



## EFFICIENCY AND ENVIRONMENTALISM THE CASE FOR UNIFORM PROCEDURES ACTS IN STATE ENVIRONMENTAL LAWS

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### I. INTRODUCTION

Imagine for a moment that you recently acquired a piece of undeveloped property. For whatever reason, you intend to improve the property by building a structure or otherwise developing the land. Wanting to do your due diligence and comply with all applicable laws, you hire a consultant of some sort to navigate the often-choppy regulatory waters. You learn that your plans will require several environmental permits to meet the provisions of the state's land use laws. After hundreds, perhaps thousands, of dollars in permit fees and consultant costs, you learn from the state regulatory agency that, while two of the necessary permits have been approved, the final permit is still in the review process, and under the statute the state still has another thirty days before it is required to notify you of the result. It is now the end of fall and your window for beginning construction before winter, which makes excavation all but impossible, is rapidly closing. There is a real possibility that you will receive final approval that will be largely meaningless. This is just one example of the hardships developers, builders and private citizens face in the environmental permitting process, and it is one that can be prevented.

State legislatures and administrative agencies enacting laws and promulgating rules relating to environmental permits face various hurdles in ensuring that regulations are meaningful, effective and fair. They must confront the heavy burden of balancing the goals of conservation and economic growth, adhering to standards set by the United States Environmental

Protection Agency (EPA)<sup>1</sup>, ensuring enactments pass constitutional muster and meeting other statutory requirements.<sup>2</sup> Procedures for procuring various permits are set by both statutes and rules intended to regulate development in a number of environmentally sensitive locales, resulting in procedural discord when the mandated procedures include provisions that do not match up with one another. This creates inefficiency in the agency charged with administering said permits, frustration within the regulated community and wasted opportunities for environmentally sound projects. New Jersey's regulations regarding development in flood plains, freshwater wetlands and coastal zones provide glaring examples of the potential disconnect in permit procedures where uniformity does not exist.<sup>3</sup> The state of New York has addressed this issue by passing the Uniform Procedures Act ("UPA" or "the Act"), which established mandatory timeframes for completeness determinations, public input, and approvals or denials of permit applications.<sup>4</sup>

This Note will explain the impact of disjointed regulations as they pertain to the environmental permitting process and argue for the adoption of legislation similar to New York's UPA and the importance for states in adopting this type of regulatory structure.<sup>5</sup> The arguments will center on the notion that the

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<sup>1</sup> *Regulations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/lawsregs/regulations> (last visited May 3, 2013).

<sup>2</sup> MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 3, 14 (3d ed. 2009). The due process requirements of the Fourteenth Amendment and state Administrative Procedures Acts, which have been adopted by most states, are of particular importance in determining legitimacy of agency regulations. *Id.*

<sup>3</sup> See Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B (West 2011); Flood Hazard Area Control Act, N.J. STAT. ANN. § 58:16A (West 2011); Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19 (West 2011); Freshwater Wetlands Protection Act Rules, N.J. ADMIN. CODE § 7:7A (2011); Flood Hazard Area Control Act Rules, N.J. ADMIN. CODE § 7:13 (2011); Coastal Permit Program Rules, N.J. ADMIN. CODE § 7:7 (2011).

<sup>4</sup> N.Y. ENVTL. CONSERV. LAW §§ 70-0101–70-0121 (McKinney 2011).

<sup>5</sup> In making this argument, this Note relies heavily on the laws and regulations, as well as the experience of the political and administrative institutions, of New Jersey due to the state's stringent environmental regulations but disjointed procedural requirements, as will be explained below.

UPA should serve as an example for other states in addressing these issues.<sup>6</sup> First, this Note will provide an overview of New York's UPA and a brief explanation of its functions. Next, this Note will explore the various problems associated with non-uniform procedures. Further, it will explain three approaches to permit application procedures and detail the beneficial outcomes of legislation creating uniform environmental permitting procedures. Lastly, this Note will argue that state legislators, as a matter of policy, can be in favor of uniform procedures without compromising a commitment to environmental protections.

## II. NEW YORK'S UNIFORM PROCEDURES ACT AS A MODEL

### A. HISTORY AND PASSAGE OF THE UPA

In 1977, the New York state legislature passed the Uniform Procedures Act in response to Governor Hugh Carey's call to action in his 1977 annual message to the legislature.<sup>7</sup> Carey, a democrat and New York's 51<sup>st</sup> governor,<sup>8</sup> implored the legislature to adopt legislation "[t]o assure that the regulatory processes fulfill their intended objectives without costly delays or attention to frivolous concerns."<sup>9</sup> In signing the UPA, the Governor noted his reasoning for calling for, and eventually approving, the legislation, when he stated that lawmakers "must also recognize that the regulation of enterprises increases the costs of production in this state" and insisted uniform procedures would prevent the "costly delays" and "frivolous

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<sup>6</sup> The arguments in this Note are largely intended to echo the sentiment of New York's Governor Carey who, upon signing the UPA, noted that the provisions should "serve as a model for other State and local regulatory programs." 1977 N.Y. Sess. Laws 2523 (McKinney).

<sup>7</sup> Philip Weinberg, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 17 1/2, ENVTL. CONSERV. LAW §§ 70-0101.

<sup>8</sup> Richard Pérez-Peña, *Hugh Carey, Who Led Fiscal Rescue of New York City, Is Dead at 92*, N.Y. TIMES, Aug. 7, 2011, <http://www.nytimes.com/2011/08/08/nyregion/hugh-carey-who-led-fiscal-rescue-of-new-york-city-dead-at-92.html?pagewanted=all>.

<sup>9</sup> 1977 N.Y. Sess. Laws 2523 (McKinney).

concerns” from interfering with the intended objectives of environmental regulations.<sup>10</sup> The democratic governor<sup>11</sup> expressed a desire to assist developers and other economic concerns despite his party’s support for environmental protections during the time period.<sup>12</sup> Carey’s statements indicate that the Act aims to bridge the gap between the typical conservative views favoring promotion of economic development with conventional liberal support for stricter environmental protections. The contrast between Governor Carey’s position on the political spectrum and his statements in signing the UPA highlights the compromise the Act aims to strike.

The express legislative intent within the statute indicates state lawmakers were motivated by several concerns in passing the UPA.<sup>13</sup> These included assuring “fair, expeditious and thorough administrative review of regulatory permits,” eliminating inefficiencies and redundancies in permitting and encouraging public participation in the process.<sup>14</sup> It is apparent the Governor and the legislature saw fit to maintain environmental protections while allowing for greater procedural efficiency.

## B. CONTENTS AND IMPORTANT PROVISIONS OF THE UPA

The UPA expressly defines much of what it covers within the statute. Namely, it establishes timelines for permit review and agency decision-making as well as providing rules for public participation.<sup>15</sup> Additionally, it creates a simple dichotomy between what are dubbed “major” projects and “minor” projects,

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

<sup>11</sup> Pérez-Peña, *supra* note 8.

<sup>12</sup> *Democratic Party Platform of 1976*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29606#axzz1buhiLopz> (last visited May 2, 2013).

<sup>13</sup> N.Y. ENVTL. CONSERV. LAW § 70-0103 (McKinney 2011).

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

<sup>15</sup> ENVTL. CONSERV. § 70-0119.

explained below.<sup>16</sup> In tandem with the state's Administrative Procedures Act (APA), the UPA also grants New York's environmental regulatory agency, the Department of Environmental Conservation (NYDEC), with rulemaking power in implementing the requirements of the statute.<sup>17</sup> As is the case with many environmental regulations, the legislature conferred authority to the state agency, here the NYDEC, to make rules to fill in the gaps between the express provisions of the statute and the practical realities of permitting procedures.

As mentioned above, the UPA prescribes specific timing requirements in the environmental permitting process, including completeness determinations, response times, public hearings and decision-making related to applications for environmental permits.<sup>18</sup> Each application the NYDEC receives for a permit enters into the process outlined. The specifics are detailed in the table below. The first step is the completeness determination. Completeness determination refers to the point at which NYDEC staff determines there are no deficiencies in the application, that is, NYDEC has all the necessary information to make a fair, informed decision on the permit.<sup>19</sup> Notice of the agency's completeness determination must be mailed within the specified time limits for the type of permit or the application is deemed to be complete.<sup>20</sup> For most permits, NYDEC has fifteen days to make its completeness

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<sup>16</sup> ENVTL. CONSERV § 70-0111.

<sup>17</sup> N.Y. A.P.A. LAW § 201 (McKinney 2011). The New York APA reads, in relevant part, "an agency may adopt by rule additional procedures not inconsistent with statute. Each agency shall strive to ensure that, to the maximum extent practical, its rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meanings." *Id.* The UPA, on the other hand, includes the following language: "[t]he department, after public hearing, shall adopt rules and regulations to assure the efficient and expeditious administration of this article. Such rules and regulations shall include but not be limited to provisions regarding notice, review, public participation and public hearings." N.Y. ENVTL. CONSERV. LAW § 70-0107 (McKinney 2011).

<sup>18</sup> N.Y. ENVTL. CONSERV. LAW §§ 70-0101–70-0121.

<sup>19</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109.

<sup>20</sup> N.Y. ENVTL. CONSERV. LAW § 70-0101.

determination.<sup>21</sup> For hazardous waste management facilities, certain wastewater discharges and certain air permit applications NYDEC has sixty days to make a completeness determination.<sup>22</sup>

Once an application is deemed complete, staff must decide whether the proposed project is a “major project” or “minor project” as defined by agency rules.<sup>23</sup> The rules expressly define all projects considered minor and include many specifically-designated major projects.<sup>24</sup> Projects that are not included in the rules are considered major.<sup>25</sup> That determination sends the application down one of two paths. Minor projects have a much shorter review period and are not subject to the public hearing provisions.<sup>26</sup> Permit decisions on minor projects must be made within forty-five days of determining that the application is complete.<sup>27</sup> The Act defines a minor project as one “which by its nature and with respect to its location will not have a significant impact on the environment” and which does not exceed rules established pursuant to the authority granted in the Act.<sup>28</sup>

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<sup>21</sup> N.Y. ENVTL. CONSERV. LAW at § 70-0109.

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

<sup>23</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 621.2 (2011). A major project is defined as “any action requiring a permit identified” in the permit regulations, “which is specifically defined as major or which is not specifically defined as minor” in the section designating specific projects as so. *Id.* A minor project, on the other hand, is defined as “any action listed as minor in section 621.4 of this Part, subject to the reservations of paragraph 621.3(c)(3). Minor projects are projects which by their nature and with respect to their location are not likely to have a significant impact on the environment.” *Id.*

<sup>24</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 621.4 (2011). An example minor project designation read: a “[m]inor stream bed or bank disturbance actions include the following: repair or in-kind replacement of existing structures; disturbances of less than 100 linear feet (30.48 linear meters) along any 1,000 feet (304.8 meters) of watercourse.” *Id.* Some categories of projects are expressly made major, e.g. “[t]here are no minor water transport projects.” *Id.*

<sup>25</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 621.2 (2011).

<sup>26</sup> N.Y. ENVTL. CONSERV. LAW §§ 70-0111–70-0121.

<sup>27</sup> N.Y. ENVTL. CONSERV. LAW § 70-0111.

<sup>28</sup> N.Y. ENVTL. CONSERV. LAW § 70-0105.

In the case of major projects, agency staff may determine if a public hearing is necessary due to a significant amount of interest from the public.<sup>29</sup> If a hearing takes place, DEC is given additional time to make a final decision.<sup>30</sup> For major projects, if no hearing is held, the final decision on the application must be made within ninety days of determination that the application is complete.<sup>31</sup> However, if a public hearing is held, the applicant and the public must be notified of a hearing within sixty days of the completeness determination.<sup>32</sup> Thereafter, the hearing must commence within ninety days of the completeness determination.<sup>33</sup> Once the hearing ends, a final decision on the application must be issued within sixty days after the agency receives the final hearing record.<sup>34</sup> Finally, DEC notifies the applicant of its disposition as to the project.<sup>35</sup>

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<sup>29</sup> N.Y. ENVTL. CONSERV. LAW § 70-0119.

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

<sup>31</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109.

<sup>32</sup> *Id.*

<sup>33</sup> N.Y. ENVTL. CONSERV. LAW § 70-0119.

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

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

New York Uniform Procedures Act – Basic Time Frame Provisions

Minor Projects:	Major Projects:	Completeness Determination:
45 days of determining that the application is complete. <sup>36</sup>	<p><i>If No Hearing is Held:</i> 90 days of determination that the application is complete.<sup>37</sup></p> <hr/> <p><i>If Public Hearing is Held:</i></p> <ul style="list-style-type: none"> <li>• notification within 60 days of the completeness determination.<sup>40</sup></li> <li>• hearing must commence within 90 days of the completeness determination.<sup>41</sup></li> <li>• final decision on the application must be issued within 60 days after receiving final record.<sup>42</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 15 days for most permits.<sup>38</sup></li> <li>• 60 days for hazardous waste management facilities, certain wastewater discharges and certain air permits.<sup>39</sup></li> </ul>

C. IMPACT OF THE UPA ON INTERESTED PARTIES

The specific provisions of the UPA raise questions about the extent to which they meet the intent of the legislature as expressed in the Governor’s statements above. Apart from the political considerations touched on, the impact on interested

<sup>36</sup> N.Y. ENVTL. CONSERV. LAW § 70-0111.

<sup>37</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> N.Y. ENVTL. CONSERV. LAW § 70-0119.

<sup>41</sup> *Id.* (but in reference to N.Y. ENVTL. CONSERV. LAW § 70-0119 (McKinney 2011)).

<sup>42</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109.



parties is telling as to whether the provisions actually “meet in the middle” as intended or if, in fact, they favor those interests typically associated with a specific political party. It is likely the regulated community, which typically aligns itself with more conservative positions as it relates to the regulatory climate,<sup>43</sup> would argue that the mandates and subsequent rules established according to the UPA are helpful, but do not go far enough in ensuring development can persist unencumbered by regulatory schemes. On the other hand, supporters of conservation, specifically the environmental lobby, which is normally allied with more liberal views,<sup>44</sup> are likely to express concerns about the potential deleterious effects the procedural requirements have on the substantive portions of environmental regulations. Lastly, government entities, affected by the need to balance changing policy goals and operational costs, may provide the best framework for realizing the benefits of the UPA.

### 1. The Regulated Community

The regulated community is most directly affected by the many subcategories of environmental regulations. The most significantly affected members of the regulated community are builders, who carry out the physical construction of improvements;<sup>45</sup> developers, who plan and implement improvements to land; companies involved in the financing and transfer of structures and properties;<sup>46</sup> and, lastly, individual, independent citizens seeking to improve their property.<sup>47</sup> The

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<sup>43</sup> See Robert W. Hahn, Sheila M. Olmstead & Robert N. Stavins, *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377, 407–08 (2003).

<sup>44</sup> *Id.*; see generally *Democratic Party Platform of 1976*, *supra* note 12.

<sup>45</sup> See generally *Industry Information: Environmental*, N.J. BUILDERS ASS’N, <http://www.njba.org/sections/?Environmental> (last visited May 3, 2013).

<sup>46</sup> See *NJBIA Vision for a Better Business Climate 2010-2011*, N.J. BUS. & INDUS. ASS’N, 2, [http://www.njbia.org/Libraries/PDF\\_Files/vision2010.sflb.ashx](http://www.njbia.org/Libraries/PDF_Files/vision2010.sflb.ashx) (last visited May 2, 2013).

<sup>47</sup> See *New Jersey Environmental Rules*, N.J. DEP’T OF ENVTL. PROT., [http://www.nj.gov/dep/rules/nj\\_env\\_law.html](http://www.nj.gov/dep/rules/nj_env_law.html) (last visited May 2, 2013) (listing New Jersey’s environmental regulatory program, including those that

difficulties faced by these groups vary with the size and location of the project, amongst other considerations. The concerns of large-scale developers and builders seeking to create residential subdivisions over large tracts of land are obviously different than those of an individual who just wants to expand the deck in his backyard.

The New Jersey Business and Industry Association (NJBIA), a trade group that advocates for regulated companies in New Jersey, lists the following as priorities in its environmental agenda: (1) lowering State and local permit fees, (2) processing permits within reasonable periods of time, (3) increasing compliance assistance from the New Jersey Department of Environmental Protection (NJDEP) to help companies meet the state's complex and confusing regulatory requirements, (4) implementing an even-handed enforcement policy that does not punish companies that make honest mistakes, (5) reducing redundancies between State, county and municipal approvals and (6) balancing environmental stewardship and economic growth.<sup>48</sup> The NJBIA complains generally that the regulatory costs act as a deterrent to business and are often "unnecessary and excessive."<sup>49</sup> It seems likely individuals would share many of these concerns, albeit in a more localized, personal fashion.

Many of the complaints on environmental regulation received from the regulated community revolve around procedural difficulties. In New Jersey, a state that does not have statutory uniform procedures, developers, builders and other businesses grow frustrated with permit fees, unreasonable and irregular timing of their receipt, and other procedural inefficacy, as evidenced by NJBIA's policy initiatives above.<sup>50</sup> While the regulated community in New York is still involved in the environmental regulatory process,<sup>51</sup> the issues experienced by

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would apply to individual property owners, e.g., regional land use rules, rules for individual septic systems and underground storage tanks).

<sup>48</sup> *NJBIA Vision for a Better Business Climate*, *supra* note 46.

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

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

<sup>51</sup> *Environment Committee Alert*, THE BUS. COUNCIL OF N.Y. STATE (Oct. 25, 2011), <http://www.bcnys.org/inside/env/2011/1025update.html>.

New Jersey businesses as they relate to the procedural requirements of environmental permits are far more significant than those faced by their counterparts in New York. The UPA provisions make large strides toward the goal of easing the regulatory burden on members of the regulated community. The timing and predictability difficulties faced by New Jersey businesses are remedied by virtue of the statutory requirements of the UPA.<sup>52</sup>

## 2. The Environmental Community

In addition to the regulated community, the environmental community is an important stakeholder in the realm of environmental regulations. Comprised largely of organizations furthering the express goal of environmental conservation and expanding environmental protections, the environmental community's interests often conflict with those of the regulated community, e.g. development companies.<sup>53</sup> Members of the environmental community advocate for "appropriate" development and staunchly oppose what they see as development projects that are detrimental or dangerous to various sensitive areas and species.<sup>54</sup> Typically, environmentalists would oppose legislation they view as too favorable towards business and economic considerations and unmindful of potential environmental impacts.<sup>55</sup> The UPA, however, does not alter substantive environmental protections. Rather, its authority is limited to the procedural inner-workings of the state's environmental permitting requirements.<sup>56</sup> As a result, environmentalists should be relatively comfortable with

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<sup>52</sup> See N.Y. ENVTL. CONSERV. LAW §§ 70-0101–70-0121 (McKinney 2011).

<sup>53</sup> See Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 506, 528 (Winter 2001).

<sup>54</sup> See Laura Lynch & The Sierra Club, N.J. Chapter, *Land Use and Preservation in New Jersey*:

*A Beginner's Guide*, SIERRA CLUB, N.J. CHAPTER (Feb. 2009), [http://newjersey.sierraclub.org/ConCom/LUandP\\_NJ2010.pdf](http://newjersey.sierraclub.org/ConCom/LUandP_NJ2010.pdf).

<sup>55</sup> See Hahn et al., *supra* note 43.

<sup>56</sup> N.Y. ENVTL. CONSERV. LAW §§ 70-0101–70-0121 (McKinney 2011).

the law's provisions and recognize their benefits to the state's regulatory agency in terms of efficient allocation of resources and ability to divert personnel and funds to substantive protections.

### 3. Government

Lastly, other extensions of state government, including state agencies, county, and municipal governments have a significant interest in permitting processes as well. These entities are largely subject to the same requirements as private actors when they initiate a development project.<sup>57</sup> Due to the various restraints placed on government fiscal affairs,<sup>58</sup> minimizing regulatory costs and burdens are of particular importance to agency and government decision-makers.

The extraordinary number of independent municipalities in New Jersey provides an illuminating example of the significance of environmental regulation to local governments. New Jersey is home to 566 municipalities<sup>59</sup> and twenty-one counties.<sup>60</sup> Both the state regulatory agency (NJDEP) and the lobbying organization for municipalities provide a wealth of information to local officials on environmental regulations and permits.<sup>61</sup>

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<sup>57</sup> See *Local Government Resources*, N.J. DEP'T OF ENVTL. PROT., <http://nj.gov/dep/localgov/guidebook.html> (last visited May 3, 2013); *NJLM Publication Index*, N.J. LEAGUE OF MUNICIPALITIES, <http://www.njslom.org/Publications.html> (last visited May 2, 2013).

<sup>58</sup> See Justin J. T. Hughes & Garth B. Rieman, *A New Generation of State Tax and Expenditure Limitations*, 22 HARV. J. ON LEGIS. 269, 270 (Winter 1985).

<sup>59</sup> *What is the League?*, N.J. LEAGUE OF MUNICIPALITIES, <http://www.njslom.org/njlabout.html> (last visited May 2, 2013). The number of municipalities in New Jersey vis-à-vis land area is notably disproportionate. By way of comparison, New Jersey is 7,354 square feet in area as opposed to California's 155,766 square feet. *Land and Water Area of States, 2008*, INFOPLEASE.COM, <http://www.infoplease.com/ipa/A0108355.html> (last visited May 3, 2013). California has 463 incorporated cities as of June 2011. *Facts at a Glance (2011)*, LEAGUE OF CAL. CITIES, <http://www.cacities.org/index.jsp?zone=loc&displaytype=12&story=53> (last updated June 19, 2011).

<sup>60</sup> *NJ Counties*, N.J. ASS'N OF CNTYS., <http://www.njac.org/Counties/default.asp> (last visited May 3, 2013).

<sup>61</sup> *Local Government Resources*, *supra* note 57; *NJLM Publication Index*, *supra* note 57.

NJDEP's website, for example, includes information on each of its program areas, most notably land use regulation, compliance and enforcement.<sup>62</sup> On the other side of the issue, the New Jersey League of Municipalities includes "terminat[ing] unnecessary and duplicative bureaucratic requirements . . . which prevent the development of vibrant economic and recreational opportunities" amongst its policy objectives.<sup>63</sup> County and municipal governments, facing the burdens noted above, should welcome the opportunity for a more structured, predictable and streamlined process. Time saved on permit applications to build a new school, create a new park or other land use will amount to money saved (which is, after all, the best outcome for a government administrator).

#### 4. Why All Interest Groups Can Support a UPA

The various interests affected by environmental regulations would seemingly favor UPA-type legislation. This type of legislation provides consistency and procedural swiftness to those handling permit applications. Additionally, it assuages the burdens placed on the regulated community, as well as other state agencies and local governments, when dealing with regulatory agencies. While it may appear—understandably so—that the UPA benefits purely economic and development interests to the detriment of environmental protections and conservation goals, this is not necessarily so. At the same time, the procedural ease does not impact the substance of regulations and should not affront the environmental community or other environmentally minded political actors. In fact, environmentalists should be supportive of UPAs, as they provide for resource savings that can (and should) result in reinvestment in substantive protections. In sum, the UPA is successful in balancing the interests of those involved in environmental regulations.

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<sup>62</sup> *Local Government Resources*, *supra* note 57.

<sup>63</sup> 2012 *Legislative Agenda*, N.J. LEAGUE OF MUNICIPALITIES, <http://www.njslom.org/legpriorities.html> (last visited May 2, 2013).

### III. THE DISJOINTED PROCEDURES' DIFFICULTY

The difficulties that non-uniform environmental regulation procedures present to those legally required to abide by them may not be obvious at first blush, but they are substantial nevertheless. The problem can be whittled down to two basic notions: inefficiency and uncertainty. Inefficiency, as a result of incongruent regulations, plagues state regulatory agencies and their staffs in administering environmental laws and regulations, causing precious and painfully finite agency resources to be unnecessarily exhausted. Uncertainty, on the other hand, affects not the *regulator* but the *regulated*. Permit applicants, unable to predict approvals that are critical in planning and timing projects, are likely to avoid, and may even be forced to abandon, meritorious projects. Uncertainty in this context chills development and has aggregate effects on economic growth, a critical consideration for state governments.

#### A. INEFFICIENCY: AGENCY INEFFICIENCY

The organizational inefficiency that pervades environmental regulatory agencies as a consequence of inconsistent procedural requirements represents a considerable drain on resources, which most state agencies cannot afford to lose. Processing permits requires experienced staff with the technical abilities to carefully review applications and make the proper determinations.<sup>64</sup> Hiring these individuals and paying their salaries and benefits accounts for a large portion of the fiscal inefficiency involved in non-uniform procedures. Reduced to the most basic notion, different requirements necessitate more staff hours reviewing applications and, in turn, more staff.

This has never been a more serious concern for state agencies. The economic downturn impacting the American economy since 2008 has crippled state revenues and forced states to “tighten their belts.”<sup>65</sup> As a result, forty-six states have

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<sup>64</sup> See, e.g., *Air Facility Permits and Registrations*, N.Y. DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/chemical/8569.html> (last visited May 2, 2013).

<sup>65</sup> Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLY PRIORITIES, <http://www.cbpp.org/cms/index.cfm?fa=view&id=711> (last updated June 27, 2012).



cut services to citizens and thirty have been forced to raise taxes in some way.<sup>66</sup> Forty-two states and the District of Columbia have closed or are working to close the gap caused by roughly \$103 billion in shortfalls for fiscal year 2012.<sup>67</sup> More specifically, New York is facing a projected \$10 billion budget short fall while New Jersey is similarly situated with an estimated \$10.5 billion deficit.<sup>68</sup> The impact of the budgetary constraints faced by states on agency operations cannot be understated. NJDEP, for example, has experienced a funding decrease of almost \$90 million, going from a total budget of roughly \$442 million in 2008<sup>69</sup> to approximately \$353 million in 2012.<sup>70</sup> Quite obviously, this has led to a sharp decrease in agency operations and staff.<sup>71</sup> Due to the budgetary pressures imposed by a stagnant economy, efficiency in agency operations, especially in processing permits, is vital to allowing state environmental agencies to effectively pursue their core missions.

## B. INEFFICIENCY: JUDICIAL INEFFICIENCY

Permit decisions, like other state agency actions, are subject to review by that state's courts.<sup>72</sup> The complications that arise in the permitting process can lead to an appeal to the state's administrative law procedures for review,<sup>73</sup> which places

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<sup>66</sup> *Id.*

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

<sup>68</sup> *Id.* These shortfalls represent 17.6% and 36%, respectively, of the total projected budget.

<sup>69</sup> *Environmental Protection*, N.J. DEP'T OF TREASURY, OFFICE OF MGMT. & BUDGET, D-125, <http://www.state.nj.us/treasury/omb/publications/o8budget/pdf/42.pdf> (last visited May 2, 2013).

<sup>70</sup> *Environmental Protection*, N.J. DEP'T OF TREASURY, OFFICE OF MGMT. & BUDGET, D-106, <http://www.state.nj.us/treasury/omb/publications/12budget/pdf/42.pdf> (last visited May 2, 2013).

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

<sup>72</sup> *See, e.g.*, N.J. ADMIN. CODE § 7:7A-1.7 (2011); *id.* at § 7:13-18.1 (2011).

<sup>73</sup> *See In re Freshwater Wetlands Statewide Gen. Permits*, 888 A.2d 441, 446-47 (N.J. 2006). Often, applicants will be obligated to apply for review by an

an unnecessary burden on the state's judiciary. An example, again from New Jersey, highlights the problems non-uniform procedures can have with respect to multiple permits and how issues arising from said permits can land the matter in court. In *Griffith v. State, Dep't of Environmental Protection*, the plaintiff wished to develop property he owned in an environmentally sensitive area of southern New Jersey.<sup>74</sup> In order to complete this project he envisioned, state law required both a permit to build a road over certain freshwater wetlands on the property and a permit under New Jersey law regulating development near the coasts.<sup>75</sup> The plaintiff first applied for the wetlands permit and, unhappy with NJDEP's disposition on the matter, fought to get a less restrictive allowance.<sup>76</sup> Five years later, he finally applied for the coastal area permit to construct residential housing.<sup>77</sup> The provisions of that permit also became contested.<sup>78</sup> This displays just one of a plethora of dilemmas that can arise with projects that require multiple permits. The requirement of two permits resulted in several court decisions involving unresolved contested matters over nearly fifteen years.<sup>79</sup>

This is the type of case that could be easily avoided with measures establishing uniform procedures in environmental permitting. If, hypothetically, the plaintiff in *Griffith* had applied for the permits at the same time under a uniform procedures regime, any unfavorable decisions would come within a predetermined, known window of time, thereby

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administrative law judge or equivalent review official before appealing to the state's trial courts. *Id.* at 444.

<sup>74</sup> *Griffith v. State, Dep't of Env'tl. Prot.*, 775 A.2d 54, 56 (N.J. Super. Ct. App. Div. 2001). The plaintiff-applicant sued NJDEP on a takings issue unrelated to the issues of different procedures relating to the permits, but the factual circumstances are helpful in understanding how issues with permits arise. *Id.*

<sup>75</sup> *Griffith v. State, Dep't of Env'tl. Prot.*, 775 A.2d 54, 57 (N.J. Super. Ct. App. Div. 2001).

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

<sup>77</sup> *Id.* at 58.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 56–60.



allowing the plaintiff to adequately prepare ahead of time and respond effectively to any such decision. State courts reviewing environmental permitting actions should not suffer the administrative and procedural burden of rehearing individual cases each time a permit is denied for the same project.

### C. UNCERTAINTY: IMPACT ON ECONOMIC DEVELOPMENT

The problems created by inefficiency in the permitting system are compounded by a second issue: uncertainty. Those subject to environmental regulation expend considerable resources in conceptualizing, planning and implementing projects.<sup>80</sup> Whether it is a large-scale developer who handles dozens of projects or an individual homeowner who needs a single permit to remedy a problem on their property, just getting to the permit application stage can represent a relatively major expenditure due to the complex nature and quantity of the information required on environmental permits.<sup>81</sup> By way of example, the NJDEP provides six separate checklists to help applicants work through flood hazard area permit applications.<sup>82</sup> The first checklist alone outlines roughly a dozen documents and certifications that must be submitted as part of the application.<sup>83</sup> This becomes extremely problematic for economic development for two main reasons: (1) it results in a delay in good projects, and (2) it frustrates the regulated

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<sup>80</sup> See *Industry Information: Environmental*, *supra* note 45; *NJBIA Vision for a Better Business Climate*, *supra* note 46; *Local Government Resources*, *supra* note 57.

<sup>81</sup> See *Forms, Checklists and Other Documents*, DIV. OF LAND USE REGULATION, <http://www.nj.gov/dep/landuse/forms.html> (last updated April 18, 2013).

<sup>82</sup> *Id.*

<sup>83</sup> *Flood Hazard Area General Permit # 1 Checklist*, N.J. DEP'T OF ENVTL. PROT. (Jan. 2010), [http://www.nj.gov/dep/landuse/download/fh\\_003.pdf](http://www.nj.gov/dep/landuse/download/fh_003.pdf). The checklist includes the requirement of (1) a completed copy of the checklist; (2) a completed soil conservation certification signed by the appropriate local official; (3) three copies of an application report which includes seven individual documents; (4) three sets of drawings of the affected property, signed and sealed by an engineer or land surveyor; and (5) an endangered or threatened species report. *Id.*

community and chills the desire to begin new projects that supply jobs and other economic benefits.

Possibly the best example of meritorious projects that are hampered by procedural uncertainty is development of clean energy sources such as wind turbine farms and solar panel arrays. Clean energy sources, while environmentally beneficial in terms of energy production, nonetheless require development with environmental impacts that subjects them to the regulatory and permitting process.<sup>84</sup> One may think that the benefits that come with clean energy projects would be enough to mitigate some of the burdens imposed by regulatory agencies, but, unfortunately, this has not been the case.<sup>85</sup> Wind farms, solar panel arrays, and other renewable energy projects have been subject to the same standards as any other project, creating the same problems and causing the same administrative delays.<sup>86</sup> Large-scale renewable energy projects are especially problematic as they are subject to the regulations of several agencies and the inconsistencies flowing from the divergent interests of those agencies.<sup>87</sup> These projects also often fall under the provisions of federal environmental laws that do not include special concessions for environmentally-friendly projects.<sup>88</sup>

A more specific example of clean energy projects is the application of land use restrictions to solar farm projects. Many land use regulations restrict the amount of impervious cover, a surface that cannot absorb rainwater, in a given area.<sup>89</sup>

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<sup>84</sup> See Neal McAleily, *Lessons for the "Green" Economy from Conventional Industries*, ENVTL. LEADER (Aug. 2, 2011), <http://www.environmental-leader.com/2011/08/02/federal-environmental-permitting-of-renewable-energy-projects>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The substance of regulatory and statutory schemes involves issues beyond the scope of this Note.

<sup>89</sup> *Impervious Cover*, NEMO DEL., UNIV. OF DEL., 1, <http://nemo.udel.edu/manual/Chap2Web.pdf> (last visited May 2, 2013). The amount of impervious cover in an area is linked to water quality and flooding; essentially, the less rainwater that can naturally enter the watershed, the greater the presence of contaminants and the less space available for rainwater to flow into the watershed. *Id.*

Originally, New Jersey's various land use laws that included restrictions on impervious cover would have applied strictly to solar panels, greatly limiting availability of land on which to construct panel arrays.<sup>90</sup> Despite the benefits of solar power as a renewable energy source, the infrastructure needed to achieve those benefits fell directly within a category of environmentally detrimental construction.<sup>91</sup> Clean energy developers who wished to install solar panel farms were stifled by regulations never intended to have an impact on the type of development they were preventing. Unsure of project feasibility due to the restrictions, developers of solar technology were unlikely to invest in projects in the state. New Jersey eventually passed legislation exempting solar panels from zoning restrictions on impervious cover as part of a larger, state-wide effort to promote renewable energy.<sup>92</sup> Save the legislative fix, regulatory difficulties would have continued to seriously burden the development of solar energy in New Jersey.<sup>93</sup> The plight of clean energy projects within the environmental regulatory process highlights how regulatory delays including non-uniform procedures can stall and even prevent environmentally and economically advantageous development.

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<sup>90</sup> Michael A. Smith, *New Legislation Promotes Solar Panel Development*, N.J. ZONING & LAND USE LAW (May 6, 2010), <http://www.njlandlaw.com/archives/815#more-815>. The specific laws included the Municipal Land Use Law, the Wetlands Act of 1970, the Coastal Area Facility Review Act, the Highlands Water Protection and Planning Act, the County Planning Act and the Planned Real Estate Development Full Disclosure Act. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* The legislation, S-291, was signed by New Jersey Governor Christie on April 22, 2010, which not-so-coincidentally is also Earth Day. *Id.* Additionally, New Jersey now has the fastest-growing capacity for solar energy development and is second only to California in current capacity. Shelly DuBois, *The Most Powerful States for Solar*, CNN MONEY (Jan. 13, 2011, 7:47 AM), [http://money.cnn.com/2011/01/12/technology/powerful\\_states\\_solar.fortune/index.htm](http://money.cnn.com/2011/01/12/technology/powerful_states_solar.fortune/index.htm).

#### D. UNCERTAINTY: IMPACT ON THE REGULATED COMMUNITY

In addition to acting as an impediment to good projects, regulatory setbacks cause a great deal of frustration amongst the regulated community and further dissuade development and economic growth. Those with the capital available to fund projects likely to bring jobs and other economic-growth generators are unlikely to continue to spend money in a state in which their projects are consistently delayed and perennially accompanied by major headaches as a result of difficult regulatory schemes. Perhaps the best representation of developer frustration with regulatory challenges in New Jersey was embodied in a 125-foot billboard in the southern New Jersey town of Pennsville as motorists passed from Delaware into New Jersey.<sup>94</sup> The sign, quite bluntly, read: "Welcome to New Jersey. A Horrible Place to Do Business" and "D.E.P. Nightmare State."<sup>95</sup> While his methods are no doubt extreme, the attitude expressed by the developer who erected the sign provides insight into the experiences of those in New Jersey who have met resistance from NJDEP or run afoul of state environmental regulations.<sup>96</sup>

Further evidence of the frustration of developers, builders and residents of New Jersey in general with NJDEP regulations lies in the election of current New Jersey Governor Chris Christie. Christie campaigned heavily on a platform of regulatory reform, promising to change what he characterized as a superfluous and burdensome system.<sup>97</sup> Shortly after taking office, Christie issued Executive Order No. 1, freezing all pending administrative rules for ninety days in order to be reviewed by a newly formed "Red

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<sup>94</sup> Jason George, *From an Irate Developer, a Sarcastic Welcome to New Jersey*, N.Y. TIMES, June 3, 2005, <http://www.nytimes.com/2005/06/03/nyregion/03billboard.html?ref=jasongeorge>.

<sup>95</sup> *Id.*

<sup>96</sup> The developer in this case was upset about NJDEP's insistence that he acquire a wetlands permit on a parcel he wished to develop into a home improvement store. *Id.* The developer felt he should be exempt from the requirement by virtue of an earlier permit for a project that was later abandoned. *Id.*

<sup>97</sup> See *Executive Order No. 1*, <http://www.nj.gov/infobank/circular/eocc1.pdf> (last visited May 2, 2013).

Tape Review Commission.”<sup>98</sup> Executive Order No. 1 proclaims that all New Jersey residents have a right to the “promulgation of administrative rules and regulations that are reasonable, comprehensible, consistent, predictable and responsive.”<sup>99</sup> This language is, at the very least, a tacit censure of past administrations and their approach to the management, or perhaps the lack thereof, of the administrative arm of state government, which many New Jersey residents, and certainly the Christie Administration, believe had a crippling effect on economic development in the state.<sup>100</sup>

#### IV. THREE APPROACHES TO PERMIT PROCESSES

In examining potential solutions to procedural complications created by environmental regulations, it is prudent to examine the approaches adopted by the states recognized as the leaders in creating and implementing administrative rules aimed at protecting the environment. Little would be accomplished by spending time picking apart problems created by state regulations that represent less stringent restrictions as, quite obviously, procedural difficulties arise as a result of complicated, protective

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

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

<sup>100</sup> See *DEP Transformation Plan*, N.J. DEP’T OF ENVTL. PROT. (Oct. 2010), <http://www.state.nj.us/dep/commissioner/2010transformationplan.pdf>. Christie’s appointee to head the NJDEP, as one of his first directives, ordered the formulation of a “transformation plan,” i.e., a detailed outline of how the agency and its functions would be critically examined and restructured to better promote “the protection of New Jersey’s air, waters, lands, natural and historic resources to ensure continued public benefit, while recognizing the inextricable link between our state’s environmental health and economic well being.” *Id.* The Transformation Plan provides a clear expression of the new administration’s approach to regulation, specifically those within the purview of NJDEP. The direct correlations drawn between environmental regulation and economic development evidence the effect of Christie’s approach to regulation on the election; 32% of New Jersey voters polled following the 2009 election indicated that the economy was top issue guiding their vote. Jennifer De Pinto, *Why Christie Won in New Jersey*, CBS NEWS (Nov. 4, 2009, 12:38 AM), [http://www.cbsnews.com/8301-503544\\_162-5517792-503544.html?tag=contentMain%3bcontentBody](http://www.cbsnews.com/8301-503544_162-5517792-503544.html?tag=contentMain%3bcontentBody). This serves as a prime example of the larger impacts and import of environmental regulations outside of the archetypical environmentalist-developer dichotomy.

regulations, not those that represent the bare minimum. As a result, viewing the issues involved in non-uniform procedures in environmental regulations through the lens of the approaches taken by those states with the most widely-acknowledged stringent environmental regulations is instructive.

In the several decades since the passage of the National Environmental Policy Act on the federal level in 1970<sup>101</sup> and the subsequent adoption of similar legislation and creation of environmental agencies by the states,<sup>102</sup> two states have emerged as the preeminent forces in setting environmental policy in the United States: California and New Jersey.<sup>103</sup> Despite representing the best the nation has to offer in terms of setting progressive and aggressive environmental policy, neither state has adopted legislation in the vein of the UPA in an attempt to alleviate procedural obstacles.<sup>104</sup>

#### A. THE PROGRAMMATIC DISJOINT APPROACH: NEW JERSEY

New Jersey's approach to uniformity in administrative procedures in handling environmental permits, as mentioned above, is better characterized as no approach whatsoever. However, for the purposes of this Note, it will be referred to as the "programmatic disjoint" approach. A review of the various New Jersey statutes and rules prescribing permit procedures reveals an apparent lack of any sort of continuity between them.<sup>105</sup> A

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<sup>101</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2006).

<sup>102</sup> See Joseph P. Koncelik, *Organization of Environmental Agencies*, THE ENVTL. COUNCIL OF THE STATES, [http://www.ecos.org/section/states/natural\\_resources\\_org](http://www.ecos.org/section/states/natural_resources_org) (last visited May 2, 2013).

<sup>103</sup> Barton H. Thompson, Jr., Note, *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 892 (1996).

<sup>104</sup> See Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B-5 (West 2011); Flood Hazard Area Control Act, N.J. STAT. ANN. § 58:1A (West 2011); Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19 (West 2011); CAL. CODE REGS. tit. 27, § 10305 (2011).

<sup>105</sup> See Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:9B; § 58:1A; § 13:19; Freshwater Wetlands Protection Act Rules, N.J. ADMIN. CODE § 7:7A (2011); Flood Hazard Area Control Act Rules, N.J. ADMIN. CODE § 7:13 (2011); Coastal Permit Program Rules, N.J. ADMIN. CODE § 7:7 (2011).

reproach of the New Jersey legislature for failing to examine pre-existing permit requirements and creating the hodgepodge that exists today would not be entirely unjustified. The state laws and regulations governing permits for projects in freshwater wetlands, flood hazard areas and coastal areas are particularly illustrative. The table below outlines the varied requirements of the different programs:

New Jersey Land Use Regulations – Basic Time Frame Provisions

<u>Program</u>	<u>Completeness Notification</u>	<u>Secondary Notification</u>	<u>Public Hearing Date</u>
Freshwater Wetlands <sup>106</sup>	30 days following receipt of application <sup>107</sup>	None	Hold hearing within 60 days after comments from EPA <sup>108</sup>
Coastal Area Facility Review Act (CAFRA) <sup>109</sup>	20 days following receipt of application <sup>110</sup>	15 days following receipt of additional information <sup>111</sup>	Set hearing date within 15 days of declaring the application complete <sup>112</sup>
Flood Hazard Area <sup>113</sup>	20 days following receipt of application <sup>114</sup>	None; application deemed complete if no action taken within 20 days after receipt of additional information <sup>115</sup>	None

<sup>106</sup> Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:9B.

<sup>107</sup> *Id.* This requirement does not apply to requests for information based on comments from the EPA. *Id.*

<sup>108</sup> *Id.* A public meeting is only required if there exists a “sufficient degree of public interest in the application as manifested by written requests for a hearing within 20 days after publication of the permit application . . .” *Id.*

<sup>109</sup> Coastal Area Facility Review Act, *supra* n. 644.

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

<sup>111</sup> *Id.*

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

<sup>113</sup> N.J. ADMIN. CODE §§ 7:13-1 – 7:13-19 (2012).

<sup>114</sup> N.J. ADMIN. CODE § 7:13-9.3 (2012).

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



<u>Program</u>	<u>Public Comment Period</u>	<u>Additional Info After Hearing/ Comment Period</u>	<u>Notice of Approval/ Denial</u>
Freshwater Wetlands <sup>116</sup>	None	None	90 days following receipt of comments from EPA or 180 days following submittal of complete application <sup>117</sup>
Coastal Area Facility Review Act (CAFRA) <sup>118</sup>	30 day period (if no hearing held) <sup>119</sup>	15 days following hearing/close of comment period <sup>120</sup>	60 days following hearing/comment period or 90 days after receipt of additional information requested after hearing/comments <sup>121</sup>
Flood Hazard Area <sup>122</sup>	30 days for entities who received notice as specified in rule <sup>123</sup>	None	90 days following receipt of complete application with one-time 30 day extension by mutual consent <sup>124</sup>

<sup>116</sup> Coastal Area Facility Review Act, *supra*, n. 644.

<sup>117</sup> *Id.*

<sup>118</sup> Coastal Area Facility Review Act, *supra* n. 644.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19.

<sup>122</sup> N.J. ADMIN. CODE §§ 7:13-1 – 7:13-19 (2012).

<sup>123</sup> N.J. ADMIN. CODE § 7:13-18.1 (2012).

<sup>124</sup> N.J. ADMIN. CODE § 7:13-9.3 (2012).

It is clear from the breakdown above that New Jersey has been remiss in establishing any uniformity in these types of laws and regulations. One can imagine a hypothetical scenario similar to the one proposed at the outset of this Note in which a developer or individual land owner must apply for a CAFRA permit, a Freshwater Wetlands, and a Flood Hazard Area Zone permit concurrently for an individual project. By way of illustration, suppose a landowner decides to develop a parcel of land along the banks of an inland, freshwater stream prone to flooding in Ocean County, New Jersey, large portions of which are within the zone governed by CAFRA rules.<sup>125</sup> It is entirely conceivable, then, that our fictitious landowner would fall under the rules of all three regulatory schemes.

If, for example, the landowner submits all three applications on January 1, the earliest he would know about the completeness of any application is January 20. If we assume that the CAFRA and Flood Hazard Area Zone applications are complete, the landowner would ostensibly be in a favorable position. Suppose further, that on January 30, the NJDEP informs the landowner that his Freshwater Wetlands permit application is deficient. The CAFRA and Flood Hazard Area Zone applications continue through the process, while the Freshwater Wetlands permit goes back to the drawing board. The expense of this process, even at this stage, should not be understated. When the application comes back to the landowner, he yet again needs to involve engineers and other professionals to rectify the deficiencies or mistakes in the application, all at the landowner's expense. Our landowner then submits his corrected Freshwater Wetlands permit application on February 1 and is informed on February 30 that the application was complete and accepted by the NJDEP.<sup>126</sup>

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<sup>125</sup> *Single Family Homes and Duplexes: A Guide to CAFRA*, N.J. DEP'T OF ENVTL. PROT., 1 (May 2002), [http://www.nj.gov/dep/landuse/download/cp\\_007.pdf](http://www.nj.gov/dep/landuse/download/cp_007.pdf). The CAFRA area fluctuates in width and extends twenty-four miles inland at its widest. *Id.* The inland limit of the CAFRA area is drawn along an irregular line made up primarily of public roads. *Id.*; see also *Geographic Information Systems*, N.J. DEP'T OF ENVTL. PROT., <http://www.nj.gov/dep/gis/digidownload/images/statewide/cafra2.gif> (last visited May 2, 2013).

<sup>126</sup> These dates are provided purely for argument's sake. It is virtually impossible, as a pure logistical matter, that an applicant would be able to correct and resubmit an application in one day. It is not unfathomable, however, that the agency would wait until the last possible day to inform an applicant of the

Ready to take the next steps in furthering the project after submitting the new Freshwater Wetlands application, the landowner learns on February 5 that a public hearing will be held on the CAFRA permit on March 30, further delaying an approval. On March 30, while trying to prepare for the public hearing to take place that evening, the landowner is informed that the Flood Hazard Area Zone permit has been denied. After three months of awaiting a response and considerable expenditures of time and money both before and after the initial application submissions, the landowner is left with absolutely no indication that he will ever be legally permitted to develop his property. Property rights and due process issues notwithstanding, basic dictates of fairness and efficient government council against allowing a situation as envisioned here to take place.

In an attempt to alleviate some of these concerns, the NJDEP has proposed a so-called “waiver rule” as part of the transformation agenda initiated by the Christie Administration.<sup>127</sup> The draft rule, slotted to be published in March 2012,<sup>128</sup> would allow individual projects to be excluded from the requirements of the state’s environmental regulations under certain circumstances.<sup>129</sup> NJDEP claims the rule will be used to solve

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agency’s disposition as to an application. This is less an indictment of administrative agencies and their staff and more a recognition of the practical constraints agencies must deal with in the face of complicated regulation and shrinking budgets.

<sup>127</sup> *Transformation*, N.J. DEP’T OF ENVTL. PROT., <http://www.nj.gov/dep/transformation/waiverrule/index.html> (last updated Dec. 22, 2011).

<sup>128</sup> Kirk Moore, *DEP Waiver Rule Will Be Ready in March*, ASBURY PARK PRESS (Feb. 8, 2012, 6:06 PM), <http://www.app.com/article/20120208/NJNEWS/302080097/DEP-waiver-rule-will-ready-March>.

<sup>129</sup> *Waiver of Department Rules*, N.J. DEP’T OF ENVTL. PROT. (Nov. 30, 2010), [http://www.nj.gov/dep/workgroups/docs/waiver\\_drafrules20101130.pdf](http://www.nj.gov/dep/workgroups/docs/waiver_drafrules20101130.pdf). The criteria the draft rule would require the NJDEP to consider in issuing a waiver include: (1) whether there are circumstances that support the need for a waiver; (2) whether the person, to whom the waiver would benefit most directly, may have caused or contributed to the circumstances that resulted in the rule being unduly burdensome; (3) whether there is a net environmental benefit; (4) whether the activity authorized by the waiver would be consistent with the purposes and objectives of all applicable statutory requirements; (5) whether the waiver is prohibited by the New Jersey Administrative Code; and (6) whether the waiver would be consistent with the NJDEP’s core mission to

complicated situations, such as conflicting rules, without lessening standards, while, predictably, environmentalists fear it will be used to circumvent important regulations.<sup>130</sup> The waiver rule is misguided as it takes an overly broad approach to a problem that has many intricacies and facets of which disjointed procedures is just one piece. It is the administrative equivalent of using a chainsaw to perform brain surgery. Rather than narrowly tailored solutions to individual programmatic problems, the rule allows a blanket escape route with a substantial potential for abuse. In response to the proposed rule, state legislators have introduced legislation claiming that the rule is inconsistent with legislative intent and beyond the statutory authority conferred to NJDEP.<sup>131</sup> Due to its overly broad approach, the waiver rule should be abandoned in favor of a UPA and individual solutions to department permitting problems.

## B. THE CONSOLIDATED PERMIT APPROACH: CALIFORNIA

While this Note advocates for the legislative solution of a Uniform Procedures Act, it is important to also examine alternative approaches to the issue. As mentioned above, California, alongside New Jersey, is at the forefront of progressive and aggressive environmental regulation<sup>132</sup>; thus, it is meaningful to examine each state's approach as an option. California has chosen a largely administrative approach, adopting a combination of legislation and administrative rules to create what it dubs "consolidated permits" and a process in which one agency is designated as the "lead agency" and is thereafter responsible for the approval or disapproval of the entire project.<sup>133</sup> The process

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maintain, protect and enhance New Jersey's natural resources and to protect public health and safety and the environment. *Id.* at 3.

<sup>130</sup> Moore, *supra* note 125.

<sup>131</sup> Assemb. Con. Res. 37, 215th Sess. (N.J. 2012); S. Con. Res. 59, 215th Sess. (N.J. 2012). Despite this resistance, the waiver rule was adopted and went into effect on August 1, 2012. See N.J. ADMIN. CODE §§ 7:1b-1.1 – 7:1b-2.4 (2013).

<sup>132</sup> Thompson, *supra* note 103.

<sup>133</sup> CAL. GOV'T CODE § 65929 (West 2013); CAL. PUB. RES. CODE §§ 71000 - 71031 (West 2013); CAL. CODE REGS. tit. 27 §§ 10100 - 10419. In addition to the lead agency, California has also established an Office of Permit Assistance to "assist, and provide information to, developers relating to the permit approval process."

eliminates the inefficiency and tediousness involved in filing multiple applications, but does little to alleviate the procedural issues that are at the bottom of the real problem examined here. Enabling legislation in California also includes time limits imposed on the lead agency relating to approvals for permits ranging from 180 days to 60 days based on certain prerequisites involving certification of required environmental impact reports by the appropriate regulatory agency or a determination that the project is exempt from the state's environmental regulations.<sup>134</sup> These rules appear similar to a uniform procedures approach, but the focus of this section is on the consolidated permits.<sup>135</sup>

Other permits do not fare quite as well. The California Code of Regulations includes a description of the median, minimum, and maximum times for application review for various environmental permits.<sup>136</sup> Most permits appear to have relatively reasonable median permit approval times, ranging from 106 days at the longest to eight at the quickest.<sup>137</sup> The minimum timeframes are all under sixty days.<sup>138</sup> The maximum timeframes, on the other hand, range from thirty days to 1200 days, or roughly three years and three months, for permits from the Department of

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CAL. GOV'T CODE § 65923.8 (West 2012). New Jersey has a similar division within NJDEP known as the Permit Coordination Unit within the Office of Permit Coordination and Environmental Review. The unit is charged with "insur[ing] that complex multi-media, high value projects receive proactive and facilitated communication and coordination in support of timely, predictable, and positive permit decisions." *Office of Permit Coordination and Environmental Review*, NJ DEP'T OF ENVTL. PROT., <http://www.nj.gov/dep/pcer/> (last visited May 2, 2013). While these types of offices within agencies are no doubt helpful, especially to very large-scale developers, they do little, if anything, to alleviate the potential procedural calamities resulting from non-uniform procedures.

<sup>134</sup> CAL. GOV'T CODE § 65950 (West 2013). The timeframes are also subject to certain restrictions and extensions as it relates to projects by public entities. See CAL. GOV'T CODE § 65950.1 (West 2011); CAL. PUB. RES. CODE § 21100.2 (West 2011); CAL. PUB. RES. CODE § 21151.5 (West 2011); CAL. PUB. RES. CODE § 21065 (West 2011).

<sup>135</sup> See CAL. GOV'T CODE § 65950 (West 2013).

<sup>136</sup> CAL. CODE REGS. tit. 27 § 10305 (2012).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

Toxic Substances Control.<sup>139</sup> A few agency processing times are labeled “TBD.”<sup>140</sup>

It would be disingenuous to discount the consolidated permit approach altogether in favor of uniform procedures as advocated by this Note. Consolidated permits provide an obvious benefit to applicants: they have one dossier of information to compile including all the necessary forms, reports, certifications, etc. as opposed to separate applications. This clearly alleviates the concerns of unfairness and undue burdens placed on applicants and would seemingly substantially reduce the associated costs. Consolidated permits do not, however, have the same effect on the problems created by non-uniform procedures that affect agencies. Agencies are still required to deal with a vast array of environmental issues and disjointed statutes and regulations.

In fact, while consolidated permits and uniform procedures seek to meet the same goal of procedural efficiency by injecting some semblance of common sense into the system, a consolidated permit scheme like California’s may only serve to create further systematic problems and procedural disorder within state government. The consolidated permit approach involves the application of statutory and regulatory mandates, restrictions and definitions across programs that are comprised of staff with divergent specialties and responsibilities. This likely only serves to create more bureaucratic issues as individuals who may not even work in the same city seek to coordinate efforts and work through various statutory and regulatory requirements on a project.<sup>141</sup>

Returning to the clean energy example, if New Jersey adopted a consolidated permit program and an applicant submitted an application for a solar panel array, whichever agency was designated to lead, likely either NJDEP or the New Jersey Board of Public Utilities (NJBPU or the “Board”), which is responsible

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> This Note certainly does not intend to ignore the significance of technological advancement in the past few decades and its applicability to agency operations, including the ease in which agency staff can communicate and share information over long distances. That being said, the importance of a staff working on a single issue being within close proximity of one another is significant in facilitating effective coordination and problem solving.

for regulating energy issues and policy,<sup>142</sup> would rely heavily on the other for information and regulatory approvals. In terms of interagency coordination, managing the schedules of the necessary staff between agencies, while certainly not impossible, unreasonably adds another layer of practical impediments.

Apart from logistical considerations, interagency coordination problems could arise due to substantive differences in agency expertise. There is a benefit in allowing separate agencies and even subdivisions within agencies to handle issues that require different expertise rather than forcing the process and the actors subject to it to deal with divergent issues in one document. Moreover, internal structural differences could exacerbate interagency problems. Taking the example above yet another step further, NJDEP is organized with a Commissioner as the agency head who is appointed by the Governor with the advice and consent of the Senate and serves at the pleasure of the Governor during his term of office.<sup>143</sup> The NJBPU, on the other hand, is headed by five commissioners appointed by the Governor and confirmed by the Senate, for six year, staggered terms.<sup>144</sup> The Governor appoints one of the five to serve as Commission President.<sup>145</sup>

This divergence in agency structure creates the possibility of at least two types of problems: political issues and policy disagreement. The first results from the fact that NJBPU commissioners are appointed to six-year terms<sup>146</sup> while the Commissioner of NJDEP serves at the will of the Governor.<sup>147</sup> Since the governor of New Jersey serves a four year term,<sup>148</sup> the NJBPU commissioners' terms will necessarily overlap those of the

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<sup>142</sup> *About BPU*, N.J. BD. OF PUB. UTILS., <http://www.nj.gov/bpu/about/index.html> (last visited May 3, 2013).

<sup>143</sup> N.J. STAT. ANN. § 13:1D-2 (West 2012); N.J. STAT. ANN. § 13:1B-2 (West 2012).

<sup>144</sup> N.J. STAT. ANN. § 48:2-1 (West 2012).

<sup>145</sup> N.J. STAT. ANN. § 48:2-1.1 (West 2012).

<sup>146</sup> § 48:2-1.

<sup>147</sup> § 13:1D-2; § 13:1B-2.

<sup>148</sup> N.J. Const. art. V, § 1, ¶ 5.



governors. Due to the election cycle and New Jersey's consecutive two-term limit on holding the state's executive office,<sup>149</sup> the probability of a politically mixed Board is, by design, high. This allows for a situation in which members of the Board, even a majority, may be from the opposite political party of the Governor, and, by that virtue, the Commissioner of NJDEP, and creates a strong likelihood of difficult cooperation.

Governors in a state like New Jersey, in which the executive appoints the members of his cabinet, as opposed to a state in which state agency heads work independently from the governor, typically appoint members of their own political parties to agency head positions. The reasons for this are obvious, but for thoroughness' sake, it is done to help ensure state agencies implement and enforce policies consistent with the Governor's overall policy goals. This is also the case on the federal level.<sup>150</sup>

Secondly, even between individuals of the same political party, policy disagreements can arise and cause interagency and intra-administration conflicts. A rumored flare up between the President of NJBPU and the Commission of NJDEP in 2011 over the validity of concerns about humankind's effects on climate change serves as a prime example of this possibility.<sup>151</sup> Interagency cooperation, however desirable, is difficult to achieve, and, as a result, consolidated permits across programs create new problems rather than merely alleviating administrative delays.

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

<sup>150</sup> *Three Cabinet Appointees from Opposing Party is Unmatched*, POLITIFACT.COM, <http://www.politifact.com/truth-o-meter/statements/2009/feb/10/barack-obama/Three-Republicans-Cabinet-Most/> (last visited May 3, 2013). A brief survey of President Obama's – as well as past presidents' – and Governor Christie's current cabinet provides strong support. See, e.g., Tom Hester, Sr., *Christie Names Bret Schundler to Head Education, Bob Martin to Oversee New Jersey's Environmental Protection*, N.J. NEWSROOM (Jan. 13, 2010, 2:56 PM), <http://www.newjerseynewsroom.com/state/christie-names-bret-schundler-to-head-education-bob-martin-to-oversee-new-jerseys-environmental-protection> (announcing Governor Christie's appointment of Republicans to head the Departments of Education and Environmental Protection).

<sup>151</sup> The Auditor, *Global Warming Splits the Christie Administration*, THE STAR-LEDGER (May 29, 2011, 6:09 AM), [http://blog.nj.com/njv\\_auditor/2011/05/global\\_warming\\_splits\\_the\\_chri.html](http://blog.nj.com/njv_auditor/2011/05/global_warming_splits_the_chri.html).



### C. THE UNIFORM PROCEDURES APPROACH

For the reasons listed above, the uniform procedures approach to problems that arise during the environmental permit application process is preferable to the consolidated permit method and, obviously, superior to the programmatic disjoint approach in New Jersey, which actually creates the problem uniform procedures seek to eliminate. The uniform procedures approach, however, is not without its shortcomings. The current New York version of the uniform procedures approach suffers from three potential procedural pitfalls: (1) public hearing requirements,<sup>152</sup> (2) completeness determinations,<sup>153</sup> and (3) required rulemaking.<sup>154</sup>

The public comment and hearing requirements, a virtually universal feature of so-called “notice and comment” rulemaking,<sup>155</sup> are important procedural methods to elicit reactions from those most affected by an administrative action. The idea being that only those who actually feel somehow implicated in the action will take the time to participate in a hearing. The benefits of public hearings, notwithstanding whether or not they are necessary, are ambiguous and the decision to hold a meeting is largely left up to agency staff.<sup>156</sup> This brings the uncertainty problem back to the surface. The benefit of the uniform procedures structure is that there is a universal, statutorily defined endpoint, even if a public hearing is necessary. Even though a hearing may add time to the decision making process, it is not an infinite amount of time and would only add a maximum of sixty days after the agency receives the final record of the meeting.<sup>157</sup> However, the language “after receipt by the department of a complete record”<sup>158</sup> creates a potential loophole that should be closed.

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<sup>152</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109 (McKinney 2011).

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

<sup>154</sup> N.Y. ENVTL. CONSERV. LAW § 70-0107 (McKinney 2011).

<sup>155</sup> ASIMOW & LEVIN, *supra* note 2, at 224.

<sup>156</sup> N.Y. ENVTL. CONSERV. LAW § 70-0109 (McKinney 2011).

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

<sup>158</sup> *Id.*

The possibility exists for irresponsible agency staff to delay the completion of the record in order to delay an application decision. This does little to correct the problems outlined throughout this Note. Future uniform procedures acts should make two changes not included in the New York version: a statutory provision on the criteria for a public hearing requirement and a strict time limit on agency completion of public hearing records.

Additionally, the New York UPA includes lengthier completeness determinations for certain projects.<sup>159</sup> Rather than being based on individual programs as the UPA proceeds, timelines should correspond to a specific project type designation, as in the major and minor project distinction in the UPA,<sup>160</sup> even if it involves creating a third category of project. The endgame is uniformity and certainty, not necessarily a more timely completeness determination. If applicants can plan on a definite timeline, they can ensure their responsibilities are fulfilled and they are prepared for an approval or denial on a specific date. A project designation that follows through all the steps in the process will add certainty and efficiency.

Lastly, the UPA includes provisions requiring further rulemaking.<sup>161</sup> This, it seems, is unavoidable. Defining what qualifies as a major or minor project is a complicated process that results in extensive and complex regulations.<sup>162</sup> There are seventeen categories of permits covered under the UPA,<sup>163</sup> each with numerous types of permits under the general section.<sup>164</sup> An attempt by the legislature to make the major-minor distinction by statute would be both onerous and ineffective. The legislature, as a whole, does not have the expertise, much less the time, to handle these types of technical issues which is, in

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<sup>159</sup> *Id.*

<sup>160</sup> N.Y. ENVTL. CONSERV. LAW 70-0111 (McKinney 2011).

<sup>161</sup> N.Y. ENVTL. CONSERV. LAW § 70-0107 (McKinney 2012).

<sup>162</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 621.4 (2012) (designating specific projects defined as minor projects for the purposes of the UPA).

<sup>163</sup> *Id.* (listing the types of permits covered by the UPA and the statutory authority for the individual subsections of the regulation).

<sup>164</sup> N.Y. ENVTL. CONSERV. LAW § 70-0107 (McKinney 2011).

itself, one of the reasons for the existence of the administrative state. Other states seeking to adopt a UPA model, however, have a leg up in the administrative rulemaking process, as they can use the UPA as a template and amend specific provisions to address issues affecting the specific state. The rulemaking process, while time-consuming and often costly, will include experts on the state's specific issues, as well as other stakeholders,<sup>165</sup> which will provide a meaningful way for state agencies to tailor the application of the uniform procedures to the specific region.

Another potential problem exists as well, specifically in the case of New Jersey. New Jersey is one of two states to whom the federal government has delegated regulatory authority over wetlands.<sup>166</sup> Changes in New Jersey's wetlands program must be done in conjunction with EPA and must meet the standards set forth in the Clean Water Act.<sup>167</sup> A possible solution, albeit undesirable, would be to exempt the wetlands program by statute or rule in order to leave it unaltered. However, given that the enactment of uniform procedures would be done with the goals of administrative efficiency and stringent substantive environmental protections, there is a good case to be made to the EPA that the changes should be agreed to. The potential EPA issues, along with the other possible limitations to the UPA method, can either be overcome or mitigated during the implementation process.

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<sup>165</sup> See, e.g., N.J. STAT. ANN. § 52:14B-4 (West 2012) (establishing guidelines for notice and public comment in administrative rulemaking).

<sup>166</sup> Press Release, N.J. Dep't of Env'tl. Prot., Wetlands Regulations Adopted (Aug. 10, 2001), available at [http://www.nj.gov/dep/newsrel/releases/01\\_0092.htm](http://www.nj.gov/dep/newsrel/releases/01_0092.htm). On March 2, 1994, the responsibility for the federal wetlands permitting program was transferred to NJDEP. *Freshwater Wetland Protection Act Rules*, N.J. DEP'T OF ENVTL. PROT., [http://www.nj.gov/dep/rules/rules/njac7\\_7a.pdf](http://www.nj.gov/dep/rules/rules/njac7_7a.pdf) (last visited May 3, 2013).

<sup>167</sup> See Press Release, N.J. Dep't of Env'tl. Prot., *supra* note 163; Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012).

## V. MAINTAINING A COMMITMENT TO ENVIRONMENTAL PROTECTION

The final roadblock to implementing a uniform procedures approach is the legislative process. A UPA in New Jersey would first require introduction and referral to the appropriate committee in both the State Senate<sup>168</sup> and General Assembly,<sup>169</sup> approval by the respective committees<sup>170</sup>, approval by both houses<sup>171</sup> and finally signature by the Governor.<sup>172</sup> Powerful committee chairpersons, individual legislators in the respective houses and, most importantly, the Governor could present significant barriers to the passage of a UPA if they have serious concerns about the legislation's impact on environmental protections. Fortunately, the fears that the UPA would not provide prudent environmental policy can be easily allayed.

The legislative and administrative processes that would be involved in the creation of uniform procedures provide procedural protection for the preservation of substantive environmental regulations. First, state legislators, with the help of legislative staff, can draft the law in a manner to ensure standards are maintained and will not be used as a tool to

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<sup>168</sup> *Senate Rules*, SENATE OF THE STATE OF N.J., 17 (Jan. 10, 2012), <http://www.njleg.state.nj.us/legislativepub/Rules/SenRules.pdf>. In the Senate, a UPA is likely to be referred to the Senate Environment and Energy Committee or the Senate State Government, Wagering, Tourism and Historic Preservation Committee. *See id.* at 12-13.

<sup>169</sup> *Rules of the General Assembly of the State of New Jersey*, GENERAL ASSEMBLY OF THE STATE OF N.J., 23, (Mar. 15, 2012), <http://www.njleg.state.nj.us/legislativepub/Rules/AsmRules.pdf>. In the General Assembly, a UPA will likely be referred to the Assembly Environment and Solid Waste Committee or the Assembly State Government Committee. *See id.* at 12-13.

<sup>170</sup> *Id.* at 16; *Senate Rules*, *supra* note 165, at 14.

<sup>171</sup> N.J. CONST. art. V, § 1, ¶ 14.

<sup>172</sup> *Id.* A bill also becomes law in New Jersey if the Governor fails to take action on the bill within forty-five days of receiving it. *Id.* A bill may also become law if the legislature votes, by two-thirds majority, to override a gubernatorial veto. *Id.*

subvert substantive regulations.<sup>173</sup> Second, the open government policies that characterize modern law and rulemaking<sup>174</sup> will allow for significant public participation and involvement of stakeholders<sup>175</sup> to influence the process in a manner consistent with good environmental policy. Finally, uniform procedures will save agencies precious time, money and other critical resources that can be redirected to help bolster substantive programs.

While the example of New Jersey's land use permit application processes might indicate otherwise, the process of legislative drafting does not take place in a vacuum devoid of concerns about the impact of proposed legislation and concerns about how to best craft the language to ensure that it has the intended effect when and if it becomes law. State legislatures employ full-time, non-partisan professional staffs with expertise in bill drafting and legislative legal analysis to assist legislators in providing specific language in the bills they introduce.<sup>176</sup> A UPA in New Jersey or other states, while largely mimicking the provisions of the New York example, could also include provisions expressly prohibiting administrative agencies or courts from interpreting the law to allow for any relaxation of substantive standards.<sup>177</sup> Such a provision would provide clear

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<sup>173</sup> See, e.g., *Office of Legislative Services: An Overview*, N.J. LEG., <http://www.njleg.state.nj.us/legislativepub/oview.asp> (last visited May 3, 2013).

<sup>174</sup> See Senator Byron M. Baer Open Public Meetings Act, N.J. STAT. ANN. §§ 10:4-6 - 10:4-21 (West 2012); see also *New Jersey's Open Public Meetings Act: "The Sunshine Law,"* RUTGERS, EDWARD J. BLOUSTEIN SCH. OF PLAN. & PUB. POL'Y, <http://hpcpsdi.rutgers.edu/NJHPG/downloads/Sunshine%20Laws.pdf> (last visited May 3, 2013).

<sup>175</sup> *New Jersey's Open Public Meetings Act: "The Sunshine Law,"* *supra* note 171.

<sup>176</sup> See, e.g., *Office of Legislative Services: An Overview*, *supra* note 170; *Who We Are*, CAL. LEGIS. ANALYST'S OFFICE, [http://www.lao.ca.gov/laoapp/laomenus/lao\\_menu\\_aboutlao.aspx](http://www.lao.ca.gov/laoapp/laomenus/lao_menu_aboutlao.aspx) (last visited May 2, 2013).

<sup>177</sup> The "Legislative Findings and Declarations" section of the New York UPA includes declarations regarding the state legislature's intent to provide "fair, expeditious and thorough administrative review of regulatory permits" and states that inconsistencies in the process be eliminated. N.Y. ENVTL. CONSERV. LAW § 70-0103 (McKinney 2012). It does not include anything regarding the law's potential effect on non-procedural regulations. *Id.*

statutory authority for the assertions that uniform procedures are intended only to provide efficiency and not be utilized in a manner to circumvent the thrust of any substantive regulations.<sup>178</sup>

A second important consideration in the process of creating legislation and correlative administrative rules is the participation of interested members of the public. In New Jersey, the Senate and Assembly rules require that the public be allowed to attend, and in most cases comment, on proposed legislation before it is voted on.<sup>179</sup> In terms of administrative rulemaking, the New Jersey Administrative Procedures Act requires that agencies provide interested parties with notice of a proposed rule and that the interested parties be given the opportunity to comment on the proposal either by submitted comments or materials, or by attending a public hearing.<sup>180</sup> Public participation in the legislative and administrative processes provides an important check on lawmakers and regulators. It allows those impacted or implicated in the issue to ensure that their views are heard and potentially alter the course of a piece of legislation or rule. In the uniform procedures context, environmentalists will likely be the most vocal and hard-working in order to ensure that the concerns outlined in this section are addressed.<sup>181</sup> However, due to the ability of the legislature to prudently draft a UPA and the required public participation in the entire process, there should be little concern regarding the potential for uniform procedures being used improperly.

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<sup>178</sup> Such a provision would fit neatly into the “Legislative Findings and Declarations” section of the UPA. *Id.* It could read, “It is the intent of the legislature that nothing in this act be construed to relax, alter or in any way affect the substantive provisions of the regulations affected by the procedural requirements imposed by this Act.”

<sup>179</sup> *Senate Rules*, *supra* note 165, at 29; *Rules of the General Assembly of the State of New Jersey*, *supra* note 166, at 15, 31.

<sup>180</sup> N.J. STAT. ANN. § 52:14B-4 (West 2012).

<sup>181</sup> On the other hand, anti-regulatory interests, typically comprised of the regulated community described above, will likely come out strongly in favor of a uniform procedures approach without the concern over substantive protections environmentalists will point to.

Lastly, the administrative savings resulting from a UPA will allow state environmental agencies to put more emphasis on the material portions of regulations through providing more staff and money to substantive programs. Rather than wasting countless staff hours trying to counter the inefficiencies created by non-uniform procedures and significant portions of agency budgets on paperwork and other bureaucratic log jams, agencies can divert funds and staff to programs that work on substantive portions of regulations, e.g. impervious cover limits in wetlands, permissible development standards in coastal regions or flood plain delineations. Instead of paying staff to process numerous non-uniform applications, funds can be used to hire more scientists and environmental specialists, as well as provide them with more resources so that they may expand agency understanding and information of environmental issues and determine the best environmental policies.

## VI. CONCLUSION

Environmental permitting serves an important purpose in the regulatory system of state governments. Permitting for projects affecting the environment allows states to ensure minimal impact on sensitive environmental areas to meet the vital goals of conservation and preservation of the natural world. Non-uniform procedural requirements, however, add an element of complicated bureaucracy that operates to hinder the administrative agency in charge of environmental permitting, frustrate the regulated community, and slow economic growth. States hoping to appease concerns of the various interests implicated in environmental permitting should endeavor to enact legislation similar to the New York Uniform Procedures Act and promulgate the correlate rules. This type of legal structure, complete with statutorily defined timelines for environmental permits, provides procedural efficiency, administrative savings and certainty for the regulated community affected by environmental regulations. Most importantly, the UPA approach can be enacted and implemented without detrimentally affecting the goals of environmentalism by preserving substantive environmental protections while eliminating unnecessary procedural complications.