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## Energy and Environmental Justice: How States Can Integrate Environmental Justice Into Energy-Related Proceedings

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# Energy and Environmental Justice: How States Can Integrate Environmental Justice Into Energy-Related Proceedings

## **Cover Page Footnote**

Associate Professor, Director of Center for Energy and Sustainable Development, West Virginia University College of Law; LL.M., Pace University College of Law; J.D., University of Iowa College of Law. I express my appreciation to my colleagues at WVU College of Law and to the Honorable Eleanor Stein, Administrative Law Judge, New York Public Service Commission, for their insightful comments on drafts of this Article, and to the WVU College of Law and the Hodges/Bloom Research Fund for their financial support for this Article.

# ENERGY AND ENVIRONMENTAL JUSTICE: HOW STATES CAN INTEGRATE ENVIRONMENTAL JUSTICE INTO ENERGY-RELATED PROCEEDINGS

*James M. Van Nostrand*<sup>+</sup>

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“Environmental justice” generally refers to the concept that all people—regardless of their race, national origin, or socioeconomic status—should benefit equally from environmental protection and have an equal opportunity to participate in governmental decisions about activities that may affect their environment or health.<sup>1</sup> Environmental-justice initiatives focus on addressing the inequities of environmental protection in low-income and minority communities that have been excluded from participating in the environmental debate and, consequently, endure greater environmental hazards than other communities.<sup>2</sup> Environmental-justice issues gained significant attention in 1987, when the United Church of Christ Commission for Racial Justice produced *Toxic Wastes and Race in the United States*, which was the first national study to correlate waste-facility sites and demographic characteristics.<sup>3</sup> Several years later, President William J. Clinton issued Executive Order 12,898, which sought to achieve equal environmental protection by focusing federal attention on environmental and health conditions of minority and low-income populations.<sup>4</sup> For more than fifteen years, the U.S. Environmental Protection Agency (EPA) has operated under the order and driven the federal government’s environmental-justice efforts.<sup>5</sup>

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1. *Environmental Justice, Basic Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/compliance/ej/basics/ejbackground.html> (last updated Mar. 15, 2011). The U.S. Environmental Protection Agency (EPA) defines “environmental justice” as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” *Id.* The EPA states that “fair treatment,” in turn, “means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.” *Id.* The EPA defines “meaningful involvement” to mean that

- (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health;
- (2) the public’s contribution can influence the regulatory agency’s decision;
- (3) their concerns will be considered in the decision making process; and
- (4) the decision makers seek out and facilitate the involvement of those potentially affected.

*Id.*

2. *Environmental Justice*, CAL. ENERGY COMMISSION, [http://www.energy.ca.gov/public\\_adviser/environmental\\_justice\\_faq.html](http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html) (last modified Jan. 19, 2012).

3. UNITED CHURCH OF CHRIST, COMM’N FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 3* (1987) (noting that the report was the first attempt to address the relationship between waste hazards and minority communities). The study found that the location of hazardous waste sites was most highly correlated with the race of the surrounding communities. *Id.* at 15.

4. Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994) (directing federal agencies to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”).

5. *Id.*

Following these federal actions, many states began devoting similar efforts to address environmental-justice issues, particularly in energy-related proceedings.<sup>6</sup> States also have a substantial role in administering many federal environmental programs, which allows them to influence the extent to which environmental-justice considerations are successfully integrated into the policies, practices, and decision-making processes of government agencies.<sup>7</sup>

New York provides a particularly good example of state-level efforts to address environmental-justice issues. Significant energy- and climate-planning initiatives have recently gained momentum in the Empire State.<sup>8</sup> Policymakers have taken a number of measures to address environmental-justice issues, such as encouraging stakeholder participation, engaging in public outreach, and conducting investigations that evaluate the impact of electric-generation emissions on environmental-justice communities.<sup>9</sup>

This Article examines how New York entities attempted to integrate environmental-justice issues into recent climate- and energy-planning initiatives. Part I discusses four proceedings in particular. First, it discusses New York's efforts to reduce electricity usage through energy efficiency, which can benefit environmental-justice communities by reducing the use of generating units, frequently located in these communities. The New York State Public Service Commission (NYPSC) developed an "energy efficiency portfolio standard" (EEPS) in 2007 that aimed to reduce electricity usage levels fifteen percent below the projected levels by 2015—the "15 by 15" target.<sup>10</sup> In the process of implementing its recommendations, the NYPSC initiated related proceedings to develop a strategy for reducing electric facilities' impact on environmental-justice communities.<sup>11</sup>

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6. See *infra* text accompanying notes 103–04.

7. See *State Implementation Plans*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/region2/air/sip/> (last updated Apr. 6, 2011). To illustrate, states submit a State Implementation Plan (SIP), a state-level blueprint for implementing federal environmental-justice policies, to the EPA. *Id.* If the EPA approves a state's SIP, then that state accepts key responsibilities for administering and enforcing federal environmental laws. *Id.* For example, to implement the Clean Air Act, states' SIPs must strive to achieve and maintain the Act's enumerated national ambient-air-quality standards. 42 U.S.C. § 7410 (2006). Similarly, under the Resource Conservation and Recovery Act, states must implement hazardous-waste programs comparable to federal measures. 42 U.S.C. § 6901 (2006); *RCA State Authorization*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epawaste/laws-regs/state/index.htm> (last updated Jan. 25, 2012). Thus, the extent to which federal environmental-justice issues are implemented is left largely up to the states.

8. See *infra* Part I.A–D.

9. See *infra* Part I.B–C.

10. Press Release, N.Y. Pub. Serv. Comm'n, *New York Seeks Aggressive Reduction in Energy Usage Through Expanded Efficiency Initiatives* (May 16, 2011), available at <http://documents.dps.ny.gov/public/common/viewdoc.aspx?DocRefId={49260A93-914E-4941-855F-F202CF56F13B}>.

11. See *infra* Part I.

Second, this Article discusses New York's participation in the Northeast Regional Greenhouse Gas Initiative (RGGI), which is an agreement among nine northeastern and mid-Atlantic states to reduce their power-sector global warming pollution by ten percent by 2018.<sup>12</sup> To achieve the desired reduction in green house gas (GHG) emissions, RGGI auctions a limited (and annually decreasing) number of carbon allowances to power generators.<sup>13</sup> RGGI conducted fourteen auctions over three years, which produced about \$952 million in revenue, and roughly \$345 million of that revenue is New York's share.<sup>14</sup> The New York State Energy Research and Development Authority (NYSERDA) appointed an RGGI Advisory Group to use these funds to develop a plan for reducing GHG emissions.<sup>15</sup>

Third, this Article discusses New York's Energy Plan, which New York agencies developed pursuant to an executive order issued in 2008.<sup>16</sup> The plan, completed in December 2009,<sup>17</sup> explained the importance of considering environmental-justice impacts.<sup>17</sup> Fourth, this Article examines New York's efforts to address climate change, particularly through executive orders. For example, New York's Executive Order No. 24 established a GHG reduction goal—often referred to as the “80 by 50” objective—that aimed to decrease emissions by eighty percent by 2050.<sup>18</sup> The order also directed the newly created Climate Action Council to prepare a climate action plan<sup>19</sup> that integrated environmental-justice issues.<sup>20</sup>

Following this review of New York's experience, Part II analyzes whether New York successfully integrated environmental-justice issues into these particular proceedings and how other states can benefit from New York's

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12. *Welcome*, REGIONAL GREENHOUSE GAS INITIATIVE, [www.rggi.org](http://www.rggi.org) (last visited Feb. 16, 2012) [hereinafter *Welcome*]. RGGI originally had ten members, but New Jersey withdrew from the agreement as of 2012. Notice from Bob Martin, Comm'r, State of N.J. Dep't of Env'tl. Prot., to Signatory States (Nov. 29, 2011), available at [http://www.rggi.org/docs/Documents/NJ-Statement\\_112911.pdf](http://www.rggi.org/docs/Documents/NJ-Statement_112911.pdf).

13. REGIONAL GREENHOUSE GAS INITIATIVE, DESIGN ELEMENTS FOR REGIONAL ALLOWANCE AUCTIONS UNDER THE REGIONAL GREENHOUSE GAS INITIATIVE 1 (2008), available at [http://rggi.org/docs/20080317auction\\_design.pdf](http://rggi.org/docs/20080317auction_design.pdf).

14. *Auction Results*, REGIONAL GREENHOUSE GAS INITIATIVE, [http://www.rggi.org/market/co2\\_auctions/results](http://www.rggi.org/market/co2_auctions/results) (last visited Feb. 12, 2011).

15. See N.Y. STATE ENERGY RESEARCH DEV. AUTH., OPERATING PLAN FOR INVESTMENTS IN NEW YORK UNDER THE CO<sub>2</sub> BUDGET TRADING PROGRAM AND THE CO<sub>2</sub> ALLOWANCE AUCTION PROGRAM: CONCEPT PAPER 1 (2008) [hereinafter *NYSERDA CONCEPT PAPER*], available at <http://www.nyserd.org/en/Page-Sections/Energy-and-Environmental-Markets/Regional-Greenhouse-Gas-Initiative/~media/Files/EDPPP/Energy%20and%20Environmental%20Markets/RGGI/Op%20Plan%2009/concept-paper-nov-12.ashx>.

16. See Exec. Order No. 2, 30 N.Y. Reg. 119, 119 (May 7, 2011).

17. N.Y. STATE, ENVIRONMENTAL JUSTICE ISSUE BRIEF, N.Y. STATE ENERGY PLAN 2009, at 1 (2009), available at [www.nysenergyplan.com/final/environmental\\_justic\\_IB.pdf](http://www.nysenergyplan.com/final/environmental_justic_IB.pdf).

18. Exec. Order No. 24, 31 N.Y. Reg. 113, 113 (Sept. 2, 2009).

19. *Id.*

20. See *infra* Part I.D.

experience. This critical review is largely based on information compiled by the author through several telephone and personal interviews with individuals who participated in the four proceedings discussed in Part I. In sum, Part II discusses New York's mixed success in integrating environmental-justice issues into energy-related proceedings. The governor and other state leaders aided this integration commitment by issuing executive orders and forming the Environmental Justice Interagency Task Force, which importantly demonstrates that state agencies and leaders have the ability to aid environmental-justice communities.<sup>21</sup> However, the review also illustrates some of the continuing challenges of enabling environmental-justice communities—particularly through financial and technical resources—to participate in these processes.<sup>22</sup>

The Article concludes by recommending how states can more effectively integrate environmental-justice issues into energy-related proceedings. As a fundamental matter, simply reaching out to environmental-justice organizations differs from actually engaging them in the process. Based on its analysis of New York's experience, this Article argues that engaging environmental-justice stakeholders in relevant proceedings—with engagement requiring the state's devotion of adequate resources to lessen stakeholders' financial barriers to participation—is essential to ameliorating environmental-justice disparities. Although this may prove challenging during these times of fiscal constraint on state governments, funding for environmental-justice issues must be included among states' priorities if environmental-justice issues are going to be further integrated in the decision-making process.

#### I. SPECIFIC ENERGY-RELATED PROCEEDINGS

New York's effort to integrate environmental-justice issues dates back to at least October 1999, when the New York State Department of Environmental Conservation (DEC) appointed an Environmental Justice Coordinator to administer the Department's Environmental Justice Program.<sup>23</sup> The DEC also created the Environmental Justice Advisory Group, which included government officials from state, local, and federal levels, community groups, environmental organizations, and those subject to environmental regulation.<sup>24</sup> The Advisory Group made recommendations to the DEC regarding New York's environmental-justice programs; partly based on these recommendations, the DEC issued *CP-29 Environmental Justice and Permitting* in March 2003.<sup>25</sup> This policy aimed to integrate environmental-

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21. See *infra* Part II.

22. See *infra* Part II.

23. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, CP-29 ENVIRONMENTAL JUSTICE AND PERMITTING 2 (2003) [hereinafter CP-29 ENVIRONMENTAL JUSTICE AND PERMITTING], available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/ejpolicy.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ejpolicy.pdf).

24. *Id.*

25. *Id.*

justice issues into New York's environmental permit process and other DEC programs.<sup>26</sup> Among other things, the policy identified areas of environmental concern.<sup>27</sup>

In 2008, former governor David Paterson's administration adopted several measures intended to integrate environmental-justice issues into state agency decision making.<sup>28</sup> One of his first executive orders, Executive Order No. 4, established a State Green Procurement and Agency Sustainability Program that, in turn, created an Interagency Committee on Sustainability and Green Procurement.<sup>29</sup> The Committee sought to develop procurement specifications for state agencies that considered public health and environmental concerns, such as "the health of children and other vulnerable populations."<sup>30</sup> With respect to energy issues in particular, Executive Order No. 4 also required each agency to create and implement programs aimed to decrease its environmental impact by becoming more energy efficient and using more renewable energy.<sup>31</sup>

Former governor Paterson also created an Environmental Justice Interagency Task Force and charged it with the task of developing plans and recommendations for state agencies.<sup>32</sup> Participating agencies—the DEC, the Department of Public Service (DPS), the New York Power Authority, and NYSERDA—issued agency-specific, draft "action agendas."<sup>33</sup> Notably, DPS's action-agenda draft reports that the agency "is immersed in and is becoming keenly aware of the many concerns faced by the environmental justice community" and noted that DPS was exploring ways to reduce the environmental and health impacts that certain electric plants have on those communities.<sup>34</sup> The following subsections discuss the proceedings of these various state agencies.

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26. *Id.* at 1.

27. *Id.* at 3–5. The policy defines a "potential environmental justice area" as "a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." *Id.* at 4.

28. See Exec. Order No. 4, 30 N.Y. Reg. 77, 77–78 (May 21, 2008).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Environmental Justice Interagency Task Force*, DEP'T ENVTL. CONSERVATION, <http://www.dec.ny.gov/public/47153.html> (last visited Feb. 2, 2011).

33. DEP'T OF ENVTL. CONSERVATION, NEW YORK STATE ENVIRONMENTAL JUSTICE INTERAGENCY TASK FORCE: DRAFT RECOMMENDATIONS 5, 7 (2009), *available at* [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/drftplnejintertskfrce.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drftplnejintertskfrce.pdf). Notably, both the NYSERDA and the DPS draft-action agendas include recommendations to increase community outreach, collaborate with environmental-justice communities, and incorporate environmental-justice issues in permitting processes. *Id.* at 94–95 (NYSERDA draft action plan); *id.* 69–71 (DPS draft action plan). NYSERDA's draft action plan includes further recommendations to make environmental justice issues a priority in certain assistance programs and to enforce reduction plans in environmental justice communities. *Id.* at 95–96.

34. *Id.* at 72.



A. *Public Service Commission's Energy Efficiency Portfolio Standard (EEPS) Proceeding*

1. *Background*

In April 2007, former New York governor Eliot Spitzer announced a policy objective to achieve a fifteen percent reduction in electricity consumption by 2015.<sup>35</sup> Shortly thereafter, the NYPSC commenced a proceeding to develop an EEPS to facilitate the “15 by 15” goal.<sup>36</sup> NYPSC stated that achieving this goal is intended to “moderate expected increases in average bills and the State’s energy costs over time; enhance system reliability; ease wholesale prices and transmission and distribution congestion; reduce greenhouse gas emissions and local air pollution from the energy sector; improve New York’s energy security and create clean energy jobs for New Yorkers.”<sup>37</sup> In a June 2008 order, the NYPSC adopted three-year targets for energy reductions aimed to achieve the “15-by-15” objective and directed certain utilities to collect additional funds to support the EEPS program.<sup>38</sup>

Shortly thereafter, the presiding administrative law judges in the EEPS proceeding issued an order identifying certain EEPS design issues.<sup>39</sup> One “outstanding policy issue” was ensuring that disadvantaged communities benefit from the EEPS program through adequate training and participation and by possibly reducing the use of energy facilities located in such communities.<sup>40</sup> The procedural ruling also established several working groups to address outstanding design and policy issues; in particular, Working Group VIII was devoted to demand-response issues and distributed generation.<sup>41</sup> “Demand response” refers to consumers of electricity temporarily decreasing

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35. *Plans to Make Governors Mansion a “Green” Building Unveiled*, DEP’T ENVTL. CONSERVATION (June 2007), [www.dec.ny.gov/environmentdec/33662.html](http://www.dec.ny.gov/environmentdec/33662.html).

36. Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Case 07-M-0548, Order Instituting Proceeding 2 (N.Y. Pub. Serv. Comm’n May 16, 2007), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={625676B8-D6A2-4AB9-8D53-5426AB4BDD6D}>.

37. Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Case 07-M-0548, Order Establishing Energy Efficiency Portfolio Standard and Approving Programs 2 (N.Y. Pub. Serv. Comm’n June 23, 2008), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D9F7E0DF-A518-4199-84CC-C2E03950A28D}>.

38. *Id.* at 3.

39. Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Case 07-M-0548, Procedural Ruling Concerning EEPS Design Issues 5–6 (N.Y. Pub. Serv. Comm’n July 3, 2008) [hereinafter *Procedural Ruling Concerning EEPS Design Issues*], *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={FF69344F-1747-4559-8AAB-BE86D2AB994B}>.

40. *Id.* at 5.

41. *Id.* at 4.

their usage in response to a “signal,” such as an increased market price.<sup>42</sup> Effective demand-response programs can provide significant air-quality benefits for environmental-justice communities by reducing or avoiding the dispatch of peaking generation units.<sup>43</sup> The procedural ruling further established that a working group would study peak-generation facilities’ impact on communities in which they are disproportionately located, as well as opportunities to replace those facilities with more energy-efficient resources.<sup>44</sup>

As part of a second procedural order, the administrative law judges assigned environmental justice to Working Group VIII’s areas of inquiry.<sup>45</sup> Working Group VIII comprised ninety participants, including representatives from utilities, environmental groups, and New York government agencies.<sup>46</sup> The order set October 15, 2008 as Working Group VIII’s deadline to submit a final report.<sup>47</sup>

## 2. Working Group VIII Final Report

On October 17, 2008, Working Group VIII submitted its final report to the NYPSC.<sup>48</sup> In framing the environmental-justice issue, the final report states that:

[c]ertain low income neighborhoods in New York, and very often communities of color, host peak generation facilities that are among the higher emitting and most inefficient units in the state. In some cases, these units have no emission controls and stacks as short as 30

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42. WORKING GROUP VIII, N.Y. PUB. SERV. COMM’N, DEMAND RESPONSE AND PEAK REDUCTION 4 (2008) [hereinafter WORKING GROUP VIII FINAL REPORT], available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0FFA7315-8714-4761-AE0B-82A836A05E86}>.

43. See *id.* at 5 (noting that demand response may lower emissions). These peaking generating units are generally “dirtier” than base-load generators; thus, avoiding deployment of these resources would provide disproportionate air-quality benefits for environmental-justice communities. See David Ehrlich, *Powering the Permit Process: A Mixed Review of Article X*, ALB. L. ENVTL. OUTLOOK, Fall 2001, at 19–20. “Emergency generation,” often utilizing diesel fuel or oil-burning generators, is generally much dirtier than base-load generation. See NANCY E. RYAN ET AL., ENVTL. DEFENSE, SMALLER, CLOSER, DIRTIER: DIESEL BACKUP GENERATORS IN CALIFORNIA 3 (2002).

44. Procedural Ruling Concerning EEPS Design Issues, *supra* note 39, at 4.

45. Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Case 07-M-0548, Procedural Ruling Considering Working Groups and Schedule 2 (N.Y. Pub. Serv. Comm’n Sept. 10, 2008) [hereinafter Procedural Ruling Considering Working Groups and Schedule], available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4B9B4619-4AC7-4080-971A-100D489A3467}>.

46. WORKING GROUP VIII FINAL REPORT, *supra* note 42, at 64–66.

47. Procedural Ruling Considering Working Groups and Schedule, *supra* note 45, at 2.

48. See generally WORKING GROUP VIII FINAL REPORT, *supra* note 42.

feet from ground level. These units are posited to have negative health impacts on the local populace.<sup>49</sup>

The final report acknowledges that demand-side management—the modification of consumer energy demand—could be used to replace some generators.<sup>50</sup> However, the report noted that determining the extent to which demand-side management can be used for this purpose is a “very technical question” because of the complexity of New York City’s electric network.<sup>51</sup> In light of this potential resolution, the final report identified three categories of peaking units at issue: (1) units that demand-side management resources could replace, both within and outside of New York City; (2) units that resources located within the same areas as those units could replace; and (3) units that could not be replaced.<sup>52</sup>

At the time Working Group VIII issued its final report, it explained that it could not make recommendations regarding environmental-justice changes because of the need for a technical assessment.<sup>53</sup> The report proposed that after such an assessment occurred, a “steering committee” could recommend additional issues to study, incentives to reduce energy demand, and mechanisms aimed to reduce air emissions in environmental-justice communities.<sup>54</sup> It also recommended further analysis “to determine whether the output from peak generation units within a half-mile of an Environmental Justice community could be fully or partially replaced or displaced with clean DSM resources”<sup>55</sup> and that such an analysis should be performed by a technical study group comprising representatives from the Consolidated Edison Company (Con Edison), the DEC, the DPS, and the New York

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49. *Id.* at 32. Con Edison explained that peaking units generally burn more fuel than non-peaking units to produce the same amount of energy; therefore, peaking units generally emit more pollution than non-peaking units. N.Y. PUB. SERV. COMM’N, CASE 09-E-0115, PROCEEDING ON MOTION OF THE COMMISSION TO CONSIDER DEMAND RESPONSE INITIATIVES: ASSESSMENT OF THE POTENTIAL FOR COST-EFFECTIVE DEMAND RESPONSE BY CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. 24 n.29 (2009) [hereinafter CON EDISON ASSESSMENT], available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9B18C259-D1D7-46C6-BC1B-836F3BEA570B}>.

50. WORKING GROUP VIII FINAL REPORT, *supra* note 42, at 32.

51. *Id.* To illustrate the complexity of New York’s electric network, the report explains that 80 percent of the generation needs of New York City must be met by generators physically located within the city. Similarly, certain generators may be required for voltage support, black start, or other system operation needs. Whether one or more peaking units could be replaced by clean DSM resources would depend on the units in question, their location, and the availability of sufficient DSM resources within that area.

*Id.*

52. *Id.* at 32–33.

53. *Id.* at 34.

54. *Id.* at 9.

55. *Id.* at 33.

Independent System Operator (NYISO).<sup>56</sup> This technical study group should evaluate the issue according to several criteria: (1) measurement of emissions; (2) impacts of those emissions on environmental-justice communities' ambient-air quality; (3) facilities' ability to maintain a reliable transmission system; (4) measurement of generated electricity; (5) communities' population residing within a half-mile of the facilities; (6) length of unit operation; and (7) any future proposals for the units.<sup>57</sup>

### 3. *The Technical Study Group's Initial Assessment*

Pursuant to Working Group VIII's final report, the technical study group convened and investigated environmental-justice issues associated with peaking generation turbines.<sup>58</sup> The group, comprising representatives from Con Edison, DEC, DPS, NYISO, NYSERDA, and Sustainable South Bronx (SSBx), submitted its initial assessment to the administrative law judges on May 27, 2009.<sup>59</sup>

To produce its report, the technical group reviewed data for eighty-six peaking turbines operating within a half-mile radius of potential environmental-justice communities<sup>60</sup> and had members visit generating sites and surrounding communities.<sup>61</sup> The group analyzed data generated from 2005 to 2008—a time when the air quality of the New York City metropolitan region exceeded the National Ambient Air Quality Standard (NAAQS) for ozone<sup>62</sup>—to constrain its evidentiary focus and gather data on days when air quality negatively affected public health.<sup>63</sup>

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56. *Id.*

57. *Id.* at 34.

58. *See generally* Letter from EEPS Working Grp. VIII Technical Study Grp. to Jaclyn A. Brillling, Sec'y, N.Y. Pub. Serv. Comm'n (May 27, 2009), *available at* [http://www.dps.ny.gov/07M0548/workgroups/WGVIII-Summary\\_Report\\_Environmental\\_Justice\\_May\\_29\\_2009.pdf](http://www.dps.ny.gov/07M0548/workgroups/WGVIII-Summary_Report_Environmental_Justice_May_29_2009.pdf).

59. *Id.* Sustainable South Bronx is an environmental-justice organization that focuses on achieving “[s]ustainability through economic and environmental solutions.” SUSTAINABLE S. BRONX, <http://www.ssbx.org> (last visited Jan. 25, 2012).

60. Letter from EEPS Working Grp. VIII, *supra* note 58, at 2. Although the group studied eighty-six peaking units, it only focused on seven individual sites because five of the generating plant sites have more than one peaking turbine. *Id.* at attachment C. For example, Narrows has sixteen turbines, whereas Astoria has thirty-one. *Id.* The DEC created maps identifying potential environmental-justice communities located within a half-mile radius of the seven peaking generation sites. *Id.* The seven facilities studied include (1) Con Edison 59th Street Station; (2) Con Edison 74th Street Station; (3) Astoria Gas Turbine Power; (4) Gowanus Generating Station; (5) Hudson Avenue Station; (6) Narrows Generating Station; and (7) Shoemaker Gas Turbine Facility.

61. Telephone Interview with Raj Addepalli, Deputy Dir. of Electric, N.Y. Dep't of Pub. Serv. (Dec. 7, 2010) [hereinafter Addepalli Interview].

62. Letter from EEPS Working Grp. VIII, *supra* note 58, at 2.

63. *Id.* DEC reviewed facilities' emission data and EPA operational data and calculated the average time that ozone NAAQS was exceeded daily. *Id.* NYISO's statistical analysis showed

Based on this analysis, the technical group came to various conclusions. The group suggested that other factors—emissions from other units, vehicles, and ozone from neighboring areas—have a greater impact on ozone levels in the New York City metropolitan area.<sup>64</sup> In addition to this suggestion, the group offered five main conclusions.

First, from 2005 to 2008, the median usage of the peaking units was slightly over eight hours on days when the air quality exceeded the ozone NAAQS.<sup>65</sup> Second, demand-side resources could potentially displace the peaking units studied.<sup>66</sup> Third, to replace some of these units, sufficient demand-side resources would need to replace the energy and services that the peaking units generated.<sup>67</sup> Fourth, absent more information about the electrical systems and demand-side resources, a determination of whether demand-side reductions could create the same amount of energy produced by the peaking units is impossible.<sup>68</sup> Fifth, the most efficient system would likely deliver reductions to the displaced units.<sup>69</sup>

The technical report also included nine recommendations—five to be implemented within three to six months and four to be implemented within six to eighteen months.<sup>70</sup> When presenting its short-term recommendations, the group urged future efforts to make “demand side improvements to areas that will impact the highest emitting peaking units.”<sup>71</sup> With respect to longer-term recommendations, the group called for additional analyses and assessments, including an analysis of any relationship between annual usage of peaking units and ozone concentration and an assessment of the technical feasibility and market future of using clean demand-side resources in areas with peaking generators.<sup>72</sup>

#### 4. *The PSC’s Demand-Response Proceeding*

The PSC initiated a proceeding to continue the work done by Working Group VIII’s investigations.<sup>73</sup> In its order, the PSC removed demand-response

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that reducing the use of peaking units at maximum output will lower emissions and that a “very strong correlation” exists between the amount of energy units generate each day and the total emissions they produced. *Id.* at attachment F. This suggests that peaking units with the highest emissions are likely used last, but that there is a weak correlation between these units’ emissions and “ambient concentrations of ozone” on days when the NAAQS were exceeded. *Id.*

64. *Id.*

65. *Id.* at 3.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 3–4

71. *Id.* at 3.

72. *Id.* at 4.

73. Proceeding on Motion of the Commission to Consider Demand Response Initiatives, Case 09-E-0115, Order Instituting Proceeding (N.Y. Pub. Serv. Comm’n Feb. 12, 2009),

programs from the EEPs proceeding's scope in order to focus more precisely on demand-response issues.<sup>74</sup> The PSC noted that reducing peak loads—the objective of demand-response programs—would reduce reliance on peaking generators, which would improve efficiency and reduce emissions.<sup>75</sup> The order directed Con Edison to propose cost-effective programs, including programs designed to reduce generating unit usage.<sup>76</sup>

On June 1, 2009, Con Edison filed a report including four new demand-response pilot programs designed to reduce peak-loads and the usage of generating units, which could benefit environmental-justice communities.<sup>77</sup> To determine the extent to which demand-response programs could possibly decrease the usage of peaking generation, Con Edison performed a “load pocket” analysis.<sup>78</sup> “Load pockets” were divisions of New York City’s electrical transmission system created by Con Edison, and the company’s analysis determined the reliability of each.<sup>79</sup> Of the thirteen load pockets in New York City, Con Edison identified one—Greenwood, Brooklyn—where peaking generators are needed to meet peak electric demand in seasons other than the summer.<sup>80</sup> Con Edison stated that this load pocket, and possibly one other, could benefit from demand-response efforts.<sup>81</sup>

For demand response “to provide a net positive environmental impact,” Con Edison proposed a thirty-percent “enrollment cap” on emergency generation.<sup>82</sup> According to Con Edison, this cap would improve air quality while also maintaining a reliable electric system.<sup>83</sup> Con Edison noted that a lower, fifteen-percent cap was feasible, but could lower program enrollment, and noted that use of other peak reduction techniques on these load pockets could also reduce emissions.<sup>84</sup>

In the PSC’s ruling on Con Edison’s demand-response proposals, it acknowledged that some units used to implement demand response, particularly distributed generation units, could generate more emissions than existing gas turbines.<sup>85</sup> The PSC further noted that using demand-response

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available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1CE8543B-6AF8-4399-A45F-1783D707BE6C}>.

74. *Id.*

75. *Id.*

76. *Id.*

77. CON EDISON ASSESSMENT, *supra* note 49, at 17–19.

78. *Id.* at 24.

79. *Id.*

80. *Id.*

81. *Id.* at 25.

82. *Id.*

83. *Id.* at 25–26. Con Edison set the cap at thirty percent based on EPA data. *Id.* at 25 n.31.

84. *Id.* at 20, 26 & n.32 (“The installation of solar, EE and peak load shifting technologies is excepted to provide additional emissions benefits.”).

85. Proceeding on Motion of the Commission to Consider Demand Response Initiatives, Case 09-E-0115, Order Adopting in Part and Modifying in Part Con Edison’s Proposed Demand

resources that produced more emissions than the existing infrastructure would be counterproductive to the proceeding.<sup>86</sup>

With regard to Con Edison's proposal to limit emergency generation, the PSC noted that two environmental-justice representatives, SSBx and the United Puerto Rican Organization of South Park (UPROSE), as well as the DEC had promoted examination of this issue.<sup>87</sup> These parties argued that distributed generation units should not be used within a half-mile of existing gas turbines, and SSBx promoted eliminating diesel-burning units from parts of New York City altogether.<sup>88</sup> SSBx further proposed that natural gas generators produced in 2000 or later should operate under a thirty-percent cap.<sup>89</sup>

The PSC addressed these concerns in several ways. First, the PSC prohibited the use of non-renewable fossil-fuel-fired distributed generation units within a half-mile of certain gas turbines near environmental-justice communities.<sup>90</sup> Second, the PSC capped the use of diesel-fired distributed generation units outside of environmental-justice areas at twenty percent of megawatt (MW) enrollment and prohibited using units manufactured before 2000.<sup>91</sup>

In other portions of the order, the PSC generally approved the demand-response proposals included in Con Edison's original filing, subject to some modifications.<sup>92</sup> Con Edison began marketing its approved demand-response programs in December 2009 in an effort to enroll participants before the April 2010 enrollment deadline.<sup>93</sup> Notwithstanding these efforts, Con Edison reported low demand-response program enrollment and described the participation of those enrolled during the summer of 2010 as "disappointing."<sup>94</sup>

In September 2010, Con Edison submitted a petition to amend its demand-response programs to make them "more customer friendly, and to help increase enrollment."<sup>95</sup> According to the petition, Con Edison expected its

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Response Programs 19 (N.Y. Pub. Serv. Comm'n Oct. 15, 2009), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7BAA0848-A2FA-4D79-BAA8-0D015AB5B4BD}>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 20–21.

91. *Id.* at 21. Natural-gas-fired units used "three-way catalyst emission controls" or "lean burn engines" from model year 2000 or later, as these emissions are lower. *Id.*

92. *See id.* at 22–27 (adopting Con Edison's proposals with modifications).

93. Petition of Consolidated Edison Company of New York, Inc. for Approval of Changes to Demand Response Programs, Case No. 09-E-0115, at 4 (N.Y. Pub. Serv. Comm'n), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D5698F36-0EE8-4BE2-B43F-7901BA5DB6E6}>.

94. *Id.*

95. *Id.* at 2.

demand-response programs to be a key part of reducing “economic, social and environmental costs” associated with peak-load activities.<sup>96</sup> The petition further notes that there are societal benefits—“particularly in environmental justice areas”—associated with pollutant reduction.<sup>97</sup> According to Con Edison, these benefits motivated its decision to target the demand-response programs “in areas where they can achieve the greatest impact on peaking emissions.”<sup>98</sup>

The PSC issued an order on January 20, 2011, approving Con Edison’s various changes to its demand-response programs.<sup>99</sup> In doing so, the PSC continued to prohibit the use of distributed-generation units within a half-mile of gas turbines in certain environmental-justice communities (Brooklyn, Queens, and Manhattan) to protect these areas.<sup>100</sup> The order also upheld the use of “renewable, non-fossil-fired DG, since such generation would result in less environmental impacts in the EJ communities, compared to the neighboring gas turbines.”<sup>101</sup> The PSC noted that “the peak load shaving demand response programs” would likely prevent or minimize peaking generation’s negative impacts on environmental-justice areas.<sup>102</sup>

### B. RGGI Advisory Group

#### 1. Background

New York is an RGGI participant; as described above, RGGI is an agreement among nine northeastern and mid-Atlantic states to reduce the carbon dioxide emitted by their power sectors by ten percent by 2018.<sup>103</sup> The states participating in RGGI—Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont—comprise nearly sixteen percent of the U.S. gross domestic product.<sup>104</sup> The RGGI program reduces GHG emissions by auctioning carbon pollution allowances to power generators in the nine participating states each

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96. *Id.* at 1–2.

97. *Id.* at 27–28.

98. *Id.* at 28.

99. Proceeding on Motion of the Commission to Consider Demand Response Initiatives, Case 09-E-0115, Order Adopting Modifications to Demand Response Programs 19–20 (N.Y. Pub. Serv. Comm’n Jan. 20, 2011), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4A149F9E-CDD4-4387-AE9F-3556A45BC057}>.

100. *Id.* at 10.

101. *Id.* at 11.

102. *Id.* at 7.

103. *See supra* note 12.

104. REG’L GREENHOUSE GAS INITIATIVE, *supra* note 12. The states developed RGGI in anticipation of a federal cap-and-trade program for GHG emissions. Gerald B. Silverman, *Supporters of Regional Initiative Say Record Shows Trading Scheme Can Serve as Model*, DAILY ENV’T REP., July 26, 2010, at B-1.



quarter.<sup>105</sup> The power plants in the region are required to submit one carbon allowance for every ton of carbon emitted during a three-year compliance period.<sup>106</sup> Power generators without enough allowances must obtain more from a secondary market.<sup>107</sup>

The total amount of purchasable pollution allowances is capped at 165 million short tons annually from 2012 through 2014.<sup>108</sup> Starting in 2015, the number of allowances will be reduced by 2.5%, a ten-percent overall reduction by 2018.<sup>109</sup>

The regulatory framework governing New York's participation in RGGI consists of two parts. First, the DEC established New York's CO<sub>2</sub> Budget Trading Program in its official compilation of codes, rules, and regulations.<sup>110</sup> Second, New York appointed the NYSERDA to administer emission allowances pursuant to the DEC's allocations.<sup>111</sup>

## 2. Measures to Address Environmental-Justice Issues

In accordance with Part 507 of its regulations, NYSERDA convened an advisory group of stakeholders to advise the agency on how to allocate the funds raised by the RGGI auction.<sup>112</sup> The advisory group, of which the author was a member, initially included only one representative from an environmental-justice organization.<sup>113</sup> The group convened in November 2008 and reviewed a concept paper for a proposed operating plan, which identified the initiatives to which the auction proceeds would be allocated.<sup>114</sup> On June

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105. See *Welcome*, *supra* note 12 (“States sell nearly all emission allowances through auctions and investment proceeds in consumer benefits: energy efficiency, renewable energy, and other clean energy technologies.”).

106. *About the Regional Greenhouse Gas Initiative (RGGI)*, REG'L GREENHOUSE GAS INITIATIVE, [www.rggi.org/docs/RGGI\\_Fact\\_Sheet.pdf](http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf) (last visited Feb. 25, 2012).

107. *Id.*

108. *Id.*

109. *Id.*

110. N.Y. COMP. CODES R. & REGS. tit. 21, § 507.1 (2012).

111. *Id.* § 507.4.

112. *Id.* § 507.4(e).

113. See NYSERDA CONCEPT PAPER, *supra* note 15, at 17. NYSERDA requested that environmental-justice groups collectively identify a representative to be a part of the RGGI Advisory Group, and the groups extended that invitation to David Hahn-Baker, a Buffalo-based environmental consultant who focuses on environmental-justice issues. See *id.* Perceived treatment of the environmental-justice community as a relatively homogenous special interest by this single appointment was highly objectionable. Interview with John Williams, Dir. of Energy Analysis, N.Y. State Energy & Research Dev. Auth. (Jan. 29, 2011) [hereinafter Williams Interview].

114. See N.Y. STATE ENERGY RESEARCH & DEV. AUTH., REGIONAL GREENHOUSE GAS INITIATIVE NEW YORK STATE RGGI OPERATING PLAN ADVISORY GROUP MEETING: PRELIMINARY AGENDA (2008), available at [http://www.nyserda.ny.gov/en/Page-Sections/Energy-and-Environmental-Markets/Regional-Greenhouse-Gas-Initiative/~/\\_media/Files/EDPPP](http://www.nyserda.ny.gov/en/Page-Sections/Energy-and-Environmental-Markets/Regional-Greenhouse-Gas-Initiative/~/_media/Files/EDPPP)

21, 2010, NYSERDA formally issued its draft operating plan for comment, which indicated that New York would have approximately \$446 million in RGGI auction funds generated from December 2008 through March 2012.<sup>115</sup>

Notwithstanding the perceived inadequate representation of environmental-justice organizations—even after it added two more environmental-justice representatives—the operating plan included a number of initiatives designed to address environmental-justice issues.<sup>116</sup> At an RGGI Advisory Group meeting held on March 6, 2009 in New York City, NYSERDA solicited comments from members of the advisory group and the public on the draft operating plan.<sup>117</sup> During the public-comment portion of this meeting, members of a number of environmental-justice groups in downstate New York participated in an organized demonstration to protest the lack of representation of environmental-justice interests on the RGGI Advisory Group.<sup>118</sup> Admittedly, the operating plan did not present the initiatives in a way that highlighted their potential impact on under-served communities. The draft did, however, include environmental justice among the program's six selection criteria,<sup>119</sup> and several of these program initiatives could be expected to provide substantial relief to low-income communities and other areas disproportionately affected by environmental impacts.

First, the operating plan identified a suite of programs relating to the residential space- and water-heating efficiency and allocated nearly thirty percent of such funding to “low-income homes and multifamily buildings.”<sup>120</sup> These programs include the EmPower New York SM, Home Performance with ENERGY STAR, Green Residential Building Program, Multifamily

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/Energy%20and%20Environmental%20Markets/RGGI/Op%20Plan%2009/rggi-advisory-group-draft-agenda.ashx; NYSERDA CONCEPT PAPER, *supra* note 15, at 9–15.

115. N.Y. STATE ENERGY RESEARCH & DEV. AUTH., OPERATING PLAN FOR INVESTMENTS IN NEW YORK UNDER THE CO<sub>2</sub> BUDGET TRADING PROGRAM AND THE CO<sub>2</sub> ALLOWANCE AUCTION PROGRAM 3-1 (2010) [hereinafter RGGI OPERATING PLAN], available at <http://www.nyserd.org/en/page-section/energy-and-environment-markets/regional-green-house-gas-initiative/~media/files/edppp/energy%20and%20environmental%20markets/rggi/rggi-rpt09-06.ashx>.

116. *Id.* at 4-1 to -4. The two additional environmental-justice representatives were Elizabeth Yeampierre, Executive Director of UPROSE, and Cecil Corbin-Mark, Deputy Director and Director of Policy Initiatives at West Harlem Environmental Action. Williams Interview, *supra* note 113.

117. *Process for Creating the Initial Operating Plan (April 2009)*, NYSERDA, <http://www.nyserd.org/Page-Sections/Energy-and-Environmental-Markets/Regional-Greenhouse-Gas-Initiative/Process-for-Creating-the-Initial-Operating-Plan-April-2009.aspx> (last visited on Mar. 28, 2012).

118. Telephone Interview with Jackson Morris, Dir. of Strategic Engagement, Pace Energy & Climate Ctr. (Apr. 2, 2012).

119. RGGI OPERATING PLAN, *supra* note 115, at ES-1 (“The initiative can help reduce the disproportionate cost burden and harmful environmental impacts on low-income families and environmental justice communities.”).

120. *Id.* at 4-1 to -7.

Performance Program, and Solar Thermal Incentive Program.<sup>121</sup> According to the operating plan, these programs will target environmental-justice issues “by directly targeting outreach to environmental justice communities and working with community-based organizations that address environmental justice issues by referring them to appropriate programs.”<sup>122</sup> These programs could be expected to help mitigate the disproportionate impact that the increased cost of electricity will have on lower income families, while also improving indoor and outdoor air quality around the energy facilities by decreasing pollutants associated with fuel combustion.

Second, the operating plan described programs that aim to improve the efficiency of commercial and industrial facilities, such as Water and Waste Water and Competitive Greenhouse Gas Reduction Industry Pilot, which are typically located in environmental-justice communities.<sup>123</sup> Improvements in these facilities’ efficiency and emission reductions could directly improve the air quality and living conditions in these communities.

Third, the operating plan described programs aimed to reduce environmental harm associated with the use of transportation infrastructure, such as commuter rails, highways, and train tracks.<sup>124</sup> Because environmental-justice communities are often located near these transportation hubs, they are directly affected by any environmental harm resulting from the operation of this infrastructure. Further reducing the harmful emissions, excess waste, noise, or other externalities associated with transportation will help alleviate the burden on environmental-justice communities. Accordingly, such programs intend to reduce the use of petroleum and improve the energy efficiency of electric mass-transit systems.<sup>125</sup> The plan claims that “[p]rivate companies and individual drivers neither perceive nor absorb the full costs of their transportation choices, which cause congestion, road deterioration, local air pollution, and climate change.”<sup>126</sup> Therefore, the plan’s proposed programs strive to help companies and drivers choose alternative transportation options with a smaller environmental impact.<sup>127</sup>

Fourth, the operating plan’s programs, which are geared to lower power plants’ GHG emissions, likely would benefit environmental-justice communities.<sup>128</sup> Fifth, the operating plan’s programs focus on how the state could create more green jobs. The plan notes that the state will use outreach

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121. *Id.* at 4-1 to -4.

122. *Id.* at 4-2.

123. *Id.* at 4-1 to -12.

124. *Id.* at 5-1.

125. *Id.*

126. *Id.*

127. *Id.* at 5-2.

128. *Id.*

activities to continue increasing the number of accredited contractors and offer training opportunities.<sup>129</sup>

### C. The 2009 New York State Energy Plan

#### 1. Background

Former governor David A. Paterson issued Executive Order No. 2 in April 2008, which created the State Energy Planning Board and tasked it with preparing a state energy plan.<sup>130</sup> The Energy Planning Board, in turn, established the Energy Coordinating Working Group (ECWG) to prepare the state energy plan, including analyses driving findings and recommendations.<sup>131</sup> The ECWG consisted of staff from the Long Island Power Authority, New York planning agencies, and the New York Power Authority.<sup>132</sup>

Soon after its creation, the ECWG engaged in an interactive drafting process before it issued its final state energy plan. In May 2008, after soliciting input during more than seventy stakeholder meetings,<sup>133</sup> the ECWG outlined pertinent issues and set the process and schedule for completing the energy plan.<sup>134</sup> In response, more than sixty-five stakeholders submitted comments.<sup>135</sup> About ten months later, the ECWG released an interim report in March 2009,<sup>136</sup> and stakeholders submitted forty-five sets of comments.<sup>137</sup> Thereafter, the group released the draft plan in August 2009,<sup>138</sup> which was followed by nine public hearings on the document.<sup>139</sup> The ECWG finally released the official *State Energy Plan* in December 2009.<sup>140</sup>

129. *Id.* at 6-1 to -2.

130. Exec. Order No. 2, 30 N.Y. Reg. 119, 119 (May 7, 2008).

131. 1 N.Y. STATE ENERGY PLANNING BD., 2009 STATE ENERGY PLAN, at xx (Dec. 2009) [hereinafter N.Y. STATE ENERGY PLAN], available at [http://www.nysenergyplan.com/final/New\\_York\\_State\\_Energy\\_Plan\\_Volume1.pdf](http://www.nysenergyplan.com/final/New_York_State_Energy_Plan_Volume1.pdf).

132. *Id.*

133. *Id.*

134. N.Y. STATE ENERGY PLANNING BD., NEW YORK STATE ENERGY PLAN AND PUBLIC SOLICITATION OF COMMENTS 1, 3 (2008), available at <http://www.nysenergyplan.com/presentations/NYS%20Energy%20Plan%20Draft%20Scope.pdf>; see N.Y. STATE ENERGY PLAN, *supra* note 131, at xx.

135. N.Y. STATE ENERGY PLAN, *supra* note 132, at xx.

136. See generally ENERGY COORDINATING WORKING GRP., 2009 NEW YORK STATE ENERGY PLAN, INTERIM REPORT (Mar. 31, 2009) [hereinafter 2009 ENERGY PLAN INTERIM REPORT], available at <http://www.nysenergyplan.com/NYS%20Energy%20Plan%20-%20Interim%20Report%20-%20March%2031%202009-web.pdf>.

137. N.Y. STATE ENERGY PLAN, *supra* note 131, at xx.

138. See generally STATE ENERGY PLANNING BD., 2009 STATE ENERGY PLAN: DRAFT (2009) [hereinafter 2009 DRAFT ENERGY PLAN], available at <http://www.e-renewables.com/documents/General/New%20York%20State%20Energy%20Plan%202009.pdf>.

139. N.Y. STATE ENERGY PLAN, *supra* note 131, at xx.

140. *Id.* It should be noted that in September 2009, during the energy-plan development period, Governor Paterson signed legislation that codified the creation of the State Energy

The ECWG prepared nine issue briefs—including a brief on environmental justice—to analyze the issues identified in the executive order.<sup>141</sup> The order also required assessments of New York’s existing “energy resources and efficiency markets,” such as renewable energy, coal, and natural gas.<sup>142</sup> Many of the *State Energy Plan*’s 2009 findings and recommendations were generated from these issue briefs and assessments.<sup>143</sup>

The *State Energy Plan* frames the issues associated with the environmental impacts of electricity generation as follows:

Combustion of carbon-based fuels, whether for electricity generation, transportation or heating, results in the emission of contaminants such as nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), particulate matter, carbon monoxide, polycyclic aromatic hydrocarbons, volatile organic compounds and metals, as well as several GHGs including CO<sub>2</sub>. These individual contaminants are associated with a number of adverse health effects, including cardiovascular disease, respiratory effects, infections, asthma exacerbation, cancer, central nervous system effects, liver effects, kidney effects, and mortality.<sup>144</sup>

The report noted that lowering contaminants from such combustion will help minimize the risk of “negative health and environmental impacts.”<sup>145</sup> The report also stated that using “cleaner carbon-based fuels (e.g., natural gas and low sulfur diesel) or non-carbon-based energy sources across all energy sectors” could limit these detrimental effects.<sup>146</sup> The *State Energy Plan*’s evaluation of environmental-justice issues was largely based on CP-29, a DEC policy initiative adopted in March 2003 to provide guidance for incorporating environmental-justice concerns into the DEC environmental-permit review process.<sup>147</sup> In particular, the *State Energy Plan* adopted the identification of a “potential environmental justice area” in accordance with the CP-29 classification.<sup>148</sup>

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Planning Board and required it to complete an energy plan. See N.Y. ENERGY LAW § 6-104 (McKinney 2012). Notably, the statute requires that the *State Energy Plan* include “an environmental justice analysis.” *Id.* § 6-104(2)(g).

141. N.Y. STATE ENERGY PLAN, *supra* note 131, at xix; see also N.Y. STATE ENERGY BD., ENVIRONMENTAL JUSTICE ISSUE BRIEF, N.Y. STATE ENERGY PLAN 2009, at 1 (2009) [hereinafter ENVIRONMENTAL JUSTICE ISSUE BRIEF], available at [http://nysenergyplan.com/final/environmental\\_justice\\_IB.pdf](http://nysenergyplan.com/final/environmental_justice_IB.pdf) (noting that Governor Paterson directed agencies to “consider the protection of public health and safety, the needs of vulnerable communities, and the role of environmental justice in energy-related decisions”).

142. N.Y. STATE ENERGY PLAN, *supra* note 131, at xix.

143. *Id.*

144. *Id.* at 5.

145. *Id.*

146. *Id.*

147. CP-29 ENVIRONMENTAL JUSTICE & PERMITTING, *supra* note 23, at 2.

148. ENVIRONMENTAL JUSTICE ISSUE BRIEF, *supra* note 141, at 4.

Referring to former governor Paterson's Environmental Justice Interagency Task Force, the plan states that efforts to ameliorate the aforementioned effects have focused on low-income neighborhoods and minority communities.<sup>149</sup>

## 2. *Environmental-Justice Issues Brief*

One of the issue briefs prepared during the drafting of the *State Energy Plan* was the *Environmental Justice Issue Brief*, which recommended reducing the impact of energy facilities located disproportionately near environmental-justice communities.<sup>150</sup> The brief states that New York's future energy-related decisions should focus on three considerations: (1) state agencies need to consider their decision's potential impact on environmental-justice communities before making decisions;<sup>151</sup> (2) the state must continue to identify potential environmental-justice communities by analyzing factors such as poverty, unemployment, and high-emission facility locations;<sup>152</sup> and (3) state agencies will analyze the correlation, if any, between those communities and high rates of certain illnesses, "such as asthma, cancer, lead poisoning, and diabetes."<sup>153</sup>

The brief acknowledged the disproportionate number of generators in environmental-justice areas and the impact that generation has on environmental communities.<sup>154</sup> For example, the brief noted that the state built eleven turbines in environmental-justice communities in New York City and Long Island as a result of a significant energy demand between 2000 and 2002.<sup>155</sup> In addition, the brief stated that temporary generators needed to meet the summer's demand were generally located near environmental-justice communities by virtue of their close proximity to the infrastructure needed to support the generators.<sup>156</sup> According to the brief, these temporary generators emit tons of pollutants and are less efficient than more permanent generators.<sup>157</sup>

The brief also noted that of the 102 combustion-based electric-generating facilities in New York, many are located near a potential environmental-justice community, although these areas only cover approximately three percent of New York's land area.<sup>158</sup> Specifically, sixty-four of the facilities are within one mile of a potential environmental-justice community, fifty-three are within one half-mile, and thirty are situated within a potential environmental-justice

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149. N.Y. STATE ENERGY PLAN, *supra* note 131, at 5.

150. ENVIRONMENTAL JUSTICE ISSUE BRIEF, *supra* note 141, at 1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1–2.

155. *Id.* at 1.

156. *Id.* at 1–2.

157. *Id.* at 2.

158. *Id.* at 13.

community.<sup>159</sup> To remedy this disparity, the brief recommended using environmental reviews and increasing stakeholder participation in decisions on the location of future generators.<sup>160</sup>

According to the brief, CP-29—the DEC policy that the ECWG relied on in the *State Energy Plan*—helps alleviate environmental-justice concerns by permitting public access to DEC’s permit data.<sup>161</sup> The brief also analyzed DEC data used to identify environmental communities to determine that those living in environmental-justice areas potentially experience higher pollution, more health problems, and increased truck and vehicle traffic, as well as having less open space than other communities.<sup>162</sup>

### 3. Recommendations to Address Environmental-Justice Issues

The *Environmental Justice Issue Brief* provided several recommendations on how to address environmental-justice issues in seven areas of energy planning, and the ECWG incorporated many of them into the *State Energy Plan*’s recommendations and implementation plan.

First, the brief concluded that “[f]air and meaningful public involvement” is needed to address potential problems with energy decisions early in the process.<sup>163</sup> Strategies to implement this recommendation include “availability of information, continual transparency, and early consultation and collaboration.”<sup>164</sup> The brief notes that holding public meetings at varying times and places to accommodate all schedules and needs could aid this strategy.<sup>165</sup> Another notable potential strategy was to appoint an environmental-justice “point person” at state agencies to coordinate with environmental-justice communities.<sup>166</sup>

Second, when determining where to establish future energy facilities, agencies should assess health and environmental risks, especially with regard to overburdened communities, which could be accomplished by incorporating environmental-impact assessments into the permit process and siting plans, strengthening emissions criteria, facilitating public involvement in siting

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159. *Id.* at 14.

160. *Id.* at 2.

161. *Id.* at 4.

162. *Id.* at 5. DEC reviews applications to determine the potential impact that proposals have on environmental-justice areas. *Id.* If the DEC identified potential harm, CP-29 requires other state agencies to review it and mandates additional public involvement. CP-29 ENVIRONMENTAL JUSTICE & PERMITTING, *supra* note 23, at 9; ENVIRONMENTAL JUSTICE ISSUES BRIEF, *supra* note 141, at 5.

163. ENVIRONMENTAL JUSTICE ISSUES BRIEF, *supra* note 141, at 27.

164. *Id.*

165. *Id.*

166. *Id.* at 27–28.

discussions, and providing grants to communities adversely affected by siting positions.<sup>167</sup>

A third energy-planning area is the upgrade of energy facilities, which could thereby reduce the impact of those emissions on environmental-justice communities.<sup>168</sup> Fourth, the brief recommended using distributed generation, which includes clean-energy sources that can help reduce air emissions caused by clusters of power generation.<sup>169</sup>

The fifth area involves providing funding to environmental-justice communities to incentivize the use of clean energy alternatives.<sup>170</sup> The brief recognized various sources of funding, such as NYSERDA grants and proceeds from RGGI auctions.<sup>171</sup> Sixth, the plan calls for the creation of green job opportunities for environmental-justice-community residents.<sup>172</sup>

The seventh and final area discussed in the brief focuses on using new designs and technologies that allow power companies to avoid relying on peaking units and other polluting back-up generators.<sup>173</sup> As discussed, the notion of using demand response to reduce the use of inefficient and relatively “dirty” peaking units was a primary focus of the EEPS Working Group VIII initiative and the subsequent demand-response proceeding at the PSC.<sup>174</sup>

#### D. New York State Climate Action Plan

##### 1. Background

In August 2009, former governor Paterson signed Executive Order No. 24, which established a goal of reducing New York’s GHG emissions by eighty percent compared to 1999 emission levels—by the year 2050.<sup>175</sup> The order also created the New York Climate Action Council, comprising officials from New York agencies, and directed the Council to develop a climate action plan.<sup>176</sup> The order required the Council to assess how the economic sectors could reduce GHG emissions and adapt to changes in climate.<sup>177</sup> Further, the order required the Council to identify the extent to which proposed actions to reduce GHG emissions support New York’s clean-energy goals.<sup>178</sup>

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167. *Id.* at 28.

168. *Id.*

169. *Id.* at 28–29.

170. *Id.* at 29.

171. *Id.*

172. *Id.*

173. *Id.* at 29–30.

174. *See supra* Part I.B.

175. Exec. Order No. 24, 31 N.Y. Reg. 113, 113 (Sept. 2, 2009).

176. *Id.*

177. *Id.*

178. *Id.* at 114.



The Council relied on input from advisory panels; one such panel assessed the best methods for reducing GHG emissions and preparing the state for climate-change effects.<sup>179</sup> Council representatives and advisory panel members formed technical work groups to represent each of the state's key economic sectors.<sup>180</sup> Four groups sought to identify ways to reduce GHG emissions,<sup>181</sup> and another addressed efforts that could “safeguard public health, the environment, and [the state's] infrastructure from expected climatic changes.”<sup>182</sup>

The Climate Action Council considered the findings of these working groups when making decisions about the climate action plan.<sup>183</sup> The Climate Action Council issued an interim report on November 9, 2010<sup>184</sup> and accepted public comment on the report for the next ninety days.<sup>185</sup>

The organization chart on the following page shows how the technical work groups' efforts relate to the action plan and, ultimately, the Climate Action Council.

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179. See Home, N.Y. ST. CLIMATE ACTION COUNCIL, <http://nyclimatechange.us> (last visited Mar. 1, 2012).

180. *Id.*

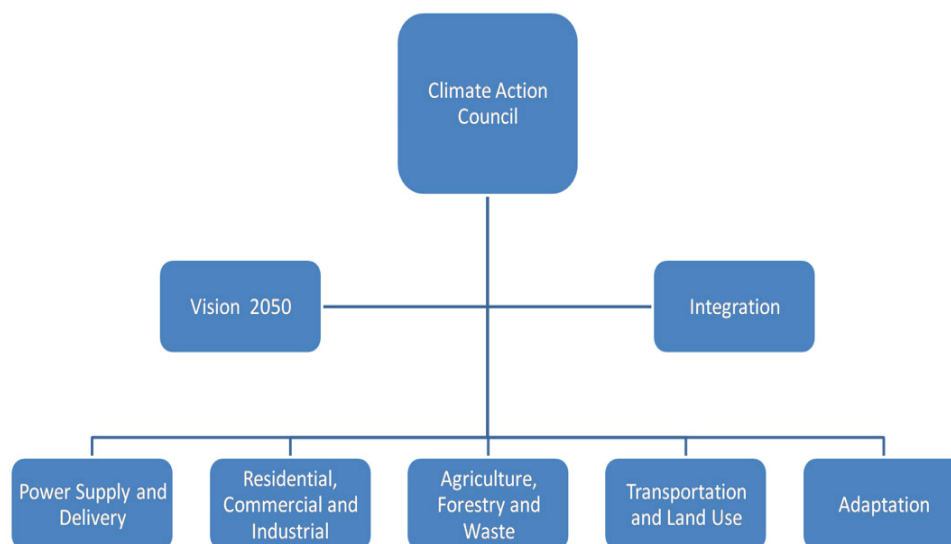
181. *Id.* The four groups focused on the following sectors: “Agriculture, Forestry and Waste Management;” “Power Supply and Delivery” (on which the author served); “Residential Commercial/Institutional;” and “Transportation and Land Use.” N.Y. ST. CLIMATE ACTION COUNCIL, CLIMATE ACTION PLAN: INTERIM REPORT, at B-2 (2010) [hereinafter CLIMATE ACTION PLAN], available at <http://nyclimatechange.us/InterimReport.cfm>.

182. *Home*, *supra* note 179.

183. *Id.*

184. *Id.* One panel—the 2050 Visioning Advisory Panel—specifically identified options for achieving the “80 by 50” goal. *Id.*

185. *Id.* (noting that the comment period ended on February 7, 2011).



## 2. *The Environmental-Justice Perspective Expressed at the Visioning Meeting*

The climate-action planning process formally commenced at a “visioning meeting” on January 5, 2010 in New York City.<sup>186</sup> Peter Iwanowicz, New York’s former assistant secretary for the environment to former governor Paterson, quickly set the tone regarding the prominent role of environmental-justice issues in the climate-action planning process:

We’re also going to take an extremely hard look and approach to deal with the issue of climate justice. I’m really happy that we’ve got a lot of environmental justice representatives that will be sitting on the various panels and working with the integration panel to ensure that . . . the emissions that we reduce and the actions that we take to reduce emissions, as well as the adaptation strategies, really have that core principle of climate justice infused throughout.<sup>187</sup>

In her remarks thereafter, Elizabeth C. Yeampierre, executive director of UPROSE, thanked Mr. Iwanowicz for so respectfully speaking about the climate and environmental justice and acknowledged that New York has made

186. *NY Climate Action Plan Meeting Dates & Locations*, N.Y. ST. CLIMATE ACTION COUNCIL (May 12, 2010), <http://www.nyclimatechange.us/ewebeditpro/items/O109F23078.pdf>.

187. Audio recording: Peter Iwanowicz, *Setting the Stage for a New York State Climate Action Plan* (Jan. 5, 2010), <http://www.nyas.org/MediaPlayer.aspx?mid=020d2f89-f202-49d1-ac8c-ced282bbcf14&wid=e7a4211c-fd9e-4683-8491-29c46fe03651>.

genuine efforts to ensure the integration of perspectives from people at the forefront of these struggles in their decision-making process.<sup>188</sup>

However, the second speaker that morning, Peter Goldmark from the Environmental Defense Fund, raised the ire of Ms. Yeampierre when he made reference to “Fort Apache in the Bronx” as an example of a seemingly intractable problem—urban slums in the 1970s—that was solved within the past few decades.<sup>189</sup> According to this speaker, Fort Apache “was absolute rubble, except for one police station . . . standing among about thirty blocks that were bombed out, worn out, totally leveled” and “became symbolic of the worst of our urban slums in the second half of the twentieth century.”<sup>190</sup> He observed that in contrast, today there are “almost no huge slum areas where there is no order, no social values, no work, total despair, buildings or wrecks of buildings inhabited by druggies, absolute junk—that almost doesn’t exist.”<sup>191</sup>

In response, Ms. Yeampierre explained, “I lived in what you called Fort Apache when I was three years old.”<sup>192</sup> She went on to state:

[T]he context within which this conversation has been had, I found was polarizing in itself. When you refer to the seventies and you don’t talk about white flight, and you don’t talk about economic disinvestment, and you don’t talk about the fact that the Bronx was burning because the landlords were burning those buildings that we were living in, and you don’t talk about the fact that the city was going through bankruptcy, it makes it seem like those people that were referred to as “bums” were our people . . . . Those were homeless people . . . . [M]any people in this audience don’t have anybody or didn’t have anybody in their family that was homeless or people who were on drugs or any of those things, but my family did, as a result of some of the economic and political decisions that were made at that time.<sup>193</sup>

Ms. Yeampierre described that

the reason that that context is important and that we present it in a way that is appropriate and historically correct, is that if we have any kind of commitment of addressing climate change, we need to be very respectful of the most vulnerable communities in our city and in our state. We need to be respectful of the fact that the struggle is

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188. Audio recording: Peter Goldmark, *Motivating the Need for Change* (Jan. 5, 2010) [hereinafter Vision Meeting], <http://www.nyas.org/MediaPlayer.aspx?mid=d8c5a254-690e-48e6-861b-313f4a1fa463&wid=e7a4211c-fd9e-4683-8491-29c46fe03651> (remarks of Elizabeth C. Yeampierre).

189. *Id.* (remarks of Peter Goldmark).

190. *Id.*

191. *Id.*

192. *Id.* (remarks of Elizabeth C. Yeampierre).

193. *Id.*

going to be very different for them, that climate adaptation and climate resilience is going to affect them even more because they live in waterfront communities, that retrofits and reclaiming their environment is important.<sup>194</sup>

Despite this ignominious beginning, the planning process later successfully integrated the consideration of environmental-justice issues.

### *3. Participation on Technical Work Groups and the Integration Advisory Panel*

At least one environmental-justice organization was included on each of the technical work groups.<sup>195</sup> With respect to the Integration Advisory Panel, the interim report states that key environmental-justice stakeholders were asked to sit on the panel.<sup>196</sup> The representatives of environmental-justice organizations included Eddie Bautista of New York City Environmental Justice Alliance, Cecil Corbin-Mark of We Act for Environmental Justice, and Elizabeth Yeampierre of UPROSE.<sup>197</sup> Mr. Bautista and Ms. Yeampierre, in particular, were active participants.<sup>198</sup>

### *4. Environmental-Justice Coordination and Advisory Videoconferences*

The Climate Action Council also partnered with DEC's Office of Environmental Justice to conduct outreach targeted at community organization and environmental-justice stakeholders.<sup>199</sup> Arturo Garcia-Costas of Outreach, Education and Strategic Partnerships in DEC's Office of Environmental Justice coordinated this effort.<sup>200</sup> According to the interim report, the outreach effort included two videoconferences available across the state, environmental-justice teleconferences, and surveys distributed to stakeholders on potential strategies to reduce emissions.<sup>201</sup> The report indicates that the teleconferences gave shareholders an opportunity to learn about the climate action plan and provide input on key environmental-justice issues.<sup>202</sup>

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194. *Id.*

195. CLIMATE ACTION PLAN, *supra* note 181, at 21-1.

196. *Id.*

197. *Id.* app. C.

198. Telephone Interview with Arturo Garcia-Costas, Outreach, Educ., & Strategic P'ships, Office of Env'tl. Justice, N.Y. State Dep't of Env'tl. Conservation (Dec. 7, 2010); Telephone Interview with Janet Joseph, Vice President for Techn & Strategic Planning, N.Y. State Energy Research & Dev. Auth. (Dec. 8, 2010).

199. CLIMATE ACTION PLAN, *supra* note 181, at 12-1.

200. *Id.* at iii (noting that Garcia-Costas managed outreach).

201. *Id.* at 12-1.

202. *Id.*

### 5. Survey Opportunities

The technical work groups identified and ranked policy options from each group.<sup>203</sup> For example, in the case of the Power Supply and Delivery group on which the author served, the policy options included: (1) implementation of a new fuel-neutral siting process; (2) extension and expansion of the state's Renewable Portfolio Standard (RPS); (3) encouraging deployment of energy-storage technologies; (4) upgrades (including smart grid technologies) to electricity distribution systems; (5) modernization of transmission network to reduce line losses; (6) implementation of a low-carbon portfolio standard; (7) rectification of barriers to renewable-energy development and encouragement of renewable resources; (8) continued enhancement of policy suggestions; (9) further investment in “research, development, and deployment” of new technologies; and (10) modernization of transmission network to reduce line losses.<sup>204</sup>

As part of the process to integrate environmental-justice issues in the development of the climate action plan, surveys then permitted stakeholders to weigh in on the considered policies.<sup>205</sup> These results were provided to technical work groups and published online for the public to view.<sup>206</sup>

### 6. Compilation of Policies and Issues

As noted above, when the Council issued its interim report, it included a six-page discussion on environmental-justice issues in its “Multi-Sector Policies and Issues” chapter.<sup>207</sup> This discussion states that the Council incorporated environmental-justice concerns “at a fundamental level,” which reflected “a commitment by New York State to approach these critical environmental policy areas in a holistic fashion.”<sup>208</sup> According to the interim report, even the technical work groups’ proposed policies that did not explicitly reference environmental-justice benefits could implicitly help environmental-justice communities.<sup>209</sup>

The interim report then explains how various policies could benefit environmental-justice communities or take environmental-justice concerns into account. For instance, it explains that one policy discusses siting generators’ impact on environmental-justice communities and notes that this must be taken into account.<sup>210</sup> The report also notes that the policies on increasing the

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203. See generally N.Y. STATE CLIMATE ACTION COUNCIL, CAC TECHNICAL WORK GROUP RECOMMENDATIONS POLICY DESCRIPTIONS (2010), available at <http://www.nyclimatechange.us/ewebeditpro/items/O109F23219.pdf>.

204. *Id.*

205. CLIMATE ACTION PLAN, *supra* note 181, at 12-2.

206. *Id.*

207. *Id.* at 12-1 to -6.

208. *Id.* at 12-2.

209. *Id.*

210. *Id.*

efficiency of fossil-fuel plants will reduce emissions in communities near such plants.<sup>211</sup> Regarding the policy on increasing development of improved energy storage technologies, the Council notes that these technologies should focus on environmental-justice communities with power generation facilities.<sup>212</sup> The plan then notes that stakeholders cautioned against deploying newer contested technologies in environmental-justice communities to preclude “unforeseen long-term health impacts.”<sup>213</sup>

In addition, the report cites several “overarching concerns” expressed by community and environmental-justice stakeholders during planning stages.<sup>214</sup> They emphasized the need to include measures aimed at increasing public awareness and community involvement.<sup>215</sup> Those stakeholders noted that these measures are necessary because decision-making processes of the “past difficulties, misunderstandings and procedural missteps,” have negatively affected such measures.<sup>216</sup> Stakeholders also stressed the need for funding and technical assistance for environmental-justice communities and expressed concern about the impact some proposed policy recommendations would have on the ability of environmental-justice communities to express their opinions regarding permitting, siting, and environmental impact assessments.<sup>217</sup> Further, stakeholders explained that it is important to assess the potential risk and impact of environmental hazards on susceptible communities and populations.<sup>218</sup> Stakeholders raised concerns about the public health impact that climate change and flooding may have on communities located near waste treatment, management, and storage sites.<sup>219</sup> In this regard, stakeholders stressed the need to examine the impact of storm surges in heavily populated areas, which could potentially expose citizens to various toxins.<sup>220</sup> As environmental-justice communities are already overburdened, stakeholders argued that the policy initiatives of the *Climate Action Plan* should be applied more forcefully to such communities.<sup>221</sup>

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211. *Id.*

212. *Id.* at 12-4.

213. *Id.*

214. *Id.*

215. *Id.* at 12-3.

216. *Id.*

217. *Id.* at 12-3 to -4.

218. *Id.* at 12-4.

219. *Id.* at 12-5.

220. *Id.* at 12-6.

221. *Id.*

## II. ANALYSIS AND RECOMMENDATIONS

Based on the author's telephone and in-person interviews with a number of participants in the environmental-justice aspects of these energy-related proceedings,<sup>222</sup> a number of themes emerge.

First, there is a significant difference between simply "inviting" community-based and environmental-justice organizations to participate in a process and actually engaging these groups effectively. In the words of one interviewee, an invitation is nothing more than a seat "at the table" to participate in someone else's process, whereas "engagement" represents an opportunity to shape the process itself.<sup>223</sup> In the former situation, the environmental-justice stakeholder is limited to a menu of options on which to weigh in, and his or her participation is perceived as something to be "tolerated."<sup>224</sup> In the case of the latter, the environmental-justice stakeholder has a role in *developing* the menu.<sup>225</sup> The *Climate Action Plan* represents a serious effort by the Climate Action Council to engage environmental-justice stakeholders. The Council devoted significant attention to the integration of environmental-justice issues in the process. Additionally, the DEC Office of Environmental Justice used other forms of innovative outreach to engage these organizations, including two statewide videoconferences and a survey designed to capture stakeholders' perspectives on the technical work groups' dozens of policy options.<sup>226</sup> The use of environmental-justice coordination and advisory teleconferences provided an additional opportunity to include an environmental-justice perspective in the process. The process also benefited from very active and committed participation by representatives from environmental-justice organizations on the Integration Advisory Panel.

Second, the climate action planning process exemplifies how success may be achieved by "designing in" the integration of environmental-justice issues. From the very outset of the planning process, community-based and environmental-justice organizations were included in the formation of the technical work groups, and committed individuals from these groups were included on the Integration Advisory Panel.<sup>227</sup> In contrast, the RGGI Advisory Group, when initially constituted, did not include representation from

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222. See Addepalli Interview, *supra* note 61; Telephone Interview with Eddie Bautista, Exec. Dir., N.Y. City Env'tl. Justice Alliance (Dec. 7, 2010) [hereinafter Bautista Interview]; Garcia-Costas Interview, *supra* note 198; Joseph Interview, *supra* note 198; Telephone Interview with Jaime Stein, Env'tl. Policy Analyst, Sustainable S. Bronx (Dec. 7, 2010) [hereinafter Stein Interview]; Williams Interview, *supra* note 113.; Interview with Elizabeth C. Yeampierre, Exec. Dir., United Puerto Rican Org. of Sunset Park (Jan. 28, 2011) [hereinafter Yeampierre Interview].

223. Bautista Interview, *supra* note 222.

224. *Id.*

225. *Id.*

226. CLIMATE ACTION PLAN, *supra* note 181, at 12-1; see *supra* text accompanying notes 201-02.

227. CLIMATE ACTION PLAN, *supra* note 181, at 12-1.

community-based or environmental-justice communities, which led these groups to resort to a protest demonstration at a public meeting of the RGGI Advisory Group to express their views.<sup>228</sup> The RGGI operating plan similarly did not expressly identify environmental-justice implications of the spending proposals, although many elements of the plan would provide explicit and implicit benefits to environmental-justice communities.<sup>229</sup> It appears that NYSEDA learned from its experience with the RGGI advisory-group process and the consequences of failing to include community-based and environmental-justice organizations by ensuring that integration of environmental-justice issues was designed into the climate action planning process from its inception.

Third, almost by their very definition, environmental-justice groups lack the financial and technical resources to participate effectively in many stakeholder processes. In the case of the *Climate Action Plan*, for example, effective participation on the technical work groups involved lengthy conference calls and the necessary analysis between calls.<sup>230</sup> Representation on the Integration Advisory Panel similarly involved five day-long meetings in Albany and the pre-meeting preparation necessary for effective participation.<sup>231</sup> Other than some financial assistance to cover travel and lodging cost, no financial or technical resources were made available to community-based and environmental-justice organizations to facilitate their participation. Moreover, for the most part, participation in a climate action planning process was not an integral part of the “mission” of these organizations; participation in the process generally required commitment by individuals dedicated to these particular issues, irrespective of funding that expressly supported such activities.

The solution to this problem is a difficult one. As noted in the *Climate Action Plan* interim report, one possible solution is to provide funding to communities affected by a proposed generator to retain experts to advise the community on the environmental impacts of the proposal. One interviewee expressed concern that the technical-assistance grants under this process could not be used to retain legal counsel, which was perceived to be more effective than retaining an “environmental engineer.”<sup>232</sup> Further, funding that may have

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228. Yeampierre Interview, *supra* note 222.

229. See RGGI OPERATING PLAN, *supra* note 115, at 4-1 to -4 (noting that programs will target and work with environmental-justice communities, but fail to express how they would be affected).

230. CLIMATE ACTION PLAN, *supra* note 181, at 12-1.

231. *Id.* at 1-3.

232. Bautista Interview, *supra* note 222. It should be noted that the limitation in former Article X precluding intervenor funding for legal counsel has been substantially eased in the newly enacted siting law, the Power NY Act, under which intervenor funding may be used for expert witnesses, consultants, and administrative and legal fees, and under which the exclusion is limited to “litigation or judicial review.” N.Y. PUB. SERV. LAW § 164(6)(a) (McKinney 2012).



previously been available to environmental-justice communities for such advice is no longer available due to the state's fiscal constraints.

Fourth, engagement of environmental-justice stakeholders, rather than simply inviting such organizations to be part of the process, requires state agencies to make a significant commitment to integration of these interests. As noted above, environmental-justice stakeholders generally lack the resources to devote the time and effort necessary for informed participation in energy- or climate-related planning processes.<sup>233</sup> An agency seeking to engage environmental-justice and community-based organizations will need to commit its personnel to engage in targeted outreach to recruit the participation of these stakeholders actively and to maintain their participation. The climate action planning process provides a good example of the necessary level of commitment. Specifically, at the outset, state agencies reached out by recruiting participants for the technical work groups and conducting a survey on the groups' policy recommendations.<sup>234</sup> However, during these times of fiscal constraints, it may be difficult to ensure that the agency personnel will be available to commit the necessary outreach to engage environmental-justice stakeholders effectively.<sup>235</sup>

Fifth, the EEPS proceeding at the PSC exhibits the importance of having key agency personnel devoted to integrating environmental-justice issues in the process. The two administrative law judges presiding over the EEPS proceeding addressed environmental-justice issues through a work group focused on demand response and peak-load reduction—efforts aimed to reduce the number of peaking generation units in the communities.<sup>236</sup> When the initial EEPS work group failed to agree on a solution, these two judges appointed a technical work group to focus exclusively on the extent to which demand-response and peak-reduction programs could be implemented to produce emissions reductions from peaking facilities located in environmental-justice communities.<sup>237</sup> As a result of this focused examination, the PSC commenced a separate proceeding to consider new demand-response programs to be offered by Con Edison directed at, among other things, achieving peak demand reductions that would reduce emissions in environmental-justice communities.<sup>238</sup> In its order implementing these

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233. Bautista Interview, *supra* note 222.

234. CLIMATE ACTION PLAN, *supra* note 181, at 12-1.

235. Additional staffing may be unnecessary to integrate environmental-justice issues into the process. In the recently issued report of the U.S. Government Accountability Office, senior EPA officials stated that environmental-justice initiatives “would only result in a negligible increase in resource needs because enhancing current program activities with environmental justice consideration or criteria should result in the same people doing many of the same things.” U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-77, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION 26 (2011).

236. *See supra* text accompanying notes 45–47.

237. *See supra* text accompanying notes 45–47 (discussing Working Group VIII).

238. *See supra* text accompanying note 75.

programs, the PSC expressly considered environmental-justice stakeholders' positions when fashioning the requirements of the demand-response programs.<sup>239</sup>

Sixth, former governor Paterson's issuance of Executive Order No. 4 and the creation of the Environmental Justice Interagency Task Force sent a strong signal to state agencies regarding the importance of integrating environmental-justice issues into the decision-making process. The creation of the task force required each agency to develop an action plan describing the actions it would take to implement state policy directives on environmental justice.<sup>240</sup>

Apart from raising the significance of environmental-justice issues within each agency, one interviewee also stressed the necessity of agency collaboration in effectively addressing climate change:

Dealing with not just carbon but the environment has to be done in a way that is inter-agency. That as a policy, different agencies have to be addressing the issue of climate change—it can't just be DEC, it can't just be the Department of Labor, it has to be done in a very inter-agency way. So that Education, Labor, Social Services, Employment, every single agency has to incorporate into it not only how they're going to retrofit their facilities, but their charge: how they distribute funding, how they educate different generations, how they employ people. It has to be inter-agency and it has to be integrated in that way.<sup>241</sup>

### III. CONCLUSION

Based on the proceedings evaluated in this Article, New York has had some success in integrating environmental-justice issues in energy-related proceedings. This integration has been aided considerably by commitment from the Executive Chamber through executive orders and the creation of an Environmental Justice Interagency Task Force. These actions impressed agency personnel with the importance of addressing environmental-justice issues in routine agency activities. An interagency task force is an essential component for a state seeking to facilitate environmental-justice initiatives. The creation of a task force reinforces the notion that integration of environmental-justice issues will often cut across agency lines, as illustrated by the fifteen agencies represented on New York's Environmental Agency Task Force. Moreover, a task-force framework provides agency personnel an opportunity to achieve some critical mass on environmental-justice issues and provides a forum for developing the best practices of each agency's experience in helping communities understand and address environmental issues.

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239. See *supra* text accompanying note 87.

240. See *supra* text accompanying notes 176–78.

241. Vision Meeting, *supra* note 188 (remarks of Elizabeth C. Yeampierre).

The review of these particular proceedings illustrates some of the continuing challenges of achieving environmental-justice stakeholder engagement in these processes, most notably, the need to provide the financial and technical resources necessary for informed and effective participation. As noted in Part II, it is difficult to secure these financial and technical resources. One solution is an intervenor funding mechanism, which would provide community groups with financial assistance for expert witnesses, consultants, and administrative and legal fees. In the case of proposed siting of new energy facilities, the applicant energy developer could provide the funds, thereby avoiding a burden on state government resources. This particular approach, however, provides a funding mechanism only for participating in specific siting proceedings, and does not provide the sustaining type of funding necessary to enhance the capability of many environmental-justice organizations to participate in an effective manner in the many governmental proceedings that may affect environmental-justice communities. The EPA, for example, “envisions a continuous dialogue” with environmental-justice community members and stakeholders to integrate environmental justice into agency policies and programs.<sup>242</sup> An intervenor-funding model could not support this dialogue.

As a practical matter, the inadequacy of the technical resources available to environmental-justice organizations must be redressed by state agencies increasing the commitment of resources, including personnel dedicated to ensuring stakeholder participation and maintaining such participation throughout the process. However, if fiscal constraints preclude agencies from devoting an adequate number of personnel to environmental-justice issues, agencies are not at a complete loss and may still address environmental-justice issues with existing staff.

The review further indicates that a few dedicated individuals—both within state agencies and community-based organizations—can make a tremendous difference in the extent to which environmental-justice issues are integrated into the agency decision-making process. In New York, for example, the administrative law judges in the PSC EEPS proceeding, and the environmental-justice representatives who participated in the climate action planning process, effectively elevated the visibility of environmental-justice concerns through perseverance and dedication.<sup>243</sup> As a practical matter, however, the successful integration of environmental-justice issues in energy-related proceedings cannot depend on the heroic efforts of a few passionate and involved individuals. Rather, policymakers must provide a framework that evinces a staunch commitment to environmental-justice issues. New York’s experience provides some valuable lessons that should be of assistance to other

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242. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 235, at 11.

243. See *supra* text accompanying notes 236–39.

states as they seek to integrate environmental justice into agency policies and programs.