

Water Front- Peter Mantius

Environmental politics in New York's Finger Lakes

Cuomo Administration Rushed Greenidge's Restart — But Was It Legal?

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Greenidge paid Mercury more than \$500,000 for the services of lobbyist Mike McKeon.

(Revised Nov. 14, 2018 to reflect a recent court decision)

DRESDEN, Nov. 13, 2018 — A state appeals court ruling expected by yearend is likely to determine whether the Cuomo Administration broke the law when it fast-tracked permits to restart the Greenidge Generation power station.

The decades-old plant began producing electricity again in March 2017 after a six-year pause and a conversion that allows it to burn natural gas rather than coal.

Two years earlier, at a closed-door meeting in Albany, representatives of the plant's owner, Atlas Holdings LLC, lobbied senior Cuomo Administration advisors over permitting issues.

That private session (<https://waterfrontonline.blog/wp-content/uploads/2018/11/1dgreenidgemeeting03032015.pdf>) on Mar. 3, 2015 was part of a multi-year campaign by the Connecticut private equity firm that included \$120,000 contributions to Gov. Andrew Cuomo's bids for reelection and more than \$500,000 in payments to lobbyists.

Payback came later in 2015 when Greenidge landed a \$2 million state grant and a crucial state waiver of an environmental impact statement, or EIS.

State law requires an EIS for any project that "may" (<https://www.dec.ny.gov/permits/50607.html>) have a significant adverse environmental impact." In granting its EIS waiver in June 2015, the state Department of Environmental Conservation held that restarting Greenidge "will not" (<https://waterfrontonline.blog/wp-content/uploads/2018/11/3greenidgenegdec1.pdf>) have such an impact.



Greenidge paid Mercury more than \$500,000 for the services of lobbyist Mike McKeon.

That stance, which triggered a pair of lawsuits, cleared the way for the plant's restart without a public airing of at least three high-stakes environmental issues that applied to Greenidge then and still apply today:



The Greenidge Generation power plant in Dresden restarted in March 2017. interim, it has not released it to the public.

— The plant's water intake system violates the federal Clean Water Act because it neither filters nor recycles cooling water. The DEC isn't requiring Atlas to fix the problem (<https://wordpress.com/view/waterfrontonline.blog>) until at least October 2022. If the DEC has performed an analysis of the consequences to aquatic life in Seneca Lake in the

— The plant's landfill illegally discharges contaminated leachate into Keuka Lake Outlet despite a consent agreement that originally mandated full cleanup by 2016. That pending cleanup, repeatedly delayed, now faces a November 2019 deadline.

— The plant's daily discharges of tens of millions of gallons of warmed water may be contributing to Seneca Lake's growing toxic algae crisis, particularly around the plant site in Dresden. By skipping the EIS, Atlas and the DEC avoided a debate over whether the plant should have been required to install a closed-cycle cooling (<https://waterfrontonline.blog/wp-content/uploads/2018/11/6zzdec2011closedcycle.pdf>) system to slash intakes and discharges by some 95 percent.

The toxic algae threat was just beginning to emerge in 2015, and it was never mentioned in the DEC's brief environmental analysis that year.

Earlier this year, attorneys for the agency moved to formally strike (<https://waterfrontonline.blog/wp-content/uploads/2018/05/aadecmay2018.pd>) from the court record affidavits (<https://waterfrontonline.blog/wp-content/uploads/2018/11/6aboyeraffidavitapr2018.pdf>) from a toxic algae expert linking the Greenidge discharges and toxic blooms.

The Sierra Club and others filed a pair of lawsuits against Greenidge and the DEC. They allege that agency's environmental review process was illegally curtailed and that the resulting state permits for air emissions and water discharges are invalid.

Judge William Kocher presided over both cases in Yates County Supreme Court. He dismissed the air permit suit (http://treichlerlawoffice.com/water/greenidge/CPFL_CPNY_petition102816.pdf) last year, and dismissed the water permit case (http://treichlerlawoffice.com/water/greenidge/SierravDEC_2017-0232_noticepetition.pdf) on Nov. 8 (<https://waterfrontonline.blog/wp-content/uploads/2018/11/kocherdecision.pdf>).



Judge William Kocher

The Sierra Club appealed (http://treichlerlawoffice.com/water/greenidge/GR_10511R%20-%20Brief.pdf) the dismissal of the air permit case to the New York Supreme Court Appellate Division — Fourth Department in Rochester. Richard Lippes, the Sierra Club attorney, said he expects to appeal the water suit as well.

The appellate decision on the air lawsuit is likely by the end of next month.

"The state and federal permits and approvals we were required to secure were and are uniquely strong," Greenidge spokesman Michael McKeon said when the water lawsuit was filed last November. "They facilitated our conversation to natural gas as our primary fuel and they will

fully protect the region's air and water."

McKeon described the water permit challenge as a bid to "rehash the same arguments already brought by these same few individuals and soundly rejected by the court."

Atlas, Greenidge's owner, is hardly the first developer to try to sidestep the state's EIS mandate. Applicants seeking permits routinely do so because the process tends to be lengthy and costly, and it can stir up public opposition.

Atlas had broad public support for getting Greenidge on line quickly to boost jobs and drive economic development in Dresden and Yates County.

The coal-fired plant had been a Dresden employer since the 1930s, when it operated one unit. It added three more units in the 1940s and 1950s, the oldest three of which have since been retired.

In proposing to convert the 106-megawatt Unit 4 to burn natural gas, Atlas promised new permanent jobs, and dozens of temporary jobs to build a four-mile connection pipeline.

Atlas said in an April 2014 press release that it would restore "30 local jobs." But in a filing with the state Public Service Commission in 2015, it said "10 new full-time jobs." (<https://waterfrontonline.blog/wp-content/uploads/2018/11/11pondsept232015.pdf>)

With the lure of new jobs, Congressman Tom Reed (R-Corning), state Sen. Tom O'Mara (R-Horseheads), Assemblyman Phil Palmesano (R-Corning) and several Yates officials became gung-ho supporters.

Behind the scenes, the Syracuse-based regional law firm Barclay Damon has assigned at least five attorneys, including a former general counsel of the DEC, to separate aspects of the Greenidge project.

Atlas also hired McKeon (<http://www.mercuryllc.com/experts/mike-mckeon/>) of Mercury Public Affairs LLC as its chief lobbyist and spokesman.

McKeon is a key liaison between Gov. Andrew Cuomo, a Democrat, and the state's Republicans. He served as executive director of Republicans for Cuomo in 2010, the governor's first bid for the office.

Under a retainer agreement (<https://waterfrontonline.blog/wp-content/uploads/2018/11/13mercurycontractgreenidge.pdf>) signed by McKeon, Greenidge agreed to pay Mercury \$20,000 a month between March 2014 and December 2015 (it dropped to \$3,000 per month thereafter). Under that contract, Mercury has so far received at least \$489,400, plus \$20,000 on expense reimbursements.

During McKeon's most active 22-month period, the primary target of McKeon's lobbying was the governor's "executive chamber." He also lobbied "the New York State Legislature" in the March-April 2015 period (<https://waterfrontonline.blog/wp-content/uploads/2018/11/14mckeonlobbyingmar2015.pdf>), disclosure reports show.

A Greenidge Timeline

2011

- May. Greenidge owner AES shuts down plant, putting it into “protective layup.”
- December. AES files for bankruptcy protection.

2013

- March. Hiscock Barclay's Frank Bifera, a former DEC general counsel, writes DEC for Atlas, a prospective buyer, that Greenidge shouldn't be deemed a “new” facility for air permitting purposes.
- December. Atlas managing partners Timothy Fazio and Andrew Bursky each contribute \$25,000 to Gov. Andrew Cuomo's reelection campaign.

2014

- January. Hiscock Barclay and Davidson & O'Mara merge. Fazio adds \$20,000 to Cuomo campaign.
- February. Atlas Holdings buys Greenidge, announces plan to restart Unit 4, burning coal.
- March. Greenidge hires Mercury Public Affairs. Mercury's Mike McKeon signs retainer agreement to receive \$20,000 per month (reduced to \$3,000/month in Jan. 2016).

2015

- January. Sen. Tom O'Mara is appointed chairman of Senate Committee on Environmental Conservation. At DEC budget hearing, O'Mara quizzes DEC Commissioner Martens on progress of permits for Greenidge restart so it can provide consistent, reliable, low-cost energy.
- February. Atlas' Lockwood landfill, in a consent agreement with DEC, agrees to clean up leachate discharges into Keuka Lake Outlet by Oct. 1, 2016.
- March. Atlas meets in Albany with Cuomo advisors, DEC officials, Sen. Tom O'Mara and Mike McKeon. Atlas contributes another \$25,000 to Cuomo campaign.
- June. DEC waives an environmental impact statement for Greenidge's restart, ruling that it “will not have a significant adverse environmental impact.” Hiscock Barclay merges with Damon Morey and is renamed Barclay Damon.
- December. Atlas receives \$2 million state grant for Greenidge, which negotiates a PILOT agreement with Yates County. EPA orders DEC to revise its air permit for the plant and treat it as a new facility.

2016

- Summer. Greenidge reapplies for a permit to restart, this time primarily with natural gas rather than coal. DEC states once again that the project “will not” have an adverse environmental impact.
- September. PSC grants go-ahead to construct 4.6 mile gas pipeline to plant.
- October. PSC grants permission to begin conversion of plant. Conversion begins.
- November. Sierra Club and others file suit seeking to annul Greenidge's air permits.

2017

- March. Greenidge restarts (without up-to-date water intake or discharge permits). Mired in a bribery scandal involving a former Cuomo aide, CPV hires Mercury's McKeon to promote its power plant.
- April. Judge denies Sierra Club petition to annul Greenidge air permits. The ruling is appealed.
- July. DEC agrees to postpone Lockwood leachate cleanup until Nov. 2019.
- September. DEC issues SPDES permit for Greenidge's water discharges. The permit requires the plant to install screens on its coolant water intake pipe to comply with the Clean Water Act by October 2022.
- November. Sierra Club and others sue Greenidge and DEC over its SPDES permit, again challenging the DEC's decision to waive an EIS.

2018

- April-May. DEC files motion to strike from the court record affidavits from Gregory Boyer, a toxic algae expert, which state that Greenidge's warm water discharges may trigger Dresden-area algae blooms. Fazio contributes \$25,000 to Cuomo campaign.

That lobbying work included the March 3, 2015 meeting in the Albany executive chambers with two of Cuomo's senior advisors: Jim Malatras and Basil Seggos. (Two days later, Malatras would be named Cuomo's director of state operations. Seggos went on to become Commissioner of the DEC later than year.)

Also present that day were Joe Martens and Ed McTiernan, then the DEC's commissioner and general counsel,



James Malatras (left), Basil Seggos, Joe Martens and Ed McTiernan.

respectively.

Atlas was represented by Timothy Fazio, its co-founder and managing partner, Greenidge plant manager Dale Irwin, and Barclay Damon attorney Frank Bifera, who had served as DEC general counsel under Gov. George Pataki.

Sen. O'Mara also attended, he said, as the representative of Greenidge's Senate district.

While Martens and Irwin (<https://waterfrontonline.blog/wp-content/uploads/2018/11/15irwinaffidavitjune2018.pdf>) did not return phone calls seeking their versions of the meeting, both O'Mara and McKeon said they vaguely recalled it. Each one said the main subject that day was whether Greenidge would have to go through the U.S. Environmental Protection Agency's rigorous "new source review" process. Bifera had suggested in a 2013 letter (<https://waterfrontonline.blog/wp-content/uploads/2018/11/biferaletter2013.pdf>) to Atlas that it would not.

"The DEC was going back and forth," O'Mara said. "Can we revive the old permit, or not, and they said ultimately said, no, they wouldn't revive the old permit."

McKeon agree that the DEC took that tough stance at the Albany meeting. "The state said if you want to get back up and running you have to go through a full new source review process," he said.

But it wasn't until nine months later that the DEC adopted that position — and only after the EPA had explicitly ordered the state agency to reverse itself.

In a Dec. 7, 2015 letter rejecting the DEC's draft air permits for Greenidge, an EPA official wrote: "While we are objecting on the basis that Greenidge will be subject to the Clean Air Act's PSD permit program as a new source, we remain concerned with NYSDEC's conclusion that the reactivation does not constitute a major modification."

McKeon said he did not recall other topics at the March 2015 meeting in Albany. He said the Lockwood landfill and the plant's lack of water intake filters never came up. "That's not something you would ever have a conversation about in the governor's office," McKeon added. "That's kind of down in the weeds."

O'Mara, who, like Bifera, is a partner at Barclay Damon, said he learned on the day of the Albany meeting — to his great surprise — that his own firm was representing Atlas,

Greenidge's parent company.

"I wasn't aware the firm was even working on the Greenidge project at that time, and I disclosed it to everyone in the room at that moment," O'Mara said in an [interview](https://waterfrontonline.blog/wp-content/uploads/2020/09/new-recording-31.m4a) (<https://waterfrontonline.blog/wp-content/uploads/2020/09/new-recording-31.m4a>). Oct. 24.

The fact that Bifera was present in support of Greenidge's lobbying of senior Cuomo aides and top DEC officials, raised potential conflicts for O'Mara. McKeon acknowledged as much, saying, "We were somewhat apologetic to the senator and the governor's office. That was a

misstep on our part."

Six weeks earlier, O'Mara had been appointed chairman of the state Senate's Committee on Environmental Conservation, which oversees the DEC.

Between the time of that appointment and the Greenidge lobbying session in March, O'Mara had [grilled Martens](https://nyassembly.gov/write/upload/files/testimony/20150128_encon/EnCons2015.pdf) (https://nyassembly.gov/write/upload/files/testimony/20150128_encon/EnCons2015.pdf) at a DEC budget hearing on when the agency was going to approve permits for the plant.

Ethics rules prohibit O'Mara from using his Senate role to aid clients of the firm, and he denied doing so at the Mar. 3, 2015 meeting — or at any other time.

"I was there as an advocate for the property tax base in (my Senate district), the value that plant has, both in jobs and the property tax base," O'Mara said.

While some may accept that line of defense, others may not, said Blair Horner, executive director of the New York Public Interest Research Group, or NYPIRG.

"The question is which master is he serving," Horner said.

Such murky situations are the result of lax state ethics laws that leave the door wide open for influence peddling, he added.

"Lawmakers should be prohibited from having outside jobs. Then all of these issues go away," said Horner, who testified at a budget hearing in February that legislators' "outside income" should be limited to 15 percent of their state pay.

Disclosure reports show Barclay Damon paid O'Mara between \$100,000 and \$215,000 last year for contract work (excluding salary from the firm) — more than his total state compensation of \$94,500.

Such outside income paid to state legislators has come under increased scrutiny in recent years.

In 2013, Cuomo's anti-corruption Moreland Commission subpoenaed six major law firms, seeking documents from their partners, including Assemblyman William Barclay (R-Pulaski) of Hiscock Barclay (now renamed Barclay Damon).

But after the firms filed [motions to quash](https://waterfrontonline.blog/wp-content/uploads/2018/11/17quashsubpoenasbarclaynews.pdf) (<https://waterfrontonline.blog/wp-content/uploads/2018/11/17quashsubpoenasbarclaynews.pdf>) the subpoenas,

the governor shuttered the commission in early 2014. Cuomo's action immediately triggered a criminal probe by U.S. Attorney Preet Bharara of the Southern District of New York.

More recently, outside income emerged prominently in the criminal cases against state Assembly Speaker Sheldon Silver and state Senate Majority Leader Dean Skelos, who were both convicted and sentenced to prison.

While O'Mara insists that he strictly obeys ethics rules, his compensation, including payments from Barclay Damon and the potential conflicts they raise, have been the subject of numerous media reports (<https://waterfrontonline.blog/wp-content/uploads/2017/08/44dcbureau10112016omaraprotectsnysfrackwasteloophole.pdf>).

In 2015, Gannett noted (<https://waterfrontonline.blog/wp-content/uploads/2018/11/19omarabarclaydclients2015news.pdf>) that Hiscock Barclay paid O'Mara, chair of the Senate's committee on the environment, while it represented clients on a host of environmental matters, including the promotion of hydraulic fracturing for natural gas.

In May, The New York Times reported (<https://waterfrontonline.blog/wp-content/uploads/2018/11/20lulusnyt4gopsenators.pdf>) that O'Mara had been authorized to receive a \$15,000 stipend as chair of the Senate's Transportation committee, which he has never chaired.

In August, USA Today's Albany Bureau reported (<https://waterfrontonline.blog/wp-content/uploads/2018/11/21usatodayaug2018.pdf>) that O'Mara had filed an incorrect disclosure report listing his outside income — mistakenly filing the same form for 2017 as for 2016. He later corrected the error uncovered by Albany Bureau reporters.

O'Mara's most recent disclosure (<https://waterfrontonline.blog/wp-content/uploads/2018/11/22omaradisclosuremay2018.pdf>) shows that payments from the law firm stem from contract relationships with several municipalities and agencies, mostly within his Senate district.

In the Oct. 24 interview, he revealed for the first time details on the most lucrative of those outside contracts, a fee-sharing arrangement in Dutchess County.

O'Mara acknowledged that he has received a percentage of legal fees paid to Barclay Damon (<https://waterfrontonline.blog/wp-content/uploads/2018/11/23aabarclaydamoncovantadefenseretainer.pdf>) for defending that

county's resource recovery agency in a lawsuit filed by Covanta, which had operated an incinerator in Poughkeepsie.

"I was involved in helping set up that client relationship with the firm through my friendship, relationship with Marc Molinaro, the county executive," O'Mara said. "He helped us get a meeting to interview for that work."

Molinaro, the Republican candidate for governor this year, lost his bid to unseat Cuomo Nov. 6.

Records show Barclay Damon received at least \$445,000 over three years for its defense work on the Covanta case, which has been settled. O'Mara said he received an "origination fee" in the form of "a percentage of the fees that are billed."

He declined to specify the percentage figure, but he has reported that his income from Barclay Damon related to Dutchess County ranged from \$50,000 to \$75,000 for both 2016 and 2017.

"The legal work I perform and/or am compensated for is wholly unrelated to my role as a state senator," O'Mara said in a email followup Oct. 30. "Accordingly, there is no conflict of interest."

"Further, Barclay Damon has a robust policy that prohibits any such conflict from arising. Its policy expressly prohibits all firm attorneys and staff from lobbying any member of the Legislature... In addition, Barclay Damon routinely erects ethical walls as an extra layer of protection to avoid even the appearance of a conflict."

Excluding O'Mara, at least five Barclay Damon attorneys have worked on various Greenidge matters dating back to Bifera's letter in early 2013, when firm was still named Hiscock & Barclay and Atlas was in talks to buy Greenidge.

O'Mara's connection to the firm began in January 2014 when it acquired his Elmira firm, Davidson & O'Mara.

Atlas bought Greenidge the following month. The law firm changed its name to Barclay Damon after another merger (<https://waterfrontonline.blog/wp-content/uploads/2018/11/24omaragannettnews2015.pdf>) in June 2015.

O'Mara's tenure as chairman of the Senate Committee on Environmental Conservation, which began in January 2015, will presumably come to a close shortly due to the results of the Nov. 6 election. Democrats won outright control (<https://waterfrontonline.blog/wp-content/uploads/2018/11/25nysenatedemstakecontrol.pdf>) of the state Senate and the right to appoint committee chairs.

Republicans had narrowly controlled that body throughout most of Cuomo's first two terms as governor, thanks to a small group of Democratic senators who caucused with the Republicans.

Cuomo has been criticized (<https://www.democratandchronicle.com/story/news/politics/albany/2018/08/30/andrew-cuomo-cynthia-nixon-fact-check/1142202002/>) by some Democrats for tolerating or even quietly encouraging the Independent Democratic Conference's role in keeping the state Senate in GOP hands.

McKeon has contributed to the campaigns of several former IDC members, and he produced a video ad (<https://www.youtube.com/watch?v=1qBBY5Pg6Dg>) for IDC's women's agenda in 2013.

His GOP credentials date back to his role as director of communications for Gov. Pataki, a Republican who served three terms ending in 2006. When Cuomo first ran for governor in 2010, McKeon served as executive director for the group Republicans for Cuomo.

Several aides of Cuomo have left to his administration to work for McKeon's firm, Mercury. That includes Cassie Prugh, a director of regional affairs for Cuomo from 2012 to 2014, who, after jumping to Mercury, lobbied on behalf of Greenidge's successful efforts to win favorable tax treatment in late 2015.

That December, Yates County completed an agreement for a payment in lieu of taxes (PILOT) deal (<https://waterfrontonline.blog/wp-content/uploads/2018/11/29greenidgetaxbreakjuly2016news.pdf>) for Greenidge, which calls for escalating payments totaling \$3.1 million over 15 years. The county's most recent estimate of the full market value of the plant is \$6.46 million (<https://waterfrontonline.blog/wp-content/uploads/2018/11/30greenidgeassessment6-4m.pdf>).

Under a PILOT agreement with the former owners of the plant more than a decade ago, plant owners paid far more — \$1.1 million a year (<https://waterfrontonline.blog/wp-content/uploads/2018/11/31oldpilotfeb2013news.pdf>) — and the county's assessed value of the plant had been as high as \$55 million.

Disclosure documents show that McKeon lobbied Yates officials from July through December 2015 as the PILOT was being prepared. Prugh joined him in lobbying Yates that November and December.

In the final month that McKeon served as an active lobbyist for Greenidge, Cuomo announced the \$2 million grant (https://regionalcouncils.ny.gov/sites/default/files/2018-02/REDCAwardsBooklet2015_2.pdf) for the Atlas project. O'Mara has said he played no role in helping Greenidge obtain the state award.

As McKeon's primary lobbying duties for Greenidge were winding down in early 2017, he took on another power plant client that had been ensnared in a Cuomo Administration bribery scandal — Competitive Power Venture's \$900 million Valley Energy project.

The new CPV plant in Wawayanda, located 75 miles northwest of New York City, is a 680-megawatt facility powered by natural gas delivered by a 8-mile connection to the Millennium Pipeline. The Cuomo Administration viewed its power as a partial offset to the planned 2021 closing of the 2,000-megawatt Indian Point nuclear plant nearby.

In the Fall of 2016, Joseph Percoco, a former executive deputy secretary to Cuomo, and Peter Galbraith Kelly Jr., a former CPV executive, were indicted by Bharara, the U.S. Attorney. Bharara charged that Kelly made secret payments to Percoco through Percoco's wife in an attempt to win official favors for CPV.

As the Percoco trial loomed in early 2017, CPV began pouring more money into state and federal lobbying, according to a report (<https://public-accountability.org/2018/04/the-percoco-connection-the-money-trail-linking-competitive-power-ventures-cuomo-and-trump/>) by the Public Accountability Initiative in Buffalo. The company's lobbying expenses quadrupled from 2016 to 2017, PAI found.

In March 2017, CPV hired Mercury (<https://waterfrontonline.blog/wp-content/uploads/2018/11/34cpvmercurymar2017.pdf>) for lobbying carried out by McKeon and Patrick McCarthy. Mercury had received \$255,000 under that contract through August. Disclosure documents show their lobbying targets included the executive chamber and the state Senate.

Percoco was sentenced (<https://waterfrontonline.blog/wp-content/uploads/2018/11/35percocosixyearsprisonnews.pdf>) to six years in prison in September. Kelly was sentenced last month to up to 14 months in prison.

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