

From: [John Reichman](#)
To: [comments_EMP](#)
Subject: [EXTERNAL] Comments to the Draft EMP
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I am attaching a hyperlink to my recent op-ed published by the Star Ledger, which demonstrates why the EMP should, and indeed must, include a moratorium (“Moratorium”) on all new fossil fuel projects. Please consider the

op-ed part of my official comments to you. <https://www.nj.com/opinion/2019/07/the-draft-of-njs-energy-plan-isnt-meeting-the-challenge-of-combating-our-climate-emergency.html>.

The remainder of my comments address the Governor’s legal authority to order a moratorium. As detailed below, the Governor has constitutionally, statutorily and by precedent that authority, which previous Governors of both parties have exercised in less compelling, emergent situations.

When first asked about a Moratorium, the Governor’s response was that the issue would be addressed in the Energy Master Plan (the “EMP”). The draft EMP, however, does not address the issue. More recently, on September 4, 2019, on the Ask the Governor WNYC radio program, the Governor suggested that he did not have the legal authority to order a Moratorium. (“I am not doing this broad based ban, which I don’t think will hold up”).

There is no question that states have the authority to regulate greenhouse gas emissions (“GHGs”). Many states have already done so. For example, pursuant to Massachusetts’s Global Warming Solutions Act, St. 2008, C.298, the State adopted regulations requiring the reduction of statewide greenhouse gas emissions. The Massachusetts Supreme Court recently upheld the State’s regulations of power plant GHG’s. New England Power Generators Association, Inc., v. Department of Environmental Protection, 480 Mass. 398 (2018).

New Jersey has existing statutes that allow for the regulation of GHGs. The Global Warming Response Act (the “GWRA”), similar to Massachusetts’s Act, requires GHG reductions of 80% below 2006 levels by 2050. The GWRA requires the DEP to prepare a report recommending the legislative and regulatory actions needed to achieve those

reductions. Importantly, the GWRA further provides that nothing in the Act “shall impose any limit on the existing authority of the department, the Board of Public Utilities, or any other State department or agency to limit or regulate greenhouse gas emissions pursuant to law.”^[1]

The GWRA thus specifically empowers the Governor and the DEP to regulate GHG’s. Indeed, the entire EMP process would be an exercise in futility, if the State did not have that power.

The question, then, is whether the Governor can, by executive order, order a Moratorium on the permitting of new fossil fuel projects that will increase GHGs until the required regulatory plan is in place. The Governor has under the New Jersey constitution and by statute this authority. N.J. Cons. Art. V, § 1 grants the Governor “Power, by appropriate action . . . to enforce compliance with any constitutional or legislative mandate.” As recently as this summer, the Administration successfully argued that its broad executive authority allows it to supervise and manage all State agencies such as the DEP. The Administration’s initial brief in Norcross v. Murphy, Docket No. MFR-L-001007-190, argued that the Governor’s creation of a task force to investigate the EPA, is “consistent with the Governor’s broad supervisory authority over “[e]ach principal department of the State, [N.J. Const. art.] § IV, 2.” (brief at 2) and that. “[u]nder the New Jersey Constitution, the Governor enjoys substantial executive authority. It is widely recognized that ‘(t)he objective of the 1947 Constitution was the creation of a strong executive.’ Kenny v. Byrne, 144 N.Y. Super. 243, 251 (App. Div. 1976), aff’d, 75 N.J. 458 (1978).” (Brief at 12-13). In the Governor’s subsequent brief to support of its decision to dismiss the Norcross action, the Governor went on to add that the Governor may carry out this constitutional obligation by issuing an executive order, “a well-accepted tool of governmental action.”

New Jersey courts have, in fact, repeatedly affirmed the broad power of the Governor to issue Executive Orders, including on subjects that also could be the subject of legislative

action. Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562 (App. Div. 2000) (upholding Governor's right to regulate firearms); Perth Amboy Bd. Of Education v. Christie, 413 N.J. Super 590 (2010) (upholding Governor Christie's Executive Order, which directed the withholding of State aid to school districts on the ground of a financial emergency); Kelly v. Byrne, 144 N.J. Super 293 (App. Div. 1976), aff'd, 75 N.J. 458 (affirming governor's Executive Order requiring high level government employees to file comprehensive financial disclosure statements.) The Court in Dunbar, noted: "[o]ne commentator has concluded that '[t]he Governor of New Jersey is, at least functionally, the most powerful chief State Executive in the nation.'" 335 N.J. Super at 753.

The only limitation on the Governor's authority to issue Executive Orders to state agencies he oversees is "if it usurps legislative authority by acting contrary to the express or implied will of the legislature." Communications Workers of America, AFL-CIO v. Christie, 413 N.J. Super 229, 259 (App. Div. 2010), "Conversely when the Governor is acting consistently with express or implied authority from the Legislature, his or her actions, should be given the widest possible judicial interpretation and the burden of persuasion would rest heavily upon any who might attack it." Id., (citation omitted)

Here, the Moratorium would not be contrary to will of the Legislature, but rather would be completely consistent with the GWRA. As noted above, the Legislature not only has determined that GHG's must be reduced, but also specifically gave the Governor the green light to take such action.

There have been numerous examples of Governors of both parties using executive orders to order moratoriums in emergent situations similar to or even less compelling than the existential climate emergency we are now in.

In Executive Order No. 7 issued on February 8, 1979, Governor Byrne ordered a de facto moratorium on all new development in the Pinelands. Governor Byrne found that there

was a “demonstrated need to protect, preserve and enhance the land and water reserves of the Pinelands” and ordered the creation of the Pinelands Commission for the purpose of, among other things, to prepare a comprehensive management plan. The Executive Order went on to provide that “Until the enactment of State Legislation which is consistent with the Executive Order, no development in the Pinelands was allowed to proceed unless “(1) there exists a compelling public need for the development or construction or (2) the denial of an approval would result in extraordinary hardship and the Commission by a two-thirds vote of its total membership so certifies to the issuing department or agency.” That Commission could not certify an application where development or construction could result in substantial impairment of the natural resources of the Pinelands.

In Executive Order 175 issued on June 8, 1987, Governor Kean ordered a moratorium on developments in New Jersey’s freshwater wetlands. That Executive Order stated that “Freshwater wetlands play a vital and significant role in maintaining the quality of life through material contributions to the water quality of the State, its economy, food supply and fish and wildlife resources;” and “the continuing random and scattered development and construction, if not controlled, poses a direct threat to the great variety of rare, threatened and endangered plant and wildlife in the wetlands. The Governor then ordered and directed that until the enactment of State legislation which provides adequate protection for freshwater wetlands, or 18 months from the date of this Executive Order, no State department or agency could approve any wetlands development or construction activities, with only limited hardship exceptions.

In Executive Order 8 issued on April 6, 1990, Governor Florio found that there was a lack of coordinated management of solid waste facilities and that until a task force created by the executive order enacted recommendations, the DEP could not approve any solid waste management plans.

The Governor and the Legislature has repeatedly acknowledged that we are in a

climate emergency and this is undoubtedly the case. Global heating presents an existential threat to the State, the country and the world. The scientific consensus is that we must achieve a 45% reduction in GHG's from 2010 levels by 2030 to avoid climate catastrophe.

Pursuant to the Constitution, statute and precedent, the Governor has the power to address our climate emergency by ordering a Moratorium until such time as GHG regulations are adopted as mandated by the GWRA. The only question is whether the Administration has the courage to do it.

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^[1] New Jersey is also a member of the U.S. Climate Alliance, which mandates the reduction of state emissions to 26-28% below 2005 levels by 2025. In addition, under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, the State has the power to deny permits to interstate gas pipelines if a project endangers its waterways. Global heating caused by GHG's emission is doing exactly that as this summer's algae blooms in Lake Hopatcong, Greenwood Lake and other places show.

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