id.*

198. 2009 N.Y. Senate-Assembly Bill S05888, S51031, A08901.

... perform energy-efficient retrofits at no initial cost to residential property owners, with the ultimate goals of improving at least one million residential units over the next five years, creating thousands of new green jobs, training workers to fill them and demonstrating the effectiveness of innovative financing mechanisms in reaching this goal.¹⁹⁹

The act provided \$4 million in funding for the green job training and proposed to “fund residential for retro-fits for at least [one] million residential units over [five] years.”²⁰⁰ Additionally, the act provided a \$70 million revolving loan fund for energy audits and for retrofitting residential as well as commercial properties.²⁰¹ Paterson then helped pass the Excelsior Jobs Program Act on June 22, 2010.²⁰² The purpose of the act was to encourage the expansion and relocation of clean-tech and renewable energy businesses to New York.²⁰³

1. Renewable Energy Portfolio Standard

Changes to the Renewable Energy Portfolio Standard (RPS) occurred during the Paterson administration, as with other governors. In 2008, the Public Service Commission (PSC) accepted the Environmental Impact Statement (FGEIS) for developing and implementing an Energy Portfolio Standard (EPS).²⁰⁴ Further, in August of 2009, \$95 million was to be made available under a Renewable Portfolio Standard program authorized by the PSC. The program focused on developing large-scale renewable energy projects, including wind, biomass, and run-of-river hydroelectric pro-

199. 2009 N.Y. Senate-Assembly Bill S05888, S51031, A08901.

200. *Id.*; see also Howard M. Fish, *The Adirondack Energy and Greenhouse Gas Inventory: An Energy and Climate Action Plan for 20 Percent of New York State (Part 1 of 2)*, 21 ENVTL. L. N.Y., no.1, 2010, at 2, available at LEXIS.

201. 2009 N.Y. Senate-Assembly Bill S05888, S51031, A08901; Fish, 21 ENVTL. L. N.Y., no.1, *supra* note 200, at 2.

202. 2010 N.Y. Senate-Assembly Bill S06609-B, A09709-C; James P. Rigano & Barry S. Cohen, *Environmental Provisions in a Contract of Sale*, 21 ENVTL. L. N.Y., no. 9, 2010, at 2, available at LEXIS.

203. 2010 N.Y. Senate-Assembly Bill S06609-B, A09709-C; Rigano & Cohen, *supra* note 202, at 2.

204. Fucci, *supra* note 134, at 4.

jects.²⁰⁵ In 2010, the PSC expanded the RPA goal to 30% renewable energy used in New York by 2015 in furtherance of Governor Paterson “45 by 15” clean energy goal.²⁰⁶ In addition to expanding the RPS’s goal, the PSC also allowed for \$279 million to be added to the program over five years.²⁰⁷

2. Regional Greenhouse Gas Initiative (RGGI)

At the beginning of his tenure Governor Paterson was involved with the Regional Greenhouse Gas Initiative (RGGI) compact. While he had inherited New York’s involvement from Governor Pataki, Governor Paterson sought to make beneficial changes. In 2008, New York contracted with RGGI outlining the relationship and duties of the program.²⁰⁸ In August of 2008, the New York State Environmental Board approved the implementing regulations for RGGI and on September 15 the CO₂ Budget Trading Program regulations were finalized and NYSERDA approved the final regulations to implement RGGI in New York.²⁰⁹ The DEC explained that RGGI will also provide limited opportunities for power companies to offset a portion of their emissions with other “green” investments, in an August 2008 press release.²¹⁰ Further, NYSERDA’s CO₂ Allowance Auction Program’s regulations became effective in 2008, and the Adirondack Climate and Energy Action Plan was formed in June of 2008.²¹¹ The Adirondack Climate and Energy Action Plan staged ground for creating a national action plan on climate mitigation.²¹² On September 25, 2008, RGGI held its first CO₂ emission allowance

205. Paul Selver et al., *RLUIPA and Land Use: An Overview and a Closer Look at the “Equal Terms” Provision and the Southern District’s Third Church Decision (Part 1 of 2)*, 20 ENVTL. L. N.Y., no.11, 2009, at 4, available at LEXIS.

206. RENEWABLE ENERGY ASSESSMENT, NEW YORK STATE ENERGY PLAN 1 (2009).

207. Marcus A. Asner & Grace Pickering, *The Lacey Act and the World of Illegal Plant Products*, 21 ENVTL. L. N.Y., no. 6, 2010, at 4, available at LEXIS.

208. N.Y. STATE BAR ASS’N, TAKING ACTION IN NEW YORK ON CLIMATE CHANGE 12 (2009), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26659>.

209. *Id.*

210. Cullen Howe, *Preparing for the Inevitable: What New York City Should do to Adapt to the Impending Effects of Climate Change (Part 2 of 2)*, 19 ENVTL. L. N.Y., no. 11, 2010, at 4, available at LEXIS.

211. Fish, 21 ENVTL. L. N.Y., no.1, *supra* note 200, at 1.

212. *Id.*

auction.²¹³ Two years later, a report was released by NYSERDA, stating that electricity generators participating in RGGI had decreased their carbon dioxide emissions by 33% between 2005 and 2009.²¹⁴ This reduction is attributed to the increase of nuclear, wind, and hydropower and the general use of less coal.²¹⁵

3. Energy Efficiency

Energy efficient practices were encouraged throughout Governor Paterson's administration. In September 2008, the Governor amended the State Energy Law to require all new construction and substantial reconstruction projects commenced by the state to comply with green building principles focused on energy efficiency.²¹⁶ NYSERDA announced in 2009, that the Pace Energy and Climate Center had been selected to develop a renewable fuels roadmap and sustainable biomass feedstock study that would arm the state with knowledge to begin increasing energy efficiency.²¹⁷ In 2009, with Paterson's influence, the Public Service Commission approved changes through net metering that would promote small-scale renewable energy systems.²¹⁸ The PSC also authorized Con Edison to implement changes to its electricity demand reduction program that would initiate greater successes in reducing electricity consumption.²¹⁹ In 2010, the PSC yet again helped power companies to encourage residential consumers to conserve energy by authorizing the implementation of energy efficiency programs.²²⁰

213. N.Y. STATE BAR ASS'N, *supra* note 208, at 12.

214. Amy Mudge et al., *Federal Trade Commission Releases Proposed Revisions to "Green Guides,"* 22 ENVTL. L. N.Y., no. 2, 2011, at 4, available at LEXIS.

215. *Id.*

216. 2008 N.Y. Senate-Assembly Bill S51111, A02005; N.Y. ENERGY LAW § 13 (McKinney 2014); Echeverria & Kenneally, *supra* note 168, at 2.

217. Delight Balducci et al., *Green Jobs in New York: Where the (Green) Economy Meets the (Green) Environmental,* 20 ENVTL. L. N.Y., no. 4, 2009, at 4, available at LEXIS.

218. Stephen G. Swisdak, *Researching Past Uses of New York Industrial Sites,* 20 ENVTL. L. N.Y., no. 5, 2009, at 4, available at LEXIS.

219. Jody Kass et al., *Analysis on the Use of Brownfield Tax Credits by Not-for-Profit Organizations (Part 2 of 2),* 20 ENVTL. L. N.Y., no. 7, 2009, at 4, available at LEXIS.

220. Mudge et al., *supra* note 214, at 4.

Finally, in December of 2010 the New York State Energy Conservation Code was updated under Paterson's direction, to meet the requirements of the American Recovery and Reinvestment Act of 2009.²²¹ Under the law, the state's energy code will meet, or exceed, the International Energy Conservation Code for residential buildings, and meet or exceed ASHRAE 90.1 for commercial buildings.²²²

4. Agriculture

Governor Paterson also took measures to deal with the environmental impacts of the agricultural industry. On July 21, 2008 Paterson passed an amendment to a law concerning the state agricultural environmental management (AEM) program.²²³ The amendment provided that states could include measures to address greenhouse gas emissions, global warming, and renewable energy related to farm operations.²²⁴ Then on September 4, 2008, the Governor enacted a law that required that certain composting and mulching operations be included in farm operations for the purposes of agricultural districts.²²⁵

5. Climate Change

Governor Paterson's administration was also active in mitigating the effects of carbon emissions on Climate Change. In January 2009, the DEC and NYSERDA announced New York and ten other northeast and mid-Atlantic states would develop a regional Low Carbon Fuel Standard (LCFS) focused on reducing the carbon concentration in vehicle and building fuels.²²⁶ Under Paterson, the DEC approved final new source review regulations in

221. 2010 N.Y. Senate-Assembly Bill S08281, A42012.

222. *Id.*; Charlotte A. Biblow, *Mandatory Electronic Equipment Recycling Comes to New York*, 22 ENVTL. L. N.Y., no. 3, 2011, at 2, available at LEXIS.

223. 2008 N.Y. Senate-Assembly Bill S08148, A11405; N.Y. AGRIC. & MKTS. LAW § 150 (McKinney 2014); Howe, 19 ENVTL. L. N.Y., no. 11, *supra* note 210, at 2.

224. 2008 N.Y. Senate-Assembly Bill S08148, A11405; N.Y. AGRIC. & MKTS. LAW § 150; Howe, 19 ENVTL. L. N.Y., no. 11, *supra* note 210, at 2.

225. 2008 N.Y. Senate-Assembly Bill S05357-A, A07526; N.Y. AGRIC. & MKTS. LAW § 301(9); Eric Schaaf, *Environmental Protection Agency Region 2 Enforcement Update*, 19 ENVTL. L. N.Y., no. 12, 2008, at 2, available at LEXIS.

226. Balducci et al., *supra* note 217, at 4.

January 2009.²²⁷ These new source review regulations would require major stationary sources, such as power plants and industrial facilities, that expand or change their operations in a way that would significantly increase emissions, to install state-of-the-art pollution controls.²²⁸ In March 2009, NYSERDA along with the NYSDOT announced that there would be funding for proposals to reduce greenhouse gas emissions and the use of petroleum fuel products by reducing the amount of vehicle miles traveled in the state.²²⁹ In 2010, Paterson amended the law that created the legislative commission to allow the commission to assess the relationship between transportation and the environment and begin to evaluate the impacts of the emissions from the transportation system on climate change.²³⁰ Paterson extended tax exemption for wind energy and farm waste energy systems in August 2013, to further encourage and promote the reduction of emissions.²³¹ In September 2010, the New York Independent System Operator released a report showing that power plants in the state have significantly reduced their emissions of three key pollutants between 1999 and 2009.²³²

B. Financing and Funding

As with many Governors, the power to allocate funds is used widely to implement various policies and it is no different when environmental policies are involved. There are many examples of this during Governor Paterson administration. For example, Governor Paterson amended the State Finance Law so that the term “centralized services” was expanded to include purchases of

227. Balducci et al., *supra* note 217, at 4.

228. *Id.*

229. Kass et al., 20 ENVTL. L. N.Y., no. 7, *supra* note 219, at 4.

230. 2010 N.Y. Senate-Assembly Bill S06609-B, A09709C; Rigano & Cohen, *supra* note 202, at 2.

231. 2010 N.Y. Senate-Assembly Bill S07730, A10875; *see also* Ross Gould & Jackson Morris, *How Reducing Greenhouse Gas Emissions Strengthens New York Businesses (Part 2 of 2)*, 21 ENVTL. L. N.Y., no. 11, 2010, at 2 *available at* LEXIS.

232. Katie Kendall, *2010 Revisions to the City Environmental Quality Review Technical Manual Improve and Enhance New York City's Environmental Review Process*, 21 ENVTL. L. N.Y., no. 12, 2010, at 4, *available at* LEXIS.

renewable energy credits and renewable energy, as well as natural gas, hydrogen, and biofuels.²³³

The Public Service Commission is the agency responsible for a lot of the state funding and varied government allocation of resources. For example, in 2008 the PSC provided an additional \$42.6 million in grants to encourage and help residential and commercial consumers in solar panels and other electricity generating equipment.²³⁴ Furthermore, the PSC set aside \$27 million to help utility companies develop energy efficient programs to help consumers lower costs.²³⁵ In 2009, the PSC provided more than \$24 million in rebate programs to help one to four family residential properties install gas efficient equipment and approved more than \$120 million in new energy efficiency programs.²³⁶ They also invested \$72.1 million in electric and natural gas efficiency programs for multifamily homes.²³⁷ In addition, the PSC set aside \$15.6 million from the RPS program to fund statewide solar panel programs in response to increased energy needs and a market need for renewable energy.²³⁸

Large-scale industrial consumers were considered by the PSC when they provided \$24.4 million for electric and natural gas efficiency programs specifically for large-scale industrial users.²³⁹ Additionally, PSC approved more than \$12 million in funding for three natural gas energy efficiency programs designed to serve the large industrial customer market segment.²⁴⁰ The PSC used \$1.2 million from the federal stimulus package for smart grid infrastructure and voted to approve a variety of smart grid initia-

233. 2009 N.Y. Senate-Assembly Bill S06046, A09019; Selver et al., 20 ENVTL. L. N.Y., no. 11, *supra* note 209, at 2.

234. Press Release, N.Y. Pub. Serv. Comm'n, Consumer's Ability to Generate Energy Expanded (Oct. 15, 2008), [http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/98284ACC6179A875852574E3006B1D12/\\$File/pr08109.pdf?OpenElement](http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/98284ACC6179A875852574E3006B1D12/$File/pr08109.pdf?OpenElement); Echeverria & Kenneally, *supra* note 168, at 4.

235. Howe, 19 ENVTL. L. N.Y., no. 11, *supra* note 210, at 4.

236. Kass, 20 ENVTL. L. N.Y., no. 7, *supra* note 219, at 4.

237. Christopher A. Amato, *DEC's Indian Nation Policy: Opening a New Era of State/Tribal Cooperation (Part 2 of 2)*, 20 ENVTL. L. N.Y., no. 10, 2009, at 4, available at LEXIS.

238. Christopher A. Amato, *DEC's Indian Nation Policy: Opening a New Era of State/Tribal Cooperation (Part 1 of 2)*, 20 ENVTL. L. N.Y., no. 9, 2009, at 4, available at LEXIS.

239. Selver et al., 20 ENVTL. L. N.Y., no. 11, *supra* note 209, at 4.

240. Selver et al., 20 ENVTL. L. N.Y., no. 12, *supra* note 151, at 4.

tives proposed by six major electric utilities in New York.²⁴¹ Furthermore, \$48.3 million was approved for nine natural gas and energy programs²⁴² and \$9 million was given to National Grid as economic development funding to create a renewable energy development program.²⁴³ In 2010, \$35 million in funding from the PSC went to a renewable field electric and steam generating plant in Rome, New York.²⁴⁴ With a focus towards the RPS, the PSC provided \$20.9 million in funding for the RPS program.²⁴⁵

The Municipal Sustainable Energy Loan Program was established under Governor Paterson.²⁴⁶ The act allows municipalities to create local finance programs using federal grants or federal credits.²⁴⁷ Such loans may go to the owners of real property within the municipality that has enacted the program and funds used for the installation of renewable energy systems, energy efficiency improvements, energy audits, renewable energy feasibility studies, etc.²⁴⁸

Budget cuts are unavoidable in times of fiscally tight state governments. During the Paterson administration the environmental issues called for heavy regulations. For example, the possibility of drilling for natural gas in New York through the controversial use of hydrofracking was a concern because the process calls for rigorous monitoring and regulation to be done safely. In this context, both gas drillers and environmentalists believe that “cuts to the state environmental agency’s staff will undermine

241. Selver et al., 20 ENVTL. L. N.Y., no. 12, *supra* note 151, at 4.

242. Howard M. Fish, *The Adirondack Energy and Greenhouse Gas Inventory: An Energy and Climate Action Plan for 20 Percent of New York State (Part 2 of 2)*, 21 ENVTL. L. N.Y., no. 2, 2010, at 4, available at LEXIS.

243. Michael R. Edelstein, *SEQR and You Will Find'r: The Integration of Sustainability Planning and Impact Assessment (Part 1 of 2)*, 21 ENVTL. L. N.Y., no. 3, 2010, at 4, available at LEXIS.

244. James M. Van Nostrand & Elizabeth McCormick, *Using Property Assessed Clean Energy (PACE) Bonds to Meet New York's Clean Energy Goals*, 21 ENVTL. L. N.Y., no. 5, 2010, at 4, available at LEXIS.

245. Michael R. Edelstein, *SEQR and You Will Find'r: The Integration of Sustainability Planning and Impact Assessment (Part 2 of 2)*, 21 ENVTL. L. N.Y., no. 4, 2010, at 4, available at LEXIS.

246. 2009 N.Y. Senate-Assembly Bill S66004-A, A40004-A.

247. *Id.*

248. *Id.*

plans for natural gas drilling in the Marcellus Shale.”²⁴⁹ DEC Commissioner Grannis was fired after the department leaked an internal memorandum that detailed the adverse consequences of the Governor’s plans to cut 209 state regulatory staff positions.²⁵⁰

C. Hydrofracking

Throughout 2009 and 2010, Governor Paterson found himself in the middle of a heated environmental policy debate over the extraction of natural gas, as New York activists called on state officials to suspend new industrial gas drilling — especially drilling that uses potentially dangerous new technologies such as High Volume Hydraulic Fracturing (HVHF) — in areas where drilling activities could contaminate the state’s drinking water supplies.²⁵¹ HVHF involves drilling vertically down and then horizontally through the Marcellus formation and injecting millions of gallons of water, sand, and chemical additives.²⁵² The process raises environmental concerns, including the large volume of water that is used, the contamination of groundwater with the injection fluids, the destruction of local roads, the increase in air pollution and greenhouse gases, and the wastewater treatment of the fracking fluids.²⁵³

With any type of oil and gas extraction, environmental review is mandatory.²⁵⁴ In 1992, the DEC developed a Generic Environmental Impact Statement (GEIS) for all oil and gas well permitting.²⁵⁵ In February 2009, the DEC began the process of completing a Supplemental GEIS (SGEIS) to address the specific

249. Mireya Navarro, *Cuts in State Agency Are Troubling, Environmentalists and Gas Drillers Agree*, N.Y. TIMES, Oct. 22, 2010, <http://www.nytimes.com/2010/10/23/nyregion/23grannis.html>.

250. *Id.*

251. *See Action Results*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/action/results.asp> (last visited Apr. 25, 2014).

252. *Marcellus Shale*, N.Y. DEPT OF ENVTL. CONSERV., <http://www.dec.ny.gov/energy/46288.html> (last visited Apr. 25, 2014); *see also* Charles Gottlieb, *Regulating Natural Gas Development Through Local Planning and Land Use Tools*, in 12 NEW YORK ZONING LAW AND PRACTICE REPORT, No. 6 (2012).

253. *Marcellus Shale*, *supra* note 252.

254. *Id.*

255. *SGEIS on the Oil, Gas and Solution Mining Regulatory Program*, N.Y. DEPT OF ENVTL. CONSERV., <http://www.dec.ny.gov/energy/47554.html> (last visited Apr. 25, 2014).

environmental concerns associated with using HVHF to extract natural gas.²⁵⁶ However, after a draft SGEIS was released for comment, Governor Paterson, through Executive Order No. 41, directed the DEC to conduct further environmental review to ensure all health and environmental impacts are properly mitigated, which would result in a Revised Draft SGEIS.²⁵⁷ Executive Order No. 41 has had a profound impact on the potential introduction of HVHF in New York; it has delayed the process, but will ensure that all environmental impacts are studied and properly mitigated.²⁵⁸ The executive order, however, is not as strong as a full moratorium approved overwhelmingly by the state legislature, because it does not apply to the fracking of vertical wells in shale formations.²⁵⁹ On July 7, 2009, a law was passed that “extended the moratorium on the issuance of certificates of environmental safety for the siting of facilities and certification of routes for the transportation of liquefied natural or petroleum gas.” The drilling moratorium was then extended until April 1, 2011.²⁶⁰

D. Protecting New York State’s Water

In 2008, New York became the fourth state to officially ratify the Great Lakes-St. Lawrence River Basin Water Resources Compact.²⁶¹ The legislation identifies that the waters of the basin are “precious public natural resources shared and held in trust by the state . . . [and are] interconnected and part of a single hydrologic system.”²⁶² As such, the intent and purpose of the compact is to “. . . protect, conserve, restore, improve[,] and effectively manage the Waters and Water Dependent Natural Resources of the Basin under appropriate arrangements for inter-governmental cooperation and consultation because current lack

256. *SGEIS*, *supra* note 255.

257. Exec. Order No. 41, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.41 (2009).

258. *See generally id.*

259. *See Action Results*, *supra* note 251.

260. 2009 N.Y. Laws 84; Amato, 20 ENVTL. L. N.Y., no. 10, *supra* note 237, at 2.

261. 2008 N.Y. Laws 27 (codified in N.Y. COMP. CODES R. & REGS. tit. 6, § 601 (2008)).

262. *Id.* § 1.3.

of full scientific certainty should not be used as a reason for postponing measures to protect the Basin Ecosystem.”²⁶³

A prevalent issue during the Paterson administration was protecting the state’s water resources from ship discharges. In 2009, the DEC Commissioner took action to urge the U.S. Coast Guard to expedite new restrictions on ships’ ability to discharge their ballast water.²⁶⁴ On November 18, 2009, this petition “to prohibit vessel waste discharges within the South Shore Estuary Reserve of Long Island” was approved by EPA Region 2.”²⁶⁵ Along these lines, DEC and EPA announced that boat sewage disposal was banned on the N.Y. Canal System, declaring the entire canal system to be a “No Discharge Zone.”²⁶⁶

E. Conservation

In 2008, Governor Paterson signed legislation amending the Real Property Tax Law, which provided for an 80% tax exemption for lands that are subject to a forest certification program recognized in DEC regulations.²⁶⁷ In August 2009, a further amendment to the Real Property Tax Law provided that, “if a property owner enters into a conservation easement with [a] Town, that property will be partially exempt from local property taxes during the time the easement is in effect.”²⁶⁸

In addition, the commissioners of DEC and the Office of Parks, Recreation, and Historic Preservation released the 2009 Open Space Conservation Plan.²⁶⁹ The plan provides a comprehensive report of New York’s conservation goals. The plan examines how New York intends to respond to climate change, foster green and healthy communities, connect people to nature and recreation, and provide safeguards for natural and cultural herit-

263. 2008 N.Y. Laws 27, § 1.3(2).

264. Fish, 21 ENVTL. L. N.Y., no. 2, *supra* note 242, at 37.

265. *Id.* at 34.

266. “No Discharge Zones” in *EPA Region 2*, EPA, <http://www.epa.gov/region02/water/ndz/index.html> (last visited Apr. 25, 2014).

267. 2008 N.Y. Laws 396; Howe, 19 ENVTL. L. N.Y., no. 11, *supra* note 210, at 2.

268. 2009 N.Y. Laws 311; Selver et al., 20 ENVTL. L. N.Y., no. 11, *supra* note 209, at 2.

269. *2009 Open Space Conservation Plan*, N.Y. DEP’T OF ENVTL. CONSERV., <http://www.dec.ny.gov/lands/47990.html> (last visited Apr. 25, 2014).

age.²⁷⁰ Also in 2009, DEC released a handbook advising municipalities how to use their local powers to protect valuable natural resources.²⁷¹ Finally, in December 2009, DEC announced the adoption of an Environmental Benefits Projects Policy.²⁷²

Paying more attention to the conservation of New York's Atlantic coastal zones, Governor Paterson signed an agreement to join the Mid-Atlantic Regional Council on the Ocean along with seven other states.²⁷³ In signing, Governor Paterson promised to work with other coastal states for the conservation and preservation of the Atlantic shoreline.²⁷⁴

F. Brownfields

A major move under Paterson's environmental agenda was the signing of New York Brownfields Reform legislation in 2008.²⁷⁵ Highlights of legislation include limiting potential redevelopment credits for non-manufacturing projects to \$35 million (or three times the cost of the project), limiting redevelopment credits for manufacturing projects to \$45 million (or six times the cost of remediation), and increasing tax credits available.²⁷⁶ Governor Paterson stated that "[t]he purpose of the Brownfields law was to clean up the environment, not clean out the state treasury . . . We will now be able to break down barriers to economic development in struggling neighborhoods across New York."²⁷⁷

270. 2009 *Open Space Conservation Plan*, *supra* note 269.

271. Jody Kass, *Analysis on the Use of Brownfield Tax Credits By Not-for-Profit Organizations (Part 1 of 2)*, 20 ENVTL. L. N.Y., no. 6, 2009, at 4, available at LEXIS.

272. CP-37/ *Environmental Benefit Projects (EBP) Policy*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/regulations/64596.html> (last visited Apr. 17, 2014); Edelstein, 21 ENVTL. L. N.Y., no. 4, *supra* note 245, at 4.

273. Amato, 20 ENVTL. L. N.Y., no. 9, *supra* note 238, at 4; Governor Paterson et al., *Mid-Atlantic Governors' Agreement on Ocean Conservation* (June 4, 2009), available at <http://midatlanticocean.org/agreement.pdf>.

274. *Id.*

275. *Brownfields Legislation*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/chemical/45734.html> (last visited Apr. 25, 2014).

276. N.Y. TAX LAW § 21 (McKinney 2014).

277. Daniel Schlesinger, *Revisiting New York's Brownfield Cleanup Program: An Analysis of A Voluntary Cleanup Program that Lost its Way*, 3 ALB. GOV'T L. REV. 403, 413 (2010) (citing Press Release, N.Y. State Office of the Governor, Governor Paterson Signs Brownfield Reform Legislation in Buffalo (July 23, 2008), available at http://www.ny.gov/governor/press/press_0723085.html).

G. Solid Waste

Solid waste policies are important to any administration because they affect the entire state's population. New York has specific regional needs, due to its highly rural population in the north as compared to its urban population in New York City. Recognizing this difference, Governor Paterson enacted a law that allowed the New York City Department of Sanitation to operate a marine transfer station.²⁷⁸ The station allows the recyclable materials produced from Manhattan to be processed on the Gansevoort peninsula.²⁷⁹ In 2009, DEC extended restrictions on the open burning of residential waste; open burning is prohibited statewide, and there is no longer an exception for community size.²⁸⁰

In one of the largest changes made to the Environmental Conservation Law, Governor Paterson signed legislation that set in place the state's electronic recycling program.²⁸¹ The Electronic Equipment Recycling and Refuse Act requires that manufacturers provide electronic waste recycling services to consumers via free and convenient means.²⁸² This ensures that New York consumers have a method of properly recycling their electronic waste.²⁸³

Similarly, in 2010 Governor Paterson signed the Rechargeable Battery Recycling Law, which requires that all rechargeable batteries be recycled, and mandates that "[n]o person shall knowingly dispose of rechargeable batteries as solid waste at any time in the [s]tate."²⁸⁴ Furthermore, the law requires that manufac-

278. 2008 N.Y. Laws 596.

279. *Id.*

280. *Questions & Answers Regarding Open Burning*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/chemical/58519.html> (last visited Apr. 25, 2014); Fish, 21 ENVTL. L. N.Y., no. 1, *supra* note 200, at 4.

281. 2010 N.Y. Laws 99; N.Y. ENVTL. CONSERV. LAW § 27-2601 (McKinney 2014).

282. 2010 N.Y. Laws 99; N.Y. ENVTL. CONSERV. LAW § 27-2601; *E-Waste Recycling*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/chemical/65583.html> (last visited Apr. 25, 2014).

283. Biblow, *supra* note 222, at 1.

284. 2010 N.Y. Laws 562; N.Y. ENVTL. CONSERV. LAW § 27-1805 (McKinney 2014).

turers must provide programs that accept and recycle the batteries for the consumer.²⁸⁵

Also in 2010, DEC finalized the New York State Solid Waste Management Plan.²⁸⁶ Known as the Sustainable Material Management Strategy, the plan discusses how materials can be managed for governments, businesses, and individuals, as well as encourages citizens to adopt sustainable practices to reduce greenhouse gases and pollution, save energy, and promote green jobs.²⁸⁷ The plan describes a twenty-year goal for New York that involves reducing the state's waste from 4.1 ounces per person to 0.6 ounces per person per day.²⁸⁸

H. The Environment Regulatory Review

In 2006, Governor Paterson signed Executive Order No. 25, which established a program to review and reform the regulatory system.²⁸⁹ Such a review was needed to alleviate the burden that outdated regulations have on all businesses and levels of government.²⁹⁰ The executive order stated that DEC is to be among the first agencies reviewed.²⁹¹ The review entails an evaluation of DEC's regulations and administrative procedures, to "identify unsound or unduly burdensome or costly rules and paperwork that can be eliminated or reformed . . ." ²⁹²

285. 2010 N.Y. Laws 562; N.Y. ENVTL. CONSERV. LAW § 27-1805.

286. See N.Y. DEP'T OF ENVTL. CONSERV., BEYOND WASTE: A SUSTAINABLE MATERIAL MANAGEMENT STRATEGY FOR NEW YORK STATE (2010), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/frptbeyondwaste.pdf.

287. *Id.* at 1.

288. *Id.* at 26-28.

289. Exec. Order No. 25, N.Y. COMP. CODES R. & REGS. tit. 9, § 7.45 (2006) (revoked by Andrew Cuomo, Exec. Order No. 12).

290. *Id.* § 7.45(1).

291. *Id.* § 7.45(4).

292. *Id.* § 7.45(3).

**VI. GOVERNOR ANDREW CUOMO –
OPPORTUNITIES FOR THE FUTURE: 2011-
PRESENT**

“A governor’s inherent power is limited. A governor’s potential power is limitless.” – Andrew M. Cuomo²⁹³

Those words were spoken by Governor Cuomo during his 2011 Inaugural Address, where he mainly focused on the economy, stating that “[i]t starts with jobs, jobs, jobs, getting the economy running once again . . . all across the state.”²⁹⁴ In his first Annual Message to the Legislature on January 5, 2011, Governor Cuomo’s broad themes focused on the fiscal crisis and the economic health of New Yorkers.²⁹⁵ For a short time, he addressed his Cleaner and Greener New York Program, where he vowed to competitively distribute \$100 million in grant funds to improve New York’s environment via emissions controls, environmental justice programs, energy (and other) sustainability initiatives, and job creation.²⁹⁶ He additionally hoped to expand energy efficiency in the agricultural sector²⁹⁷ as well as expand fresh food into urban centers.²⁹⁸

Prior to the gubernatorial election, Governor Cuomo laid out his ambitious environmental agenda, which focused on preserving New York’s environment.²⁹⁹ He has subsequently continued to update his environmental agenda and goals throughout his administration.³⁰⁰ It is clear that Governor Cuomo realizes that a strong connection exists between environmental protection and economic development:

293. Andrew Cuomo, Governor of N.Y., Inaugural Address (Jan. 1, 2011), transcript available at <http://www.governor.ny.gov/press/inaugurationaddress>.

294. *Id.*

295. *See generally* Andrew Cuomo, Governor of N.Y., Annual Message to the Legislature (Jan. 5, 2011), transcript available at <https://www.governor.ny.gov/assets/documents/SOS2011.pdf>.

296. *Id.* at 23.

297. *Id.* at 23-24.

298. *See generally id.* at 26-28.

299. *See generally* ANDREW CUOMO, THE NEW N.Y. AGENDA: A CLEANER, GREENER NY 57-62 (2010) [hereinafter THE NEW N.Y. AGENDA], available at http://webivadownton.s3.amazonaws.com/487/d4/3/1266/andrew_cuomo_cleaner_greener_ny.pdf.

300. *See id.*

[t]he protection and improvement of our environment is not only an investment in the health and quality of life for all New Yorkers, but it can also improve our economy and is the key to any urban revitalization efforts. Environmental protection efforts can benefit our economy — creating green jobs while reducing pollution, increasing energy efficiency and protecting our water sources — all while helping to foster greener, environmentally friendly business opportunities.³⁰¹

The proposals of the Cleaner, Greener New York Program included building sustainable communities that encourage smart growth and embracing the three legs of sustainability: the economy, the environment, and social needs.³⁰² A Smart Growth Public Infrastructure Policy Act should be enacted that will streamline the planning process for local governments and encourage smart growth among local governments.³⁰³ Through this program, competitive grants for communities with sustainable plans that encompass urban revitalization, climate smart planning, green (not grey) infrastructure, environmental justice awareness, public transportation initiatives, and environmental tax programs will be set in place.³⁰⁴

Governor Cuomo also expressed a commitment to increase renewable energy and energy efficiency, close the Indian Point nuclear energy facility, promote clean air and clean energy, and ensure that any drilling of the Marcellus Shale would be done in an environmentally safe and sensitive manner.³⁰⁵ Additionally, an amendment to the Public Authorities Law was enacted, which added a new section requiring NYSERDA to provide an annual report to certain elected officials concerning the establishment of the energy efficiency portfolio standard.³⁰⁶ The amendment additionally authorized NYSERDA to act as central clearinghouse for information on all energy and energy resource related matters.³⁰⁷

301. THE NEW N.Y. AGENDA, *supra* note 299, at 1.

302. *Id.* at 19-22.

303. *Id.* at 22.

304. *Id.* at 23-36.

305. *Id.* at 47-56.

306. 2011 N.Y. Laws 5.

307. 2011 N.Y. Laws 503.

Finally, the Public Service Law was amended to expand the definition of alternate energy production facilities.³⁰⁸

Furthermore, a strong concern for environmental justice was expressed through several proposals that addressed the effective representation of low-income and minority communities, the availability of an intervenor fund for a new Article X (which regulates the siting of power generating plants), the reform of the State Environmental Quality Review Act (SEQRA) to address environmental justice concerns, and the strengthening of all environmental justice regulations and controls in New York.³⁰⁹

Cleaner and greener transportation alternatives are also expressed as a priority of the Cuomo administration. Governor Cuomo mentioned upgrading the rail system to allow for high-speed trains, integrating pedestrian and bicycle infrastructures into communities to lower carbon emissions, developing and fostering alternative fuel vehicles, and retrofitting current transportation systems (e.g., converting buses to hybrid systems).³¹⁰ For example, in 2011 the PSC approved a Natural Fuel Gas Distribution Corporation partnership that sought to promote the use of natural gas powered cars.³¹¹

A. Power NY Agenda

It was clear from the start that Governor Cuomo sought to increase the efficiency of how energy is generated and distributed in New York. In his 2012 State of the State Address, Governor Cuomo focused on the need to strengthen the energy infrastructure in New York via an “Energy Highway” that will complement the new energy created from the Power New York Act of 2011.³¹² Furthermore, he called for large investments to be made in solar energy production while protecting consumer prices, and expressed a concern for legislation that will promote energy effi-

308. 2011 N.Y. Laws 6 (the definition was changed to include energy storage devices utilizing batteries, flow batteries, flywheels, or compressed air).

309. THE NEW N.Y. AGENDA, *supra* note 299, at 57-62.

310. *Id.* at 63-74.

311. Cullen Howe, *Financing Energy Efficiency Improvements in Residential Buildings Property Assessed Clean Energy (PACE) and “On-Bill” Financing (Part 2 of 2)*, 23 ENVTL. L. N.Y., no. 2, 2012, at 4, available at LEXIS.

312. Andrew Cuomo, Governor of N.Y., State of the State Address 12 (Jan. 4, 2012), transcript available at <http://www.governor.ny.gov/stateofthestate2012>.

ciency upgrades.³¹³ To meet that end, Governor Cuomo proposed a NY-Sun Initiative to increase consumer-sited photovoltaic panels and total solar energy output.³¹⁴ In his 2012 Address to the State, the Governor outlined his Power New York Agenda and focused on the energy and supportive infrastructure needs of the state.³¹⁵

1. Power New York Act of 2011

Perhaps the most significant legislative change spearheaded by Governor Cuomo was the signing of the Power New York Act of 2011.³¹⁶ The Governor's administration noted that the new Act would create thousands of jobs, allow for cleaner and more reliable energy, and strengthen the environmental protections that are needed when producing energy.³¹⁷ The Governor stated that "[w]e must rebuild and expand New York's energy infrastructure to meet the demands of the [twenty-first] century and grow out economy."³¹⁸ At the time the bill was passed, Carol Murphy, Executive Director for the Alliance for Clean Energy New York, praised the Governor, stating, "[f]rom the beginning, Governor Cuomo has emphasized that any investment in new power production must uphold New York's environmental protections, and I commend the Governor today for signing a bill that reinvigorates the energy industry while ensuring robust safeguards for the environment."³¹⁹

The Power New York Act of 2011 replaced the previously sunset Article X and addresses the siting process for new power plants in the state.³²⁰ Under the new legislation, all power plants with a generating capacity of 25 MW or more, or an increase of generating capacity of 25 MW to an existing power plant, must

313. Cuomo, *supra* note 312, at 13-14.

314. *Id.* at 14.

315. *See Id.*

316. 2011 Senate-Assembly Bill S05844, A08510.

317. Press Release, N.Y. State Office of the Governor, Governor Cuomo Signs Power NY Legislation (Aug. 4, 2011), *available at* <http://www.governor.ny.gov/press/08042011NYLegislation>.

318. *Id.*

319. *Id.*

320. 2011 N.Y. Laws 388.

obtain a Certificate from the State Siting Board.³²¹ The Power New York Act of 2011 reduces the threshold for requiring a Certificate from 80 MW under the sunset Article X, now allowing for smaller generating plants to be governed by the law.³²² In effect, the Act displaces control over the siting of applicable power plants from the local government agencies to the state for a more efficient process.³²³ This created a one-stop siting process, avoiding the plethora of local regulations and SEQRA procedures that would otherwise apply and possibly hinder the construction of new, lower-threshold power plants.³²⁴ The law was monumental in the search for cleaner energy, because now renewable energy projects (e.g., wind farms) that did not meet the 80 MW threshold and thus were not subjected to the rigors of local regulation now may fall under the 25 MW threshold and are more efficiently sited for quicker implementation.³²⁵

Aside from decreasing the megawatt threshold, the Power New York Act of 2011 also directs the DEC to develop regulations to reduce carbon dioxide emissions from power plants, requires the DEC to promulgate regulations addressing disproportionate environmental impacts, allows homeowners and businesses to repay loans for energy efficiency upgrades by using a surcharge on utility bills, and directs NYSERDA to undertake a study on the potential for increasing solar energy into the state.³²⁶

2. New York Energy Highway

In 2012, the Energy Highway Task Force released their blueprint, which provides a comprehensive plan for adding 3200 MW of additional electric generation and transmission capacity and clean energy generation in New York.³²⁷ The task force was ini-

321. 2011 N.Y. Laws 388.

322. *Id.*

323. NICHOLAS FASO & TERRESA BAKNER, THE RETURN TO ARTICLE X: A NEW PARADIGM FOR APPROVING ENERGY PROJECTS IN NEW YORK STATE, 12 N.Y. ZONING L. & PRACTICE REP., NO. 2, at 1 (Sept./Oct. 2011).

324. *Id.*

325. *Id.*

326. 2011 N.Y. Laws 388.

327. Press Release, N.Y. State Office of the Governor, Governor Cuomo Receives Plan to Modernize the State's Energy Infrastructure and Spur Billions of

tiated by Governor Cuomo in his 2012 State of the State Address and was described as the “centerpiece” of the Power New York Agenda.³²⁸ In a press release, the Governor stated, “. . . this blueprint continues to position New York State as a national leader in clean energy production and investment.”³²⁹

The blueprint calls for a series of significant monetary investments: \$1 billion for 100 MW of new electric transmission capacity, \$250 million for renewable energy projects capable of creating 270 MW of new power, and \$250 million in Smart Grid Technologies.³³⁰ The blueprint further advocates for the modernizing of existing plants as well as investing in existing transmission and distribution projects to increase reliability and safety (while reducing costs and emissions).³³¹ All of these measures are intended to establish New York as a national leader in energy management control.³³² Additionally, the blueprint requires studies to be conducted to examine the potential for offshore wind power generation in the Atlantic Ocean.³³³

3. The NY-Sun Initiative

The NY-Sun Initiative was announced in April 2012. It seeks to double the amount of customer solar energy projects installed annually, and then quadruple that amount by 2013.³³⁴ In a press release, the Governor stated that “[t]he NY-Sun Initiative puts New York at the forefront of solar development and research, creating green jobs while containing energy costs for consumers . . . [t]his clean energy investment will help protect the environment, expand our solar capacity, and lead to a long term reduction of the cost of solar in New York.”³³⁵ The New York Power Authority

Dollars In Private Sector Investment (Oct. 22, 2012), *available at* <http://www.governor.ny.gov/press/10222012-modernize-energy-infrastructure>.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Press Release, N.Y. State Office of the Governor, *supra* note 327.

334. Press Release, N.Y. State Office of the Governor, Governor Cuomo Announces Comprehensive NY-Sun Initiative to Expand Solar development in New York (Apr. 19, 2012) [hereinafter Gov. Cuomo Announces NY-Sun Initiative], *available at* <http://www.governor.ny.gov/press/04192012-sun-initiative>.

335. *Id.*

(NYPA) president and chief executive officer stated, “Governor Cuomo’s NY-Sun Initiative provides for the exponential growth of clean renewable solar power in New York State.”³³⁶

The NY-Sun Initiative is a collaborative effort by NYSERDA, Long Island Power Authority (LIPA), and NYPA to expand the production of solar energy in New York in an efficient and coordinated process.³³⁷ Through 2015, \$800 million will be invested to expand the state’s solar energy production.³³⁸ The initiative will reduce the costs of solar energy by increasing financial incentives for small- to medium-sized residential projects as well as commercial systems.³³⁹ Furthermore, the initiative will create a “balance-of-system” program (BOS) that will standardize and streamline permitting and grid connection procedures, as well as increase development and training.³⁴⁰ The BOS program will involve NYSERDA and NYPA partnerships with other public and private entities, as well as academic institutions.³⁴¹

At its inception, PSC approved NYSERDA’s request for an additional \$432 million, over four years, to fund customer-sited solar electric systems.³⁴² Furthermore, NYSERDA and NYPA are providing a minimum of \$40 million for the promotion of solar energy equipment and installation research in an attempt to lower the associated costs.³⁴³ Earlier in 2012, NYPA authorized the NY-Sun Solar Market Acceleration Program (Solar Map) that will provide \$30 million, over five years, to research and training concerning solar energy.³⁴⁴

On August 8, 2012, Governor Cuomo announced that \$30 million had been awarded to finance sixteen large-scale solar de-

336. Gov. Cuomo Announces NY-Sun Initiative, *supra* note 334.

337. *About*, THE NY-SUN INITIATIVE, <http://ny-sun.ny.gov/about> (last visited Apr. 25, 2014).

338. THE N.Y.-SUN INITIATIVE, FACT SHEET 2 (2012), *available at* <http://ny-sun.ny.gov/sites/default/files/GEN-NYSERDA-nysun-fs-1-v3.pdf>.

339. *About*, THE NY-SUN INITIATIVE, *supra* note 337.

340. *Id.*

341. *Id.*

342. Gov. Cuomo Announces NY-Sun Initiative, *supra* note 334.

343. *Id.*

344. Press Release, N.Y. Power Auth., \$30 Million Solar Market Acceleration Program Introduced by NY Power Authority; *Part of Gov. Cuomo’s NY-Sun Initiative, and NYSERDA & LIPA’s Efforts* (Mar. 27, 2012), *available at* <http://www.nypa.gov/Press/2012/120327b.html>.

velopment projects in New York City and the Lower Hudson Region.³⁴⁵ Governor Cuomo stated, “[t]hese awards will help large commercial and industrial businesses to invest in solar power, stimulating economic development while helping reduce use of fossil fuels and greenhouse gases emissions.”³⁴⁶ The next day, \$107 million was made available through the NY-Sun Initiative for the expansion of solar energy in New York.³⁴⁷ These funds will support the NY-Sun Competitive PV Program, which seeks proposals for the installation of photovoltaic systems (PV) for businesses, factories, municipal buildings, and other commercial and industrial consumers.³⁴⁸ Recent awards given out by the Competitive PV Program include \$36.4 million made available in 2012, and \$70.5 million in 2013.³⁴⁹

In September 2012, PSC allowed NYSERDA to reallocate \$25 million from the uncommitted System Benefits Charge to support solar energy programs.³⁵⁰ Of the \$25 million, “\$10 million [will go] to develop and implement programs to reduce the balance-of-systems costs for solar photovoltaic (PV) installations and to support PV technology development.”³⁵¹ The rest will support research for a smart grid energy storage hub and expand the Advanced Buildings Program, which seeks out energy savings for commercial buildings.³⁵²

The NY-Sun Initiative was also the catalyst for a series of legislative actions that sought to make solar energy more affordable. On August 17, 2012, Governor Cuomo signed a bill, effec-

345. Press Release, N.Y. State Office of the Governor, Governor Cuomo Announces \$30 Million Awarded through NY-Sun Initiative to Assist New York Businesses Install Solar Power (Aug. 8, 2012), *available at* <http://www.governor.ny.gov/press/08082012-nysun-initiative-30m>.

346. *Id.*

347. Press Release, N.Y. State Office of the Governor, Governor Cuomo Announces \$107 Million Available Through NY-Sun Initiative for Large Scale Solar Power Installation (Aug. 9, 2012), *available at* <http://www.governor.ny.gov/press/080812ny-sun>.

348. *Id.*

349. *Id.*

350. Press Release, N.Y. Pub. Serv. Comm’n, PSC Approves NYSERDA Funding Request (Sept. 13, 2012), *available at* [http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/D799071E3FA7033385257A78005ED34F/\\$File/pr12070.pdf?OpenElement](http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/D799071E3FA7033385257A78005ED34F/$File/pr12070.pdf?OpenElement).

351. *Id.*

352. *Id.*

tive immediately, to allow tax credits for homeowners who acquire solar equipment through a lease or a power purchase agreement.³⁵³ On that same day, the Governor also signed a bill that exempts the sale and installation of commercial solar energy equipment from sales taxes, including an option allowing cities and municipalities to do the same.³⁵⁴ Finally, the Governor signed a bill that would allow property tax abatements to be made available for solar energy generating systems in New York City for 2013 and 2014.³⁵⁵ This will mitigate costs for the installation of such systems in the city.³⁵⁶

4. Green Jobs-Green New York

The Green Jobs-Green New York program promotes “. . . energy efficiency and the installation of clean technologies to reduce energy costs and reduce greenhouse gas emissions.”³⁵⁷ The program provides New York residents with the ability to conduct energy audits, provides installation services, and provides low cost financing options.³⁵⁸ The program seeks to foster sustainable community development by targeting residential, small businesses, non-profits, multifamily homes, and workforce development.³⁵⁹

While the program was signed into law in 2009 during the Paterson administration, it was not until later that NYSERDA announced the numbers of New York State homeowners who completed energy efficiency retrofits reached all-time monthly records in both January and February 2011, through the Green Jobs-Green New York Program.³⁶⁰

353. 2012 N.Y. Laws 375.

354. *Id.* at 406 (effective Jan. 1, 2013).

355. *Id.* at 401 (effective Jan. 1, 2013).

356. Press Release, N.Y. State Office of the Governor, Governor Cuomo Signs Legislation to Make Solar Power More Affordable for Homeowners and Businesses (Aug. 17, 2012), *available at* <http://www.governor.ny.gov/press/08172012-affordable-solar-power>.

357. *Green Jobs Green New York*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., <http://www.nyserda.ny.gov/en/Energy-Efficiency-and-Renewable-Programs/Green-Jobs-Green-New-York> (last updated Apr. 3, 2014).

358. *Id.*

359. *Id.*

360. Press Release, N.Y. State Energy Research & Dev. Auth., Record Numbers of New Yorkers Retrofit Homes for Energy Efficiency Using Green

For residential property owners, Green Jobs-Green New York provides low cost energy audits and low interest financing. NYSERDA's Home Performance through ENERGY STAR allows residential consumers to access low cost energy audits.³⁶¹ For homeowners seeking low interest financing there are two options. Option one includes "on-bill recovery loans" that allow homeowners to pay for energy upgrades through their utility bill.³⁶² The current interest rate is 3.49% with payments in the form of monthly charges on your utility bills.³⁶³ The amount paid per year on the improvements is specifically calculated to not exceed the amount of energy saving that result from the improvements.³⁶⁴ Option two is the ability to have unsecured loans with affordable interest rates (3.49% to 3.99%) paid by monthly bank withdrawals.³⁶⁵

The Green Jobs-Green New York Program³⁶⁶ is a pilot program by NYSERDA to help the commercial building sector and multifamily buildings reduce their energy use,³⁶⁷ an expansion of available funding to encourage wind energy use by homeowners, farmers, businesses and municipalities,³⁶⁸ and the re-launch of

Jobs/Green NY Free or Reduced-Cost Energy Audit/Low-Cost Financing Program (Mar. 10, 2010), *available at* <http://www.nysesda.ny.gov/About/Newsroom/2011-Announcements/2011-03-10-Record-Numbers-of-New-Yorkers-Retrofit-Homes-for-Energy-Efficiency.aspx?p=1>.

361. *Green Jobs Green New York*, *supra* note 357.

362. *Home Performance with ENERGY STAR®, Existing Home Renovations*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH. (Apr. 17, 2014), <http://www.nysesda.ny.gov/Energy-Efficiency-and-Renewable-Programs/Green-Jobs-Green-New-York/Residential.aspx>.

363. *Id.*

364. *Id.*

365. *Id.*

366. Press Release, N.Y. State Energy Research & Dev. Auth., *supra* note 360.

367. Press Release, N.Y. State Energy Research & Dev. Auth., NYSERDA Announces Benchmarking Initiative to Help Commercial and Multifamily Building Owners Reduce Energy Use, Control Costs (Apr. 20, 2011), *available at* <http://www.nysesda.ny.gov/About/Newsroom/2011-Announcements/2011-04-20-Benchmarking-Initiative-Helps-Buildings-Reduce-Energy.aspx>.

368. Press Release, N.Y. State Energy Research & Dev. Auth., NYSERDA Extends On-Site Wind Turbine Incentive Program Following Strong Interest from Public (May 3, 2011), *available at* <http://www.nysesda.ny.gov/About/Newsroom/2011-Announcements/2011-05-03-NYSERDA-Extends-On-Site-Wind-Turbine-Incentive-Program.aspx?p=1> (stating that the New York State Energy Research and Development Authority (NYSERDA) expanded the funding available for an-

NYSERDA's Energy Star Homes Program with \$14.5 million in incentives.³⁶⁹

The options for small businesses and multifamily homes are similar to the benefits that are received by residential homeowners. They include low costs energy audits and financing options for upgrades.³⁷⁰

5. Cleaner, Greener Communities Program

The notion of environmental protection and economic health seem to run hand in hand with the Cuomo administration. The Cleaner, Greener Communities Program seeks to address the need for citizens and small businesses to reduce their environmental impacts through the use of less natural resources while maintaining quality of life and economic development.³⁷¹ Cleaner, Greener Communities uses the idea of regional development and collaboration to improve economic development and environmental stewardship and will fund regional sustainable development and smart growth practices.³⁷² The regional planning teams work with the local regional economic development councils and public and private experts to guide state investment opportunities.³⁷³

Ten regions participate in a competitive two-phase grant process. First, \$1 million is provided to each regional planning team to create a regional sustainability plan or improve on the existing

other six months and added \$1.4 million in incentive dollars after receiving a record number of applications for its wind incentive program for homeowners, farmers, businesses and municipalities); see *On-Site Wind Turbine Incentive Program Opportunity Notice (PON) 2097*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., <http://www.nyserdera.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/PON-2097-Customer-Sited-Wind-Turbine-Incentive-Program.aspx> (last visited Apr. 25, 2014).

369. *EPA Recognizes NYSEDA with 2012 Energy Star® Sustained Excellence Award*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., <http://www.nyserdera.ny.gov/About/Newsroom/2012-Announcements/2012-03-16-EPA-Recognizes-NYSEDA-with-2012-ENERGY-STAR-Sustained-Excellence-Award.aspx> (last updated May 14, 2013).

370. *Green Jobs Green New York*, *Supra* note 357.

371. *Cleaner, Greener Communities Program*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH., <http://www.nyserdera.ny.gov/Statewide-Initiatives/Cleaner-Greener-Communities.aspx> (last updated June 27, 2013).

372. *Id.*

373. *Id.*

plan.³⁷⁴ Secondly, the state has provided up to \$90 million to award to the planning teams for the implementation of their sustainability goals.³⁷⁵ Phase two of the Cleaner, Greener Communities Program was set for 2013.³⁷⁶

NYSERDA mentions the benefits of sustainability and the creation of such a plan are vast. Benefits include, but are not limited to, using renewable energy, controlling sprawl to reduce housing and transportation costs, investing in public transportation, increasing mixed use developments, attracting businesses, initiating complete streets program, reusing developed land, adopting clean technologies, conserving natural resources, and reducing greenhouse gases.³⁷⁷

B. Land: Acquisitions and Banking

1. Historic Adirondack Acquisitions

In an historic land acquisition, Governor Cuomo acquired in 2012 69,000 acres of land that was previously owned by a timber company and the Nature Conservancy.³⁷⁸ The acquisition was praised as the largest addition to the Adirondack State Forest Preserve in over 100 years.³⁷⁹ Governor Cuomo stated:

‘Adding these properties to the Forest Preserve protects the incomparable and breathtaking natural resources of this region and preserves a significant portion of the Upper Hudson River watershed . . . Today’s agreement will make the Adirondack Park one of the most sought after destinations for paddlers, hikers, hunters, sportspeople and snowmobilers. Opening these lands to public use and enjoyment for the first time in 150 years will pro-

374. *Cleaner, Greener Communities Program*, *supra* note 371.

375. *Id.*

376. *Id.*

377. CLEANER, GREENER COMMUNITIES PROGRAM: SUSTAINABLE, SMART GROWTH PRACTICES FOR EVERY NEW YORK REGION, N.Y. STATE ENERGY RESEARCH & DEV. AUTH. 2 (2013), *available at* <http://www.nysesda.ny.gov/Statewide-Initiatives/Cleaner-Greener-Communities.aspx>.

378. Press Release, N.Y. State Office of the Governor, Governor Cuomo Announces Unprecedented Acquisition of 69,000 Acres of the Former Finch Pruyn Lands in the Adirondack Park (Aug. 5, 2012) [hereinafter Unprecedented Acquisition], <http://www.governor.ny.gov/press/080512adirondackfinchpruynland>.

379. *Id.*

vide extraordinary new outdoor recreational opportunities, increase the number of visitors to the North Country and generate additional tourism revenue.’³⁸⁰

This most recent acquisition was in addition to a 2010 land acquisition of 89,000 acres, the same forested area where New York State purchased conservation easements from the former land owners.³⁸¹ In 2007, the entire 161,000 acres of land was acquired by the Nature Conservancy.³⁸² The 69,000 acres that was not under a conservation easement was purchased by the New York State using the Environmental Protection Fund, with totals costs of \$49.8 million over five years.³⁸³

These lands will be added to the thousands of state owned acres that consist of the “forever wild” forest preserve. The property’s landscape is such that it will provide many outdoor recreational opportunities to area residents and tourists.³⁸⁴ Currently, the Adirondack Park Agency (APA) and the DEC are in the process of classifying the land under the Adirondack Park State Land Master Plan that will prescribe its appropriate recreational use.³⁸⁵ The acquired land includes: 180 miles of rivers and streams, 175 lakes and ponds, 465 miles of undeveloped shoreline along rivers, streams, lakes and ponds, and six mountains over 2000 feet tall.³⁸⁶

2. Land Banking Legislation

Early on in his administration, Governor Cuomo addressed the large number of vacant and abandoned properties within New York’s municipalities.³⁸⁷ Vacant and abandoned property “represents lost revenue to local governments and large costs ranging from demolition, effects of safety hazards and spreading deterioration of neighborhoods including resulting mortgage foreclo-

380. Unprecedented Acquisition, *supra* note 378.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. Unprecedented Acquisition, *supra* note 378.

387. N.Y. NOT-FOR-PROFIT CORP. LAW § 1601 (McKinney 2014).

tures.”³⁸⁸ Furthermore, such properties have a negative effect on sustainability because the real property is not being efficiently used.

To address these concerns Governor Cuomo signed the Land Bank Act in July 2011. The bill states that “[l]and banks are one of the tools that can be utilized by communities to facilitate the return of vacant, abandoned, and tax-delinquent properties to productive use.”³⁸⁹ Governor Cuomo states that “[t]his legislation will allow for new economic development projects and improve neighborhoods across New York State.”³⁹⁰ The Governor stated, “I included the creation of land banks in my urban agenda as a way to help transform our struggling urban communities.”³⁹¹ The legislation allows ten land banks to exist at any given time within New York State and each conditioned upon the approval of the New York State Urban Development Corporation.³⁹²

C. Complete Streets Legislation

Governor Cuomo realized that municipal streets are significant channels of transportation for all users. As such, he signed an amendment to the New York Highway Law that set in place a complete streets policy in all New York municipalities.³⁹³ The legislative findings state:

To achieve a cleaner, greener transportation system the transportation plans of New York [S]tate should consider the needs of all users of our roadways including pedestrians, bicyclists, public transportation riders, motorists and citizens of all ages and abilities . . . By encouraging good planning, more citizen will achieve the health benefits associated with active forms of transportation

388. N.Y. NOT-FOR-PROFIT CORP. LAW § 1601.

389. *Id.*

390. Press Release, N.Y. State Office of the Governor, Governor Cuomo Signs Land Bank Legislation (July 29, 2011), *available at* <http://www.governor.ny.gov/press/072911landbanklegislation>.

391. *Id.*

392. N.Y. NOT-FOR-PROFIT CORP. LAW § 1601(g).

393. Charles Gottlieb, *Complete Streets: New York Legislation and Policy Overview*, 26 N.Y. ST. B.A. MUN. LAWYER no. 1 (2012).

while traffic congestions and auto related air pollution will be reduced.³⁹⁴

A complete streets policy advances these notions by adapting the transportation system for all users in an attempt to encourage walking, biking, and public transportation to lower emissions rates. Under the amendment, planners are required to consider roadway improvements such as sidewalks, paved shoulders for all users, lane striping, bicycle lanes, share the road signage, crosswalk, curb cuts, etc.³⁹⁵ When traffic is cut down, and other less environmentally adverse modes of transportation are encouraged, the air will be cleaner and New York will be able to cut their carbon emissions.

D. Water Withdrawal Legislation

*The preservation and protection of New York's water resources is vital to the state's residents, farmers and businesses . . . This law will enhance the state's ability to manage its water to promote economic growth and address droughts while protecting the environment.*³⁹⁶

Governor Cuomo gave these remarks in reference to the Water Withdrawal legislation that he signed in August 2011. The new water withdrawal legislation requires a DEC permit for all users that seek to use water for any purpose and have the capacity to withdrawal more than 100,000 gallons or more per day of surface or groundwater.³⁹⁷ Furthermore, any user who meets this threshold must file an annual report with the DEC that includes twelve months of data, a reporting fee, water source and location, the amount of water withdrawn, a description of the use, and estimated amounts of water to be returned.³⁹⁸

New York State enacted this law in order to manage its water resources more closely in response to climate change,

394. 2011 N.Y. Senate Bill S5411, § 1.

395. *Id.* § 2(b).

396. Press Release, N.Y. State Office of the Governor, Governor Cuomo to Sign Law to Protect New York's Waters (Aug. 15, 2011) [hereinafter Law to Protect New York's Waters], available at <http://www.governor.ny.gov/press/08152011LawtoProtectNewYorksWaters>.

397. 2011 N.Y. Assembly Bill A5411 § 2(14).

398. *Id.* § 4(4).

droughts, and natural resources protection, future water supply demands, and unanticipated threats.³⁹⁹

E. High Volume Hydraulic Fracturing

Without doubt the most controversial environmental policy that Governor Cuomo has had to face during his tenure is the possible introduction of High Volume Hydraulic Fracturing (HVHF) to extract natural gas from the subsurface, specifically within the Marcellus Shale rock formation.

As of the date of this lecture, the revised Supplemental Generic Environmental Impact Statement (SGEIS) is still in the process of being reviewed by the DEC, as well as the implementing regulations for the HVHF process.⁴⁰⁰ Governor Cuomo has made several suggestions and actions that indicate indecisiveness on the issue. A decision was expected in the Fall of 2012; however, the DEC and Governor Cuomo surprised New Yorkers when they decided that the review must undergo a health impact assessment by the New York State Department of Health to determine the health impacts associated with the drilling practice.⁴⁰¹

While environmental groups called for an independent study of the health impacts, meaning an assessment outside of state government, DEC Commissioner Martens stated, "I believe deferring to an outside group or entity would be an inappropriate delegation of a governmental responsibility. Government is the public's independent review: that is the essence of the current process."⁴⁰² Commissioner Martens also notes that Governor Cuomo's sentiments and instructions regarding the controversial review process are clear ". . . let the science determine the outcome."⁴⁰³

399. Law to Protect New York's Waters, *supra* note 396.

400. *Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (GEIS)*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/energy/45912.html> (last visited Apr. 25, 2014).

401. Mireya Navarro, *New York State Plans Health Review as it Weighs Gas Drilling*, N.Y. TIMES, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/nyregion/new-york-states-decision-on-hydrofracking-will-await-health-eview.html>.

402. Press Release, N.Y. Dep't of Env'tl. Conserv., Commissioner Martens Rejects Call for "Independent" Health Study of High Volume Hydraulic Fracturing (Sept. 20, 2012), *available at* <http://www.dec.ny.gov/press/85071.html>.

403. *Id.*

In June 2012, prior to the health impact assessment decision, a senior official at the DEC revealed the administration's plan to allow HVHF in struggling communities along the Pennsylvania border in New York's southern tier.⁴⁰⁴ In the southern tier region the Marcellus Shale rock formation is at its deepest, which would lessen the risk of groundwater contamination.⁴⁰⁵ Additionally, the administration expressed that they would only permit HVHF in communities that expressed support for the extraction method.⁴⁰⁶ While many communities in New York have enacted local bans and moratoriums on the practice, the validity of which is being litigated in the courts,⁴⁰⁷ southern tier communities are more accepting of the practice and in need to the economic boom that would follow.⁴⁰⁸

F. Effects of Hurricane Sandy

Cuomo's 2013 State of the State Address was titled "NY Rising" and in that report, the final subject area to be addressed was responding to the crisis.⁴⁰⁹ This was the sixth subject area, in his address, to which he was referring to natural disasters.⁴¹⁰ Among other things, he announced the New York State 2100 Commission to review the vulnerabilities faced by the state's infrastructure systems.⁴¹¹ In the report, the Commission has worked to develop specific recommendations that can be implemented to increase New York's resilience in the five main areas:

404. Danny Hakim, *Cuomo Proposal Would Restrict Gas Drilling to A Struggling Area*, N.Y. TIMES, June 13, 2012, http://www.nytimes.com/2012/06/14/nyregion/hydrofracking-under-cuomo-plan-would-be-restricted-to-a-few-counties.html?_r=0.

405. *Id.*

406. *Id.*

407. *See* *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Tompkins Cnty. Sup. Ct. 2012); *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722, 730 (Otsego Cnty. Sup. Ct. 2011).

408. Hakim, *supra*, note 404.

409. *See* Andrew Cuomo, Governor of N.Y., State of the State Address (Jan. 9, 2013), at 206, *transcript available at* <https://www.governor.ny.gov/sites/default/themes/governor/sos2013/2013SOSBook.pdf>.

410. *See id.*

411. *Id.* at 211.

transportation, energy, land use, insurance, and infrastructure finance.⁴¹²

Cuomo noted:

in just two years New Yorkers have witnessed firsthand the destructive force of three powerful storms that have crippled the state, Irene, Lee, and most recently Sandy . . . Extreme weather is the new normal. In the past two years we've had two storms each with odds of 100 year occurrence.⁴¹³

VII. CONCLUSION

When initially preparing for this Kerlin Lecture, I began with the idea that it was possible to quantify a determination as to who was a better governor when it came to environmental matters. I thought it would be possible to analyze who had the better agenda, who was more successful at implementation, and that there might be a basis for analysis depending upon political party. However, I concluded, like one of my suffragette heroines, Kate Stoneman, that “there are always opportunities to be had . . .” and in the end each Governor has left a legacy that helped advance environmental protection for the time they served in office. The good news is that each of the last five governors in New York have placed a high priority on advancing and implementing a meaningful environmental agenda. This somewhat brief review of the highlights of the major accomplishments of each governor lends further support to the notion that gubernatorial commitment to environmentalism is critical to achieving a more sustainable New York.

412. Cuomo, *supra* note 409, at 211.

413. *Id.* at 206.