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Environmental Law in New York State: The Past as Prologue to the Future: Eighth Annual Gilbert and Sarah Kerlin Lecture on Environmental Law October 19, 2007

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**Eight Annual Gilbert and Sara Kerlin
Lecture on Environmental Law
October 19, 2007**

**ENVIRONMENTAL LAW IN NEW
YORK STATE:
THE PAST AS PROLOGUE TO THE FUTURE**

JOHN P. CAHILL*

I know this lecture is an academic exercise but I've been a political and bureaucratic hack for the last twelve years, so my talk will not be so much on the academic side but sharing my experiences with you in Albany and talking about how environmental law is made and how environmental policy is made.

I know most of us, when we think of environmental law, start thinking about those seminal cases such as *Massachusetts v. EPA*, or landmark legislation such as NEPA or SEQRA. There's no question about their enormous importance in the development of environmental law. But if you look at the twelve years that I spent involved in environmental issues in the State of New York the legislative victories and even the seminal legal decisions were really not what drove environmental policy and environmental law. It really came down to the executive utilizing the powers that he has, through executive orders, through control of the regulatory agencies that are under his domain, as well his authorities to use market powers to help change and help drive the environmental policy.

When I first started back in 1995, it was a tumultuous time in DEC. We had a Commissioner who some might say was a little bit of a cowboy. He was doing different things with enforcement that wasn't really the way to go about getting things done. So by the spring of 1996 he was somewhat disenchanted, but the Governor was very much concerned about environmental issues. He spent

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the first two years of his office really focusing on fiscal issues. The state at that point was faced with about a \$5 billion deficit. Crime was a major issue in New York City and the upstate communities. And the Governor was engaged in enormous political battles with the legislature on changing the financial position of the state, which he dealt with to a great deal of success. It's fair to say that in those first two years environmental issues were not at the front and center of the Governor's environmental agenda. Although he had been well recognized as a legislator for his environmental positions, his positions on environmental issues as a governor had not yet risen to the forefront.

I remember getting a phone call in June 1996 from the Governor—and I knew the Governor because I had practiced law with him after graduating from Pace—which was unusual because although the Commissioner would sometimes get a call from the Governor, it was me that was getting the phone call. He said, "Come up to Garrison. We're going to have a meeting and I want you to be there." It was beautiful Saturday afternoon on the shores of Garrison and at that meeting were all the leading environmental groups of the State of New York: John Adams, John Cronin, the folks from Environmental Defense, Jim Tripp. The purpose of that meeting was to discuss an Environmental Bond Act. An Environmental Bond Act was tried by Governor Cuomo back in 1990, six years earlier, and that failed miserably. The Governor saw the need for an Environmental Bond Act, not only to push New York State to the forefront of environmental issues, but also as a way to bring economic development to so many areas of upstate New York. The environmental groups I must say were fairly surprised about the Governor's desire to take on a political fight for a bond act, because for the most part they were not entirely happy with the Governor for his first eighteen months in office.

But from that day we built an enormous coalition from the get-go with the environmental community about support of what was at that time going to be a \$1.5 billion bond act. That week we announced the program and we had the constituents: the environmental community, the labor community, and even the business community lined up in support of a \$1.5 billion bond act. It was done differently, because in the 1990 Bond Act there wasn't an overwhelming amount of money for land acquisition, which really turned out voters against it in 1990 in upstate New York. It was also different because it wasn't pork-barreled, with specific

projects for specific legislators. It was very general with five to seven topics that the money was going to be dedicated to. It was an interesting dynamic trying to get something through the legislature. Even spending money—which is what they love to do more than anything else—was an enormous challenge, but thankfully we had the constituents on board before we even announced. That helped, frankly, since we gave the legislature a very short period of time to negotiate this because we announced it in June and had to be adopted by the end of the session at the end of June. At the end of the day they added about another \$250 million to the Bond Act, which made it a \$1.75 billion Bond Act, which in my opinion helped change the course of the agenda for the Governor in getting things done over the next ten years of his term.

For me, it was also a lesson in the realities of politics in Albany—that it's almost impossible to get anything done through the legislative means. In promoting environmental and other issues, the Governor had to use his bully pulpit, he had to use executive orders, and he had use the control of the agencies to get that done.

It was further demonstrated in 1998, when the state superfund, which funds the remediation of hazardous waste sites throughout the state, was basically running out of money—and so the environmentalists were clamoring. But at the same time in upstate New York these contaminated sites were a real burden to local communities and were very much a dissuading factor to redeveloping some of the urban areas of downtown Buffalo and downtown Rochester where there were sites that had the possibility of being contaminated. So the Governor asked me to lead a task force back in 1998, again with the consensus of the environmental community and business community, to put together recommendations of how to reform and refinance the state superfund.

In 1999, after a very torturous process of dealing with the environmental community and with the business community trying to put together a package that we could stand behind, we made recommendations to the Governor and the legislature of changes to the state superfund law. It took four years for the legislature to act on that recommendation, which had the broad support of the environmental community as well as the business community, because at the end of the day it comes down to horse trading with the legislature. Even though there may be public support, there's

always the issue of dealing with particular legislators in both houses to try to accomplish anything in the New York Legislature.

And you compare that process with the process the Governor was able to achieve in the historic New York City Watershed Agreement. As you may recall New York City was faced with a filtration order from EPA that was going to require the construction of a filtration plant for all of the Catskill-Delaware water-system. The Governor brought together the interest groups of upstate New York and downstate New York and in 1997 we came to a historic agreement that avoided filtration and avoided the city from spending billions of dollars on a filtration plant by putting together a plan of land use regulations as to development and health regulations to ensure the water quality of drinking water for New York City residents. But a beautiful thing about this agreement was that it was accomplished in a relatively short period of time because you did not have the enormous difficulty of dealing with the New York State legislature.

The Governor's environmental agenda progressed from the 1996 bond act to the 1997 New York City Watershed Agreement to issuance of executive orders to help promote environmental policy. In 2001, the Governor issued Executive Order 111. We knew that this was important for state government but the importance of Executive Order 111 took all of us by surprise. What that executive order did was it required all government agencies to reduce energy usage by 35 percent from 1990 levels—an aggressive number no doubt. More importantly it sent a message to the public and it sent a message to the market participants that the state was going to continue to play a very active role in energy efficiency.

To show how that market influence works I want to point to another example from 2000. Back in 2000, the MTA capital plan was due. They do a five year capital plan. A big issue for many in the environmental justice community was the issue of dirty diesel buses in New York City that were spewing high PM, NO_x, and SO_x. The MTA—god bless them—likes to do things the way they've always done them. They like to buy the same buses, buy the same fuels, and run them at the same timeframe on the same streets. The Governor decided that we weren't going to do this anymore: the MTA is the largest buyer of buses in the world, and we would to use the power of the MTA to basically transform the way buses are built here in the United States. The MTA responded that they couldn't find low-sulfur fuel. We said that if the MTA needs low-sulfur fuel, we guarantee you you're going to find

producers. Sure enough, we did the five year capital plan requiring that the MTA ditch all of its dirty diesels, and directing them to buy compressed natural gas buses, directing them to buy hybrid buses, as well as low-sulphur diesel buses.

The results were astounding, not only environmentally but economically. Those buses that are being built for the MTA right now are built in upstate New York by Orion Bus and they are now exporting those buses around the world. And so we had the story of an enormous environmental success for New York City, but at the same time providing market opportunities for a small—at that time—struggling bus company in upstate New York. It's that type of market driven positioning that the Governor and his administration tried to do in its last seven years.

Another example is on the RPS. In 2002, the Governor in his state-of-the-state announced that he was directing the Public Service Commission to come up with a renewable portfolio standard to require that 25 percent of the electricity that is sold in New York State be from renewable sources—quite a significant amount. It was amazing, and frankly I find it more amazing now that I'm out in the private sector, to see all of the impacts that these decisions had on businesses around the state, but what it did was it catapulted New York State to the forefront of wind development in the eastern part of this country. As a direct result of the RPS, we had three major wind farms being built in upstate New York, one of which at the time was a 300 megawatt wind farm outside of Loudenville, which hadn't seen \$450 million of private sector investment ever in its history, and positioned itself as the largest wind farm east of the Mississippi. It was another example of the Governor using market forces to go ahead and drive new energy technologies.

In looking back and seeing one of the more important things we did was the whole issue of cap-and-trade and the Regional Greenhouse Gas Initiative. I remember it was 2001 and I was flying down with the Governor on the helicopter to New York City and he was being honored by the League of Conservation Voters for the NO_x and SO_x regulations, for the Watershed Agreement, for the Bond Act and a whole host of other things that he had done as governor. He asked me what he should talk about, what were the big issues? I told him, "the big issue is going to be climate change, Governor." We were facing a lot of issues with Washington trying to get the administration to include carbon as a pollu-

tant. I told him, "I don't think we're going to see any change come out of Washington. It's going to take state leadership."

So that night he announced the formation of the Greenhouse Gas Working Group, which he put me in charge of, and it really was the beginning of this whole method of trying to bring about a regional plan to address greenhouse gas emissions. That led to a report in 2003 that was done by both DEC and the Clean Air Policy Center in Washington making numerous recommendations that the region and the state could take with respect to greenhouse gases. Immediately after that the Governor sent a letter to all of the northeastern states asking them to join in a cap-and-trade program for the northeast, that we were not going to see action on a federal level and that the region needed to do something. So, after two years of arduous negotiations with the various states, the various interest groups, dealing with the political dynamics of people thinking about running for president deciding how to position themselves—they were in, they were out, they were in—he was eventually out.

In 2005, we had an agreement with seven of the states, Massachusetts and Rhode Island at that time decided not to participate. I really think that was an impetus, no so much for a cap-and-trade program here in the northeast, even though I really do believe it's important. But, since the Regional Greenhouse Gas Initiative, you have seen the explosion of that issue across state lines. You've seen California adopt its own policies and its own legislation with respect to greenhouse gases. You've seen the western governors go ahead and announce their own regional program along with the Canadian provinces. And I think you're really seeing more and more momentum for a cap-and-trade program here in the United States.

That is a great example of what government can do without having to deal with the legislature in order to promote and environmental agenda. States such as New York provide a wonderful laboratory to promote issues here in New York that sometimes those down in Washington are always hesitant to deal with. By pushing the agenda, by coming up with plans, New York State on its own is not going to solve the whole issue of climate change, but by taking those steps directly by governmental agencies and governmental authorities the Governor was able to put greenhouse gases on the top of the agenda, particularly coming from a Republican Governor of New York.

And when you look at the program [RGGI], it's frankly not the most aggressive program looking at it now, but in 2003 we said how are we ever going to get this thing done. You're looking basically at a 10 percent reduction by 2020 of emissions from utility generating facilities of more than 25 megawatts. But what's more important with respect to aggressiveness of the agenda of that program was, frankly, that it was the first. It was the first time people were willing to step out and say, as an American, that we're going to do *something*. Maybe it's not the perfect answer, but we're willing to do something to the fight on climate change.

As we look and follow the issues that are being dealt with in Washington now and how they are being dealt with I do feel more optimistic about a national cap-and-trade program. Not this year, maybe not next year, but I think that the political tide is turning, that the states are already behind it. The utilities are asking the federal government to impose a cap-and-trade program—otherwise they're going to get a carbon tax. So I do think there is an agenda for change in Washington on the climate issue, and I think that is because of the leadership that the states have provided.

So as we go ahead and we do the research and we look at the landmark legislation and we read the seminal cases, I'd ask you to look at the smaller things: those executive orders and those directives to executive agencies and executive authorities. What's needed is a constant moving forward of the environmental agenda. We can't wait for once in every twenty years to have a piece of hallmark legislation or a hallmark decision by the highest courts in the land. It really does take a concerted effort on a weekly or yearly basis to make sure that progress is being made so that the private sector knows where to invest, so that the private sector can be comfortable in investing \$300 million or \$450 million in a windmill facility in upstate New York. They have to know there's going to be some sort of continuity with respect to that type of policy. The answer is if there's no continuity, they won't invest. They have to see continuous progress on those issues in knowing that the rug will not be pulled out from under them.

I really believe if we have a sustained policy, a sustained environmental policy, that the issues facing particularly upstate New York can be dramatically changed. You know, Albany used to be, and still is obviously, the capital of New York, and certainly, in my opinion, we're a backward governmental town controlled by government and government employees. But we see what happened in Albany with the development of nanotechnology, where you had

IBM, Tokyo Electron, and AMD announcing literally billions of dollars in private investment because they knew there was going to be a continuity of policies that were going to favor that type of technology development in upstate New York. The same thing is needed in this county for environmental and energy technology in this country. We need a continuous, serious commitment by policy makers so that the private sector can have confidence in their investments.

Someone told me, and I believe this to be a fact, that in Germany 60 percent of new jobs that are being developed come from clean energy, particularly in solar technology. That should be what we should be doing for upstate communities in New York State, to give them the faith and the hope through smart continuous policies that we can go ahead and find jobs to replace the old rust belt in upstate New York.

The new administration's term has started. They're seeing that it's very difficult to deal with Shelly Silver and Joe Bruno. They have their agenda, and—for better or for worse—they're an equal branch of government. To try to get your agenda through that equal branch of government is very difficult. The strongest power that the legislature has is to do nothing—to stop an agenda. They can't get anything done without the executive, but they have enormous power and enormous ability to stop and agenda as we're seeing, frankly, right now. And that's why governors and executives need to find a way to go around the legislature to keep the ball moving on important issues. Certainly for Governor Pataki, the environment was at the forefront of our agenda, and that's why we were constantly looking for ways to skirt around the legislature and come up with our own ideas to go ahead and promote those types of policies.

Looking back, in twelve years in government, it was a really amazing opportunity—to see how Albany works and to see how Albany doesn't work. Someday maybe I'll write a book about it, but the one thing you learn about Albany is it's a culture very much unto itself. Albany sees itself, obviously, as the capital of New York, but many people outside Albany don't see it as terribly important.

It's funny, I grew up in Yonkers, I grew up on the Hudson River, and I was so thrilled to become Commissioner of the Department of Environmental Conservation, it was really a tremendous honor for me. When I went down to my buddies and said, "Hey, I just got made Commissioner of DEC," they were like,

“What’s that?” They never heard of it before! I said, “Professor Ottinger says it’s one of the most important agencies in the state.” But for me, it was a really humbling experience to come back to New York City and the guys that I grew up with. They don’t know DEC, so you can’t count on their support to go ahead and get things done. You’ve got to come up with ways, find your own ways, your own means to pursue and agenda. I do hope, and I think with the help of what the Pace Environmental Law program does to push the envelope—let me totally honest with you. I didn’t always agree with the positions here at Pace or with the Riverkeeper. We had our disagreements, but they were healthy disagreements.

One thing that bothers me, frankly, about the state of environmental issues is that there is not a lot of progress on climate change, but I’m extraordinarily concerned that there are environmental issues that are not being discussed. I think clean water is just an enormous issue—it’s a growing issue for our country, particularly in the Southwest. We’ve had very little discussion to date about what our responsibility is to help developing countries meet the need for clean water.

So as we go ahead, and we push the issue of climate change, which I believe in and am firmly committed to doing, we can’t lose sight of those important issues that the world and our nation face, particularly in light of our growing and expanding population. We need many voices from here at Pace to talk not only about climate change, but to talk about poverty, to talk about environmental justice, the right to clean potable drinking water. We need everybody in this room and a lot more to keep making these cases to the public officials in order to have a sustainable globe for this century.

It has been a real honor and thrill for me to be here today. Professor Robinson, thank you for giving me this honor, and Dean Simon, thank you for having me here today.