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## **Symposium Introduction: 25th Anniversary of the New York State Department of Environmental Conservation: Past and Future Challenges and Directions**

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## SYMPOSIUM

### ***The 25th Anniversary of the New York State Department of Environmental Conservation: Past and Future Challenges and Directions***

*David L. Markell*<sup>1</sup>

The April 1996 conference held at Albany Law School, formally titled *25th Anniversary of the New York State Department of Environmental Conservation: Past and Future Challenges and Directions* [hereinafter "Conference"],<sup>2</sup> brought together an exceptional group of leaders of government and the business, environmental, and sportsmen communities from throughout New York State to reflect about the progress made in environmental protection over the past twenty-five years, and the challenges that remain.<sup>3</sup> This

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<sup>1</sup> David L. Markell is a Professor of Law, Albany Law School.

<sup>2</sup> Michael B. Gerrard, a partner with Arnold & Porter and Chair of the New York State Bar Association Environmental Law Section during the year leading up to the conference, deserves credit for proposing this conference. The Conference was co-sponsored by Albany Law School, the New York State Bar Association Environmental Law Section, and the State Department of Environmental Conservation (DEC). In addition to Mr. Gerrard, Gavin Donohue, Deputy Commissioner at the DEC, and Patricia Salkin, Director of the Law School's Government Law Center (GCL), made invaluable contributions to the organization of the Conference.

The complete program of the Conference immediately precedes this introduction.

<sup>3</sup> The participating DEC Commissioners (past and present) deserve special acknowledgement for taking the time to share with us their perspectives on the evolution of the Department over the past twenty-five years. To Peter Berle, Henry Williams, Michael Zagata and John Cahill, as well as to Henry Diamond, whose illness at the last minute prevented his participation, we extend a sincere thank you.

While a few retrospectives on federal environmental regulation have been undertaken, the April 1996 Conference in Albany is a relatively rare example of a systematic attempt to engage in such an inquiry primarily from a state vantage point and with a state focus. See Damon M. Chappie, et al., *Pollution Control 20 Years After Earth Day: A Retrospective on Federal Environmental Programs*, ENVIRONMENTAL REPORTER 123 (May 4, 1990) (BNA); Symposium, *Twenty-Five Years of Environmental Regulation*, 27 LOY. L.A. L. REV. 779 (1994); see also *Symposium on NEPA AT TWENTY*, 20 ENVTL. L. No. 3 (1990).

Symposium issue of the Albany Law Journal of Science & Technology is a compilation of papers prepared and delivered in connection with the Conference.<sup>4</sup> This Introduction provides an overview of the Conference, summarizes some of the significant points made during the presentations, and offers some reflections on themes that emerged during the proceedings.

## I. THE PURPOSE OF THE DEC 25TH ANNIVERSARY CONFERENCE AND ITS STRUCTURE

Events such as the *DEC 25th Anniversary Conference*, which bring people together to think contextually about the complex and controversial topic of "environmental protection," are of critical importance. This is especially true in these transitional times, during which seemingly all stakeholders recognize that traditional approaches to environmental protection and regulation are showing their age and need reworking. The need for reform is captured in an article by a former high-ranking U.S. Environmental Protection Agency (EPA) official: "the main area of agreement among thoughtful observers [about current environmental regulatory approaches] is not whether transformation of our environmental management system should occur, but what path reform should follow and how quickly it can be achieved."<sup>5</sup>

April 1996 was a particularly propitious time for such a conference in New York. Two months prior to the Conference, the State University of New York's public policy institute, The Nelson A. Rockefeller Institute of Government, a national leader in public policy-related research, issued its report on the history of the DEC and the Department's challenges for the future.<sup>6</sup> The DEC's issu-

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<sup>4</sup> To give credit where it is due, this Symposium issue is much more than a mere compilation of papers. It is the product of the hard work not only of the speakers, but of the small army of student editors of the Albany Law Journal of Science & Technology whose efforts have made an immeasurable contribution to the pages that follow. The value of the DEC 25th Anniversary Conference, which we believe is considerable in its own right, has been augmented considerably by the preparation of this Symposium issue memorializing thirteen of the presentations made during the Conference.

<sup>5</sup> Robert M. Sussman, *Formula For Success*, 14 ENVTL. L. 22, 25 (Jan./Feb. 1997); see also David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 348-50, nn. 1-5 (1994) [hereinafter "*States as Innovators*"] (citing numerous critiques of our environmental regulatory scheme).

<sup>6</sup> THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, THE DEPARTMENT OF ENVIRONMENTAL REGULATION: A 25TH ANNIVERSARY REVIEW (1996) [hereinafter ROCKEFELLER REPORT].

ance of its own appraisal of the Rockefeller Report in March 1996 reflects that government officials were focusing on the Department's past performance and future challenges.<sup>7</sup> Thus, as a form of preparation for the Conference, environmental decision makers in the State, as well as academicians and others, had already invested considerable energy in analyzing New York's environmental performance over the past twenty-five years and anticipating the challenges the State faced in the future.

The Conference was a two-day affair. It featured six panel discussions, separate presentations by leading officials of the State Assembly and Senate, and a "DEC Commissioner's Forum."<sup>8</sup> The Conference's opening panel reviewed the origins of the DEC, including the evolution of its structure and budget over the past twenty-five years. Panel participant Gary L. Spielmann, DEC's Executive Deputy Commissioner at the time of the conference, traces the history of the Department from a budgetary perspective.<sup>9</sup> Mr. Spielmann describes New York's history as one of bipartisan support for environmental protection, and he highlights the broad scope of DEC's jurisdiction, which exceeds that of the federal EPA or most state environmental regulatory agencies.<sup>10</sup> Among other topics, Executive Deputy Commissioner Spielmann reviews: 1) increases in environmental budgets over the years; 2) shifts in spending;<sup>11</sup> 3) the proliferation of "special revenue" accounts and the relative decline of the General Fund as

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<sup>7</sup> Department of Environmental Conservation, Internal Memorandum Evaluating THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: A 25TH ANNIVERSARY REVIEW (1996) (March 1996) (on file with the Department of Environmental Conservation).

<sup>8</sup> The Conference program, which includes a complete listing of all conference participants, immediately precedes this introduction.

<sup>9</sup> In connection with his participation in the Conference, Mr. Spielmann published an article entitled *The "Evolution" of the Department of Environmental Conservation Budget and Funding Sources, 1970-1995*. An article by other members of the opening panel appears in the Environmental Outlook as well. See 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 21. Mr. Spielmann is currently the Director of Planning, New York State Office of Mental Health. The Executive Deputy Commissioner is the Department's second-ranking official.

<sup>10</sup> See Gary L. Spielmann, *The "Evolution" of the Department of Environmental Conservation Budget and Funding Sources, 1970-1995*, ALB. L. ENVTL. OUTLOOK, Spring 1996, at 21 [hereinafter "*Evolution*"].

<sup>11</sup> For example, in State Fiscal Year 1970-1971, DEC's Divisions of Fish and Wildlife and Lands and Forests accounted for nearly 40% of DEC expenditures. By FY 1994-1995 their share, however, made up only 12% of Departmental expenditures, largely because of the dramatic expansion of the Department's environmental quality programs. See *Evolution*, supra note 10, at 21.

the source of DEC's funding;<sup>12</sup> 4) the history of Bond Acts enacted over the past quarter-century;<sup>13</sup> 5) the enactment in 1993 of the Environmental Protection Fund, a revenue stream dedicated to particular environmental protection activities;<sup>14</sup> and 6) the role of the State Revolving Fund in supporting the upgrading of portions of the "environmental protection infrastructure" (particularly wastewater treatment plants).<sup>15</sup>

"Following the money" leads Mr. Spielmann to conclude that much of the environmental regulatory action has devolved to the states, that state agencies such as the DEC are where the "environmental action" will be. He notes that "[m]ore than 80 percent of environmental programs are state-funded . . . and [t]he [US EPA] no longer has the staff, resources or ability to run day-to-day environmental programs."<sup>16</sup>

The second panel, which was devoted to air and water quality issues, began with presentations by the DEC Deputy Commissioner responsible for regulating these media and the relevant DEC Division Directors.<sup>17</sup> These government officials focused on the evolution of the DEC programs over the past twenty-five years

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<sup>12</sup> See *id.* at 21, 26. "The shift to special revenue funding has helped shield the Department from many of the cutbacks experienced by other state agencies in New York. However, such protection has a price. The Department currently administers more than 200 separate special revenue accounts." ROCKEFELLER REPORT, *supra* note 6, at 22-23.

<sup>13</sup> See *Evolution*, *supra* note 10, at 24-25. The next chapter of this history was written after the April 1996 Conference. In November 1996, the people of New York ratified the 1996 Environmental Bond Act, which will provide \$1.75 billion for a variety of environmental activities. See David L. Markell, *Some Overall Observations About the 1996 New York State Environmental Bond Act and a Closer Look at Title 5 and Its Approach to the "Brownfields" Dilemma*, 60 ALB. L. REV. 1217 (1997); Sarah Metzgar, *Pataki Set to Pick Bond Act Projects*, TIMES UNION (Albany, N.Y.), Nov. 7, 1996, at B2.

<sup>14</sup> See *Evolution*, *supra* note 10, at 25.

<sup>15</sup> See *id.* at 24.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> David Sterman, DEC Deputy Commissioner for the Office of Environmental Quality and Remediation made the opening presentation. For those readers more familiar with the structure of the federal Environmental Protection Agency than with that of the State DEC, DEC Deputy Commissioners are essentially the State counterparts to EPA Assistant Administrators. Division Directors at DEC generally report directly to a Deputy Commissioner. While Deputy Commissioners are considered to be part of DEC's Executive Office and are located together on the sixth floor of DEC's Headquarters office at 50 Wolf Road in Albany, the Division Directors operate as "line managers" and are housed with the divisions they lead. See generally ROCKEFELLER REPORT, *supra* note 6, at 14 (DEC Organizational Structure Chart).

and on the "state of the environment" with respect to the particular media involved.

In his presentation, DEC Division of Water Director N.G. Kaul's<sup>18</sup> lauds the "impressive gains" the State's water pollution control efforts have produced over the past quarter century, especially with respect to point sources.<sup>19</sup> Director Kaul, also acknowledges, however, that "a significant amount of work remains."<sup>20</sup> He points to the trend of improving quality in many of New York's waters, but also discusses "major sources of impairment" of these waters (agriculture, urban runoff, etc.) that require heightened attention, and the need for a "whole new approach" to solving the significant problem of non-point source pollution.<sup>21</sup> Director Kaul suggests the Division's "watershed" focus will help "to ensure that our attention remains on the critical issues."<sup>22</sup>

In sum, the second panel, like the third and fourth,<sup>23</sup> included presentations from high-ranking DEC officials covering the evolution of government programs. These presentations, *inter alia*, summarized institutional developments (e.g., creation of a Division of Air Resources and key milestones in the Division's evolution over the years) and discussed particular, significant program initiatives and their outcomes. The introductory presentations on each panel were also intended to provide the audience with an overview of changes in environmental conditions over the past

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<sup>18</sup> In connection with his participation in the Conference, Mr. Kaul published an article entitled *25 Year Accomplishments of the DEC Water Program*. N.G. Kaul, *25 Year Accomplishments of the DEC Water Program*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 31 [hereinafter "*New York Waters*"].

<sup>19</sup> See *New York Waters*, *supra* note 18, at 31. New York State Environmental Conservation Law § 17-0803, prohibits the "discharge[ ] of 'pollutants' from 'point sources' . . . into the 'waters of the State' . . . unless they are authorized by a [State Pollution Discharge Elimination System] permit." ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 6.4.1 (William R. Ginsberg & Philip Weinberg eds., 1996) [hereinafter "*Ginsberg & Weinberg*"]. Section 17-0105(16) of the ECL defines a 'point source' as "any discernible confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft or landfill leachate collection system from which pollutants are or may be discharged." *Id.*

<sup>20</sup> See N.G. Kaul, Remarks at Conference (April 9-10, 1996) (transcript on file with ALB. L.J. SCI. & TECH.).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *infra* notes 43-76 and accompanying text for a discussion of the presenters of the third and fourth panels.

twenty-five years and the evolution of regulatory and other approaches during this period.<sup>24</sup>

The second panel, like the third and fourth,<sup>25</sup> also included distinguished representatives of the major constituency groups, including environmental, industry, and local government leaders. These participants shared their perspectives on "where we have been, where we are, and where we are going" in terms of the significant environmental issues the State faces. The articles by Kenneth Pokalsky, Director of Environmental and Regulatory Programs for the Business Council,<sup>26</sup> and Eric Goldstein, a senior attorney with the Natural Resources Defense Council,<sup>27</sup> are representatives of this genre.

In his article, Mr. Pokalsky decries the "crisis management" approach that he believes characterizes much of environmental regulation today.<sup>28</sup> In its place, Mr. Pokalsky recommends that several overarching principles be used to set priorities and fashion environmental protection strategies.<sup>29</sup> He suggests that "probably the most important" principle is to focus on "risk" — *i.e.*, to "focus upon the items of greatest concern from a public health and environmental perspective."<sup>30</sup> Among the other important items on Mr. Pokalsky's list of changes New York should make to improve its environmental regulatory approach are: 1) increasing the level of compliance assistance provided to regulated parties; 2) establishing a presumption that federal regulations are sufficiently stringent in order to maintain a "level playing field" for facilities

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<sup>24</sup> The attention to environmental results is a variant of the theme of identifying "environmental indicators," a matter currently receiving considerable attention. See David L. Markell, *Preliminary Thoughts on Future Policy Directions for the Management of Solid and Hazardous Waste*, 7.1 ALB. L. J. SCI. & TECH. 119, 21 (1996) [hereinafter "*Future Policy Directions*"].

<sup>25</sup> See *infra* notes 43-76 and accompanying text for a discussion of the presenters of the third and fourth panels.

<sup>26</sup> See Kenneth J. Pokalsky, *Air and Water Pollution Control: Perspective of the Regulated Community*, 7.1 ALB. L.J. SCI. & TECH. 31 (1996).

<sup>27</sup> See Eric A. Goldstein, *Air and Water Pollution Control: Perspective of the Environmental Community*, 7.1 ALB. L.J. SCI. & TECH. 41 (1996).

<sup>28</sup> See Pokalsky, *supra* note 26, at 31, 32. Mr. Pokalsky is by no means the only one to hold this view. See, *e.g.*, Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, § 1, at 1 (quoting former EPA administrator William K. Reilly's statement that traditionally we have set our environmental agenda by "episodic panic").

<sup>29</sup> See Pokalsky, *supra* note 26, at 32-37.

<sup>30</sup> *Id.* at 33.

in New York compared to those in other states; and 3) developing benchmarks of performance and environmental quality.<sup>31</sup>

A second non-government commentator, Eric Goldstein, a senior attorney with the Natural Resources Defense Council (NRDC), points to instances of significant progress in improving air and water quality,<sup>32</sup> including the construction of more than 1,300 new sewage treatment facilities that have “dramatically reduced the level of raw sewage discharges into state waterways over the past twenty-five years.”<sup>33</sup> Mr. Goldstein also emphasizes that “much work remains” to be done with respect to controlling air and water pollution.<sup>34</sup> Mr. Goldstein identifies several challenges that he believes DEC needs to address. Sharing a theme with Mr. Pokalsky, Mr. Goldstein identifies DEC’s first challenge to be “priority setting” — he notes that DEC “cannot do everything” and that, accordingly, it needs to “do a better job of setting priorities in order to focus on the biggest problems . . .”<sup>35</sup> He endorses the Rockefeller Institute’s view that this priority setting must be done in a “very public way.”<sup>36</sup> A second challenge both Mr. Goldstein and Mr. Pokalsky identify is the need to “establish stronger and more meaningful performance measures.”<sup>37</sup> Again, Mr. Goldstein highlights the importance of embarking on a public debate of what should be measured.<sup>38</sup> Other important challenges he identifies include DEC’s “preserv[ing] an arms-length relationship with the regulated community” and the need for new recruitment programs to attract the best and the brightest to serve at the DEC.<sup>39</sup> He points to the federal Department of Justice’s “honors program” as an example of such a program that deserves possible emulation at the state level.<sup>40</sup>

Professor Philip Weinberg of St. Johns Law School, the final presenter for the second panel, sounds two major themes in his article. First, Professor Weinberg comes down squarely on the side of those who believe that a safe environment and stringent environmental requirements are necessary for a sound economy

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<sup>31</sup> *Id.* at 35-37.

<sup>32</sup> Goldstein, *supra* note 27, at 41-43.

<sup>33</sup> *Id.* at 42.

<sup>34</sup> *Id.* at 43.

<sup>35</sup> *Id.* at 44.

<sup>36</sup> *Id.* at 44 (citing ROCKEFELLER REPORT, *supra* note 6, at 6).

<sup>37</sup> See Pokalsky, *supra* note 26, at 33-35; Goldstein, *supra* note 27, at 45.

<sup>38</sup> See Goldstein, *supra* note 27, at 45.

<sup>39</sup> See *id.* at 46.

<sup>40</sup> See *id.* at 47.



— that the two are mutually reinforcing, rather than antithetical to one another.<sup>41</sup> Second, he emphasizes that enforcement of the environmental laws is and must be an inherent “part of the scene” of environmental regulation.<sup>42</sup>

The third panel of the Conference focused on solid and hazardous waste management and remediation. Again, the panel began with presentations by the DEC Deputy Commissioner responsible for the DEC regulatory programs that address these issues and by the relevant DEC Division Directors. These DEC presentations focused on the evolution of the DEC programs over the past twenty-five years and the “state of the environment” with respect to these environmental concerns.

Norman H. Nosenchuck, Director of DEC’s Division of Solid & Hazardous Materials, an individual whose long-standing tenure with the State DEC gives him a first-hand perspective on many of the issues he discusses, offers a comprehensive review of the evolution of DEC’s structure, and statutory and regulatory enactments, concerning solid and hazardous waste management in the State over the past quarter century.<sup>43</sup> He also chronicles some of the major milestones in this area, including the discovery of Love Canal in western New York, an event that would have repercussions at the national level as well as in New York.<sup>44</sup> Finally,

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<sup>41</sup> See Philip Weinberg, *DEC’s Air and Water Quality Programs: A Journey Half Completed*, 7.1 ALB. L.J. SCI. & TECH. 49 (1996). See generally ROBERT REPETTO ET AL., *HAS ENVIRONMENTAL PROTECTION REALLY REDUCED PRODUCTIVITY GROWTH? WE NEED UNBIASED MEASURES* (World Resources Institute ed., 1996).

<sup>42</sup> See Weinberg, *supra* note 41, at 49.

<sup>43</sup> See Norman H. Nosenchuck, *Key Events of the New York State Solid Waste Management Program: 1970-75*, 7.1 ALB. L.J. SCI. & TECH. 69 (1996) [hereinafter “*Key Events*”]. An earlier version of Mr. Nosenchuck’s article appears in 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 35. For a discussion of hazardous waste remediation, see Michael J. O’Toole, Jr., *State of the Environment*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 45. See also David Sterman, *Evolution of DEC’s Hazardous Waste Site Remediation Program*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 27. Mr. Sterman was a participant in the second and third panels of the Conference.

<sup>44</sup> See *Key Events*, *supra* note 43, at 73-74. Both the New York and federal “Superfund” statutes were enacted partially in response to Love Canal. See generally David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1 (1993); Ginsberg & Weinberg, *supra* note 19, at § 9.15 (noting that:

The New York State Inactive Hazardous Waste Program [(the “State Superfund”)] was passed into law in June 1979 . . . . The Love Canal hazardous waste site in Niagara Falls, New York, had become the subject of international attention, and there was a very strong public reaction to the perceived health and environmental hazards presented by inactive

Director Nosenchuck traces the evolution of solid and hazardous waste management policies and approaches, with a particular focus on the emergence of pollution prevention-related strategies and the integration of federal, state, and local efforts.<sup>45</sup>

Articles by two of the panel's commentators, Elliott Stern, Director of Environmental Health & Safety Legal Staff at the Eastman Kodak Company,<sup>46</sup> and Judy Enck, Senior Environmental Associate, New York Public Interest Research Group,<sup>47</sup> offer contrasting perspectives on past approaches and future directions in the solid and hazardous waste arenas. Writing from the perspective of a solid and hazardous waste generator, Mr. Stern emphasizes the importance of "simplify[ing] and rationaliz[ing] the existing state [solid and hazardous waste management and remediation] program with the federal program."<sup>48</sup> Mr. Stern recommends that DEC, among other actions: 1) "continue its efforts to more closely mirror the federal hazardous waste program;"<sup>49</sup> 2) "work pro-actively with EPA and other states on programs already underway to reduce unnecessary regulatory requirements at the federal level;"<sup>50</sup> and 3) "consider background levels and future land usage in its remediation decision-making process."<sup>51</sup> Mr. Stern's ultimate conclusion is that the State needs to "develop a more rational, less costly strategy for protecting our environment; one that meets its goals more efficiently by using more creativity and less bureaucracy."<sup>52</sup> He holds out the hope that "[i]f we can all work together . . . we can truly improve the system."<sup>53</sup>

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hazardous waste sites. . . . In the face of these concerns, the State Legislature recognized that additional legal tools were necessary to protect the public from these hazards, but also expected that federal assistance in this area was forthcoming. . . . [The State Superfund statute was passed] as an interim measure until federal programs [were] in operation . . . ."

<sup>45</sup> See *id.* at 69-95. The state of the environment was also addressed by Michael J. O'Toole, the DEC Director of the Division of Hazardous Waste. See also O'Toole, *supra* note 43.

<sup>46</sup> See Elliot Stern, *Solid and Hazardous Waste Management and Remediation: Perspective of Waste Generators*, 7.1 ALB. L.J. SCI. & TECH. 97 (1996).

<sup>47</sup> Judith Enck, *Solid and Hazardous Waste: Perspective of the Environmental Community*, 7.1 ALB. L.J. SCI. & TECH. 105 (1996).

<sup>48</sup> Stern, *supra* note 46, at 98.

<sup>49</sup> *Id.* at 99.

<sup>50</sup> *Id.* at 100.

<sup>51</sup> *Id.* at 101.

<sup>52</sup> *Id.* at 103.

<sup>53</sup> Stern, *supra* note 46, at 103.

In her article, Judy Enck emphasizes two themes, among others. Ms. Enck suggests that the State needs to give much greater emphasis to preventing pollution than it has to date:

[T]he hierarchy that has been established in state law [for managing solid and hazardous waste] . . . is . . . very important [but] [i]n reality, what has happened in New York State is that the hierarchy has been flipped upside down. The vast majority of money and attention continues to be focused on the bottom two rungs of the hierarchy, burying waste and burning waste . . . .<sup>54</sup>

Ms. Enck also touts the value of early public involvement in the decision-making process. Discussing efforts to site incinerators, she notes:

If there was a legitimate effort to involve the public in the decision-making process before all of the money was spent in promoting this technology, we would have saved a lot of time. . . . I know there is a sense that public participation slows down government (like it could get any slower), but I think when you pull people in early, there is the ability to anticipate what the problems are going to be.<sup>55</sup>

In the final presentation for the panel on solid and hazardous waste management, I identify a series of paradigm shifts that I believe are occurring in our approaches to environmental regulation.<sup>56</sup> Picking up on one of Ms. Enck's themes, I focus especially

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<sup>54</sup> Enck, *supra* note 47, at 109. See also DIV. OF SOLID WASTE, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, NEW YORK STATE SOLID WASTE MANAGEMENT PLAN 1993/94 UPDATE 23 (listing in order of usage (the "hierarchy"), the preferred solid waste management methods of New York State). "The [Solid Waste Management Act of 1988 [currently codified at ECL §§ 27-0101 through 27-0719] established a statutory hierarchy of solid waste management priorities, and a framework for solid waste planing, both at the state and local level." Ginsberg & Weinberg, *supra* note 19, at § 8.31. The hierarchy establishes "policy priorities" which "shall guide the solid waste management programs and decisions of DEC and other state agencies and authorities." *Id.* at § 8.3.2 (citing ECL §§ 27-0106(1)(a-d), 27-0106(3) and noting that:

[t]he state's solid waste management priorities are based on the following hierarchy:

- (a) first, to reduce the amount of solid waste generated;
- (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
- (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
- (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department).

<sup>55</sup> Enck, *supra* note 47, at 114.

<sup>56</sup> See *Future Policy Directions*, *supra* note 24, at 119-40.

on the benefits associated with pursuing pollution prevention strategies and I urge a more concentrated effort to increase use of these strategies.<sup>57</sup> I also discuss possible impacts of heightened efforts to prioritize on the future shape and content of DEC's activities in the solid and hazardous waste arenas, among other topics.<sup>58</sup>

While Conference Panel Four followed the same format as the previous two panels, its subject matter represented a fairly significant shift in focus. Panel Four focused on the natural resources of the State (wetlands, lands and forests, marine districts, and fish and wildlife).<sup>59</sup> The article by Robert Bathrick, former Director of DEC's Division of Lands and Forests and a thirty-year DEC veteran, discusses the evolution of the State's forested lands.<sup>60</sup> Mr. Bathrick traces the initial destruction of much of our forested lands during the 1800's.<sup>61</sup> He then discusses the subsequent regeneration of these valuable resources, and the fact that New York has more forested land than any other northeastern state, over 18.5 million acres.<sup>62</sup> Mr. Bathrick also identifies some of the more significant current challenges to New York's forests, such as urban sprawl.<sup>63</sup>

Mr. Bathrick observes that "fashionable buzzwords" in frequent use today to discuss environmental protection approaches — ecosystem-based strategies, bio-diversity, and sustainable devel-

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<sup>57</sup> See *id.* at 125-29.

<sup>58</sup> See *id.* at 129-33.

<sup>59</sup> DEC's jurisdiction exceeds that of the federal Environmental Protection Agency (EPA) with respect to these resources. DEC's jurisdiction, for example, includes preserving many of the forests in the State as well as fish and wildlife. See, e.g., N.Y. ENVTL. CONSERV. LAW Articles 9, 11 (McKinney 1984 & Supp. 1997). More generally, the DEC's enabling legislation, the State environmental conservation law, describes the mission of the DEC to be "to conserve, improve and protect [the State's] natural resources and environment and control water and air pollution, in order to enhance the health, safety and welfare of the people of the state." N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 1984).

<sup>60</sup> See Robert H. Bathrick, *Resource Management: Lands & Forests*, 7.1 ALB. L.J. SCI. & TECH. 159 (1996) [hereinafter "*Resource Management*"]. In connection with the Symposium, Mr. Bathrick published an article in the *Albany Law Environmental Outlook*, entitled "Lands and Forests: An Overview." Robert H. Bathrick, *Lands and Forests: An Overview*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 61. An article by panel participant John T. Major addresses issues relating to fish and wildlife. See John T. Major, *The State of New York's Fish and Wildlife Resource: Past, Present, and Future*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 67.

<sup>61</sup> See *id.* at 159.

<sup>62</sup> See *id.* at 160.

<sup>63</sup> See *id.* at 166-67.

opment — “all roll into a holistic management of today’s forest in New York State.”<sup>64</sup> Former Director Bathrick points to a series of trends in DEC policies geared towards fulfilling the Department’s responsibilities. State acquisition of environmentally-sensitive lands, together with increasing use of other tools such as conservation easements, are strategies likely to continue.<sup>65</sup> Mr. Bathrick identifies the challenge of managing lands to foster recreation while preventing exceedances in the carrying capacity of the property as one of increasing magnitude for the Department.<sup>66</sup> Echoing a point made by Judy Enck during the solid and hazardous waste panel,<sup>67</sup> Mr. Bathrick touts the benefits of expanding public outreach during the decision-making process, noting that “[o]ne of the philosophies of [the DEC Division of] Lands and Forests is that all of us are smarter than any one of us.”<sup>68</sup> Finally, Mr. Bathrick highlights the importance of protecting the forest resource by using the tax code to create appropriate incentives for private landowners to preserve their forests, rather than subdivide them.<sup>69</sup>

The article co-authored by Michael B. Gerrard and Deborah Goldberg<sup>70</sup> offers an example of the type of integrative thinking that occurred during the fifth and sixth panels of the Conference, which focused on various regulatory tools available to DEC and on the future of environmental regulation in the State.<sup>71</sup> The authors discuss comparative risk assessment — the examination of the relative risks posed by different dangers, with a view to deciding which “deserves the most governmental attention.”<sup>72</sup> Though this technique and its close relative, cost-benefit analysis, have been much in vogue in recent years in both Albany and Washington,<sup>73</sup> Mr. Gerrard and Ms. Goldberg suggest that they

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<sup>64</sup> See *id.* at 164.

<sup>65</sup> See *Resource Management*, *supra* note 60, at 166-67.

<sup>66</sup> See *id.* at 166.

<sup>67</sup> See Enck, *supra* note 47, at 114.

<sup>68</sup> *Resource Management*, *supra* note 60, at 168.

<sup>69</sup> See *id.* at 169.

<sup>70</sup> See Michael B. Gerrard & Deborah Goldberg, *Comparative Risk Assessment in New York*, 7.1 ALB. L.J. SCI. & TECH. 171 (1996). Both Mr. Gerrard and Ms. Goldberg practice environmental law in the New York office of Arnold & Porter. Mr. Gerrard also teaches environmental law as a member of the adjunct faculty of Columbia Law School. An earlier version of this article appeared in the *New York Law Journal* and is reprinted here with permission.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 172-73 (noting that the New York State Governor’s Office of Regulatory Reform, in January 1996, “issued a book, *Cost-Benefit Analysis: A*

tend to exclude many of the human values that are important in environmental decision-making.<sup>74</sup> Moreover, they argue, even within their sphere — such as the physical risks caused by various environmental hazards — the current state of the scientific art is not sufficiently advanced to allow reliable quantification of many important factors.<sup>75</sup> The authors conclude that “[r]isk analysis is a primitive science that deserves nurturing and attention, but not obedience — like a precocious youngster with intellectual flash but not yet sound judgment.”<sup>76</sup>

Complementing the six panel discussions were presentations by legislative leaders and an evening forum involving several DEC Commissioners past and present. In his article, Senator Carl L. Marcellino, Chair of the State Senate Environment Committee,<sup>77</sup> sounds several themes raised by speakers throughout the presentations. Articulating his vision of the future of environmental regulation, Senator Marcellino notes that “[t]he government cannot be everywhere,” and that creative approaches that involve additional “self-policing” need to be developed.<sup>78</sup> He stresses the importance of shifting from single media to multi-media approaches to environmental regulation,<sup>79</sup> and reports his intent to introduce legislation that will move the State increasingly in that direction, including a bill to promote integrated facility permitting.<sup>80</sup> Senator Marcellino also highlights his goal of facilitating redevelopment of “brownfields,” an initiative discussed by several panelists during the solid and hazardous waste panel.<sup>81</sup>

This Symposium issue includes articles by two former DEC Commissioners (Michael Zagata and Henry Williams).<sup>82</sup> Commis-

*Guide for New York State's Regulatory Agencies . . .* [and that] [t]he U.S. Environmental Protection Agency has been studying CRA [comparative risk assessment] in a series of studies dating back to 1987.”

<sup>74</sup> See *id.* at 174-78.

<sup>75</sup> See Gerrard & Goldberg, *supra* note 70, at 180.

<sup>76</sup> *Id.* at 181.

<sup>77</sup> Carl L. Marcellino, *25th Anniversary of the New York State DEC: A Legislator's Perspective*, 7.1 ALB. L.J. SCI. & TECH. 59 (1996).

<sup>78</sup> See *id.* at 60-61.

<sup>79</sup> See *id.* at 61; see also *State as Innovators*, *supra* note 5, at 360-67.

<sup>80</sup> See Marcellino, *supra* note 77, at 61 (stating that “[f]irst, we have legislation to facilitate the Environmental Facilities Corporation’s multi-media assistance [citing S. 7133, 219th Leg., 1st Reg. Sess. (N.Y. 1996)] . . . [a]nd second, a bill to allow the DEC to issue integrated facility permits (citing S. 7356, 219th Leg., 1st Reg. Sess. (N.Y. 1996)).”

<sup>81</sup> See *id.* at 64.

<sup>82</sup> See Henry G. Williams, *A Special Place: Reflections and Observations of a Former DEC Commissioner*, 7.1 ALB. L.J. SCI. & TECH. 141 (1996); Michael

sioner Zagata contributes two articles, one that relates to his role as the speaker opening the Conference<sup>83</sup> and the second relating to his participation in the Commissioner's Forum.<sup>84</sup> Commissioner Zagata stresses several points in his articles. The Commissioner cites the Department's mission statement as support for the notion that a strong economy and a sound environment go hand-in-hand. Section 1-0101 of the State Environmental Conservation Law articulates the Department's mission to be "to conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."<sup>85</sup> Commissioner Zagata mentions the Catskill watershed agreement as an example of a "win-win" arrangement that will enhance environmental conditions and further economic development.<sup>86</sup> Investing in making the environmental improvements that will obviate the need for a multi-billion dollar filter mechanism will serve both environmental protection and economic development goals.<sup>87</sup>

Commissioner Zagata identifies two other themes as well. First, he highlights the interconnected nature of the Department's natural resources and environmental quality functions,<sup>88</sup> and the fact that the whole is greater than the sum of its parts.<sup>89</sup> Among his other points, Commissioner Zagata stresses the importance of prevention over remediation. He notes that "[o]ur goal, our mission, is to protect the environment. Remediating sites is an

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Zagata, *Commissioner's Comments*, 7.1 ALB. L.J. SCI. & TECH. 149 (1996) [hereinafter *Zagata Comments*]; Michael Zagata, *A Commissioner's View*, 7.1 ALB. L.J. SCI. & TECH. 19 (1996) [hereinafter *Commissioner's View*]. Commissioner Williams served as the Commissioner of the DEC from 1983 to 1987. Commissioner Zagata served as the Commissioner of the DEC from 1994 to December 31, 1996. Commissioner Zagata also published an article entitled *Command and Control Versus Economic Incentives in Environmental Protection with the Albany Law Environmental Outlook* in connection with the Symposium. Michael D. Zagata, *Command and Control versus Economic Incentives in Environmental Protection*, 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996, at 10.

<sup>83</sup> See *Commissioner's View*, *supra* note 82, at 19.

<sup>84</sup> See *Zagata Comments*, *supra* note 82, at 149.

<sup>85</sup> N.Y. ENVTL. CONSERV. LAW § 1-0101 (McKinney 1984).

<sup>86</sup> See *Commissioner's View*, *supra* note 82, at 19-20.

<sup>87</sup> See Andrew C. Revkin, *New York Begins Spending to Save City's Reservoirs*, N.Y. TIMES, Jan. 22, 1997, at A1 (stating that the watershed agreement will "save[] the city . . . billions of dollars" by postponing "until at least 2002 a threatened order by the Federal Environmental Protection Agency to keep the city's water clean with a filtration plant").

<sup>88</sup> See *Commissioner's View*, *supra* note 82, at 26.

<sup>89</sup> See *id.* at 26-27.

admission of failure. This environment has already become polluted which should have been prevented in the first instance.<sup>90</sup>

Commissioner Henry Williams' article contains his reflections about the DEC's travails and victories during his tenure.<sup>91</sup> Commissioner Williams focuses a significant amount of attention on administrative and management issues. Among the challenges he sees is the need for continued improvement in the "matrix-style" management system the Department uses,<sup>92</sup> a concept discussed by Commissioner Zagata<sup>93</sup> and covered in considerable length in the Rockefeller Report issued before the Conference.<sup>94</sup> Commissioner Williams touts his creation of a separate Office of Hearings as an institutional structure improvement that insulates the hearings office from other DEC staff and thereby enhances that Office's credibility.<sup>95</sup> On the topic of progress in environmental protection during his watch, Commissioner Williams cites the high priority his administration gave to the Great Lakes and the advances made with respect to the Lakes.<sup>96</sup>

To sum up briefly, of the many overarching themes discussed during this Conference, I will limit myself to highlighting three for the reader. First is the importance of holistic or integrated thinking about environmental issues.<sup>97</sup> This notion, which has gained great currency today in many circles,<sup>98</sup> was articulated by several speakers and is discussed in several articles. Perhaps the most interesting contribution of the Conference in this regard was the different contexts in which this concept was raised, and the different actors who raised it. There has been talk over the years in New York of dividing the DEC into two agencies, an environmental quality agency and a natural resources agency. Speakers from across the spectrum highlighted the strong links between these

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<sup>90</sup> See *id.* at 28.

<sup>91</sup> See Williams, *supra* note 82, at 141.

<sup>92</sup> See *id.* at 143-45.

<sup>93</sup> See *Commissioner's View*, *supra* note 82, at 23-24.

<sup>94</sup> See ROCKEFELLER REPORT, *supra* note 6, at 13-19.

<sup>95</sup> See Williams, *supra* note 82, at 147. For an in-depth discussion of administrative hearings officers and the use of a central panel to maintain fairness see New York Executive Order Number 131. See PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 3.19 (1995) (citing N.Y. Exec. Order No. 131, § II(c), N.Y. COMP. CODES R. & REGS. tit. 9, § 4.131 (1995)).

<sup>96</sup> See Williams, *supra* note 82, at 146-47.

<sup>97</sup> See U.S. EPA, SAB-EC-90-021, REDUCING RISK: SELLING PRIORITIES & STRATEGIES FOR ENVTL. PROTECTION 6 (Sept. 1990) [hereinafter "REDUCING RISK"]; *States as Innovators*, *supra* note 5, at 360-67.

<sup>98</sup> See REDUCING RISK, *supra* note 97, at 6.



two sides of the DEC. The speakers defended the current integrated structure and challenged the wisdom of artificially separating the inextricably connected environmental quality and natural resource functions. DEC Commissioner Zagata, for example, talked about the spreading of manure on farms and the impacts of this practice on the availability of food for turkeys during the winter months.<sup>99</sup> He noted that many turkeys would have starved during the 1995/1996 winter, but for the manure, and that the DEC staff in the environmental quality divisions (the Division of Water, etc.) who set the rules for manure spreading need to involve the Department's natural resources staff in making policy judgments.<sup>100</sup>

A second context in which speakers raised the importance of integrated thinking or convergence of views involved the relationship between "environmentalists" and "sportsmen." Oftentimes on opposite ends of the political spectrum and policy debates, representatives of the "environmental community" (e.g., The Nature Conservancy) and the "conservationist community" (e.g., New York State Conservation Fund Advisory Board) focused on the "common ground" that exists between the two constituencies and on the need for them to invest renewed effort to identify, and work together in support of, common interests (habitat protection, etc.). The very real differences that exist between certain constituencies (e.g., between "animal rights" activists and hunters and fishermen) should not blind these groups to the common ground that literally transcends their differences in a very real sense — notably, the preservation of habitat needed for the conservation of species.

A second observation from listening to the presentations and reading the articles is the surprising amount of consensus that exists with respect to past performance and future challenges. To a person, the speakers acknowledged that progress has been made, but that the nature of the remaining challenges requires reworking of our traditional approaches.<sup>101</sup> There even was consensus, though perhaps not unanimously shared, about several types of changes that are needed. The notions of setting priorities, for example, and of shared decision-making, seem to be embraced widely by the various presenters. The Goldstein (NRDC) and

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<sup>99</sup> See *Commissioner's View*, *supra* note 82, at 26-27.

<sup>100</sup> See *id.* at 27.

<sup>101</sup> Of course, there were differences about the degree of progress.

Pokalsky (Business Council) articles are particularly remarkable for the convergence of views they reflect.<sup>102</sup>

Proving the importance of the seemingly mundane, the emphasis that several speakers gave to DEC's matrix organizational structure, the quality of the Department's staffing, the nature of its resources and their distribution, and similar issues, reflects that having a competent, appropriately staffed, regulatory agency in place is a key element to achieving success in environmental protection. As a recent article on international environmental issues suggests, having adequate resources is at least as important as the quality of the legal infrastructure to the accomplishment of environmental goals.<sup>103</sup>

As this summary reflects, the *DEC 25th Anniversary Conference* provided an important opportunity to reflect about the State's efforts to protect the environment over the past quarter-century. Speakers recounted successes as well as failures, and offered their perspectives on what remains to be done and how it can be accomplished. Together with complementary efforts such as the Rockefeller Report<sup>104</sup> and the Albany Law Environmental Outlook's Conference Issue,<sup>105</sup> this Symposium Issue provides a substantial amount of basic information concerning trends in environmental conditions in New York State, a history of the evolution of institutional structures to deal with environmental concerns, and the perspectives of a wide variety of experts on past actions and future directions. As one of the several individuals involved in organizing this conference, I am confident that I speak (and write) for my colleagues in saying that the Journal's publication of this Symposium Issue will prove a valuable source of material for researchers and others interested in environmental issues in New York State and beyond.

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<sup>102</sup> See Goldstein, *supra* note 27; Pokalsky, *supra* note 26.

<sup>103</sup> See Special Report, *Environmental Laws on the Books in Latin America But Enforcement, Environmental Infrastructure*, 20.4 INT'L ENV'T REP. (BNA) 176 (Feb. 19, 1997).

<sup>104</sup> ROCKEFELLER REPORT, *supra* note 6.

<sup>105</sup> 2.3 ALB. L. ENVTL. OUTLOOK, Spring 1996.

