



**NEW YORK STATE BAR ASSOCIATION  
HOUSE OF DELEGATES  
SATURDAY, JUNE 17, 2017 – 8:30 A.M.  
THE OTESAGA, COOPERSTOWN, NEW YORK**

**REVISED AGENDA**

- |     |  |            |
|-----|--|------------|
| 1.  | Call to order, Pledge of Allegiance and introduction of new members – Mr. Michael Miller             | 8:30 a.m.  |
| 2.  | Approval of minutes of April 1, 2017 meeting   | 8:35 a.m.  |
| 3.  | Report of Treasurer – Mr. Scott M. Karson  | 8:40 a.m.  |
| 4.  | Memorial for Hon. Sheila Abdus-Salaam – Hon. Eugene M. Fahey   | 8:55 a.m.  |
| 5.  | Presentation of Root/Stimson Award – Ms. Sharon Stern Gerstman                                       | 9:05 a.m.  |
| 6.  | Remarks by ABA President Linda A. Klein  | 9:15 a.m.  |
| 7.  | Installation of Sharon Stern Gerstman as President – Oath to be administered by Hon. Eugene M. Fahey | 9:25 a.m.  |
| 8.  | Report of President – Ms. Sharon Stern Gerstman  | 9:40 a.m.  |
| 9.  | Report and recommendations of Committee on the New York State Constitution – Mr. Henry M. Greenberg  | 10:00 a.m. |
| 10. | Report and recommendations of Environmental Law Section – Mr. Kevin M. Bernstein                     | 11:15 a.m. |
| 11. | Memorial for Gregory T. Miller – Vincent E. Doyle III  | 11:45 a.m. |
| 12. | Report of The New York Bar Foundation – Mr. John H. Gross  | 11:55 a.m. |
| 13. | Administrative items – Mr. Michael Miller  | 12:00 p.m. |
| 14. | New business   | 12:05 p.m. |
| 15. | Date and place of next meeting<br>Saturday, November 4, 2017<br>Bar Center, Albany, New York         |            |

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
BAR CENTER, ALBANY  
APRIL 1, 2017**

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**PRESENT:** Abbott; Aidala; Alden; Arenson; Baker; Barreiro; Behe; Block; Bonina; Bowler; Braunstein; Brown, T.; Bruno; Burke, J.; Burns, S.; Calareso; Chambers; Chang; Cheng; Christian; Christopher; Clouthier; Cohen, C.; Cohen, D.; Cohen, O.; Connery; Cooper; Dean; DeFelice; Denton; Effman; Fennell; Finerty; First; Fisher; Flynn; Fox, G.; Fox, M.; Gaddis; Gallagher; Galligan; Gayle; Genoa; Gensini; Gerbini; Gerstman; Gische; Goldberg; Goldenberg; Gonzalez; Grays; Greenberg; Grogan; Gutekunst; Hacker; Hage; Heath; Hersh; Hetherington; Himes; Hines; Hoffman; Hurteau; Hyer; Jackson; James; Karson; Kase; Kean; Keiser; Kelly; Kenneally; Kenney; King, B.; Koch; Krausz; LaRose; Lewis; Lindenauer; Makofsky; Mancuso; Marangos, D.; Martin; McCann; Miller, C.; Miller, G.; Miller, M.; Millon; Minkowitz; Moskowitz; Murphy; Napoletano; Nowotarski; O'Donnell, T.; Onderdonk; Ostertag; Owens; Poster-Zimmerman; Preston; Quist; Reitzfeld; Richman; Rivera; Rodriguez; Rosner; Russell; Ryba; Salch; Samuels; Schofield; Shafer; Shamoon; Sheehan; Sigmond; Silkenat; Silverman; Simmons; Singer; Spirer; Spitler; Standard; Starkman; Strong; Strenger; Sulimani; Sullivan; Tarver; Tennant; Thaler-Parker; Tully; Vitacco; Wallach; Walsh; Weathers; Weinberger; Westlake; Whiting; Whittingham; Wildgrube; Williams; Zuchlewski.

Ms. Gerstman presided over the meeting as Chair of the House.

1. The meeting was called to order and the Pledge of Allegiance recited.
2. Approval of minutes of January 27, 2017 meeting. The minutes were accepted as previously distributed.
3. Report of Treasurer. Scott M. Karson, Treasurer, reported that through February 28, 2017, the Association's total revenue was \$13 million, a decrease of approximately \$126,500 over the previous year, and total expenses were \$5 million, an increase of approximately \$732,800 over 2016. Mr. Karson also provided a report on the expenses of Association committees. The report was received with thanks
4. Election of the Nominating Committee and NYSBA Delegates to the ABA House of Delegates. Seymour W. James, Jr., member-at-large of the Nominating Committee, presented the report of the Nominating Committee.
  - a. Election of members of the Nominating Committee. The following were nominated for service on the 2017-2018 Nominating Committee:

District members and alternates of the Nominating Committee: First –Peter Harvey, John Owens Jr., Lisa Stenson Desamours, Stephen P. Younger, Michael McNamara, Stephen Lessard, Adrienne Koch, Susan B. Lindenauer, and Asha Smith, with Martha Harris, First Alternate, Alan Rothstein, Second Alternate, and Megan Davis, Third Alternate; Second – Andrew M. Fallek and Hon. Cheryl E. Chambers, with Barton L. Slavin as Alternate; Third – David W. Myers and

Hermes Fernandez, with Sandra Rivera as Alternate; Fourth – Michelle H. Wildgrube and Marne Onderdonk, with Jeremiah Wood as Alternate; Fifth – Karen Stanislaus and Gioia Gensini, with Michael E. Getnick as Alternate; Sixth – Bruce J. McKeegan and Kathryn Grant Madigan, with Richard C. Lewis as Alternate; Seventh – LaMarr Jackson and Keith McCafferty, with June M. Castellano as Alternate; Eighth – Vincent E. Doyle III and Kathleen Marie Sweet, with Cheryl Smith Fisher as Alternate; Ninth – Jessica D. Thaler-Parker, Mark T. Starkman, and Hon. Arlene Gordon-Oliver, with Kelly Welch as Alternate; Tenth – Steven G. Leventhal, A. Thomas Levin, Ilene S. Cooper and Richard A. Weinblatt, with Marian C. Rice, First Alternate, and Rosemarie Tully, Second Alternate; Eleventh – Violet E. Samuels and Chanwoo Lee, with Arthur N. Terranova as Alternate; Twelfth – Carlos M. Calderón and Michael A. Marinaccio, with Samuel M. Braverman as Alternate; Thirteenth – Michael J. Gaffney and Robert A. Mulhall, with Orin J. Cohen as Alternate.

A motion to elect the foregoing was adopted.

- b. Election of Delegates to ABA House: A motion was adopted to elect the following for a two-year term commencing in August 2017: Claire P. Gutekunst, Seymour W. James, Jr., Glenn Lau-Kee, Michael Miller, and Stephen P. Younger.
5. Report of re Membership Challenge. Michelle H. Wildgrube, co-chair of the Challenge, updated the House on the Challenge's results to date, including section best practices and partnerships with county bars. The report was received with thanks.
6. Report of the President. Ms. Gutekunst highlighted the items contained in her written report, a copy of which is appended to these minutes. She observed that this meeting is her last as President and thanked the members for the opportunity to serve. She also thanked Ms. Gerstman and the other officers, section and committee chairs, and the staff for their assistance during her term. She thanked the members of the House for their service. The House gave Ms. Gutekunst a standing ovation.
7. Discussion re Special Prosecutors and the Role of the Executive. Richard J. Davis, who served on as Assistant Special Prosecutor on the Watergate Special Prosecution Force from 1973 to 1975, and Alvin L. Bragg, Jr., Executive Deputy Attorney General for Social Justice of the State of New York, led a discussion of the appointment of special prosecutors at the federal and state levels. The presentation was received with thanks.
8. Report of NYSBA/WBASNY Domestic Violence Initiative. Amy E. Schwartz-Wallace, co-chair of the Initiative, updated the Executive Committee with respect to the Initiative's work in the area of legislation, education and training, and pro bono service. The report was received with thanks.
9. Report of Environmental Law Section. Lawrence P. Schnapf, chair of the section, reported on the section's work in updating the 2009 report of the Task Force on Global Warming, outlining the recommendations being made by the section. How noted that the

report will be presented to the House for debate and vote at the June 17, 2017 meeting. The report was received with thanks.

10. Report of The New York Bar Foundation. John H. Gross, President of The New York Bar Foundation, updated the House on The Foundation's work, noting that The Foundation awarded \$650,000 in grants last year as well as \$1 million in cy pres funds it administers. He reported that the Catalyst Fund for supporting summer internships for law students in public service is now being administered by The Foundation. Finally, he presented a check in the amount of \$40,000 in support of the joint Association/Foundation initiative to connect pro bono volunteers with legal services groups serving immigrants. The report was received with thanks.
11. Report of Executive Director. Pamela M. McDevitt, Executive Director, reported on opportunities to increase non-dues revenue and the development of services that will help lawyers improve their practices. The report was received with thanks.
12. Administrative items. Ms. Gerstman reported on the following:
  - a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2017-2018 Association year and to approve the filed roster of the members of the House for the 2017-2018 year were requested and approved.
  - b. She announced that immediately following the meeting, the Committee on Leadership Development would host a meeting for members interested in exploring leadership opportunities in the Association.
  - c. She noted that this meeting represents her last as Chair of the House and thanked the House for the opportunity to serve. She thanked the departing members of the Executive Committee and the House for their service and thanked the staff for their support. She introduced Mr. Miller as the next Chair of the House and presented her with the House's gavel.
13. New Business.
  - a. Mr. Weinberger encouraged the House to promote the Lawyers' Fund for Client Protection and the OCA Attorney-Client Fee Dispute Resolution Program to senior citizens who might be unaware of these programs.
14. Date and place of next meeting. Ms. Gutekunst announced that the next meeting of the House of Delegates would take place on Saturday, June 17, 2017 at The Otesaga in Cooperstown.
15. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,

A handwritten signature in black ink, reading "Ellen G. Makofsky". The signature is fluid and cursive, with the first name "Ellen" and last name "Makofsky" clearly legible.

Ellen G. Makofsky  
Secretary



**CLAIRE P. GUTEKUNST**

President, New York State Bar Association

917-734-5458

cgutekunst@gutekunstadr.com

April 1, 2017

April 2017

President's Report to the  
House of Delegates

## **1 PRESIDENT'S INITIATIVES**

### **Immigration Representation**

The Association is addressing the recent rise in the need for representation and training on matters related to immigration. A New York Bar Foundation grant along with an equal commitment from the Association will focus on developing an online portal for pro bono volunteers, mentors, and service providers to get connected with each other and to valuable resources. Working through the Committee on Immigration Representation we will be sponsoring introductory and train the trainer events to increase the number of volunteer lawyers equipped to volunteer their services to address the immigrant communities' legal needs. To staff this initiative we are creating a one-year immigration pro bono fellowship.

### **Legal.io**

In February 2017 the Association formally launched its online referral platform for people seeking an attorney, partnering with Legal.io. The online service is available 24 hours a day; if an individual wishes, however, he or she can continue to use the Lawyer Referral and Information Service (LRIS) toll-free telephone line. A person using the online service completes a confidential questionnaire describing their legal issue and location. A LRIS staff member will review the questionnaire and match the person with a lawyer in the same or a nearby community. If the person is in a county with a locally-operated lawyer referral service, LRIS will forward the request to that local service. The referral itself is free; if the person consults with the lawyer, there is a \$35 fee for a 30-minute consultation, with exceptions made for personal injury, social security, veterans or military law, unemployment, or workers' compensation.

### **Domestic Violence Initiative**

The NYSBA/WBASNY Domestic Violence Initiative has three very active subcommittees. The Legislation Subcommittee has prepared memoranda in support of three bills: a revision to the Victim's Rights Notice to make it more understandable to victims in crisis; the establishment of a right for tenants to call for police or emergency assistance without fear of losing housing; and permitting Family Court to award temporary spousal support when issuing temporary orders of protection. These memoranda were presented to the Executive Committee on March 31.

On April 4, the Education and Training Subcommittee will record a day-long training program to educate lawyers on domestic violence issues. Topics will include orders of protection; domestic violence in later life; the impact of domestic violence on children and behavior; immigration; and trauma centered lawyers. The program will be available online for replay.

Finally, the Pro Bono Subcommittee is working to identify gaps in the provision of legal services to domestic violence victims in order to develop strategies to address these gaps in service.

## **Membership Challenge**

As you know, the goal of the Membership Challenge is to increase membership by 2% in 2017 and an additional 3% in 2018. In addition to working with the sections to identify ways to increase membership within sections and the Association, the Membership Committee has asked committees to identify the ways in which they serve members. The committee also has undertaken efforts to encourage members to become Sustaining members of the Association.

## **FreeLegalAnswers.org**

As I previously reported, NYSBA launched New York's Free Legal Answers site in August 2016, as part of the ABA's national Free Legal Answers project. Free Legal Answers is a virtual legal advice clinic where low-income individuals post their civil legal questions and volunteer attorneys respond on a limited scope representation basis. Any member of the New York bar who is registered and in good standing with the Office of Court Administration may volunteer for Free Legal Answers after watching a brief video on the ethics of limited scope representation developed by Judge Fern Fisher. The project is managed by NYSBA's Pro Bono Services Department. A number of NYSBA members have signed up to volunteer and have already answered more than 150 questions. However, the project would benefit from having additional volunteers with knowledge of various legal areas. Please join! To learn more about Free Legal Answers and to sign up as a volunteer, go to [ny.freelegalanswers.org](http://ny.freelegalanswers.org).

## **2. LEGISLATIVE ACTIVITIES**

### State Legislative Activity

On March 21, I was joined by Sharon Stern Gerstman and Michael Miller, for a series of meetings with key state legislators and staff in Albany, regarding the proposed 2017-18 state budget. As I reported to you in January, the Governor proposed a \$50 increase of the Biennial Attorney Registration Fee, in order to provide revenue for improving indigent criminal defense services in New York State. This item was at the top of our agenda.

We expressed support for proposed statewide extension of the *Hurrell-Harring* settlement, in order to improve indigent defense throughout the state. Nevertheless, we expressed our strong opposition to funding the proposals, in part, by increasing the Biennial Attorney Registration Fee. Providing the indigent with criminal defense services is a societal, constitutional obligation, the expense of which is properly funded by the State's General Fund. We commended the Senate for eliminating this fee increase in its one-house budget proposal. Further, we called on the Assembly and Governor to join with the Senate in eliminating this surcharge on the legal profession to pay for the State's constitutional, societal obligation, which should be funded out of the General Fund.

We also focused our efforts by speaking with lawyer-legislators, many of whom were unfamiliar with the details of this proposal.

In addition to State Bar leaders meeting personally with state legislators advocating against this fee increase, last week, we again activated our members to contact their state representatives to urge opposition to this fee increase. We then shared our online advocacy tool with local and specialty bar associations throughout the state, to ensure that as many lawyers as possible could express their opposition even if they are not members of this Association.

Further, I coordinated an effort with several presidents of county bar associations to send letters to legislators expressing opposition by both the State Bar Association and the county bar associations.

I, along with Ms. Stern Gerstman, Mr. Miller, and NYSBA's Governmental Relations staff continued our efforts on this issue throughout the budget process.

Our Leaders have heard from members throughout the state that they oppose this fee increase and we have focused on that issue. However that focus has not been exclusive. We have other budget priorities for which we have advocated with state policymakers. We have shared our support for Raising the Age of Criminal Responsibility, Wrongful Conviction Reform, ensuring that the state provides a constitutionally sustainable level of criminal indigent defense services, and the Judiciary Budget.

At the time my President's Report went to print the state budget process was still underway. I will provide an oral update as appropriate.

#### Federal Legislative Activity

On February 15, Ms. Stern Gerstman, Mr. Miller and I had a series of meetings on Capitol Hill in Washington, DC to facilitate the in-person delivery of NYSBA's message to specific Members of Congress, regarding the Association's 2017 federal legislative priorities.

Issues at the top of our agenda were as follows:

- **Support for adequate funding for the Legal Services Corporation.** The Legal Services Corporation (LSC), formed in 1974 with bipartisan Congressional support, was created to ensure that all Americans have access to a lawyer and the justice system for civil legal issues regardless of their ability to pay. The LSC provides funding to independent local legal services programs through a competitive grant process. LSC clients include the working poor, veterans, family farmers and people with disabilities. Family law matters (including domestic violence and child custody) and housing issues are the largest categories of cases handled by LSC-funded programs. New York has seven LSC grantees: Legal Aid Society of Mid-New York, Legal Aid Society of Northeastern New York, Legal Assistance of Western New York, Legal Services NYC, Legal Services of the Hudson Valley, Nassau/Suffolk Law Services Committee, and Neighborhood Legal Services. The state currently receives \$20,890,565 in federal funding for LSC;
- **Support for states' authority to regulate the Tort System.** Laws covering the area of civil justice are truly the province of state legislatures, the judiciary, and voters. For over 200 years the authority to promulgate "tort law", including law relating to liability for



medical errors, has rested with the states, which have the experience and expertise with these matters. The federal government should leave it to the states to determine how best to provide access to the courts for the injured to exercise their right to seek compensation for their injuries and to make reasonable adjustments to the system; and,

- **Oppose Lawsuit Abuse Reduction Act (LARA).** The bill would amend Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) -- via a process that is inconsistent with the Rules Enabling Act, 28 USC sections 2072-74 -- to reinstate a mandatory sanctions provision that was deleted from the FRCP in 1993. If enacted, this bill would significantly multiply satellite litigation, substantially degrade the efficiency of the courts, and greatly increase the cost of litigation. Changing Rule 11, as this bill proposes, would poison the relationships between parties and their attorneys, making cases more difficult to settle.

We met with all New York’s Members of Congress in the Majority Republican Caucus in the House of Representatives, several key Members of the House Minority Democrat Caucus, Counsel for Senator Schumer and Senator Gillibrand, and with newly-elected Members of Congress from New York State.

Our meetings took place prior to the release of the Trump Administration’s proposed budget for Fiscal Year 2018, which commences on October 1, 2017. The proposed budget would eliminate funding for LSC.

We are planning to return to Washington for ABA Day, April 25-27, at which time funding for LSC will again be at the top of our agenda. Moreover, John Nonna and the Committee on Federal Legislative Priorities will develop a strategy for continued advocacy on this issue throughout the federal budget process.

### **3. NEWS, ACTIVITIES AND EVENTS**

#### **ABA Midyear Meeting**

In February, I, together with the other members of the New York delegation, attended the ABA Midyear Meeting in Miami. We are proud that former President Kenneth G. Standard received the Spirit of Excellence Award from the ABA Commission on Racial Diversity in the Profession in recognition of his commitment to racial and ethnic diversity. In addition, longtime NYSBA member Helaine Barnett received the Outstanding Service Award from the Fellows of the American Bar Foundation.

#### **State of the Judiciary**

Also in February, I attended Chief Judge Janet DiFiore’s first State of the Judiciary address at the Bronx Hall of Justice. Among other topics, the Chief Judge reported on advances made in the court system since the start of her Excellence Initiative; the expansion of the mission of the Justice Task Force, which was formed to identify and eliminate the causes of wrongful conviction; criminal justice reform; and the Task Force on the New York State Constitution.

## **Meeting with the Chief Judge**

Executive Director Pamela McDevitt and I met with the Chief Judge and Chief Administrative Judge Lawrence D. Marks on February 27. We had an opportunity to discuss issues of mutual concern to our Association and the court system.

## **Events**

On February 8, I attended the Albany County Bar Association's annual Court of Appeals Dinner, and on February 27 I attended the Richmond County Bar Association's Annual Dinner. On March 2, the Bar Center hosted "Dinner with a Lawyer," a program designed to bring together law students and lawyers to provide an opportunity for discussion and mentoring.

On March 10, the Committee on Media Law and the New York Fair Trial/Free Press Conference co-sponsored a program at the Bar Center. The Conference employed a hypothetical case as a platform to encourage frank discussion, reveal all sides of an issue and air the pitfalls of certain types of reactions and conduct, and centered on the issues of a fair trial, First Amendment rights and the effect of social media on the dissemination of information.

On March 21, I hosted the first of three Women's Bench and Bar Reception at the Bar Center in Albany. A special thanks to the members of the Court of Appeals for attending. Future receptions will take place in Yonkers on April 29 and in Rochester on May 2.

## **June Meeting of the House of Delegates**

Our next Executive Committee and House of Delegates meetings will be held on Thursday June 15<sup>th</sup>, Friday June 16<sup>th</sup>, and Saturday June 17<sup>th</sup> in Cooperstown, New York. I hope you will join us.

Sincerely,

*Claire P. Gutekunst*



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item # 3**

Attached for your reference are the Association's financial statements through April 30, 2017.

**NEW YORK STATE BAR ASSOCIATION  
2017 OPERATING BUDGET  
FOUR MONTHS OF CALENDAR YEAR 2017**

**REVENUE**

	2017 BUDGET	ADJUST- MENTS	2017 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 4/30/2017	% RECEIVED 4/30/2017	2016 BUDGET	UNAUDITED RECEIVED 4/30/2016	% RECEIVED 4/30/2016
<b>MEMBERSHIP DUES</b>	10,925,000		10,925,000	9,729,197	89.05%	10,925,000	10,140,545	92.82%
<b>SECTIONS:</b>								
Dues	1,411,600		1,411,600	1,260,433	89.29%	1,416,400	1,309,144	92.43%
Programs	2,763,550		2,763,550	1,242,397	44.96%	2,606,550	1,016,044	38.98%
<b>INVESTMENT INCOME</b>	345,000		345,000	50,153	14.54%	390,000	50,974	13.07%
<b>ADVERTISING</b>	133,000		133,000	11,998	9.02%	125,000	51,488	41.19%
<b>CONTINUING LEGAL EDUCATION</b>	3,900,000		3,900,000	1,266,168	32.47%	4,050,000	1,398,274	34.53%
<b>USI AFFINITY PAYMENT</b>	2,269,000		2,269,000	734,985	32.39%	2,025,000	734,985	36.30%
<b>ANNUAL MEETING</b>	869,500		869,500	900,992	103.62%	919,500	868,120	94.41%
<b>HOUSE OF DELEGATES &amp; COMMITTEES</b>	108,100		108,100	30,496	28.21%	206,200	90,448	43.86%
<b>PUBLICATIONS, ROYALTIES AND OTHER</b>	274,200		274,200	22,260	8.12%	276,800	47,321	17.10%
<b>REFERENCE MATERIALS</b>	1,350,000		1,350,000	231,924	17.18%	1,450,000	338,581	23.35%
<b>TOTAL REVENUE</b>	<b>24,348,950</b>	<b>0</b>	<b>24,348,950</b>	<b>15,481,003</b>	<b>63.58%</b>	<b>24,390,450</b>	<b>16,045,924</b>	<b>65.79%</b>

**EXPENSE**

	2017 BUDGET	ADJUST- MENTS	2017 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 4/30/2017	% EXPENDED 4/30/2017	2016 BUDGET	UNAUDITED EXPENDED 4/30/2016	% EXPENDED 4/30/2016
<b>SALARIES &amp; FRINGE</b>	10,409,950		10,409,950	3,049,643	29.30%	10,365,900	3,221,423	31.08%
<b>BAR CENTER:</b>								
Rent	305,000		305,000	107,323	35.19%	288,000	96,745	33.59%
Building Services	283,250		283,250	59,863	21.13%	285,000	67,458	23.67%
Insurance	142,000		142,000	47,399	33.38%	150,000	45,021	30.01%
Taxes	5,250		5,250	-806	-15.35%	7,750	3,572	46.09%
Plant and Equipment	858,000		858,000	297,923	34.72%	620,000	247,444	39.91%
Administration	543,500		543,500	271,434	49.94%	539,700	177,682	32.92%
<b>SECTIONS</b>	4,171,175		4,171,175	1,808,093	43.35%	3,961,650	1,603,488	40.48%
<b>PUBLICATIONS:</b>								
Reference Materials	430,150		430,150	135,522	31.51%	491,050	98,698	20.10%
Journal	431,200		431,200	158,983	36.87%	489,200	183,840	37.58%
Law Digest	187,800		187,800	54,362	28.95%	221,000	60,201	27.24%
State Bar News	247,300		247,300	75,421	30.50%	254,300	69,121	27.18%
<b>MEETINGS:</b>								
Annual Meeting	348,200		348,200	337,245	96.85%	303,100	321,896	106.20%
House of Delegates, Officers and Executive Committee	520,600		520,600	230,555	44.29%	481,250	234,706	48.77%
<b>COMMITTEES:</b>								
Continuing Legal Education	1,767,875		1,767,875	611,185	34.57%	1,944,050	545,970	28.08%
LPM / Electronic Communication Committee	86,250		86,250	49,946	57.91%	85,300	57,009	66.83%
Marketing / Membership	971,200		971,200	248,560	25.59%	1,000,650	321,274	32.11%
Media Services	115,300		115,300	29,888	25.92%	267,750	65,831	24.59%
All Other Committees and Departments	2,489,075		2,489,075	850,277	34.16%	2,612,220	782,011	29.94%
<b>TOTAL EXPENSE</b>	<b>24,313,075</b>	<b>0</b>	<b>24,313,075</b>	<b>8,422,816</b>	<b>34.64%</b>	<b>24,367,870</b>	<b>8,203,390</b>	<b>33.66%</b>
<b>BUDGETED SURPLUS</b>	<b>35,875</b>	<b>0</b>	<b>35,875</b>	<b>7,058,187</b>		<b>22,580</b>	<b>7,842,534</b>	

NEW YORK STATE BAR ASSOCIATION  
STATEMENTS OF FINANCIAL POSITION  
AS OF APRIL 30, 2017

<u>ASSETS</u>	<u>UNAUDITED</u> <u>4/30/2017</u>	<u>UNAUDITED</u> <u>4/30/2016</u>	<u>UNAUDITED</u> <u>12/31/2016</u>
<b><u>Current Assets:</u></b>			
General Cash and Cash Equivalents	12,372,088	12,470,278	14,728,435
Accounts Receivable	146,012	121,169	157,953
Accrued interest receivable	0	0	0
Prepaid expenses	610,456	740,297	1,170,385
Royalties and Admin. Fees receivable	151,062	658,062	705,055
Total Current Assets	13,279,618	13,989,806	16,761,828
<b><u>Board Designated Accounts:</u></b>			
<b><u>Cromwell Fund:</u></b>			
Cash and Investments at Market Value	2,175,658	2,020,753	2,077,752
Accrued interest receivable	0	0	0
	2,175,658	2,020,753	2,077,752
<b><u>Replacement Reserve Account:</u></b>			
Equipment replacement reserve	1,116,777	1,116,443	1,116,667
Repairs replacement reserve	793,804	793,566	793,726
Furniture replacement reserve	219,794	219,729	219,773
	2,130,375	2,129,738	2,130,166
<b><u>Long-Term Reserve Account:</u></b>			
Cash and Investments at Market Value	20,990,403	19,027,773	19,835,080
Accrued interest receivable	0	0	119,404
	20,990,403	19,027,773	19,954,484
<b><u>Sections Accounts:</u></b>			
Section Accounts Cash equivalents and Investments at market value	3,600,852	3,524,420	3,527,130
Cash	694,737	721,700	8,273
	4,295,589	4,246,120	3,535,403
<b><u>Fixed Assets:</u></b>			
Furniture and fixtures	1,340,918	1,332,511	1,340,918
Leasehold Improvements	1,368,781	1,363,251	1,366,016
Equipment	8,511,919	8,402,075	8,466,905
Telephone	107,636	107,636	107,636
	11,329,254	11,205,473	11,281,475
Less accumulated depreciation	8,655,769	8,335,628	8,548,569
Net fixed assets	2,673,485	2,869,845	2,732,906
Total Assets	45,545,128	44,284,035	47,192,539
<b><u>LIABILITIES AND FUND BALANCES</u></b>			
<b><u>Current liabilities:</u></b>			
Accounts Payable & other accrued expenses	686,046	569,558	1,117,148
Deferred dues	0	0	7,921,620
Deferred income special	1,076,922	1,307,692	1,153,845
Deferred grant revenue	33,575	33,355	34,780
Other deferred revenue	103,132	111,640	797,941
Unearned Income - CLE	19,478	32,664	53,183
Payable To The New York Bar Foundation	3,731	17,313	35,845
Total current liabilities & Deferred Revenue	1,922,884	2,072,222	11,114,362
<b><u>Long Term Liabilities:</u></b>			
Accrued Pension Costs	(14,115)	1,352,046	734,372
Accrued Other Postretirement Benefit Costs	7,312,723	6,955,303	7,212,723
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	149,200	229,399	381,559
Total Liabilities & Deferred Revenue	9,370,692	10,608,970	19,443,016
<b><u>Board designated for:</u></b>			
Cromwell Account	2,175,658	2,020,753	2,077,752
Replacement Reserve Account	2,130,375	2,129,738	2,130,166
Long-Term Reserve Account	13,542,595	10,491,025	11,506,426
Section Accounts	4,295,589	4,246,120	3,535,403
Invested in Fixed Assets (Less capital lease)	2,673,485	2,869,845	2,732,906
Undesignated	11,356,734	11,917,584	5,766,870
Total Net Assets	36,174,436	33,675,065	27,749,523
Total Liabilities and Net Assets	45,545,128	44,284,035	47,192,539

**New York State Bar Association**  
**Statement of Activities**  
**For the Four Months Ending April 30, 2017**

	<u>April 2017</u>	<u>April 2016</u>	<u>December 2016</u>
<b>REVENUES AND OTHER SUPPORT</b>			
Membership dues	\$9,729,197	\$10,140,545	\$10,537,010
Section revenues			
Dues	1,260,433	1,309,144	1,360,835
Programs	1,242,397	1,016,044	2,223,618
Continuing legal education program	1,266,168	1,398,274	3,631,127
Administrative fee and royalty revenue	762,805	754,063	2,493,706
Annual meeting	900,992	868,120	865,217
Investment income	128,817	114,651	856,515
Reference Books, Formbooks and Disk Products	231,924	338,581	1,256,740
Other revenue	<u>73,939</u>	<u>240,059</u>	<u>425,172</u>
 Total revenue and other support	 15,596,672	 16,179,481	 23,649,940
<b>PROGRAM EXPENSES</b>			
Continuing legal education program	830,628	807,724	2,463,499
Graphics	664,386	651,928	1,951,609
Government relations program	205,222	200,068	632,713
Law, youth and citizenship program	59,259	67,704	210,082
Lawyer assistance program	63,408	77,221	206,129
Lawyer referral and information services	56,183	60,485	191,052
Law practice management services	69,045	72,494	208,606
Media / public relations services	151,833	150,504	382,731
Meetings services	11,125	116,014	274,929
Marketing and Membership services	516,544	599,010	1,718,802
Pro bono program	61,224	49,532	190,320
Local bar program	27,223	45,707	136,472
House of delegates	211,897	210,643	454,622
Executive committee	18,658	24,063	46,196
Other committees	255,684	304,816	762,377
Sections	1,808,093	1,603,488	3,576,180
Section newsletters	53,817	53,638	154,959
Reference Books, Formbooks and Disk Products	346,161	315,110	1,083,732
Publications	288,766	313,162	779,118
Annual meeting expenses	<u>337,245</u>	<u>321,896</u>	<u>321,137</u>
 Total program expenses	 <u>6,036,401</u>	 <u>6,045,207</u>	 <u>15,745,265</u>
<b>MANAGEMENT AND GENERAL EXPENSES</b>			
Salaries and fringe benefits	1,088,480	1,037,681	3,373,284
Pension plans and other employee benefit plan costs	221,610	221,593	44,928
Rent and equipment costs	320,493	282,296	919,372
Consultant and other fees	415,016	349,601	972,151
Depreciation and amortization	251,200	201,600	601,546
Other expenses	<u>89,627</u>	<u>65,411</u>	<u>237,335</u>
 Total management and general expenses	 <u>2,386,426</u>	 <u>2,158,182</u>	 <u>6,148,616</u>
<b>CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS</b>	<b>7,173,845</b>	<b>7,976,092</b>	<b>1,756,059</b>
Realized and unrealized gain (loss) on investments	1,251,071	334,568	629,058
<b>CHANGES IN NET ASSETS</b>	<b>8,424,916</b>	<b>8,310,660</b>	<b>2,385,117</b>
Net assets, beginning of year	<u>27,749,523</u>	<u>25,364,406</u>	<u>25,364,406</u>
Net assets, end of year	<u><u>36,174,439</u></u>	<u><u>33,675,066</u></u>	<u><u>27,749,523</u></u>



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #9

**REQUESTED ACTION:** Approval of the report and recommendations of the Committee on the New York State Constitution.

In July 2015, then-NYSBA President David P. Miranda appointed the Committee on the New York State Constitution to serve as a resource on issues or matters relating to the State Constitution; to make recommendations regarding possible constitutional amendments; to provide advice regarding the upcoming 2017 referendum on whether to convene a constitutional convention; and to promote initiatives to educate the legal community and the public about the State Constitution. Prior to this meeting, the committee has presented reports with respect to the establishment of a preparatory commission on a constitutional convention; constitutional home rule; the conservation article of the State Constitution; and the Judiciary Article of the State Constitution.

In January 2017, the Executive Committee asked the committee to make a recommendation for consideration by the House as to whether a convention should be held. Accordingly, the committee undertook a review of arguments both for and against a convention. Arguments for holding a convention include the following:

- ☐ A convention could streamline and modernize the Constitution.
- ☐ A convention is needed to fix basic structural problems with state government.
- ☐ A convention provides an opportunity to establish new positive rights.
- ☐ There is no practical alternative to a convention for enacting needed reforms.

Arguments against holding a convention include the following:

- ☐ A convention places at risk cherished constitutional rights.
- ☐ A convention could add harmful new provisions to the Constitution.
- ☐ A convention will be faced with the same political hurdles that undermine the legislative process.
- ☐ Legislators and judges serving as delegates will receive double salaries.
- ☐ A convention is unnecessary.
- ☐ A convention will be expensive.

After considering both arguments for and against, the committee has recommended that the Association support an affirmative position on the November ballot question. The committee's recommendation is based on the belief that restructuring the state's court system, long supported by the Association, has little chance of being achieved without a convention. In addition, the committee believes the State Constitution needs to be streamlined and measures taken to increase voter participation, both of which would be advanced by holding a convention.

The committee recognizes concerns relating to procedural issues raised by a convention. Accordingly, it recommends the establishment of a preparatory commission as soon as possible (as recommended in the committee's report approved by the House in November 2015); reform of the delegate selection process; and support for measures that would prohibit or provide disincentives for dual compensation.

The report was published in the Reports Group Community in April 2017. As of this writing, no comments have been received.

The report will be presented by Henry M. Greenberg, chair of the Committee on the New York State Constitution.



**NEW YORK STATE BAR ASSOCIATION**

**REPORT AND RECOMMENDATIONS**

**CONCERNING**

**WHETHER NEW YORKERS SHOULD  
APPROVE THE 2017 BALLOT QUESTION  
CALLING FOR A CONSTITUTIONAL  
CONVENTION**

**ADOPTED BY**

**THE COMMITTEE ON THE NEW YORK  
STATE CONSTITUTION**

**APRIL 20, 2017**



The opinions expressed are those of the committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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## **Membership of the New York State Bar Association's Committee on the New York State Constitution**

### **CHAIR:**

Henry M. Greenberg, Esq.

### **MEMBERS:**

Mark H. Alcott, Esq.  
Martin Bienstock, Esq.  
Christopher Bopst, Esq.  
Hon. Cheryl E. Chambers  
Hon. Carmen Beauchamp Ciparick  
Linda Jane Clark, Esq.  
David Louis Cohen, Esq.  
John R. Dunne, Esq.  
Margaret J. Finerty, Esq.  
Hon. Helen E. Freedman  
Mark F. Glaser, Esq.  
Hon. Victoria A. Graffeo  
Peter J. Kiernan, Esq.  
A. Thomas Levin, Esq.  
Bennett Liebman, Esq.  
Justine M. Luongo, Esq.  
John M. Nonna, Esq.  
Hon. Karen K. Peters  
Joseph B. Porter, Esq.  
Andrea C. Rendo, Esq.  
Sandra Rivera, Esq.  
Prof. Nicholas Adams Robinson  
Hon. Alan D. Scheinkman  
Hon. John W. Sweeny, Jr.  
Claiborne E. Walthall, Esq.  
G. Robert Witmer, Jr., Esq.  
Hon. James A. Yates  
Stephen P. Younger, Esq.  
Jeremy A. Benjamin, Esq., Liaison to Civil Rights Committee  
Hermes Fernandez, Esq., Liaison to Committee on State Legislative Policy  
Betty Lugo, Esq., Liaison to Trial Lawyers Section  
Alan Rothstein, Esq., Liaison to New York City Bar Association  
Richard Rifkin, NYSBA Staff Liaison  
Ronald F. Kennedy, NYSBA Staff Liaison

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## **TABLE OF CONTENTS**

Introduction and Executive Summary .....	1
I. Background of the Report .....	4
II. Principal Arguments Supporting and Opposing a Call for a Constitutional Convention.....	7
A. Arguments Supporting a Call for a Convention .....	7
1. A Convention Could Streamline and Modernize the Constitution.....	7
2. A Convention Is Needed to Fix Basic Structural Problems with State Government.....	9
3. A Convention Provides an Opportunity to Establish New Positive Rights.....	11
4. There Is No Practical Alternative to a Convention for Enacting Needed Reforms .....	12
B. Arguments Opposing a Call for a Convention.....	14
1. A Convention Places at Risk Cherished Constitutional Rights .....	14
2. A Convention Could Add Harmful New Provisions to the Constitution.....	15
3. A Convention will be Faced with the Same Political Hurdles that Undermine the Legislative Process .....	16
4. Legislators and Judges Serving as Delegates Will Receive Double Salaries .....	17
5. A Convention is Unnecessary.....	20
6. A Convention Will be Expensive .....	21

III.	Recommendations .....	21
IV.	Conclusion.....	32

## **INTRODUCTION AND EXECUTIVE SUMMARY**

On November 7, 2017, New Yorkers will vote on a 13-word referendum question: “Shall there be a convention to revise the constitution and amend the same?” That question appears on the ballot because the New York State Constitution commands that at least once every 20 years voters are asked whether or not to call a Constitutional Convention.<sup>1</sup> The mandatory referendum presents a rare chance for direct democracy; arguably a “grand stroke of intelligent populism” in which New Yorkers can reinvent their State government, if they so choose.<sup>2</sup>

Since its formation in July 2015, the New York State Bar Association’s Committee on the New York State Constitution (the “Committee”) has undertaken a comprehensive study of many of the Constitution’s 20 articles. To date, the Committee has held 20 meetings; heard presentations from more than two dozen experts; issued four substantive reports; and sponsored and participated in CLE programs, symposiums and webinars that have contributed to the growing public discourse about a Constitutional Convention.

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<sup>1</sup> N.Y. CONST. art. XIX, § 2 (“At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question ‘Shall there be a convention to revise the constitution and amend the same?’ shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large.”).

<sup>2</sup> Sam Howe Verhovek, *Cuomo Opens a Session with Barbs and a Gambit*, N.Y. TIMES, Jan. 12, 1992, at E6 (quoting Governor Mario Cuomo); PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 109-10 (1996) [hereinafter, “ORDERED LIBERTY”].

In January 2017, the leadership of the State Bar asked the Committee for its opinion whether a Constitutional Convention should be called. Committee meetings on which this issue has been addressed revealed that members hold a range of viewpoints on a potential Convention, and concerns in both directions sparked respectful debate. What follows is the Committee’s report and recommendations, reflecting its best judgment on this profoundly important question.

After careful reflection, the Committee recommends that the State Bar support a Convention call on the November ballot question.<sup>3</sup> This recommendation is based primarily on the Committee’s belief that the restructuring and reorganization of the State’s court system — for nearly five decades an abiding concern of the State Bar — has little practical chance of being achieved without a Constitutional Convention. In addition, the Committee believes that our 52,000-word Constitution needs to be streamlined and modernized and measures should be taken to increase voter participation, and a Convention is the only practical means of achieving these goals.

The Committee advocates an affirmative position on the ballot question mindful of the thoughtful arguments against a Convention. Serious potential drawbacks include concerns about the delegate selection process, the possibility of domination of the Convention by “special interests,”

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<sup>3</sup> The positions taken in this report have been reached by the Committee as an entity and should not be attributed to any particular member of the Committee or to any groups, committees, or affiliations associated with a member. In particular, Hon. Alan D. Scheinkman, a member of the Committee, has been named by Chief Judge Janet DiFiore to serve as Co-Chair of the Judicial Task Force on the New York State Constitution, and has abstained with respect to the recommendations contained in this report.

threats to cherished Constitutional rights, amendments adding harmful new provisions to the Constitution, and double compensation for certain delegates. However, the Committee has examined these concerns and found that they do not outweigh the promise and possibility that a “Yes” vote would present. It bears emphasis that anything approved by a Convention would be a proposal only. No Constitutional change can be made unless affirmatively approved by the electorate. The voters stand as the guardians of that which should be preserved in the Constitution and can reject any proposed Constitutional changes that they regard as improper.

In its deliberations and reports, the Committee has faithfully attempted to present all issues thoroughly and dispassionately, detailing arguments for and against, followed by a conclusion. This report follows that model as an aid to the deliberations and anticipated debate in the House of Delegates, as well as to frame some of the main issues for the broader public discourse certain to occur as the November vote draws near.

Section 1 of the report presents the background work of the Committee, including prior reports and the process leading to this report and recommendations. Section 2 sets forth the principal arguments made for and against a Convention. The report then concludes with Recommendations, setting forth the basis for the Committee’s support for an affirmative vote. It also discusses related issues, such as advocating for a preparatory commission, proposing reforms to the delegate selection process, and opposing salary and pension “double dipping” by public officials.

In this report, the Committee seeks to provide not only recommendations, but also a roadmap for the rational, deliberative and well-

informed discussion New Yorkers deserve.

## **I. BACKGROUND OF THE REPORT**

Mindful of the coming ballot referendum on whether to call a Constitutional Convention, then State Bar President David P. Miranda announced, on July 24, 2015, the creation of the Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the November ballot question; and promote initiatives designed to educate the legal community and public about the State Constitution.<sup>4</sup> The Committee's membership is diverse and highly experienced with respect to State government and Constitutional law. It includes four former State Bar presidents; seven sitting and former trial and appellate jurists; former State and local legislators; former high-level executive and legislative branch officials; and other distinguished members of the Bar from around the State.

Since its establishment, the Committee has met regularly (typically once every six weeks), heard presentations from 28 distinguished authorities on different aspects of the State Constitution, and sponsored educational programs that provided valuable information about a potential Convention and related issues. Additionally, the Committee issued lengthy substantive reports on the Establishment of a Preparatory State Commission on a

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<sup>4</sup> Press Release, N.Y. State Bar Assn., N.Y. State Bar Assn. President Miranda Forms Committee to Study NYS Constitution (July 24, 2015), *available at* <http://www.nysba.org/NYSConstitutionReviewCommittee/>.



Constitutional Convention (October 8, 2015);<sup>5</sup> Constitutional Home Rule (April 2, 2016);<sup>6</sup> and the Environmental Conservation Article of the State Constitution (August 3, 2016).<sup>7</sup>

Most recently, on December 12, 2016, the Committee issued its fourth report, entitled “Opportunities to Restructure and Modernize the New York Courts,”<sup>8</sup> which focuses on Article VI of the State Constitution, the Judiciary Article. Approximately 16,000 words long, and representing approximately one-third of the Constitution, Article VI creates the structure and organization of the court system in New York. By contrast, Article III of the United States Constitution, which outlines the court system for the Federal government, consists of a mere 375 words. In its report, the Committee reviewed a multitude of issues governed by Article VI, including its history, the design of our court system, and methods used for selecting judges of different courts. The Committee found that Article VI represents “an

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<sup>5</sup> N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM’N ON A CONSTITUTIONAL CONVENTION (2015), *available at* <http://www.nysba.org/nysconstitutionreport/> [hereinafter, “Preparatory Commission Report”].

<sup>6</sup> N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE (2016), *available at* <http://www.nysba.org/homerulereport/> [hereinafter, “HOME RULE REPORT”].

<sup>7</sup> N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) (2016), *available at* <http://www.nysba.org/ArticleXIVreport/> [hereinafter, “CONSERVATION ARTICLE REPORT”].

<sup>8</sup> N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., THE JUDICIARY ARTICLE OF THE N.Y. ST. CONST.: OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE THE N.Y. COURTS (2017), *available at* <http://www.nysba.org/judiciaryreport2017/> [hereinafter, “JUDICIARY ARTICLE REPORT”].

unnecessarily large and complex portion of the State Constitution,” and raises critical features of New York’s legal system that are ripe for discussion. Indeed, the report maintains that a Convention would provide an opportunity to institute reforms that would “reorganize, modernize and simplify the constitutional structure of the Unified Court System,” and “improve the Judiciary in New York.”

Each of the Committee’s reports has been approved unanimously or with near unanimity by the State Bar’s policymaking body, the House of Delegates.

On January 26, 2017, the State Bar’s Executive Committee requested a recommendation from the Committee to aid it and ultimately the House of Delegates in taking a position on the November ballot question. In response, the Committee held a meeting on March 9, 2017 to hear presentations from Evan A. Davis and Arthur J. Kremer, two well-known figures in the public debate on whether to hold a Constitutional Convention,<sup>9</sup> and reviewed a detailed outline summarizing arguments both for and against a Convention. The Committee met to discuss a draft report on April 6, 2017 and adopted this report on April 20, 2017.

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<sup>9</sup> Evan A. Davis is manager of the Committee for a Constitutional Convention, which describes itself as “a leadership group to support advocacy in favor of calling a Convention to convene in 2019 to craft proposals for voter consideration that would make needed changes in the New York State Constitution.” See website of the Committee for a Constitutional Convention, *available at* <http://www.concon19.org/>. Arthur J. Kremer is the co-author of “Patronage, Waste, and Favoritism: A Dark History of Constitutional Conventions,” a book which argues that “New York State does not need another convention to revise its constitution.” ARTHUR J. KREMER, ANTHONY M. FIGLIOLA & MARIA DONOVAN, *PATRONAGE, WASTE, AND FAVORITISM: A DARK HISTORY OF CONSTITUTIONAL CONVENTIONS* (2015) [hereinafter, “PATRONAGE, WASTE, AND FAVORITISM”].

## **II. PRINCIPAL ARGUMENTS SUPPORTING AND OPPOSING A CALL FOR A CONSTITUTIONAL CONVENTION**

What follows are arguments that have been made both for and against holding a Constitutional Convention.

### **A. Arguments Supporting a Call for a Convention**

#### **1. A Convention Could Streamline and Modernize the Constitution**

Over the last two generations, civic reformers, scholars, the media, and politicians have called for systematic and substantive reform of the State Constitution.<sup>10</sup> The current version of the document, adopted in 1894 and amended over 200 times since, including substantial changes by the Constitutional Convention of 1938, is in significant need of revision.<sup>11</sup> Many of the provisions in the 52,500 word Constitution are: (1) outdated or obsolete;<sup>12</sup> (2) unconstitutional in the wake of subsequent decisions by the

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<sup>10</sup> See, e.g., Peter J. Galie & Christopher Bopst, *Constitutional ‘Stuff’: House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1388 n.12 (2013/2014) (citing a representative list of calls for reforming the Constitution) [hereinafter, “*House Cleaning—Part I*”].

<sup>11</sup> See *id.*

<sup>12</sup> Antiquated sections include the authorized issuance of state bonds that have been retired for generations. See, e.g., N.Y. CONST., art. VII, § 14 (allowing the issuance of bonds for the removal of railroad crossings at grade that were retired during the 1987-88 fiscal year); N.Y. CONST., art. VII, § 18 (allowing the legislature to create debt to pay a bonus to veterans of World War II; such debt has been retired since 1958). For a detailed analysis of the sections of the state constitution that are obsolete, see Galie & Bopst, *House Cleaning—Part I*, *supra* note 10 and Peter J. Galie & Christopher Bopst, *Constitutional ‘Stuff’: House Cleaning the New York Constitution—Part II*, 78 ALB. L. REV. 1513 (2014/2015).

United States Supreme Court;<sup>13</sup> (3) wholly legislative in character;<sup>14</sup> and/or (4) inconsistent with the demands of the modern state.<sup>15</sup>

In fact, the State Constitution has long been subject to neglect and ridicule, and is often honored in the breach.<sup>16</sup> In contrast to the United States Constitution, our State's fundamental document is not known or read by the public or most public servants, including many if not most government attorneys who have sworn to uphold it.<sup>17</sup>

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<sup>13</sup> These unconstitutional sections include the provision requiring that a public official who refuses to waive his or her Fifth Amendment privilege against self-incrimination involving the performance of official duties is to be terminated from employment and the segments of the apportionment sections of the Legislative Article that have been held to violate one-person, one-vote requirements of the United States Constitution's Equal Protection Clause. The public officer waiver provision was held unconstitutional in *Gardner v. Broderick*, 392 U.S. 273 (1968). The apportionment scheme was held unconstitutional in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964) and *In re Orans*, 15 N.Y.2d 339, 258 N.Y.S.2d 825, 206 N.E.2d 854 (1965).

<sup>14</sup> These include the provision in N.Y. CONST., art. III, § 24 providing the terms and conditions under which prison labor may be used.

<sup>15</sup> These include portions of the public debt and finance provisions written in the 1840s. For a description of how the state's finance provisions are inconsistent with financing mechanisms used in the twenty-first century, see Kenneth Bond, 'Till Debt Do Us Part: The Opportunity for New York Finance Law to Enter the Twenty-first Century, in NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 187 (Peter J. Galie, Christopher Bopst & Gerald Benjamin, eds., 2016) [hereinafter, "BROKEN CONSTITUTION"].

<sup>16</sup> Galie & Bopst, *House Cleaning—Part I*, *supra* note 10, at 1388 ("By trivializing its content, these provisions have done more than discourage reading: they have derogated from the constitution's character as a fundamental document, engendering disrespect if not ridicule.").

<sup>17</sup> Henrik Dullea, *We the People: A Constitutional Convention Opens the Door to Reform*, Vol. 89/No. 2 N.Y. ST. B.J. 32, 32 (Feb. 2017) ("When it comes to the New York State Constitution, most people aren't aware of its existence. Even the hundreds of thousands of public employees who, when taking their oaths of office, swear or affirm that they 'will support the constitution of the United States, and the constitution of the

## **2. A Convention Is Needed to Fix Basic Structural Problems with State Government**

The workings of many institutions of New York State government are inextricably tied to, and impaired by, the State Constitution. Of concern is the Constitution's Judiciary Article (Article VI), which promises a unified court system and then proceeds to establish the most byzantine and complex system in the nation. In painstaking detail, the Judiciary Article describes the composition of the State's eleven trial-level courts, the most in the nation (California, a state with approximately double the population of New York, has one trial level court).<sup>18</sup> Despite numerous pleas for reform by Chief Judges of the State dating back to Charles Breitler in 1974,<sup>19</sup> and multiple recommendations by blue ribbon panels for court consolidation and mergers,<sup>20</sup> change has not occurred. New York's byzantine court system is not merely a matter of academic concern; the New York State Special Commission on the Future of the New York State Courts has concluded that

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State of New York' generally have absolutely no idea as to what they are promising to uphold.”).

<sup>18</sup> NEW YORK STATE SPECIAL COMMISSION ON THE FUTURE OF THE NEW YORK STATE COURTS, A COURT SYSTEM FOR THE FUTURE: THE PROMISE OF COURT RESTRUCTURING IN NEW YORK STATE 30-32 (2007), *available at* [http://www.nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://www.nycourts.gov/reports/courtsys-4future_2007.pdf) [hereinafter, “A COURT SYSTEM FOR THE FUTURE”].

<sup>19</sup> Chief Judge Judith S. Kaye, Testimony before Joint Legislative Hearing on Court Restructuring, October 7, 1997, [https://www.nycourts.gov/press/old\\_keep/cjtestim.shtml](https://www.nycourts.gov/press/old_keep/cjtestim.shtml) (accessed Mar. 21, 2017).

<sup>20</sup> *See, e.g.*, A COURT SYSTEM FOR THE FUTURE, *supra* note 18, at 67-78; NEW YORK STATE SPECIAL COMMISSION ON THE FUTURE OF THE NEW YORK STATE COURTS, “JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE” 83-103 (2008), *available at* [http://www.nycourtreform.org/Justice\\_Most\\_Local\\_Part1.pdf](http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf).

these inefficiencies cost the State, litigants, employers and municipalities approximately \$502 million in unnecessary spending annually.<sup>21</sup>

In a similar vein, the State's relationship with its municipalities is a source of ongoing tension and frustration for many local officials.<sup>22</sup> The Local Government Article (Article IX) added to the State Constitution in 1963 remains un-amended since the time of its adoption.<sup>23</sup> This article, which was intended to give local governments significant autonomy over their own affairs, has not realized its potential. The article was intended to eliminate the State's power to pass special laws on matters of purely local concern without the consent of the impacted municipality.<sup>24</sup> In practice, however, this limitation has proven illusory. The Legislature today has unfettered authority to enact legislation impacting municipalities that involve matters of "state concern."<sup>25</sup> Additionally, unlike other states, New York's State Constitution contains no provision to protect municipalities from unfunded mandates.<sup>26</sup>

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<sup>21</sup> See A COURT SYSTEM FOR THE FUTURE, *supra* note 18, at 96.

<sup>22</sup> See HOME RULE REPORT. *supra* note 6, at 2-3, 20-21, 25-33.

<sup>23</sup> See N.Y. Const., art. IX; HOME RULE REPORT. *supra* note 6, at 7-15.

<sup>24</sup> See HOME RULE REPORT. *supra* note 6, at 13-15.

<sup>25</sup> See *id.* at 23-28; Richard Briffault, 'Mind The Gap': *The Promise and Limits of Home Rule in New York*, in BROKEN CONSTITUTION, *supra* note 15, at 170 for a description of *Greater New York Taxi Assn. v. State*, 21 N.Y.3d 289, 970 N.Y.S.2d 907, 993 N.E.2d 393 (2013), a case in which the court of appeals unanimously upheld State legislation regulating medallion cabs and livery vehicles in New York City only, which legislation had been adopted without a home rule message.

<sup>26</sup> See HOME RULE REPORT. *supra* note 6, at 29-30.

Thus, a Convention would provide the opportunity to consider fundamental reforms to New York's court system, reinvigorate New York's local governments, fix basic structural problems in the State, enhance the overall performance of government, and strengthen public ethics.

### **3. A Convention Provides an Opportunity to Establish New Positive Rights**

The current Constitution does not include some rights that have been recognized by the United States Supreme Court (e.g., right to marriage for same-sex couples, reproductive rights) or potential new rights that New Yorkers may wish to enshrine in their basic law (e.g., environmental bill of rights, Equal Rights Amendment, expanded privacy rights). Similarly, although the State Constitution safeguards certain voting rights,<sup>27</sup> the State Bar has previously adopted a position calling for much-needed changes to modernize registration procedures to permit, for example, same-day registration and early voting. Such measures would increase overall voter participation, which remains at historically low levels in New York.<sup>28</sup>

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<sup>27</sup> See N.Y. CONST., art. II, § 1 (“Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.”). The Legislature by statute has lengthened this registration period from the constitutional minimum of 10 days before an election to 25 days prior to an election. N.Y. ELEC. LAW § 5-210.

<sup>28</sup> See N.Y. STATE BAR ASSN. SPECIAL COMMITTEE ON VOTER PARTICIPATION, FINAL REPORT 1 (2013), *available at* <http://www.nysba.org/voterreport/> [hereinafter, “VOTER PARTICIPATION REPORT”] (“In both national and local elections voter participation in the State of New York has for over a decade been far below that of most other states. New York also compares unfavorably to other states in the percentage of its eligible citizens who are registered to vote[.]”) (citations omitted). See also *New York: Voter Turnout Appears to be Record Low*, N.Y. Times, Nov. 6, 2013 (“Turnout in Tuesday’s election for New York City mayor appeared to have set a record low of 24

Thus, a Convention would provide an opportunity to enhance existing positive rights or propose new ones that the Constitution's framers did not envision. Prior Constitutional Conventions proposed positive rights, approved by the voters, that are among the State's most cherished. For example, the 1938 Convention established a requirement to care for the State's needy<sup>29</sup> and a right to collective bargaining.<sup>30</sup>

#### **4. There is No Practical Alternative to a Convention for Enacting Needed Reforms**

A Constitutional Convention is the only practical way to make necessary major changes to the State Constitution. The Legislature could, if it wanted, propose Constitutional amendments. The Constitution provides that it may be amended through legislatively initiated amendments.<sup>31</sup> In this

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percent of registered voters.”), *available at* [https://www.nytimes.com/news/election-2013/2013/11/06/new-york-turnout-appears-headed-for-record-low/?\\_r=0](https://www.nytimes.com/news/election-2013/2013/11/06/new-york-turnout-appears-headed-for-record-low/?_r=0); Matthew Hamilton, Report: *New York ranks 41st in voter turnout in 2016*, Albany Times Union, Mar. 16, 2017 (citing report from Nonprofit VOTE that showed “New York ranked 41st in the country for voter turnout in the 2016 general election, with just more than 57 percent of the ‘voting-eligible population’”), *available at* <http://blog.timesunion.com/capitol/archives/273112/report-new-york-ranks-41st-in-voter-turnout-in-2016/>. Presently, the State Constitution requires registration to occur at least 10 days prior to an election. *See* N.Y. CONST., art. II, § 5 (“Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law.”).

<sup>29</sup> *See* N.Y. CONST., art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

<sup>30</sup> *See* N.Y. CONST., art. I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”).

<sup>31</sup> *See* N.Y. CONST., art. XIX, § 1 (“Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty



process, an amendment must be adopted by two consecutively-elected legislatures, and then approved by a majority of the voters voting on the question.<sup>32</sup> However, there is no reason to believe the Legislature is willing to address the State's Constitutional deficiencies in a comprehensive way, or will be able to resolve in the next 20 years the problems not fixed over the past several decades.

Thus, a Constitutional Convention presents a unique opportunity to enact comprehensive Constitutional reforms. If the State misses this opportunity in 2017, it will likely not have another chance until 2037.

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days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.”).

<sup>32</sup> *Id.* The State Constitution has been frequently amended in this manner. There have been 222 legislatively initiated amendments approved by voters since the 1894 Constitution took effect. The number of amendments, however, does not necessarily correlate with an effective Constitution. However, the number of amendments in recent decades has dropped significantly.

## **B. Arguments Opposing a Call for a Convention**

### **1. A Convention Places at Risk Cherished Constitutional Rights**

A Convention could open a Pandora's Box of potential constitutional mischief, placing at risk of elimination or alteration cherished fundamental rights.<sup>33</sup> It is hard to imagine New York State without the right to a free education;<sup>34</sup> the right to “freely speak, write and publish [one's] sentiments on all subjects”;<sup>35</sup> the “forever wild” protection for the Adirondack and Catskill Parks;<sup>36</sup> the mandate for State provided “aid, care and support” for

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<sup>33</sup> See, e.g., Assn. of the Bar of the City of N. Y., REPORT OF THE TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION, 52 RECORD OF THE ASSN. OF THE CITY BAR OF N.Y. 535-36 (1997) [hereinafter, “CITY BAR 1997 TASK FORCE REPORT”] (“[T]ime-honored provisions, which in many cases afford greater protection than the United States Constitution, would be opened to amendment or repeal by a constitutional convention.”); Ned Hoskins, *Why we must say NO to a state constitutional convention*, NYSUT UNITED (Jan. 26, 2016) (quoting NYSUT Vice President Paul Pecorale, “Delegates to a possible convention can essentially blow up the way of life New Yorkers enjoy and the expectations and priorities each of us have. . . . Whether it's public education, collective bargaining, our retirement security, environmental protections, spending caps in the budget, or any other issue one cares about, it's all at risk.”), available at <http://www.nysut.org/news/nysut-united/issues/2016/february-2016/why-we-must-say-no-to-a-state-constitutional-convention>.

<sup>34</sup> See N.Y. CONST., art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

<sup>35</sup> N.Y. CONST., art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

<sup>36</sup> See N.Y. CONST., art. XIV, § 1 (“The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.”).

the needy;<sup>37</sup> pension rights for public employees;<sup>38</sup> and the “bill of rights for labor,” including the rights to workers’ compensation, belonging to a union and collective bargaining.<sup>39</sup> The current State Constitution, with its focus on individual liberty, social welfare, and the environment, in many cases affords greater protections for its citizens than the United States Constitution.

A Constitutional Convention has the potential to place at risk established protections and other longstanding provisions by opening up the entire Constitution, without limitation, for extensive modifications. Should those rights that have no equivalent in the United States Constitution, such as the mandate to aid the needy, be weakened or eliminated, they could be lost for at least the next twenty years, if not longer.

## **2. A Convention Could Add Harmful New Provisions to the Constitution**

Just as a Convention could propose eliminating established Constitutional rights, it could also propose new provisions that would be highly controversial and divisive and/or harmful to responsible governance. For example, while some argue that the Constitution should be amended to add limits on State debt, recalibrate the balance of power between the

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<sup>37</sup> N.Y. CONST., art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

<sup>38</sup> N.Y. CONST., art. V, § 7 (“After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.”).

<sup>39</sup> N.Y. CONST., art. I, §§ 17 (labor not a commodity; hours and wages in public work; right to organize and bargain collectively), 18 (workers’ compensation).

Governor and Legislature in the State budget process, and establish an environmental bill of rights, others warn that such amendments could lead to unintended and deleterious consequences for the State. To be sure, reasonable minds can differ on such controversial and complex issues, and often do.<sup>40</sup> In any event, since a Convention opens up the entire Constitution for potential revisions, there is no way to control or limit the delegates' ability to propose changes to the document.

### **3. A Convention will be Faced with the Same Political Hurdles that Undermine the Legislative Process**

Ensuring a fairly represented and balanced Constitutional Convention process requires a diverse body of delegates untethered to special interest group financing, with varied political leanings, integrity and sincere concern. Some argue, however, that a Convention's outcome will be constrained by a partisan and possibly unlawful delegate selection process under New York State and Federal campaign and election laws.<sup>41</sup> Candidates for delegate must engage in political campaigns that may be financed by campaign contributions from special interests. As is the case in other political spheres,

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<sup>40</sup> Nothing herein should be construed as taking a position, one way or the other, on such issues.

<sup>41</sup> See, e.g., CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 535 ("If a constitutional convention were called in 1997, delegates would be elected in November 1998 under the present system, thus risking not only a lack of fair representation among delegates to the convention, but also the prospect of costly Voting Rights Act litigation."); *Diverse Perspectives*, 70 N.Y. ST. B.J. 9 (1998) ("The Executive Committee [of NYSBA] voted at its June 1997 meeting to oppose a constitutional convention absent legislative approval of a delegate selection process that would assure full and fair citizen participation. Concerns included the use of a multimember district selection process, in light of the Voting Rights Act, and the need for sufficient opportunity for broad participation to provide diverse participation in addressing issues that would be raised at a convention.").

the financial influence of special interests could undermine the ability of delegates to serve the public interest. In other words, special interests could command excessive influence over a Convention, as is argued they often do in the Legislature.

According to some commentators, Conventions have historically been similar to a typical legislative session, influenced by Albany insiders and special interests.<sup>42</sup> They argue that because the current delegate selection process virtually ensures that many delegates will be legislators, judges, and other politically-connected individuals, the Convention would be controlled by those who are unlikely to propose significant reforms or otherwise disturb the status quo.<sup>43</sup>

#### **4. Legislators and Judges Serving as Delegates Will Receive Double Salaries**

There is no Constitutional bar to sitting legislators or judges simultaneously serving as delegates to a Constitutional Convention. The Constitution mandates that a delegate “shall receive for his or her services the same compensation as shall then be annually payable to the members

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<sup>42</sup> See KREMER, FIGLIOLA & DONOVAN, PATRONAGE, WASTE, AND FAVORITISM, *supra* note 9, at 1 (“The fact is, constitutional conventions in New York may have a noble purpose and are filled with lofty goals, but they often fell victim to the same types of hurdles that a typical session of the state legislature does.”).

<sup>43</sup> See, e.g., Alan Chartock, *One big problem with New York state constitutional conventions*, DAILY FREEMAN, Sept. 25, 2016 (“The problem [with a Constitutional Convention] is, and even the proponents of the proposed convention know it, that the same politicians who are always protecting their fannies by refusing to pass sensible ethics reform will be the ones controlling the proposed Convention. Why in the world would they or their hack friends vote for the same sort of reform in a Constitutional Convention?”) [hereinafter, “One big problem”], available at <http://www.dailyfreeman.com/opinion/20160925/alan-chartock-one-big-problem-with-new-york-state-constitutional-conventions>.

of the Assembly,” regardless of how long the Convention lasts.<sup>44</sup> The Constitution also prevents the reduction of salaries for legislators or judges by statute during their terms.<sup>45</sup> As a result of these provisions, those individuals who simultaneously serve as delegates and legislators or judges will be able to receive two public salaries, so-called “double dipping.”<sup>46</sup> In addition, because pensions are based upon total earnings over three consecutive years, legislators or judges who serve as delegates may be able to enhance their pensions.<sup>47</sup>

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<sup>44</sup> See N.Y. CONST., art. XIX, § 2 (“Every delegate shall receive for his or her services the same compensation as shall then be annually payable to the members of the assembly and be reimbursed for actual traveling expenses, while the convention is in session, to the extent that a member of the assembly would then be entitled thereto in the case of a session of the legislature.”).

<sup>45</sup> See N.Y. CONST., art. III, § 6 (“Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected, nor shall he or she be paid or receive any other extra compensation.”), & art. VI, § 25.a. (“The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate’s court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed.”).

<sup>46</sup> CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 541-43.

<sup>47</sup> See *id.* at 542. The Constitution provides that the benefits of membership in any State or local pension system “shall not be diminished or impaired.” N.Y. CONST., art IV, § 7. Several sections of New York’s Retirement and Social Security Law were amended to cover the delegates to the 1938 and 1967 Constitutional Conventions by specifically including their service as “government service” when they were delegates. See, e.g., Retire. & Soc. Sec. Law §§ 2 (definition of “annual compensation”), 44 (with respect to 1967 delegates in local pension system), 216(a) (regarding re-employment of 1967 delegates), & 302(12)(a)(1) (with respect to members of police and fire pension systems).

Such “double dipping” and pension enhancements are problematic for a number of reasons. First, “the perception of public officials using the convention to engage in double dipping would significantly undermine public confidence in the integrity of the process.”<sup>48</sup> Second, “[i]t is wrong for an elected official or any person to be paid two annual salaries for public service in the same year.”<sup>49</sup> Third, the prospect of dual compensation will give sitting legislators and judges an inappropriate financial incentive and motivation to serve as delegates — especially in view of the salary levels involved.<sup>50</sup> A Convention should not become an opportunity for individuals who are already on the public payroll to enhance their salaries and pensions.<sup>51</sup>

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<sup>48</sup> CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 542; *cf.*, N.Y.C. BAR TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION, REPORT ON DELEGATE SELECTION PROCEDURES 2 (Feb. 2016) (“Though the Task Force has concerns about whether government officials elected as delegates should be able to accept the delegate salary in addition to the salaries they earn from their government position, current constitutional provisions lead to the conclusion that all public officials should be entitled to collect delegate salaries in addition to their other salaries, as has been done at past conventions.”), *available at* <http://www2.nycbar.org/pdf/report/uploads/20073044-DelegateSelectionProceduresConConReportFINAL2.9.16.pdf>.

<sup>49</sup> TEMPORARY N.Y. ST. COMM’N ON CONSTITUTIONAL REVISION, *The Delegate Selection Process: Interim Report of the Temporary New York State Commission on Constitutional Revision* (March 1994), *reprinted in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 434 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter, “*Delegate Selection Process*”] (quoting concurring statement of commission member Malcolm Wilson).

<sup>50</sup> *Delegate Selection Process*, *supra* note 49, at 426; CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 542.

<sup>51</sup> CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 541.

## 5. A Convention is Unnecessary

Some argue that a Convention should only be held if it provides the sole avenue to amend the Constitution. Because a Convention is unnecessary to amend the Constitution, which can be amended through a legislatively initiated process,<sup>52</sup> the risks associated with holding a Convention cannot be justified. In fact, the legislative process has been used to amend the Constitution over 200 times in the past 100 years.<sup>53</sup> Accordingly, “there is virtually nothing that a Constitutional Convention would do that the Legislature couldn’t do.”<sup>54</sup>

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<sup>52</sup> N.Y. CONST., art. XIX, § 1 (“Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.”).

<sup>53</sup> Seth H. Agata, *Should New York Have a constitutional convention? No*, STATE BAR NEWS (Nov./Dec. 1996), at 16 (“While there may be a desired reform, a convention may not be the most appropriate avenue by which to achieve it. There is an amendment process which affords the public the opportunity to consider discrete, carefully crafted reform.”).



## **6. A Convention Will be Expensive**

The staging of a Constitutional Convention would be a highly expensive enterprise. The 1967 Constitutional Convention cost taxpayers as much as \$15 million.<sup>55</sup> The cost of a Convention in 2019 would likely dwarf that figure, with the largest expense being salaries for delegates and staff.

## **III. RECOMMENDATIONS**

The Committee has carefully considered the arguments summarized above, among others, both for and against a Convention. Both sides of the debate present serious, thoughtful views about the possibilities and risks of a Convention. The Committee carefully reviewed reasons not to support a Convention, and agreed that they raise serious concerns. The difficult question the Committee struggled with was whether the potential for making major improvements in the State Constitution through a Convention outweighs the risks in holding one.

In the end, the Committee concluded that the State should not forfeit this rare, generational opportunity to modernize and significantly improve

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<sup>54</sup> Chartock, *One big problem, supra* note 43 (“We are talking about spending millions of dollars of the people’s money to make this happen, when there is virtually nothing that a Constitutional Convention would do that the Legislature couldn’t do. They just won’t. So, if one and one make two and the Legislature won’t do what has to be done, why should we believe that a convention would fare any better?”).

<sup>55</sup> See Bill Mahoney, *How the Cost of a Convention Became Urban Legend*, POLITICO/NEW YORK, Feb. 9, 2017 (noting that Henrik Dullea, an expert on the 1967 Constitutional Convention, believed that the total cost to prepare for and stage that Convention exceeded \$10,800,000, but doubted that it topped \$15 million) [hereinafter, “*Cost of a Convention*”], available at <http://www.politico.com/states/new-york/albany/story/2017/02/how-an-implausible-cost-estimate-for-a-constitutional-convention-spread-109467>.

the Constitution that forms the foundation of State government. Accordingly, the Committee recommends that the State Bar support a Convention call, primarily because a Convention presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system.

Court reorganization is a matter of supreme importance to the legal profession, and a subject on which the State Bar has long and repeatedly advocated. For too long lawyers and their clients have had to accept and endure a costly and byzantine system that few understand, and no one can justify. Despite the best efforts of reformers, the Legislature has shown little interest in consolidating trial courts or taking other steps that would significantly improve the delivery of justice. Forty years of commissions, studies and reports by the State Bar and others have not yielded the structural changes necessary to ensure an efficient, modern and sustainable system that will provide access to justice for all.<sup>56</sup> Thus, the Committee sees

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<sup>56</sup> JUDICIARY ARTICLE REPORT, *supra* note 8, at 2, 34-70. For example, the Fund for Modern Courts has repeatedly called for court simplification, and in 2011, the Fund organized a broad-based coalition, which was supported by the State Bar, to advocate for this reform. See <http://moderncourts.org/programs-advocacy/courtstructuring-and-simplification/>; see also N.Y. ST. BAR ASSN., REPORT OF ACTION UNIT NO. 4 (COURT REORGANIZATION) TO THE HOUSE OF DELEGATES ON TRIAL COURT MERGER AND JUDICIAL SELECTION (1979); see also Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. TIMES (Mar. 20, 1997), available at <http://www.nytimes.com/1997/03/20/nyregion/chiefjudge-offers-a-plan-to-consolidate-the-court-system.html>. So, too, the New York City Bar Association has frequently supported consolidating all trial courts into a single trial court of general jurisdiction. See September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); "Legislative Proposals on Court Merger and Merit Selection of Judges," by the Committee on State Courts of Superior Jurisdiction, 35 THE RECORD 66 (1980); December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration);

a Convention as the most efficient path to achieving fundamental court reform.

Notably, the League of Women Voters, which opposed a Constitutional Convention in 1997, now has called for a Convention in 2019, citing court reform as an issue that could be taken-up “that Albany has refused to undertake.”<sup>57</sup> Likewise, Citizens Union of the City of New York supports a “Yes” vote on the November ballot question because a Convention would provide an opportunity to “streamline and enhance operations” of the court system, “with a consolidated trial court system and merit-based appointments for judges.”<sup>58</sup>

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September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration). In 1997, the City Bar, under its then President Michael A. Cardozo, supported Chief Judge Kaye’s plan to create a two-tier trial court in New York. Assn. of the Bar of the City of New York, Council on Judicial Administration, *The Chief Judge’s Court Restructuring Plan, with Certain Modifications, Should Be Adopted*, available at [http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=46](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46).

<sup>57</sup> Press Release, League of Women Voters of New York State, *League of Women Voters of New York State Announces Support for 2017 Constitutional Convention Ballot Question* (Mar. 27, 2017) (“A Constitutional Convention would provide New Yorkers the opportunity to consider critical reforms that Albany has refused to undertake, including in the areas of . . . [s]tremlining and modernizing our court system, making it more effective . . . .”), available at [http://lwvny.org/programs-studies/concon/2017/Press-Concon\\_032717.pdf](http://lwvny.org/programs-studies/concon/2017/Press-Concon_032717.pdf).

<sup>58</sup> Citizens Union of the City of New York, *Policy Position on the 2017 Constitutional Convention Ballot Question*, available at <https://echalk-slate-prod.s3.amazonaws.com/private/districts/466/resources/e300a6e5-0229-44e7-a61b-a80cd9fee545?AWSAccessKeyId=AKIAIZQPKIVDQVS7TUJA&Expires=1790866192&response-content-disposition=%3Bfilename%3D%22Position%2520in%2520Support%2520of%2520ConCon%2520-%252012-2015.pdf%22&response-content-type=application%2Fpdf&Signature=fvgebwKPPI26Cjyzt2HnA7zh1I%3D>.

Also, there is much-needed “house cleaning” of the Constitution to remove anachronisms, redundancies and needless details that demean the document.<sup>59</sup> The Committee’s own detailed look at the Judiciary and Conservation Articles identified opportunities to streamline and improve the document, even without making significant substantive changes.

Furthermore, “[w]hereas citizens of New York might once have seen themselves as on the cutting edge as to the registration and voting process, that is no longer the case.”<sup>60</sup> Certain election administration reforms such as Election Day and same-day registration would require Constitutional amendment, and a Convention would provide an opportunity to consider these and other measures to enhance voter participation.

More broadly, the State Constitution was meant to be amended over time to reflect the needs and concerns of each era, while remaining a foundational document.<sup>61</sup> The Constitution proposed by the 1894 Convention continued the basic structure of the government and adopted

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<sup>59</sup> The text of the Judiciary Article alone comprises approximately 16,000 words, representing almost one-third of the State Constitution. The City Bar’s 1997 Report of the Task Force on the New York State Constitutional Convention called the article “substantially more comprehensive and detailed than any other part of the Constitution.” CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 595. *See also* Galie & Bopst, *House Cleaning—Part I*, *supra* note 10, at 1424 (“[T]here are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article.”).

<sup>60</sup> VOTER PARTICIPATION REPORT, *supra* note 28, at 1.

<sup>61</sup> In his capacity as President of the 1915 Constitutional Convention, Elihu Root said: “The most obvious duty before us is to scrutinize attentively the framework of the State government in order to ascertain in what respect, if any, the established institutions are insufficient or ill-adapted to accomplish the ends of government. Great changes have come in the industrial and social life of the State since the last convention.” ‘*Save Rights*’ – Root, Washington Post, Apr. 7, 1915.

fundamental protections such as “forever wild,” while also bringing “good government” ideas and protections into the structure of State government. The amendments proposed by the 1938 Convention responded to the Great Depression by addressing the need for social justice and the demands of a modern administrative state. The 1967 Convention, called in the wake of the “one-person, one-vote” decisions of the United States Supreme Court, proposed a Constitution (ultimately rejected by voters) that attempted to further refine the Constitution. Approximately once a generation, until 1967, New Yorkers had seized the opportunity to reconsider the fundamentals of how we govern ourselves.

However, with respect to significant structural issues of governance, the Constitutional amendment process has long been dysfunctional.<sup>62</sup> There has been no Constitutional Convention in 50 years, and no new Constitution in nearly 120 years. As a result, we have a Constitution that, despite its

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<sup>62</sup> See John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, MONT. L. REV. 395, 396 (2010) (“For many years, constitutional conventions were called regularly; however, in recent years they have become increasingly rare. In the 195-year period from 1776 to 1970, the 50 states held 220 conventions, and most were called by legislatures, which are generally, but not always, required to obtain approval from the people beforehand; but the 40-year period from 1971 to 2010 has produced only 13 conventions (and none after 1992).”) (citations omitted). Over the last three decades, legislatively initiated amendments to the State Constitution have declined in number relative to the period before then. For example, from 1986 to 2015, the State Legislature submitted 32 amendments to the voters, who approved 26 of them. See Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 77, 89 (Rose Mary Bailly & Scott N. Fein, eds., 2016). Contrast this with the ten-year period between 1956 and 1965, when voters approved 36 of the 46 amendments placed before them. *Id.* Ironically, when most needed to provide Constitutional revision during the longest convention drought in New York’s history, the Legislature has adopted the least number of amendments in generations. Most significantly, the amendments that have been approved during the last 30 years have largely been tinkering around the edges.

timeless values and storied provisions, contains simply too much detritus and unreadable verbiage and does not meet the ever-changing problems of our time.

Although the Committee supports a 2019 Convention, there are serious, good faith concerns that have been expressed about calling one. For example, some are fearful that certain fundamental rights would be at risk of alteration or elimination if a Convention were held. It is true that delegates would not be prohibited from proposing such changes. But the Committee believes it is unlikely Convention delegates in sufficient numbers would rollback established rights, given the State's history and political demographics.<sup>63</sup> The nine constitutional conventions held during the State's history have accounted for almost every single right — individual and collective — present in the Constitution today.<sup>64</sup> There is no empirical basis for believing that the 204 Convention delegates who will be elected by New Yorkers (three per senate district, and 15 at large delegates) would undermine the State's core principles. Moreover, the Constitutional requirement that any proposals from the Convention must be approved by

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<sup>63</sup> Peter J. Galie, Christopher Bopst & Gerald Benjamin, *Coda*, in their *BROKEN CONSTITUTION*, *supra* note 15, at 307-310; Peter J. Galie, *A Pandora's Box: Holding a Constitutional Convention in the State of New York* in *TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATORS OF NEW YORK* 69-81 (1995).

<sup>64</sup> See Peter J. Galie & Christopher Bopst, *Another Voice: Constitutional Convention is Needed to Reshape State*, *BUFFALO NEWS*, Feb. 1, 2017, available at <http://buffalonews.com/2017/02/01/another-voice-constitutional-convention-needed-reshape-state/>.

the voters<sup>65</sup> would make the roll back of any rights even more unlikely.

In this regard, the Committee undertook a detailed study of Article XIV, dealing with Environmental Conservation, which included a historical examination of the “forever wild” clause, an oft-cited example of one such precious provision that could be threatened by a Convention.<sup>66</sup> The historical record demonstrated that the “forever wild” clause — itself a product of the 1894 Constitutional Convention in response to insufficient statutory protections for the State Forest Preserve — had been addressed at multiple Conventions and had never been weakened, but instead has been consistently affirmed.<sup>67</sup> Thus, at least with respect to the “forever wild” clause, the Committee found no evidence supporting fears that delegates at a 2019 Convention would try to repeal it, but rather, a solid 120-year history of strengthening coupled with a host of other provisions deserving serious study and consideration.<sup>68</sup>

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<sup>65</sup> See N.Y. CONST., art. XIX, § 2.

<sup>66</sup> CONSERVATION ARTICLE REPORT, *supra* note 7, at 11-15.

<sup>67</sup> *Id.* at 19.

<sup>68</sup> See *id.* at 19 (“In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters. After more than 120 years, however, the forever wild clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause’s future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.”).

In short, the Committee is unpersuaded that delegates to a 2019 Convention or the public at large would be moved to rip out of the State Constitution fundamental rights and freedoms.

Likewise, the Committee is not persuaded that the costs of staging a Convention, sizable though they may be, provide sufficient reason to cast a “No” vote on the November ballot question. Depending on the source, calculations of the cost of the most recent Convention in 1967 ranged from \$6.5 million<sup>69</sup> to \$15 million (approximately \$47 million to \$108 million in 2017 dollars).<sup>70</sup> This is a significant amount of money, but even at \$108 million in 2017 dollars, represents less than one-tenth of one percent of the State’s 2017-2018 budget.<sup>71</sup> This is a good investment if it leads to a better functioning State government.

Finally, the Committee carefully considered a number of procedural issues relating to a Convention, some of which were the basis for several groups (including the State Bar) opposing a Convention call in 1997.<sup>72</sup>

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<sup>69</sup> Civil Service Employees Association, New York State Constitutional Convention, *available at* <https://cseany.org/wp-content/uploads/2015/10/con-conflier.pdf>.

<sup>70</sup> *See Mahoney, Cost of a Convention, supra* note 55.

<sup>71</sup> *See* State of New York, Andrew M. Cuomo, FY 2018 EXECUTIVE BUDGET FINANCIAL PLAN, *available at* <https://www.budget.ny.gov/pubs/executive/eBudget1718/financialPlan/FinPlan.pdf>.

<sup>72</sup> *See* N.Y. St. Bar Assn., Minutes of Executive Committee Meeting (June 26-27, 1997) (setting forth resolution opposing call for Constitutional Convention in the absence of legislative reform of the delegate selection process); *see also, e.g.,* CITY BAR 1997 TASK FORCE REPORT, *supra* note 33, at 537-38 (“On balance, we conclude that a constitutional convention should not be called by the November 1997 referendum. Without a mandate for comprehensive reform, and improvement of the process by which



These issues include delegate selection concerns (particularly worries about multimember district elections for Convention delegates as violative of the Federal Voting Rights Act), concerns about dominance of the Convention by interest groups and sitting legislators, and concerns about dual compensation for legislators and judges. Here again, the Committee found that these concerns do not outweigh the potential benefits from holding a Convention, although they should nevertheless be addressed, especially if voters call for a Convention this November.

Thus, although the Committee recommends that the State Bar support a Convention call, we nevertheless believe that, between the calling of a Convention and its commencement in April 2019, the State Bar should continue to urge policymakers to establish a preparatory commission, reform the delegate selection process and address the subject of dual compensation by delegates, as explained below.

- **Establishing a Preparatory Commission**

The Committee's first report in the fall of 2015 described the history of preparatory commissions and constitution review commissions that have been called since the 19th Century to prepare for the 20-year vote or for a Convention called by legislation. During the 20th Century, the question of whether to hold a Constitutional Convention was placed before the voters on seven occasions (1914, 1916, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional

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convention delegates would be elected, we have little confidence that a constitutional convention would offer a realistic possibility of achieving satisfactory reform.”).

Conventions held in 1915, 1938 and 1967.<sup>73</sup> Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997.<sup>74</sup> Initial indications following the Committee's first report in the fall of 2015 and advocacy by other organizations on this same issue seemed to favor creation of such a Commission prior to the November 2017 vote. However, this effort has thus far not been successful. In the event a Convention is called in November 2017, there will be relatively little time to undertake the preparations necessary for an effective Convention in the spring of 2019. Therefore, the State Bar should renew its call for establishment of a preparatory commission as soon as possible, and in any case, immediately following an affirmative vote to the November ballot question.

- **Reforming the Delegate Selection Process.**

The State Bar's Executive Committee opposed the 1997 Constitutional Convention vote over concerns about delegate selection,<sup>75</sup> joining other organizations such as the League of Women Voters.<sup>76</sup> Although a range of

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<sup>73</sup> The 1915 and 1967 Conventions were called in response to affirmative votes by the electorate to ballot questions initiated by the State Legislature — not the 20-year mandatory referendum provided for under the State Constitution. In the 20th Century, the 1938 Convention was the only Convention held as a result of an affirmative vote in response to a mandatory referendum. *See* GALIE, ORDERED LIBERTY, *supra* note 2, at 188, 230-31, 307-08.

<sup>74</sup> *See* the full discussion of these issues in the Committee's PREPARATORY COMMISSION REPORT, *supra* note 5, at 6-19.

<sup>75</sup> N.Y. St. Bar Assn., Minutes of Executive Committee Meeting (June 26-27, 1997) (setting forth resolution opposing call for Constitutional Convention in the absence of legislative reform of the delegate selection process).

<sup>76</sup> League of Women Voters of New York, *1993 Constitutional Convention Position*, available at

issues surfaced over delegates, including dual office-holding by sitting public officials, overly partisan “slate elections,” and campaign finance, the primary issue concerned potential Federal Voting Rights Act violations occasioned by the constitutionally prescribed multimember districts for election of delegates.<sup>77</sup> The multimember district procedures in Article XIX, Section 2 long pre-date modern voting rights laws and court decisions which strongly disfavor such districts because they tend to prevent minority voters from electing a candidate of their choice. Various remedies were studied and proposed prior to the 1997 vote, including a comprehensive study by the State Temporary State Commission on Constitutional Revision (often referred as the “Goldmark Commission”)<sup>78</sup> and thorough examination of the question by the New York City Bar Association.<sup>79</sup> The Committee recommends that, following a Convention call, consideration should be given to favoring or requiring reform of voting procedures to ensure Voting Rights Act compliance and avoid undue partisanship prior to any Convention delegate elections in 2018. Numerous campaign finance proposals are also worth serious study and consideration.

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<http://www.lwvny.org/advocacy/impact/issues/government/ConstitutionalConvention.pdf> ; League of Women Voters of New York, *LWVNY Opposes Constitutional Convention*, State Board Report (Jan. 1997).

<sup>77</sup> N.Y. CONST. art. XIX, § 2.

<sup>78</sup> *Delegate Selection Process*, *supra* note 49, at 407-434.

<sup>79</sup> Assn. of the Bar of the City of N. Y., Task Force on the N.Y. St. Constitutional Convention, *Countdown to the Constitutional Referendum: A Report on Delegate Selection, Election and Ethics Issues*, 50 THE RECORD 748 (June 1995) [hereinafter, “City Bar Countdown Report”]; CITY BAR 1997 TASK FORCE REPORT, *supra* note 33.

- **Dual Compensation (Salary and Pension “Double-Dipping”)**

Article XIX, Section 2 of the Constitution provides a convention delegate “shall receive for his services the same compensation as shall then be annually payable to the members of the assembly.” Both sitting judges and legislators have salary guarantees preventing the reduction of their salary during their time in office and receive pension credit based on highest salary earnings. At the 1967 Constitutional Convention, delegates included 24 judges and 13 legislators, comprising approximately 20% of the total delegates. Various thoughtful reform proposals were circulated prior to the 1997 vote by the Goldmark Commission<sup>80</sup> and the New York City Bar Association.<sup>81</sup> The Committee recommends that the State Bar should support measures that would prohibit or provide disincentives for double-dipping by any public officials in connection with Convention service.

#### **IV. CONCLUSION**

Once in a generation, New Yorkers exercise a unique Constitutional right with no Federal counterpart: a vote on whether to hold a Constitutional Convention.<sup>82</sup> This treasured right of direct democracy represents a trust placed in us long ago, in 1846, by delegates at a Constitutional Convention that was called only after years of partisan deadlock.<sup>83</sup> In our own time, we

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<sup>80</sup> *Delegate Selection Process*, *supra* note 49, at 407-434.

<sup>81</sup> City Bar Countdown Report, *supra* note 78, at 748; *see also* CITY BAR 1997 TASK FORCE REPORT, *supra* note 33.

<sup>82</sup> N.Y. CONST. art. XIX, § 2.

<sup>83</sup> *See* GALIE, ORDERED LIBERTY, *supra* note 2, at 99, 109-10.

have become increasingly timid about making major, comprehensive, structural change to State government — preferring to live with the devils we know, rather than risking those we fear. Members of this Committee hold a range of viewpoints on whether a Convention should be called, and serious concerns in both directions deserve careful consideration. Nonetheless, the Committee believes that a Constitutional Convention presents a rare opportunity to achieve much-needed progress on issues at the very center of the State Bar’s concerns<sup>84</sup> — such as court restructuring and modernization — and that the arguments against a Convention do not outweigh this opportunity.

In the final analysis, the Committee has chosen to accept the challenge posed by the framers of the State’s mandatory call for a Convention referendum — namely, that We the People can be trusted to make beneficial changes to our government; that our best days are yet to come; and that the State’s motto, “Excelsior,” Ever Upwards, remains a living promise we must continually renew.

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<sup>84</sup> The holding of a Constitutional Convention clearly fits within original purposes of the New York State Bar Association as established by Ch. 210, L. 1877, in that a Convention would serve “to cultivate the science of jurisprudence, to promote reform in the law, [and] to facilitate the administration of justice.”



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #9**

Attached are comments received from the Committee on Legal Aid and the President's Committee on Access to Justice with respect to the report and recommendations of the Committee on the New York State Constitution.



## COMMITTEE ON LEGAL AID

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June 6, 2017

Kathleen R. Mulligan Baxter  
General Counsel  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

Dear Ms. Baxter,

Attached is a report on the position of the Committee on Legal Aid, together with dissenting views, in response to the Report of the Task Force on the Constitutional Convention which will be presented to the House of Delegates at the June meeting. The vote of the CoLA membership was 20 in favor of the majority view that NYSBA should not support the call for a Constitutional Convention and 2 opposed to that position.

Respectfully,

Keisha A. Williams, Esq.  
Co-Chair Committee on Legal Aid

Sergio Jimenez, Esq.  
Co-Chair Committee on Legal Aid



# NEW YORK STATE BAR ASSOCIATION

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June 6, 2017

Kathleen R. Mulligan Baxter

General Counsel

New York State Bar Association

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Dear Ms. Baxter,

Attached hereto please find the comments of the President's Committee on Access to Justice, which voted by a majority against the Report of the Committee on the New York State Constitution, which recommended that the New York State Bar Association support the 2017 ballot question calling for a constitutional convention.

Kindest regards,

Edwina Martin, Esq.

Michael Miller

Edwina Martin, Esq.

Co-Chair, President's Committee on Access to Justice

Michael Miller

President-elect, New York State Bar Association

Co-Chair, President's Committee on Access to Justice



## **MEMO**

Date: May 30, 2017  
To: Committee on the NYS Constitutional Convention  
From: PCAJ/CoLA Joint Subcommittee on the NYS Constitutional Convention  
Re: Comments to the Committee on the NYS Constitutional Convention's Report

Please find below a memo of a joint subcommittee of the Committee on Legal Aid and the President's Committee on Access to Justice. The subcommittee members are Ronald Tabak, Lillian Moy, Harvey Epstein, Sally Curran, Dennis Kaufman, Saima Akhtar, Susan Horn, Jeffrey Seigel, and Joseph Kelemen. All subcommittee members except for Lillian Moy and Saima Akhtar are of the majority position in opposition to a New York State Constitutional Convention.

### **Majority Report**

By Ronald Tabak

The report submitted to the House of Delegates in support of a resolution favoring holding a New York State constitutional convention is based on a number of premises that are so clearly incorrect that – even aside from other significant problems – we oppose the resolution.

The report asserts incorrectly that "the voters ... can reject any Constitutional changes that they view as improper." This statement could only be accurate if the constitutional convention – which under the New York State Constitution "determines the rules of its own proceedings" – decides to permit the electorate to vote separately on each proposed constitutional amendment. No prior convention has adopted such amendment-by-amendment voting. There is no provision for a limitation on or oversight of the convention's powers in this regard. Far more likely would be an all-or-nothing vote with regard to the entire panoply of all proposed changes, or perhaps voting on clumps of proposed changes.

The unlikelihood of separate voting on each proposed constitutional change is even greater than it might otherwise be because at least so far, there has not been an advance commission considering the merits or best practices of a convention. Moreover, it is considerably more likely than in the past that moneyed special interests would exert great influence at a convention (as well as in voting for delegates and on voting on a convention's proposals). They may find it to their perceived advantage for the convention to (a) combine in one ballot vote an otherwise unpopular amendment that the special interests favor with other provisions that are popular or (b) support a regressive amendment to the state constitution (such as a "tough on crime" measure, *e.g.*, putting the death penalty into the state constitution – as has happened elsewhere) – not because the special interests really care about it but in order to improve the chances of other regressive amendments, *e.g.*, barring state funding for civil legal services for immigrants and other poor people: these could be paired in a single ballot vote.

This leads us to focus on a second fundamentally flawed assumption underlying the resolution. The supporting report assumes that only changes that the State Bar would either support or not oppose will be proposed and voted on by the electorate and that they will be important enough to the electorate to attract voters to go to the polls and vote for these proposed changes in the 2019 election. However, although we favor all of the constitutional changes discussed in the supporting report, we are extremely dubious that they will attract large numbers of people to come out and vote in large enough numbers for these changes to win in the very low voter turnout general election year of 2019. In that year, there will be no presidential, gubernatorial, or New York City mayoral election. Higher turnout will occur in those places with hotly contested county or local elections – outside of New York City. Moreover, if, as is quite possible, regressive constitutional changes are on the ballot, they are likely to motivate more voters who favor them than those who oppose them – especially in

that election year, in which more progressive voters won't otherwise be voting in high numbers. So, regressive changes would have a substantial chance of winning – or depending on what the voters vote on, of causing the defeat of any positive changes.

History in elections and on referendums in New York and other states shows that people who, *e.g.*, favor more "gun rights," restrictions on women's right to choose, anti-immigrant proposals, and rollbacks of state constitutional rulings that are not mandated by the U.S. Constitution as interpreted by the Supreme Court, are more likely to vote than people motivated by things like court reforms.<sup>1</sup> Fortunately, New York is in general not a referendum state -- something that a convention could change.

To be realistic about the possible downsides of a constitutional convention, one should be cognizant of provisions in the existing constitution on its face – or as interpreted by the New York Court of Appeals -- that could be endangered by a constitutional convention or by a referendum system that a convention could introduce. These are ignored or severely downplayed in the supporting report's summary of arguments against. They include (among many other things) Court of Appeals decisions concerning free expression,<sup>2</sup> religious liberty<sup>3</sup> and the rights of criminal suspects and defendants,<sup>4</sup> in which the state constitution has been consistently interpreted more expansively than the Bill of Rights. Moreover, the state constitution provides for some rights on which the U.S. constitution is silent, including in the contexts of education, social welfare, public health, immigrants' rights and environmental conservation.

Finally, the report submitted to the House of Delegates largely overlooks the likely distorting effects of electing most constitutional convention delegates by at-large voting within gerrymandered State Senate districts – with the remaining 15 members being selected in at-large statewide voting. The use of at-large voting has often been found to dilute the voting impact of people of color. The selection system is vulnerable to a legal challenge that, if made, is unlikely to be adjudicated before a convention completes its work. For these various reasons, the selection system for delegates could greatly increase the risk of a convention's proposing at least some significant highly regressive measures.

In sum, the supporting report submitted to the House of Delegates is highly unrealistic and notable mostly for its omissions. If not considered carefully, it could lead State Bar delegates to vote in favor of a constitutional convention on the basis of an extremely skewed exercise in wishful thinking combined with downplaying the more likely scenarios of how a convention would play out.

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<sup>1</sup> There have been a number of examples elsewhere (such as California) of entrenched interests' relying on appeals to social conservatives to win elections – even where the entrenched interests did not really care about social conservative-attractive issues they used to win the elections.. This has happened in the context, *e.g.*, of retention elections for high state court judges --- where entrenched business interests focused their campaigns on things like the judges' death penalty decisions in order to get off the bench judges that these interests disliked because of pro-environment or pro-consumer rulings.

<sup>2</sup> The Court of Appeals requires more protection for opinions than the U.S. Supreme Court does under the First Amendment. New York law also provides journalists a qualified right to withhold sources, even where not gained in confidence. .

<sup>3</sup> While the Supreme Court allows restrictions on religious exercise where a prohibition is the effect of a generally applicable provision, New York uses a balancing test in which state interest is weighed against the incidental burden imposed on a free exercise right. And New York's constitution explicitly bars spending public dollars on religious education.

<sup>4</sup> New York law is more protective than federal law with regard to searches and seizures. Moreover, the New York Constitution specifies stringent requirements for waiver of a criminal jury trial and requires a 12-member jury in a felony case. In addition, New York courts treat the right to counsel as being unwaivable in counsel's absence once the right attached and apply the right to post-conviction proceedings and to questioning on unrelated charges. The Court of Appeals has also been more protective of a defendant's right to effective assistance of counsel than the Supreme Court.

## Dissent

By Lillian Moy & Saima Akhtar

I respectfully dissent from the majority report. I voted to support the Report of the Committee on the New York State Constitution calling for the New York State Bar Association to support the 2017 ballot question calling for a constitutional convention. I am a lifelong legal aid lawyer and at my core, I think of myself as a hopeful and optimistic person. The Committee's report resonates with the hope and optimism that infuses my life's work. I support the Committee's report and hope that the Committee on Legal Aid and the President's Committee on Access to Justice will join in the report because a Constitutional Convention could create substantial new rights for our low income clients. As we have known for many years, the benefits of court reorganization alone would greatly simplify the rights of low income litigants. Multiple court appearances, multiple types of proceedings, make it extremely hard for a low-income person to participate in the justice system. No other solution has come to pass in spite of many years of support for court reform.

In addition, a constitutional convention provides an opportunity to establish new positive rights. With respect to access to justice, I am particularly thinking of establishing a right to counsel outside of the city of New York. This is a right that is unlikely to be developed or funded by local cities and towns outside of New York City. At the moment, there is no practical alternative for creating a civil Gideon in the rest of state and I believe the constitutional convention is our only hope for establishing this right outside of New York City in our generation. As the committee on the Constitutional Convention points out, there is no practical alternative to convention for enacting many needed and desired reforms.

Nor is there empirical evidence to believe that long held constitutional rights such as the "forever wild" clause and Article 17 protections for the poor and needy would be eliminated by Convention delegates. I agree with the committee that it is "unlikely constitutional delegates in sufficient numbers would roll back established rights, given the state's history and political demographics." Id. page 26. and any such unlikely attempted rollback would also have to be approved by the voters.

The report calls for NYSBA to "continue to urge to establish a preparatory commission, reform the delegate selection process and address the subject of dual compensation by delegates,..." See committee report, page 29. The State Bar should call for establishment of a preparatory commission as soon as possible, and "in any case, immediately following an affirmative vote on the November ballot question."

A constitutional convention is the one practical opportunity this generation of the Association has to modernize, clean up and restructure the Constitution. I hope the New York State Bar Association will join with the League of Women Voters, Citizen Union of the City of New York (<http://www.nydailynews.com/opinion/fix-government-vote-constitutional-convention-article-1.3180479>) as well as former Chief Judge Jonathan Lippman in voting for hope on behalf of low-income clients throughout the state and supporting a vote for a constitutional convention. I dissent from the subcommittee majority opinion and I hope the Committee on Legal Aid and Presidents' Committee on Access to Justice will support the Report and Recommendation of the Committee on the Constitution.

Commercial and Federal Litigation Section  
Comments on Report and Recommendations of  
NYSBA Committee on the New York State Constitution

Dated April 20, 2017

The NYSBA (“State Bar”) Committee on the New York State Constitution (“Committee”) has studied whether New Yorkers should approve the 2017 ballot question calling for a Constitutional Convention.

In its report dated April 20, 2017, the Committee recommends that the State Bar support a call for a Constitutional Convention on the November 2017 ballot. It did so based primarily on the belief that the state court system cannot be effectively reorganized and restructured without a convention. The Committee believes that the State Constitution needs to be streamlined, reorganized and modernized. The Committee made these recommendations notwithstanding concerns of the potential effects of special interest groups and the exposure to the possibility of adverse changes to protections already found in the State Constitution.

The Committee's Report is very thorough, based on research, study and interviews undertaken over a lengthy period of time. The Committee members consisted of well-respected lawyers and judges, including leaders of the State Bar. The Committee's work has been fulsome and expansive in its endeavor to analyze differing views.

The Committee notes that the Constitution, adopted in 1894, has been amended over two hundred times, but nonetheless contains antiquated and outdated provisions, including some that have been found unconstitutional by the United States Supreme Court.

In its focus on the Judiciary Article, the Report notes that the Constitution establishes an eleven level trial court system notwithstanding its goal of having a unified court system. The Committee's research shows that the current structure of the court system has been estimated to add approximately \$502 Million in unnecessary spending annually.

Noting that the Constitution also does not include certain rights that have been recognized by the

Supreme Court, the Committee observes that there are rights that New Yorkers may have interest in protecting through constitutional amendments, and, in addition, there is a need to modernize voting related procedures.

While the Constitution can be amended through the legislative process, the Committee concluded that there is no reasonable basis to believe that it would do so.

The committee noted some of the risks of a convention -

1. Existing rights may be put at risk and controversial provisions potentially may be sought to be added (although because proposed amendments must be approved by voters, the committee believes this risk to be small);
2. As delegates are elected, the campaign process introduces the influence of special interests and the selection process is structured to attempt to ensure that many delegates will be legislators, judges and other politically connected individuals;
3. As delegates are paid as legislators, those delegates with government jobs would receive double compensation, which may undermine the public confidence in the process;
4. The cost of the convention is expected to be significant - perhaps as much as \$100 Million - about one tenth of one percent of the State's budget.

The Section concludes that the Committee's work was based on a comprehensive and inclusive process and, as a result, is very thorough and deliberate, thus seeking to assure an appropriate review of the issues.

The Section supports the work of the Committee and believes that its analysis is well-balanced and provides a fair view of the potential benefits and detriments of a Constitutional Convention and, as such, the Section supports the Committee's recommendations.



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TO: Sharon Stern Gerstman, Esq., President

FROM: Kevin M. Bernstein, Esq., Chair, NYSBA Environmental and Energy Law Section

RE: **Report and Recommendations Concerning WHETHER NEW YORKERS SHOULD APPROVE THE 2017 BALLOT QUESTION CALLING FOR A CONSTITUTIONAL CONVENTION**, adopted by the NYSBA Committee on the New York State Constitution ("Committee"), April 20, 2017

As you may know, the members of the Environmental and Energy Law Section have been very involved in the debate as to whether there should be a Constitutional Convention, a question which will be put to the voters of this state on November 7, 2017. Indeed, Section member Professor Nicholas Robinson is a member of the Committee and also has been very involved in the report issued by the Committee in August 2016 regarding the Forest Preserve article in the New York State Constitution, Article XIV.

In the Section's memo submitted to the House of Delegates in October, 2016, my predecessor, Lawrence Schnapf, submitted the views of the Section regarding the Report of the Committee on Article XIV in advance of the meeting held on November 5, 2016, based on discussion and debate of the Section's Executive Committee at our Fall meeting on October 16, 2016, in Cooperstown, New York.

On April 20, 2017, the Committee issued another thorough and well thought-out Report and Recommendation, this time to address whether there should be a Constitutional Convention at all. The Report was circulated to the Executive Committee of the Section and there was debate about the Report and its recommendation at the Section's Executive Committee meeting on May 3, 2017. In addition, the Section utilized "Communities" to elicit views and encourage debate about this issue, one whose conclusion was clearly not even clear cut to the Committee.

After the above-mentioned debate, and the polling of the members of the Section's Executive Committee, it is the majority view of the Section's Executive Committee that the Report should NOT be approved. Stated a different way, a majority of those providing us their view (and there was more than a quorum of the Executive Committee) believe that there should NOT be a Constitutional Convention.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Kevin Bernstein". The signature is written in a cursive, flowing style.

Kevin M. Bernstein, Esq.  
Chair, Environmental and Energy Law Section

**President**  
Michael J. McNamara

**President-Elect**  
Stephen C. Lessard

**Vice President**  
Vincent T. Chang

**Secretary**  
Asha Smith

**Treasurer**  
Adrienne B. Koch

**Immediate  
Past President**  
Carol A. Sigmond

June 12, 2017

Henry M. Greenberg, Esq.  
Chair, Committee on the NY State Constitution  
c/o New York State Bar Association  
1 Elk Street  
Albany, New York 12207

**Re: Report of the New York State Bar Association's Committee on the New York State  
Constitution Recommending a Constitutional Convention**

Dear Mr. Greenberg:

This letter<sup>1</sup> is submitted by the New York County Lawyers Association Task Force on the Constitutional Convention ("NYCLA TF") in support of the April 20, 2017 report of the New York State Bar Association's Committee on the New York State Constitution ("COSC") urging a yes vote on the referendum question to be presented to the voters on November 7, 2017 on whether New York should hold a Constitutional Convention. This is the fifth report issued by COSC since its inception. NYCLA TF would like to recognize the extensive and excellent work that COSC has performed in highlighting important issues that a Constitutional Convention could address. This most recent report presents a comprehensive and thoughtful discussion of the rationale for voting affirmatively on a Constitutional Convention at this time. In particular, NYCLA TF believes that a Constitutional Convention provides an opportunity to achieve significant and needed reform in the areas of: court restructuring and modernization; voting rights; ethics in government; and strengthening our bill of rights and social welfare protections. The New York State Constitution, having been amended over 200 times, is cumbersome and contains obsolete and unconstitutional provisions. A Constitutional Convention can better address these issues, resulting in a more cogent and effective document. For these reasons, NYCLA TF is supportive of a Constitutional Convention, and urges that the report of COSC be approved and a resolution to support a Constitutional Convention be adopted by the NYSBA House of Delegates.

NYCLA was founded more than 100 years ago with the avowed purpose of being a bar association open to all lawyers in good standing without regard to race, creed, religion, ethnicity or gender, and with a mission to be a progressive bar association dedicated to improving the law and supporting access to justice. It has continued to serve as a voice in furtherance of these objectives. Recognizing that there are significant deficiencies in New York's court structure, NYCLA has been a strong voice for judicial reform<sup>2</sup>, as well as for

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<sup>1</sup>The views expressed are those of the NYCLA Task Force on a Constitutional Convention only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

<sup>2</sup> NYCLA submitted an Amicus Brief to the United States Supreme Court in the matter of New York State Board of Elections v. Lopez Torrez, 2007 WL 2030539 (2007), in support of respondent Lopez Torrez. In the past, NYCLA's Task Force on Judicial Selection has examined and spoken out on all aspects of the judicial selection process, including public financing of judicial elections, judicial districts for election purposes, elective versus appointive systems, court consolidation, and other issues.



**President**  
Michael J. McNamara

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Past President**  
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strengthening voting rights and developing ethics standards that are effective and applicable to all branches of government. While the Legislature has the power to address these issues, either through legislation or through multi-year passage of constitutional amendments that would then be submitted to the voters, efforts to achieve significant reforms through legislative action have not been successful. At this point in time, a Constitutional Convention is the best opportunity to accomplish meaningful change.

NYCLA TF acknowledges the concerns expressed by those who oppose a convention because of fears that convention delegates may recommend narrowing the constitutional support for social welfare, education and environmental provisions in the existing New York State Constitution. The concerns expressed by those who oppose holding a constitutional convention for these reasons cannot be ignored. The New York State Constitution contains a number of unique and valuable provisions, including Article XVII, which requires the state to provide assistance to the needy. This means that the state has a duty to assist those in need even if the political branches of government are either hostile or indifferent to doing so. In an era in which there is great concern about federal withdrawal of support and resources from those in need, this provision of the New York State Constitution serves as a bulwark for the millions of poor New Yorkers.

NYCLA TF agrees with the view expressed in COSC's Report that given the fact that prior constitutional conventions have been the vehicle that instituted these crucial protections, including aid to the needy, the "forever wild" clause, and the right to collective bargaining, among others, and New York's history as a leader in enacting social welfare and equal rights reforms, there is no empirical basis to believe that such a scenario would occur. To the contrary, NYCLA TF believes that a Constitutional Convention could achieve an expansion of social welfare and educational reform, and incorporate fundamental rights into the Constitution, such as the right of same-sex couples to marry, the right to a clean and sustainable environment and an environmental bill of rights. Whatever proposals for changes to New York's Constitution result from a Constitutional Convention, it is the voters of New York who will decide whether to accept or reject them. This is the fundamental protection that is wisely set forth in New York State's Constitution, which places the ultimate power in the hands of the People, where it rightfully resides.

It is essential that the public be informed about the significance of the decision they face when they go to the polls on November 7, 2017. NYCLA TF intends to continue to fulfill its mission of educating the public on important legal issues prior to this crucial election, and looks forward to working with NYSBA and COSC in accomplishing this important task.

Respectfully submitted,

**The NYCLA Task Force on the Constitutional Convention**

*Hon. Margaret J. Finerty and Susan Lindenauer, Co-Chairs*

*Bruce A. Green*

*Stephen C. Lessard*

*Michael J. McNamara*

*Carol A. Sigmond*

*Asha Smith*



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: Approval of the report and recommendations of the Environmental and Energy Law Section.

In 2009, the NYSBA Task Force on Global Warming prepared a report that reviewed efforts to address climate change and steps that New York State could take to mitigate greenhouse gas emissions and address the effects of climate change. The report was approved by the House of Delegates at its April 2009 meeting and is available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26659>. The resolution adopted by the House at that time is attached.

Last year, then-President Claire P. Gutekunst asked the Environmental and Energy Law Section to review that report and provide an update. The Section drew upon work by the Elizabeth Haub School of Law at Pace University, which produced an update to the Task Force report in 2011 (available at [https://www.nysba.org/Sections/Environmental\\_and\\_Energy/Task\\_Force\\_on\\_Global\\_Warming/GWTFUpdateReportDraft012511Unmarked.pdf.html](https://www.nysba.org/Sections/Environmental_and_Energy/Task_Force_on_Global_Warming/GWTFUpdateReportDraft012511Unmarked.pdf.html)) and another update in 2017. The 2017 update is included in your materials.

Attached are the Section's recommendations, entitled "Possible New York State Actions to Fight Climate Change in Current Political Environment." This document addresses actions that New York State can undertake as a leader in fighting climate change at a time when Federal efforts are expected to slow. The recommendations relate to renewable energy development; the Regional Greenhouse Gas Initiative; motor vehicle standards; appliance standards; electric vehicles; low carbon fuel standard; the State Environmental Quality Review Act; flood mapping; infrastructure planning; securities disclosure; federal deregulation; state climate legislation; and local laws.

The report was published in the Reports Group Community in March 2017 and was presented to you on an informational basis at the April 1, 2017 meeting. No comments on the report have been received to date.

The report will be presented by Lawrence P. Schnapf, immediate past chair of the Environmental and Energy Law Section.

# **NEW YORK STATE BAR ASSOCIATION**

## **House of Delegates Resolution**

**April 4, 2009**

WHEREAS, New York State is particularly vulnerable to climate disruptions, including rising sea levels, higher temperatures, extreme weather events, and increased precipitation; and

WHEREAS, the State has already taken a number of steps to address climate change, but lacks a comprehensive climate change strategy that has a specific, measurable and binding reduction target; and

WHEREAS, the New York State Bar Association's Task Force on Global Warming was appointed to make specific proposals that the State can implement in a timely and cost-effective manner to reduce greenhouse gas emissions and prepare for the impacts of climate change; and

WHEREAS, the Task Force has completed a report entitled *Taking Action in New York on Climate Change*, which contains a series of recommendations that can be implemented in a timely and cost-effective manner; and

WHEREAS, effective policies to address global warming will require significant emissions reductions at the federal and international levels, in addition to state-wide action; and

WHEREAS, state-wide, national and world greenhouse gas emission reductions will require significant capital flows to finance emission reduction technology development and implementation; and

WHEREAS, New York's capital markets position New York to play an unique role in developing state, national and world-wide carbon markets to facilitate the necessary flow of capital to achieve significant emissions reductions;

**NOW, THEREFORE, IT IS**

**RESOLVED**, that the New York State Bar Association hereby approves the report of the Task Force on Global Warming; and it is further

**RESOLVED**, that the officers of the Association are directed to make wide distribution of this report to policy makers, government agencies, and other interested parties for their consideration; and it is further

**RESOLVED**, that the Association undertakes to support efforts to enact federal and international greenhouse gas emissions reduction programs and the development of carbon markets in New York through lobbying and other appropriate means; and it is further

**RESOLVED**, that the officers of the Association are hereby empowered to take such other and further action as they may deem warranted to implement this resolution.

**NEW YORK STATE BAR ASSOCIATION  
Environmental Law Section<sup>1</sup>**

**Possible New York State Actions to Fight Climate Change  
in Current Political Environment**

This document lists several actions that the government of New York State (and, in a few instances, local governments) can take in furtherance of our leading role in fighting climate change, and preparing for its impacts, during a period when the federal executive and legislative branches are moving to halt or slow federal efforts. Except where noted, no new state legislation is needed for these actions.

Several of the items below reference actions taken in California. California is, by far, the leading state in terms of combatting climate change; all other states are considerably behind. However, New York has set some of the nation's most ambitious clean energy and greenhouse gas (GHG) emissions reduction goals, and should continue to build upon the important work it has accomplished to date. New York should join with California where appropriate, such as when the combined market power of the two states (plus other states that want to continue the fight against climate change) will induce manufacturers to produce vehicles and equipment that have low GHG emissions and energy use.

**Renewable energy development**

In 2016 the New York Public Service Commission adopted a Clean Energy Standard as a successor to the prior Renewable Portfolio Standard. Under the new Clean Energy Standard, 50% of the electricity in the state must be procured from eligible clean energy sources by 2030.

Meeting this standard will require a large program of renewable energy construction. New York should continue to vigorously pursue the construction of onshore and offshore wind facilities; rooftop and utility-scale solar photovoltaic units; cogeneration, geothermal; small hydropower; and any other applicable technologies. New York should also continue its program to create transmission capacity to import hydropower from Quebec.

**Regional Greenhouse Gas Initiative (RGGI)**

RGGI is a cap-and-trade program for carbon dioxide emissions from fossil fuel power plants. New York is one of the nine northeastern and mid-Atlantic states that participates in the program. Each state has established a cap on the total emissions from these sources. The sources must purchase an "allowance" at auction for each ton of carbon dioxide they emit. Under the RGGI agreements, the emissions cap is declining, but the declines stop in 2020. Moreover, the current cap is well above the current emissions level. (This is due largely to the conversion of

coal-burning plants to natural gas, and to the success of energy efficiency measures.) For this reason the auction price for RGGI allowances is very low; the program is not generating nearly as much revenue for New York as it could; and the cost of allowances is not driving emissions reductions, contrary to the original intent of RGGI.

New York should work with the other RGGI states as part of the ongoing RGGI program review to extend and lower the emissions caps.

### **Motor vehicle standards**

In 2010 the Obama Administration and the automobile industry reached an agreement under which the Corporate Average Fuel Economy (CAFÉ) and greenhouse gas standards for automobiles and light-duty trucks would be progressively tightened through model year 2025, but there would be a midcourse review to see if these standards should be modified. This tightening of the standards was the action taken by the Obama Administration that had by far the greatest impact in reducing GHG emissions.

Shortly before leaving office the Obama Administration announced that it had concluded this midcourse review and determined that the standards should remain in place. On March 15, 2017, President Trump announced that the midcourse review would be reopened. This may well lead to a new rulemaking in which the standards are relaxed.

The Clean Air Act provides that the federal CAFÉ standards preempt any state standards, with one important exception. The State of California may apply for a waiver of this preemption, and if the waiver is granted, California may adopt its own tighter standards. Other states may adopt the California standards if the waiver has been granted. Traditionally California did receive this waiver, and New York and several other states adopted the California standards.

If the federal government does relax the standards, California will apply for a waiver to keep the prior federal standards in effect. If the waiver is granted, New York should adopt the California standards. If the waiver is denied, California will sue; New York should join that suit.

### **Appliance standards**

Under the federal Energy Policy and Conservation Act of 1975, as amended, the U.S. Department of Energy sets energy efficiency standards for appliances, computers, and other types of equipment. Each standard undergoes a rulemaking process. This program has yielded very large savings in energy use and therefore GHG emissions. Several standards were undergoing the rulemaking process at the time of the election. The Trump administration has signaled that it will halt these rulemakings, and may seek to roll back some of the existing standards.

The federal statute provides that state appliance standards are preempted if (and only if) there is a federal standard in place for the particular kind of appliance.

New York Energy Law Article 16 authorizes the Department of State, in consultation with the New York State Energy Research and Development Authority (NYSERDA), to adopt standards for about 25 types of appliances. New York, working with other states, should pick up where the Department of Energy leaves off in promulgating additional standards, and should adopt at the state level any standards that are repealed. This will require state legislation designating the additional types of appliances that should be regulated, and then a state rulemaking process to adopt the standards. California may well take the lead in this process (as it has long done with appliance standards), but New York should join. These two states, plus others that may wish to join, are such a large market that appliance manufacturers will certainly make equipment that complies with these standards.

Along similar lines, the Trump administration may eliminate the Energy Star program, a successful program of EPA and the Department of Energy to recognize energy efficient equipment, buildings and other products. If this happens, New York should work with other states in establishing a comparable program to be run by the states.

### **Electric vehicles**

New York should vigorously pursue its program of building charging infrastructure to encourage the use of electric vehicles. New automobiles procured by the state should be electric to the extent these vehicles have the power and range needed to meet their purposes.

### **Low carbon fuel standard**

California requires a certain percentage of the motor fuel sold in the state to come from low-carbon sources such as biofuels. The northeastern states have been considering adopting a similar standard. New York should vigorously pursue examination of adopting such a standard.

### **State Environmental Quality Review Act (SEQRA) and Social Cost of Carbon**

During the Obama Administration, rulemaking processes and certain other decisions were informed by the use of the “social cost of carbon” – a method of calculating the negative environmental impacts of the greenhouse gas emissions attributable to an action. The Trump administration has indicated it will halt use of this technique.

SEQRA, as interpreted by the Department of Environmental Conservation (DEC), requires consideration of the GHG emissions of actions under review. DEC should call for the use of the social cost of carbon for projects under SEQRA review.

### **Flood mapping**

In February 2017, DEC adopted official projections for sea level rise for the Upper Hudson Valley, New York City and the Lower Hudson Valley, and Long Island. However, the flood maps adopted by the Federal Emergency Management Agency (FEMA) do not reflect sea level rise; they are based entirely on historic flood levels. The flood maps play a central role in setting

flood insurance rates and in land use planning. FEMA has a process underway to change the way it prepares flood maps so that sea level rise will be reflected, but this process is going extremely slowly, and it is unknown whether it will continue under the Trump administration.

New York City is modifying its flood maps to reflect sea level rise. New York State should undertake a similar process for the other parts of the state that are vulnerable to sea level rise. (This includes areas along the Atlantic Ocean, Long Island Sound, and the Hudson River south of the Troy Dam.) In conjunction with the flood mapping process New York should also consider the extreme precipitation events that are likely to increase due to climate change, resulting in more inland flooding.

### **Infrastructure planning**

Much of New York's infrastructure is vulnerable to sea level rise, extreme precipitation, and heat waves, all of which will be intensified by rising temperatures. The Community Risk and Resiliency Act of 2014 aims to help prepare for sea level rise. The Public Service Commission has taken certain steps to help Consolidated Edison prepare for heat waves, but this has not extended elsewhere. New York should vigorously pursue efforts to prepare its infrastructure for these phenomena.

### **Securities disclosure**

The Martin Act gives the New York Attorney General broad authority to oversee the securities disclosures of public companies, and to take enforcement action against companies that do not make adequate disclosure. The Attorney General should continue efforts to utilize this authority to investigate companies that may not be making adequate disclosures of the impacts that climate change and its regulation may have on investors.

### **Legal actions concerning federal deregulation**

There will be considerable litigation challenging efforts of the Trump administration to weaken or revoke environmental regulations and orders. New York should participate in this litigation where appropriate. Where the federal government needs to undertake formal rulemaking processes, New York should provide comments and otherwise participate.

### **State climate legislation**

In 2009, Governor David Paterson issued Executive Order No. 24, which established a goal of reducing New York's GHG emissions by 2050 to 80% below 1990 levels. In 2015 the State Energy Plan reiterated this goal, and established an interim goal of a 40% reduction by 2030. Also in 2015, Governor Andrew Cuomo affirmed these goals as part of his execution of the "Under 2 MOU" – a memorandum of understanding that has now been signed by 167 subnational governments in 33 countries around the world, pledging to work toward keeping global temperature rises under two degrees Celsius above pre-industrial levels.

These goals are laudible. However, they were issued purely by executive action. It would be desirable to codify them in state legislation; without that, they could be vulnerable to shifting political winds. Legislation should also establish clear authority for the actions that will be required to meet these goals.

### **Local laws**

Under the Community Risk and Resiliency Act, the Department of State will be issuing model local legislation on resiliency. The municipalities of New York should seriously consider adopting this legislation. Municipalities should also adopt local laws on green buildings and on renewable energy, such as rooftop solar voltaic. Many model laws on these subjects already exist.

**Prepared by  
New York State Bar Association, Environmental Law Section, Global Climate Change  
Committee Co-chairs**

Michael B. Gerrard  
J. Kevin Healy  
Carl R. Howard  
Virginia C. Robbins

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<sup>i</sup> The Section is solely responsible for the contents of this Report and the recommendations contained herein. Unless and until adopted in whole or in part by the Executive Committee or the House of Delegates of the New York State Bar Association, no part of the Report should be attributed to the Association



DRAFT

Dated: March 29, 2017

PREPARED FOR THE NEW YORK STATE BAR ASSOCIATION

# **Taking Action on Climate Change in New York: 2017 Update Report**

The Current Status of the Recommendations  
Proposed in the 2009 Report and 2011 Update<sup>1</sup>

**Elisabeth Haub School of Law at Pace University  
White Plains, NY**

Laura Jenson  
Director of Environmental Programs

James Creech  
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Marissa Weiss  
Justin Woods

March 29, 2017

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<sup>1</sup> The Section is solely responsible for the contents of this Report and the recommendations contained herein. Unless and until adopted in whole or in part by the Executive Committee or the House of Delegates of the New York State Bar Association, no part of the Report should be attributed to the Association.

**New York State Bar Association, Environmental Law Section,  
Global Climate Change Committee Co-chairs**

Michael B. Gerrard  
J. Kevin Healy  
Carl R. Howard  
Virginia C. Robbins

## **Table of Contents**

<b>Introduction</b> .....	1
<b>Important Developments</b> .....	1
Hurricane Irene and Superstorm Sandy .....	1
Reelection of Governor Cuomo and Actions on Climate Change .....	3
New York's Reforming the Energy Visions (REV) .....	3
Community Risk and Resiliency Act .....	4
Transportation and Climate Initiative of the Northeast and Mid-Atlantic States .....	9
Fracking Ban .....	21
<b>Updates to 2011 Report</b> .....	22
<i>Buildings &amp; Energy</i> .....	22
1. Improve New York's Current Incentives Regarding Energy Efficiency in Buildings .....	22
2. Enhance New York's Renewable Portfolio Standard .....	25
3. Authorize the Public Service Commission to Require Time-of-Use Pricing .....	29
4. Provide Incentives for the Installation of Smart Meters .....	30
5. Require Electric Sub-Metering in All Buildings .....	31
6. Amend the Energy Code to Cover More Building Renovations .....	33
7. Require Schools to Meet Green Building Standards .....	34
8. Adopt Conservation Requirements for Water and Wastewater Treatment Plants .....	34
9. Reinstate Energy Planning Requirements in Article Six of the Energy Law .....	36
<i>Land Use</i> .....	37
10. Amend SEQRA Regulations to Incorporate GHG Emission Considerations .....	37
11. Incorporate GHG Emission Considerations into Local Comprehensive Plans .....	41
12. Encourage Wind Energy Projects, Including Those Located Offshore .....	42
<i>Vehicles &amp; Transportation</i> .....	46
13. Strive for a Ten Percent Reduction in Vehicle Miles Traveled .....	46
14. Consider Feebates for the Purchase of New Vehicles .....	46
15. Encourage Government Purchasing of Alternative Fuel Vehicles .....	48
16. Promote Energy-Saving Vehicle Maintenance Techniques .....	49
<i>Other Initiatives</i> .....	50

17. Expand the Regional Greenhouse Gas Initiative .....	50
18. Pursue Carbon Capture and Sequestration (CCS) in New York if Federal Funds are Available .....	52
19. Promote Green Workforce Development in New York .....	52
20. Encourage the State’s Interagency Committee on Sustainability and Green Procurement to be Aggressive in Setting Green Specifications .....	54
21. Promote Methane Capture .....	55
22. Improve New York’s Floodplain Mapping System.....	57

## Introduction

In January 2009, the New York State Bar Association's (NYSBA) Task Force on Global Warming published a report (2009 Report) that reviewed efforts to address climate change at a variety of levels—statutory, regulatory, and policy—in New York.<sup>2</sup> The 2009 Report further provided a specific list of proposals with respect to initiatives that the State could undertake to help mitigate greenhouse gas (GHG) emissions as well as aid in adapting to the effects of climate change. The proposals were designed to be concrete and cost-effective in a state facing fiscal challenges.

In January 2011, Pace University Law School produced an update to the report (2011 Update), tracking the State's progress on the recommendations as well as new developments.<sup>3</sup> The 2011 Update noted that significant progress had been made by the State to address climate change—including the creation of a Climate Action Council and the publication of a Climate Action Plan—and identified some setbacks. With respect to the 2009 Report's specific proposals, the 2011 Update explained that while several recommendations had been acted upon in whole or in part, the majority of recommendations had not been achieved.

This report now seeks to provide another comprehensive update, tracking the additional progress the State of New York has made on climate change since 2011. As with 2011 Update, it is hoped that “by identifying both progress and failures, the Update will provide a basis for refining and redeveloping the recommendations necessary to continue to advance the urgent objectives of mitigating the impact of climate change for New Yorkers and laying the foundation for the adaptation measures necessary to cope with the inexorable climate change impacts which are already upon us.”<sup>4</sup>

## Important Developments

### **Hurricane Irene and Superstorm Sandy**

In August 2011, Hurricane Irene swept through Upstate New York, devastating communities from the Catskills through the Mohawk Valley, and up to Essex County.<sup>5</sup> The storm was the

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<sup>2</sup> N.Y. STATE BAR ASS'N TASK FORCE ON GLOBAL WARMING, TAKING ACTION IN NEW YORK ON CLIMATE CHANGE (2009) [hereinafter 2009 Report], <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26659>.

<sup>3</sup> JAMES M. VAN NOSTRAND ET AL., PACE LAW SCHOOL, TAKING ACTION IN NEW YORK ON CLIMATE CHANGE: 2011 UPDATE REPORT (2011) [hereinafter 2011 Update], [https://www.nysba.org/Sections/Environmental/Task\\_Force\\_on\\_Global\\_Warming/GWTFUpdateReportDraft012511Unmarked\\_pdf.html](https://www.nysba.org/Sections/Environmental/Task_Force_on_Global_Warming/GWTFUpdateReportDraft012511Unmarked_pdf.html).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> Steve Stanne, *Perfect Storms: How Hurricane Irene and Tropical Storm Lee Slammed NY*, N.Y. STATE CONSERVATIONIST, Aug. 2012, at 8, 10,

worst to hit New York since Tropical Storm Agnes in 1972.<sup>6</sup> Much of the damage across the state was a result of flooding from extraordinarily heavy rainfall.<sup>7</sup> On Long Island, a storm surge wreaked additional havoc.<sup>8</sup> “[Heavy] winds and water-logged soils [on Long Island] brought down many trees, tree limbs and electrical wires; a half-million customers lost power, some for a week or more.”<sup>9</sup>

In October 2012, Superstorm Sandy devastated New York, resulting in economic losses over \$30 billion.<sup>10</sup> New York City was the hardest hit by the storm’s onshore winds, which reached the city at maximum speeds of 80 miles per hour.<sup>11</sup> The resulting storm surge damaged the City’s Atlantic coastline and lower bay, particularly impacting homes and businesses in the surrounding neighborhoods.<sup>12</sup> The Category One hurricane flooded over 51 square miles of New York City, inundating “buildings containing more than 300,000 homes and approximately 23,400 businesses,” as well as most of the City’s critical infrastructure, including hospitals, transportation networks, and key power facilities.<sup>13</sup> Damage to electric utilities left nearly two million people without power.<sup>14</sup>

The impact of Irene and Sandy raised concerns over emergency preparedness and disaster relief and galvanized New York to address the reality of climate change. The short time period between these two devastating storms sparked discussions at the state level on the likelihood of more frequent extreme weather events occurring as a result of climate change. The Governor responded by forming new commissions to better prepare the state for severe storms, to determine how to respond to the immediate aftermath of such events, and to develop a plan for fortifying the state’s infrastructure.<sup>15</sup> Governor Cuomo recognized that the state, as well as the

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[http://www.dec.ny.gov/docs/administration\\_pdf/0812perfectstorms.pdf](http://www.dec.ny.gov/docs/administration_pdf/0812perfectstorms.pdf); OFFICE OF THE GOVERNOR, NEW YORK STATE RESPONDS: HURRICANE IRENE AND TROPICAL STORM LEE: ONE YEAR LATER 3 (2012),

<http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/Irene-Lee-One-Year-Report.pdf>.

<sup>6</sup> See Stanne, *supra* note 7, at 13 (“Flooding from rainfall can be devastating; in this respect, 1972’s tropical storm Agnes, whose costs totaled \$702.5 million (not adjusted for inflation) in New York, probably outdid Irene.”).

<sup>7</sup> See OFFICE OF THE GOVERNOR, *supra* note 7, at 3–4.

<sup>8</sup> Stanne, *supra* note 7, at 9–10.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> Andrew Cuomo, Op-Ed, *We Will Lead on Climate Change*, N.Y. DAILY NEWS, Nov. 5, 2012, <http://www.nydailynews.com/opinion/lead-climate-change-article-1.1202221>.

<sup>11</sup> NEW YORK CITY, A STRONGER, MORE RESILIENT NEW YORK 11 (2013), [http://www.nyc.gov/html/sirr/downloads/pdf/final\\_report/Ch\\_1\\_SandyImpacts\\_FINAL\\_singles.pdf](http://www.nyc.gov/html/sirr/downloads/pdf/final_report/Ch_1_SandyImpacts_FINAL_singles.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> Cuomo, *supra* note 12.

country as a whole, must reduce energy consumption that contributes to climate change, beginning with upgrading building codes and working towards energy reform.<sup>16</sup>

## Reelection of Governor Cuomo and Actions on Climate Change

In November 2014, Andrew Cuomo was reelected as Governor of New York. Since then, Governor Cuomo has announced New York's continued commitment to combating climate change and reducing greenhouse gas emissions: and acted upon that commitment by directing the New York State Department of Public Service to produce the 2015 State Energy Plan, which established a Clean Energy Standard that 50% of all electricity consumed in New York by 2030 be generated by clean and renewable energy sources.<sup>17</sup> Governor Cuomo also "set the most aggressive climate mitigation target in the nation: to reduce greenhouse gas emissions 40% by 2030 and 80% below 1990 levels by 2050."<sup>18</sup> To achieve these goals, he announced plans to engage fellow members of Regional Greenhouse Gas Initiative, as well as Quebec and California to explore pursuing a North American greenhouse gas cap-and-trade program; dedicated a billion dollars to New York's solar industry through the NY-SUN initiative; called for the installation of renewable energy at all SUNY campuses by 2020; and requested the Public Service Commission to initiate a program called Reforming the Energy Vision "to build a cleaner, more affordable and resilient energy system for all New Yorkers through a combination of new energy policies, state-wide initiatives and regulatory reforms."<sup>19</sup>

## New York's Reforming the Energy Vision (REV)

In 2014, the Cuomo administration launched New York's Reforming the Energy Vision (REV) initiative to build an integrated energy network served by both central grid power and distributed generation.<sup>20</sup> REV is intended to provide a comprehensive roadmap for building a cleaner, more reliable, and more affordable energy system.<sup>21</sup> Under REV state agencies are seeking to

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<sup>16</sup> *Id.*

<sup>17</sup> Press Release, Office of the Governor, Governor Cuomo Directs Department of Public Service to Begin Process to Enact Clean Energy Standard (Dec. 2, 2015), <https://www.governor.ny.gov/news/governor-cuomo-directs-department-public-service-begin-process-enact-clean-energy-standard>.

<sup>18</sup> Press Release, Office of the Governor, Governor Cuomo, Joined by Vice President Al Gore, Announces New Actions to Reduce Greenhouse Gas Emissions and Lead Nation on Climate Change (Oct. 8, 2015), <https://www.governor.ny.gov/news/governor-cuomo-joined-vice-president-gore-announces-new-actions-reduce-greenhouse-gas-emissions>.

<sup>19</sup> *Id.*

<sup>20</sup> See N.Y. STATE DEP'T OF PUB. SERV., REFORMING THE ENERGY VISION (REV) 1 (2016), <https://www.ny.gov/sites/ny.gov/files/atoms/files/WhitePaperREVMarch2016.pdf>; see also *About the Initiative*, N.Y. STATE DEP'T OF PUB. SERV., <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument> (last visited Feb. 1, 2017).

<sup>21</sup> N.Y. STATE ENERGY PLANNING BD., THE ENERGY TO LEAD: 2015 NEW YORK STATE ENERGY PLAN 9 (2015) [hereinafter N.Y. STATE ENERGY PLANNING BD., THE ENERGY TO LEAD],

integrate renewable energy into the electric power grid and encourage investment by private capital in renewable energy.<sup>22</sup> More particularly, through REV, the Public Service Commission (PSC) aims to align markets with the regulatory landscape while furthering state policy objectives of producing energy savings for customers, providing opportunities for local power generation, and promoting more efficient use of renewable energy resources.<sup>23</sup> The initiative seeks to reassess and alter the way utilities make money, primarily because current utility regulation incentivizes building generation facilities and transmission lines, rather than improving and making more efficient the grid system and resources already leveraged.<sup>24</sup> The new regulatory landscape would create economic incentives for distributed generation that would adequately compensate customers.<sup>25</sup> Some of the programs arising out of the REV initiative include the Clean Energy Standard, Clean Energy Fund, NY-SUN, K-Solar, NY Prize, BuildSmart NY, and the NY Green Bank.<sup>26</sup>

As discussed later in this report, the Clean Energy Standard (CES) adopted by the PSC at the request of the Governor mandates that 50 percent of the State's power be generated from renewable sources by 2030. The CES also imposes an interim milestone whereby utilities are required to procure 30 percent of the power they provide from renewables by 2021. This ambitious new mandate – which was put into place by the PSC on January 25, 2016, is likely to trigger a dramatic increase in renewable energy development in and nearby the State, with many of those projects aimed at developing New York's ample offshore wind resources. The first of those projects – a 90 megawatt wind array to be located 30 miles from the Montauk shoreline – is now getting underway under a contract approved by the Long Island Power Authority board on January 25, 2017.

## Community Risk and Resiliency Act

Governor Cuomo signed the Community Risk and Resiliency Act (CRRA) into effect on September 22, 2014.<sup>27</sup> With the passage of the CRRA, New York has become one of the first states to include climate impacts as a part of the state agency decision-making process.<sup>28</sup> The

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<http://energyplan.ny.gov/-/media/nysenergyplan/2015-state-energy-plan.pdf>; *see also The Energy to Lead*, N.Y. STATE ENERGY PLANNING BD., <http://energyplan.ny.gov/> (last visited Feb. 1, 2017).

<sup>22</sup> N.Y. STATE ENERGY PLANNING BD., *THE ENERGY TO LEAD*, *supra* note 20, at 7.

<sup>23</sup> *About the Initiative*, N.Y. STATE DEP'T OF PUB. SERV., *supra* note 19.

<sup>24</sup> *See* N.Y. STATE ENERGY PLANNING BD., *THE ENERGY TO LEAD*, *supra* note 20, at 59.

<sup>25</sup> *Id.* at 57–58.

<sup>26</sup> N.Y. STATE ENERGY PLANNING BD., *REFORMING THE ENERGY VISION 2* (2016), <https://www.ny.gov/sites/ny.gov/files/atoms/files/REV42616WHATYOUNEEDTOKNOW.pdf>. For more information on REV, its various proceedings, and resulting programs see *Reforming the Energy Vision (REV)*, N.Y. STATE ENERGY PLANNING BD., <https://rev.ny.gov/> (last visited Feb. 1, 2017).

<sup>27</sup> 2014 N.Y. Laws ch. 355.

<sup>28</sup> Michael B. Gerrard, *New Statute Requires State Agencies to Consider Climate Risks*, N.Y.L.J., Nov. 13, 2014, at 3 (“New York has moved into the front rank of states in legally mandating that future climate change be considered in decisions by state agencies.”).



CRRA has been lauded as a bipartisan effort that “transforms New York into a national leader on climate change,”<sup>29</sup> and “marks a transition in New York State from focusing predominantly on reactive disaster policies to work to proactively reduce risk and increase community resilience.”<sup>30</sup>

Notably, the CRRA was passed in the State Legislature with virtually no opposition. In fact, “[t]here were no business, policy, advocacy, or other groups that publicly opposed the measure.”<sup>31</sup> The bipartisan support was likely due to the impact of recent storms both in New York City and upstate: “Climate impacts aren’t just in the city, they are statewide . . . in both liberal and conservative communities alike.”<sup>32</sup> The Georgetown Climate Law Center observes that the CRRA is the only legislation in the nation to require climate planning “not just in the state’s coastal areas, but in all 62 counties.”<sup>33</sup>

The CRRA has several important provisions, but five of those provisions stand out as the most significant.<sup>34</sup>

a. The Department of Environmental Conservation (DEC) Must Adopt Science-Based Sea Level Rise Projections and Update Them Every Five Years

Section 17 of the CRRA modified the Environmental Conservation Law (ECL) by adding section 3-0319, which requires the DEC to “adopt regulations establishing science-based state sea level rise projections.”<sup>35</sup> Thereafter, the DEC must update the projections “no less than every five years.”<sup>36</sup> In developing the projections, the DEC relied on ClimAID model outputs<sup>37</sup> and other technical reports regarding sea level rise as well as stakeholder outreach.<sup>38</sup>

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<sup>29</sup> Bagley, *supra* note 36 (quoting Bill Ulfelder, executive director of the New York Branch of the Nature Conservancy).

<sup>30</sup> Press Release, The Nature Conservancy, Community Risk and Resilience Act Passed in the Senate and Assembly, (June 19, 2014), <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/newyork/newsroom/community-risk-reduction-and-resilience-act-passed-in-the-senate-and-assembly.xml>.

<sup>31</sup> Bagley, *supra* note 36.

<sup>32</sup> *Id.* (quoting Bill Ulfelder, executive director of the New York Branch of the Nature Conservancy).

<sup>33</sup> *New York Community Risk and Resiliency Act (S06617B)*, GEORGETOWN CLIMATE CTR., <http://www.georgetownclimate.org/resources/new-york-community-risk-and-resiliency-act-s06617b> (last visited Feb. 1, 2017).

<sup>34</sup> See Gerrard, *supra* note 38. For additional interpretation of the CRRA and its structure, see *New York Community Risk and Resiliency Act (S06617B)*, GEORGETOWN CLIMATE CTR., *supra* note 44.

<sup>35</sup> 2014 N.Y. Laws ch. 355, § 17 (to be codified at N.Y. ENVTL. CONSERV. LAW § 3-0319).

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 31 (“The Department is basing its proposed low, low-medium, high-medium and high projections for the three regions on the 10th, 25th, 75th and 90th percentiles of ClimAID model outputs, respectively.”). See generally RADLEY M. HORTON ET AL., NYSERDA, CLIMATE

The DEC adopted final regulations setting forth the projections required by the statute on February 7, 2017. Those regulations, which are codified at 6 New York Code of Rules and Regulations, Part 490 include tables depicting sea level rise predictions for three regions of New York State: the Mid-Hudson, New York City/the Lower Hudson, and Long Island.<sup>39</sup> The predictions are made for time intervals of the 2020s, 2050s, 2080s, and 2100, and include a range of five different statistically significant percentile quantifications of the rate of sea level rise (low, low–medium, medium, medium–high, and high).<sup>40</sup> As discussed below, the new DEC sea level regulations can be expected to have a significant effect on project planning in New York State, because the CRRA requires that they be considered by applicants under certain permit and funding programs, and they also will have to be taken into account where relevant in environmental reviews performed under the State Environmental Quality Review Act (SEQRA).

b. State Permitting, Funding, or Facility Siting Decisions Must Factor in Sea Level Rise, Storm Surge, and Flooding

The CRRA requires various state agencies to consider climate change risks due to sea-level rise, storm surges, and flooding in the decision-making<sup>41</sup> by amending the ECL and other laws to add climate change risks to the enumerated decision-making criteria. The statute specifically requires that the risks of climate change be taken into account in: permitting programs for oil and natural gas wells;<sup>42</sup> eligibility determinations under the Water Pollution Control Revolving Fund;<sup>43</sup> siting of commercial hazardous waste treatment, storage, and disposal facilities;<sup>44</sup> as

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CHANGE IN NEW YORK STATE: UPDATING THE 2011 CLIMAID CLIMATE RISK INFORMATION (2014).

<sup>38</sup> *Id.*; see also N.Y. ENVTL. CONSERV. LAW § 3-0319 (“In adopting such regulations, the department shall consider information including, but not limited to, reports of the Intergovernmental Panel on Climate Change, the National Oceanic Atmospheric Administration Climate Assessment, the Sea Level Rise Task Force report created pursuant to chapter six hundred thirteen of the laws of two thousand seven, projections prepared by the New York City Panel on Climate Change and any other relevant regional, state and local reports.”).

<sup>39</sup> 37 N.Y. Reg. at 30 (proposing section 490.4(a)–(c)).

For the Mid-Hudson Region:

2020s, the low projection is 1 inch, the high projection is 9 inches, for the 2050s: 5 - 27”; 2080s: 10 - 54”; 2100: 11 - 71.”

For the New York City/Lower Hudson Region:

2020s: 2 - 10”; 2050s: 8 - 30”; 2080s: 13 - 58”; 2100s: 15 - 75.”

For the Long Island Region:

2020s: 2 - 10”; 2050s: 8 - 30”; 2080s: 13 - 58”; 2100s: 15 - 72.”

<sup>40</sup> *Id.*

<sup>41</sup> 2014 N.Y. Laws §§ 3–9, 12–15.

<sup>42</sup> *Id.* § 14-a (codified at N.Y. ENVTL. CONSERV. LAW § 23-0305(8-a)).

<sup>43</sup> *Id.* § 3 (codified at N.Y. ENVTL. CONSERV. LAW § 17-1909(1)(d)(ii)(e)).

<sup>44</sup> *Id.* § 4 (codified at N.Y. ENVTL. CONSERV. LAW § 27-1103(2)(i)).

well as hazardous bulk storage facilities;<sup>45</sup> and for municipal landfill closure investigation projects.<sup>46</sup>

These risks also must be assessed in connection with: an agreement for the maintenance and operation of urban open space land conservation projects or park projects;<sup>47</sup> state acquisition of land;<sup>48</sup> decisions regarding whether to give state assistance to coastal rehabilitation projects;<sup>49</sup> in the regulations for existing and new petroleum bulk storage facilities;<sup>50</sup> decisions regarding applications for state funding of local farmland protection programs;<sup>51</sup> and decisions regarding applications for state funding for drinking water projects.<sup>52</sup> Additionally, the statute makes clear that climate change risks *may* be considered for local waterfront revitalization programs.<sup>53</sup>

The CRRA also amends the DEC's statutory uniform procedures to require applicants for certain "major projects" to show they have considered climate change risks.<sup>54</sup> Those projects include those relating to: the protection of waters; sewerage systems in realty subdivisions; liquefied natural and petroleum gas; mined land reclamation; freshwater wetlands except for those administered by the Adirondack Park Agency; tidal wetlands; and coastal erosion hazard areas.<sup>55</sup>

Clear parallels exist between the CRRA and the State Environmental Quality Review Act (SEQRA).<sup>56</sup> Conceptually speaking, the CRRA acts in tandem but from a different perspective; in effect, it creates a "reverse environmental impact analysis" requirement.<sup>57</sup> Instead of requiring consideration of the effect of a proposed action on the environment and climate, the CRRA "begins from the other end, requiring that agencies consider the future impacts of climate risks on the projects they may fund or permit."<sup>58</sup> However, even prior to the passage of the CRRA it had been recognized that sound practice under SEQRA required consideration of such risks to

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<sup>45</sup> *Id.* § 5(codified at N.Y. ENVTL. CONSERV. LAW § 40-0113(1)(b)).

<sup>46</sup> *Id.* § 8 (codified at N.Y. ENVTL. CONSERV. LAW § 54-0503(3)).

<sup>47</sup> *Id.* § 7 (codified at N.Y. ENVTL. CONSERV. LAW § 54-0303(2)(a)).

<sup>48</sup> *Id.* § 6 (codified at N.Y. ENVTL. CONSERV. LAW § 49-0203(3)).

<sup>49</sup> *Id.* § 11 (codified at N.Y. ENVTL. CONSERV. LAW § 54-1105(1)).

<sup>50</sup> *Id.* § 9 (codified at N.Y. ENVTL. CONSERV. LAW § 17-1015(1)).

<sup>51</sup> *Id.* § 12 (codified at N.Y. AGRIC. & MKTS. LAW § 325).

<sup>52</sup> *Id.* § 13 (codified at N.Y. PUB. HEALTH LAW § 1161).

<sup>53</sup> *Id.* § 10 (codified at N.Y. ENVTL. CONSERV. LAW § 54-1101(5)).

<sup>54</sup> *Id.* § 15 (codified at N.Y. ENVTL. CONSERV. LAW § 70-0117(9)). The ECL recognizes two types of projects: minor and major. A "minor project" is "a proposed project which by its nature and with respect to its location will not have a significant impact on the environment and will not exceed criteria established in rules and regulations adopted by the [DEC]." N.Y. ENVTL. CONSERV. LAW § 70-0105(3). Generally speaking, an application for a minor project is subject to lighter procedural requirements than major projects. *See id.* § 70-0111.

<sup>55</sup> *See* N.Y. ENVTL. CONSERV. LAW §§ 70-0117(9), 70-0107(3)(a), (f), (h), (i), (j), (k), (m).

<sup>56</sup> *See* N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117.

<sup>57</sup> *See* Michael B. Gerrard, *Reverse Environmental Impact Analysis: Effect of Climate Change on Projects*, N.Y.L.J., Mar. 8, 2012, at 3, *cited in* Gerrard, *supra* note 38.

<sup>58</sup> Susan E. Golden, *New York Community Risk and Resiliency Act*, VENABLE LLP (Oct. 10, 2014), <https://www.venable.com/new-york-community-risk-and-resiliency-act-10-10-2014/>.

the extent relevant.<sup>59</sup> However, the CRRA eliminates any lingering uncertainty on this score with respect to the programs the statute addresses.

c. Mitigation of Risk Due to Sea Level Rise, Storm Surge, and Flooding Is Added to the List of Smart Growth Criteria

The CRRA amends the Smart Growth Public Infrastructure Policy Act (SGPIPA)<sup>60</sup> to add “mitigat[ion] [of] future physical climate risk due to sea level rise, and/or storm surges and/or flooding” as a new smart growth public infrastructure criterion.<sup>61</sup> Passed in 2010 in an effort to “minimiz[e] the unnecessary cost of sprawl development,”<sup>62</sup> SGPIPA initially required certain state agencies to consider ten smart growth criteria when approving, supporting, funding, and undertaking public infrastructure projects.<sup>63</sup> The CRRA thus adds an eleventh criterion to any consistency evaluation required under section 6-0107 of SGPIPA.<sup>64</sup> In other words, all consistency evaluations now must consider sea level rise, storm surge, and flooding. The DEC anticipates its new regulations regarding sea level rise projections will be useful to agencies performing a consistency evaluation.<sup>65</sup>

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<sup>59</sup> See Gerrard, *supra* note 38; Ethan I. Strell, *New York Environmental Impact Statements Beginning to Address Climate Resiliency*, 25 ENVTL. L. N.Y. 205, 205 (2014) (“In the past year, most New York City environmental impact reviews for projects located in floodplains have explicitly addressed adaptation to climate change, and several [environmental impact statements] in other parts of the state have also discussed how a changing climate may affect the proposed project.”), <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/strell.pdf>.

<sup>60</sup> 2010 N.Y. Laws ch. 433 (codified at N.Y. ENVTL. CONSERV. LAW art. 6).

<sup>61</sup> 2014 N.Y. Laws ch. 355, § 2 (codified at N.Y. ENVTL. CONSERV. LAW § 6-0107(2)(k)).

<sup>62</sup> See 2010 N.Y. Laws ch. 433, § 1 (codified at N.Y. ENVTL. CONSERV. LAW § 6-0105).

<sup>63</sup> *Id.* (codified at N.Y. ENVTL. CONSERV. LAW § 6-0107(2)). In fact, “no state infrastructure agency shall approve, undertake, support or finance a public infrastructure project, including providing grants, awards, loans or assistance programs, unless, to the extent practicable, it is consistent with the relevant criteria specified in subdivision two of this section.” N.Y. ENVTL. CONSERV. LAW § 6-0107(1). At least one New York State Department refers to decision-making process as a “consistency evaluation.” See *NYSDOT Implementation of the Smart Growth Public Infrastructure Policy Act (SGPIPA)*, N.Y. STATE DEP’T OF TRANSP., <https://www.dot.ny.gov/programs/smart-planning/smartgrowth-law> (last visited Feb. 1, 2017) (“The Act is intended to minimize the unnecessary cost of sprawl development and requires State infrastructure agencies, including NYSDOT, to ensure public infrastructure projects undergo a *consistency evaluation* and attestation using the eleven Smart Growth criteria specified in the Act.” (Emphasis added.)).

<sup>64</sup> See N.Y. ENVTL. CONSERV. LAW § 6-0107(2).

<sup>65</sup> See N.Y. STATE DEP’T OF ENVTL. CONSERVATION, REGULATORY IMPACT STATEMENT, 6 NYCRR PART 490, PROJECTED SEA-LEVEL RISE 2 (2015), [http://www.dec.ny.gov/docs/administration\\_pdf/risslr.pdf](http://www.dec.ny.gov/docs/administration_pdf/risslr.pdf) (“CRRA also amends [SGPIPA] to add an additional smart growth criterion regarding mitigation of future climate physical risk. Adoption of Part 490 will help to ensure that sea-level rise projections are incorporated into

d. The Department of State Must Develop Model Local Laws that Include Consideration of Risk from Sea Level Rise, Storm Surge, and Flooding

The CRRA also contemplates local governments will take future physical climate risks into consideration: it directs the Department of State (DOS) to “prepare model local laws that include consideration of future physical climate risk due to sea level rise, and/or storm surges and/or flooding . . . and . . . make such laws available to municipalities.”<sup>66</sup> DOS shall develop these model local laws in cooperation with DEC and base the laws on predictions of extreme weather using hazard risk analysis.<sup>67</sup> There is, however, no timeline for drafting these or requirements for adoption by communities.<sup>68</sup> Therefore, the usefulness of such model laws remains to be seen. DEC has developed three model local laws for flood damage prevention that communities can adopt to join the National Flood Insurance Program: one for communities without mapped flood hazards, one for communities with standard mapped flood hazards, and another for communities with coastal flood hazard areas. Copies of the model laws can be obtained from the staff at the DEC Division of Water.

e. DEC Must Develop Guidance on the Use of Resiliency Measures that Utilize Natural Resources and Processes to Reduce Risk

Section 16 of CRRA also requires that DEC, in consultation with DOS, prepare “guidance on the implementation” of the CRRA using “relevant data sets and risk analysis tools . . . predicting the likelihood of future extreme weather events.”<sup>69</sup> Additionally, the DEC and DOS must develop guidance “on the use of resiliency measures that utilize natural resources and natural processes to reduce risk.”<sup>70</sup> According to the DEC, this process is in its beginning stages, and no information has been released regarding its progress.<sup>71</sup>

## **Transportation & Climate Initiative of the Northeast and Mid-Atlantic States**

A substantial portion—30 to 40%—of GHG emissions come from transportation.<sup>72</sup> The Transportation and Climate Initiative of the Northeast and Mid-Atlantic States (TCI) seeks to

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decision-making processes in a consistent, transparent manner and will contribute to regulatory certainty.”).

<sup>66</sup> 2014 N.Y. Laws ch. 355, § 14.

<sup>67</sup> *Id.*

<sup>68</sup> Gerrard, *supra* note 38.

<sup>69</sup> 2014 N.Y. Laws ch. 355, § 16.

<sup>70</sup> *Id.*

<sup>71</sup> See N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 45 (“The state agencies responsible for implementing CRRA are currently identifying information needs and organizing staff teams to develop guidance required by CRRA. These agencies anticipate providing regular updates on progress and providing opportunities for public input beginning in late 2015 and continuing through 2016.”).

<sup>72</sup> See *Multi-State Climate Initiatives*, CENTER FOR ENERGY AND CLIMATE SOLUTIONS, <http://www.c2es.org/us-states-regions/regional-climate-initiatives> (last visited Feb. 1, 2017)

address this issue through a variety of efforts.<sup>73</sup> TCI is a multi-state climate initiative that includes Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.<sup>74</sup> The Georgetown Climate Center (GCC) facilitates the TCI.

Formed in June 2010 and building upon the Regional Greenhouse Gas Initiative (RGGI) and the 2009 proposal for a regional low-carbon fuel standard,<sup>75</sup> TCI “seeks to develop the clean energy economy and reduce oil dependence and greenhouse gas emissions from the transportation sector.”<sup>76</sup> State and district agencies, all of which are involved on a self-directed basis, steer TCI.

TCI’s initiatives are organized into four core work areas: (1) Clean Vehicles and Fuels; (2) Sustainable Communities; (3) Freight Efficiency; and (4) Information and Communication Technologies.<sup>77</sup> Together all four of these work areas aim to implement crucial innovations in furtherance of reducing emissions from the transportation sector. The complexity of the problem dictates the inherent intricacies and multiple facets of the solution, as can be seen from what follows. To its credit, New York has made a strong commitment to these initiatives, and the years ahead will reveal the extent of its success.

a. Clean Vehicles and Fuels

i. Northeast Electric Vehicle Network

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(“Transportation currently accounts for roughly 40 percent of greenhouse gas emissions in the U.S. Mid-Atlantic and Northeast.”); TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, DECLARATION OF INTENT,

<http://www.transportationandclimate.org/sites/default/files/TCI-declaration.pdf> (“We further recognize that that the transportation sector contributes approximately 30 percent of the greenhouse gas emissions in the Mid-Atlantic and Northeast Regions of the United States.”).

<sup>73</sup> *About Us*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/about-us> (last visited Feb. 1, 2017).

<sup>74</sup> *Id.*

<sup>75</sup> See TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, DECLARATION OF INTENT, *supra* note 89. The RGGI establishes the region’s cap-and-trade program. See REG’L GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/> (last visited Feb. 1, 2017) (“The [RGGI] is the first mandatory market-based program in the United States to reduce greenhouse gas emissions. RGGI is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont to cap and reduce CO<sub>2</sub> emissions from the power sector.”). A regional low carbon fuel standard has been proposed but not adopted. See Memorandum of Understanding, Northeast and Mid-Atlantic Low Carbon Fuel Standard (Dec. 30, 2009).

<sup>76</sup> *About Us*, TRANSPORTATION & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, *supra* note 90.

<sup>77</sup> *Id.*

One of this work area's major accomplishments thus far has been the launch of the Northeast Electric Vehicle Network (NEVN).<sup>78</sup> The list of participating states includes all of those in TCI plus select communities in Maine.<sup>79</sup> NEVN was created in 2011 and lays the groundwork for deployment of electric vehicles and associated environmental and employment benefits in the region.<sup>80</sup> This groundwork consists of four major initiatives:

- Developing partnerships needed in both the public and private sector to build a robust network of charging stations throughout the region;
- Encouraging the streamlining of permits for the installation of home and public charging stations and removing other barriers;
- Coordinating regional, state, and local planning to ensure that charging stations are placed in locations that maximize both local and regional travel; and
- Ensuring a consistent experience for electric vehicle users.<sup>81</sup>

There are already 1,700 public charging stations in the region.<sup>82</sup> Impressively, NYSERDA notes that there are already more than 1,100 electric-vehicle charging stations in New York alone, en route to a goal of having more than 3,000 stations in New York by 2018.<sup>83</sup> A unique feature of the NEVN website is a tool called “Find an EV Charging Station Near You,” which generates a map of the TCI region with blue-and-yellow lightning icons marking the locations of chargers when the user enters an area code or state.<sup>84</sup> An informative assortment of documents with robust content regarding the siting, equipment required, incentives, related planning and policy information, and building and electrical codes necessary for electric vehicles (including model

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<sup>78</sup> *Northeast Electric Vehicle Network*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/northeast-electric-vehicle-network> (last visited Feb. 1, 2017).

<sup>79</sup> *Id.*

<sup>80</sup> See Agreement of the Northeast and Mid-Atlantic States to Develop a Northeast Electric Vehicle Network and Promote Alternative Transportation Fuels (Oct. 19, 2011), <http://www.transportationandclimate.org/sites/www.transportationandclimate.org/files/northeast-electric-vehicle-network-agreement.pdf>.

<sup>81</sup> See *Northeast Electric Vehicle Network in Action*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/northeast-electric-vehicle-network-action> (last visited Feb. 1, 2017).

<sup>82</sup> *Northeast Electric Vehicle Network*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, *supra* note 95. According to the NEVN: “The [NEVN] will enable travelers to drive their plug-in cars and trucks from northern New England to D.C. and everywhere in between.” *Id.*

<sup>83</sup> See *ChargeNY*, NYSERDA, <http://www.nyserdera.ny.gov/All-Programs/Programs/ChargeNY> (last visited Feb. 1, 2017).

<sup>84</sup> For instance, searching for stations in New York reveals clusters throughout the state. See *Find an EV Charging Station Near You*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, [http://www.transportationandclimate.org/content/find-ev-charging-station-near-you?field\\_zip\\_value=&field\\_state\\_value=NY](http://www.transportationandclimate.org/content/find-ev-charging-station-near-you?field_zip_value=&field_state_value=NY) (last visited Feb. 1, 2017).

codes from Vancouver, Oregon, and Los Angeles) is also available on the NEVN website for further reference.<sup>85</sup>

Funding for NEVN comes from a roughly \$1 million “Electric Vehicle Readiness” grant from the DOE Clean Cities Initiative to NYSERDA on behalf of TCI.<sup>86</sup> In contrast to some of the other TCI Initiatives, NEVN is action-oriented and has evolved beyond the research phase. Evidence of this success can be found in the fact that the U.S. Department of Transportation recently designated several highways in the Northeast, including several highways in New York, as “alternative fuels corridors.”<sup>87</sup> The goal of the U.S. Department of Transportation’s designations is “establishing a national network of alternative fueling and charging infrastructure along national highway system corridors.”<sup>88</sup> As impressive as the progress being made by NEVN and other initiatives sparked by DOE’s Clean Cities grant program may be, it is likely that under the budget proposed by the Trump Administration funding for the program will be sharply reduced, by as much as 32 percent according to some reports.<sup>89</sup>

## ii. Zero-Emission Vehicle Action Plan

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<sup>85</sup> *Northeast Electric Vehicle Network Documents*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/northeast-electric-vehicle-network-documents> (last visited Feb. 1, 2017). For example, NEVN’s document collection includes a “menu” of electric vehicle incentives compiled by TCI, *see* TRANSPORTATION & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, MENU OF PLUG-IN ELECTRIC VEHICLE INCENTIVES (2013), [http://www.transportationandclimate.org/sites/default/files/Menu%20of%20Plug-In%20EV%20Incentives\\_Final.pdf](http://www.transportationandclimate.org/sites/default/files/Menu%20of%20Plug-In%20EV%20Incentives_Final.pdf), and an analysis of how building and electric codes relate to electric vehicles, *see* NYSERDA & TRANSPORTATION & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, E-V READY CODES FOR THE BUILT ENVIRONMENT (2012), [http://www.transportationandclimate.org/sites/default/files/EV-Ready\\_Codes\\_for\\_the\\_Built\\_Environment\\_0.pdf](http://www.transportationandclimate.org/sites/default/files/EV-Ready_Codes_for_the_Built_Environment_0.pdf).

<sup>86</sup> *About Us*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, *supra* note 90; *Search Clean Cities Projects*, U.S. DEP’T OF ENERGY, [https://cleancities.energy.gov/partnerships/search?project\\_search=Electric+Vehicle+Community+Readiness](https://cleancities.energy.gov/partnerships/search?project_search=Electric+Vehicle+Community+Readiness) (last visited Feb. 1, 2017) (noting the NEVN was awarded a \$992,784 grant).

<sup>87</sup> *U.S. Department of Transportation Designates Electric Vehicles Corridors in the Transportation and Climate Initiative Region*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/us-department-transportation-designates-electric-vehicles-corridors-transportation-and-climate> (last visited Feb. 1, 2017).

<sup>88</sup> *Alternative Fuel Corridors*, FED. HIGHWAY ADMIN., [http://www.fhwa.dot.gov/environment/alternative\\_fuel\\_corridors/](http://www.fhwa.dot.gov/environment/alternative_fuel_corridors/) (last visited Feb. 1, 2017).

<sup>89</sup> *U.S DOE’s Budget Request Reduces Funding for Clean Cities Program*, NGV America News, <http://ngv.com/u-s-does-2017-budget-request-reduces-funding-for-clean-cities-program/>



The Multi-State Zero-Emission Vehicle Task Force was built around the hope that zero-emission vehicles (ZEVs) have a large part to play in the future of emissions reduction.<sup>90</sup> In October 2013, New York joined seven other states in signing a Memorandum of Agreement committing to implementing a ZEV plan.<sup>91</sup> The following May saw the release of the Multi-State ZEV Action Plan, the main goal of which is to put 3.3 million ZEVs on the roads of each member state through “market preparation and growth.”<sup>92</sup> The plan includes the following car models: pure battery-electric vehicles; plug-in hybrid electric vehicles; and hydrogen fuel cell electric vehicles.<sup>93</sup>

Governor Cuomo stated that New York will support the effort “through the [ChargeNY] Initiative by installing 3,000 electric vehicle charging stations – vital to the growth of a completely wired Northeast Corridor.”<sup>94</sup> In addition, the ChargeNY initiative is working to bolster the ZEV market by developing best practices guides for municipalities, reducing regulatory obstacles that had hindered the installation of charging stations, educating the community about ZEVs and charging stations, and providing other incentives for ZEVs.<sup>95</sup>

However, challenges exist to greater ZEV adoption remain, including financial, infrastructural, and informational challenges.<sup>96</sup> To address some of these issues, TCI convened a workshop about plug-in vehicles in Boston in June 2014.<sup>97</sup> The following January, the GCC released a

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<sup>90</sup> *About the ZEV Task Force*, MULTI-STATE ZEV TASK FORCE, <http://www.zevstates.us/about-us/> (last visited Feb. 1, 2017).

<sup>91</sup> State Zero-Emission Vehicle Programs Memorandum of Understanding (Oct. 24, 2013), <http://www.nescaum.org/documents/zev-mou-8-governors-signed-20131024.pdf/>. Partner states to the ZEV include California, Connecticut, Maryland, Massachusetts, New York, Oregon, Rhode Island and Vermont.

<sup>92</sup> MULTI-STATE ZEV TASK FORCE, MULTI-STATE ZEV ACTION PLAN 3 (2014), <http://www.nescaum.org/topics/zero-emission-vehicles/multi-state-zev-action-plan>.

<sup>93</sup> *Id.* at 2. For further description of the differences between types of ZEVs, see CHARLES ZHU AND NICK NIGRO, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC, PLUG-IN ELECTRIC VEHICLE DEPLOYMENT IN THE NORTHEAST: A MARKET OVERVIEW AND LITERATURE REVIEW 8–9 (2012), [http://www.transportationandclimate.org/sites/default/files/TCI-EV-Lit-Review\\_0.pdf](http://www.transportationandclimate.org/sites/default/files/TCI-EV-Lit-Review_0.pdf).

<sup>94</sup> Press Release, Northeast States for Coordinated Air Use Management, 8 State Alliance Releases Plan to Put 3.3 Million Zero-Emission Vehicles on the Road (May 29, 2014), <http://www.nescaum.org/topics/zero-emission-vehicles/press-release-8-state-alliance-releases-plan-to-put-3-3-million-zero-emission-vehicles-on-the-road>.

<sup>95</sup> See *ChargeNY*, NYSERDA, *supra* note 100.

<sup>96</sup> CASSANDRA POWERS, GEORGETOWN CLIMATE CTR., SUPPORTING THE PLUG-IN ELECTRIC VEHICLE MARKET: BEST PRACTICES FROM STATE PEV PROGRAMS 1 (2014), <http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCC-Supporting-PEV-Market-December-2014.pdf>.

<sup>97</sup> *Id.*

report reflecting best practices discussed at this workshop for the implementation of state plug-in vehicle programs.<sup>98</sup>

b. Sustainable Communities

With its sustainable communities work area, TCI aims to “develop state-level tools and policies that promote more sustainable communities throughout the region.”<sup>99</sup> The sustainable communities work area of TCI is research based and aims to establish cross-state common indicators to measure environmental and economic progress of state-level efforts.<sup>100</sup> This regional orientation allows participating states to uniformly track benefits and outcomes of sustainable communities policies.

Research produced by the GCC and Edward J. Bloustein School of Planning and Public Policy at Rutgers University in consultation with the twelve TCI jurisdictions have isolated eleven common indicators for the purposes of gauging these improvements:

- Transportation-related GHG emissions
- Energy consumption in the transportation sector
- Travel mode share (drive-alone, transit, walking, biking, etc.)
- Proportion of development (jobs, housing) occurring inside or outside developed areas or designated growth areas
- Acres of agricultural or natural lands developed annually per new resident
- Proximity to amenities (shopping, healthcare, fresh food, recreation, etc.)
- Proportion of jobs or housing near transit
- Transportation investments by mode (i.e. highway, pedestrian or bicycle, transit, freight) and type (i.e. operations/maintenance, state of good repair, safety, capacity expansion)
- Return on investment from transportation projects
- Combined housing and transportation cost as a proportion of area median income
- Health impacts of transportation emissions<sup>101</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Sustainable Communities*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/sustainable-communities> (last visited Feb. 1, 2017).

<sup>100</sup> *Measuring Sustainability*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/node/34> (last visited Feb. 1, 2017).

<sup>101</sup> See EDWARD J. BLOUSTEIN SCH. OF PLANNING & PUB. POLICY, OVERVIEW OF THE TRANSPORTATION & CLIMATE INITIATIVE SUSTAINABLE COMMUNITIES SCOPING PAPERS 1 [hereinafter EDWARD J. BLOUSTEIN SCH. OF PLANNING & PUB. POLICY, OVERVIEW OF THE TCI SCOPING PAPERS], <http://www.transportationandclimate.org/sites/www.transportationandclimate.org/files/tci-sustainable-communities-scoping-papers-overview.pdf>; see also JON A. CARNEGIE, EDWARD J. BLOUSTEIN SCH. OF PLANNING & PUB. POLICY, TCI METRIC RESEARCH PROJECT: WORKING TOWARD A COMMON SET OF INDICATORS (2012).

Research and scoping papers by the Bloustein School of Planning and Public Policy have demonstrated that some of these indicators are better suited to implementation than others.<sup>102</sup> Thus, TCI has organized the indicators into three tiers according to their utility and need for either additional refinement or modification at the state level.<sup>103</sup> For each tier, TCI described what potential strategies could be used to support them and identified how some already have been utilized for policymaking in TCI jurisdictions.<sup>104</sup>

The first tier, containing the “most promising” indicators, includes: (1) transportation-related GHG emissions; (2) energy consumption in the transportation sector; and (3) travel mode share.<sup>105</sup> The first two indicators—transportation-related GHG emissions and energy consumption in the transportation sector—are especially promising because they are “relatively easy to calculate using energy use data” and reductions in transportation-related greenhouse gas emissions are a “direct measure of [TCI’s] progress.”<sup>106</sup> Transportation-related GHG emissions and energy consumption in the transportation sector are naturally considered in tandem since “[e]nergy consumption in the transportation sector is often a proxy for emissions.”<sup>107</sup> These first two indicators have been used to support initiatives in Massachusetts, Vermont, and New York.<sup>108</sup> The last indicator of this cohort, travel mode share, “describes the proportion of trips taken by various means and can help gauge the extent to which viable transportation alternatives exist.”<sup>109</sup> As with the first two indicators, travel mode share is easily calculable based on readily available survey and geographic information system data.<sup>110</sup> It has been used to support initiatives in Maryland, New Jersey, New Hampshire, and Massachusetts.<sup>111</sup>

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<sup>102</sup> See EDWARD J. BLOUSTEIN SCH. OF PLANNING & PUB. POLICY, OVERVIEW OF THE TCI SCOPING PAPERS, *supra* note 117, at 1–2 (“The scoping papers reveal that certain indicators would be easier to calculate than others, due to availability of the data, ease of data collection, and the extent to which data are already being used to inform existing state policies.”).

<sup>103</sup> See *id.* at 2–7.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* This is not to say TCI does not contemplate some further or continuing refinement for these indicators; as TCI notes, the fact of interstate travel, for instance, limits the efficacy to using fuel sales as a proxy for transportation-related GHG emissions in the state, and, conversely, merely estimating the miles travelled by passenger vehicles may not account for the sometimes significant GHG emissions generated by rail and bus. See *id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* (identifying Massachusetts’s Global Warming Solutions Act, Vermont’s Comprehensive Energy Plan, and New York State’s Transportation Master Plan for 2030 as examples).

<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* (identifying the Maryland Department of Transportation’s Annual Attainment Report on Transportation System Performance, New Jersey’s Transit Village Program, the New Hampshire Department of Transportation’s Balanced Scorecard, and Massachusetts’s GreenDOT Policy and Plan as examples).

The second tier—indicators “requiring substantial data modification or processing”—includes: (4) the proportion of development occurring inside (or outside) developed or designated growth areas; (5) agricultural or natural lands developed annually per new resident; (6) proximity to amenities; (7) proportion of jobs or housing near transit; and (8) investment by mode.<sup>112</sup> All of these factors show promise but require further refinement in terms of how data is collected or measured. Jurisdictional and geographic differences throughout the TCI region account for some of the limitations TCI identified in these factors. For instance, indicators 4 and 5 “assess whether growth is happening in ways that are conducive to ‘smart growth’ or in ways that are likely to increase per-capita [vehicle miles travelled] and GHG emissions,” but TCI notes that states may want to modify data inputs based on “[d]ifferent legal structures surrounding land use, designated growth areas, and protected land areas as well as varied data collection methods.”<sup>113</sup> Similarly, indicator 8, which analyzes investment in public transit or active modes of travel like biking and walking, can provide a valuable measure of progress on reducing vehicle miles traveled and GHG emissions; but TCI expects that states may collect investment data differently.<sup>114</sup> Implicit in TCI’s recognition of the limits of second tier indicators is the recognition that an indicator that first requires new collection of data is necessarily limited in terms of implementation. Moreover, TCI contemplates that the availability of data relating to the proximity of amenities and the proportion of housing and jobs near transit may “vary significantly across the TCI region” and, in any event, “fail to capture physical or social barriers that prevent easy access to amenities.”<sup>115</sup> Nonetheless, these indicators have been successfully utilized to support various initiatives in Maryland and New Jersey.<sup>116</sup>

The last tier of indicators includes those “needing refinement or additional information,” which includes: (9) combined housing and transportation cost as a proportion of area median income; (10) return on investment; and (11) health benefits.<sup>117</sup> As with the second tier of indicators, TCI recognizes that these latter indicators have significant potential; however, each third-tier indicator suffers from drawbacks beyond mere data collection or state modification. For example, while the combined cost of housing and transportation as a proportion of area median income may be easily ascertainable, TCI recognizes the need for exploration of how to use the indicator beyond the neighborhood level.<sup>118</sup> Additionally, return-on-investment calculations

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<sup>112</sup> See *id.* at 3–5.

<sup>113</sup> *Id.* at 3–4.

<sup>114</sup> *Id.* at 5.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 3–4 (identifying Maryland’s PlanMaryland and 12 Visions, and the New Jersey Department of Environmental Protection’s Environmental Trends Tracking as examples of indicators 4 and 5 put to use; Maryland’s PlanMaryland and 12 Visions, and New Jersey’s State Strategic Plan as examples of indicators 6 and 7 put to use; and New Jersey’s “Fix It First” Policy as an example of indicator 8 put to use).

<sup>117</sup> *Id.* at 5–7.

<sup>118</sup> *Id.* at 5. However, TCI notes this factor was successfully used by Mercer County, New Jersey in the 2010 update of its Master Plan. *Id.*

have historically failed to capture social and environmental benefits, and measuring the health of a community may not be a meaningful indicator standing alone.<sup>119</sup>

A deeper discussion of the potential strategies that each indicator could support are beyond the scope of this Update, but the project overview and the TCI Scoping Paper Series provide a further exploration of these topics.<sup>120</sup>

c. Freight Efficiency

In recognition of the contribution of the movement of freight to climate change, this work area focuses on increasing the efficiency of the movement of goods through the TCI region. It aims to: (1) promote sustainable economic development; (2) minimize traffic congestion; and (3) reduce greenhouse gas emissions through more efficient goods movement and technology.<sup>121</sup>

A major milestone thus far in this work area has been the commissioning and completion of a quantitative study by Dr. James Winebrake of the Rochester Institute of Technology on the patterns and distribution of freight movement in the TCI region.<sup>122</sup> Reducing freight flow is important because “freight is closely tied to economic growth” and “[f]or every trillion dollar increase in GDP, we expect an additional ~140 billion ton-miles.”<sup>123</sup> This study revealed that 87% of freight transported within the TCI states was moved by heavy trucks—one of the most energy- and GHG-intensive modes of freight transportation.<sup>124</sup> New York also has the second-heaviest weight of freight flows in the Northeast (only Pennsylvania has heavier).<sup>125</sup>

The study also identifies ways to reduce energy and emissions through two frameworks. One framework presents “options for emissions reductions from freight” and another “evaluates trade-offs across important criteria” like “cost, time-of-delivery, [and] emissions.”<sup>126</sup> Dr. Winebrake has presented his findings several times, and TCI notes the study received a “positive response” and that “a follow-up study was proposed that would a) explore the energy use and emissions associated with the freight movement throughout the region, and b) identify freight

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<sup>119</sup> See *id.* at 6, 7.

<sup>120</sup> All seven research papers in this series prepared by the Bloustein School at Rutgers University are available for download at <http://www.transportationandclimate.org/indicators-measure-progress-promoting-sustainable-communities> (last visited Feb. 1, 2017).

<sup>121</sup> *Freight Efficiency*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/freight> (last visited Feb. 1, 2017).

<sup>122</sup> James J. Winebrake, PhD, Rochester Inst. of Tech., *Achieving Emissions Reductions in the Freight Sector: Understanding Freight Flows and Exploring Reduction Options*, (Mar. 21, 2012), <http://www.transportationandclimate.org/sites/default/files/Freight%20Seminar%20Presentation.pdf>.

<sup>123</sup> See *id.* at 4, 5. A ton-mile is a unit of transportation measurement referring to a ton of freight transported one mile.

<sup>124</sup> See *id.* at 4, 10.

<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.* at 16.

routes by vehicle miles traveled . . . and time to market . . . to determine potential transportation improvements in specific areas.”<sup>127</sup>

d. Information and Communication Technologies

This work area focuses on how states can use technology to make systemic operational improvements and provide information to travelers in order to reduce the GHG impact of the transportation sector. TCI lists nine goals that it will use emerging technologies to advance. These include: (1) promoting transit use through information technologies; (2) encouraging travelers to use real-time information offered in 511 and other systems to reduce their travel times; (3) improving bus scheduling and routing; (4) reducing travel times and traffic congestion; (5) reducing idling and unproductive run times for trucks and other heavy-duty vehicles; (6) introducing new ways of collecting and disseminating travel data; (7) reducing the cost of vehicle ownership; (8) improving public safety; and (9) expanding consumer travel choices.<sup>128</sup>

i. *American Public Transit Association v. ArrivalStar S.A.*: Real-Time Vehicle Information Lawsuit Settlement

As acknowledged above, the robust use of public transportation is vital to the reduction of greenhouse gas emissions. “Transit apps can help increase or maintain ridership, which helps reduce automobile traffic, which is a major source of emissions.”<sup>129</sup> Until recently, however, a very real threat of lawsuits against public agencies nationwide hindered the use of real-time transit data and the creation of transit app services.<sup>130</sup> The chilling effect on public agencies has been palpable.<sup>131</sup>

The entity responsible for bringing these suits was ArrivalStar, a Luxembourg-based company that holds exclusive licensing rights to thirty-four patents relating to the provision of real-time traffic information.<sup>132</sup> From 2010 to 2012, ArrivalStar brought patent infringement suits against ten state and regional transit authorities.<sup>133</sup> All were settled or dismissed within months except

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<sup>127</sup> *Freight Movement in the Northeast*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/freight-movement-northeast> (last visited Feb. 1, 2017).

<sup>128</sup> *Information and Communication Technology*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/content/information-and-communication-technology> (last visited Feb. 1, 2017).

<sup>129</sup> Emily Badger, *Why is a Patent Troll in Luxembourg Suing U.S. Public Transit Agencies*, CITYLAB, Apr. 23, 2012, <http://www.citylab.com/tech/2012/04/why-patent-troll-luxembourg-suing-us-public-transit-agencies/1819/>.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* Another entity, Melvino Technologies, Ltd., actually holds the patents, and the two entities act in concert. *See id.*

<sup>133</sup> *See* Complaint at 6–7, *Am. Pub. Transp. Ass’n v. ArrivalStar S.A.*, No. 1:13-cv-04375-ALC at 7 (S.D.N.Y. filed June 25, 2013),

one.<sup>134</sup> In response to a continuing threat of litigation, the American Public Transit Association (APTA), a coalition of transit stakeholders including almost all U.S. public transportation agencies, filed a complaint in federal district court in 2013 seeking a declaratory judgment against ArrivalStar.<sup>135</sup> The complaint alleges that the goal of these suits was “not to seek remedy for a legitimate claim, but rather to settle for an amount below the cost to each defendant to defend itself in court.”<sup>136</sup> Indeed, ArrivalStar typically settled its suits against public agencies for amounts between \$50,000 and \$75,000.<sup>137</sup>

Since ArrivalStar’s approach involved suing public agencies for relatively small dollar amounts to elicit quick settlement, none of the public agencies were “stepping back and seeing how big the picture was.”<sup>138</sup> In response, the GCC “compiled a file of all the relevant patents and known lawsuits, as well as potential legal defenses that might be used to counter them.”<sup>139</sup> Thus, the GCC assisted in identifying issues and solutions to curtail these threatened lawsuits against public agencies that used real-time traffic information to keep commuters up-to-date about bus and train arrivals/departures.<sup>140</sup>

Filed by the Public Patent Foundation at Cardozo School of Law as attorneys for APTA, the complaint enumerated five theories of relief including immunity from patent infringement suits under the Eleventh Amendment for state and regional public transportation authorities<sup>141</sup> and the

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<http://www.apta.com/mediacenter/Documents/APTA%20v%20ArrivalStar%20-%20Complaint%20%28STAMPED%29.pdf>.

<sup>134</sup> *Id.* at 1, 4.

<sup>135</sup> *Id.* at 7. Even the one case that did not settle quickly did not proceed to trial. *See id.*; Joe Mullin, *A New Target for Tech Patent Trolls: Cash-Strapped American Cities*, ARS TECHNICA (Mar. 15, 2012), <https://arstechnica.com/tech-policy/2012/03/a-new-low-for-patent-trolls-targeting-cash-strapped-cities/> (“ArrivalStar has racked up dozens of licensees, all without going anywhere near trial. Only one of its lawsuits even made it to the ‘claim construction’ phase.”).

<sup>136</sup> Complaint, *supra* note 149, at 7. “Patent litigation is notoriously expensive.” Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443, 1483 (2014). Even for cases with less at stake, the cost of litigation can easily soar above \$1,000,000. *See id.*

<sup>137</sup> *See* Mullin, *supra* note 151 (“[An attorney for ArrivalStar] said his client typically looks for between \$50,000 and \$75,000 from the public transit systems”); Bernstein, *supra* note 152, at 1457.

<sup>138</sup> Badger, *supra* note 145 (quoting Vicki Arroyo, Executive Director of the Georgetown Climate Center).

<sup>139</sup> *Id.* The Electronic Frontier Foundation also searched for prior art, which could invalidate the patents. *Id.*

<sup>140</sup> *ArrivalStar Agrees to Stop Suing Public Agencies Over Use of Real-Time Travel Data*, GEORGETOWN CLIMATE CTR., <http://www.georgetownclimate.org/arrivalstar-agrees-to-stop-suing-public-transit-agencies-over-use-of-real-time-travel-data> (Aug. 26, 2013) (describing GCC’s role in identifying the problem and subsequent development of legal and policy research, convening of interested stakeholders and legal experts, and raising of the issue with federal policy makers).

<sup>141</sup> Complaint, *supra* note 149, at 9.

invalidity and unenforceability of ArrivalStar's patents.<sup>142</sup> In August 2013, APTA announced the case had been settled: ArrivalStar "'agreed not to make any future patent infringement claims against any of APTA's public transportation agency members or any vendors providing goods and services to APTA public transportation agency members.'"<sup>143</sup>

e. Market-Based Policies to Cut GHG Emissions from Transportation

In November 2015, six TCI member jurisdictions announced their intention to work towards a regional agreement that will use "market-based policies to achieve significant reductions in greenhouse gas emissions and other pollution from the transportation sector."<sup>144</sup> New York DEC Commissioner Basil Seggos praised the announcement, saying: "Today we are taking an important step toward reaching our State Energy Plan goals to reduce carbon emissions 40% by 2030, as we work with our northeast partners to consider ways to expand clean energy markets while reducing emissions from transportation."<sup>145</sup>

A report released by the GCC accompanying this announcement finds that the Northeast and Mid-Atlantic region is on track to achieve a 29% reduction in GHG emissions from the 2011 levels for the transportation sector by 2030 (with currently existing policies).<sup>146</sup> The report goes further, however, and presents additional strategies to achieve a total reduction of 31–40%.<sup>147</sup> Substantial increases in savings, earnings, jobs, and public health improvements come along with this.<sup>148</sup> The outlined methodologies, state the authors, will promote the "80 percent reduction by 2050 from 1990 levels" goal commonly adopted by various state and regional bodies.<sup>149</sup>

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<sup>142</sup> *Id.* at 10–11.

<sup>143</sup> Press Release, APTA, APTA Announces Settlement with ArrivalStar: Frivolous Patent Infringement Claims Against APTA Members Will Stop (Aug. 21, 2013), [http://www.apta.com/mediacenter/pressreleases/2013/Pages/130821\\_Patent.aspx](http://www.apta.com/mediacenter/pressreleases/2013/Pages/130821_Patent.aspx) (quoting Michael Melaniphy, APTA President and CEO).

<sup>144</sup> *Five Northeast States and DC Announce They Will Work Together to Develop Potential Market-Based Policies To Cut Greenhouse Gas Emissions From Transportation*, TRANSP. & CLIMATE INITIATIVE OF THE NORTHEAST & MID-ATLANTIC STATES, <http://www.transportationandclimate.org/five-northeast-states-and-dc-announce-they-will-work-together-develop-potential-market-based> (last visited Feb. 1, 2017). The six jurisdictions are: Connecticut, Delaware, the District of Columbia, New York, Rhode Island, and Vermont. *Id.* Although other TCI jurisdictions have not signed on, the joint statement approved by the six jurisdictions expressly mentioned the TCI. *Id.*

<sup>145</sup> *Id.* (quoting New York DEC Acting Commissioner Basil Seggos); *see also* N.Y. STATE ENERGY PLANNING BD., THE ENERGY TO LEAD, *supra* note 20, at 112 (noting a 40% reduction in GHG emissions from 1990 levels as one of the energy plan's 2030 targets).

<sup>146</sup> *See* GABE PACYNAK ET AL., GEORGETOWN CLIMATE CTR., REDUCING GREENHOUSE GAS EMISSIONS FROM TRANSPORTATION: OPPORTUNITIES IN THE NORTHEAST AND MID-ATLANTIC 2, 17 (2015), [http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCC-Reducing\\_GHG\\_Emissions\\_from\\_Transportation-11.24.15.pdf](http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCC-Reducing_GHG_Emissions_from_Transportation-11.24.15.pdf).

<sup>147</sup> *Id.* at 2, 26, 33.

<sup>148</sup> *Id.* at 2, 33.

<sup>149</sup> *Id.* at 2.



## Fracking Ban

In 2008, Governor David A. Paterson directed the DEC to conduct an environmental review of high-volume hydraulic fracturing (HVHF), also known as fracking.<sup>150</sup> During the preliminary phases of the environmental review process, Governor Paterson issued Executive Order 41 in 2010, imposing a moratorium on HVHF in the state pending the outcome of DEC's environmental review.<sup>151</sup>

Following DEC's release of its draft environmental impact statement in 2012, the Department of Health (DOH) commenced a public health review in response to DEC's request that DOH review the health impacts of HVHF disclosed in the draft environmental impact statement.<sup>152</sup> DOH concluded "there are significant uncertainties about the kinds of adverse health outcomes that may be associated with HVHF, the likelihood of the occurrence of adverse health outcomes, and the effectiveness of some of the mitigation measures in reducing or preventing environmental impacts which could adversely affect public health."<sup>153</sup> Consequently, DOH recommended that "[u]ntil the science provides sufficient information to determine the level of risk to public health from HVHF and whether the risks can be adequately managed, HVHF should not proceed in New York State."<sup>154</sup>

On June 29, 2015, DEC issued its formal findings on HVHF, finalizing the environmental review process under SEQRA, and officially prohibiting fracking throughout New York State as recommended by DOH.<sup>155</sup> DEC's findings disclose a variety of significant environmental impacts associated with fracking including: contamination of surface water, ground water, and wetlands from well injections, spills and increased storm water runoff; loss of habitat and habitat fragmentation due to the grading and clearing of the natural environment, as well as the

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<sup>150</sup> See N.Y. Exec. Order No. 41 (Dec. 13, 2010), N.Y. COMP. CODES R. & REGS. tit. 9, § 7.41, <http://docs.dos.ny.gov/info/register/2011/jan12/pdfs/execorders.pdf>. HVHF is a technique for extracting natural gas from subsurface rock that generally involves drilling wells thousands of feet into bedrock and injecting a mixture of water and chemicals into the well bore, causing the underlying natural gas to rise to the surface for capture. *The Process of Hydraulic Fracturing*, EPA, <https://www.epa.gov/hydraulicfracturing/process-hydraulic-fracturing> (last visited Feb. 1, 2017).

<sup>151</sup> See N.Y. Exec. Order No. 41, *supra* note 168; N.Y. STATE DEP'T OF ENVTL. CONSERVATION, FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM FINDING STATEMENT, 1–2 (2015), [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/findingstatehvhf62015.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf).

<sup>152</sup> N.Y. STATE DEP'T OF HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT 1 (2014), [http://www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf).

<sup>153</sup> *Id.* at 11.

<sup>154</sup> *Id.*

<sup>155</sup> See N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 169, at 42; Press Release, N.Y. State Dep't of Env'tl. Conservation, New York State Officially Prohibits High-Volume Hydraulic Fracturing: DEC issues Finding Statement Concluding Extensive Seven-Year Review (June 29, 2015), <http://www.dec.ny.gov/press/102337.html>.

construction of wells, access roads, structures and pipelines; increased air pollution and greenhouse gas emissions associated with the extraction process, transportation and eventual combustion of natural gas; uncertainty about whether HVHF increases the frequency or magnitude of seismic events; noise pollution and the destruction of visual resources; and changes to community character resulting from the conversion of rural or open space into HVHF facilities.<sup>156</sup> DEC justified the prohibition based on its finding that “there are no feasible or prudent alternatives that would adequately avoid or minimize adverse environmental impacts and that address the scientific uncertainties and risks to public health from [HVHF].”<sup>157</sup> According to DEC, the fracking ban is necessary in order to “avoid[] adverse environmental impacts to the maximum extent practicable” while “achiev[ing] the appropriate balance between the protection of the environment and the need to accommodate social and economic considerations.”<sup>158</sup>

## **Updates to 2011 Report**

### **Buildings & Energy**

#### **1. Improve New York’s Current Incentives Regarding Energy Efficiency in Buildings**

##### **a. Centralize Information Concerning Energy Efficiency Incentives**

The 2009 Report observed that New York has so many tax credits and other incentives for green buildings that the complex eligibility rules are difficult to decipher.<sup>159</sup> It recommended establishing a centralized clearinghouse for this information, including a toll-free hotline or website to provide information, answer questions and assist in the application process.<sup>160</sup> The 2011 Report noted that the NYSERDA website failed to provide a section specific to residents and noted that the information about programs remained diffuse and difficult to access.<sup>161</sup>

#### **2017 Update:**

NYSERDA has addressed these concerns and developed a more user-friendly website.<sup>162</sup> The current configuration of the website includes user-targeted sections with information pertaining

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<sup>156</sup> See N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 169, at 9–29.

<sup>157</sup> *Id.* at 42.

<sup>158</sup> *Id.* at 42–43.

<sup>159</sup> 2009 Report, *supra* note 1, at 35.

<sup>160</sup> *Id.*

<sup>161</sup> 2011 Update, *supra* note 2, at 2.

<sup>162</sup> See *Programs & Services*, NYSERDA, <http://www.nyserda.ny.gov/All-Programs> (last visited Feb. 1, 2017).

to “Business & Industry,” “Communities & Governments,” “Residents & Homeowners,” “Partners & Investors,” and “Cleantech & Innovation.”<sup>163</sup>

b. Update Building Energy Codes More Swiftly & Provide Incentives for Local Code Enforcement

New York updates its State Energy Code every three years, and the DOS has reduced the review period from twelve to three months to expedite this process.<sup>164</sup> The 2009 Report recommended that other state agencies involved in the Energy Code review process follow DOS’s lead and streamline their own processes.<sup>165</sup> Additionally, some municipalities do not properly enforce the Energy Code.<sup>166</sup> The 2009 Report recommended that New York provide incentives for proper training and enforcement and consider including energy conservation themes in the training.<sup>167</sup> A surcharge on fire insurance policies had been collected to fund code enforcement, but these funds have since been diverted to the General Fund.<sup>168</sup>

The 2011 report also noted that, in response to the American Recovery and Reinvestment Act of 2009, the State Fire Prevention and Building Code Council adopted a rule establishing the 2010 Energy Conservation Construction Code of New York State.<sup>169</sup> Additionally, the 2011 update recognized that DOS planned on conducting 1,000 training sessions, including “one-on-one training to code officials and design professionals,” but noted that there was still not “funding in place to assist municipalities in code training or enforcement.”<sup>170</sup>

**2017 Update:**

Green building codes set a standard for all new construction and major modifications for buildings that can have a long-term effect on reducing energy use and greenhouse gas emissions in a community. Although New York updates its State Building and Energy Codes every three years, it remains a generation behind the model codes. For example, New York is using the 2010 American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE) Commercial Building Energy Code and the 2009 Residential Energy Code, where in both cases, there are 2012 and 2015 Code updates available.<sup>171</sup> The New York legislature should mandate that the State Fire Prevention and Building Code Council adopt a more aggressive schedule incorporating the latest building and energy code standards.

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<sup>163</sup> *Id.*

<sup>164</sup> See 2009 Report, *supra* note 1, at 36.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> 2011 Update, *supra* note 2, at 3.

<sup>170</sup> *Id.* at 3–4.

<sup>171</sup> *Status of State Energy Code Adoption*, U.S. DEP’T OF ENERGY, <https://www.energycodes.gov/status-state-energy-code-adoption> (last visited Feb. 1, 2017). According to the U.S. Department of Energy, as of April 2016, Vermont and Alabama are the only states, along with Washington D.C., that has adopted the most recent commercial and residential building energy codes. *Id.*

Absent state action, local governments may choose to reference existing standards such as LEED, Energy Star, ICC-IGCC 2012 or ASHRAE Standard 189.1 or may choose to establish its own standards, but those standards must not be inconsistent with the State Energy Conservation Construction Code.<sup>172</sup> NYSERDA and DOS should provide technical assistance and incentives to municipalities that seek to incorporate greener building codes.

c. Expedite Processing for Climate-Friendly Projects

The 2009 Report recommended that New York should allow “climate-friendly” projects to “move to the front of the line” when undergoing state review and that municipalities should be authorized to do the same.<sup>173</sup> It stated that there should be clear criteria as to what sort of projects would qualify for this treatment.<sup>174</sup> The 2011 report noted that this recommendation had not been implemented in any way.<sup>175</sup>

**2017 Update:**

Unfortunately, the State does not appear to be implementing this recommendation in its projects. However, the development of Regional Sustainability Plans through NYSERDA’s Cleaner, Greener Communities Program,<sup>176</sup> and the evolution of DEC’s Climate Smart Communities program<sup>177</sup> are important steps forward. Notably, the Climate Smart Communities program evolved from a simple pledge to providing municipalities with resources to reduce greenhouse gas emissions and adapt to climate change.<sup>178</sup> Additional appropriations must be made to assist municipalities with planning and funding the implementation of climate friendly projects.

d. Prioritizing Energy Efficiency Incentives for Affordable Housing

The 2009 Report recommended that New York should prioritize energy efficiency incentives for those buildings that provide affordable housing.<sup>179</sup> The 2011 Report noted that NYSERDA has a webpage regarding the New York Energy Smart Multifamily Performance Program, in which implementation of an energy efficiency program in existing buildings and adherence to specific targets can make a building owner eligible for incentives.<sup>180</sup> Additionally, new building projects that consist of five or more residential buildings that will house low-income individuals may be eligible for the “Green Affordable Housing Component,” which provides “technical assistance to

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<sup>172</sup> See N.Y. ENERGY Law § 11-109(1).

<sup>173</sup> See 2009 Report, *supra* note 1, at 37.

<sup>174</sup> *Id.*

<sup>175</sup> 2011 Update, *supra* note 2, at 4.

<sup>176</sup> RFP 2391 Cleaner, Greener Communities Regional Sustainability Planning Program, NYSERDA, <https://www.nyserdera.ny.gov/Funding-Opportunities/Closed-Funding-Opportunities/RFP-2391-Cleaner-Greener-Communities-Regional-Sustainability-Planning-Program.aspx> (last visited Feb. 1, 2017).

<sup>177</sup> See *Community Action on Climate Change*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/76483.html> (last visited Feb. 1, 2017).

<sup>178</sup> See *id.*

<sup>179</sup> See 2009 Report, *supra* note 1, at 37.

<sup>180</sup> 2011 Update, *supra* note 2, at 5.

improve the energy efficiency, health, safety, and security of these projects as they are planned, designed, and constructed.”<sup>181</sup> In addition to the regular incentives for new buildings, building projects in this program are eligible for further incentives “for the installation of green building features, and will be required to gain LEED Certification at the Silver level.”<sup>182</sup>

### **2017 Update:**

Affordable housing continues to be a problem in New York City and the surrounding counties while high energy costs are problematic throughout the State. In addition to expanding existing programs, the State should link NYSEERDA with the other affordable housing programs administered by NYS Homes and Community Renewal and by municipal and nonprofit program partners throughout the State.

An important role could be played by the Energy Improvement Corporation (EIC), which is a not-for-profit local development corporation established specifically to increase the demand for energy efficiency and renewable energy building upgrades.<sup>183</sup> With a growing base of member municipalities, EIC offers the Energize NY Finance Program, which is New York State’s Property Assessed Clean Energy (PACE) finance program.<sup>184</sup> PACE financing is made available to eligible property owners to provide financing for property improvements that lower energy consumption.<sup>185</sup> In addition, EIC offers the Energize NY Commercial and Residential Programs to assist property owners through the energy upgrade process.<sup>186</sup>

## **2. Enhance New York’s Renewable Portfolio Standard**

The State of New York has had some form of Renewable Portfolio Standard (RPS), generally defined as a policy seeking to increase the proportion of renewable electricity used by retail customers, since 2004.<sup>187</sup> RPS targets are organized into two tiers: (1) the “Main Tier,” which includes large-scale generators that sell power to the wholesale grid or in some cases generate electricity for on-site use; and (2) the “Customer-Sited Tier” (CST), which involves incentives, solicitations, and other support mechanisms for small-scale generators of wind or solar in the

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Energy Improvement Corporation*, ENERGIZE NY, <http://energizeny.org/eic> (last visited Feb. 1, 2017).

<sup>184</sup> *Energize NY Finance*, ENERGIZE NY, <http://commercial.energizeny.org/energize-ny-finance> (last visited July 26, 2016).

<sup>185</sup> *See id.*

<sup>186</sup> *Energy Improvement Corporation*, ENERGIZE NY, *supra* note 201.

<sup>187</sup> *See Order Regarding Retail Renewable Portfolio Standard, Retail Renewable Energy Portfolio Standard*, Case 03-E-0188 (N.Y. Pub. Serv. Comm’n Sept. 24, 2004). For a timeline of major events in the RPS proceeding, see *03-E-0188: Renewable Portfolio Standard*, N.Y. STATE DEP’T OF PUB. SERV., <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/1008ED2F934294AE85257687006F38BD?OpenDocument> (last visited Feb. 1, 2017).

residential, commercial, or government context.<sup>188</sup> In implementing the RPS, the PSC has solicited large-scale renewable projects via a central procurement model, while offering CST incentives based upon competitive applications following a program opportunity notice.<sup>189</sup>

The 2009 Report recommended that New York raise its RPS to at least 30% by 2015.<sup>190</sup> As stated in the 2011 Update, the PSC acted upon this recommendation in an order issued in January 2010, establishing a new RPS goal of 30% by 2015.<sup>191</sup> Addressing concerns regarding geographic imbalances in distribution of RPS funding and project siting, the PSC also authorized a budget of up to thirty million dollars annually through 2015 for Main Tier projects located downstate, including solar, anaerobic digesters, and fuel cells.<sup>192</sup>

### **2017 Update:**

The RPS Main Tier and CST programs were authorized to operate through December 31, 2015, to support the State's goal of 30% renewable energy by 2015.<sup>193</sup> "Through eleven solicitations, the Main Tier has 81 active projects under contract totaling 2,421 [megawatts (MW)] of new renewable capacity," or enough to "supply [clean power to] over 825,000 average-sized homes per year."<sup>194</sup> However, by 2013, renewable-sourced electricity accounted for less than half of the 2015 goal.<sup>195</sup> And in 2017, only an estimated 23% of the State's electricity comes from renewable sources. The largest contributor remains traditional hydroelectric while wind,

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<sup>188</sup> See 03-E-0188: *Renewable Portfolio Standard*, N.Y. STATE DEP'T OF PUB. SERV., *supra* note 205. NYSERDA acknowledges a third tier, "other market activities," which includes individuals and businesses that choose to support renewable energy. See *New York Renewable Portfolio Standard*, NYSERDA, <http://www.nyserda.ny.gov/About/Renewable-Portfolio-Standard> (last visited Feb. 1, 2017); see also NYSERDA, NEW YORK STATE RENEWABLE PORTFOLIO STANDARD ANNUAL PERFORMANCE REPORT THROUGH DECEMBER 31, 2015 5 (2016) (discussing a "voluntary market" for renewable energy).

<sup>189</sup> See 03-E-0188: *Renewable Portfolio Standard*, N.Y. STATE DEP'T OF PUB. SERV., *supra* note 205.

<sup>190</sup> 2009 Report, *supra* note 1, at 38.

<sup>191</sup> Order Establishing New RPS Goal and Resolving Main Tier Issues at 10, Retail Renewable Portfolio Standard, Case 03-E-0188 (N.Y. Pub. Serv. Comm'n Jan. 8, 2010); 2011 Update, *supra* note 2, at 5.

<sup>192</sup> Order Establishing New RPS Goal and Resolving Main Tier Issues, *supra* note 209, at 16–17; see also Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balance and Other Issues Pertaining to the RPS Program, Renewable Portfolio Standard, Case 03-E-0188 (N.Y. Pub. Serv. Comm'n Apr. 2, 2010).

<sup>193</sup> See Order Establishing New RPS Goal and Resolving Main Tier Issues, *supra* note 209, at 14.

<sup>194</sup> *Renewable Portfolio Standard*, NYSERDA, <https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Portfolio-Standard> (last visited Feb. 1, 2017).

<sup>195</sup> See Order Commencing Proceeding at 2 n.3, Clean Energy Fund, Case 14-M-0094 (N.Y. Pub. Serv. Comm'n May 8, 2014).

biomass, and solar account for a smaller proportion.<sup>196</sup> The current status of the RPS is tied to a number of new proceedings that the Department of Public Service (DPS) and other governing bodies have undertaken in recent years.

For instance, in June 2015, the New York State Energy Planning Board replaced the 2009 State Energy Plan with a new State Energy Plan that would complement and implement Reforming Energy Vision.<sup>197</sup> The 2015 State Energy Plan includes three overarching clean energy goals for the year 2030: (1) a renewable-energy goal to achieve 50% energy generation from renewable energy sources; (2) a carbon-reduction goal of 40% reduction in GHG emissions from 1990 levels; and (3) an efficiency goal of 600 trillion British thermal units (Btu) increase in statewide energy efficiency.<sup>198</sup> These are some of the nation's most ambitious clean energy targets for 2030.<sup>199</sup>

Subsequently, in November 2015, Governor Cuomo directed the DPS to commence proceedings to establish a Clean Energy Standard (CES) to implement the goal of 50% renewable energy generation by 2030, supplanting the RPS.<sup>200</sup> Referencing the international climate negotiations in Paris, the Governor noted that the CES was important to set the right example and to cost effectively and efficiently achieve the State's environmental emissions objectives.<sup>201</sup> In January 2016, the PSC issued an order expanding the scope of its Large-Scale Renewables proceeding, a separate track within REV, to consider a CES.<sup>202</sup>

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<sup>196</sup> *How New York Uses Renewable Energy*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/83070.html> (last visited Feb. 1, 2017).

<sup>197</sup> *See generally* N.Y. STATE ENERGY PLANNING BD., *THE ENERGY TO LEAD*, *supra* note 20. The PSC is required to take steps to render decisions and policies that are reasonably consistent with the State Energy Plan. N.Y. ENERGY LAW § 6-104(5)(b) (McKinney 2015).

<sup>198</sup> *Id.* at 112.

<sup>199</sup> *See* Press Release, Office of the Governor, *supra* note 5.

<sup>200</sup> Letter from Gov. Andrew M. Cuomo to the Aubrey Zibelman, CEO, N.Y. State Dep't of Pub. Serv. (Dec. 2, 2015), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable\\_Energy\\_Letter.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf).

<sup>201</sup> *Id.* In his letter, Governor Cuomo also noted that "elimination of upstate nuclear facilities, operating under valid federal licenses would eviscerate the emissions reduction achieved through the State's renewable energy programs," and he indicated that continued support for these sources of electricity should remain distinct from the renewable energy goal. *Id.* The DPS has accordingly expanded the scope of its CES proceedings to include maintenance of non-emitting nuclear generation. Order Expanding Scope of Proceeding and Seeking Comments at 5–7, Implementation of a Large-Scale Renewable Program, Case 15-E-0302 (N.Y. Pub. Serv. Comm'n Jan. 21 2016).

<sup>202</sup> Order Expanding Scope of Proceeding and Seeking Comments, *supra* note 219, at 5–6. As directed by the Commission, DPS issued a Staff White Paper in January 2016 discussing the policy objectives of the CES, compliance mechanisms, and the role of tiers in implementation. *See* N.Y. STATE DEP'T OF PUB. SERV., STAFF WHITE PAPER ON CLEAN ENERGY STANDARD 2–4 (2016).

On August 1, 2016, the PSC adopted the CES.<sup>203</sup> Under the CES, New York is expected to procure 9,347,020 MWh of electricity from large-scale renewable sources by 2021.<sup>204</sup> Additionally, the PSC acknowledged the vast potential for offshore wind energy in New York and requested that NYSERDA determine the appropriate ways to fully take advantage of offshore wind's potential.<sup>205</sup> Recognizing that abruptly shuttering nuclear facilities in upstate New York would risk drastically increasing the reliance on nonrenewable fossil fuels like natural gas, the PSD opted to subsidize upstate nuclear facilities as a bridge over the next twelve years while more renewable sources are fully implemented and integrated.<sup>206</sup>

Also relevant to the progress of the new CES is the recent creation of a Clean Energy Fund (CEF).<sup>207</sup> In January 2016, the PSC approved the CEF, based upon a formal proposal from NYSERDA, for \$5.322 billion over ten years.<sup>208</sup> Consistent with the new direction of New York's energy system in the context of REV, the CEF envisions a more market-focused system, subject to a transparent upper limit on ratepayer collections.<sup>209</sup> NYSERDA submitted an Investment Plan for the Market Development and Innovation & Research portfolios of the CEF on February 22, 2016.<sup>210</sup> The Investment Plan thus far indicates that the CEF will be used to leverage new investments under the CES and provide essential continued funding for Customer-

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<sup>203</sup> Order Adopting a Clean Energy Standard 154, Large-Scale Renewable Program and a Clean Energy Standard, Case 15-E-0302 (N.Y. Pub. Serv. Comm'n Aug. 1, 2016).

<sup>204</sup> *Id.* at 16.

<sup>205</sup> *Id.* at 17. As noted above, a 90 megawatt wind array to be located 30 miles from the Montauk shoreline was approved by the Long Island Power Authority board on January 25, 2017.

<sup>206</sup> *Id.* at 19–20. Governor Cuomo has announced that the Indian Nuclear Power Plant in Buchanan, NY, will be closed by 2021.

<sup>207</sup> Order Authorizing the Clean Energy Fund Framework, Clean Energy Fund, Case 14-M-0094 (N.Y. Pub. Serv. Comm'n Jan. 21, 2016); Order Instituting Proceeding, Clean Energy Fund, Case 14-M-0094 (N.Y. Pub. Serv. Comm'n May 8, 2014); *see also* Press Release, Office of the Governor, Governor Cuomo Launches \$5 Billion Clean Energy Fund to Grow New York's Clean Energy Economy, NYSERDA (Jan. 21, 2016), <https://www.governor.ny.gov/news/governor-cuomo-launches-5-billion-clean-energy-fund-grow-new-york-s-clean-energy-economy>.

<sup>208</sup> Order Authorizing the Clean Energy Fund Framework, *supra* note 225, at 106. The CEF has four main components: A Market Development portfolio, budgeted for \$3.43 billion, will facilitate on-site clean energy technologies and dedicate a portion of the fund to low-to-moderate income initiatives. *See id.* at 20, 106, 108 & app. E. The Innovation and Research division will support environmental and business research with a focus on smart grids, distributed generation, and transportation. *See id.* at 20, 106. NY-Sun is a comprehensive effort to promote sustainable and subsidy-free solar electric industry in the State. *See id.* at 20, 106. Lastly, the NY Green Bank is a state-sponsored finance entity providing support to overcome market barriers and leverage private sector investment. *See id.* at 20, 106.

<sup>209</sup> *See id.* at 1–4, 15–18; Order Instituting Proceeding, *supra* note 225, at 5–6.

<sup>210</sup> *See* NYSERDA, Clean Energy Fund Investment Plan: Resource Acquisition Transition Chapter, Clean Energy Fund, Case 14-M-0094 (rev. Feb. 22, 2016); *see also* NYSERDA, Clean Energy Fund Investment Plan: Budget Accounting and Benefits Chapter, Clean Energy Fund, Case 14-M-0094 (rev. Feb. 22, 2016).



Sited Tier programs (including for solar, small wind, anaerobic digesters, and fuel cells) and energy efficiency programs to help transition these programs into the new regulatory and market framework developed by the REV proceeding.<sup>211</sup> DPS staff approved the Investment Plan on May 23, 2016.<sup>212</sup>

### 3. Authorize the Public Service Commission to Require Time-of-Use Pricing

The 2009 Report urged New York to pass a bill to reauthorize PSC to require time-of-use pricing.<sup>213</sup> “Time-of-use pricing is a method by which the price of electricity charged consumers varies with the time of day, which allows the price to more closely track the actual cost of producing electricity in each hour.”<sup>214</sup> This permits consumers to make energy efficient and cost-effective choices by “shifting their usage from peak periods when prices are highest to non-peak periods when prices are lower.”<sup>215</sup> While large utilities must offer time-of-use pricing, the 2009 Report noted the PSC previously had the power to mandate time-of-use pricing actually be used if in the public interest.<sup>216</sup> However, the provision was deleted in 1997.<sup>217</sup> The 2011 Update noted that while no such bill had passed, numerous studies and reports in the interim had explored the value of time-of-pricing.<sup>218</sup>

#### **2017 Update:**

Unfortunately, the State Legislature has still not reauthorized the PSC to require time-of-use pricing.<sup>219</sup> However, the PSC has taken steps to encourage opt-in time-of-use pricing.<sup>220</sup> The PSC’s action remains tentative and preliminary; however, PSC directed staff to study the efficacy of time-of-use pricing further as well as incentives to increase the rate at which customers opt in to time-of-use pricing.<sup>221</sup> Additionally, the PSC ordered each utility to propose

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<sup>211</sup> See NYSERDA, Clean Energy Fund Investment Plan: Resource Acquisition Transition Chapter, *supra* note 228, at 70–85.

<sup>212</sup> Letter from Christina Palmero, Dir., Office of Clean Energy, N.Y. State Dep’t of Pub. Serv. to Valerie S. Milonovich, Senior Counsel, NYSERDA (May 23, 2016).

<sup>213</sup> 2009 Report, *supra* note 1, at 39.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* The provision read in pertinent part: “Nothing in this section [permitting large utilities to offer time-of-use pricing] shall prohibit the commission from mandating such time of use rates where it deems such rates to be in the public interest.” N.Y. PUB. SERV. LAW § 66(27)(a) (McKinney 1995).

<sup>217</sup> 2009 Report, *supra* note 1, at 39; see 1997 N.Y. Laws ch. 307 (striking “Nothing in this section shall prohibit the commission from mandating such time of use rates where it deems such rates to be in the public interest” from N.Y. PUB. SERV. LAW § 66(27)(a)).

<sup>218</sup> 2011 Update, *supra* note 2, at 6–7.

<sup>219</sup> See N.Y. PUB. SERV. LAW § 66(27) (McKinney 2015).

<sup>220</sup> See Order Adopting a Ratemaking and Utility Revenue Model Policy Framework at 156–57, Reforming the Energy Vision, Case 14-M-0101 (N.Y. Pub. Serv. Comm’n May 19, 2016).

<sup>221</sup> See *id.* at App. A, pg. 5.

revisions to its voluntary time-of-use pricing for mass market customers with next rate filing.<sup>222</sup> Finally, the PSC acknowledged other options that may increase customer opt-in rates for time-of-use pricing, such as “shadow billing,” which would show the customer what they would have paid under a time-of-use billing structure.<sup>223</sup>

In the absence of the power to require time-of-use pricing (and the actual requirement that New York’s utilities employ time-of-use pricing), these reforms can go a long way to bringing New York closer to the national average for customer opt-in rates for time-of-use pricing: New York has a particularly low rate of customers who opt in to time-of-use pricing: “While nationwide averages of opt-in [time-of-use] enrollment rates are approximately 25%, adoption rates for New York utilities range between 0.1% and 1.9%.”<sup>224</sup> Consonant with REV’s revolutionary approach, the *Order Adopting a Ratemaking and Utility Revenue Model Policy Framework* is a broad change in the incentive structure for utilities, from one that incented a traditional centralized system to one that encourages distributed generation, evolving technological and environmental factors, and aligning utility profits with customer-oriented objectives.<sup>225</sup>

#### 4. Provide Incentives for the Installation of Smart Meters

The 2009 Report recommended that New York should provide financial incentives for power companies to install smart meters, particularly if their cost-effectiveness remained in doubt.<sup>226</sup> A smart meter is “any time-based meter and related communication equipment that measures and records electricity usage data on a time-differentiated basis in at least [twenty-four] separate time segments per day.”<sup>227</sup> Smart meters permit information exchange between the power provider and the consumer’s meter; consequently, smart meters are integral to the full implementation of time-of-use pricing, described above.<sup>228</sup> As of 2009, all customers were allowed to install smart meters, but only the largest commercial and industrial electric customers were required to.<sup>229</sup>

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<sup>222</sup> *Id.* at 155–56.

<sup>223</sup> *Id.* at 134.

<sup>224</sup> *Id.* at 133 (citing PETER CAPPERS ET AL., LAWRENCE BERKLEY NATIONAL LABORATORY, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: INTERIM REPORT ON CUSTOMER ACCEPTANCE, RETENTION, AND RESPONSE TO TIME-BASED RATES FROM THE CONSUMER BEHAVIOR STUDIES, LBNL-183209 (2015), [https://emp.lbl.gov/sites/all/files/lbnl-183029\\_0.pdf](https://emp.lbl.gov/sites/all/files/lbnl-183029_0.pdf), and Ahmad Faruqui et al., *Smart by Default*, PUB. UTILS. FORTNIGHTLY, Aug. 2014, <http://www.fortnightly.com/fortnightly/2014/08/smart-default>).

<sup>225</sup> *Id.* at 11; see also N.Y. STATE DEP’T OF PUB. SERV., STAFF WHITE PAPER ON RATEMAKING AND UTILITY BUSINESS MODELS 27 (2015).

<sup>226</sup> 2009 Report, *supra* note 1, at 40.

<sup>227</sup> *Id.* As the 2009 Report points out, “smart meter” is defined in the Internal Revenue Code. See 26 U.S.C. § 168(i)(18) (2012).

<sup>228</sup> See 2009 Report, *supra* note 1, at 39, 40 (“Customers must have ‘advanced’ or smart meters to take advantage of time-of-use pricing.”).

<sup>229</sup> *Id.* at 40.

The 2011 Update noted that, like time-of-use pricing, a number of interim reports had acknowledged smart meters, but that no concrete progress had been made.<sup>230</sup>

### **2017 Update:**

As noted in the 2011 Update, there remains a dearth of financial incentives particularized to the installation of smart meters. However, the PSC recently approved Consolidated Edison (ConEd)'s business plan for an advanced metering infrastructure.<sup>231</sup> As a part of the business plan, ConEd plans to install more than 3.5 million electric smart meters and 1.2 million gas smart meters by the end of 2022.<sup>232</sup> The project will cost \$1.285 billion,<sup>233</sup> but the business plan, and the PSC's approval of it, show that the installation of smart meters can be profitable and economically beneficial to consumers even in the absence of formal financial incentives for their installation: over a twenty-year period, ConEd estimates a net benefit of its smart meters of more than a billion dollars.<sup>234</sup> Additionally, the PSC is optimistic about the program: "If implemented successfully, [advanced metering infrastructure] will have a positive impact not only on customer costs, but will also provide substantial benefits to the environment by minimizing GHG emissions from fossil fuels and the potential need for new central station generators that consume fossil fuels."<sup>235</sup>

## **5. Require Electric Sub-Metering in All Buildings**

The 2009 Report urged the State Legislature to amend the Public Service Law to require sub-metering in all multi-unit buildings.<sup>236</sup> The value of mandatory sub-metering is straightforward: it "will encourage consumers to use electricity wisely by providing them appropriate price signals to minimize their consumption."<sup>237</sup> The 2011 Update noted the State Legislature had not

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<sup>230</sup> 2011 Update, *supra* note 2, at 8.

<sup>231</sup> Order Approving Advanced Metering Infrastructure Business Plan Subject to Conditions, Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service, Case 15-E-0050 (N.Y. Pub. Serv. Comm'n Mar. 17, 2016).

<sup>232</sup> *Id.* at 6; *see also* Katherine Tweed, *New York Prepares for Millions of Smart Meters Under REV*, GREENTECH MEDIA, Oct. 29, 2015, <http://www.greentechmedia.com/articles/read/new-york-prepares-for-millions-of-smart-meters-under-rev>.

<sup>233</sup> Order Approving Advanced Metering Infrastructure Business Plan Subject to Conditions, *supra* note 249, at 4.

<sup>234</sup> *Id.* at 5.

<sup>235</sup> *Id.* at 20.

<sup>236</sup> 2009 Report, *supra* note 1, at 41. Since 1977, sub-metering has been required in all newly constructed multi-unit buildings. *Id.* As the 2009 Report point out, this requirement is less effective in some municipalities like New York City where many of the buildings were constructed prior to 1977. *Id.*

<sup>237</sup> *Id.* Two New York City case studies that focused on multifamily buildings demonstrate the positive effects upgrading to electricity sub-metering can have on building owners and tenants. *See* NYSERDA, CASE STUDY – TOWER EAST, <http://www.nyserra.ny.gov/-/media/Files/Publications/Case-Studies/Submetering-Multifamily-Buildings/towereast-cs.pdf> (noting sub-metering "can reduce building-wide energy consumption by up to 20%");

acted on the 2009 recommendation.<sup>238</sup> Additionally, the 2011 Update recommended a regional and national survey of sub-metering to determine what techniques would be most efficient to enforce in New York.<sup>239</sup>

### **2017 Update:**

The State Legislature still has not amended the Public Service Law to require electric sub-metering in all buildings. However, New York City's Local Law 88, part of Mayor Bloomberg's Greener, Greater, Buildings Plan, generally speaking now requires sub-metering for buildings that are 50,000 square feet or greater.<sup>240</sup> In buildings covered by Local Law 88, certain tenant spaces must be equipped with sub-meters beginning on January 1, 2025.<sup>241</sup> The State should take note of New York City's plan and implement key initiatives to further encourage energy efficiency and conservation methods.

Although New York State does not require electric sub-metering in all buildings, NYSERDA has previously offered financial incentives that pay for up to 50% of the cost of sub-meters, up to \$250 per unit.<sup>242</sup> As of 2016, NYSERDA provided some incentives for sub-meters in multifamily buildings, but not at the previous level.<sup>243</sup>

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NYSERDA, CASE STUDY – PARK CITY ESTATES, <http://www.nyserda.ny.gov/-/media/Files/Publications/Case-Studies/Submetering-Multifamily-Buildings/parkcity-cs.pdf> (“Following the submetering conversion and other energy-saving initiatives, the building cut maintenance costs by 15%.”).

<sup>238</sup> 2011 Update, *supra* note 2, at 8.

<sup>239</sup> *Id.*

<sup>240</sup> 2009 N.Y.C. Local Law 88, [http://www1.nyc.gov/assets/buildings/local\\_laws/ll88of2009.pdf](http://www1.nyc.gov/assets/buildings/local_laws/ll88of2009.pdf); *see also* MAYOR'S OFFICE OF SUSTAINABILITY, *Greener, Greater Buildings Program*, NYC.GOV, <http://www.nyc.gov/html/gbee/html/plan/plan.shtml> (last visited Feb. 1, 2017). Local Law 88 also requires sub-metering for “two or more buildings on the same tax lot that together exceed 100,000 gross square feet.” 2009 N.Y.C. Local Law 88.

<sup>241</sup> A “covered tenant space” is a space “larger than 10,000 gross square feet (929 m<sup>2</sup>) on one or more floors of a covered building let or sublet to the same person” or one “floor of a covered building larger than 10,000 gross square feet (929 m<sup>2</sup>) consisting of tenant spaces let or sublet to two or more different persons.” 2009 N.Y.C. Local Law 88. “If the covered tenant space is a floor with multiple tenancies, each tenancy that is 10,000 gross square feet (929 m<sup>2</sup>) or less shall (i) have a separate sub-meter, (ii) share a sub-meter with other tenant spaces on the floor, or (iii) share a sub-meter covering the entire floor.” *Id.*

<sup>242</sup> *See* NYSERDA, ADVANCED SUBMETERING PROGRAM APPLICATION (2014).

<sup>243</sup> Conference call held on Sept. 20, 2016 with Mr. Dean Zias, Project Manager with NYSERDA; *see also Comprehensive Option for Multifamily Affordable Buildings*, NYSERDA, <https://www.nyserda.ny.gov/All-Programs/Programs/MPP-Existing-Buildings/Comprehensive-Option> (last visited Feb. 1, 2017).

## 6. Amend the Energy Code to Cover More Building Renovations

The 2009 Report lamented that many building renovations did not need to comply with the Energy Code because the Code limited its coverage to “substantial” renovations—ones that involved the replacement of more than 50% of a “building subsystem.”<sup>244</sup> The 2011 Update observed that the State Fire Prevention and Building Code Council established the Energy Conservation Construction Code of New York State (ECCCNYS) in 2010, replacing the old code and rejecting the prior 50% rule.<sup>245</sup> In addition, the 2011 Update explained that the latest initiatives by New York will assist in producing compliant buildings, and enforcement of the ECCCNYS.<sup>246</sup> The 2011 Update noted the 2010 ECCCNYS established minimum requirements for energy-efficient buildings using prescriptive and performance-related provisions.<sup>247</sup>

### **2017 Update:**

In November 2014 the New York State Fire Prevention and Building Code Council voted to adopt an update to the commercial provision of the ECCCNYS.<sup>248</sup> The 2014 ECCCNYS makes it possible to use “new materials and innovative techniques that conserve energy.”<sup>249</sup> The 2014 ECCCNYS took effect on January 1, 2015.<sup>250</sup> In March 2016, the New York State Fire Prevention and Building Code Council adopted an update to both the commercial provisions and the residential provisions of the ECCCNYS.<sup>251</sup> The 2016 amendment addresses “the design and construction of energy-efficient building envelopes and the installation of energy-efficient mechanical, lighting and power systems through requirements emphasizing performance.”<sup>252</sup> The 2016 amendment became effective on October 3, 2016.<sup>253</sup>

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<sup>244</sup> 2009 Report, *supra* note 1, at 41 (citing Energy Conservation Construction Code Act § 11-103(b)).

<sup>245</sup> 2011 Update, *supra* note 2, at 9.

<sup>246</sup> *Id.* at 10.

<sup>247</sup> *Id.*

<sup>248</sup> N.Y. STATE DEP’T OF STATE, 2014 SUPPLEMENT TO THE NEW YORK STATE ENERGY CONSERVATION CONSTRUCTION CODE (2014), [https://www.dos.ny.gov/dcea/pdf/2014EnergySUPP\\_041114.pdf](https://www.dos.ny.gov/dcea/pdf/2014EnergySUPP_041114.pdf).

<sup>249</sup> DIV. OF CODE ENF’T & ADMIN., *Energy Conservation Construction Code of New York State*, N.Y. STATE DEP’T OF STATE, [https://www.dos.ny.gov/dcea/energycode\\_code.html](https://www.dos.ny.gov/dcea/energycode_code.html) (last visited Feb. 1, 2017).

<sup>250</sup> *Id.*

<sup>251</sup> N.Y. STATE DEP’T OF STATE, 2016 UNIFORM CODE SUPPLEMENT (2016), [http://www.dos.ny.gov/dcea/pdf/2016%20DOS\\_UniformCodeSupplement\\_03212016.pdf](http://www.dos.ny.gov/dcea/pdf/2016%20DOS_UniformCodeSupplement_03212016.pdf).

<sup>252</sup> DIV. OF CODE ENF’T & ADMIN., *Energy Conservation Construction Code of New York State*, N.Y. STATE DEP’T OF STATE, *supra* note 267.

<sup>253</sup> *Id.*

## 7. Require Schools to Meet Green Building Standards

The 2009 Report compared and contrasted the approach of the New York State Education Department (NYSED) with New York City.<sup>254</sup> The 2009 Report explained NYSED had not adopted a comprehensive state-wide standard of green building for schools but instead had a voluntary system called NY-CHPS (New York-Collaborative for High Performance Schools) Guidelines.<sup>255</sup> In contrast, New York City had adopted a 2005 law, Local Law 86, which requires specific green building standards, including for schools.<sup>256</sup> Ultimately, the 2009 Report recommended New York's adoption of mandatory green standards for new and substantially renovated schools based on NY-CHPS guidelines or on New York City's model. The 2011 Update noted New York still lacked a statewide school green building standard (it operated with a voluntary system).<sup>257</sup>

### **2017 Update:**

NYSED still has not adopted a comprehensive statewide green building standard. Not only can New York City's Local Law 86 serve as a model, the Center for Green Schools offers a guide on how state legislators can require green school construction.<sup>258</sup> The guide cites Maryland, Illinois, and Rhode Island as examples of states with green school legislation.<sup>259</sup> Generally speaking, the laws the report cites require newly constructed or renovated buildings to obtain some form of LEED certification.<sup>260</sup> New York can follow these states and enact legislation requiring new school construction and major renovation projects be built to trusted national green rating system guidelines. By using a third-party rating system, such as LEED, New York can efficiently ensure green benchmarks have been achieved. Moreover, doing so will demonstrate a commitment to providing healthy and safe schools, while exhibiting fiscal responsibility and promoting green jobs.

## 8. Adopt Conservation Requirements for Water and Wastewater Treatment Plants

The 2009 Report urged New York to “adopt minimum energy conservation requirements for water and wastewater treatment plants” and to adopt “more aggressive energy conservation

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<sup>254</sup> 2009 Report, *supra* note 1, at 42–43.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 43; *see* 2005 N.Y.C. Local Law 86, [http://www1.nyc.gov/assets/buildings/local\\_laws/ll\\_86of2005.pdf](http://www1.nyc.gov/assets/buildings/local_laws/ll_86of2005.pdf).

<sup>257</sup> 2011 Update, *supra* note 2, at 10.

<sup>258</sup> *See* THE CTR. FOR GREEN SCHOOLS, GREENING OUR SCHOOLS: A STATE LEGISLATOR'S GUIDE TO BEST POLICY PRACTICES (2010), [http://www.centerforgreenschools.org/sites/default/files/resource-files/GreeningOurSchools\\_PRINT.pdf](http://www.centerforgreenschools.org/sites/default/files/resource-files/GreeningOurSchools_PRINT.pdf).

<sup>259</sup> *Id.* at 15.

<sup>260</sup> *See id.*

requirements when these plants are funded through the Environmental Facilities Corporation (EFC).”<sup>261</sup>

By 2011, the recommendation made in the 2009 Report had not been implemented.<sup>262</sup> This result led to a shift in focus to New York State’s current conservation wastewater programs, including programs financed under the Commercial, Industrial, Municipal, and Institutional (CIMI) Program and programs financed through the Clean Water Act State Revolving Fund (SRF).<sup>263</sup> Additionally, the New York Power Authority (NYPA) announced in 2009 a campaign to reduce energy demand from water and wastewater treatment facilities by 20% by 2015 by promoting on-site solar electric systems, biogas recovery to supply on-site systems and energy efficiency measures.<sup>264</sup>

### **2017 Update:**

Since 2011, many of those programs still exist, though New York State has yet to require minimum energy requirements for wastewater treatment plants, including the SRF, which provides loans for new energy efficient or energy renewable projects;<sup>265</sup> NYSERDA’s FlexTech, which provides technical assistance and customized energy evaluations;<sup>266</sup> and the NYPA’s energy efficiency and renewable energy programs, which help upgrade publicly owned buildings throughout the state with energy-efficient materials.<sup>267</sup>

On December 28, 2012, Governor Cuomo issued an Executive Order directing state agencies to increase energy efficiency in state buildings by 20% by April 1, 2020.<sup>268</sup> Guidelines, published in September 2013, provided clarification to the scope of the Executive Order.<sup>269</sup> However, the guidelines do not clarify whether waste facilities funded through the EFC, fall under the

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<sup>261</sup> 2009 Report, *supra* note 1, at 44.

<sup>262</sup> See 2011 Update, *supra* note 2, at 11.

<sup>263</sup> See *id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Clean Water State Revolving Fund*, EPA, <http://www.epa.gov/cwsrf> (last visited Feb. 1, 2017).

<sup>266</sup> *Funding and Technical Assistance Program*, NYSERDA, <http://www.nyserdera.ny.gov/All-Programs/Programs/FlexTech-Program> (last visited Feb. 1, 2017).

<sup>267</sup> *Energy Services for Water and Wastewater Facilities*, N.Y. POWER AUTH., <https://www.nypa.gov/services/ESforWaterandWastewaterFacilities.htm> (last visited Feb. 1, 2017).

<sup>268</sup> See N.Y. Exec. Order No. 88, (Dec. 28, 2012), N.Y. COMP. CODES R. & REGS. tit. 9, § 8.88, <http://www.governor.ny.gov/news/no-88-directing-state-agencies-and-authorities-improve-energy-efficiency-state-buildings>. Executive Order 88 is the keystone of a larger initiative, BuildSmart NY, to accelerate energy efficiency in State buildings, while incorporating broader State policy goals to foster cost-effective investment, stimulate the clean energy marketplace, advance energy security and resiliency and protect the environment and public health.

<sup>269</sup> N.Y. POWER AUTH., EXECUTIVE ORDER 88 GUIDELINES: NEW YORK STATE GOVERNMENT BUILDINGS (2013), <https://www.nypa.gov/BuildSmartNY/Guidelines.pdf>.



Order.<sup>270</sup> New York should expand on the Executive Order 88 to include wastewater facilities funded through EFC.

Finally, the legislature passed the Water Infrastructure Improvement Act (WIIA) on March 31, 2015 as part of the 2015–2016 budget.<sup>271</sup> The WIIA provides the EFC \$200 million over three years to fund “water quality infrastructure projects.”<sup>272</sup> “Water quality infrastructure projects” are “sewage treatment works” as defined under the ECL or an “eligible project” under section 1160(4)(a), (b), (c), and (e) of the Public Health Law.<sup>273</sup> Funds are available only for the repair or replacement infrastructure or else projects to “compl[y] with environmental and public health laws and regulations related to water quality.”<sup>274</sup> While the WIIA does not provide funding specifically for conserving energy usage, repairs and replacements of infrastructure at wastewater treatment plants could certainly yield energy conservation benefits. The WIIA is popular: the State Legislature expanded the funding for the WIIA in the 2016–2017 budget by \$200 million. The ECF should make funding projects that improve the energy conservation of wastewater treatment facilities a priority.

## 9. Reinstatement Energy Planning Requirements in Article Six of the Energy Law

The 2009 Report called for the State Legislature to “amend Article 6 of the State Energy Law to reinstate the State Energy Planning Board.”<sup>275</sup> The 2011 Update recognized that, as recommended, the State Legislature did reinstate the State Energy Planning Board in 2009.<sup>276</sup> Primarily, the State Energy Planning Board was charged with crafting a comprehensive State Energy Plan by 2013.<sup>277</sup>

### **2017 Update:**

The State Energy Planning Board recently released its 2015 New York State Energy Plan.<sup>278</sup> The State Energy Plan advocates coordination with other State agencies that deal with energy policy to help the REV.<sup>279</sup> These partnerships, along with “private sector innovation and

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<sup>270</sup> See *id.* app. A.

<sup>271</sup> See 2015 N.Y. Laws ch. 60, pt. G, §§ 1–4.

<sup>272</sup> Press Release, Riverkeeper, Budget Agreement: \$200 million in Drinking Water and Sewer Infrastructure Grants (Mar. 31, 2015), <http://www.riverkeeper.org/news-events/news/water-quality/budget-agreement-200-million-in-drinking-water-and-sewer-infrastructure-grants/>.

<sup>273</sup> 2015 N.Y. Laws ch. 60, pt. G, § 2(1) (“For purposes of this act . . . “water quality infrastructure project” shall mean “sewage treatment works” as defined in section 17–1903 of the environmental conservation law or “eligible project” as defined in paragraphs (a), (b), (c) and (e) of subdivision 4 of section 1160 of the public health law.”).

<sup>274</sup> *Id.* § (3)(1).

<sup>275</sup> 2009 Report, *supra* note 1, at 44.

<sup>276</sup> 2011 Update, *supra* note 2, at 12.

<sup>277</sup> *Id.*; see also N.Y. ENERGY LAW § 6-102(4).

<sup>278</sup> N.Y. STATE ENERGY PLANNING BD., THE ENERGY TO LEAD, *supra* note 20.

<sup>279</sup> See *The Energy to Lead*, N.Y. STATE ENERGY PLANNING BD., *supra* note 20.



investment fueled by REV,” will put New York State on the best path to achieving its robust clean energy goals by 2030, including a “40% reduction in GHG emissions from 1990 levels,” a “50% increase of energy generation from renewable sources,” and a “600 trillion Btu increase in Statewide energy efficiency.”<sup>280</sup> The State Energy Plan solidifies the State Energy Planning Board’s continued role as the foundational governmental entity promoting clean energy within the State.

## **Land Use**

### **10. Amend SEQRA Regulations to Incorporate GHG Emission Considerations**

The 2009 Report recommended that DEC adopt revisions to Environmental Assessment Forms (EAFs) and create a technical guidance document defining how climate change will be considered under SEQRA.<sup>281</sup> As a related point, the 2009 Report urged DEC to amend its SEQRA regulations “so that some discussion of climate change (at a level appropriate in light of project characteristics) was more explicitly required for all actions undergoing Environmental Impact Statement (EIS) review.”<sup>282</sup> Additionally, the 2009 Report recommended amending 6 NYCRR 617.11(d)(5) “to provide that the findings statements issued by agencies upon the completion of a final EIS should also include a finding that the selected alternative incorporated cost-effective energy efficiency and renewable energy measures into its design, construction and operation to the maximum extent practicable, consistent with social, economic and other essential considerations.” Finally, the 2009 Report called for additional amendments to the SEQRA regulations to address GHG emissions as appropriate, such as what constitutes a “significant impact” from GHG emissions.<sup>283</sup>

At the time of the 2011 Update, DEC had proposed revisions to both the Full EAF (FEAF) and the Short EAF (SEAF), and the comment stage was still ongoing.<sup>284</sup> According to the 2011 Update, DEC was proposing structural and substantive changes to the EAFs, final versions of which are described below.<sup>285</sup> The 2011 Update did not address any progress regarding the 2009 Report’s call for updating the SEQRA regulations.

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<sup>280</sup> *Id.* A 600 trillion Btu increase in statewide energy efficiency “equates to a 23% reduction from 2012 in energy consumption in buildings.” N.Y. STATE ENERGY PLANNING BD., THE ENERGY TO LEAD, *supra* note 20, at 112.

<sup>281</sup> 2009 Report, *supra* note 1, at 45.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 46.

<sup>284</sup> 2011 Update, *supra* note 2, at 13.

<sup>285</sup> *Id.*

## **2017 Update:**

DEC adopted revised EAFs, which became effective on October 7, 2013.<sup>286</sup> The FEAF must be used for “Type I actions” in order to determine the significance of their potential environmental adverse impacts.<sup>287</sup> “Type I actions” are more likely to require the preparation of an EIS than Unlisted actions (in contrast to “Type II actions”, which do not require review under Part 617).<sup>288</sup> The SEAF must be used to determine the significance of any potential adverse environmental impacts of “Unlisted Actions” (those classified neither as Type I nor as Type II actions).<sup>289</sup>

The new EAFs make a number of important structural changes. Useful digital tools have been introduced and guides have been made available in order to make the filling out of the EAFs easier. For instance, DEC improved its website to provide instructions, background information, links to maps and illustrations, and additional guidance, all of which is generally referred to as the SEAF and FEAF “Workbooks.”<sup>290</sup> The EAFs themselves can be digitally filled out and saved with Acrobat Reader as PDF files.<sup>291</sup> Additionally, each section of the new forms has a hyperlink to the DEC website, where an explanation is provided on how to provide the requested information (for both the applicant or project sponsor and the lead agency). When appropriate, the explanation also contains hyperlinks to other relevant sources.

DEC has developed the EAF Mapper Application, which is specifically designed to facilitate the NY State Environmental Quality Review process by answering geographic or place-based

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<sup>286</sup> See *State Environmental Quality Review (SEQR) Act Forms*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/6191.html> (last visited Feb. 1, 2017). The revised EAFs were originally adopted on January 25, 2012, but then were amended on September 5, 2013. See N.Y. State Dep’t of Env’tl. Conservation, Amended Certificate of Adoption (Sept. 5, 2013),

[http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/amended61720.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/amended61720.pdf).

<sup>287</sup> *SEQR Handbook: Type I Actions*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/43711.html> (last visited Feb. 1, 2017).

<sup>288</sup> See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.4, 617.5.

<sup>289</sup> See *SEQR Handbook: Type I Actions*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 305.

<sup>290</sup> *How to Use the EAF Workbooks*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/90201.html> (last visited Feb. 1, 2017). DEC also makes available the SEQRA Handbook (last updated in 2010), which provides a reference guide to the procedures prescribed by SEQRA and addresses common questions that arise during the process of applying SEQRA, including questions on the content of a draft EIS in terms of GHGs. See N.Y. STATE DEP’T OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK (3d ed. 2010), [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf).

<sup>291</sup> See N.Y. State Dep’t of Env’tl. Conservation, Full Environmental Assessment Form; Part 1 – Project and Setting, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/feafpart1.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf); N.Y. State Dep’t of Env’tl. Conservation, Short Environmental Assessment Form: Part 1 – Project Information, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seafpartone.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seafpartone.pdf).

questions on both the SEAF and the FEAF.<sup>292</sup> The EAF Mapper provides its results by directly filling out many place-based questions in Part 1 of an electronically fillable SEAF or FEAF and returning the partially completed form to the applicant or sponsor to be finished.

The new FEAF also makes important substantive changes, incorporating questions (to be answered by the applicant or project sponsor) regarding GHG emissions and potential impacts of climate change (such as floods).<sup>293</sup> Other questions invoke smart growth and some of them—related to pollution—could be indirectly linked to environmental justice issues.<sup>294</sup> There are no questions related to energy conservation.<sup>295</sup> While some of the incorporated questions ensure that GHG emissions issues are taken into account during the environmental assessment process, DEC should incorporate (i) more straightforward questions on climate change-related impacts, smart growth and environmental justice; and (ii) specific questions in relation to energy conservation. In contrast, the new SEAF considers just a few questions that barely make reference to floods, wetlands and availability of transportation,<sup>296</sup> but does not consider any questions related to GHG emissions. It is advisable, therefore, that an evaluation be conducted on the feasibility of incorporating GHGs, climate change, and energy conservation-related questions in the SEAF.

While the substantive changes incorporated in the FEAF ensure that GHG emissions issues and a few climate change-related issues are taken into account during the early stage of the environmental assessment process, no amendments to the SEQRA regulations have yet been adopted to: (i) explicitly require discussion of climate change for all actions undergoing EIS review; (ii) provide that the findings statements issued under a final EIS include a finding that the selected alternative incorporates cost-effective energy efficiency and renewable energy measures into its design, construction and operation; nor (iii) explicitly address GHG emissions. As the 2009 Report urged, it is advisable that these amendments be adopted.

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<sup>292</sup> *EAF Mapper*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/eafmapper/> (last visited Feb. 1, 2017). DEC has also made available “New EAFs – EAFs for the 21st Century,” which is a Power Point Presentation “webinar” or “training program” on using the new (2013) EAFs, the Workbooks and the EAF Mapper. N.Y. State Dep't of Env'tl. Conservation, *The New EAFs: EAFs for the 21st Century*, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/eafwebinar.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/eafwebinar.pdf). According to the presentation slides, five live webinars were conducted during April and May 2014.

<sup>293</sup> See N.Y. State Dep't of Env'tl. Conservation, *Full Environmental Assessment Form: Part 1 – Project and Setting*, *supra* note 309.

<sup>294</sup> See *id.*

<sup>295</sup> See *id.* Question D.2.k. asks whether the proposed action will generate new or additional demand for energy and what the anticipated sources or suppliers are, but it does not mention energy conservation.

<sup>296</sup> See N.Y. State Dep't of Env'tl. Conservation, *Part 2 – Impact Assessment*, [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seafparttwo.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seafparttwo.pdf) (Question 6 inquires whether the proposed action “fails to incorporate reasonably available energy conservation or renewable energy opportunities.”).

In 2012 DEC completed the scoping process for the environmental impact review related to proposed amendments to the SEQRA regulations in order to “improve and streamline the SEQRA process without sacrificing meaningful environmental review.”<sup>297</sup> On February 8, 2017, DEC published notice of its proposal to amend the SEQRA regulations. Comments on the proposed amendments will be accepted by DEC through May 19, 2017. In terms of climate change-related issues, DEC has proposed to include the following as Type II actions: upgrades to buildings to meet energy codes; and the retrofit of an existing structure or facility to incorporate green infrastructure. These changes were discussed in the DEC’s Final Scope for the amendments.<sup>298</sup> Regarding green infrastructure, the DEC’s Final Scope stated that the rationale for its inclusion is that (i) the current language “could be interpreted to preclude the use of green infrastructure in place of the existing more conventional development techniques”; and (ii) “installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency and reduce generation of runoff.”<sup>299</sup> The proposed amendments also include as Type II actions the installation of five megawatts or less of rooftop solar energy arrays on existing structures not listed on the National or State Register of Historic Places nor determined to be eligible for listing on the State Register of Historic Places and the installation of five MW or less of solar energy arrays on sanitary landfills, brownfield sites, waste-water treatment facilities, sites zoned for industrial use or the installation of five MW or less of solar canopies at or above residential and commercial parking facilities (lots or parking garages) . With respect to the solar energy arrays, the rationale is that their installation can substantially reduce energy costs and GHG emissions.<sup>300</sup> Regarding landfills, the rationale is that the redevelopment of a closed sanitary landfill as a solar energy site would return a currently under-used site to a productive use, like those currently generating energy from the combustion of methane gas and connected to the electrical grid.<sup>301</sup>

With respect to impacts that must be discussed in any EIS, the proposed amendments add the consideration of the use of renewable energy sources to discussions about the impacts of proposed actions on the use and conservation of energy. Also, DEC proposes to add to the description of mitigation measures required in an EIS a description of measures to avoid or reduce both an action’s environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding.

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<sup>297</sup> See *State Environmental Quality Review Act – Proposed Amendments 2012*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/83389.html> (last visited Oct. 15, 2016).

<sup>298</sup> See N.Y. State Dep’t of Env’tl. Conservation, Final Scope for the Generic Environmental Impact Statement (GEIS) on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) 9 (Nov. 28, 2012), [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/617finalscope.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

## 11. Incorporate GHG Emission Considerations into Local Comprehensive Plans

The 2009 Report explained:

Land use is an important tool to address climate change in New York, largely because higher densities can encourage mass transit use and reduce trip lengths and, therefore, greenhouse gas emissions. Municipal actions, particularly zoning, are effective ways for municipalities to mitigate and adapt to climate change in the long term. Local governments' comprehensive plans provide a good opportunity to integrate transportation, energy efficiency, and land use planning to reduce GHG emissions.<sup>302</sup>

Accordingly, the 2009 Report recommended that the State Legislature amend the General City Law, the Town Law, and the Village Law to provide that municipal comprehensive plans consider GHG emissions and energy efficiency as well as adaptation to climate change when developing comprehensive plans.<sup>303</sup>

The 2011 Update noted that while the recommended amendments had not been passed, local governments were not precluded from considering GHG emissions and energy efficiency within a comprehensive plan.<sup>304</sup> It also documented that the New York State Climate Smart Communities Program, a creation of NYSERDA, DEC, DOS, and PSC, encouraged local action, “inciting towns, villages, and cities to achieve GHG emissions reductions within their community by pledging to combat climate change . . . by setting long-term emissions reductions goals, determining how these emissions can be reduced within the community, and by acting to cause these reductions.”<sup>305</sup> As of 2011, the program included eighty-five communities, and six of these member communities had chosen to achieve their goals through “sustainable transportation, climate change adaptation, and energy planning.”<sup>306</sup>

### **2017 Update:**

As of 2016, the previous recommendations to update comprehensive plan sections of state law have not been adopted, and state law does not require municipalities to have a comprehensive plan. However, the state has begun using Environmental Protection Fund grants and incorporating climate change and adaptation planning into the Local Waterfront Revitalization Program.<sup>307</sup> For more than 100 years, planners have been designing their communities. Comprehensive plans have changed a great deal in that time, but never so much as in the past

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<sup>302</sup> 2009 Report, *supra* note 1, at 46.

<sup>303</sup> *Id.* at 46–47.

<sup>304</sup> 2011 Update, *supra* note 2, at 13–14.

<sup>305</sup> *Id.* at 14.

<sup>306</sup> *Id.*

<sup>307</sup> *Sea Level Rise and Climate Change Adaptation*, N.Y. STATE DEP'T OF STATE, OFFICE OF PLANNING & DEV., <http://www.dos.ny.gov/opd/programs/SeaLevelRiseCC/index.html> (last visited Feb. 1, 2017).

several years. Today's plans focus on different topics—sustainability, social equity, community energy, and climate change are all front and center—and land use and transportation, to name just one pairing, are much better integrated. It is time to update the relevant portions of Town, Village, and General City Law to require baseline GHG emissions and consideration of other climate mitigation and adaption techniques as a critical, integrated step in the development of local environmental policy in comprehensive plans.

## 12. Encourage Wind Energy Projects, Including Those Located Offshore

The 2009 Report recommended that New York adopt broad policy support for wind energy development, including development of promising wind resources located offshore, and that it include statewide wind goals within its new Renewable Portfolio Standard.<sup>308</sup> The 2011 Update concluded that although “New York did not include a specific goal for wind energy development as a requirement in its [updated RPS in 2010], it had successfully sponsored a number of initiatives aimed at increasing wind capacity under the general framework of its RPS mandate.”<sup>309</sup> By 2011, a number of large-scale wind generators were participating in RPS programs, while NYSERDA offered “a suite of incentives for small-scale and customer-sited wind turbines.”<sup>310</sup>

### **2017 Update:**

For several years, the Main Tier program within New York's RPS has allowed NYSERDA to pay a fixed price production incentive and procure RPS attributes from competitively selected wind-powered electricity generators.<sup>311</sup> As of 2017, New York is home to 26 large-scale active wind energy projects operating under the RPS Main Tier, totaling 2,148 MW and creating enough electricity to power over 500,000 homes—a significant increase from the 425 MW referenced in the 2011 Update.<sup>312</sup> In 2015, the Main Tier was subsumed within the State's innovative REV proceeding by an order of PSC, which instituted the REV large-scale renewable track and later connected the large-scale renewable programs to the CES.<sup>313</sup> As one of the three

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<sup>308</sup> 2009 Report, *supra* note 1, at 47.

<sup>309</sup> 2011 Update, *supra* note 2, at 14.

<sup>310</sup> *Id.* at 14–15.

<sup>311</sup> See *Past Main Tier Solicitations Under the RPS*, NYSERDA, <https://www.nyseda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Portfolio-Standard/Past-Main-Tier-Solicitations> (last visited Feb. 1, 2017).

<sup>312</sup> See *Renewable Portfolio Standard*, NYSERDA, *supra* note 212; *Wind Power*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/40966.html> (last visited Feb. 1, 2017).

<sup>313</sup> Order Adopting Regulatory Policy Framework and Implementation Plan at 83, Reforming the Energy Vision, Case 14-M-0101 (N.Y. Pub. Serv. Comm'n Feb. 26, 2015); Notice Instituting Proceeding, Soliciting Comments and Providing for Technical Conference, Implementation of a Large-Scale Renewable Program, Case 15-E-0302 (N.Y. Pub. Serv. Comm'n June 1, 2015); see also NYSERDA, LARGE-SCALE RENEWABLE ENERGY DEVELOPMENT IN NEW YORK: OPTIONS AND ASSESSMENT 7 (2015),

main pillars of the REV proceeding, the PSC recently approved a ten-year, \$5 billion-dollar Clean Energy Fund.<sup>314</sup> NYSEDA will administer the CEF to accelerate the growth of New York's clean energy resources, including wind, and to move toward a more widely distributed energy system. One of the four main CEF portfolios, the NY Green Bank, will promote private investment in wind projects and has committed \$54 million to install over 160 wind turbines.<sup>315</sup> Further, a provision of the New York State Real Property Tax Law, which provides a 15-year real property tax exemption for certain wind energy systems both small and large, has been extended through the beginning of 2025.<sup>316</sup>

Since 2012, NYSEDA has also operated an On-Site Wind Turbine Incentive Program, incentivizing distributed, behind-the-meter wind resources as part of the Customer-Sited Tier of the RPS.<sup>317</sup> Over four years, this program offered approximately \$13.8 million in incentives to residential, commercial, institutional, and government wind energy systems with a maximum size of 2 MW.<sup>318</sup> The program expired in February 2016,<sup>319</sup> but was revived as the Small Wind Turbine Incentive Program in 2016 and will run through 2018.<sup>320</sup> Within REV, distributed wind resources will now be incentivized through a new Small Wind Investment Program, which is an extension of the CST and is initially budgeted for approximately \$6 million through 2018 for market development and innovation and research.<sup>321</sup> Although many uncertainties remain regarding specific policies and implementation of REV programs, many of the REV initiatives, such as community net metering, valuing distributed generation in utility rate-setting, and demonstration projects, will likely promote the distributed wind industry in New York.

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<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B26BD68A2-48DA-4FE2-87B1-687BEC1C629D%7D>.

<sup>314</sup> Order Authorizing the Clean Energy Fund Framework, *supra* note 225, at 106.

<sup>315</sup> *Id.*

<sup>316</sup> See N.Y. REAL PROP. TAX LAW § 487 (2015); see also *Solar, Wind, or Farm Waste Energy Systems*, N.Y. STATE DEP'T OF TAX'N & FIN., [https://www.tax.ny.gov/research/property/assess/manuals/vol4/pt1/sec4\\_01/sec487.htm](https://www.tax.ny.gov/research/property/assess/manuals/vol4/pt1/sec4_01/sec487.htm) (last visited Feb. 1, 2017).

<sup>317</sup> See NYSEDA, ON-SITE WIND TURBINE INCENTIVE PROGRAM: PROGRAM OPPORTUNITY NOTICE (PON) 2439 (2013); see also *PON 2439 Small Wind Turbine Incentive Program*, NYSEDA, <http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/PON-2439-Small-Wind-Turbine-Incentive-Program> (last visited Feb. 1, 2017).

<sup>318</sup> NYSEDA, ON-SITE WIND TURBINE INCENTIVE PROGRAM: PROGRAM OPPORTUNITY NOTICE (PON) 2439, *supra* note 337.

<sup>319</sup> *Id.*

<sup>320</sup> NYSEDA, SMALL WIND TURBINE INCENTIVE PROGRAM: PROGRAM OPPORTUNITY NOTICE (PON) 2439 (2016).

<sup>321</sup> See NYSEDA, Clean Energy Fund Investment Plan: Budget Accounting and Benefits Chapter 2, Proceeding on Motion of the Commission to Consider a Clean Energy Fund, Case 14-M-0094 (N.Y. Pub. Serv. Comm'n Feb. 16, 2016).

Regarding offshore wind, NYSERDA has commissioned several assessments by industry experts, but there is still no active offshore wind development in New York.<sup>322</sup> NYSERDA continues to predict that offshore wind could be a major source of power in the State, particularly the NYC metropolitan area, and assessments have revealed that the Atlantic waters offshore from New York could support up to 39 GW of renewable power.<sup>323</sup> In the course of the REV proceeding, many environmental stakeholders have requested that the PSC create a specific tier of the CES to provide upstream financial support for development of offshore wind resources.<sup>324</sup>

Lamentably, the competitive solicitation process for the Great Lakes Offshore Wind Project, referenced in the 2011 Update, was terminated by the NYPA in September 2011 without awarding a contract for project development, due in part to high estimated annual costs and economic conditions.<sup>325</sup> However, the Long Island–New York City Offshore Wind Collaborative—a partnership of the NYPA, Long Island Power Authority (LIPA), and ConEd—is referenced in the 2011 Update with regard to its 2011 interconnection application with the New York Independent System Operator,<sup>326</sup> is moving forward successfully. March 2016 marked an important step in this process: the Bureau of Ocean Energy Management (BOEM) defined a wind energy area of 81,130 acres based on NYPA’s request, located eleven miles south of Long Island.<sup>327</sup> BOEM conducted an environmental assessment in this area, considering the

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<sup>322</sup> See *Offshore Wind Energy*, NYSERDA, <http://www.nyserdera.ny.gov/offshorewind> (last visited Feb. 1, 2017). [Although, as noted above, the project off Montauk is projected by 2030 to power 1.25 million New York homes, starting with the 90-megawatt project 30 miles off Montauk on Long Island’s South Fork and that Governor Cuomo has set out a nation-leading plan to jumpstart development of as much as 2,400 megawatts of offshore wind power in the state, as part of New York’s plan to get 50 percent of its electricity from renewable sources by 2030. If so, New York State will become the nation’s leader on clean, offshore wind power.]

<sup>323</sup> *Id.* The State has also sponsored significant research of marine and tidal resources offshore from New York for potential development of marine and hydrokinetic (MHK) power. See, e.g., NYSERDA, MARINE AND HYDROKINETIC ENVIRONMENTAL POLICY WORKSHOP: FINAL REPORT (Report No. 12-27b) (2012).

<sup>324</sup> NYSERDA and other agencies will take into account the findings of a commissioned 2015 cost reduction study by the University of Delaware’s Special Initiative for Offshore Wind, which recommended technical and financial best practices for New York agencies and identified cost reductions expected to result from technology advances. The report found that New York could intervene to create a visible market of scale, prepare port facilities and develop a future workforce, all of which could reduce offshore wind costs by approximately 30%. See UNIV. OF DEL. SPECIAL INITIATIVE ON OFFSHORE WIND, NEW YORK OFFSHORE WIND COST REDUCTION STUDY 17, 40 (2015) (Prepared for NYSERDA), <https://www.ceoe.udel.edu/File%20Library/About/SIOW/2016-06-ny-offshore-wind-cost-reduction-study-ff8.pdf>.

<sup>325</sup> Press Release, N.Y. Power Authority, NY Power Authority Trustees Vote to End Proposed Great Lakes Offshore Wind Project (Sept. 27, 2011), <https://www.nypa.gov/Press/2011/110927b.html>.

<sup>326</sup> 2011 Update, *supra* note 2, at 15.

<sup>327</sup> See Press Release, U.S. Dep’t of Interior, Secretary Jewell Announces Milestone for Commercial Wind Energy Development Offshore New York (Mar. 16, 2016),



impacts of conducting surveys and installing resource assessment facilities in the area.<sup>328</sup> “After reviewing comments received on the Environmental Assessment, BOEM removed about 1,780 acres from the lease area due to environmental concerns regarding a seafloor feature known as the Cholera Bank.”<sup>329</sup> BOEM had moved forward with eleven other commercial wind energy leases off the Atlantic coast prior to this one.<sup>330</sup>

Impressively, Governor Cuomo committed in his 2017 State of the State Address to building 2.4 gigawatts (GW) of wind energy offshore by 2030.<sup>331</sup> NYSERDA estimates 2.4 GW of offshore wind could power 1.25 million homes.<sup>332</sup> The contours of this goal will become clearer with the completion of the Offshore Wind Master Plan by the end of 2017.<sup>333</sup> New York began the process by crafting a Blueprint for the New York State Offshore Wind Master Plan in 2016.<sup>334</sup> More immediately, Governor Cuomo called on LIPA to approve a 90 MW offshore wind facility located 30 miles southeast of Montauk, which would power as many as 50,000 homes.<sup>335</sup> The Blueprint and the Offshore Wind Master Plan will play a critical role in meeting the aggressive goals of the REV and CES, notably the goal of providing 50% renewable energy by 2030.<sup>336</sup> Indeed, in the State of the State, Governor Cuomo suggested offshore wind may play a role in eventually providing 100% renewable energy in New York.<sup>337</sup>

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<https://www.doi.gov/pressreleases/secretary-jewell-announces-milestone-commercial-wind-energy-development-offshore-new-york-wind-energy-development-offshore-new-york>.

<sup>328</sup> *Id.*

<sup>329</sup> Press Release, U.S. Dep’t of Interior, Interior Department to Auction Over 79,000 Acres Offshore New York for Wind Energy Development (Oct. 27, 2016), <https://www.doi.gov/pressreleases/interior-department-auction-over-79000-acres-offshore-new-york-wind-energy-development>; *see also* *New York Activities*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/New-York/> (last visited Feb. 1, 2017).

<sup>330</sup> Press Release, U.S. Dept. of Interior, *supra* note 347.

<sup>331</sup> Joshua S. Hill, *New York Governor Cuomo Commits to Offshore Wind*, CLEANTECHNICA, Jan. 11, 2017, <https://cleantechnica.com/2017/01/11/new-york-governor-cuomo-commits-offshore-wind/>; Press Release, Office of the Governor, Governor Cuomo Presents 25th Proposal of 2017 State of the State: Nation’s Largest Offshore Wind Energy Project Off Long Island Coast and Unprecedented Commitment to Develop up to 2.4 Gigawatts of Offshore Wind Power by 2030 (Jan. 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-25th-proposal-2017-state-state-nations-largest-offshore-wind-energy>.

<sup>332</sup> *Offshore Wind Energy*, NYSERDA, *supra* note 342.

<sup>333</sup> *See* Press Release, Office of the Governor, *supra* note 351.

<sup>334</sup> NYSERDA, BLUEPRINT FOR THE NEW YORK STATE OFFSHORE WIND MASTER PLAN (2016), <https://www.nyserdera.ny.gov/-/media/Files/Publications/Research/Biomass-Solar-Wind/New-York-State-Offshore-Wind-Blueprint.pdf>.

<sup>335</sup> Press Release, Office of the Governor, *supra* note 351.

<sup>336</sup> NYSERDA, *supra* note 354; Press Release, Office of the Governor, *supra* note 351; *see also supra* notes 221–23 and accompanying text.

<sup>337</sup> Hill, *supra* note 351; *Governor Cuomo Calls on LIPA to Approve Offshore Wind Project Southeast of Montauk*, MONTAUK PATCH, Jan. 10, 2017, <http://patch.com/new-york/montauk/governor-cuomo-calls-lipa-approve-offshore-wind-project-southeast-montauk>.

## Vehicles & Transportation

### 13. Strive for a Ten Percent Reduction in Vehicle Miles Traveled

The 2009 Report urged New York to strive for a 10% reduction in vehicle miles traveled below business as usual within 10 years, and for the state to continue its efforts to reach this goal.<sup>338</sup> Achieving this goal would result in a reduction of approximately 2.75 million metric tons of CO<sub>2</sub> emissions in 2020. The 2011 Update noted that state's use of Transportation Investments Generating Economic Recovery (TIGER) funds to boost intermodal transit projects in the state and recommended the State Legislature adopt legislation for a congestion pricing program to reduce New York City's traffic congestion.<sup>339</sup> It also recommended providing more incentives for transit-oriented development (TOD) and acknowledged the passage of SGPIPA, which was intended to address sprawl by requiring certain state agencies to approve, undertake and fund infrastructure projects in a manner that is consistent with smart growth principles.<sup>340</sup>

#### 2017 Update:

The DEC provides information about reducing the energy used in transportation,<sup>341</sup> and the TCI is researching how to reduce vehicle miles traveled through its Sustainable Communities program.<sup>342</sup> However, New York's efforts to actually reduce vehicle miles traveled are limited. There have been positive efforts to promote multimodal transit options including walking, biking, and limited transit. However, despite SGPIPA, EFC has continued to fund sprawl-inducing water and sewer infrastructure projects, and transportation planning outside of the New York City metro area is based on rehabbing roads and bridges. There have been several positive TOD projects in Westchester and surrounding counties surrounding MTA stations, but the State needs to reinvest and rebuild public transit.

### 14. Consider Feebates for the Purchase of New Vehicles

The 2009 Report recommended that the State Legislature pass legislation creating a system of "feebates" to strategically incentivize the purchase of more fuel-efficient vehicles: in essence, fees should be imposed on new vehicles with low fuel economy, while rebates should be given to new vehicles that have high fuel economy.<sup>343</sup> The 2011 Update pointed out that New York State had not implemented a feebate system.<sup>344</sup> However, the 2011 Update highlighted other programs to incentivize the purchase of Alternative Fuel Vehicles (AFVs), including the Clean Pass program, which allows eligible low-emission, energy-efficient vehicles to use the 40-mile

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<sup>338</sup> 2009 Report, *supra* note 1, at 47–48.

<sup>339</sup> 2011 Update, *supra* note 2, at 16.

<sup>340</sup> *Id.* at 16–17; *see also* N.Y. ENVTL. CONSERV. L. § 6-0107.

<sup>341</sup> *Reduce Municipal Energy Use for Transportation*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/56925.html> (last visited Feb. 1, 2017).

<sup>342</sup> *See supra* notes 121–27 and accompanying text.

<sup>343</sup> 2009 Report, *supra* note 1, at 48.

<sup>344</sup> 2011 Update, *supra* note 2, at 18.

Long Island Expressway High Occupancy Vehicle lane, regardless of the number of occupants in the vehicle.<sup>345</sup> NYSERDA had also joined with the Electric Power Research Institute to conduct an engineering study of the effects of plug-in hybrid vehicles on the state's electrical grid.<sup>346</sup>

### **2017 Update:**

New York State has still not implemented a feebate system. Nevertheless, New York has adopted several programs to encourage, enable and facilitate the use of fuel-efficient vehicles and AFVs, including the production of cleaner fuels.<sup>347</sup> For instance, the “New York Truck Voucher Incentive Program,” a program aimed at reducing the incremental costs of purchasing AFVs for medium to heavy private and public truck and bus fleets.<sup>348</sup> The Port Authority of New York and New Jersey also operates the Regional Truck Replacement Program, which aims at covering up to 50% of the cost to replace a heavily emitting truck, with a maximum of \$25,000, whichever is less.<sup>349</sup> In addition, DEC has continued to add eligible vehicles to the Clean Pass Program, which now comprises more than 50 models.<sup>350</sup> The Green Pass Discount Plan offers a 10% discount on the E-Z Pass to hybrid vehicles getting at least 45 miles to the gallon, including the vehicles eligible for the Clean Pass Program.<sup>351</sup> Vehicles powered

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 19.

<sup>347</sup> See *Electric Vehicle Programs*, NYSERDA, <https://www.nyserdera.ny.gov/Researchers-and-Policymakers/Electric-Vehicles/Electric-Vehicle-Programs> (last visited Feb. 1, 2017); *Transportation How-To for Municipalities*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/57108.html> (Feb. 1, 2017); *Green Driver State Incentives in New York*, DMV.ORG, <http://www.dmv.org/ny-new-york/green-driver-state-incentives.php> (last visited Feb. 1, 2017).

<sup>348</sup> NEW YORK STATE, *Truck Voucher Incentive Program*, <https://truck-vip.ny.gov/about.php> (last visited Feb. 1, 2017). This program consists of three separate funds; one to encourage the purchase of electric vehicles, one to encourage the purchase of AFVs, and one to encourage the purchase of diesel emission control technologies. *Id.* NYSERDA also provides information to delivery fleets to determine if compressed natural gas vehicles are an option and, if so, how to integrate them into the fleet. NYSERDA, *GUIDEBOOK—NATURAL GAS FOR DELIVERY FLEETS IN NEW YORK* (2012), <https://www.nyserdera.ny.gov/-/media/Files/EIBD/Research/CNG/cng-delivery-fleets.pdf>.

<sup>349</sup> *Regional Truck Replacement Program*, PORT AUTH. OF N.Y. & N.J., <http://www.panynj.gov/truckers-resources/truck-replacement.html> (last visited Feb. 1, 2017). According to the website, only applications for replacement trucks with engines model year 1994 and 1995 are currently being accepted.

<sup>350</sup> *New York's Clean Pass Program*, N.Y. STATE DEP'T OF TRANSP., <https://www.dot.ny.gov/portal/page/portal/programs/clean-pass> (last visited Feb. 1, 2017).

<sup>351</sup> *Green Pass Discount Program*, N.Y. THRUWAY AUTH., <http://www.thruway.ny.gov/ezpass/greentag.html> (last visited Feb. 1, 2017). “The E-ZPass is a regional electronic toll collection system that can be used throughout New York State and beyond,” providing drivers non-stop travel and reduced travel time, as well as helping to reduce congestion. *What Is E-ZPass?*, N.Y. THRUWAY AUTH., <http://www.thruway.ny.gov/ezpass/whatis.html> (last visited Feb. 1, 2017).

exclusively by electricity are exempt from both the on-board diagnostic system and low-enhanced emissions inspections.<sup>352</sup>

Alternative fuel (CNG, hydrogen and E85) used to operate a motor vehicle engine was previously exempt from state sales and use taxes.<sup>353</sup> Other incentives also exist: New York has a refundable credit for production of biofuel on or after January 1, 2006, and before January 1, 2020, at a biofuel plant located in New York State.<sup>354</sup> The credit is equal to fifteen cents per gallon of biofuel produced at a biofuel plant located in New York State, after the production of the first 40,000 gallons per year presented to market. The credit limit is \$2.5 million per entity per tax year and can be claimed for four consecutive tax years per biofuel plant. Additionally, New York has a nonrefundable tax credit for the purchase of recharging property for electric vehicles and AFVs.<sup>355</sup>

New York is also a party to two regional transportation initiatives: (i) the Northeast Electric Vehicle Network, a subsidiary of the Transportation & Climate Initiative and lays the groundwork for the deployment of electric vehicles throughout the Northeast; and (ii) the Multi-State ZEV Task Force, a program committing eight states to collectively have at least 3.3 million ZEVs operating on their roadways by 2025.<sup>356</sup> ChargeNY, which “aims to reach 3,000 [plug-in electric vehicle] charging stations to support an expected 30,000–40,000 [plug-in electric vehicles] on the road in New York by 2018,” is a critical part of the latter initiative.<sup>357</sup>

Notwithstanding the important steps taken so far, it is advisable that legislation be considered to formally impose fees on the purchase of low fuel economy vehicles and offer rebates for the purchase of fuel-efficient vehicles and AFVs of all classes, including passenger vehicles.

## 15. Encourage Government Purchasing of Alternative Fuel Vehicles

The 2009 Report recommended that New York should broaden incentives and requirements for Government AFV purchases, by the following actions: First, Executive Order 111, which mandated that, by 2010, state agencies may only purchase AFVs for light-duty vehicle purchases, should be expanded in order to include also medium and heavy vehicles, unless the purchase of such vehicles is unduly expensive or otherwise not suitable as an AFV; Second,

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<sup>352</sup> *New York Vehicle Inspection Program (NYVIP2)*, N.Y. STATE DEP’T OF MOTOR VEHICLES, <http://dmv.ny.gov/inspection/new-york-vehicle-inspection-program-nyvip> (last visited Feb. 1, 2017).

<sup>353</sup> *See Transportation How-To for Municipalities*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 367.

<sup>354</sup> *Biofuel Production Credit*, N.Y. STATE DEP’T OF TAX’N & FIN., <https://www.tax.ny.gov/pit/credits/biofuel.htm> (last visited Feb. 1, 2017).

<sup>355</sup> *See Alternative Fuels and Electric Vehicles Recharging Property Tax Credit*, N.Y. STATE DEP’T OF TAX’N & FIN., [https://www.tax.ny.gov/pit/credits/alt\\_fuels\\_elec\\_vehicles.htm](https://www.tax.ny.gov/pit/credits/alt_fuels_elec_vehicles.htm) (last visited Feb. 1, 2017).

<sup>356</sup> *See supra* notes 95–114 and accompanying text.

<sup>357</sup> *See ChargeNY*, NYSERDA, *supra* note 100.

NYSERDA should broaden its grant programs to provide for 100% reimbursement of the incremental costs of purchasing other municipal vehicles besides buses and expand its program for grants for private AFV fleets throughout the state; and third, the State Legislature should enact legislation requiring all municipalities to purchase AFV vehicles in instances when the state provides financial assistance or require it in all instances unless it is unduly expensive or otherwise not suitable.<sup>358</sup> The 2011 Update stated that some progress had been made in boosting government procurement of AFVs.<sup>359</sup> However, the original three recommendations remained.

### **2017 Update:**

On December 28, 2012, Governor Andrew Cuomo signed Executive Order 88,<sup>360</sup> directing state agencies and authorities to improve the energy efficiency of state buildings. The order also revoked and superseded Executive Order 111, and did not provide any new AFV state purchase requirement. Therefore, currently there is not any similar mandate. A new provision mandating that state agencies may only purchase AFVs for light-duty, medium and heavy vehicles should be adopted. Notwithstanding the above, as part of a pilot Clean Fleets NY program, DEC, NYPA, and NYSERDA, among other agencies, will ensure in 2016 that at least 50% of new administrative-use vehicles will be ZEVs, including battery electric, plug-in electric hybrid, or hydrogen fuel cell vehicles.<sup>361</sup> This pilot would be aimed at exploring innovative ZEV acquisition models (such as leasing) to take advantage of federal tax incentives and lifecycle savings to reduce costs.

NYSERDA's New York Truck Voucher Incentive Program (NYT-VIP), which aims at reducing the cost of electric vehicles and AFVs for truck and bus fleets that purchase and operate the vehicles in the State of New York, covers 80% of the incremental cost.<sup>362</sup> Of the three funds that compose the program, one—the New York State Electric Vehicle – Voucher Incentive Fund (NYSEV-VIF)—applies to public fleets and provides vouchers that cover the 80% of the cost of all-electric vehicles up to \$60,000 per vehicle.

## **16. Promote Energy-Saving Vehicle Maintenance Techniques**

The 2009 Report encouraged the Department of Motor Vehicles (DMV) to promote vehicle maintenance techniques that would boost energy efficiency and conservation, such as topping off gas and oil, keeping tires fully inflated, and changing clogged air filters.<sup>363</sup> The 2011 Update had several additional recommendations, such as including adding tire pressure and other factors that affect gas mileage to mandated inspections, providing motorists with information on vehicle

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<sup>358</sup> 2009 Report, *supra* note 1, at 49.

<sup>359</sup> 2011 Update, *supra* note 2, at 20–21.

<sup>360</sup> See N.Y. Exec. Order No. 88, *supra* note 286.

<sup>361</sup> *Electric Vehicle Programs*, NYSERDA, *supra* note 367.

<sup>362</sup> NEW YORK STATE, *Truck Voucher Incentive Program*, *supra* note 368.

<sup>363</sup> 2009 Report, *supra* note 1, at 49–50.

maintenance through mailings or online, and fuel-saving techniques available on DMV's website.<sup>364</sup>

### **2017 Update:**

While the New York DMV has yet to implement any of the proposed changes in the 2011 Update, the Port Authority of New York and New Jersey has promoted the Drive Green, Save Green Campaign, which is an initiative that highlights “eco driving,” the value of driving more efficiently and maintaining a vehicle.<sup>365</sup> The North Carolina Department of Transportation has advanced their Drive Green, Save Green by posting videos on their webpage.<sup>366</sup> This is an initiative that the NYDOT and DMV, in addition to the Port Authority, should be advertising to motorists via mailings and online. Other sources, such as the 2016 Fuel Economy Guide, also provide information on how efficient driving and vehicle maintenance can improve fuel economy.<sup>367</sup>

## **Other Initiatives**

### **17. Expand the Regional Greenhouse Gas Initiative**

The 2009 Report urged RGGI to expand to cover all GHG emitters.<sup>368</sup> It also suggested RGGI should lower the then-existing emissions cap of a 10% reduction by 2018.<sup>369</sup> Finally, the 2009 Report recommended limiting the use of auction proceeds to energy efficiency programs and emissions reduction technologies.<sup>370</sup> The 2011 Update noted the third recommendation had not been accomplished.<sup>371</sup> However, the Update noted the RGGI Memorandum of Understanding provides for a 2012 program review, which was then underway, and that reducing the emissions cap and expanding RGGI into other sectors of the economy were being considered.<sup>372</sup>

Additionally, in 2009, Indeck Corinth, a gas-fired power plant, challenged New York's participation in RGGI as unconstitutional and DEC's and NYSERDA's promulgation of the CO<sub>2</sub> Budget Trading Program and the CO<sub>2</sub> Allowance Auction Program as arbitrary and

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<sup>364</sup> 2011 Update, *supra* note 2, at 21.

<sup>365</sup> *Drive Green, Save Green*, PORT AUTH. OF N.Y. & N.J., <http://www.panynj.gov/bridges-tunnels/drive-green.html> (last visited Feb. 1, 2017).

<sup>366</sup> *Drive Green, Save Green*, N.C. DEP'T OF TRANSP., <http://www.ncdot.gov/travel/drivegreen/> (last visited Feb. 1, 2017).

<sup>367</sup> U.S. DEPARTMENT OF ENERGY & U.S. DEPARTMENT OF ENVIRONMENTAL PROTECTION AGENCY, FUEL ECONOMY GUIDE 4 (2016), <http://www.fueleconomy.gov/feg/pdfs/guides/FEG2016.pdf>.

<sup>368</sup> 2009 Report, *supra* note 1, at 50.

<sup>369</sup> *Id.* at 51.

<sup>370</sup> *Id.*

<sup>371</sup> 2011 Update, *supra* note 2, at 22.

<sup>372</sup> *Id.* at 22–23; *see also* Reg'l Greenhouse Gas Initiative, Memorandum of Understanding 10 (Dec. 20, 2005), [http://www.rggi.org/docs/mou\\_12\\_20\\_05.pdf](http://www.rggi.org/docs/mou_12_20_05.pdf).

capricious.<sup>373</sup> Those claims were dismissed as part of a 2010 consent decree,<sup>374</sup> in which “ConEd will pay Indeck and the intervenors for the cost of allowances in excess of those allocated to them under DEC rules, and that NYSERDA will allot a portion of RGGI proceeds to offset ConEd’s costs.”<sup>375</sup>

### **2017 Update:**

RGGI has completed the 2012 program review mentioned in the 2011 Update and updated its model rule.<sup>376</sup> As a part of the 2012 program review, the regional cap was lowered to 91 million tons.<sup>377</sup> But the cap is still well above the current emission level due largely to the conversion of coal-burning plants to natural gas, and to the success of energy efficiency measures. The other recommendations sought by the 2009 Report and 2011 Update have not been made. Nor has NYSERDA changed its operating plan or rules to limit use of auction proceeds to energy efficiency and emissions reduction programs.<sup>378</sup> Following the previous update, there is still no statutory provision that codifies the limitations on uses to which RGGI auction proceeds can be devoted. Additionally, NYSERDA reports since 2011 have not mentioned including other sectors along the lines of the Western Climate Initiative or the Midwest Governors’ Greenhouse Gas Accord. RGGI is currently conducting a 2016 program review, and it should consider expanding to cover all GHG emitters and should also decrease its cap further.<sup>379</sup>

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<sup>373</sup> Consent Decree, *Indeck Corinth, L.P. v. David Paterson, et al.*, Index No. 5280-09 (N.Y. Sup. Ct. June 2015), <http://op.bna.com.s3.amazonaws.com/hl.nsf/r%3FOpen%3Dthyd-7z2nhd>.

<sup>374</sup> *Id.*

<sup>375</sup> *Settlement Reached in Regional Greenhouse Gas Initiative Lawsuit*, SIVE, PAGET, & RIESEL, P.C. (Jan. 14, 2010), <http://www.sprlaw.com/settlement-reached-in-regional-greenhouse-gas-initiative-lawsuit/>.

<sup>376</sup> See *2012 Program Review*, REG’L GREENHOUSE GAS INITIATIVE, <http://rggi.org/design/program-review> (last visited Feb. 1, 2017); REG’L GREENHOUSE GAS INITIATIVE, MODEL RULE (2013), [http://rggi.org/docs/ProgramReview/\\_FinalProgramReviewMaterials/Model\\_Rule\\_FINAL.pdf](http://rggi.org/docs/ProgramReview/_FinalProgramReviewMaterials/Model_Rule_FINAL.pdf).

<sup>377</sup> See REG’L GREENHOUSE GAS INITIATIVE, RGGI 2012 PROGRAM REVIEW: SUMMARY OF RECOMMENDATIONS TO ACCOMPANY MODEL RULE AMENDMENTS 1 (2013), [http://rggi.org/docs/ProgramReview/\\_FinalProgramReviewMaterials/Recommendations\\_Summary.pdf](http://rggi.org/docs/ProgramReview/_FinalProgramReviewMaterials/Recommendations_Summary.pdf); see also REG’L GREENHOUSE GAS INITIATIVE, MODEL RULE, *supra* note 396.

<sup>378</sup> As in 2009, auction proceeds may be used for “reasonable administrative costs incurred by [NYSERDA] in undertaking the activities described in this Part and for administrative costs, auction design and support costs, and program design and support costs associated with the CO2 Budget Trading Program, whenever incurred.” 21 N.Y. COMP. CODE OF R. & REGS. tit. 21, § 507.4(d); see also NYSERDA, NEW YORK’S REGIONAL GREENHOUSE GAS INITIATIVE INVESTMENT PLAN: 2015 OPERATING PLAN (2015), <https://www.nyserda.ny.gov/-/media/Files/EE/RGGI/2015-RGGI-Operating-Plan.pdf>.

<sup>379</sup> *2016 Program Review*, REG’L GREENHOUSE GAS INITIATIVE, <http://rggi.org/design/2016-program-review> (last visited Feb. 1, 2017).



## 18. Pursue Carbon Capture and Sequestration (CCS) in New York if Federal Funds are Available

The 2009 Report urged New York to pursue the development of carbon capture and sequestration (CCS) technology to the extent federal funds are available.<sup>380</sup> The 2009 Report also recommended identifying impediments to the development of CCS technology.<sup>381</sup> Finally, if CCS technology could be used, the Report recommended developing appropriate regulatory safeguards, such as a requirement that 90% of CO<sub>2</sub> be captured and sequestered.<sup>382</sup> The 2011 Update explained that no federal funds had been made available for CCS in New York, and that a fifty MW demonstration proposed for Jamestown, New York had been denied funding by the U.S. Department of Energy.<sup>383</sup>

### **2017 Update:**

There is still no federal funding available for CCS in New York State. However, federal CCS funding has been made available to several projects in other states.<sup>384</sup> The debate over CCS is both rigorous and ongoing; proponents and opponents of CCS technology continue to make their case to the public.<sup>385</sup>

## 19. Promote Green Workforce Development in New York

The 2009 Report recommended the promotion of green collar jobs through enhanced education and job training programs.<sup>386</sup> It also recommended the PSC adopt a PSC Working Group's suite

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<sup>380</sup> 2009 Report, *supra* note 1, at 52.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> See 2011 Update, *supra* note 2, at 23.

<sup>384</sup> Power, *Power Giants to Get Federal Funds to Develop Large-Scale Carbon Capture Pilots*, POWER, Nov. 1, 2015, <http://www.powermag.com/power-giants-to-get-federal-funds-to-develop-large-scale-carbon-capture-pilots/>.

<sup>385</sup> See, e.g., David Bookbinder, Opinion, *Lack of Regulation Is as Big a Problem as Costs for Carbon Capture*, N.Y. TIMES, July 7, 2016, <http://www.nytimes.com/roomfordebate/2016/07/07/clean-coal-or-a-dirty-shame/lack-of-regulation-is-as-big-a-problem-as-costs-for-carbon-capture>; David Hawkins, Opinion, *Despite Its Problems, Carbon Capture Is a Useful Alternative*, N.Y. TIMES, July 7, 2016, <http://www.nytimes.com/roomfordebate/2016/07/07/clean-coal-or-a-dirty-shame/despite-its-problems-carbon-capture-is-a-useful-alternative>; Howard J. Herzog, Opinion, *Carbon Capture Is Technically Feasible, and It Can Be Financially Feasible*, N.Y. TIMES, July 7, 2016, <http://www.nytimes.com/roomfordebate/2016/07/07/clean-coal-or-a-dirty-shame/carbon-capture-is-technically-feasible-and-it-can-be-financially-feasible>; Allison Kole, Opinion, *It's Too Late for Expensive Carbon Capture Technology to Help the Climate*, N.Y. TIMES, July 7, 2016, <http://www.nytimes.com/roomfordebate/2016/07/07/clean-coal-or-a-dirty-shame/its-too-late-for-expensive-carbon-capture-technology-to-help-the-climate>.

<sup>386</sup> 2009 Report, *supra* note 1, at 52.



of recommendations to boost the green jobs economy.<sup>387</sup> The 2011 Update noted the New York State Legislature passed the Green Jobs/Green New York Bill, which creates green job opportunities for new entrants into the state's workforce, the long-term unemployed and displaced workers.<sup>388</sup> The 2011 Update also noted that the PSC had made progress supporting green jobs, pointing to a PSC order from June 2009 Authorizing Workforce Development Initiatives and approving a Workforce Development Program (WFD) to be administered by NYSERDA.<sup>389</sup> One way the Green Jobs, Green New York bill was implemented was by encouraging retrofits of residential and commercial properties, and the Update explained three financing possibilities —property assessed clean energy (PACE), on-bill recovery financing, and direct loans—but that only direct loans were being used at that time.<sup>390</sup>

### **2017 Update:**

On March 30, 2012, NYSERDA petitioned PSC to have Energy Efficiency Portfolio Standard (EEPS) funding allocated for energy and gas reallocated for WFD explaining the WFD Operating Plan “detailed specific goals to provide the present and future workforce with the technical skills necessary to serve the needs of the portfolio of programs funded through EEPS, and to overcome the barriers to workforce training and to expand the existing energy efficiency training infrastructure across the State,” and that: “Using EEPS-1 funds, NYSERDA established the necessary infrastructure, recruited training partners and trained new instructors, and supported curriculum development and equipment purchases to achieve these goals. EEPS-2 funding is intended to capitalize on these investments.”<sup>391</sup> NYSERDA closed by stating:

As the Commission acknowledged in its June 2009 Order, WFD initiatives are essential to remediate the skills gap and to minimize the inefficient use of public resources and shortages of specially-trained workers in the majority of occupations in the energy efficiency sector. With the Commission's support, we have built a strong infrastructure and statewide network to support WFD. NYSERDA respectfully seeks the Commission's approval to allocate \$24 million in uncommitted EEPS funds to continue these efforts as described herein.<sup>392</sup>

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<sup>387</sup> *Id.* at 53–54.

<sup>388</sup> 2011 Update, *supra* note 2, at 23; *see* Green Jobs–Green New York Act of 2009, 2009 N.Y. Laws ch. 487 (codified at N.Y. PUB. AUTH. LAW §§ 1890 through 1899-a).

<sup>389</sup> 2011 Update, *supra* note 2, at 24; *see* Order Authorizing Workforce Development Initiatives, Energy Efficiency Portfolio Standard, Case 07-M-0548 (N.Y. Pub. Serv. Comm'n June 22, 2009); *see also* NYSERDA, GREEN JOBS GREEN NEW YORK: WORKFORCE DEVELOPMENT OPERATING PLAN (2010), <https://www.nyserda.ny.gov/-/media/Files/EERP/GJGNY/gjgny-workforce-development-operating-plan.pdf>.

<sup>390</sup> 2011 Update, *supra* note 2, at 24.

<sup>391</sup> NYSERDA, Petition for Allocation of Uncommitted EEPS Funds for Workforce Development Initiatives, Energy Efficiency Portfolio Standard, Case 07-M-0548 (N.Y. Pub. Serv. Comm'n Mar. 30, 2012).

<sup>392</sup> *Id.* at 9; *see also* Order Authorizing Workforce Development Initiatives, *supra* note 409, at 6.

The PSC granted NYSERDA's request on December 17, 2012.<sup>393</sup>

Additionally, two methods of financing retrofits of residential and commercial buildings that were not being used as of the 2011 Update are now being used. PACE, which was on hold at the time of the 2011 Update, is now available at least for commercial properties and supported by Energize NY.<sup>394</sup> Additionally, customers of certain utilities may now take advantage of on-bill recovery financing.<sup>395</sup> These additional methods may make retrofits to residential and commercial properties more affordable and feasible for homeowners and businesses.

## **20. Encourage the State's Interagency Committee on Sustainability and Green Procurement to be Aggressive in Setting Green Specifications**

In 2008, Governor Paterson signed Executive Order 4, which established a State Green Procurement and Agency Sustainability Program.<sup>396</sup> Executive Order 4 also created an Interagency Committee on Sustainability and Green Procurement, which was given the duty of creating an annual list of categories and products to be developed and issued with green specifications for use by state agencies and public authorities in the procurement of commodities, services and technology.<sup>397</sup> For example, the Interagency Committee helps guide other state agencies in implementing Executive Order 18, which restricts the purchase of bottled water by the State.<sup>398</sup> Recognizing the Interagency Committee's broad reach, the 2009 Report

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<sup>393</sup> Order Modifying Budgets and Targets for Energy Efficiency Portfolio Standard Programs and Providing Funding for Combined Heat and Power and Workforce Development Initiatives, Energy Efficiency Portfolio Standard, Case 07-M-0548, at 57, 59 (N.Y. Pub. Serv. Comm'n Dec. 17, 2012).

<sup>394</sup> See *Energize NY Finance*, *supra* note 202; see also *supra* notes 202, 203, and accompanying text.

<sup>395</sup> See *On-Bill Recovery Financing Program*, NYSERDA, <https://www.nyserda.ny.gov/All-Programs/Programs/On-Bill-Recovery-Financing-Program> (last visited Feb. 1, 2017). "On-Bill Recovery Financing is a way to obtain loans for all-fuel energy efficiency improvements through the New York State Energy Research and Development Authority (NYSERDA) and to repay these through a charge on the customer's electric and/or gas utility bill. On-Bill Recovery Financing makes it easy to pay for home energy improvements without paying cash up front." *On-Bill Recovery Financing Program Frequently Asked Questions*, NYSERDA, <https://www.nyserda.ny.gov/All-Programs/Programs/On-Bill-Recovery-Financing-Program/FAQ> (last visited Feb. 1, 2017).

<sup>396</sup> See N.Y. Exec. Order No. 4 (Apr. 25, 2008), N.Y. COMP. CODES R. & REGS. tit. 9, § 7.4, <http://www.dec.ny.gov/energy/71389.html>.

<sup>397</sup> 2011 Update, *supra* note 2, at 25.

<sup>398</sup> See N.Y. STATE OFFICE OF GEN. SERVS. & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, GREENING NEW YORK STATE: THIRD PROGRESS REPORT ON STATE GREEN PROCUREMENT AND AGENCY SUSTAINABILITY 1 (2015), <http://www.ogs.ny.gov/EO/4/Docs/ThirdProgressReport.pdf>; see also N.Y. Exec. Order No. 18 (May 5, 2009), N.Y. COMP. CODES R. & REGS. tit. 9, § 7.18, [http://www.albany.edu/purchasing/research\\_funded/Executive\\_Order\\_18\(1\).pdf](http://www.albany.edu/purchasing/research_funded/Executive_Order_18(1).pdf).

recommend it be more “aggressive in incorporating energy efficiency and GHG reductions into particular product specifications.”<sup>399</sup>

## **2017 Update:**

The Interagency Committee is still in place and has continued to move forward with its State Green Procurement and Agency Sustainability Program.<sup>400</sup> The Office of General Services (OGS) and DEC released a detailed report identifying the successes and challenges in implementing Executive Order 4 thus far.<sup>401</sup> The report, consisting of a compilation of agency reports, noted wide success throughout the state in the green procurement arena, especially in virtually eliminating the purchase of bottled water.<sup>402</sup> For example, one of the “biggest success stories” of green procurement is that 89% of “agencies responsible for cleaning operations at their facilities (either directly or through contractors) reported the use of green cleaning products from the OGS List of Approved Products.”<sup>403</sup> Additionally, the recycling and composting of various materials, including commingled, single-stream and organic wastes, as well as training and tracking, have been successes.<sup>404</sup>

## **Promote Methane Capture**

The 2009 Report recommended New York require methane capture or otherwise incentivize methane capture in municipal solid waste landfills.<sup>405</sup> The benefits are two-fold: methane is “a greenhouse gas that is more than twenty times more potent than CO<sub>2</sub>” and so its capture prevents its release into the atmosphere; but captured methane can also be converted to a valuable energy source.<sup>406</sup> The 2011 Update acknowledged that incentives to encourage methane capture exist, such as New York’s CO<sub>2</sub> Budget Trading Program.<sup>407</sup> Additionally, the 2011 Update noted that New York was a leader in methane capture at dairy farms; the report noted that twelve anaerobic digesters were installed on New York dairy farms to capture methane, and that the digesters produced 1.3 MW of electricity for New York.<sup>408</sup>

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<sup>399</sup> 2009 Report, *supra* note 1, at 54.

<sup>400</sup> See N.Y. STATE OFFICE OF GEN. SERVS. & N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 418.

<sup>401</sup> See *id.* at vi–vii.

<sup>402</sup> *Id.* at 7.

<sup>403</sup> *Id.* at 15.

<sup>404</sup> *Id.* at 9–11.

<sup>405</sup> 2009 Report, *supra* note 1, at 55.

<sup>406</sup> *Id.* at 54.

<sup>407</sup> 2011 Update, *supra* note 2, at 26 (citing *CO<sub>2</sub> Emissions Offset Projects*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/53449.html> (last visited Feb. 1, 2017)); see also *Landfill Methane Gas Capture and Destruction*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/53455.html> (last visited Feb. 1, 2017) (providing instructions on how to apply for Offset Project Sponsorship for methane gas capture).

<sup>408</sup> 2011 Update, *supra* note 2, at 26.

## **2017 Update:**

Methane capture has continued to play an important—indeed, expanding—role in New York. In 2008, landfill methane power generators in New York were already providing 80 MW of electricity, and the EPA outreach program has suggested that an additional 27.3 MW could be added by landfills that are likely candidates for methane capture.<sup>409</sup> In 2011, the Fresh Kills methane capture project in Staten Island generated five million cubic feet of usable methane daily, providing New York with twelve million dollars per year from selling the gas.<sup>410</sup> Also, the Development Authority of the North Country (DANC) has a methane capture facility in place in Rodman, New York, and NYSERDA provides a subsidy of approximately twenty-two dollars per MW to the DANC.<sup>411</sup> To be sure, some methane capture projects at landfills are suspended or cancelled due to lack of funds for initial costs.<sup>412</sup>

However, as described above, methane capture and anaerobic digesters will be part of the CES.<sup>413</sup> Moreover, as part of the REV, Governor Cuomo announced that the first large-scale anaerobic digester in New York City would be placed on Long Island.<sup>414</sup> “The new anaerobic digester will be operated by American Organic Energy at Long Island Compost’s 62-acre facility in Yaphank, Suffolk County and will process over twice as much food waste as currently processed at any existing privately-owned food waste digesters accepting offsite food waste in New York State.”<sup>415</sup> When completed, the Long Island anaerobic digester “is expected to reduce greenhouse gas emissions by approximately 40,000 tons annually, equivalent to removing 8,125 cars from the road.”<sup>416</sup> New York should continue to encourage the double boon of capturing methane—from both landfills and dairy farms—and using it as a renewable energy resource.

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<sup>409</sup> John Rather, *Tapping Power from Trash*, N.Y. TIMES, Sep. 13, 2008, <http://www.nytimes.com/2008/09/14/nyregion/nyregionspecial2/14Rmethane.html>.

<sup>410</sup> Mike Di Paola, *Methane Brings New York \$12 Million a Year as Dump Becomes Park*, BLOOMBERG NEWS, Aug. 24, 2011, <http://www.bloomberg.com/news/articles/2011-08-24/methane-fuel-trove-brings-new-york-12-million-a-year-as-dump-becomes-park>.

<sup>411</sup> PIONEER VALLEY PLANNING COMM’N, UNDERSTANDING METHANE CAPTURE FROM LANDFILLS, <http://www.pvpc.org/sites/default/files/files/PVPC-Methane%20Capture%20From%20Landfills.pdf>.

<sup>412</sup> See, e.g., Rather, *supra* note 429 (noting the Croton Point landfill in Westchester County ended without a project).

<sup>413</sup> See *supra* notes 210 and 229 and accompanying text.

<sup>414</sup> Press Release, Office of the Governor, Governor Cuomo Announces Innovative Clean Energy Project on Long Island Under Reforming the Energy Vision (Sept. 1, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-innovative-clean-energy-project-long-island-under-reforming-energy>.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

## 22. Improve New York's Floodplain Mapping System

Floodplain mapping, the process of mapping out which areas in a state or municipality are especially subject to flooding,<sup>417</sup> is governed by the National Flood Insurance Program (NFIP).<sup>418</sup> In New York, the DEC administers NFIP in coordination with the Flood Insurance and Mitigation Administration, which operates under the Federal Emergency Management Administration (FEMA).<sup>419</sup> Mapping is done by county, and counties are at various levels of mapping status.<sup>420</sup>

Both the 2009 Report and 2011 Update recommended that New York update its flood zone maps to correctly reflect which areas are at risk of flooding by looking at projections regarding future sea level rise, with a hope that maps accurately reflecting future risk would allow municipalities to adjust land use regulation and better control construction in flood-prone areas.<sup>421</sup> In addition, a 2010 report of New York's Sea Level Rise Task Force recommended that DEC and DOS work together to update floodplain maps to reflect projected sea level rise and changes in coastal flooding through 2100; and that municipalities increase coastal resiliency using a suite of non-structural solutions such as buffer zones, elevation, and building codes.<sup>422</sup>

### **2017 Update:**

Beginning in 2008 and 2009, FEMA Region 2 began coordinating with state agencies to update their Flood Insurance Rate Maps (FIRMs) to better account for current projected flood risk and the significant amount of development that had occurred since the 1980s.<sup>423</sup> In coastal New York and New York City, the mapping process was led by FEMA's New York/New Jersey Coastal Flood Study, which was initiated in 2009 and prioritized increased transparency in the

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<sup>417</sup> 2009 Report, *supra* note 1, at 55.

<sup>418</sup> See National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973, 42 U.S.C. §§ 4001–4129 (2012); N.Y. ENVTL. CONSERV. LAW §§ 36-0101 to 36-0113.

<sup>419</sup> See *Floodplain Management*, N.Y. STATE DEPT. OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/lands/24267.html> (last visited Feb. 1, 2017); see also *Federal Insurance and Mitigation Administration*, FEMA, <http://www.fema.gov/what-mitigation/federal-insurance-mitigation-administration> (last visited Feb. 1, 2017).

<sup>420</sup> See *New York – Mapping Status*, FEMA, <https://www.rampp-team.com/ny.htm> (last visited Feb. 1, 2017). Note that this database of Region 2 maps is in transition, and current floodplain maps can also be found at <http://www.region2coastal.com/view-flood-maps-data/view-preliminary-flood-map-data/> (last visited Feb. 1, 2017).

<sup>421</sup> 2009 Report, *supra* note 1, at 55; 2011 Update, *supra* note 2, at 27.

<sup>422</sup> N.Y. STATE SEA LEVEL RISE TASK FORCE, REPORT TO THE LEGISLATURE 42, 59–60 (2010), [http://www.dec.ny.gov/docs/administration\\_pdf/slrfffinalrep.pdf](http://www.dec.ny.gov/docs/administration_pdf/slrfffinalrep.pdf); see also 2011 Update, *supra* note 2, at 27.

<sup>423</sup> See FEMA, SUMMARY OF OUTREACH AND COMMUNITY ENGAGEMENT INVESTMENTS: NEW YORK/NEW JERSEY COASTAL RISK MAP FLOOD STUDY 3 (2015), [https://data.femadata.com/NationalDisasters/Hurricane%20Sandy/RiskMAP/Public/Public\\_Documents/FEMA\\_RegionII\\_CoastalStudy\\_CommunityEngagement.pdf](https://data.femadata.com/NationalDisasters/Hurricane%20Sandy/RiskMAP/Public/Public_Documents/FEMA_RegionII_CoastalStudy_CommunityEngagement.pdf).

floodplain mapping process.<sup>424</sup> Major updates included new storm surge and overland wave modeling and new, detailed topographic information.<sup>425</sup> As a technical partner, New York developed a Floodplain Mapping Program to aid FEMA's Flood Hazard Mapping.<sup>426</sup> Updated maps were set to be delivered by mid-2013.

The update process was stunted by Superstorm Sandy in 2012, which destroyed or damaged over 500,000 homes along the New York and New Jersey coasts.<sup>427</sup> Focus shifted toward storm recovery, as Governor Cuomo established the Governor's Office of Storm Recovery (GOSR) to address housing, infrastructure, and community reconstruction,<sup>428</sup> and the New York State Resilience Institute for Storms and Emergencies (NYS RISE), a consortium of five universities and the U.S. Department of Energy that operates as a preparedness research center.<sup>429</sup> Meanwhile, FEMA developed updated advisory base flood elevations to support near-term reconstruction efforts.<sup>430</sup> As Superstorm Sandy recovery efforts continued, FEMA returned to the floodplain maps updates process, and updated preliminary FIRMs were released between 2012 and 2015 for most counties. The FIRMs and underlying technical studies are all publically available and open for public comment.<sup>431</sup> While a handful of the maps have been finalized and adopted by local officials to translate into new flood insurance rates, many FIRMS remain in the appeals and public comment period and will not immediately affect flood insurance rates or the requirement to purchase federal flood insurance in high risk flood areas.<sup>432</sup>

FEMA has continued to exclude information about projected future impacts of sea level rise in the NFIP, and it does not limit flood insurance in areas likely to experience flooding under present climate change projections.<sup>433</sup> Rather, FIRMs map coastal flood hazards based on existing shoreline characteristics and wave and storm climatology at the time of the flood study. Nonetheless, updated FIRMs in many areas show significantly increased flood level heights which reflect new data on storm surges, existing sea level rise, and increased development on the

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<sup>424</sup> See *id.* The Coastal Flood Study was done in coordination with the New York City Mayor's Office of Long-Term Planning and Sustainability and the U.S. Army Corps of Engineers.

<sup>425</sup> See *id.*

<sup>426</sup> *Floodplain Management*, N.Y. STATE DEPT. OF ENVTL. CONSERVATION, *supra* note 439.

<sup>427</sup> N.Y. State Resiliency Inst. for Storms & Emergencies, *Mission*, NYS RISE, <http://nysrise.org/news/> (last visited Feb. 1, 2017).

<sup>428</sup> *About*, N.Y. GOVERNOR'S OFFICE OF STORM RECOVERY, <http://stormrecovery.ny.gov/about> (last visited Feb. 1, 2017).

<sup>429</sup> N.Y. State Resiliency Inst. for Storms & Emergencies, *Mission*, *supra* note 447.

<sup>430</sup> FEMA, HURRICANE SANDY ADVISORY BASE FLOOD ELEVATIONS (ABFEs) (2012).

<sup>431</sup> See *New York – Mapping Status*, FEMA, *supra* note 440.

<sup>432</sup> See *id.*

<sup>433</sup> See Letter from Daniel A. Zarrilli, Dir. of City of New York Mayor's Office of Recovery & Resiliency, to Michael Moriarty, Dir., Mitigation Div., FEMA Region II (June 26, 2015), [http://www1.nyc.gov/assets/floodmaps/images/content/pages/1-NYC%20FEMA%20Appeal%20FINAL%20with%20Appendices%20and%20Cover%20Letter%2006252015\\_web.pdf](http://www1.nyc.gov/assets/floodmaps/images/content/pages/1-NYC%20FEMA%20Appeal%20FINAL%20with%20Appendices%20and%20Cover%20Letter%2006252015_web.pdf).

floodplain. In part as a result of these changes, FEMA has received appeals from a number of New York communities, including a recent appeal from New York City.<sup>434</sup>

FEMA does encourage New York communities to map and plan locally based on projected future flooding, using data known as “future-conditions hydrology.”<sup>435</sup> At a local government’s request, FEMA can include the future impacts on their flood insurance rate map, but the impact and usefulness of this approach is limited because FEMA does not use this data in any official capacity and does not incorporate it into flood insurance premium rates.<sup>436</sup> In addition, the New York Department of Homeland Security and Emergency Services coordinates with FEMA under the Disaster Mitigation Act<sup>437</sup> to develop a Standard Hazard Mitigation Plan. The most recent Hazard Mitigation Plan, released in 2014, considers projected sea level rise through 2080 for planning purposes, as well as other long-term impacts of climate change.<sup>438</sup>

New York has also made strides in coastal resiliency efforts. Such efforts are essential given New York’s estimated 1,850 miles of tidal shoreline, where scientists are projecting increased sea levels of 18 to 50 inches.<sup>439</sup> With the enactment of the CRRA in 2014, a variety of permitting, funding, and planning programs in all 62 counties now must demonstrate consideration of future physical risks due to sea level rise, flooding, and storm surge, and DEC has proposed new sea level rise projections.<sup>440</sup> As stated above, the Department of Environmental Conservation adopted final regulations setting forth the projections required by the CRRA on February 7, 2017. Those regulations, which are codified at 6 New York Code of Rules and Regulations, Part 490 include tables depicting sea level rise predictions for three regions of New York State: the Mid-Hudson, New York City/the Lower Hudson, and Long Island. New York City is modifying its flood maps to reflect sea level rise. New York State

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<sup>434</sup> See CITY OF NEW YORK MAYOR’S OFFICE OF RECOVERY AND RESILIENCY, APPEAL OF FEMA’S PRELIMINARY FLOOD INSURANCE RATE MAPS FOR NEW YORK CITY (2015), [http://www1.nyc.gov/assets/floodmaps/images/content/pages/1-NYC%20FEMA%20Appeal%20FINAL%20with%20Appendices%20and%20Cover%20Letter%2006252015\\_web.pdf](http://www1.nyc.gov/assets/floodmaps/images/content/pages/1-NYC%20FEMA%20Appeal%20FINAL%20with%20Appendices%20and%20Cover%20Letter%2006252015_web.pdf). In June 2015, New York City filed a technical appeal of its preliminary floodplain maps, contending that the new maps overestimated the height of flood levels by up to two-and-a-half feet. See *id.* City officials argue that this error mistakenly affected 26,500 buildings and 170,000 people by including them in areas susceptible to a 100-year storm. *Id.* As of March 2016, the appeal was still under review by FEMA. See *Appeals*, NYC Flood Maps, <http://www1.nyc.gov/site/floodmaps/appeals/overview.page> (last visited Feb. 1, 2017).

<sup>435</sup> See 44 C.F.R. §§ 59.1, 64.3 (2015).

<sup>436</sup> See PACE LAND USE LAW CENTER, HUDSON RIVER SUSTAINABLE SHORELINES PROJECT: LEGAL FRAMEWORK ANALYSIS 49–50 (2011), <https://www.hrner.org/doc/?doc=240189622>.

<sup>437</sup> See Disaster Mitigation Act, 42 U.S.C. §§ 5121–5208 (2012); 44 C.F.R. pt. 201 (2015).

<sup>438</sup> N.Y. STATE DIV. OF HOMELAND SEC. & EMERGENCY SERVS., 2014 NEW YORK STATE HAZARD MITIGATION PLAN § 3.4, at 10–11 (2014), <http://www.dhSES.ny.gov/recovery/mitigation/documents/2014-shmp/2014-SHMP-full.pdf>.

<sup>439</sup> *Sea Level Rise: What is Expected for New York*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/45202.html> (last visited Feb. 1, 2017).

<sup>440</sup> See *supra* notes 48–74 and accompanying text.

should undertake a similar process for the other parts of the state that are vulnerable to sea level rise. (This includes areas along the Atlantic Ocean, Long Island Sound, and the Hudson River south of the Troy Dam.) In conjunction with the flood mapping process New York should also consider the extreme precipitation events that are likely to increase due to climate change, resulting in more inland flooding.



**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF EXECUTIVE COMMITTEE MEETING  
BAR CENTER, ALBANY  
MARCH 31, 2017**

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Present: Alyssa M. Barreiro, David Louis Cohen, Orin J. Cohen, Cheryl Smith Fisher, Michael L. Fox, Michael W. Galligan, Sharon Stern Gerstman, Evan M. Goldberg, Ira S. Goldenberg, Taa R. Grays, Henry M. Greenberg, Claire P. Gutekunst, Bryan D. Hetherington, Scott M. Karson, Elena DeFio Kean, Stuart J. LaRose, Ellen G. Makofsky, Michael Miller, Steven E. Millon, David P. Miranda, Domenick Napoletano, Sandra Rivera, Sheldon K. Smith, David H. Tennant, Sherry Levin Wallach.

Guests: Lois Bladykas, Prof. Ira M. Bloom, Norman P. Effman, Hermes Fernandez, Albert Feuer, Margaret J. Finerty, Sarah E. Gold, Andre R. Jaglom, Hilary F. Jochmans, Tara Lynn Moffett, Amy E. Schwartz-Wallace, Carol A. Sigmund, Joanne Simon, Michelle H. Wildgrube.

Ms. Gutekunst presided over the meeting as President of the Association.

The members were welcomed and Messrs. Effman and Jaglom, together with Ms. Finerty, Ms. Gold and Ms. Sigmund, were introduced as incoming Executive Committee members for the term commencing on June 1, 2017. It was noted that Jonathan B. Behrins will serve as Vice President, Thirteenth District and William T. Russell, Jr. and Richard M. Gutierrez will serve as members-at-large for the term commencing on June 1, 2017; they were unable to attend the meeting.

1. Approval of minutes of meetings. The minutes of the January 27, 2017 meeting and the February 14, 2017 teleconference meeting were approved as distributed.
2. Consent calendar:
  - a. Amendments to rules of Section Caucus
  - b. Amendments to Bylaws of Environmental Law Section
  - c. Amendments to Bylaws of Trial Lawyers Section
  - d. Amendments to Bylaws of Intellectual Property Law Section
  - e. Approval of bank account signatories
  - f. Approval of amendments to Bylaws of Judicial Section

The consent calendar, consisting of the items listed above, was approved by voice vote.

3. Confirmation of presidential appointments to the House of Delegates. Ms. Gerstman reported that she had recommended the appointment of 12 delegates to further racial and ethnic diversity in the House and two non-resident members for the 2017-2018 Association year. After discussion, a motion was adopted to confirm the appointments.

4. Report of Treasurer. In his capacity as Treasurer, Mr. Karson reported that through February 28, 2017, the Association's total revenue was \$13 million, a decrease of approximately \$126,500 over the previous year, and total expenses were \$5 million, an increase of approximately \$732,800 over 2016. Mr. Karson also provided a report on the expenses of Association committees. The report was received with thanks
5. Report of staff leadership. Pamela M. McDevitt, Executive Director, and Elizabeth Derrico, Associate Executive Director, updated the Executive Committee with respect to membership initiatives and greater development of non-dues revenue. Ms. McDevitt announced that Katherine Suchocki has assumed the position of Senior Director of Continuing Legal Education and that Taunya Hannibal-Williams had joined the staff as Diversity Coordinator. The report was received with thanks.
6. Report of Committee on Continuing Legal Education. In her capacity as chair of the committee, Ms. Makofsky, together with Senior Director Katherine Suchocki, provided an update on CLE programming and the work of the committee's subcommittees with respect to new program topics and methods of delivery, diversity, and downstate conference spaces. The report was received with thanks.
7. Report of Trusts and Estates Law Section. Prof. Ira M. Bloom, chair of the section's New York Uniform Trust Code Committee, outlined an affirmative legislative proposal recommending the enactment of a revised version of the Uniform Trust Code, noting that New York has not conducted a comprehensive view of its trust laws in 50 years and outlining some of the significant provisions of the proposal. After discussion, it was agreed that this report should be presented to the House of Delegates in view of its far-reaching effects on areas other than trusts and estates law. The report will be scheduled for presentation at the November House meeting.
8. Report of Vice Presidents. The Vice Presidents in attendance provided updates as to local bar interactions and activities in their respective districts. The reports were received with thanks.
9. Report of President. Ms. Gutekunst highlighted the information contained in her printed report, a copy of which is appended to these minutes.
10. Proposal to establish a committee on Technology and the Legal Profession. Ms. Gutekunst outlined a proposal to create a committee to identify and make recommendations to address subjects concerning technology that will impact the delivery of legal services now and in the future. After discussion, a motion was adopted to approve the creation of the committee.
11. Report and recommendations of Committee on Disability Rights. Tara Lynn Moffett, chair of the committee, reviewed the committee's publication, "A Guide to the Use of Service Animals in New York State," prepared jointly with a task force of the New York City Bar Association. After discussion, a motion was adopted to approve the Guide.

12. Reports and recommendations of Trusts and Estates Law Section.
  - a. EPTL 5-1.1-A(d)(1). Lois Bladykas, a member of the Section, reviewed the section's affirmative legislative proposal to amend EPTL 5-1.1-A(d)(1) with respect to a surviving spouse's right of election, to clarify the proper method of service when the nominated executor has not filed a designation. After discussion, a motion was adopted to approve the proposal.
  - b. EPTL §7-3.1/CPLR §5205(c). Albert Feuer, chair of the section's Committee on Life Insurance and Employee Benefits, outlined the section's affirmative legislative proposal to amend section 7-3.1 of the Estates, Powers and Trusts Law and CPLR section 5205(c) to provide that the beneficiary of a trust shall not be considered the creator of a trust solely by reason of the waiver, release, or lapse of the beneficiary's right to withdraw property to the extent the affected property does not exceed the greatest amount specified in the Internal Revenue Code. After discussion, a motion was adopted to approve the proposal.
13. Report of Committee on Membership. Committee member Michelle H. Wildgrube and Associate Executive Director Elizabeth Derrico reported on membership statistics and efforts to renew members. The report was received with thanks.
14. Report and recommendations of NYSBA/WBASNY Domestic Violence Initiative. Amy E. Schwartz-Wallace, co-chair of the initiative, outlined three memoranda in support of legislation to address domestic violence:
  - a. Amendments to the Family Court Act and the Criminal Procedure Law to simplify the Victim's Rights Notice. After discussion, a motion was adopted to approve the memorandum.
  - b. Amendments to the Family Court Act to permit Family Court to award temporary spousal support when issuing temporary orders of protection. After discussion, a motion was adopted to approve the memorandum.
  - c. Establishment of a right for tenants to call police or emergency assistance without fear of losing housing. After discussion, a motion was adopted to approve the memorandum. Ms. Kean abstained from participating in the vote.
15. Update on legislative activities. Hermes Fernandez, chair of the Committee on Legislative Policy, updated the Executive Committee on legislative activity, particularly with respect to the 2017-2018 state budget process. Hilary F. Jochmans, vice chair of the Committee on Federal Legislative Priorities, reported on federal initiatives, with a particular focus on LSC funding. The reports were received with thanks.

16. New Business.

- a. Report and recommendations of Finance Committee. Ms. Gutekunst reported that at its January 2017 meeting, the Finance Committee had approved a recommendation for an increase in the stipend paid to the President and President-Elect, commencing in June 2019. After discussion, a motion to approve the recommendation failed. Mr. Karson abstained from participating in the discussion and vote.
- b. Proposed Task Force on School to Prison Pipeline. Ms. Gerstman outlined a proposed task force to address issues relating to school discipline and restorative justice. After discussion, a motion was adopted to approve the creation of the task force.
- c. Amendments to Guidelines for Effective Advocacy. Ms. Gutekunst reviewed a proposed amendment to the Guidelines to provide that communications with the President of the United States or White House officials should be limited to the Association President. After discussion, a motion was adopted to approve the amendment.
- d. Ms. Gutekunst observed that David Cohen, Orin Cohen, Cheryl Fisher, Evan Goldberg, Ira Goldenberg, Ellen Makofsky and Sheldon Smith are rotating off the Executive Committee and that this is their last meeting. She thanked them for their service and their participation. She thanked the officers, members of the Executive Committee, and staff for their assistance during her term as President. Ms. Gerstman thanked Ms. Gutekunst for her leadership of the Executive Committee.

17. Date and place of next meeting.  
Thursday and Friday, June 15-16, 2017  
The Otesaga, Cooperstown

18. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Ellen G. Makofsky  
Secretary

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**REPORT TO MEMBERSHIP** 2016–2017

# President's Message

## The Year in Review

### Our Legislative Priorities

Sometimes the stars align. I was fortunate that, during my year as your President, a number of our Association's key state legislative priorities were realized.

### Our State Priorities

Four of our Association's legislative priorities were included in the budget agreed to by the New York State Legislature and the Governor. We helped achieve important criminal justice reforms and defeated an unfair proposal to increase registration fees for New York lawyers. With your support, we addressed important issues and realized powerful results.

- ◆ We averted a proposed \$50 surcharge on lawyers to pay part of the State's constitutional obligation to provide criminal defense services for the indigent. Thousands of members joined the effort, as did a number of bar associations across the state.

With other stakeholders, we helped convince the state to:

- ◆ Improve indigent criminal defense. The Office of Indigent Legal Services is now charged with developing plans to extend the five-county *Hurrell-Harring* settlement to the entire state, which the state has committed to pay for.
- ◆ Enact reforms to reduce wrongful convictions. Video recording of custodial interrogations and new eyewitness identification procedures will help prevent tragic errors.
- ◆ Raise the age of criminal responsibility. After a two-year phase-in period, children under age 18 will no longer be prosecuted as adults for nonviolent crimes.
- ◆ Give a second chance. Nonviolent offenders with certain prior convictions, who keep a clean record for 10 years, will be able to petition a court to have their criminal record sealed.

After enactment of the budget in April, we have advocated to improve the state law that currently results in power of attorney forms that are too complex, too costly, and unreasonably difficult for clients to understand, and we will continue to do so throughout the legislative session.

### Our Federal Priorities

- ◆ Legal Services Corporation. In February and again on ABA Day in April, we carried this message to Congress, and we will continue to do so: Fully fund the LSC. If it is defunded, as the President has proposed, New York legal services organizations stand to lose \$21 million a year, which would devastate their efforts to provide legal services to those in need.

### Domestic Violence Initiative

- ◆ NYSBA/WBASNY Domestic Violence Initiative. We forged a ground-breaking partnership with the Women's Bar Association of the State of New York to address domestic violence. The fallout from domestic violence doesn't end with a restraining order. Victims and their families need high-quality civil legal services to rebuild their lives. The NYSBA/WBASNY Domestic Violence Initiative educates and trains lawyers to volunteer with legal service providers; develops pro bono models to help increase access to legal assistance in underserved areas; and reviews and supports legislation.

### Measured Responses to Urgent Issues

In the course of this year, our Association was called upon to turn on a dime and address issues we did not seek: they came roaring at us. I am so proud that our Association – and the NYSBA staff – willingly shouldered the extra burden.



- ◆ Independent judiciary. When a federal judge ordered a temporary halt to an Executive Order stopping immigration from seven majority-Muslim countries, the Executive Branch expressed its disagreement by personally denigrating the judge and demeaning the judiciary. This threatened the independence of our judiciary, which is enshrined in our Constitution, and we responded with a statement emphasizing the importance of judicial independence and adherence to the rule of law.

- ◆ Legal limbo. Prior to the judge's order, a number of immigrants and their families were stuck at U.S. airports or prevented from boarding flights to the U.S. Thousands of lawyers worked around the clock to protect these immigrants' legal rights. We quickly issued a statement expressing our deep appreciation. And we began a new presidential priority: protecting immigrants' legal rights.

### Do the Public Good

Although I had not anticipated this need, immigration representation became a priority for our Association this year, in response to the Executive Orders and the federal government's heightened enforcement efforts. We are committed to ensuring that the legal rights of immigrants are protected.

- ◆ Pro bono immigration project. With a grant from The New York Bar Foundation, we are developing an online portal to connect pro bono volunteers, mentors and service providers with

each other and with available resources. Working with the Governor's Liberty Defense Project, our Committee on Immigration Representation is sponsoring trainings to help increase the pool of volunteer lawyers. To staff this effort, we have created a one-year Immigration Pro Bono Fellowship, funded by the Association and TNYBF.

- ◆ Making pro bono easier. In August, we launched [NY.freelegalanswers.org](http://NY.freelegalanswers.org), an online portal whereby low-income individuals can ask simple legal questions and attorneys can log on and answer them at their convenience.

## Increase Opportunity for Members

In 2017, we expanded the reach and utility of our Lawyer Referral and Information Service (LRIS) with a new online referral platform.

- ◆ People in the 45 New York counties served by LRIS can request a lawyer at any time it is convenient. Our online referral platform drives more potential clients to LRIS and the services LRIS panel attorneys provide – in the first month since it has gone live, client referrals have increased 16.31%.

## A New Generation

Each new generation of law school graduates is more diverse, tech-savvy and likely to have more solo or small firm practitioners than the previous one. As our profession changes and grows, so must our Association. I began my term by instituting a Membership Challenge to our Sections and Committees and the Association as a whole, to develop programming and resources and to reach out to law students and lawyers, with a particular focus on young, diverse and women lawyers, and to show how membership in our Association will enhance their practice and enrich their lives

in the law. Working with our Pathway to the Profession program, I have met with many of the deans and students at law schools across New York to further our collaboration with and support of the future of our profession.

- ◆ Diversity and inclusion. For our Association to remain relevant – and to thrive – we need to be attractive to all lawyers, including those who reflect our increasingly diverse society. To retain diverse members, we need to be more inclusive, which includes creating clear paths to leadership. That's not only the right thing to do, it's the smart thing. We hired a membership diversity and inclusion coordinator to help us with outreach and programming. We also supported a proposal to require attorneys to take one MCLE credit relating to diversity and inclusion and the elimination of bias during each biennial reporting period. I participated in meetings and events with leaders of numerous affinity bar associations. Our Sections are stepping up their efforts to attract and retain diverse members. Working together, we can make a more diverse and inclusive Association and profession a reality.

- ◆ Committee on Technology and the Legal Profession. Being reasonably competent in technology relevant to our practice is an ethical obligation, and smart use of technology can enhance the practice of law and help bridge the justice gap. We created a new committee to look at the dangers and the advantages that technology brings, encourage the Association to make appropriate technology and training available to our members, and study the role of legal technology companies to ensure the public is protected.

- ◆ Solo and small firms. Solo and small firm practitioners are one of our fastest-growing member segments. With these members in mind, we developed practice tools like LawHUB<sup>sm</sup>, beefed up LRIS by creating an online presence and embraced the ABA-sponsored online free legal answers program. We recently started a series of "Roadshows," where we reach out to local bars with CLEs, demonstrations or networking events – whatever they require.

- ◆ New staff leadership. The Association's Executive Director, David Watson, left the Association in December 2016 to return to the Midwest. I am thrilled that, after a nationwide search, we hired Pamela McDevitt as our new Executive Director. Pam brings a wealth of experience as a private attorney, as director of our Law Practice Management Department, and as director of the ABA's Law Practice and Technology Group. I am confident that she will continue our focus on identifying and meeting our members' needs, particularly in the areas of technology, professional development and law practice management.

## Thank You

I want to thank all of you – leadership, members and staff – for a wonderful and fulfilling year as your President. When we work together, we achieve great things. So let's take a minute to acknowledge what we have accomplished. And then let's roll up our sleeves and get back to work, under the leadership of our new President, Sharon Stern Gerstman.

*Claire F. Kutekunst*



# Legislative Advocacy

## Federal

In February and again on ABA Day in April, State Bar Leaders, President Claire P. Gutekunst, President-Elect Sharon Stern Gerstman and President-Elect-Designee Michael Miller went to Washington, D.C., and met with key policymakers in the State's congressional delegation.

### Legal Services Corporation

Our main concern was the President's proposal to defund the Legal Services Corporation, which would result in New York service providers losing about \$21 million a year. We cautioned that defunding the LSC would have a devastating impact on local legal services providers that assist millions of low-income Americans, and made it clear that the LSC should be funded at no less than \$385 million.

### Lawsuit Abuse Reduction Act

We also repeated our opposition to proposed federal regulation of the tort system and urged our Senators to oppose the so-called Lawsuit Abuse Reduction Act (LARA), which would significantly multiply satellite litigation, substantially degrade the efficiency of the courts and greatly increase costs of the litigation process. LARA passed the House in February.

## State

State Bar Leaders, President Claire P. Gutekunst, President-Elect Sharon Stern Gerstman, and President-Elect-Designee Michael Miller led the Association's successful efforts regarding several of our 2017 state legislative priorities.

*The final state budget included provisions to enhance indigent criminal defense services, address wrongful convictions, raise the age of criminal responsibility, and allow sealing of records relating to certain criminal convictions.*

### Averted Increase of Biennial Attorney Registration Fee

It was particularly important that the Legislature adopted public policy to extend to all counties terms of the settlement in *Hurrell-Harring v. State of New York*, thereby improving indigent criminal defense services – **without** increasing the Biennial Attorney Registration Fee to provide funds for that program.

Ms. Gutekunst led NYSBA's strong objection to that proposed fee increase immediately after it appeared in the proposed Executive Budget on January 17, because providing indigent criminal defense is a constitutional mandate. Extending the terms of *Hurrell-Harring* throughout the state is a state obligation and a societal responsibility that should be paid for by the state's General Fund, not by a surcharge on lawyers – a position that we will continue to promote.

### Indigent Criminal Defense Services

NYSBA supported extending the substance of the settlement in *Hurrell-Harring v. State of New York* to counties throughout the state, critical to improving indigent criminal defense services in New York State. We strongly objected to funding the proposals in part by increasing the attorney registration fee, and opposed any proposal that would diminish the independence of the Office of Indigent Legal Service. None of these proposals were part of the final budget.





NYSBA president and president-elect with L.I. Rep. Kathleen Rice in D.C. #SaveLSC.

## Wrongful Conviction Reform

Wrongful convictions cast serious doubt on a fundamental assumption of our criminal justice system – that the innocent will remain free and the guilty will be punished. Eradication of wrongful convictions is key to ensuring public confidence in our criminal justice system.

In 2015 David P. Miranda, then–President; Glenn Lau-Kee, then–Immediate Past President; leaders of the District Attorneys Association of the State of New York (DAASNY); and Barry Scheck, co–founder of the Innocence Project (IP), announced that our organizations had reached agreement on a bill requiring the recording of custodial interrogations in certain serious crimes and allowing the admissibility of photographic arrays in enhanced identification procedures.

The Governor’s Executive Budget proposal on wrongful convictions built “upon previous efforts” by NYSBA, DAASNY, and IP. It was adopted in the final budget.

## Increasing the Age of Criminal Responsibility

In New York State, children who are age 16 and over cannot be prosecuted as juvenile delinquents and, consequently, are prosecuted as adults in the criminal justice system – not the case in the overwhelming majority of states. Recent research has proven conclusively that children under the age of 18 have significantly diminished judgmental capabilities. Rather than being prosecuted in adult criminal court, children 16 years and over could benefit from services available only for children adjudicated as delinquents.

## Sealing Records of Conviction of Certain Crimes

New York law provides for the sealing of records of a limited number of crimes. There are many to which the sealing provisions do not apply. The consequences of a conviction can follow a person for the rest of his or her life, interfering with – if not preventing – reintegration into the community. Under certain circumstances, a reformed person with a clean record should be able to move forward without the collateral consequences of a long-past conviction. The Association supported legislation enacted as part of the 2017-18 budget, providing that persons in such circumstances be allowed to apply to the court to have their record sealed.

# Serving New York Attorneys

## Continuing Legal Education

NYSBA CLE provides award-winning programming with top experts at locations throughout the state, with simultaneous webcast options for those who cannot attend in person. Our frequent lunchtime webcasts focus on breaking legislation and in-depth analysis of current issues.

- ◆ Every year, NYSBA presents more than 75 live programs in a variety of formats at more than 150 statewide locations. Programs range from practice-based “how tos” introducing new lawyers to various areas of practice to Institutes offering in-depth analysis for experienced attorneys.
- ◆ Consistently sold-out, NYSBA CLE’s popular “Bridging-the-Gap” two-day program for newly admitted attorneys is offered three times a year, live in New York City with simultaneous video-conference links to Albany and Buffalo. Washington, D.C., was added as a video-conference location this year.
- ◆ The NYSBA Digital Media Library offers hundreds of recorded topics in online video/audio streaming and DVD/CD formats. We also offer closed captioning for online programs. Our new topic selection feature allows you to select online programs by topic – so that you get only the information you need.
- ◆ Members can bundle their online video/audio purchases and get up to 40% off their recorded product cart total. Visit [www.nysba.org/cle](http://www.nysba.org/cle) for additional information.
- ◆ The Law Practice Management Committee focuses on the needs of solo and small firm practitioners. LPM produces CLE programs, publications and maintains a website resource database, providing up-to-date information and practical tips on how to manage and apply technology in day-to-day practice. Find programs on LPM-related topics at [www.nysba.org/LPM](http://www.nysba.org/LPM).



Packed CLE at Annual Meeting #NYSBA17



# Publications

This past year, NYSBA published more than 30 books, supplements, and forms products, including downloadable forms, and five document assembly products created by experienced attorneys exclusively for attorneys practicing in New York.

- ◆ Titles published include the 2016–2017 edition of our *Practical Skills Series*, covering 26 areas of practice, *Making a Modern Constitution*, and new editions of *Lefkowitz on Public Sector Labor and Employment Law*, *N.Y. State Physician's HIPAA Privacy Manual*, *Contract Doctrine and Marital Agreements in New York*, and *Sales and Use Tax and the New York Construction Industry*. All offer practical, real-world information and advice to help New York attorneys succeed.
- ◆ We launched the NYSBA Online Publications Library on Fastcase. NYSBA members get electronic access to virtually all our reference titles at an exclusive discount, which more than covers the cost of membership.
- ◆ We continue to publish the *New York State Law Digest* and the *NYSBA Journal*, which are also available on the NYSBA Periodicals app, and Case-PrepPlus, a weekly e-newsletter summarizing recent and significant New York appellate cases. We also publish the *State Bar News*. These are free to all NYSBA members. Our 25 Section publications (75 issues a year) have been redesigned and are available as e-books.
- ◆ We partnered with LexisNexis to launch the NYSBA Estate Planning System, a document assembly tool created by a leading New York trusts and estates practitioner, which enables users to draft customized, estate planning documents.





# Legal and Community Service

## Pro Bono

The Association's Pro Bono Services Department partners with legal service providers, the courts, governmental organizations and law schools to provide pro bono service training, recruitment and guidance. The Association advocates for increased civil legal service funding and also encourages and recognizes the generous pro bono work of members who carry out one of the proudest traditions of our profession.

The Association holds annual awards ceremonies that encourage and highlight the generous pro bono work of its members.

- ◆ The Association's Empire State Counsel® program highlights members who have done 50 or more hours of pro bono work in the past year. During the Association's Annual Meeting in January, the Justice for All Luncheon celebrated Empire State Counsel law firm and individual attorney honorees.

- ◆ On May 1, 2017, the annual President's Pro Bono Service Awards ceremony recognized the exemplary pro bono contributions made by attorneys, law firms, law students, and others across the state.

### Closing the Access to Justice Gap

An estimated 80% of low-income New York residents must cope on their own in the face of legal problems related to core needs, such as housing, domestic violence, employment and access to government benefits.

- ◆ NYSBA's Pro Bono Services Department launched [NY.freelegalanswers.org](http://NY.freelegalanswers.org) as part of the American Bar Association's Free Legal Answers project. This project provides a web-based opportunity for lawyers to do pro bono and for low-income New Yorkers to receive basic legal assistance.

- ◆ With a grant from The New York Bar Foundation, we are developing an online portal to connect pro bono volunteers, mentors and service providers with each other and with available resources. To staff this effort, we have created a one-year Immigration Pro Bono Fellowship, funded by the Association and TNYBF.

- ◆ The Pro Bono Services Department partnered with local bar associations, legal service providers and courts to recruit pro bono attorneys and to offer free or low cost pro bono training on a variety of subjects.

- ◆ NYSBA regularly advocates for adequate legal services funding at both the state and federal level.

In September 2016, NYSBA sponsored and subsidized a Legal Assistance Partnership Conference that provided affordable and high-quality continuing legal education to more than 550 civil legal services attorneys and paralegals.

## Lawyer Assistance Program

The Association's Lawyer Assistance Program provides confidential assistance to attorneys, judges, and law students who are struggling with alcohol or other substance abuse, mental health issues or other personal concerns that can potentially impact their abilities to successfully function in the legal profession. LAP also provides CLEs to professionals and educational programs to law school students on recognizing, preventing, and dealing with addiction, suicide, and other mental health issues.

**LAP helpline:** 800.255.0569 / [lap@nysba.org](mailto:lap@nysba.org)

Honoring President's Pro Bono Service Award Winners  
#Wevolunteer.



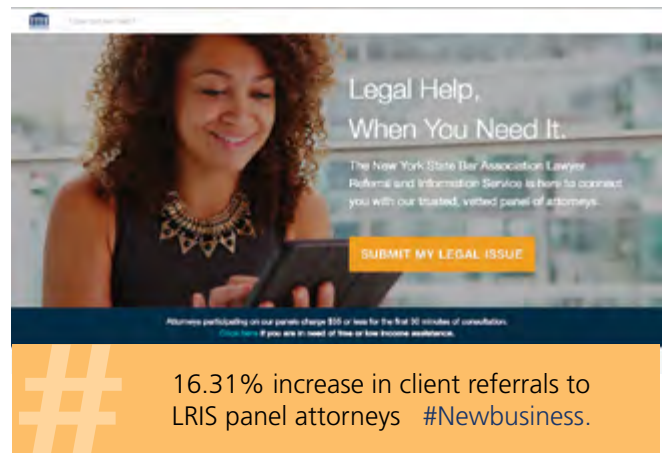
# Lawyer Referral and Information Service

In 2017, the State Bar's Lawyer Referral and Information Service (LRIS) partnered with Legal.io to develop and launch an online referral platform for people seeking an attorney (<https://nysbarlr.is/legal.io>). This puts the LRIS in the online marketplace, which lets potential clients request a referral at their convenience. Additionally, the platform automates many of the back-end administrative tasks of LRIS and provides participating attorneys with consistent reporting, up-to-date data, and an easy way to pay fees they owe. Having an online referral platform will drive more potential clients to the LRIS site and to the services LRIS panel attorneys provide.

**Fact:** LRIS received more than 10,000 calls for assistance in 2016.

**Fact:** In the first month of our new online presence, we've had a 16.31% increase in client referrals to LRIS panel attorneys.

Each year, LRIS presents the Angelo T. Cometa Award to an individual or group that demonstrates outstanding and long-term commitment to assisting the public and providing referrals for legal help, as needed. 2017's award winner was the Brooklyn Volunteer Lawyers Project.



# Law, Youth & Citizenship Program

LYC programs have a deep and meaningful impact on the education community of New York.

The Committee on Law, Youth and Citizenship (LYC) brings to the teachers and classrooms of New York State free and low-cost resources and training in law-related and civic education. Every June and July, we host professional development programs for educators around the state. During this year we are also providing civic education programming at local Girls Inc. sites.

LYC was the sub-award recipient of the James Madison Legacy Grant to provide professional development for educators in the We the People: The Citizen and the Constitution program. By July 1, we will have trained 67 teachers. In February, LYC hosted six high school teams at the We the People State Final Hearings. The New Visions Law & Government Team from the Capital District traveled to the national competition at the National Conference Center in the DC area on April 21–24.

NYSBA's 2017 New York State High School Mock Trial Tournament materials were prepared by the LYC's Mock Trial Subcommittee; this year, the subject was a civil case for malicious prosecution.

LYC hosted the State finals at the Federal District Courthouse in Albany. More than 350 mock trial teams began their local competitions in December and completed their regional tournaments at the end of April. On May 21, the top eight teams from around the state arrived in Albany to compete in the state finals. United States District Judge Mae A. D'Agostino, of the Northern District of New York, presided over the final round on May 23. W. Tresper Clarke High School, Westbury, NY, won the tournament.

This year's Mock Trial Summer Institute for high school students will be held on Lake

George on July 16–21. Students return to their schools in September ready to be leaders of their schools' Mock Trial teams.

In response to the large community of LYC-network educators around the New York, LYC moves its annual conference to different parts of the state. The 41st Annual Civics and Law-Related Education Conference will be at the Sagamore in Bolton Landing, NY. The theme is Participation in Government. This year we will partner with the Children and the Law Committee to offer Continuing Legal Education for attorneys, and professional development for educators.

With the support of the New York State Bar Association, The New York Bar Foundation and the legal community at large, for over 41 years, these programs have had a deep and meaningful impact on the education community of New York.

Stay up to date with LYC via social network sites such as Facebook, Twitter, YouTube and blogs. Find us at [www.lycnyc.org](http://www.lycnyc.org).

# Sections and Committees

NYSBA's Committees research and make recommendations on issues all lawyers care about. NYSBA's 25 Sections offer online communities, resources, innovative and substantive CLE programs and outreach to students, young lawyers and diverse attorneys. Visit us at [www.nysba.org/Sections](http://www.nysba.org/Sections).

## A Few Highlights

- ◆ In a first-time partnership, the Association teamed up with the Women's Bar Association of the State of New York to create a Domestic Violence Initiative. The Initiative educates attorneys about the issue, trains attorneys to represent victims, develops pro bono models for use in underserved communities, and reviews and supports legislation.
- ◆ Responding to increasing need for pro bono representation in the immigrant community, the Committee on Immigration Representation, with funding from the Association and The New York Bar Foundation, is developing a Legal.io portal to match volunteers' skills with organizations that need them. Working with the Governor's Liberty Defense Project, the Committee is sponsoring trainings to increase the pool of volunteer lawyers. TNYBF and NYSBA are also funding a one-year, grant-based pro bono fellow to staff the effort.
- ◆ In May, the Committee on Women in the Law produced its first-ever edition of the *NYSBA Journal*.
- ◆ International Section signed two Memorandums of Understanding: one with The Florida Bar and the other with the Union Internationale des Avocats (International Association of Lawyers).
- ◆ Trusts and Estates Law Section held an important program on the incapacitated client: "Lessons from Astor, Clark & Redstone."

## Pro Bono

Our biannual Pro Bono Partnership Conference, hosted by our Committee on Legal Aid, brought together legal service providers and pro bono coordinators from across the state. The conference hosted 550 attorneys and paralegals and offered 37 workshops for attendees.

Intellectual Property Law Section members joined in the Entertainment, Arts and Sports Law Section's pro bono clinic in March.

## Sections Join Forces

Corporate Counsel and Business Law Sections held a joint program in the fall and another at the Annual Meeting.

In March, Dispute Resolution and Commercial and Federal Litigation Sections held a joint program titled "Cross-Fertilization of Best Practices Recommendations."

Trial Lawyers Section and Torts, Insurance and Compensation Law Section jazzed things up by holding a joint Fall Meeting in New Orleans, LA.

## Diversity

Commercial and Federal Litigation Section celebrated the 11th anniversary of Smooth Moves, a program focusing on career strategies for diverse attorneys.

Corporate Counsel Section's annual Kenneth G. Standard Internship Program selected students of color to apply for summer internships in corporate law departments in New York State.

Family Law Section offered four diversity fellowships to attorneys in 2016, pairing each fellow with a mentor from the FLS Executive Committee.



1,000 tax lawyers having lunch #NYSBA17 #Thatsalotofchicken





Labor and Employment Law Section extended its Diversity Fellowship Program to two years. Health Law Section offered a Diversity Summer Fellowship program.

Dispute Resolution Section established Diversity Scholarships to its mediation and arbitration trainings. The awards go to minority and women attorneys to attend trainings in the field of dispute resolution.

### Young Lawyers and Law Students

Young Lawyers Section held its annual Trial Academy, and a number of Sections, including Criminal Justice, offered scholarships to attendees. This fall, YLS will hold its first-ever Advanced Trial Academy.

YLS hosted the U.S. Supreme Court Admissions Program in Washington, D.C. President Claire Gutekunst was the mo-  
vant. Justice Ruth Bader Ginsburg welcomed the group and led a discussion.

### A New Name

As of April 1, 2017, Environmental Law Section changed its name to Environmental and Energy Law Section, reflecting its members' interest in including energy as part of the Section's mission.

### Innovative Programming

General Practice Section workshoped "Improvisational Acting in the Court House."

A YLS half-day CLE mashed-up social media ethics, representing a craft brewery and finding your niche practice, topping it off with an after-hours tour of the Court of Appeals.

Local and State Government Law Section's inaugural Government Law Spring Forum covering FOIL, who is the client of a government attorney and judicial review of agency decisions, was so successful it's been added to the Section's annual roster.

### Sold Out!

Trial Academy; Pro Bono Partnership Conference; EASL's annual Music Business and the Law Conference; Intellectual Property Section's Women in IP



Trial Academy Team X, led by Xavier Donaldson  
#Needwesaymore?

# House of Delegates

## Reports Approved by the House

### November 2016

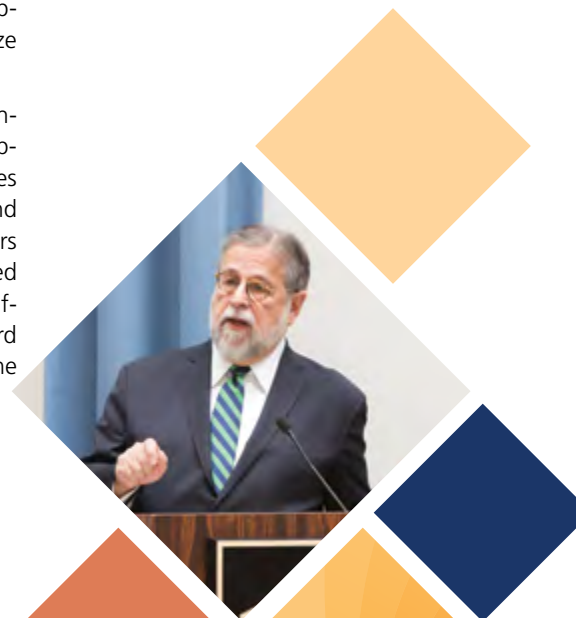
The Committee on the NYS Constitution made recommendations regarding Article XIV, Conservation. The report concluded that concerns that a constitutional convention might affect the “forever wild” provision in the current constitution are unwarranted. It also made recommendations as to other environmental issues that might be addressed by a convention. Press release is at [www.nysba.org/ForeverWildClause/](http://www.nysba.org/ForeverWildClause/).

The President’s Committee on Access to Justice presented a report in support of the concept of limited scope legal services for poor and moderate income persons. Limited scope representation provides clients with specific, limited representation (e.g., drafting documents) as long as the limited representation is reasonable and the client consents after full disclosure of the limits.

### January 2017

The Committee on the NYS Constitution made recommendations regarding Article VI, Judiciary. The report addresses opportunities to restructure and modernize New York’s court system.

The Report of the Committee on Continuing Legal Education expressed support for amendments to the MCLE rules to require one credit hour in diversity and inclusion CLE as part of the 24 hours biennial requirement for experienced attorneys. The report was sent to the Office of Court Administration’s CLE Board for consideration; as of this writing, the rule is pending.





# The New York Bar Foundation

As the philanthropic arm of the bar association, The New York Bar Foundation is committed to making a difference to those in need of legal services, helping enrich the profession, and increasing public understanding of the law.

Because of your generosity, in its 2017 grant cycle The Foundation allocated more than \$640,000 in grants to 97 law-related projects across New York State. These grants addressed some of the most fundamental needs of our society.

Several new and innovative fundraising efforts helped grow our grant program in the past year.

## Young Lawyers Network to Help Veterans

The Young Lawyer Friends of The Foundation and Young Lawyers Section created our first online 24-hour giving challenge, to raise funds for legal services organizations that assist veterans in need of legal services. Using social media, attorneys invited their families, colleagues, and friends to help realize their \$5,000 goal. They raised more than \$7,500.

## Ensuring the Future of the Legal Profession

Through generous gifts from the New York State Bar Association Sections and donors, fellowships and scholarships that provide invaluable educational opportunities are available to law students from across New York State. More than \$90,000 was distributed, helping students build a solid base that will serve them throughout their entire career. The students describe the impact of these experiences as a remarkable boost on their professional pathway.

In 2016, the Foundation added two new scholarships to honor Chief Judge Judith S. Kaye's passion and commitment to making a difference through the legal profession: the Honorable Judith S. Kaye Children and the Law Committee Scholarship, and the Honorable Judith S. Kaye Commercial and Federal Litigation Scholarship.

When you give to The New York Bar Foundation, your gift creates a ripple effect throughout New York State and beyond.

## Law Firms Are Philanthropic Partners

In 2016, The Foundation launched a law firm fundraising challenge. Law firms from different geographic regions within New York State participated, generating nearly \$60,000 to assist the grant program. Participants included Sullivan & Cromwell, LLP; Hughes Hubbard & Reed; Meyer, Suozzi, English & Klein, P.C.; Rivkin Radler Attorneys at Law; Stroock; Whiteman Osterman & Hanna LLP; Ingerman Smith, LLP, Farrell Fritz, P.C.; Debevoise & Plimpton, LLP; Getnick, Livingston, Atkinson & Priore, LLP; Hancock Estabrook, LLP; and Mitchell Silberberg & Knupp, LLP.

## The Fellows Flourish

The Fellows of The New York Bar Foundation are members of the bench and bar who are recognized for outstanding professional achievement, dedication to the legal profession, and commitment to the organized bar. Fellows appreciate that the combined professional effort of all lawyers nurtures and sustains the rule of law and American democracy. They strive to develop, uphold and maintain these core values of the profession. This year, we welcomed 51 new Fellows to this distinguished group of professionals.

Fellows commit to financially supporting the goals and objectives of The Foundation through charitable contributions. Additionally, in 2016 the Fellows held their second basket auction during the summer House of Delegates meeting in Cooperstown, generating nearly \$8,000 for the grant program.

## Another Louisiana Flood, Another Call to Action

After 2016's devastating floods in Louisiana, The Foundation and the NYSBA put out a call for assistance. Our network quickly generated over \$7,500 in donations that were sent to the Louisiana Bar Foundation to help fund flood recovery grants to address victims' legal needs. E. Jane Sherman, President of the Louisiana Bar Foundation noted, "We are honored and privileged to count The New York Bar Foundation as a partner and are grateful for your support of the Louisiana Bar Foundation."

## When You Give

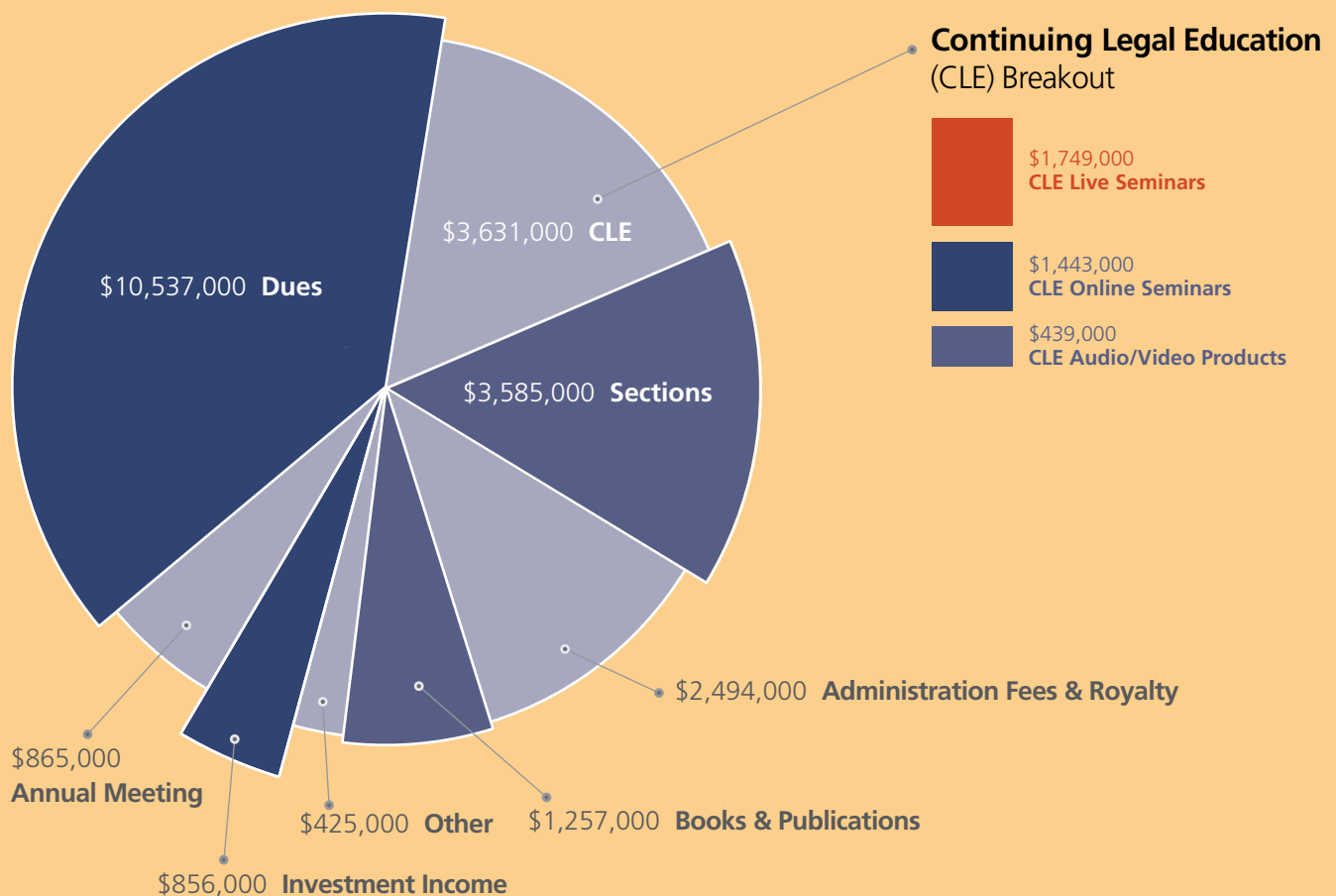
When you give to The New York Bar Foundation, you make a difference. Your gift's impact is enhanced through the grant, fellowship and scholarship programs that create a ripple effect extending throughout New York State and beyond. By working together for the greater good, you help assist people with life-changing legal matters. Thank you.

# NYSBA Finances

The New York State Bar Association is committed to being accountable to its members and the public for its finances.

The Association works hard to ensure that member dollars are used to create professional, public service, and educational activities and benefits in the diverse and changing legal profession. Copies of the complete audited financial statements for the years ended December 31, 2016 and 2015 are available to members and may be obtained by contacting Kristin M. O'Brien, Senior Director of Finance, [kobrien@nysba.org](mailto:kobrien@nysba.org).

## Revenue & Support



Complete audited financial statements for 2016 and 2015 are available to members.

## Assets

Cash	<b>\$1,835,000</b>
Investments	<b>\$40,484,000</b>
Property & Equipment	<b>\$2,733,000</b>
Other Assets	<b>\$2,141,000</b>





## NEW YORK STATE BAR ASSOCIATION

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