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In the States

New York establishes Lower Salmon River State Forest

In the Courts

U.S. Supreme Court holds regulations barring landowners' sale of adjacent lot do not effect a taking

In the Congress

House passes Hydropower Permit Extension Act

In the Agencies

EPA proposes to stay new source performance standards for GHG and VOC emissions from the oil and natural gas sector



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Vanderbilt University Law School

ENVIRONMENTAL LAW AND POLICY ANNUAL REVIEW

Federico Cheever and Jessica Owley

Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCES)

With Responses by Roger McCoy, Liz McLaurin, and Bill Sylvester

J. Peter Byrne and Kathryn A. Zyla

Climate Exactions

With Responses by Christopher V. Carlyle, Adam Freed & Jake Elder, and Gwen Wright

James W. Coleman

How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures

With Responses by Alan Horowitz, Jeffrey A. Smith, and Brian J. Wong

Eloise Pasachoff

The President's Budget as a Source of Agency Policy Control

With Responses by Russell Shay and Ali A. Zaidi

Linda K. Breggin, Kline Moore, Marian Mikhail, and Michael P. Vandenberg

The Environmental Law and Policy Annual Review: Top 20 Articles

ENVIRONMENTAL LAW AND POLICY ANNUAL REVIEW

2016-2017

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About ELR® . . .

ELR—*The Environmental Law Reporter*® is an essential online research tool edited by attorneys that provides the most-often cited analysis of environmental, sustainability, natural resources, energy, toxic tort, and land use law and policy. *ELR* has three components:

- *News & Analysis*, *ELR*'s highly respected monthly journal, provides insightful features relevant to both legal practice and policy on today's most pressing environmental topics. *News & Analysis* is available in print as well as online.

- *ELR UPDATE* provides expert summaries three times a month of the most important federal and state judicial and administrative developments as well as federal legislative and international news. Subscribers can also receive *ELR Daily Update*, our daily summary of federal administrative news.

- *ELR Online*, *ELR*'s subscription-only website at www.eli.org, is a one-stop environmental law and policy research

site with access to over 45 years of *ELR* analysis, extensive links to statutes, regulations and treaties, a comprehensive subject matter index, and many other tools.

Submissions . . .

ELR invites readers to submit articles and comments, which are shorter features, for publication. Manuscripts may be on any subject of environmental, sustainability, natural resources, energy, toxic tort, or land use law or policy. Citations should conform to *A Uniform System of Citation* (the "Bluebook") and should include *ELR* citations for materials that we have published.

Manuscripts should be submitted by e-mail attachment to austin@eli.org. We prefer that the file be in Microsoft Word® format.

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The Environmental Law and Policy Annual Review

Dear Readers:

The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* (ELR) in partnership with Vanderbilt University Law School. ELPAR provides a forum for the presentation and discussion of the best environmental law and policy-relevant ideas from the legal academic literature each year. The publication is designed to fill the same important niche as *ELR* by helping to bridge the gap between academic scholarship and environmental policymaking.

ELI and Vanderbilt formed ELPAR to accomplish three principal goals. The first is to provide a vehicle for the movement of ideas from the academy to the policymaking realm. Academicians in the environmental law and policy arena generate hundreds of articles each year, many of which are written in a dense, footnote-heavy style that is inaccessible to policymakers with time constraints. ELPAR selects the leading ideas from this large pool of articles and makes them digestible by reprinting them in a short, readable fashion accompanied by expert, balanced commentary.

The second goal is to improve the quality of legal scholarship. Academicians have strong incentives to write theoretical work that ignores policy implications. ELPAR seeks to shift these incentives by recognizing scholars who write articles that not only advance legal theory, but also reach policy-relevant conclusions. By doing so, ELPAR seeks to provide incentives for academicians to generate new policy ideas and to improve theoretical scholarship by asking them to account for the hard choices and constraints faced by policymakers. And the third and most important goal is to provide a first-rate educational experience to law students interested in environmental law and policy.

To select articles for inclusion, the ELPAR Editorial Board and Staff conducted a key word search for "environment!" in an electronic database. The search was limited to articles published from August 1, 2014, through July 31, 2015, in the law reviews from the top 100 *U.S. News and World Report*-ranked law schools and the environmental law journals ranked by the Washington and Lee University School of Law. Journals that are solely published online were searched separately. Student scholarship and non-substantive content were excluded.

The Vanderbilt students then screened articles for consistency with the ELPAR selection criteria. They included only those articles that met the threshold criteria of addressing an issue of environmental quality and offering a law or policy-relevant solution. Next, they considered the articles' feasibility, impact, creativity, and persuasiveness.

Through discussion and consultation, the students ultimately chose 20 articles for the ELPAR Advisory Committee to review. The Advisory Committee provided invaluable insights on article selection. Vanderbilt University Law School Prof. Michael Vandenberg, ELI Senior Attorney Linda Breggin, ELI Director of Communications and Publications Rachel Jean-Baptiste, and *ELR* Editor-in-Chief Jay Austin also assisted in the final selection process. Commentary on the selected papers then was solicited from practicing experts in both the private and public sectors.

On March 31, 2017, in Washington, DC, ELI and Vanderbilt cosponsored a conference where some of the authors of the articles and comments presented their ideas to an audience of business, government (federal, state, and local), think tank, media, and nonprofit representatives. The conference was structured to encourage dialogue among presenters and attendees. Audio recordings of these events are posted on the ELI and Vanderbilt University Law School ELPAR websites.

The students worked with the authors to shorten the original articles and to highlight the policy issues presented, as well as to edit the comments. Those articles and comments are published here as ELPAR, which is also the August issue of *ELR*. Also included in ELPAR is an article on trends in environmental legal scholarship, which is based on the data collected through the ELPAR review process. We are pleased to present the results of this year's efforts.

Linda K. Breggin, Senior Attorney, Environmental Law Institute;
Adjunct Professor of Law, Vanderbilt University Law School

Jay E. Austin, Editor-in-Chief, *Environmental Law Reporter*

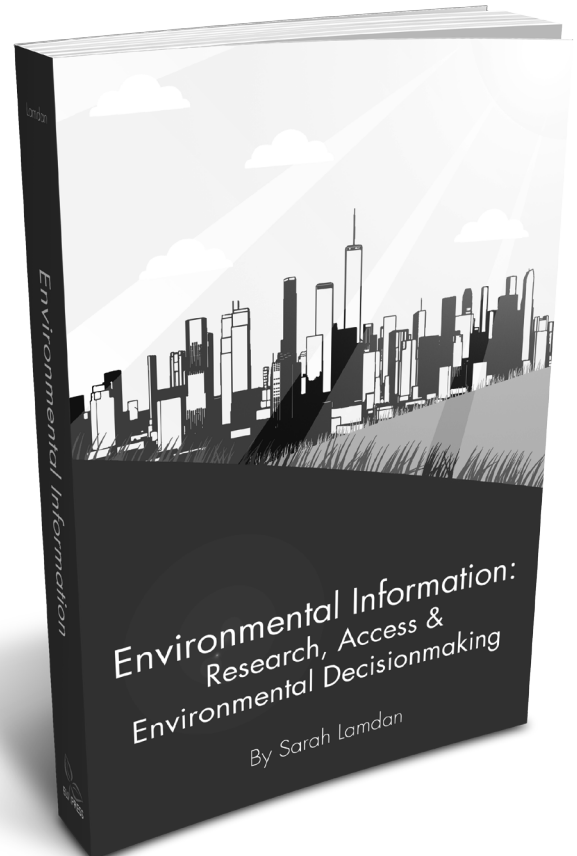
Michael P. Vandenberg, David Daniels Allen Distinguished Chair
of Law, Vanderbilt University Law School

Environmental Information Research, Access & Environmental Decisionmaking

By Sarah Lamdan

In an ideal world, environmental information would be easy to find and use. But the current state of environmental information access requires additional knowledge and expertise—the kind that this book provides.

Designed for legal practitioners, librarians, journalists, advocates, students, and researchers, this book helps environmental information seekers locate, obtain, and make sense of environmental records, documents, and pieces of data. It contains tips and concepts that expand beyond legal research or general research and into the broader realm of information-gathering. The book discusses environmental research tactics and resources and it also covers methods for obtaining information from nontraditional sources like government offices and open meetings.



About the Author

Sarah Lamdan is an Associate Professor and librarian at the City University of New York School of Law. Sarah specializes in government information access and transparency with a focus on environmental agency records, and she teaches legal research, advanced legal research, and lawyering skills courses.



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C O M M E N T

The Environmental Law and Policy Annual Review: Top 20 Articles

by Linda K. Breggin, Kline Moore, Marian Mikhail, and Michael P. Vandenberg

Linda K. Breggin is a Senior Attorney with the Environmental Law Institute and Adjunct Professor, Vanderbilt University Law School. Marian Mikhail and Kline Moore are recent graduates of Vanderbilt University Law School. Michael P. Vandenberg is the David Daniels Allen Distinguished Chair of Law and Co-Director of the Energy, Environment, and Land Use Program, Vanderbilt University Law School.

The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* in partnership with Vanderbilt University Law School. This edition marks ELPAR's 10th anniversary. In accordance with its objective to provide a vehicle for the movement of ideas from the academy to the policymaking realm, ELPAR has provided a forum each year for the presentation and discussion of some of the most creative and feasible environmental law and policy proposals culled from the legal academic literature.

The student editors of ELPAR, with input from the course instructors, narrow down the pool of environmental articles published during the prior year to a list of about 20 contenders, all of which meet ELPAR's criteria of persuasiveness, impact, feasibility, and creativity. From this group of articles, the ELPAR student editors—in consultation with ELPAR's Advisory Committee, Environmental Law Institute staff, and the course instructors—select several articles to re-publish in shortened form with commentaries from leading practitioners and policymakers.¹

This year, ELPAR elected for the first time to share the year's list of top 20 articles, found in Table 1. Of the 20 articles outlined below, seven call for a federal agency—such as the U.S. Environmental Protection Agency, the U.S. Department of Interior, or the U.S. Department of Agriculture—to change regulations, policies, or practices. Three articles envision explicit presidential action through either the federal procurement, regulatory review, or the federal agency budget process. In addition, three articles focus on actions that could be taken by state or local governments, two by the judiciary, and one by private parties. Four articles contemplate actions that can be taken at the international level.

The student editors categorize the top 20 articles using the *Environmental Law Reporter's* topic categories. Because articles do not always fit neatly into a category, and often topic categories are interrelated, such as energy and climate, articles often are assigned a primary and secondary topic. Primary topics addressed in the top 20 articles are: climate change (12); governance (5); and energy (3). Secondary topics include: climate change (2); energy (3); governance (3); land use (4); air (1); and water (1). When both primary and secondary topics are considered, 14 articles addressed climate change in some manner.

This year's pool of articles came from both general and environmental law journals. Eleven out of the top 20 articles came from specialty journals focusing on environmental issues, while the other nine articles were originally published in general law review journals. Only two of these articles were published in the same journal, the *Harvard Environmental Law Review*.

The lead authors of the articles came from a range of law schools, but the following universities had two professors who each published a piece, as a lead author, that was included in the top 20: Georgetown University Law School; University of Texas-Austin Law School; Florida State Law School; and University of Minnesota Law School. The pool of articles this year also featured one practitioner who practices law in the United States Air Force as a Judge Advocate Officer.

The chart below lists every article included in the top 20 with a brief description of each article's big idea. The descriptions of the big ideas presented in the articles were drafted by the student editors and reflect the key points they thought made an important contribution to the environmental law and policy literature. Links are provided to the full articles and most of the links contain the authors' own abstracts.

1. For a full description of the methodology used for selecting articles, please refer to Environmental Law Institute, *Environmental Law and Policy Annual Review*, Publications, Trends in Environmental Law Scholarship Methodology: <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited May 10, 2017).

Table I: Article Overview Chart

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Barsa, Michael & David Dana	<i>A “Switching Costs” Approach: EPA’s Clean Power Plan as a Model for Allocating the Burden of Carbon Reductions Among Nations</i>	7 SAN DIEGO J. CLIMATE & ENERGY L. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809210	Climate Change/ Energy	Carbon reduction responsibilities among nations should be determined by a “switching costs” approach, as used in the Clean Power Plan, in which a state’s responsibility for emissions reduction is based largely on its ability to obtain energy from sources other than fossil fuels.
Behles, Deborah	<i>Controlling Ancillary Emissions Under the Clean Air Act: Consideration of Energy Storage as Best Available Control Technology</i>	42 ECOLOGY L.Q. 573 http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2105&context=elq	Climate Change/ Energy	Energy storage and renewable energy should be considered Best Available Control Technologies for purposes of reducing greenhouse gas emissions from the starting, stopping, and running of fossil fuel facilities that are used to back up renewable resources.
Burger, Michael, Ann E. Carlson, Michael B. Gerrard, Jayni F. Hein, Jason A. Schwartz, & Keith J. Benes	<i>Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act</i>	28 GEO. ENVTL. L. REV. 359 https://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf	Climate Change/ Governance	EPA should regulate GHG emissions under Section 115 (“International Air Pollution”) of the Clean Air Act, which provides EPA with authority to require state implementation plans to address emissions that endanger public health or welfare in other countries if those countries provide the U.S. with reciprocal protections.
Byrne, J. Peter & Kathryn Zyla	<i>Climate Exactions</i>	75 MD. L. REV. 758 http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2681&context=facpub	Climate Change/ Land Use	Local governments should impose monetary exactions on developments that increase carbon emissions or reduce the natural resiliency of the locality, and use the fees collected to mitigate harmful environmental effects within the jurisdiction.
Cheever, Federico & Jessica Owley	<i>Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)</i>	40 HARV. ENVTL. L. REV. 1 http://harvardelr.com/wp-content/uploads/2016/03/Cheever-Owley.pdf	Climate Change/ Land Use	Options to Purchase Conservation Easements (OPCEs) could flexibly and efficiently conserve resources in the face of shifting coastlines and species migration due to climate change, if state legislatures amended current conservation easement enabling statutes to: (1) specifically recognize OPCEs; (2) immunize OPCEs from a range of potential common-law challenges; and (3) integrate OPCEs into the burgeoning body of conservation easement law.
Coleman, James W.	<i>How Cheap Is Corporate Talk? Comparing Companies’ Comments on Regulations With Their Securities Disclosures</i>	40 HARV. ENVTL. L. REV. 47 http://harvardelr.com/wp-content/uploads/2016/03/Coleman.pdf	Governance	Environmental regulators should use public companies’ securities disclosures to assess the sincerity of companies’ comments about the cost of proposed regulation.
Hull, Jason Robert	<i>Hey Now, Let’s Be Social: The Social Cost of Carbon and the Case for Its Inclusion in the Government’s Procurement of Electricity</i>	7 J. ENERGY & ENVTL. L. 18 https://gwu.jeel.files.wordpress.com/2016/02/jeel_vol7_issue1_hull.pdf	Climate Change/ Governance	Pursuant to authority under the Federal Property and Administrative Services Act, the president should require by executive order that agencies apply a social cost of carbon-based downward adjustment to electricity pricing to advantage low emitters in the federal procurement process.

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Klass, Alexandra & Jim Rossi	<i>Revitalizing Dormant Commerce Clause Review for Interstate Coordination</i>	100 MINN. L. REV. 129 http://www.minnesotalawreview.org/wp-content/uploads/2015/11/KlassRossi_onlinefinal.pdf	Energy/ Governance	Dormant Commerce Clause review provides “an independent ground” for courts to address challenges to state and local regulators’ failure to approve multistate energy infrastructure projects, and courts should “evaluate political process concerns” to ensure that “state decision-making frameworks allow for consideration of out-of-state benefits.”
Marzen, Chad G. & J. Grant Ballard	<i>Climate Change and Federal Crop Insurance</i>	43 B.C. ENVTL. AFF. L. REV. 387 http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2196&context=ealr	Climate Change/ Land Use	To mitigate the future impact of climate change on agriculture, the definition of “good farming practices” under the federal Crop Insurance Program should be amended to include as a “substantial” factor in making coverage determinations whether the farmer insured used “sustainable, resilient, and soil-building agricultural practices.”
Masur, Jonathan & Eric Posner	<i>Toward a Pigouvian State</i>	164 U. PA. L. REV. 93 https://www.pennlawreview.com/print/164-U-Pa-L-Rev-93.pdf	Governance/ Water/Air	Pigouvian taxes are superior to command-and-control regulation in addressing negative externalities such as pollution, and regulators have the authority to impose them under the Clean Air and Clean Water Acts.
Meyer, Timothy	<i>How Local Discrimination Can Promote Global Public Goods</i>	95 B.U. L. REV. 1937 http://www.bu.edu/bulawreview/files/2016/01/MEYER.pdf	Energy/Climate Change	To promote clean energy: (1) the World Trade Organization should change its position that local subsidy programs are unlawful if they require renewable energy companies to use locally manufactured parts, and instead should assess whether such requirements were politically necessary and if the global benefits exceed the economic discrimination costs; and (2) nations should negotiate limited exceptions for local renewable energy.
Van Nostrand, James M.	<i>Keeping the Lights on During Superstorm Sandy: Climate Change Adaptation and the Resiliency Benefits of Distributed Generation</i>	23 N.Y.U. ENVTL. L.J. 92 http://www.nyu.edu/wp-content/uploads/2015/09/VanNostrand_ready_for_website_1.pdf	Climate Change/ Energy	Distributed generation allows for system “resiliency” in the face of increased dangerous weather, and existing tools can be used to force utilities to adopt it.
Osofsky, Hari M., Jessica Shadian, & Sara Fechtelkotter	<i>Arctic Energy Cooperation</i>	49 U.C. DAVIS L. REV. 1431 http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1488&context=faculty_articles	Energy/Climate Change	Broader and more formalized “hybrid cooperation” among diverse stakeholders can assuage the environmental risks presented by the current, highly fragmented Arctic energy production governance regime while better protecting traditionally marginalized interests, such as those of indigenous peoples.
Pasachoff, Eloise	<i>The President’s Budget as a Source of Agency Policy Control</i>	125 YALE L.J. 2182 https://perma.cc/532N-QNT5	Governance	The president’s power over agencies through procedural “levers” in the budget and appropriations processes should be acknowledged and transparency improved through an executive order governing the Resource Management Offices, congressional requirements, and civil input.

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Prum, Darren A.	<i>Foiled by the Banks? How a Lender's Decision May Support or Undermine a Jurisdiction's Environmental Policies That Promote Green Buildings</i>	5 MICH. J. ENVTL. & ADMIN. L. 435 http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1051&context=mjeal	Climate Change	To support climate change action within the built environment, lenders should adjust the underwriting process and loan documents to properly evaluate and mitigate the risks associated with financing green building.
Ruhl, J.B. & James Salzman	<i>Regulatory Exit</i>	68 VAND. L. REV. 1295 https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2015/10/Regulatory-Exit.pdf	Governance	When government regulates, it should consider how it (or the regulated parties) will “exit” the regulatory regime and include that plan in the regulation.
Taylor, Melinda & Holly Doremus	<i>Habitat Conservation Plans and Climate Change: Recommendations for Policy</i>	45 ELR NEWS & ANALYSIS 10863 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600161	Climate Change/ Land Use	To protect endangered species, current policies and regulations should be modified to allow new and existing Habitat Conservation Plans to accommodate climate change considerations through adaptive management techniques and other approaches.
Verchick, Robert R.M.	<i>Culture, Cognition, and Climate</i>	2016 U. ILL. L. REV. 969 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516887	Climate Change	Judges and legislators can build public support for climate action by writing in a way that recognizes and resonates with their audiences' cultural values.
Wagner, Wendy	<i>A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power</i>	115 COLUM. L. REV. 2019 http://columbialawreview.org/content/a-place-for-agency-expertise-reconciling-agency-expertise-with-presidential-power/	Governance	To strike the right balance between agency independence in making scientific determinations and Office of Information and Regulatory Affairs review, several institutional reforms are necessary, including improved documentation of technical decisionmaking, more rigorous peer and public review of science-based decisions, and additional timely political input at critical points in the rulemaking process.
Wara, Michael	<i>Building an Effective Climate Regime While Avoiding Carbon and Energy Stalemate</i>	41 COLUM. J. ENVTL. L. 313 http://www.columbiaenvironmentallaw.org/building-an-effective-climate-regime-while-avoiding-carbon-and-energy-stalemate/	Climate Change	By focusing climate change negotiations on short-lived climate pollutants, rather than carbon dioxide emissions, the international community can address climate change with fewer political barriers.

Environmental Law and Policy Annual Review

In Memory of Federico (Fred) Cheever

From Jay Austin, *Environmental Law Reporter*; Linda Breggin, Environmental Law Institute and Vanderbilt University Law School; J.B. Ruhl, Vanderbilt University Law School; and Michael Vandenberg, Vanderbilt University Law School

It is with great sadness that we note that one of our winning authors, Fred Cheever, passed away just prior to publication of this issue of ELPAR. With Jessica Owley, Fred co-authored *Enhancing Conservation Options, An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)*, 40 HARV. ENVTL. L. REV. 1 (2016). A shortened version of the article, along with commentary, follows. The article was a strong favorite of the Vanderbilt students and our peer advisory panel, and it reflects the combination of creativity and policy relevance that characterized so much of Fred's work.

Fred presented the *Enhancing Conservation Options* article at Vanderbilt University Law School in Nashville, Tennessee, on March 13, 2017. The video is available at <https://www.youtube.com/watch?v=t2P9OSTB028>. His excitement about the topic was infectious, and his enthusiasm for protecting the landscape was obvious to everyone in the room. The students, faculty, and practitioners who participated were privileged to have experienced his energy, intellectual firepower, sense of humor, and commitment, which have been taken from us far too early.

Fred was widely respected and admired by his academic colleagues working in environmental and natural resources law and policy. The outpouring of grief-stricken e-mails exchanged among us on the news of his passing showed just how broadly and deeply Fred influenced our field. It is small comfort, but comfort nonetheless, that over 100

colleagues were with him at a conference he organized in Banff, Alberta, just days before his tragic death. He received a standing ovation during the proceedings for his work organizing that and similar teacher conferences for 10 years. A fitting last memory of a friend and colleague if ever there was one.

Like so many others, we will miss Fred and dedicate this issue of ELPAR to him.



From Jessica Owley, SUNY Buffalo Law School

I first met Fred Cheever in 2009 through my then-law firm's representation of land conservation organizations. We quickly bonded over exploring legal tools to increase and improve land conservation. We shared a nerdy fascination with conservation easements. Fred quickly became a mentor and friend. We began collaborating on projects before I even taught my first law school class. Despite having 20 years of teaching and research experience on me, Fred always treated me as an equal and enthusiastically listened to my proposals and approaches. We didn't always agree, but our disagreements were congenial and helped us both improve our work. More frequently, however, we found common ground and enjoyed long conversations and brainstorming sessions about land conservation. The work here began as a "what if" conversation over lunch one day. Writing with Fred was a joy, and I am so thankful that I had that experience. He made my life richer and is dearly missed.

A R T I C L E

Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)

by Federico Cheever and Jessica Owley

Federico Cheever was a Professor of Law and the Co-Director of the Environmental and Natural Resources Program at the University of Denver Sturm College of Law. Jessica Owley is a Professor of Law at SUNY Buffalo Law School.

I. Introduction

Land conservation transactions have been the most active component of the conservation movement in the United States for the past three decades.¹ Practitioners use traditional real estate tools to preserve habitat, scenery, and historically significant places. Sometimes these tools are used by government entities, but they often involve nonprofit land conservation organizations known as land trusts, which buy and accept donations of land and conservation easements encumbering land. According to the Land Trust Alliance 2010 National Census, more than 1,700 land trusts (local, state, and national) are active in the United States.² These organizations are staffed and supported by almost 5 million people.³ A conservation easement, the primary private land conservation tool, is a non-possessory property right restricting a landowner's use of a parcel of land to yield a conservation benefit.⁴ The National Conservation Easement Database estimates that approximately

40,000,000 acres of land have been protected by conservation easement in the United States.⁵

The prospect of climate change diminishes the value of most real estate tools currently used by proponents of land conservation transactions.⁶ A conservation easement binds only the parcel of land described. What scientists know of climate change suggests a natural world in motion; there is no guarantee that the things people value on specific parcels will continue to be there in future decades. This Article outlines one potential response to the challenge of private land conservation under climate change: a reinvigorated use of real estate options to purchase conservation easements (OPCEs).

In the world climate change is creating, with its substantial uncertainties and shifting windows of opportunity, OPCEs can serve strategic purposes. For example, if a potential conservation easement holder knows that a particularly valuable species habitat will migrate over time, but does not know exactly where or when it will migrate, the prospective conservation easement holder could choose to purchase options to preserve habitat along a number of potential migration pathways intending, eventually, only to purchase conservation easements along one pathway as the actual migration pattern emerges. Similarly, potential conservation easement holders—committed to preserving coastal habitats and aware that sea level will rise, but unable to determine how far sea level will rise and how sea level rise and storm surge will affect coastal configuration and usage—might purchase options across a broad zone of potential future shoreline habitat with the intent to

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1. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW viii–ix (2d ed. 1994); ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 15–16 (2012); Don Gourlie, *The Wilderness Act at 50*, 44 ENVTL. L. 285, 285 (2014).
2. KATIE CHANG, LAND TRUST ALLIANCE, 2010 NATIONAL LAND TRUST CENSUS REPORT 5 (2011), <http://perma.cc/A6DS-RURA>.
3. *Id.* at 8.
4. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 14–22 (2d ed. 2005).

5. NATIONAL CONSERVATION EASEMENT DATABASE, *Completeness*, <http://perma.cc/8UBB-2NJT>.
6. See Jessica Owley, *Property Constructs and Nature's Challenge to Perpetuity*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64 (Keith Hirokawa ed., 2014) (discussing the inherent mismatch between static property tools and the changing world).

eventually purchase conservation easements to create new shoreline habitat preserves and storm buffers once they have learned enough to know where that shoreline will be.⁷

The ability of OPCEs to protect land in the context of uncertainty would be significantly increased if state legislatures amended current conservation easement enabling statutes⁸ to: (1) specifically recognize OPCEs, (2) immunize OPCEs from a range of potential common law challenges, and (3) integrate OPCEs into the burgeoning body of conservation easement law.

Part II describes the current relationship between the land trust community and climate change, then introduces OPCEs and discusses how they could fit into a conservation strategy. Part III examines the advantages OPCEs could provide in the shifting world climate change is creating, and addresses some potential objections. Part IV describes problems under the common law and the corresponding virtues of statutory recognition of OPCEs.

II. New Problems, Old Tools

Many species are at risk of extinction as a result of climate change-related impacts, such as ecosystem shifts, habitat modifications, and introductions of invasive species including diseases.⁹ Researchers still struggle to predict patterns of species dispersal and migration and rates of coastal loss.¹⁰ Programs to protect species will need to be flexible to account for multiple future scenarios.¹¹ Yet, even with the knowledge of impending changes to the land and need to retard climate change, land conservation organizations have been slow to change policies, programs, or choice of land conservation tools. While the Nature Conservancy—the world's largest and most sophisticated land trust—urges preserving larger portions of important ecosystems to adapt to the impacts of climate change,¹² it has not adopted an overarching approach for dealing with the

effects of climate change on its conservation strategy. Similarly, interviews we conducted with land trust professionals as part of a distributed seminar conducted in 2011 revealed that a third of the participants believed that it is likely or very likely that climate change will negatively affect the goals of their conservation easements.¹³ Twenty-two percent stated that climate change already was affecting their conservation work.¹⁴ While the majority of interviewees believed their conservation easements were flexible enough to deal with climate change,¹⁵ their responses expressed a clear sense that more could be done. Only 8% said that their organizations had either changed their conservation easement language or conservation easement acquisition policies to better deal with climate change, and just 17% stated that their land conservation organizations were actively considering how to respond to climate change.¹⁶ By far the most common response was that their organizations were doing “nothing” to prepare for climate change.¹⁷ In some cases, the lack of action could be due to uncertainty in available mechanisms for protecting a changing world.

Real estate options generally allow investing parties to mitigate risks associated with a lack of knowledge about the future by granting the right to purchase without the requirement to purchase. A more extensive use of OPCEs would offer conservation organizations a proven tool to deal with uncertain future scenarios such as shifting habitats and sea-level rise.

Imagine a conservation organization committed to preserving a species that depends upon a particular plant. The organization knows that the plant's range will migrate over time, but it does not know how fast or where it will migrate. OPCEs could enable the organization to purchase the right to preserve lands along various potential migratory corridors for the habitat, only exercising certain options as the habitat moves, as studies clarify where it will move, or preemptively to allow time for restoration of habitat that has been degraded.

7. For a more detailed discussion of these strategies, see *infra* Part IV.

8. As conservation easements ran into conflicts with historical property law rules for easements and covenants, states passed enabling acts to ensure their enforceability. See ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES (2010).

9. WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 1, 4, 6, 14-17, 23 (2014), <http://perma.cc/W59H-WZ4U>.

10. See, e.g., Terence P. Dawson et al., *Beyond Predictions: Biodiversity Conservation in a Changing Climate*, 332 SCI. 53, 53 (2011); Damien A. Fordham et al., *Plant Extinction Risk Under Climate Change: Are Forecast Range Shifts Alone a Good Indicator of Species Vulnerability to Global Warming?*, 18 GLOBAL CHANGE BIOLOGY 1357, 1357 (2012).

11. See, e.g., Robert J. Nicholls & Anny Cazenave, *Sea-Level Rise and Its Impact on Coastal Zones*, 328 SCI. 1517, 1517 (2010); Rebecca K. Runting et al., *Does More Mean Less? The Value of Information for Conservation Planning Under Sea Level Rise*, 19 GLOBAL CHANGE BIOLOGY 352, 352-54 (2013); Carla M. Sgrò et al., *Building Evolutionary Resilience for Conserving Biodiversity Under Climate Change*, 4 EVOLUTIONARY APPLICATIONS 326, 332-33 (2011) (suggesting protecting areas with a range of habitats, gradients, and refugia, and not focusing solely on connectedness); see also Lee Hannah et al., *Protected Area Needs in a Changing Climate*, 5 FRONTIERS IN ECOLOGY & ENV'T 131 (2007) (objecting to the current mode of fixed protected areas).

12. See THE NATURE CONSERVANCY, *Climate Change: Our Priorities*, <http://perma.cc/TX4C-KNDV>.

13. Adena Rissman et al., Presentation at Land Trust Alliance Rally in Milwaukee, WI: Conservation Easements in a Changing Climate (Oct. 15, 2011) (on file with authors); see also Jessica Owley & Adena R. Rissman, *Distributed Graduate Seminars: An Interdisciplinary Approach to Studying Land Conservation*, 2 PACE ENVTL. L. REV. ONLINE COMPANION 88, 88 (2011) (describing the distributed graduate seminar). Researchers interviewed more than 70 representatives from the land conservation community, including both nonprofit land trusts and government conservation agencies, and reviewed more than 250 conservation easements. See Adena R. Rissman et al., *Adapting Conservation Easements to Climate Change*, 8 CONSERVATION LETTERS 69 (2015) (describing data gathering).

14. Adena Rissman et al., Presentation at Land Trust Alliance Rally in Milwaukee, WI: Conservation Easements in a Changing Climate (Oct. 15, 2011) (on file with authors).

15. *Id.*

16. *Id.*

17. *Id.* However, in a Land Trust Alliance webinar for coastal land trusts, 33 of 43 respondents stated that their land trust was doing some type of climate change adaptation planning (but with 99 participants on the webinar, the majority of participants did not respond). Among barriers land trusts identified was uncertainty with how to proceed, both programmatically and with respect to expected climate change impacts. LAND TRUST ALLIANCE, *Coastal Land Trusts and Climate Change Adaptation*, <http://perma.cc/DER9-397X>.

Similarly, imagine a conservation organization committed to preserving a beach ecosystem, aware that sea levels will rise but unaware how far and how fast. The organization could purchase OPCEs reaching onto dry land, and then exercise or release OPCEs as the shoreline shifts. Such an approach may be particularly salient as a response to catastrophic weather events, where both damaged and threatened areas can change rapidly without notice.

In both of the scenarios above, the flexibility of OPCEs could add to the repertoire of land trusts and other organizations working to protect important species and lands. Using options in land conservation endeavors is not new, but their true potential to combat and adapt to climate change has not yet been realized.

Several land trusts already have experience using options to meet other important goals. For example, the Pennsylvania Land Trust Association suggests that options can be used for (1) “buying time,” for example, to secure financing; (2) “reducing risk” when “a land trust may tentatively identify a property as . . . important . . . but cannot risk purchase before a thorough investigation”; (3) “assembling parcels” when a particular conservation process depends on encumbering multiple parcels; (4) “handling messy ownership situations” allowing conservation organizations to acquire the right to purchase rights to a single piece of land separately from multiple owners; (5) “incentivizing action” using the limits of the option to motivate donors to act; (6) “compensating for lost opportunity” when a landowner must be compensated for keeping her land off the market; and (7) “controlling outcomes,” for example, “a land trust that transfers property to a local government may want an option to reacquire the property for a nominal or below-market value if the government’s promises are not kept.”¹⁸

III. The Promise and Peril of OPCEs

A. Recognized Benefits of OPCEs

The many advantages of OPCEs, six of which are listed below, can help conservation organizations better respond to uncertainties caused by climate change.

First, OPCEs allow conservation organizations time to marshal funding or arrange government acquisition. If conservation organizations acquire OPCEs in areas where conservation easements might mitigate extreme weather events, post-disaster funding could be used to exercise existing OPCEs. This would put in place property-based protections to preserve natural resources and protect against future extreme weather events. Land subject to predictable flooding or fire could be preserved undeveloped subject to conservation easements purchased with disaster relief money. In particularly disaster-prone areas, funds released after the first flood or fire could be used to purchase OPCEs. Funds after

subsequent catastrophes could be used to exercise specific options to purchase conservation easements to mitigate additional future events.

Second, land trusts sometimes purchase conservation easements preemptively, even when there is no obvious threat of development, but then their ability to control development is limited to terms negotiated before the threat materialized. OPCEs can protect against future threats of development without these complications. Once the threat emerges, the option can be exercised with terms that better anticipate the actual development threat. Should the land no longer be valuable for conservation, the organization has no obligation to exercise the OPCE.

Third, habitat corridors cannot function without sufficient concentrations of protected habitat.¹⁹ Broad habitat acquisition deals could use OPCEs to preserve species migration corridors or larger, more resilient blocks of protected habitat by assembling parcels.

Fourth, OPCEs might discourage harmful types of development on adjacent lands. Because private developers are not qualified holders of conservation easements, they cannot obtain OPCEs in advance to eliminate the possibility of their exercise.²⁰

Fifth, OPCEs might be used in conjunction with conservation leases or fixed-term conservation easements, allowing organizations to determine whether perpetual protection of the land is warranted during or after the original term. For example, a conservation organization might lease a parcel of land for 50 years to preserve its habitat values. In conjunction with the lease, the landowner could grant the organization an option to purchase a perpetual conservation easement on the parcel with an option period coterminous with the lease, thus ensuring that the land is protected for 50 years while reserving the right to determine whether the land should continue to be protected in perpetuity.

Sixth, options may tip the balance of power in favor of the option holder and therefore can be used to counter misconduct by ostensible conservation partners who fail to fulfill their conservation obligations.²¹ For example, a county might grant an OPCE to a private conservation organization to serve as a deterrent for government conduct inconsistent with the original conservation purpose.²² Rather than sue a public agency for its conduct, the private conservation organization could exercise the preexisting OPCE to buy the conservation land at a below-market price.

B. Anticipating Objections to OPCEs

An expanded use of OPCEs could face objections. First, some land trust professionals have asserted that long-term options would likely cost as much as actual conservation

18. PA LAND TRUST ASS'N, *Purchase Options: Gaining the Rate Without the Obligation to Acquire Property Interests*, <http://conservationtools.org/guides/27-purchase-options>.

19. See MALCOM L. HUNTER & JAMES GIBBS, *FUNDAMENTALS OF CONSERVATION BIOLOGY* 235-38 (3d ed. 2007).

20. See, e.g., Uniform Conservation Easement Act §1(2), 12 U.L.A. 174 (1981).

21. See PA LAND TRUST ASS'N, *supra* note 18.

22. See A. BENEDICT & EDWARD T. MCMAHON, *GREEN INFRASTRUCTURE: LINKING LANDSCAPES AND COMMUNITIES 1* (2006).

easements.²³ This objection is based on the traditional view of using OPCEs to buy financing time where the transaction is fully expected to go forward. Accordingly, it makes sense for the option price to be a significant portion of the final price of the conservation easement, as a down payment.

In contrast, OPCEs for climate change adaptation would be purchased as risk management devices with a relatively low probability of being exercised. Landowners should therefore be willing to grant options at relatively low prices, discounted by the probability that they will never be exercised. It is also worth noting that, in some land trust professionals' experience, options are often sold for far less than their reasonable value.²⁴ Because an option is no more than a right to future purchase, OPCEs generally do not give option holders rights to manage activities on the ground, thereby limiting potential stewardship costs.

Another critique is that a landowner might destroy the values an OPCE was intended to preserve before the option is exercised. Still, because OPCEs must be voluntarily granted, it is likely that the initial landowner is sympathetic to their purpose. When a landowner is less sympathetic or land changes hands, options may need to be reinforced with other interim protections. Conservation options could be coupled with conservation leases, term conservation easements, or even zoning to preserve baseline habitat values.²⁵ Further, by destroying habitat the OPCE was designed to preserve, landowners would destroy any possibility of the option being exercised, and thereby eliminate any possibility of payment or tax benefit. In situations where development value exceeds conservation value, this would be no protection. However, where values are similar, the presence of an OPCE would make landowners think twice before destroying habitat.

Overall, there is little "downside" to clarifying and reinforcing the power to grant options. The "upside" may be difficult to predict, but that is no reason not to offer OPCEs as an enhanced tool for conservationists.

IV. Updating the Law

A. Problems With the Common Law of OPCEs

Confusion surrounding the use of OPCEs results in large part from whether parties and courts think of the option

primarily as a contract or real estate interest.²⁶ How the OPCE is characterized bears on the applicability of common law rules such as rules against perpetuities and unreasonable restraints on alienation, rules related to transfer of the property,²⁷ and the remedies available for breach of an option agreement.²⁸ Litigation often arises when a party seeks to exercise an option and the optionor asserts that it is not enforceable. Optionors commonly argue that the option (1) is too vague to be enforced,²⁹ (2) constitutes an unreasonable restraint on alienation,³⁰ (3) was not intended to burden successors in interest,³¹ or (4) was purportedly transferred, but was not transferable.³² As discussed below, all of these problems are aggravated in the conservation easement context.

I. Too Vague to Be Enforced

An option to purchase a conservation easement may be entered into before all of the specific provisions of the conservation easement have been negotiated.³³ It may not be possible to specify all terms when creating the option to purchase agreement.³⁴ Conditions may change or new scientific knowledge may suggest different approaches, particularly if an option is intended to last for a significant period. Thus, courts may treat OPCEs as "agreements to agree" or "letters of intent" and refuse to enforce them.³⁵

Additionally, OPCEs may require the landowner to maintain the property in its current state or, at least, to preserve the conservation values articulated in the draft conservation easement. A contractual obligation to preserve land over a long period could easily become a source

23. E-mail from Ann Taylor Schwing, Of Counsel, Best Best & Krieger LLP, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with authors); E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with author).
24. E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Federico Cheever, Law Professor, University of Denver Sturm College of Law (Aug. 15, 2014) (on file with author).
25. See, e.g., *North Grand Mall Assocs. v. Grand Ctr., Ltd.*, 278 F.3d 854 (8th Cir. 2002); *Kelley v. Burnsed*, 805 So. 2d 1101 (Fla. Dist. Ct. App. 2002); *Venture Stores, Inc. v. Pac. Beach Co.*, 980 S.W.2d 176 (Mo. Ct. App. 1998); *Coomler v. Shell Oil Co.*, 814 P.2d 184 (Or. Ct. App. 1991).

26. See Gregory Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP., PROB., & TR. J. 129, 138-39, 151 53 (2000) (discussing alternative characterizations of options to purchase as either contract or property interests).
27. Compare Ronald B. Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 187-88 (1987); 2 COLO. PRAC., METHODS OF PRACTICE §61:27 (6th ed.); 63 TEX. JUR. 3D REAL ESTATE Sales §324; *Melrose Enters. v. Pawtucket Form Constr.*, 550 A.2d 300 (R.I. 1988); and *Scott v. Fox Bros. Enters.*, 667 P.2d 773, 774 (Colo. App. 1983) (contract interests), with, e.g., *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (N.Y. App. 1996); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3(2) cmt. c (2000); Gosfield, *supra* note 26 at 138-39; *Atlantic Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1191 (Colo. 2014); *Bauermeister v. Waste Mgmt. Co. of Neb.*, 783 N.W.2d 594, 600 (Neb. 2010); *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 858-59 (Utah 1998); *Nolan v. Nolan*, 262 S.E.2d 719, 724-25 (N.C. Ct. App. 1980) (property interests). See also *Anderson v. Parker*, 351 S.W.3d 827, 831 (Mo. App. 2011).
28. Compare RESTATEMENT (SECOND) OF CONTRACTS §359 (1981), with RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §8.3 (2000).
29. See, e.g., *Marshall v. Floyd*, 664 S.E.2d 793, 795-96 (Ga. Ct. App. 2008); *Cochran v. DeShazo*, 579 S.W.2d 408, 410 (Mo. Ct. App. 1979).
30. See, e.g., *Cole v. Peters*, 3 S.W.3d 846, 852 (Mo. Ct. App. 1999).
31. See, e.g., *Beeren & Barry Invs., v. Equity Trustee, LLC*, 2007 WL 6013583, at *2 (Va. Cir. Ct. June 25, 2007).
32. See, e.g., *Shower v. Fischer*, 737 P.2d 291, 295 (Wash. Ct. App. 1987).
33. ME. COAST HERITAGE TR., CONSERVATION OPTIONS: A GUIDE FOR MAINE LANDOWNERS (Forest Dillion et al. eds., 5th ed. 2003), <http://perma.cc/9KT2-SJD4>.
34. See Telephone Interview with Karin Marchetti Ponte, Gen. Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass'n (Dec. 3, 2014).
35. See Gosfield, *supra* note 26, at 134-35; see also WILLISTON ON CONTRACTS §70:95 (4th ed. 2015).

of ambiguity because natural systems are inherently dynamic. The impact on such ambiguity on enforceability is unclear.

2. Unreasonable Restraint on Alienation

An OPCE might need to be in place for decades before a conservation organization can determine whether its exercise would benefit the resource the OPCE was intended to protect. That does not mean the original option needs to last for half a century. However, it might mean that the option holder may need to be able to extend the option period for that long. Allowing an OPCE to remain unexercised for decades raises thorny questions regarding a variety of doctrines designed to further transferability and strike down unreasonable restraints on alienation.³⁶ Without legislative direction, it is not clear how courts will grapple with this issue.

3. No Intent to Bind Successors in Interest

The potentially long time frames of OPCEs also support arguments against the responsibilities of successors to the original optionor. *American Law of Property* states, “there is a strong tendency to construe options and rights of first refusal to be limited to the lives of the parties unless there is evidence of a contrary intent.”³⁷ However, with options to purchase held for long periods, both the property subject to the option and the option itself will likely change hands before the option is exercised. Technical property law arguments may allow optionors’ successors to challenge the exercise of options. This concern may be abated by articulating transferability in the option agreement and by legislative clarification.

4. Non-Transferability

Courts sometimes presume that options to purchase are “personal” to the original parties.³⁸ The ability to transfer the OPCE would be enormously important. While many land trusts are stable and well-managed, organizations sometimes dissolve, change priorities, or are unable to find hoped-for funding. While conservation goals may be advanced with some personal OPCEs, the most potentially beneficial agreements will include provisions for transferability. Again, legislative recognition of transferability would increase the usefulness of this tool.

B. Statutory Amendments to Clarify and Reinforce OPCEs

Even though OPCEs are already in use by numerous conservation organizations,³⁹ state enabling statutes do not recognize their existence. Modest amendments to existing conservation easement legislation could leave unaltered the broad existing pattern of land conservation in the United States and help guarantee OPCE law will be consistent with existing conservation easement law.

I. The Uniform Conservation Easement Act as Precedent

The Uniform Conservation Easement Act (UCEA) is the dominant conservation easement enabling law in roughly half the states.⁴⁰ We use it to show how any state’s legislation might reinforce and clarify OPCEs. The current version of the UCEA does not include any reference to real estate options.

First, we propose a statutory amendment to each state’s conservation easement enabling act, officially recognizing the existence and enforceability of OPCEs in the same way it does for conservation easements generally. Statutory recognition of OPCEs might increase their use.

Second, statutory amendments should limit the purposes for which OPCEs could be used, as the UCEA does through its definition of “conservation easement.”⁴¹ OPCE amendments could simply incorporate the conservation purposes currently applied to conservation easements in the state. This would integrate OPCEs into the growing body of conservation easement case law while limiting negative impact on non-conservation transactions.

Third, amendments should limit potential OPCE holders to parties capable of holding conservation easements, generally government entities and nonprofit organizations committed to conservation.⁴² This would enhance public legitimacy, and parties may be more amenable to allowing conservation easements in perpetuity.

Fourth, OPCE amendments could address potential common law infirmities: ambiguity, restraints on alienation, transferability of the burdens of the option to subsequent landowners, and transferability of the benefits of the option from one qualified holder to another. Conservation easement statutes have remedied similar common law infirmities for conservation easements. While the issues are sometimes different for OPCEs, the statutory structure can be easily adapted.

For example, section 4 of the Uniform Conservation Easement Act, titled “Validity,” states that a conservation easement is valid even if:

36. See generally JESSE DUKEMEINIER ET AL., PROPERTY 208 (7th ed. 2010); see also e.g., RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3(2) (2000); GA. CODE §44-5-60(b) (2012) and MASS. GEN. LAWS ch. 184 §23 (2014).
37. 6 AMERICAN LAW OF PROPERTY §26.67 (Supp. 1977); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3 (2000).
38. See, e.g., In re Maguire’s Estate, 466 P.2d 358, 688-89 (Kan. 1970). But see El Paso Prod. Co. v. PWG P’ship, 866 P.2d 311, 315-16 (N.M. 1993).

39. See *supra* introduction.

40. See K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 775; LEVIN, *supra* note 8.

41. Uniform Conservation Easement Act §1(1), 12 U.L.A. 174 (1981).

42. *Id.* §1(2).

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch and concern real property; or
- (7) there is no privity of estate or of contract.⁴³

Because an “appurtenant” easement is sturdier in our common law system than an easement “in gross,” subsection (1) should be retained in amendments reinforcing and clarifying OPCEs.⁴⁴ Similarly, subsection (2)—intended to ensure that the interest (the “benefit”) created was transferable—also applies to OPCEs. Subsection (3) is a broad antidote to arguments based on traditional common law doctrines. Subsections (4), regarding the imposition of negative burdens, and subsection (5), regarding affirmative burdens, might be relevant to the degree an OPCE might impose restrictions on land before the option was actually exercised. Subsections (6) and (7), regarding “touch and concern” and “privity of estate or contract” deal with specific doctrinal limitations on interests that “run with the land.” Because courts characterize options binding subsequent landowners as real covenants “running with land,” these provisions are also relevant to OPCEs.

An amendment applying the validity sections of conservation easement statutes to OPCEs could be as simple as inserting the words “or an option to purchase a conservation easement” after “conservation easement” in the first line of the UCEA’s §4. This amendment would also serve the purpose of integrating OPCEs into the growing body of conservation easement law.

2. Addressing Special OPCE Problems

The need for supplemental validity provisions regarding OPCEs arises from questions of vagueness and restraints on alienability. Conservation easement statutes could be amended to state: “options to purchase conservation easements shall not be void or unenforceable because the terms

of the conservation easements to be purchased have not been identified.” If a state legislature felt that authorizing such an open-ended conservation easement might put landowners at a disadvantage, the statute might further require that “the conservation purposes of the conservation easement have been identified and included in the purchase option agreement and the specific prohibitions and rights reserved by the landowner have been identified and included in the agreement document.”

Concerning the unreasonable restraint on alienability issue, a statutory amendment could provide: “options to purchase conservation easements shall not be deemed unreasonable restraints on alienation so long as they do not directly affect the transferability of the land encumbered by the option.” If this language seems intolerably broad to legislators, OPCEs could be limited to 50 years or even 30 years.

Finally, the dual nature of OPCEs—in contract and property—can create confusion regarding remedies. Although the UCEA contains no provision regarding remedies, the Colorado Conservation Easement Act does.⁴⁵ Including such a provision in OPCE amendments to conservation easement statutes would avoid confusion when breaches take place. A provision for the resolution of disputes that arise could also be added to facilitate enforceability.

It is not our purpose to resolve all OPCE issues with one stroke. Many will take issue with a broad statutory mandate for remedies for breach of an option. However, broad effective remedies will help make sure that options are effective tools for conservation.

V. Conclusion

The land trust community currently lacks the tools to deal with long-term climate change. Purchasers of both conservation easements and real estate in fee simple obtain rights to land without any guarantee that its conservation values will persist. Reviving and reinforcing OPCEs may offer land trusts a cost-effective tool for mitigating this problem. Only the decisions that specific landowners and conservation easement holders make in the decades to come will prove or disprove the actual utility of OPCEs. However, in light of the potentially dire effects of climate change on our current system of land conservation, it would be wise to include such an “option” in our conservation toolbox.

43. *Id.*, §4.

44. See 4 POWELL ON REAL PROPERTY §34.02[d] (Michael Allan Wolf ed., 2013).

45. COLO. REV. STAT. §§38-30.5-108(2), (3) (2014).

C O M M E N T

Comment on *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*

by Roger McCoy

Roger McCoy is the director of the Division of Natural Areas within the Tennessee Department of Environment and Conservation, where he works extensively on monitoring and managing rare species in Tennessee's natural areas. Mr. McCoy holds a Master of Science in botany.

The Tennessee State Natural Areas Act was signed in 1971. Tennessee has 85 state natural areas and 56 state parks under its Department of Environment and Conservation. The Department has an active land acquisition program that is funded in part by a real estate transfer tax. In addition, over the years, the Department has reached out to and worked with private land trusts.

The focus in the Division of Natural Areas is to protect rare communities and rare ecosystems. Profs. Federico Cheever and Jessica Owley correctly point out that conservation organizations may not “grapple with the problem of what happens when the resources a conservation easement”—or, in the state's case, ownership—“was intended to preserve are no longer present.” The experience in Tennessee, for example, is that a key threat to rare ecosystems, in addition to climate change, is invasive species. Buying a piece of property or having an easement is certainly not enough, if there is an assault from invasive plants. For example, the woolly adelgid is threatening much of the state's forests in the east, so even if a conservation easement was intended to preserve a hemlock stand, that stand may now be gone. Other forest pests include the emerald ash borer.

Aside from managing invasive species, there is a direct correlation with climate change and problems with *native* species such as red maple which has invaded prairies on the Eastern Highland Rim of Tennessee. The change in hydrological regimes has meant that in Coffee County, for example, red maple is almost uncontrollable; whereas, several decades ago red maple was not a concern.

Furthermore, in Tennessee, indirect results of climate change are evident including precipitation increases and

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fire regime changes—which are important because some native ecosystems even in the eastern U.S. are dependent upon fire. This means conservation easements or acquisitions will need to be managed accordingly. The challenge of preserving ecosystems is complicated by the fact, as the authors note, that ecosystems are inherently dynamic, even without increased CO₂ from fossil fuel. Therefore, if a land management agency acquires a property and assumes it can maintain the land in a wilderness state and walk away, it could lose a lot of rare species.

It important to note that simply preserving larger portions of important ecosystems to adapt to the impacts of climate change may not be enough without an overarching approach for *dealing* with the effects of climate change. For example, obtaining large tracts of land that include microhabitats so when the climate does change species can move positions (e.g., to a more shaded environment) may not work. Even if a species is not out of its temperature range, there may be some other factors, such as flooding or fire, that have changed the habitat or disturbance regime it requires.

There are also genetic factors related to climate change. As habitats shrink, what ecologists refer to as “genetic bottlenecking” and degradation of native systems could occur. There are also phenological changes—such as birds migrating at a different time and flowers opening at a different time. The problem is that a flower's opening may not be quite on par with the pollinator it needs with a change in climate.

The authors make the valid case for the use of long-term options, in addition to the way current conservation easement options are used—mainly as short-term options while conservation groups raise funds for purchases. Use of the legal mechanism they address is certainly important and would in no way *hinder*, and would most likely *assist*—

but there may be some other challenges in addition to the legal difficulties the authors note.

First, most of the imperiled species and ecosystems in Tennessee are naturally rare. They occur in rare habitats that may be endemic to just a few areas. This would make it very difficult to find a place outside of that native range that would suit the needs of the species using a predicted climate model.

Second, the most urgent threat to imperiled species in Tennessee is development pressures. The State and the Land Trust are just trying to keep up, as it is already difficult to work with multiple land owners and complete conservation planning in the short term. For example, it is possible to have fifteen heirs who own a piece of prop-

erty. Working decades ahead as the authors mention would really be a challenge. It is not a challenge to back away from, and the legal tool the authors recommend is needed, but implementing it will represent a great challenge.

Lastly, the scenario mentioned by the authors in which an organization purchases a long term option and realizes the option is not needed could be problematic from a public perception or landowner standpoint. For example, even if the organization determines that the species it is trying to protect is not migrating as expected, the people living around the area subject to the option may still want to have that prairie, fen or woods preserved

Notwithstanding these concerns, the authors' proposal certainly has merit and is worth exploring.

C O M M E N T

Response to *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*

by Liz McLaurin

Liz McLaurin is the president and CEO of The Land Trust for Tennessee. Notable among her projects for The Land Trust is her leadership in the revitalization of the 65-acre Glen Leven farm in Nashville.

The Land Trust for Tennessee (Land Trust) was founded in 1999, as a statewide land conservation organization. Our bread and butter is the donated conservation easement, which differs from purchased easements whereby owners are compensated for extinguishing some development rights on their property. There is a significant federal tax deduction for donated easements and in some cases there are state deductions as well, but not in Tennessee. The largest *number* of Land Trust projects is in Middle Tennessee—particularly in Williamson County, which was Nashville’s farmland, and also in Davidson County—but the greatest *acreage* is in a place that has been identified in Tennessee as a place that is particularly resilient to climate change, the South Cumberland.

As Profs. Federico Cheever and Jessica Owley recognize, the Land Trust takes into account conservation purposes, including protecting prime agricultural soils, wildlife habitat, rare and endangered species, open-space for recreation, and scenic and historic view sheds. Over the past 17 years, the Land Trust has protected nearly 119,000 acres across the state. Last year was a record year—the Land Trust protected nearly 19,000 acres; whereas, the year before we protected about 6,000 acres. Due to development pressures, people are really jumping on the bandwagon and feeling the urgency to protect land.

There are not a lot of conservation organizations that have used options to purchase conservation easements. The Land Trust has used options to acquire land in fee, but for a very short period of time. For example, the Land Trust works with the Department of Defense around Fort Campbell through the Army Compatible Use Buffer Program. In some cases, the Land Trust has worked with pri-

vate land owners around the base and purchased options as a way to be sure that the Land Trust was investing its time and money wisely. Later the Land Trust did move forward with the purchase of an easement, using monies from the Department of Defense.

The authors’ concept of options is quite fascinating as it relates to climate change. In Tennessee, there already are changes in the habitat of some freshwater fish which are thriving in some places but not doing as well in others because of water temperature. For the Land Trust, prioritizing work related to climate change is a significant challenge. For a lot of land trusts it would be a big leap to really figure out *how* to prioritize work related to climate change and how to best use the options tool. It’s a big thing to think about, but it’s a very good thing to think about.

Here are a few points about options to consider. The first issue is transferability of an option from one generation to the next. Does the option stay in one family or one owner to the next if there is a sale involved? This would be important to nail down, because with a 50-year timeline or 100-year timeline that kind of transferability is key question.

Second, if an organization is investing philanthropic dollars, people expect—even if it is a long-term horizon—that an organization is going to do what it say it is going to do with their money. Donor intent is something that ethical nonprofits really hold dear, and that would be a concern of the Land Trust as well. For example, if an organization spends \$5,000 of somebody’s money to acquire an option in 2018 and 50 years later it does not exercise that option, it would be a rare donor who would say, “Yes, that’s an okay thing for you to do.” We have some of them in Nashville and in Tennessee, but they are rare.

The urgency issue is another concern related to donors. Donors like to see an immediate return on their investment. For example, the Land Trust is about to have two big celebrations with the Tennessee Department of Envi-

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ronment and Conservation for two major projects that were great partnerships, because celebrations rally people behind the next project. Urgency for funding is always a good thing, but philanthropy may not get so excited about options.

In addition, another complication is that acquiring options could entail monitoring responsibilities. When the Land Trust has an interest in a property, staff visit that property every year to assess the conservation value and

ensure that the easement is being upheld. Arguably, conservation organizations that acquire options would have a responsibility even without a conservation easement in place to take on the increased responsibility to monitor properties every year.

Despite these concerns, the article is very interesting. The whole staff of the Land Trust has reviewed it and will consider the recommendations in our work.

C O M M E N T

Thoughts on *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*

by Bill Sylvester

Bill Sylvester is a shareholder at Baker Donelson's Birmingham office. He has substantial experience in federal tax law and real property law, including work on the real estate and tax implications of conservation easements.

The following brief comments on Profs. Federico Cheever's and Jessica Owley's article are from the perspective of a tax and real estate lawyer. First, a key issue to flag is the possibility of Trump Administration tax reforms that could decrease the value of the deductions for conservation easements, if the maximum federal tax rate is reduced.

Second, in reaction to their argument for statutory recognition of options to purchase conservation easements, is a tax deduction for giving an option raises valuation issues. Valuation is often the most important federal tax issue concerning conservation easements, which are covered by the deduction under Section 170(h) of the Internal Revenue Code. The Code requires a baseline report which is a recitation of the condition of a property on the date that a gift is made. In almost all cases, the baseline documentation is done by the donee, and donees very rarely find that there are not adequate conservation purposes because they hope to get a stewardship payment.

The trial associated with the Pine Mountain Preserve, in Shelby County, Alabama, near Birmingham, and in which no decision has yet been rendered, shows the challenges associated with valuation. Usually, after these types of trials occur, it might be 18 months or more before the judge issues an opinion. In most cases, IRS Form 8283 is filed and signed by the appraiser, the donor, and the donee, and in this case the original appraiser found a value of \$33,000,000 for three related conservation easements at issue.

At trial, the government took the view that the aggregate value of the conservation easements was approxi-

mately \$7,000,000. Meanwhile, the taxpayer presented an expert trial witness who testified to the number of around \$101,000,000.

As the trial concluded, the judge reportedly called counsel to the parties into his chambers to encourage the parties to "split the difference." The government lawyer assumed that this meant the average of \$7,000,000 and \$33,000,000 (for an amount of \$20,000,000), and expressed optimism that such a deal could be reached at that amount. The judge is said to have quickly clarified that he had been greatly impressed by the taxpayer's expert, and that the average should instead be taken between \$7,000,000 and \$101,000,000 (for an amount of \$54,000,000)!

Third, another crucial issue is the permanence of a conservation easement. In a recent filing in the Pine Mountain Preserve case, the government argued that the easement in question was not permanent because it had a plain, rudimentary amendatory clause. Unfortunately, such a position would preclude even minor amendments to conservation easements. Instead, greater flexibility is needed in order to maintain the integrity of the conservation commitment, while allowing for realistic, beneficial adjustments. One solution could be a national panel of ecologists and other experts that could approve or disapprove a proposed amendment. Another solution might prohibit only amendments for easements that are 10 years old or less. This could help account for long-term change. Such a solution would acknowledge that tax deduction is driving the boat, but it would allow some flexibility.

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A R T I C L E

Climate Exactions

by J. Peter Byrne and Kathryn A. Zyla

J. Peter Byrne is the J. Hampton Baumgartner Chair in Real Property Law at Georgetown University Law Center and Faculty Director at Georgetown Climate Center. Kathryn A. Zyla is the Deputy Director at Georgetown Climate Center.

I. Introduction

Monetary exactions are a tool that can mitigate the environmental or other public harms of land development. Local governments commonly impose fees, or monetary exactions, on new development to offset public costs such development will impose, such as exacerbated traffic congestion. This Essay argues that monetary fees offer significant potential as a tool to help local governments manage land development's contribution to climate change. Such "climate exactions" can put a price on the carbon emissions attributable to new development, such as increased vehicle miles travelled by new residents of a car-dependent subdivision. They can also mitigate development that reduces the jurisdiction's natural resiliency to climate change. While no jurisdiction has yet imposed exactions to address such climate problems, exactions are commonly used to address other negative externalities and public service needs and provide a promising legal template for climate concerns.

II. Why "Climate Exactions"?

Land development can exacerbate climate change and its consequences. New development can increase a jurisdiction's greenhouse gas ("GHG") emissions in many ways, such as by locating new residences, workplaces, or retail in areas not served by public transit, leading to increased driving. Development also affects the land's ability to respond to the impacts of climate change. For example, structures like sea walls built to protect development from sea-level rise can damage beaches and wetlands, encourage even greater development behind the wall (increasing risks of catastrophic failure), and aggravate flooding and erosion of neighboring properties.¹ If we are to successfully address land development's role in climate change, we will have to address both its contributions to emissions and its effect on climate resilience.

Land development is regulated primarily at the local government level. In recent years, there has been substantial regulatory action at the federal and state levels to reduce emissions from large stationary sources² and vehicles.³ Although continuation of such initiatives at the federal level now appears doubtful, federal efforts will have little impact on the land use patterns that drive transportation decisions. Rather, local planning decisions influence these patterns: they influence where and how people travel. In addition to cleaner fuels and more efficient vehicles, reducing emissions from transportation requires reducing miles traveled by fossil fuel vehicles, which is heavily influenced by land development patterns and the availability of transit. Additionally, while stationary sources like power plants are already part of an existing national regulatory regime for air emissions and other pollutants, it is much harder to regulate emissions from many small, distributed sources of emissions like buildings and transportation, at the national (or even state) level.

Local governments, on the other hand, have significant experience employing land use tools to mitigate environmental concerns.⁴ Although local governments may want to take vigorous regulatory action to reduce emissions, aggressive prohibitions on development may expose them to liability for regulatory taking (and may not be desirable for other policy reasons like economic development goals).⁵ The costs of litigating regulatory takings claims—let alone paying large compensation awards—are daunting, and lawyers for property owners are well aware of this vulnerability.

One promising approach that has not yet been applied to carbon emissions or adaptation is the use of monetary

This Article is adapted from Peter J. Byrne and Kathryn Zyla, Climate Exactions, 75 MD. L. REV. 758 (2016), and is reprinted with permission.

1. JESSICA GRANNIS, ADAPTATION TOOL KIT: SEA-LEVEL RISE AND COASTAL LAND USE 6 (2011).

2. See, e.g., *Clean Power Plan: What EPA Is Doing*, U.S. ENVTL. PROT. AGENCY (July 17, 2015), <http://www2.epa.gov/carbon-pollution-standards/what-epa-doing>.

3. See, e.g., *Cars and Light Trucks: Vehicle Standards and Regulations*, U.S. ENVTL. PROT. AGENCY (Oct. 23, 2015), <http://www.epa.gov/otaq/standards.htm>.

4. See generally JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND (2014).

5. Takings problems arising from regulatory efforts to adapt to climate change are discussed in J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69 (2012). See also James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998).

exactions. Climate exactions could condition new development upon payment for its impact on greenhouse gas emissions or the jurisdiction's climate change resiliency and use the funds to mitigate the impact.

An exaction is a required conveyance to the government of money or real property in exchange for the grant of a discretionary development permit.⁶ The government then uses the property or money to mitigate some public harm from the proposed development. Today, despite decades of scholarly criticism,⁷ exactions are a ubiquitous feature of the development process, requiring conveyances or fees to remedy increased traffic, overburdened schools, and a growing lack of affordable housing, among myriad other needs. Exactions permit developments to go forward despite their generation of public harms because they provide the means to mitigate those harms.

In *Nollan v. California Coastal Commission*⁸ and *Dolan v. City of Tigard*⁹ the United States Supreme Court required that every exaction have an “essential nexus” with a public harm justifying regulation¹⁰ and that the value of the property exacted be “roughly proportional” to the degree of harm threatened by the proposed development.¹¹ So long as the requirements are met, the use of exactions to address public harms is permissible under *Nollan* and *Dolan*.

Monetary exactions have become a particularly important form of exaction. Rather than conveying to the government an interest in real property, the developer pays the government an equivalent in money, which the government then spends to mitigate the public harm attributable to the development.¹² These development impact fees can be assessed for a wider range of community needs than can land exactions.¹³

An important safeguard is that the funds collected must be segregated in an account that may be used only to mitigate the harm for which the money was exacted.¹⁴ Many jurisdictions have legislated schedules of impact fees, which provide generally applicable formulas or tables of monetary charges for specific types and scales of development.¹⁵ Developers may prefer monetary exactions, and legisla-

tive development fees in particular, to in-kind exactions as being more predictable and transparent.

In *Koontz v. St. Johns River Water Management District*, the Supreme Court held that the constitutional test for exactions applies to monetary exactions as well.¹⁶ Justice Alito's opinion in *Koontz* affirms the value of exactions more forcefully than any prior Court opinion: “Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy.”¹⁷

This Essay will argue that *Koontz* does not pose a significant barrier to the use of climate exactions. Rather, climate exactions fall squarely within the Court's approval of monetary exactions that mitigate public harms.¹⁸ They can be structured to avoid the undue “leverage” that the Court identified as the rights violation, and to operate with transparency. Indeed, climate exactions can be assessed following established formulas that provide objective calculation of proportionality.

III. Applying a “Climate Exaction”

This Section will suggest ways in which exactions might be used to address both emissions and loss of adaptive capacity caused by development.

A. Climate Exactions to Address GHG Emissions

In the emissions context, developers might be charged a climate exaction based on the calculated “emissions impact” of the development. For example, the development may be found to generate substantial new automobile travel and therefore increased emissions from driving. The jurisdiction could use a fee on these emissions to invest in infrastructure to encourage more walking and biking to offset the emissions caused by increased motor vehicle traffic. The jurisdiction might also use a fee to support energy efficiency programs to offset emissions caused by energy use in the new building itself. In either case, the use of a monetary exaction allows the jurisdiction to pool funds received from multiple projects to make broader infrastructure investments that benefit the community in ways that individual on-site mitigation projects could not.

I. Demonstrating an Essential Nexus for an Emissions Fee

Development fees offer the flexibility to identify the most cost effective mitigation investments wherever they occur.

6. See, e.g., Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 623–24 (2004).

7. See, e.g., Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 465–67, 510 (1977) (criticizing exactions as unfair and inefficient burdens imposed by cartels of current homeowners).

8. 483 U.S. 825 (1987).

9. 512 U.S. 374 (1994).

10. *Id.* at 386; *Nollan*, 483 U.S. at 837.

11. *Dolan*, 512 U.S. at 391.

12. See, e.g., *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1355 (Cal. 1997).

13. See JULIAN CONRAD JUERGENSEMEYER & THOMAS. E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT LAW* 318–21 (3d ed. 2013).

14. See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. REV. 177, 228 (2006).

15. See JUERGENSEMEYER & ROBERTS, *supra* note 13, at 319–22.

16. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013). *Koontz* did not address whether the heightened scrutiny of *Nollan/Dolan* applies to legislatively scheduled impact fees. The analysis in this Essay assumes that *Nollan/Dolan* will apply to climate exactions.

17. *Id.* at 2595.

18. See *infra* Part III.

However, this flexibility may raise questions about whether a geographically distant mitigation project bears a strong enough nexus to the impact caused by the development. GHG emissions may offer a clearer nexus between impact and mitigation activity than other measures, even if the mitigation project occurs elsewhere in the jurisdiction.

Courts have been flexible with the scope of the nexus, as long as one can be demonstrated.¹⁹ For a fee imposed to mitigate a development's GHG emissions, the location of the mitigation project and the source of emissions reduced matter less than a fee based on infrastructure demand. Because climate change is a global problem, and GHGs mix uniformly in the atmosphere, emissions increases in one part of town can be "offset" by emissions reductions elsewhere.

A local government provides a logical boundary within which to reduce net emissions.²⁰ In communities with jurisdictionwide GHG emissions reduction goals the local government aligns with the geographic area in which mitigation strategies would occur, providing for a relatively straightforward administration of the program. Economically, it can be far more affordable to achieve GHG reductions across a wider geographic area than in a facility-by-facility manner.²¹ By pooling mitigation fees the jurisdiction can make the best use of funds by directing them to the most cost-effective reduction opportunities. As long as the community identifies a governmental interest in reducing GHG emissions,²² and assures that the fees will be spent to reduce emissions within the jurisdiction, the nexus test would be satisfied.²³

2. Demonstrating Rough Proportionality for an Emissions Fee

In order to pass the rough proportionality test, local officials would have to show that approximately the same level of emissions would be reduced by the mitigation effort as would be increased by the development project.

A strategy that quantified GHG emissions resulting from the traffic impacts of a development would most closely resemble the impact fees local governments currently impose. However, there is no legal reason to limit the emissions analysis to the gases resulting from transportation, as long as a nexus can be shown between the mitigation strategy and the development. Therefore, local officials might also calculate the contribution that the

development makes to emissions from its energy use or other sources.

a. Rough Proportionality: Transportation Emissions

It is relatively easy to quantify the GHG emissions associated with increased traffic, and even to estimate the reductions that could be achieved by investing in bicycling and walking infrastructure. Planners already estimate the traffic impacts of new development in order to establish uncontroversial development fees to improve road infrastructure. Travel demand forecasting models analyze the impacts of a given development project on the transportation system.²⁴ In order to calculate the GHG emissions associated with that travel, the travel forecast can then be fed into a transportation GHG modeling tool, such as the EPA's MOVES ("Motor Vehicle Emissions Simulator").²⁵

Traditional transportation impact fees use metrics like level of service ("LOS"), which identify the infrastructure service the local government will provide the community (e.g., x miles of road per capita), and then impose a fee on the development to cover the incremental infrastructure needed to maintain that LOS.²⁶ Recently, some progressive jurisdictions have started to develop multi-modal LOSs in addition to automobile-focused LOSs.²⁷ However, using GHGs instead of some version of LOS might simplify the calculation and the legal analysis by providing a standard metric that applies to all projects and mitigation efforts.²⁸

b. Rough Proportionality: Nontransportation Emissions

The prototypical development fee addresses a development's impact on traffic. However, if the concern is GHG emissions, any given development will also be responsible for emissions from its own energy use, and jurisdictions might consider requiring developers to offset these emissions as well. There is precedent for development fees to support green building initiatives. Arlington County, Virginia, imposes a fee on development projects to support the coun-

19. *Id.* at 875.

20. *See, e.g., Local Examples of Climate Action*, U.S. ENVTL. PROT. AGENCY, <http://www3.epa.gov/statelocalclimate/local/local-examples.html> (last visited Dec. 16, 2015).

21. A. DENNY ELLERMAN ET AL., PEW CTR. ON GLOBAL CLIMATE CHANGE, EMISSIONS TRADING IN THE U.S.: EXPERIENCE, LESSONS, AND CONSIDERATIONS FOR GREENHOUSE GASES iii (2003), <http://www.c2es.org/publications/emissions-trading-us-experience-lessons-and-considerations-greenhouse-gases>.

22. U.S. ENVTL. PROT. AGENCY, *supra* note 20.

23. To demonstrate that the nexus is truly in place, it would likely be important for communities to isolate funds collected for a given impact. *See supra* Part II.

24. ICF CONSULTING, ASSESSMENT OF GREENHOUSE GAS ANALYSIS TECHNIQUES FOR TRANSPORTATION PROJECTS 21 (2006), [http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25\(17\)_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25(17)_FR.pdf).

25. U.S. ENVTL. PROT. AGENCY, USING MOVES FOR ESTIMATING STATE AND LOCAL INVENTORIES OF ON-ROAD GREENHOUSE GAS EMISSIONS AND ENERGY CONSUMPTION 5 (2012), <http://www.epa.gov/otaq/stateresources/420b12068.pdf>.

26. PETER N. BROWN & GRAHAM LYONS, CITY ATTORNEYS DEPT., LEAGUE OF CAL. CITIES, A SHORT OVERVIEW OF DEVELOPMENT IMPACT FEES 7-9 (2003), http://www.ca-ilg.org/sites/main/files/file-attachments/resources__overviewimpactfees.pdf.

27. Sarah Peters, Impact Fees for Complete Streets: A Comprehensive Project Submitted in Partial Satisfaction of the Requirements for the Degree Master of Arts in Urban Planning 3 (2012) (unpublished M.A. thesis, University of California, Los Angeles), http://164.67.121.27/files/Lewis_Center/CompleteStreetsInitiative/Peters_report.pdf.

28. *See, e.g.,* Letter from Amanda Eaken, Deputy Dir. Sustainable Communities, & Justin Horner, Policy Analyst, NRDC, to Christopher Calfee, Senior Counsel, Governor's Office of Planning and Research (Feb. 13, 2014), http://www.opr.ca.gov/docs/NRDC_LOS2-13.pdf.

ty's green building educational fund; and Eagle County, Colorado rebates permit fees for residential projects that exceed green building standards, and they imposes additional fees on projects that do not.²⁹ Prof. Carl Circo has proposed greater use of this tool to promote energy efficient buildings, on the ground that green building projects "serve the public health and general welfare in the same way that environmental regulations do."³⁰ However, as with transportation, GHG emissions provide another tool to encourage energy efficiency, and with an already standardized metric. Conveniently, GHG emissions from building energy consumption are even easier to calculate than induced transportation emissions.

The "Greenhouse Gas Protocol," an accounting framework developed by nongovernmental organizations that serves as the foundation for nearly every GHG reporting standard in the world,³¹ identifies three "scopes" of emissions³²: direct emissions from a facility³³; emissions from purchased electricity, heat, or steam produced off-site³⁴; and other "indirect" emissions, which would include the travel-demand-related emissions discussed above.³⁵ The protocol provides guidance for quantifying these different types of emissions, including emissions associated with a particular project, and could be used to calculate an exaction level roughly proportional to emissions resulting from development.³⁶

3. Proposed Frameworks for Calculating an Emissions Fee

The authors are not aware of any jurisdictions that have imposed a fee on a development project to mitigate its GHG emissions. However, the consideration of a few alternative approaches suggests one potential methodology.

It might be tempting for a jurisdiction to attempt to quantify the societal cost of GHG emissions, and then charge the developer this amount to truly internalize the full cost of the emissions released by a given development.³⁷ However, it would be hard to argue that the local jurisdiction bears all of these costs and therefore that there is a clear nexus between this level of fee and the local government interest harmed by the development. There is also considerable debate about what the appropriate level

of the social cost of carbon should be, and the issue is very politically charged.³⁸ For these reasons, the social cost of carbon may not be the best fit for calculating local development fees.

An alternative approach would involve quantifying the emissions resulting from a given project and then identifying the local cost to achieve the same level of reduction, which avoids the challenging economic modeling exercise and maintains a clear nexus. Project costs may vary, and calculations will have to assume a baseline level of emissions that would have occurred in the absence of the project. However, the fee must only be roughly proportional (not a "precise mathematical calculation"³⁹), allowing the jurisdiction to estimate a reasonable local cost and determine fees accordingly.

B. Climate Exactions for Climate Adaptation

In the adaptation context, a climate exaction could take multiple forms. Most simply, it could require that existing environmental impact fees take into account the effect that climate change will have on the relevant impact. A more challenging but valuable version of this strategy would also quantify and mitigate any loss in adaptive capacity caused by the development, such as a project that made it harder for a wetland to migrate with rising sea levels.

1. Demonstrating Essential Nexus for an Adaptation Fee

A mitigation fee approach is already used to require developers causing a loss of wetlands to mitigate the loss on- or off-site, and fees in lieu of mitigation may be imposed.⁴⁰ *Koontz* involved this type of exaction, and the Court found in Mr. Koontz's favor because the local government failed to correctly apply the Nolan/Dolan test to the fee imposed.⁴¹

2. Demonstrating Rough Proportionality for an Adaptation Fee

Quantifying a project's impact on climate resilience may be more difficult, given complications regarding timing and uncertainty of future projections. In California, the Coastal Commission already charges mitigation fees to offset the impacts of private seawalls on beaches. Owners of the Ocean Harbor House Condominium in Monterey, California requested a permit to build a 585-foot seawall

29. Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM & MARY ENVTL. L. & POL'Y REV. 55, 73 (2009).

30. *Id.* at 77.

31. *About the GHG Protocol*, GREENHOUSE GAS PROTOCOL, <http://www.ghg-protocol.org/about-ghgp> (last visited Dec. 16, 2015).

32. GREENHOUSE GAS PROTOCOL, A CORPORATE ACCOUNTING AND REPORTING STANDARD 25 (rev. ed. 2004), <http://www.ghgprotocol.org/files/ghgp/public/ghg-protocol-revised.pdf>.

33. *Id.*

34. *Id.*

35. *Id.*

36. GREENHOUSE GAS PROTOCOL, THE GHG PROTOCOL FOR PROJECT ACCOUNTING (2005), http://www.ghgprotocol.org/files/ghgp/ghg_project_protocol.pdf.

37. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

38. See, e.g., PETER HOWARD, OMITTED DAMAGES: WHAT'S MISSING FROM THE SOCIAL COST OF CARBON (2014), http://costofcarbon.org/files/Omitted_Damages_Whats_Missing_From_the_Social_Cost_of_Carbon.pdf; Andrew Childers, *Putting a Social Price on Carbon. Is \$37 a Ton Adequate?*, BLOOMBERG (BNA) ENERGY & ENV'T BLOG (Feb. 28, 2014), <http://www.bna.com/putting-social-price-b17179882522/>.

39. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

40. U.S. ENVTL. PROT. AGENCY, EPA-843-F-08-002, WETLANDS COMPENSATORY MITIGATION, http://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf.

41. *Koontz*, 133 S. Ct. at 2597–98.

to protect the complex.⁴² As a condition of the permit, the Coastal Commission imposed a \$2.15 million beach impact fee and dedication of public beach access through a parking lot in the complex based on the *historical* rate of erosion and the recreational value of the beach.⁴³ The court upheld this fee under *Nolan/Dolan*.⁴⁴

In an adaptation context, however, regulators may need to reconsider how they calculate the beach fee in the following ways:

- (1) Erosion rates are likely to increase as sea levels rise, so regulators may need to project *future* erosion rates over the life of the project to adequately mitigate the impacts.
- (2) Beaches and natural shorelines provide important flood risk reduction benefits that will become increasingly important to communities as the climate changes.⁴⁵ With development, these resources will be unable to migrate inland to avoid erosion from rising sea levels.

Regulators should account for ways that climate change will affect the currently calculated impacts (e.g., recreation) of a development in the future, as well as how the project may exacerbate future risks of climate change impacts to neighboring properties. As this example shows, rough proportionality for adaptation may require more of a risk-mitigation analysis, which may be harder to calculate and monetize than GHG emissions are. The amount of an adaptation fee probably should be discounted to reflect that it addresses climate harms that will occur at an uncertain time in the future. Finally, as in the emissions discussion above, the requirement is only that the jurisdiction demonstrate *rough* proportionality, not a precise mathematical calculation.

IV. Addressing Critiques

We can anticipate some concerns about our proposal for climate exactions. An immediate objection may be that such exactions would unduly raise the costs of housing. When the measure of an exaction is known to a developer before initiating a project, the landowners will bear the costs of the exaction because developers will pay the landowners less for their land.⁴⁶ Lower prices for land may decrease the amount of land available for development. But given that development of such a parcel will impose costs on all from GHG emissions or weakened resilience, it seems both efficient and fair for the exaction to discourage development of the site.

In some circumstances, the costs of an exaction likely will be passed on to purchasers in the form of higher real

estate prices.⁴⁷ If the exaction is used to benefit the site (e.g. zero-emission bus line to the burdened site), a higher price paid could be appropriate because the development will be more valuable due to the added public infrastructure. However, if the municipality funds the bus line elsewhere within the jurisdiction, then the cost of the burdened parcel will rise without any increase in value. This may be justified as a strategy to discourage development at a site that will create large new emissions and encouraging new development where climate impacts will be smaller.

Some may express concern that local governments are not the proper level of government to impose regulations directed at reducing GHG emissions. Of course, the federal government has exclusive authority to regulate emissions from motor vehicles, with a notable statutory exception for California, and co-regulates emissions from power plants along with the states.⁴⁸ But local land use regulations do not regulate tailpipe or building emissions or gas mileage; rather, they are the chief tool available to reduce vehicle miles traveled, which has an obvious and independent effect on emissions. Moreover, local governments are able to provide alternatives to automobile travel, by providing bicycle and pedestrian options and developing public transit, and they implement the building codes that drive the energy consumption of new buildings. In addition, preparing for the impacts of climate change is an inherently local concern, as sea-level rise, increased storms, or urban heat will affect each jurisdiction according to its own location and presence of features to mitigate these effects. There seems to be no reasonable argument that climate exactions or other land use regulations aimed at reducing emissions or responding to the impacts of climate change are preempted by federal law.⁴⁹ On the contrary, the Supreme Court has often stated that land use regulation is primarily entrusted to state and local governments and has even read federal authority narrowly to preserve local authority.⁵⁰

47. See Rosenberg, *supra* note 14, at 211.

48. 42 U.S.C. §7543 (2012). 42 U.S. Code §7411.

49. In *American Electric Power Co. v. Connecticut*, the United States Supreme Court held “that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” 131 S. Ct. 2527, 2537 (2011). Although the Court did not address whether the Clean Air Act also preempts state claims based on GHG emissions, *id.* at 2540, other courts have held that it does not. *E.g.*, *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013). But even if the Clean Air Act does preempt state and federal tort claims against power plants, the scope of the Act’s preemption would not reach local land use regulations, because the Clean Air Act only preempts state action to the extent that the EPA is regulating at the national level. Current EPA GHG regulations under the CAA address vehicle tailpipe emission rates and power plant emission rates, not land-use patterns that lead to greater use of fuels. In contrast, other state actions have been expressly preempted by the Clean Air Act. For example, states are prevented from adopting or attempting to enforce standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, 42 U.S.C. §7543(a), although even in this case, the Act also explicitly allows the state of California to seek a waiver to this provision, 42 U.S.C. §7543(b), and allows other states to adopt California’s standards. 42 U.S.C. §7507.

50. See, e.g., *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (finding that construction of Clean Water Act to permit federal jurisdiction over abandoned sand and gravel pit “would result in a significant impingement of the States’ traditional and primary power

42. *Ocean Harbor House Homeowners Ass’n v. Cal. Coastal Comm’n*, 77 Cal. Rptr. 3d 432, 43 (Cal. Ct. App. 2008).

43. *Id.* at 439.

44. *Id.* at 450.

45. See, e.g., FLA. STAT. ANN. §163.3178 (West 2015).

46. See Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: A J. POL’Y DEV. & RES. 139, 153 (2005).

Similarly, the reality that climate change is a planetary problem, meaning that local emissions contribute to harm globally, should not preclude local efforts to reduce local emissions. Local emissions contribute to aggregate global emissions, which impose both global and local harms. Local governments have jurisdiction over local land development; no global entity can address emissions from such local development. Climate exactions do not attempt to regulate any economic activity outside of the regulating jurisdiction; for example, they neither discriminate against nor burden interstate commerce.⁵¹

Emissions reductions achieved by one local government could have little effect if other localities continue to grow emissions at historic levels. However, local government initiatives such as climate exactions may lead to broader collaboration on difficult climate problems, because local governments motivated to address climate issues will not place themselves at a short-term comparative economic disadvantage if acting in concert with other localities. In addition, coordination of climate land use regulations within metropolitan regions, among states, and even internationally could create a more efficient regulatory structure with greater benefits. Concern about climate change has led to novel efforts among states and localities to coordinate land use to adapt to effect greater reductions of GHGs.⁵² Successful climate policy measures often bubble up from lower levels of government rather than emerging from top down directives.⁵³

V. California: A Compelling Candidate for Climate Exactions

In addition to the constitutional permissibility of climate exactions, a key question is whether a jurisdiction has the legal and technical capacity to undertake this approach. Environmental protection statutes at the state level could provide tools for a jurisdiction to impose a GHG mitigation fee.⁵⁴ Some state environmental policy acts also incorporate climate change explicitly,⁵⁵ and perhaps these states

are well suited to creating local development policies to reduce emissions.

The State of California might be an excellent place to explore climate exactions, for a number of reasons. First, California is one of the states with its own state-level environmental protection statute, the California Environmental Quality Act (“CEQA”).⁵⁶ CEQA does not independently authorize a jurisdiction to impose exactions on developers, but it does provide that:

[a] lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the ‘nexus’ and ‘rough proportionality’ standards established by case law.⁵⁷

Most importantly, CEQA now requires that California agencies analyze the GHG emissions of proposed projects and reach a conclusion regarding the significance of those emissions.⁵⁸ The analysis must include the project’s potential energy use, including transportation-related energy, and ways to reduce energy demand⁵⁹; agencies also must consider potential mitigation measures to reduce those emissions.⁶⁰ A GHG mitigation fee would be well aligned with this direction to consider mitigation measures, particularly if the fee were included in a local climate action plan.

Second, California has a particularly acute local government funding challenge, increasing jurisdictions’ dependence on development fees.⁶¹ The GHG mitigation fee would create a new funding source for emissions reduction or climate adaptation projects.

Finally, California has already been a leader on the development of innovative laws and policies to address climate change.⁶² It enacted S.B. 375, requiring the state to set regional targets for GHG reductions from passenger vehicles, and requiring metropolitan planning organizations to prepare a Sustainable Communities Strategy (“SCS”) as part of their Regional Transportation Plans.⁶³ S.B. 375 could also provide a framework for incorporating GHG mitigation fees into an SCS. The fee could, in turn, provide the mechanism to implement the plan and achieve the goals of S.B. 375, rather than stopping at the planning stage for lack of funding. This approach would also offer developers a streamlined approval process from the incentives provided in the legislation.

over land and water use”); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

51. *Cf. Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014) (finding that California low carbon fuel standard does not discriminate against interstate commerce).

52. *See, e.g.*, SOUTHEAST FLORIDA REGIONAL CLIMATE CHANGE COMPACT, <http://www.southeastfloridaclimatecompact.org/>; TRANSPORTATION AND CLIMATE INITIATIVE OF THE NORTHEAST AND MID-ATLANTIC STATES, <http://www.transportationandclimate.org> (last visited Jan. 31, 2016).

53. For example, current federal vehicle GHG standards build on standards established by California and followed by other states under §177 of the Clean Air Act. Likewise, the Clean Power Plan recently finalized by the EPA builds on existing state-level limits.

54. *See, e.g.*, Michael B. Gerrard, *Climate Change and the Environmental Impact Review Process*, 22 NAT. RES. & ENV’T, Winter 2008, at 20, 24 (discussing the extent to which state and federal environmental reviews consider climate change in their analyses).

55. *ELA Guidelines for Assessing the Impact of a Project on Climate Change*, SABIN CENTER FOR CLIMATE CHANGE LAW, <http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center/environmental-assessment-protocols-consideration-climate-change#StateGuidelines> (last visited Jan. 31, 2016).

56. *See* CAL. PUB. RES. CODE §§21000-165 (West 2007).

57. CAL. CODE REGS. tit. 14, §15041(a) (2015).

58. CAL. CODE REGS. tit. 14, §15064.4 (2015).

59. CAL. CODE REGS. tit. 14, app. F.

60. CAL. CODE REGS. tit. 14, §15126.4(c).

61. *See, e.g.*, JEFFREY I. CHAPMAN, PUB. POL’Y INST. OF CAL., PROPOSITION 13: SOME UNINTENDED CONSEQUENCES 11 (1998), http://www.ppic.org/content/pubs/op/OP_998JCOP.pdf.

62. The political elements contributing to California’s strong support for policies addressing climate change are analyzed insightfully in Eric Biber, *Cultivating a Green Political Climate: Lessons for Climate Change Policy From the Defeat of California’s Proposition 23*, 66 VAND. L. REV. 399 (2013).

63. Sustainable Communities and Climate Protection Act of 2008, S.B. 375, 2008 Leg., 2007–08 Sess. (Cal. 2008), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf.

Other state bills have been met with considerable political opposition, being characterized as attempts by the state to take land use decisions away from local government.⁶⁴ Although emissions mitigation fees may be met with political opposition, but they would remain in the hands of local officials and planners, which might make them more politically palatable than more state-driven approaches.

VI. Conclusion

The imposition of fees on developers to mitigate GHG emissions offers several benefits to local governments concerned with meeting the *Nollan* and *Dolan* tests. First, it may actually be easier to apply these tests to monetary fees than to physical dedications of property, whose value may be harder to calculate and demonstrate as roughly proportional. Second, GHGs provide a consistent metric for which there are standard methodologies to calculate. Based on this analysis, there is no constitutional barrier to local governments imposing a fee on developments in order to mitigate GHG emissions.⁶⁵ However, barriers still exist: a fee enabling act may be required due to state-level restrictions, and political opposition may weigh against the policy.

A. Challenges

In difficult economic times, jurisdictions are often wary of not being sufficiently welcoming of new development. Rather than imposing new fees, some jurisdictions waive or defer existing impact fees to court economic development.⁶⁶ Political inertia is a factor as well, and the GHG mitigation fee idea is a relatively new one. Additionally, although GHGs may provide a more transparent method

for connecting new development to the need for alternative transportation infrastructure, it may be more expedient to stick with traffic impacts as the basis for the fee, if only to avoid a political battle.

B. Opportunities

On the other hand, jurisdictions interested in adopting strategies to address GHG emissions should consider a mitigation fee placed on new development. It provides a source of funding for implementation of climate goals, and ties the cost for any given development to the impact of that specific development. The funding aspect of this strategy is worth additional emphasis—to the extent that state and federal gasoline taxes fund transportation projects, those sources of funds are already inadequate to meet spending obligations,⁶⁷ and will decline even further if climate change policies reduce GHG emissions by decreasing fuel consumption.⁶⁸ A GHG mitigation fee would put the power to manage GHGs—and to pay for them—in the hands of local governments.

Given the *Koontz* decision, the safest approach for a jurisdiction is to design a fee program that applies to developers broadly rather than ad hoc, as well as to meet the *Nollan* and *Dolan* tests. This approach should be workable in the case of GHG emissions mitigation given the availability of standardized quantification tools and methodologies.

Jurisdictions that may have struggled to justify transportation impact fees based on other metrics may find that applying a GHG emissions lens to the analysis reveals both an essential nexus and a rough proportionality that might otherwise be difficult to demonstrate. For these communities a GHG mitigation fee may offer a viable strategy to address emissions reductions in local land use decisionmaking.

64. See, e.g., Lawrence J. McQuillan, *Good News! SB 1 Dies (For Now)*, IN-DEP. INST., THE BEACON (Sept. 25, 2013, 5:26 PM), <http://blog.independent.org/2013/09/25/good-news-sb-1-dies-for-now/>; Stephen Frank, *Senate Bill 1: Good Bye California Republic, Hello California "Soviet Socialist" Republic or the "CSSR" for Short*, AGENDA 21 RADIO (Aug. 12, 2013), <http://agenda21radio.com/?p=697>; Damien Newton, *Gov. Brown Could Sign Bill to Help Finance Sustainable Development in CA*, STREETS BLOG (Aug. 9, 2013), <http://la.streetsblog.org/2013/08/09/gov-brown-could-sign-bill-to-help-finance-sustainable-development-in-ca/>.

65. Some states require that an expenditure of a monetary exaction must directly benefit the land charged for the impact fee. See, e.g., *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000). While these states apply the rule to impact fees for construction of public capital projects, they do not seem to apply the rule to monetary exactions designed to mitigate environmental harms. Even if they did, climate exactions to mitigate emissions do directly benefit residents of the burdened development as much as other residents. For exactions to address loss of adaptive resilience, however, the analysis might require the adaptation measures to benefit the burdened residents, so that investments to increase the community's adaptive capacity would need to protect and serve the development, although not exclusively.

66. See, e.g., *Development Impact Fee Deferral Program*, CITY OF ELK GROVE, http://www.elkgrovecity.org/city_hall/departments_divisions/economic_development/incentive_programs/development_impact_fee_deferral_program (last visited Dec. 18, 2015).

67. CONG. BUDGET OFF., THE HIGHWAY TRUST FUND AND THE TREATMENT OF SURFACE TRANSPORTATION PROGRAMS IN THE FEDERAL BUDGET 5 (2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45416-TransportationScoring.pdf>.

68. See, e.g., Pacyniak et al., *Reducing Greenhouse Gas Emissions From Transportation: Opportunities in the Northeast and Mid-Atlantic*, GEORGETOWN CLIMATE CENTER 15 (2015), http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCCReducing_GHG_Emissions_from_Transportation-11.24.15.pdf.

C O M M E N T

Comment on *Climate Exactions*

by Christopher V. Carlyle

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In 2004, I was hired to work on an appellate matter involving Coy A. Koontz, Jr.¹ and the St. Johns River Water Management District. That was the beginning of a legal odyssey that would last for well over a decade as the case wound its way through Florida's intermediate appellate courts, the Florida Supreme Court, the United States Supreme Court,² and back to the Florida courts before its ultimate resolution in 2016.

At its most basic, the Supreme Court's *Koontz* opinion held two things. First, it applied the unconstitutional conditions doctrine to monetary exactions, and held that the conditions placed on the issuance of a permit by a municipality must meet the tests set forth in *Nollan* and *Dolan*.³ Specifically, those cases held that the exaction imposed by a governmental agency must have an "essential nexus" with the public harm that would be created by the permitted development, and that the substance of the exaction be "roughly proportional" to the threatened harm. The *Koontz* decision also held that a taking may occur when the exaction is either a condition subsequent to the issuance of the permit, or a condition precedent.

In the years that I worked on the case, and for all its complexity, the basic principal seemed fairly straightforward and logical. When I would explain what the case was about to those who asked, I would say that the real issue was when a governmental agency is asking a landowner for something (be it property or money) in exchange for the issuance of a permit, the item sought ("the exaction") must be tied to the harm that the development would cause. Of course, the constitutional issues involved were exceedingly complex, though the overriding principal, or the starting point if you will, seemed fairly self-evident.

Authors Jay Peter Byrne and Kathryn A. Zyla argue that the principals of essential nexus and rough proportionality may, and should, be extended to the harms caused in the context of climate change. The first question would be are such "climate exactions" legal under the principals set forth in *Koontz*, and it certainly seems that they are. *Koontz*

did not change the tests previously set forth in *Nollan* and *Dolan*, and those tests require a connection between the harm caused by the development and the exaction sought to mitigate that harm. It logically follows that there is no reason to exclude a "harm" in the context of environmental damage caused by a particular development.

The authors discuss climate exactions in two contexts, and discuss how they might occur relative to the potential harms in those scenarios. Specifically, they propose climate exactions to counteract greenhouse gas ("GHG") emissions and to combat climate adaptation.

When considering climate exactions in either of these contexts, it would seem critical that the methodology used to determine the exaction be largely unassailable and widely accepted. Over the years many courts have gone to great lengths to criticize land use exactions as being arbitrary, and they have criticized local jurisdictions for "extorting" whatever concessions they deem appropriate. As one author has explained, this "extortion narrative" has been widely accepted as fact, and therefore exactions (including those that are entirely defensible and legitimate) are viewed through a skeptical prism.⁴ As the author explains, under the extortion narrative, "local officials act in ever-present bad faith by misusing their regulatory powers to coerce concessions by developers seeking land use approvals." The author goes on to suggest that the "extortion narrative" is not supported factually, though it has been used to justify the changes to exactions law with culminated in the *Koontz* decision.

The roots of the extortion narrative in the Supreme Court are found in Justice Scalia's 1987 opinion *Nollan v. California Coastal Commission*. In *Nollan*, he wrote that if the condition for a permit was unrelated to the state interest sought to be protected, then the condition would amount to "an out-and-out plan of extortion" to seize the landowner's property.

This language was seized on by a judge on Florida's Fifth District Court of Appeal in one of the early decisions in the *Koontz* litigation. In 2003, the St. Johns River Water Management District appealed an order in *Koontz's* favor to that Court. The Court, in a per curiam opinion, dismissed the appeal for lack of jurisdiction because the order was not

1. The initial permit was sought by Coy A. Koontz, Sr. in 1994. The matter lasted so long that Mr. Koontz, Sr. passed away, and his son, Coy A. Koontz, Jr., became the party in interest as representative of his estate.

2. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

3. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

4. Daniel P. Selm, *Takings and Extortion*, 68 FLA. L. REV. 323 (2016).

a final appealable order.⁵ However, one judge on the panel concurred specially in the opinion, and wrote:

I concur that we do not have jurisdiction and must dismiss this appeal. I write only to describe the extortionate actions of the St. Johns River Water Management District (St. Johns) in this case as shown in the trial below. I hope that upon remand to the District, it will agree to a reasonable option for the property owner. I also hope that the District will stop the extortionate demands on property owners which this case demonstrates.⁶

To that judge, and to others who have considered in the case,⁷ the seemingly indefensible actions by the District cried out for a remedy for Mr. Koontz. Further, Justice Alito's opinion in *Koontz* brought full circle the extortion narrative in the case identified by a concurring Florida judge a decade before. Justice Alito's opinion supported the extortion narrative by noting that "land use permit applicants are especially vulnerable to the type of coercion" exerted by local governments due to the economic realities of development.⁸ He went on to state that "extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."⁹

Thus, the extortion narrative is quite powerful and is ingrained in Supreme Court jurisprudence, including *Koontz*, and it was used to justify the decision. As such, governmental agencies seeking to impose exactions (be they climate exactions, or otherwise) must be prepared to overcome the perception that all exactions are a form of extortion until proven otherwise.

Of the two categories of climate change harm sought to be addressed by Profs. J. Peter Bryne and Kathryn A. Zyla, it would seem that exactions addressing GHG emissions would be much more likely to survive attack under the extortion narrative. The reason for this is that, as the authors point out, it is common for planners to impose impact fees which take into account increased traffic. The

number of additional cars can be reasonably quantified. While climate exactions relating to GHG's is obviously a different context, the concept of additional autos impacting the community makes sense, and has been accepted for many years. It would seem the harder lift would be in the calculation of the fee, and what the funded mitigation might be.

Further, in the context of climate adaptation, the entire exercise would be far more speculative because, as the authors point out, "adaptive measures raise additional complications regarding the timing and certainty of future projections." The speculative nature of what will (some would argue that the question involves what "might" occur, as opposed to "will") occur in the future, and given the many variables involved, the argument that such fees are a unfounded exercise in extortion would be much easier for opponents of the fees to make.

As a final point, it is clear that the viability of such fees would be remarkably dependent on the jurisdiction in which the permits are sought. Some states and cities embrace the concepts of climate change and adopt measures to actively combat the problem, while others deny the issue entirely. Planners and politicians throughout the country are actively attempting to address climate issues by avoiding terms such as "climate change" which will immediately raise a negative reaction from some sectors. "Resilience" seems to be the most popular term to avoid an instant backlash to proposals addressing the problem. In 2015, the Promoting Resilience and Efficiency in Preparing for Attacks and Responding to Emergencies Act ("PREPARE"), a bipartisan bill to help the federal government recover from extreme weather events, conspicuously avoided any mention of the term "climate change," yet the word "resilience" was used 40 times. The semantics were not enough to allow the bill to become law, but the lesson seems clear. Local governments might be more willing (again, depending on where they are) to seek to impose "resilience exactions" as opposed to "climate exactions."

5. *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267 (Fla. 5th DCA 2003).

6. *Id.* at 1268-69 (Pleus, J., concurring specially).

7. *See, e.g., St. John's River Water Management Dist. v. Koontz*, 908 So. 2d 518, 519 (Fla. 5th DCA 2005) (Torpy, J. concurring and concurring specially) (noting that if the Court had jurisdiction, "I would affirm the trial court for the reasons expressed by Judge Pleus in *Koontz II*").

8. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

9. *Id.* at 2595.

C O M M E N T

Climate Exactions: One Tool in a City’s Toolbox

by Adam Freed and Jake Elder

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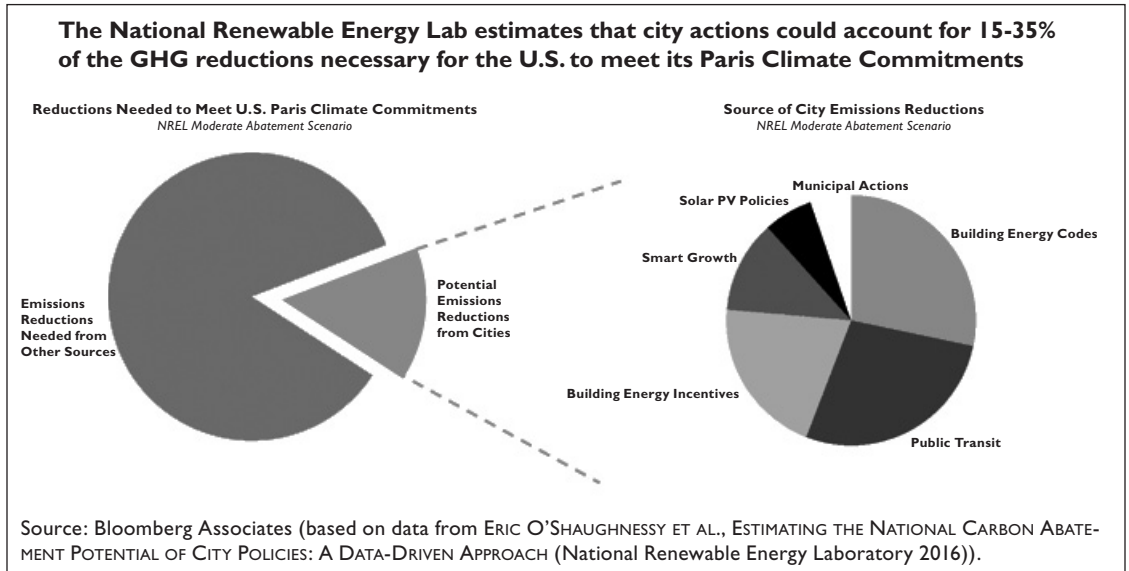
I. The Role of Cities in Addressing Climate Change

Climate change is a real and present danger that must be aggressively addressed to protect people, ensure economic growth, and preserve our natural systems. Reducing greenhouse gas (GHG) emissions and protecting communities from natural hazards requires rethinking every facet of the built environment. From where and how we build, to how we generate energy and move goods and people, to how we integrate nature into our cities, we must fundamentally change our approach to development and infrastructure investments. Local governments are a critical player in this effort.

Local governments—particularly cities—have many of the tools and powers needed to cut carbon emissions. A report by the National Laboratory for Renewable Energy (NREL) estimates that cities can contribute approximately 15–35% of the remaining carbon reductions needed to achieve the U.S.’s COP21 target.¹ Local governments are also on the frontlines of responding to climate hazards when they occur and have a tremendous stake in reducing climate risks. Cities have also demonstrated a willingness to take action on climate

change; more than 130 U.S. Mayors have signed on to the Global Covenant of Mayors, committing their cities to take action to reduce carbon emissions.

J. Peter Byrne and Kathryn Zyla offer an intriguing new mechanism for municipalities to address climate change. They propose that local governments levy a climate exaction, or fee, on new developments to offset the increased GHG emissions or climate risks caused by the new development. This fee is modelled on exactions commonly used to mitigate issues such as traffic congestion or infrastructure needs. Following legal precedent, climate exactions would need to be “roughly proportional” to the impact of new development and used to fund actions that have an “essential nexus” to offset the harm caused by the developments to which they are applied.²



1. ERIC O'SHAUGHNESSY ET AL., ESTIMATING THE NATIONAL CARBON ABATEMENT POTENTIAL OF CITY POLICIES: A DATA-DRIVEN APPROACH vi (National Renewable Energy Laboratory 2016), <http://www.nrel.gov/docs/fy17osti/67101.pdf>.

2. As outlined by Byrne and Zyla, the courts have ruled that exactions must meet two critical thresholds to be legal: they must “have an ‘essential nexus’ with a public harm justifying regulation” and “the value of the property exacted be ‘roughly proportional’ to the degree of harm threatened by the proposed development.” See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (establishing rough proportionality requirement); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (establishing “essential nexus” requirement).

II. Making Climate Exactions Work

Under Byrne and Zyla's proposal, climate exactions could achieve three key goals. First, they could discourage sprawl and lower-density new development far from transit by putting a price on carbon. Second, they could discourage new development in areas vulnerable to natural hazards or in sensitive areas where new development could exacerbate risks to others. Third, they could generate funding for climate mitigation and adaptation efforts to offset the impacts of new development.

As stated earlier, city leaders need to use every tool at their disposal to put the U.S. on a pathway to keep global temperature changes below 2°C. Accomplishing this objective requires fundamentally rethinking all aspects of our urban systems and operating procedures. An effectively designed climate exaction program could be a useful tool in this endeavor. To further refine the concept, the authors and others should work to address three big questions.

First, additional clarification is needed regarding the timing—and time scale—of payments. The “harm” caused to society from a new development is not a point in time event; it will continue for as long as the development continues to exist. The authors do not state how such a fee would be calculated and how many years out the payment would need to cover. The risk here is that to properly account for the lifespan of a development, the fee might need to cover 30 to 50 years of potential harm. That raises a second question related to timing: how the fee is paid. On one hand, requiring developers to pay an exaction for the entire lifespan of a development up front could be cost prohibitive and raise questions as to the “proportionality” of the payment. On the other hand, if exaction payments were made on an annual basis, the local government may struggle to raise a critical mass of dollars to fund large scale mitigation or adaptation measures.

Second, climate exactions should be structured in a way that acknowledge the uncertainty around climate change impacts and provides the flexibility needed to account for the risk that impacts occur faster than anticipated or in unexpected ways. The authors overlook the complexity related to this topic. Exactions agreed upon at the time of development will struggle to account for changes in emissions over time as building infrastructure deteriorates, citizen behavior shifts, and new technologies are adopted. Not only can emissions change, the “harm” associated with those emissions will also change. As one example, a property on the fringe of a floodplain might not require a climate exaction; however, risks will change as sea levels rise. As a result, an exaction agreed upon at the time of development would no longer be relevant or proportional to the harm that development has caused. Lastly, the authors note that “it is relatively easy to quantify the GHG emissions associated with traffic.” While this may be the case in the very short run, it becomes much more difficult over a 30 to 50 year time scale. Traffic patterns can shift and new tech-

nologies will be adopted, both of which can dramatically alter the GHG emissions from a forecast.

Third, climate exactions will only be successful if developers do not have a reasonable alternative outside of a local government's jurisdiction. If a development can be moved to a location outside the localities' jurisdiction and thus not subject to a fee, then developers could be faced with a perverse incentive to move their project further away from an urban center. 2016 population estimates from the U.S. Census Bureau are already showing a shift in population trends away from denser urban areas towards lower density suburbs.³ In 2016, lower-density suburbs in the U.S. grew by 1.3%, while higher density suburbs grew by about 1% and urban counties saw less than a 0.5% increase in population. Unless there is a regional approach, exactions could have the unintended consequence of pushing development to the peri-urban areas outside of a city's boundaries, intensifying urban sprawl rather than mitigating its impacts.

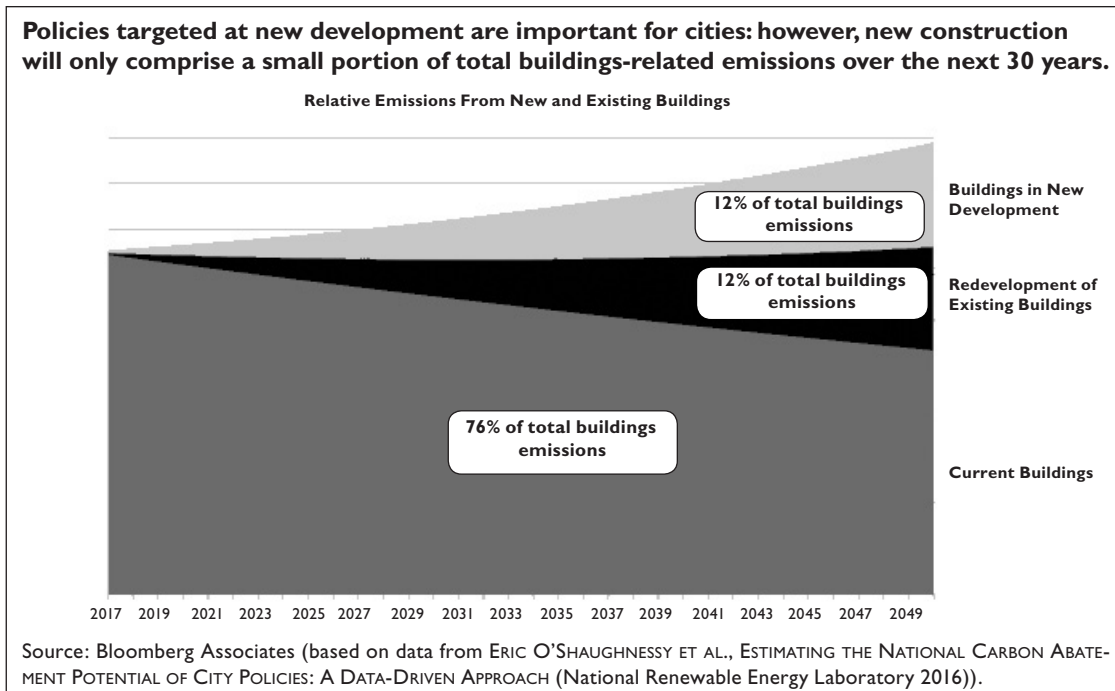
III. Established Pathways to Higher Impact

Local governments already have well-established pathways to achieve deep reductions in GHG emissions by fully leveraging their control of building and energy codes, zoning regulations, infrastructure investments, and incentive programs. Given that we do not expect significant action on climate from the current Congress or White House, it is critical that we expand the tools available to municipalities to address climate change. As cities need to take an “all of the above” approach to achieve an 80% reduction in GHG emissions by 2050—the level needed to keep us to 2°C of warming—“climate exactions” should be further explored and tested in jurisdictions with a receptive regulatory system and legal structure. If successful, exactions could be a useful tool to prevent additional damage beyond that which we are already on pace to inflict.

We need to be careful, however, about overpromising what exactions can deliver compared to other policy levers already available to cities. Many of the outcomes Byrne and Zyla hope that climate exactions will achieve can be more effectively met through energy and building codes, zoning regulations, prioritization of infrastructure investments, and energy conservation programs in existing buildings. For example, under Mayor Michael Bloomberg New York City enacted new building codes to reduce energy use in the city's largest buildings. These laws, part of the City's Greener, Greater Buildings Plan, are projected to cut the city's GHG emissions by 5% between 2014 and 2030. The NREL analysis similarly estimates that cities can reduce their emissions by approximately 5 to 10% through stronger building codes and incentives that apply to all building, not just new developments.⁴

3. Jed Kolko, *Americans' Shift to the Suburbs Sped Up Last Year*, FIVETHIRTYEIGHT (Mar. 23, 2017), <https://fivethirtyeight.com/features/americans-shift-to-the-suburbs-spiced-up-last-year/>.

4. O'SHAUGHNESSY ET AL., *supra* note 1, at 12, 18.



New developments alone will have a marginal impact on the overall emissions profile of our cities. The NREL estimates that city smart growth policies for new development, of which climate exactions are just one tool, could reduce a municipality's carbon emissions by 0.8–2.5% by 2030.⁵ One key driver of this projection is that new development represents a small fraction of future emissions. Due to technological advances and new construction methods and materials, new development generally has a lower carbon intensity than existing buildings—with new buildings consuming nearly 30% less energy on average than the existing building stock.⁶ As new buildings are built over time, their contributions to U.S. emissions will gradually make up a greater portion of our building-related emissions. But by 2050, this percentage will still be quite small—about 12% of all building-related emissions.⁷

One must also consider the extent to which revenues from climate exactions would enable a locality to make significant progress towards climate change mitigation or adaptation. Byrne and Zyla rightly note that exactions levied on a development must be “roughly proportional” to the impacts of that development. As a result, exactions, by nature and design, will only prevent new development from occurring in suboptimal locations (e.g., far from transit or in a floodplain) or provide funding to reduce emissions equal to those generated from a new development.

While the authors argue that new revenue generated by climate exaction fees could be better reallocated to emissions reductions efforts in other areas of a city, it is important to keep in mind that the funding required to produce transformational change in our infrastructure and transportation systems is significant. At best, exactions will help cities lower the arc of their business as usual trajectory, but they will not be a major contributor to lowering a locality's baseline emissions.

As our communities continue to grow, we need to ask hard questions about how and where growth occurs. Local governments need to aggressively reduce emissions to achieve the ambitious goals that many have established and to avoid the worst impacts of climate change. They also need to prevent risky development that harms environmentally sensitive areas or increases our exposure to climate risks.

If the authors are able to address the questions outlined in this article, exactions could help prevent increases in GHG emissions caused by new development, discourage sprawl and development in environmentally-sensitive areas, and provide financing for climate adaptation and mitigation activities. However, exactions will not produce significant reductions in GHG emissions from current levels. Exactions are a tool that should be explored, but other local policy mechanisms already exist and should be more widely and aggressively applied.

5. *Id.* at 24.

6. *Id.* at 9.

7. Based on Bloomberg Associates analysis. O'Shaughnessy et al. estimate that new buildings are 73% as energy intensive as existing buildings stock. Assuming that new development in cities expands the housing stock by 1% per year; housing in new developments will make up 27% of a city's housing stock by 2050. The greater efficiency of that housing along with the delayed emissions from buildings that are built in later years means that new residential development will cumulatively account for only 12% of cities' building-related emissions between 2017 and 2050.

C O M M E N T

Thoughts on *Climate Exactions*

by Gwen Wright

Gwen Wright is the Director of the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission.

I. Introduction

Montgomery County, Maryland, has a long history of progressive land use policies that are aligned with the overall goal of addressing climate change and its negative effects. Preservation of large areas of open space and environmentally sensitive areas, as well as a strong focus on transit-oriented development to reduce vehicle miles traveled are at the core of the county's planning strategy. In addition, a sophisticated development review process, including an adequate public facilities ordinance, ensures infrastructure is in place to accommodate school and transportation capacity through a series of exactions tied to these public interests.

For all of these reasons, Montgomery County is in an excellent position to assess the viability of the *Climate Exactions* paper prepared by authors J. Peter Byrne and Kathryn A. Zyla regarding the potential for implementing exactions on the local government level to address climate change impacts.

II. Background

The Maryland-National Capital Park and Planning Commission (M-NCPPC) is a bi-county agency tasked with planning for the physical development of the two counties surrounding the District of Columbia: Montgomery and Prince George's Counties. The Montgomery Planning Department is the part of M-NCPPC focused on land use, transportation, and environmental sustainability issues for Montgomery County. The county is a jurisdiction of more than 1 million residents and is home to a number of important "edge cities" such as Bethesda and Silver Spring. Montgomery County has grown from a suburban community of commuters into a regional job center. Land use policies are oriented toward concentrating development along designated transportation corridors, protecting stream valleys, wetlands and forests, and preserving agricultural land.

Guiding documents, such as the 1964 General Plan of Wedges and Corridors, and the 1980 Functional Plan for the Preservation of Agriculture and Rural Open Space—which protects more than 93,000 acres of land in the county, are the foundation for more environmental sus-

tainability efforts to minimize suburban sprawl, preserve land, and concentrate highest densities along major thoroughfares and transit routes. Our current planning policies and tools aim to reduce carbon emissions by achieving compact, transit-oriented, and mixed-use development. The county has set a goal of reducing countywide carbon emissions to year 2005 levels by 2050.

III. Existing Policies and Tools

The following policies and tools provide a comprehensive planning strategy for Montgomery County. They not only create a blueprint for more sustainable development, but also advance the county's goals of greenhouse gas reduction.

- A. Agriculture Reserve:** This designated land use zone is intended to preserve agriculture and rural open space in the northern and western parts of the county by permitting a density of no greater than one dwelling unit per 25 acres. A system of transferring development rights to other parts of the county with the infrastructure to support growth is an important tool that allows the Agricultural Reserve to succeed. In addition, the county has created the Building Lot Termination program—which is funded by development requirements in other parts of the county—to further reduce the impact of development in the Agricultural Reserve. The Agricultural Reserve creates a de facto growth boundary, limiting vehicle miles travelled.
- B. Forest Conservation Law:** The law aims to protect, maintain and plant forest areas, especially in stream buffers within the county. It also protects trees of 30-inches in diameter or greater. The law ensures that tree canopy goals and forest preservation and planting requirements are adhered to closely.
- C. Growth Policy and Adequate Public Facilities:** The county's growth policy is entitled the "Subdivision Staging Policy" (SSP) and is the guiding document that ensures public facilities, such as schools, transportation infrastructure, and other vital public services, are adequate to meet new development. The 2016 SSP encourages the devel-

opment of compact, walkable, transit-oriented development. This policy also assesses transportation impact taxes and traffic mitigation payments based on the location and overall impact of the development on existing infrastructure. Metrics such as vehicle miles of travel and percentage of non-auto driver mode share (the percentage of trips made by non-single occupant vehicles) are proxies for the relative impact of development on both the environment and infrastructure. A development that provides less parking is treated as having less of an impact on the road network than a development that provides more. Through the SSP, exactions for schools and transportation are accessed at the time of building permit.

D. Commercial/Residential (CR) Zone: This mixed-use zone seeks to incentivize more compact, mixed-use development, with the goal of creating walkable communities that do not rely on automobile travel. Developers of projects in the CR zone are required to provide public benefits from a predetermined list of potential amenities that will support and accommodate higher densities. The following public benefits that are available and that contribute to the reduction of greenhouse gases specifically include:

- | | |
|---|---|
| 1. Proximity to transit | 7. Vegetated roofs |
| 2. Energy conservation and generation | 8. Tree canopy cover |
| 3. Habitat preservation and restoration | 9. Public open space |
| 4. Public parking | 10. Vegetated areas |
| 5. Live/work units | 11. Location near retail establishments |
| 6. Trip mitigation | 12. Retained buildings |

IV. Potential for Exactions Related to Climate Change

Even a modest level of growth inherently brings new development, which increases carbon output. The Planning Department is continuously evaluating effective growth management strategies that balance development with the need to reduce carbon emissions. Therefore, the Planning Department is increasingly aware of the need to implement policies that explicitly target reductions in greenhouse gas emissions. However, as carbon reduction requirements for new development become more prevalent, they present a variety of challenges that must be addressed to develop tools that can measure impact and policies to address that impact.

Prof. J. Peter Byrne and Kathryn A. Zyla contemplated and addressed many of the challenges in their paper. The most relevant challenges fall into three categories: (1) creating a defensible methodology to measure the level of impact on an individual development scale; (2) weighing exactions related to carbon emissions amongst other top public priorities; and (3) a concern that adding climate exactions to the current robust list of development requirements would have a chilling effect on new development and needed tax revenues.

Currently, the Montgomery Planning Department does a carbon footprint analysis for each master plan under review and evaluates changes in the carbon footprint as a result of recommended changes in zoning, land use, and projected vehicle miles travelled. However, we have never attempted to do this type of modeling on an individual development level. To some degree, this may be easier as new methodologies for measuring a building's carbon footprint are becoming sophisticated, although complex. As noted in the paper, it may be possible to improve upon our existing methodology for a more refined quantification of greenhouse gas emissions connected to transportation modeling—a regular part of both the master planning and the individual regulatory processes.

In accordance with this approach, the Department has also been working on new tools to refine our transportation modeling efforts so that they are not solely based on automobile travel but rather consider multi-modal options including transit, bicycling, and walking. Although tying the modeling for climate exactions to transportation modeling has great potential, it could be complicated by the fact that this methodology only addresses one element of environmental impact. The construction of a new building, in and of itself, has climate impacts as does the long-term operation of that building. In addition, steps that a developer may be taking to reduce vehicular trips would need to be considered—such as minimizing parking availability and entering into a formal Transportation Demand Management agreement. As an example of this concern, our current master plan level modeling methodology does not account for continual improvements in technology, building efficiencies, and energy standards, such as Energy Star and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). Until better models become available, measuring carbon projections in small geographic areas and on an individual basis is challenging. At best, the methodology for quantifying the level of environmental impact for an individual development project would be complex and would need to be multi-pronged.

A second challenge is a political one: many public interests and priorities need to be balanced in reviewing every development project. In some cases, provision of affordable housing is paramount; in other cases, provision of a key

piece of open space or public infrastructure takes priority. In almost every case, many threads of public interest need to be woven together and balance a wide variety of competing interests. This consideration of multiple interests is not to minimize the importance of addressing climate change; however, it may be that the implementation of exactions needs to be balanced with other important factors including sustainability proffers. For example, these may include whether the development is near transit, whether the development is proposing a high level of efficiency and sustainability in its construction, and whether the development is proposing to minimize parking and take other actions to reduce vehicle trips. Adding carbon reductions to the menu of other top priorities and exactions that are required of new development will require a high level of political will, not only from county staff, but also from elected leaders.

Finally, there is a real and legitimate concern that adding more exactions will have a chilling effect on new development. The CR zones in Montgomery County provide flexibility in development and offer higher densities in exchange for significant public amenities. Robust exactions for schools and transportation are applied to every development project. Montgomery County also has one of the earliest inclusionary zoning laws in the United States and 12.5 percent of every new residential development over 20 units must be moderately priced dwelling units.

The challenge for developers is weighing the economics of the total development (including provision of public amenities) with all the county's public interests and requirements. Adding a new carbon tax could be perceived as another burdensome layer and would compete with other ostensibly more urgent priorities, including afford-

able housing, transportation infrastructure, and school impact taxes.

V. Conclusion

The Montgomery Planning Department achieves carbon reduction through multiple processes and at all levels of master planning and development. Through current efforts to implement smart growth principles, we are limiting vehicle miles travelled, improving environmental sustainability, negating heat island effect, and reducing greenhouse gases and energy demand. These efforts include everything from focusing on transit-oriented development, protecting large areas of agricultural and rural open space, preserving forest, and directing developers toward energy efficient buildings by making the economic case that such improvements financially and ecologically benefit property owners and tenants.

The concept of incorporating evaluation of climate impact into individual development projects and creating a climate exaction is creative and deserves further consideration. But this proposal presents challenges in measuring the exact amount of greenhouse gases generated or reduced by an individual project, balancing this important public interest with other priorities, and ensuring that an additional exaction will not have an undue chilling effect on positive new development.

However, the goal of reducing greenhouse gas emissions and addressing climate change is essential to our future survival as a society and we should continue to look for every method to make positive progress in this area.

A R T I C L E

How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures

by James W. Coleman

James Coleman is Assistant Professor at the Southern Methodist University Dedman School of Law.

“[T]his bill could prevent continued production of automobiles . . . [and] is a threat to the entire American economy and to every person in America.”

—*Lee Iacocca, president, Ford Motor Company, on the Clean Air Act of 1970*¹

“The automobile industry has survived and grown even in countries where government policies have made the cost of car ownership several times higher than it is in the United States. We have no doubt that our industry will continue to grow, because people everywhere place a high value on the individual mobility and on the freedom that this mobility makes possible.”

—*Lee Iacocca, president, and Henry Ford II, chairman, Ford Motor Company, Annual Report 1970*²

I. Introduction

When a public company describes the impact of a proposed regulation it must consider two audiences: regulators and investors. It would like to convince the regulator to avoid burdensome regulations by emphasizing how stringent regulations could cause job losses or

reduce investment. But it may wish to convince investors that the company will thrive in the face of any plausible regulatory outcome. These conflicting incentives may lead to inconsistent messages and fuel a perception that industry submissions to regulators and investors are often “cheap talk.”

Despite the common perception that corporations exaggerate the economic impact of regulation, and anecdotal reports of inconsistencies between comments to regulators and reports to investors, to date there has been no empirical study of congruence between submissions to regulators and shareholder letters. This project performs such a study, comparing comments submitted on the United States Environmental Protection Agency’s Renewable Fuel Standard rulemakings between 2009 and 2013 with contemporaneous annual statements from the same companies describing their exposure to regulatory risk.

The study empirically demonstrates that oil companies facing costly regulations tailor their messages to each audience—emphasizing the cost and economic danger of regulation while telling shareholders that regulation is merely a cost of doing business with few negative impacts. On the other hand, corporations anticipating beneficial regulations—the ethanol companies planning on mandates for their product—present a more consistent and cautiously optimistic forecast in both fora.

These findings suggest that environmental regulators should monitor corporate securities disclosures to ensure that they are given an accurate picture of the true regulatory risk they may be imposing on companies. It also suggests that the Securities and Exchange Commission and private plaintiffs should scrutinize company comments to determine what regulatory risks companies are pointing out to regulators without disclosing them to investors. Finally, it suggests that corporate counsel should align these two sets of statements to protect public companies

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1. *Women's Suffrage and Other Visions of Right-Wing Apocalypse*, THE NEW REPUBLIC, Dec. 21, 2009, <http://www.newrepublic.com/article/womens-suffrage-and-other-visions-right-wing-apocalypse> (alterations in original); HARVEY BLATT, AMERICA'S ENVIRONMENTAL REPORT CARD: ARE WE MAKING THE GRADE? 221 (2004).
2. FORD MOTOR COMPANY, ANNUAL REPORT 1970 3 (Mar. 10, 1971).

from securities litigation and enhance their credibility in each forum.

II. The Regulator's Dilemma: Public Decisions, Private Knowledge

In 1970, Ford Motor's president, Lee Iacocca called the Clean Air Act "a threat . . . to every person in America" that "could prevent continued production of automobiles." His statement is an archetype of the prophecies of doom that industry often issues in the face of new regulations. When industry complains about how much a proposed regulation will cost, advocates for regulation may justly respond that such predictions have been wrong in the past. And these advocates often imply that such predictions can be safely ignored. After all, no one listens to the boy who cried wolf.

But the reason such false alarms are dangerous is because they prevent us from recognizing accurate warnings: the problem with "crying wolf" is that there *are* wolves. Some regulatory standards would, in fact, be technically impossible or economically infeasible to achieve. So when regulators set standards through notice-and-comment rulemaking, they almost always consider whether these standards are achievable.³

Regulators face a fundamental difficulty when they set regulatory standards, which could be called the "regulator's dilemma". Public regulators often must prescribe standards that require the "best" or "lowest" rate of pollution that is "available", "demonstrated", "achievable", or "practicable".⁴ But private industry generally has the most complete information about the monetary cost and practical feasibility of different control technologies.⁵ And industry has no motive to accurately report this private information; instead it has an incentive to exaggerate the costs of new pollution control technologies and minimize their benefits to dissuade regulators from mandating new technologies that will reduce industry profits.⁶

As a result, environmental regulators are locked in ubiquitous stand-offs with industry, in which industry claims a new environmental rule is infeasible and the agency must decide whether industry is bluffing. This dilemma is most obvious with command-and-control regulation where the agency directly mandates facilities' emission rates, but can

also arise when an agency sets broader goals for national or statewide reductions. Thus, even market-based regulations are often challenged based on their feasibility or economic impact.⁷

This study demonstrates how another set of corporate statements can be used to audit corporations' regulatory submissions, easing the regulator's dilemma. Public corporations must make predictions about the impact of proposed regulations to another audience: their investors. Public companies must file an annual report with the Securities and Exchange Commission (SEC), known as Form 10-K, that summarizes the state of their business and includes a summary of the important risks facing the business.⁸

At least in theory, these predictions are more constrained than statements made to other regulators because corporations may be held liable under SEC Rule 10b-5 for false or misleading statements and omissions made to the public.⁹ Annual 10-K reports are a frequent basis for lawsuits under Rule 10b-5, and many scholars have argued or assumed that this liability induces more honest corporate disclosures of risk.¹⁰ Furthermore, accounting bodies and the SEC have pursued several initiatives to improve reporting of risks due to environmental regulation.¹¹

Indeed, regulators concerned by Lee Iacocca's prophecies of doom in 1970 would have been reassured if they read Ford Motor Company's contemporaneous Form 10-K disclosures. In its 1970 report, the company assured its investors that it had "no doubt" that domestic operations would continue to succeed because "[t]he automobile industry has survived and grown even in countries where government policies have made the cost of car ownership several times higher than it is in the United States."¹²

This article shows how this alternate set of corporate statements on the impact of regulation, collected in Form 10-K submissions, can be compared to corporate statements on proposed rules. If corporations warn regulators that rules will cause them economic harm but fail to warn their investors of the same risks in 10-K reports, then we can conclude that they are either exaggerating the harm from the rules or failing to disclose important risks to their investors. This type of audit can help regulators gauge the seriousness of corporate warnings and ensure that corporations are adequately disclosing risk to their investors.

3. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–65 (1985). Even when statutes do not allow regulators to make decisions based on cost, regulators often consider cost as a matter of economic or political necessity. Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1372–79 (2009).

4. Such standards are particularly common under the Clean Air Act, 42 U.S.C. §7411(a)(1), ELR STAT. CAA §§101-618 (prescribing the "best system of emission reduction which . . . has been adequately demonstrated").

5. Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L. J. 795, 815 (2005); Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 278–79 (2004); David Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 767, 771 (2008).

6. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 19 (1982); James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87, 112 (2014).

7. David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 327–28 (1998) (describing how market-based regulations present the same feasibility and complexity problems).

8. 17 C.F.R. §249.310.

9. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 (2013); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

10. See, e.g., Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 409 (1990).

11. In 2010, the Securities and Exchange Commission issued binding guidance requiring companies to disclose risks related to climate regulation. Commission Guidance Regarding Disclosure Related to Climate Change; Final Rule, 75 Fed. Reg. 6,290, 6,296 (Feb. 8, 2010).

12. FORD MOTOR COMPANY, *supra* note 2, at 3 (going on to say "[b]ut it will grow more and serve better if governments, unions and manufacturers all accept their share of the responsibility to control costs").

III. The Renewable Fuel Standard: A Running Battle in Notice-and-Comment Rulemaking

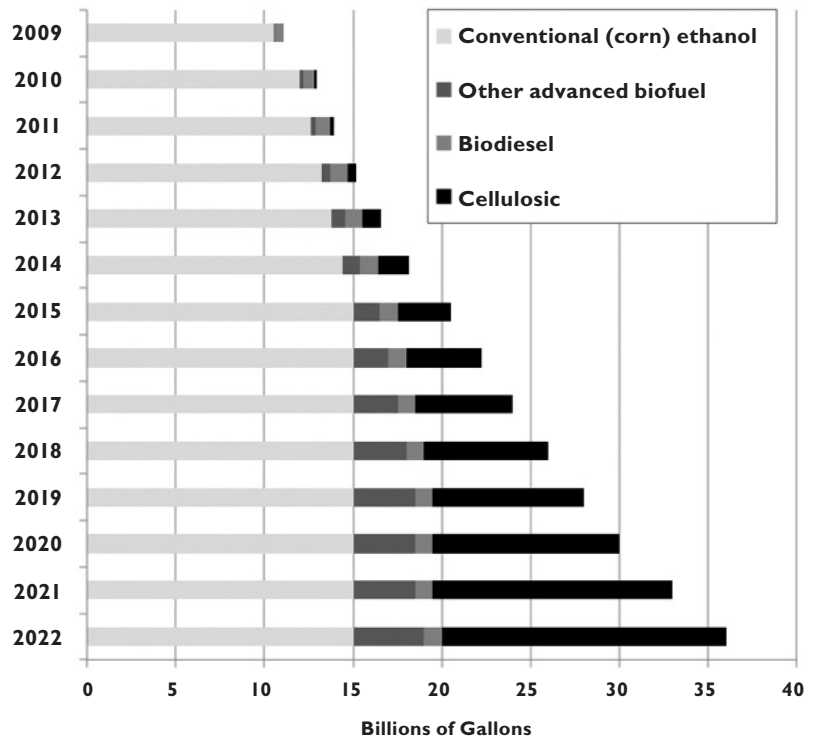
The United States' Renewable Fuel Standard requires oil companies to blend renewable fuels into the fuels that they sell. It presents an ideal test case for developing a method to compare corporate statements to regulators and investors for three reasons. First, the Environmental Protection Agency (EPA) updates the standard each year, giving many opportunities to comment. Second, these standards exemplify a regulator's dilemma: oil companies have frequently warned EPA that its proposed regulations are infeasible, while biofuel companies have disagreed. Third, the United States consumes a fifth of the world's oil production, so its fuel regulations are a crucial source of financial risk even for corporations that participate in international markets.¹³

The stated goals of the Renewable Fuel Standard are to reduce greenhouse gas emissions, reduce reliance on imported petroleum, and develop the country's renewable fuel sector.¹⁴ Renewable fuels like ethanol and biodiesel are used as a substitute for more traditional motor fuels that are derived from oil.¹⁵ When renewable fuels are burned in an engine, they produce greenhouse gas emissions, just like oil products.¹⁶ But when plants grow, they pull carbon dioxide out of the air, so if plants are grown and burned at the same rate, the net impact on the atmosphere is zero.¹⁷ So in theory, replacing oil products with renewable fuels can reduce the net amount of greenhouse gases emitted to the atmosphere as a result of motor fuels.¹⁸

The Renewable Fuel Standard of the Energy Policy Act of 2005,¹⁹ mandated that a minimum volume of renewable fuel be sold in the United States each year.²⁰ To comply with this statute, EPA finalized a rule in 2007 that required

fuel refiners to blend renewable fuel into transportation fuels like gasoline and diesel.²¹ In 2007, Congress mandated dramatically increasing volumes of separate categories of renewable fuel by setting out year-by-year targets for consumption and extending the standard to include diesel and gasoline as shown in Figure 1.

Figure 1. Renewable fuel volumes mandated by the Energy Independence and Security Act



EPA set out to implement the revised Renewable Fuel Standard, sometimes known as "RFS2",²² through annual rulemakings, mandating specified percentages of four categories of renewable fuel: biomass-based diesel, advanced biofuel, cellulosic biofuel, and total renewable fuel.²³ The Energy Independence and Security Act²⁴ required EPA to set the annual standard each year by November 30 before the start of the year in which it would apply.²⁵ But EPA has struggled to meet these deadlines. The final rule for 2010, which also included some requirements for 2008 and 2009, was not published until March 26, 2010.²⁶ The 2011 and 2012 rules

13. BP STATISTICAL REVIEW OF WORLD ENERGY 9 (2014) (in 2013 the United States consumed 19.9% of global oil production; China is next largest at 12.1%).

14. Energy Independence and Security Act of 2007 (Pub. L. No. 110-140) §801.

15. RANDY SCHNEPF & BRENT D. YACOBUCCI, CONG. R. SERV., R 40155, RENEWABLE FUEL STANDARD (RFS): OVERVIEW AND ISSUES 16 (2013) ("[t]he mandated 36 bgals of renewable fuel will displace about 13.6 bgals of petroleum-based gasoline and diesel fuel, representing about 7% of expected annual U.S. transportation fuel consumption").

16. *Id.*; U.S. ENERGY INFO. ADMIN., FREQUENTLY ASKED QUESTIONS: HOW MUCH CARBON DIOXIDE IS PRODUCED BY BURNING GASOLINE AND DIESEL FUEL? (2014), <http://www.eia.gov/tools/faqs/faq.cfm?id=307&t=11>. In general, when "renewable" fuels are used for combustion, there is no climate benefit in the combustion itself. The benefit, if any, comes from the carbon that is taken out of the air before the product is burned.

17. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 25,040 (May 26, 2009).

18. In fact, the net climate impact of renewable fuels is sharply contested. See KELSI BRACMORT, CONG. RESEARCH SERV., R 41603, IS BIOWATER CARBON NEUTRAL? (2015), <http://fas.org/sgp/crs/misc/R41603.pdf>.

19. Energy Policy Act of 2005 (Pub. L. No. 109-58) (Aug. 8, 2005).

20. *Id.* at §1501 (amending 42 U.S.C. §7545).

21. Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule, 72 Fed. Reg. 23,900, 23,903 (May 1, 2007).

22. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 24,908 (May 26, 2009).

23. *Id.* at 24,909.

24. 42 U.S.C. §7545(o)(2)(B)(i) (prescribing volumes for renewable fuels, advanced biofuel, cellulosic biofuel, and biomass-based diesel). Prescribed volumes of biomass-based diesel end in 2012 at one billion gallons, which is the plateau for biomass-based diesel shown in this chart, but EPA is given continuing authority to adjust this volume up or down in subsequent years. 42 U.S.C. §7545(o)(2)(B)(i)(IV).

25. 42 U.S.C. §7545(o)(3)(B).

26. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule, 75 Fed. Reg. 14,670 (Mar. 26, 2010).

were only a few weeks late,²⁷ but the 2013 rule was not finalized until August 2013²⁸ and the 2014 rule was so late that EPA decided to just roll it into the 2015 rulemaking.²⁹

From 2010 to 2013, 36 public companies filed comments related to the annual renewable fuel standards rulemakings: 16 from the oil industry and other industries that oppose higher ethanol mandates and 20 from the ethanol industry as well as related pro-ethanol businesses.³⁰ Several companies submitted comments in multiple years, so the 36 companies submitted 56 unique comments over those four years. Figure 2 shows how many comments were filed in each year.

Figure 2. Number of comments in each year

	2010	2011	2012	2013
Total	3257	529*	529*	169
Public companies	33	3	9	11
Anti-ethanol companies	14	1	6	7
Pro-ethanol companies	19	2	3	4

*The 2011 and 2012 rules used a combined docket. Public company comments made clear which year they were addressing, but the total number here is for both years.

The Renewable Fuel Standard remains extremely controversial because of two developments in United States energy markets: a fall in gasoline consumption, and the failure of the renewable fuel industry to produce the quantities of cellulosic ethanol mandated by the Renewable Fuel Standard. When Congress passed the Energy Independence and Security Act in 2007, the United States projected that gasoline use would continue to increase in coming decades, just as it had in past decades.³¹ But when the financial crisis hit in 2008, growth in gasoline consumption abruptly ended, and it now seems that gasoline consumption may even be in decline: the United States is now projected to use only half as much gasoline in 2030 as was projected just nine years ago.³²

The fall in gasoline consumption created substantial problems for the Renewable Fuel Standard because the standard calls for dramatically increasing sales of renewable fuel at the same moment that total fuel sales are falling. Achieving the standard would require a rapid transition to a very high proportion of renewable fuels: gasoline would have to be 25% ethanol by 2022.³³ But conventional automobiles are not designed to run on ethanol blends greater than 10%.³⁴ This 10% upper limit creates a “blend wall” which limits ethanol sales to about 15 billion gallons annually at current levels of gasoline consumption.³⁵ The Renewable Fuel Standard demands volumes that reach 15 billion gallons in 2012³⁶ and 22.25 billion gallons by 2016. Hitting the 2016 target would require either radical shifts in United States energy markets and infrastructure or pointless combustion of billions of gallons of ethanol.³⁷

At the same time, renewable fuel producers have not been able to produce nearly as much of one of the mandated categories of fuel—cellulosic biofuel—as the Energy Independence and Security Act requires.³⁸ The statute required 500 million gallons of cellulosic biofuel in 2012 and 16 billion gallons by 2022.³⁹ But zero gallons were produced in 2012 and the U.S. now projects that even by 2022, just 327 million gallons will be produced—about 2% of what the statute requires for that year.⁴⁰

As motor fuel use and cellulosic production fell further behind projected levels, EPA’s Renewable Fuel Standard proposal for 2014 effectively admitted the impossibility of meeting the statute’s increasingly ambitious targets. Although the statute mandated an increase in renewable fuels from 16.55 billion gallons to 18.15 billion gallons,⁴¹ EPA proposed to decrease the renewable fuel requirement to 15.21 billion gallons, asserting that it had authority to waive the statutory requirement to avoid the blend wall.⁴² EPA also proposed mandating just 17 million gallons of cellulosic ethanol, which is about 1% of the 1.75 billion gallons mandated by the law.⁴³ EPA’s retreat from the statutory goals caused a furious controversy that ultimately pushed EPA to delay its 2014 standard.⁴⁴

27. Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards; Final Rule, 75 Fed. Reg. 76,790 (Dec. 9, 2010); Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Final Rule, 77 Fed. Reg. 1,320 (Jan. 9, 2012).

28. Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards; Final Rule, 78 Fed. Reg. 49,794 (Aug. 15, 2013).

29. Delay in Issuing 2014 Standards for the Renewable Fuel Standard Program, 79 Fed. Reg. 73,007 (Dec. 9, 2014).

30. The 16 anti-ethanol companies are: The Boeing Company, BP plc, Caterpillar, Celanese Corporation, Chevron Corporation, ConocoPhillips, CVR Energy Inc., ExxonMobil Corporation, Ford Motor Company, LyondellBasell Industries N.V., Marathon Petroleum Corporation, Oglethorpe Power Corporation, Phillips 66, Royal Dutch Shell plc, United Refining Company, Valero Energy Corporation. The 20 pro-ethanol companies are Amyris Inc., Archer Daniels Midland Company, Bluefire Renewables Inc., Clean Energy Fuels Corporation, Covanta Holding Corporation, Darling International Inc., Deere & Company, E.I. Du Pont De Nemours and Company, Gevo Inc., Greenshift Corporation, Honeywell International Inc., Iowa Renewable Energy LLC, MagellanMidstream Partners LP, Monsanto Company, Renewable Energy Group Inc., Rentech Inc., Syntroleum Corporation, Tyson Foods Inc., WasteManagement Inc., and Weyerhaeuser Company.

31. ECONOMIC REPORT OF THE PRESIDENT 246 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp.pdf.

32. *Id.*

33. CONG. BUDGET OFFICE, THE RENEWABLE FUEL STANDARD: ISSUES FOR 2014 AND BEYOND 2 (2014), <https://www.cbo.gov/sites/default/files/45477-Bio-fuels2.pdf>; BRENT D. YACOBUCCI, CONG. RESEARCH SERV., R40445, INTERMEDIATE-LEVEL BLENDS OF ETHANOL IN GASOLINE, AND THE ETHANOL “BLEND WALL” (2010), <http://fas.org/sgp/crs/misc/R40445.pdf> [hereinafter “BLEND WALL”].

34. *Id.* at 5–6.

35. *Id.* at 5.

36. *Id.* at 2. See *supra* Figure 1.

37. 42 U.S.C. §7545(o)(2)(B)(i)(I).

38. “BLEND WALL,” *supra* note 33, at 1.

39. 42 U.S.C. §7545(o)(2)(B)(i)(III).

40. “BLEND WALL,” *supra* note 33, at 6–7.

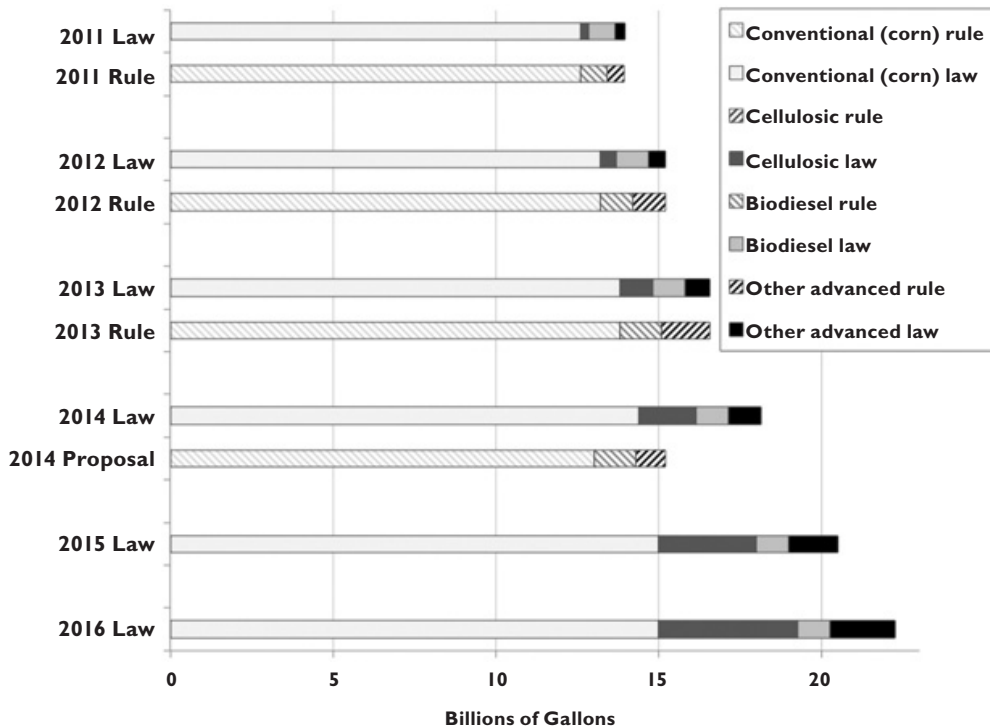
41. 2014 Standards for the Renewable Fuel Standard Program; Proposed Rule, 78 Fed. Reg. 71,732, 71,734 (Nov. 29, 2013).

42. *Id.* (noting that EPA has authority to waive the requirements under 42 U.S.C. 42 U.S.C. §7545(o)(7)(A) if “[t]here is inadequate domestic supply”).

43. *Id.* at 71,755.

44. See Delay in Issuing 2014 Standards, Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards; Final Rule, 75 Fed. Reg. 76,790 (Dec. 9, 2010); Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Final Rule, 77 Fed. Reg. 1,320 (Jan. 9, 2012).

Figure 3. EPA changes to Renewable Fuel Standard targets, 2011-2014 (2014 proposal would ramp down mandated renewable fuel volumes while the statute calls for continually increasing volumes)



IV. The Methodology: Comparing Statements to Two Audiences

This study reports a new methodology for comparing statements on the same topic to two audiences. Most actors facing a two-audience problem are smart enough to avoid direct factual contradictions. Instead, actors resolve two-audience problems through differential emphasis, using selective omission, deliberate ambiguity, and exaggeration. Even Lee Iacocca's statement that the Clean Air Act "could prevent continued production of automobiles" does not technically contradict his contemporaneous statement that the "industry will continue to grow."⁴⁵ He may have thought that although the Act *could* shut down the car industry, and should be seen as a "threat", his warnings would ensure that its implementation would be altered so that the industry could keep growing. Indeed, his reassurance was specifically predicated on the political strength of the auto industry, which did, at key moments, convince EPA to delay implementation of some of the standards he feared.⁴⁶ So although his statements were so inconsistent that they would leave polar opposite impressions on a listener, they do not involve the kind of factual or quantitative contradiction that is easily tested. Thus, testing a two-audience problem for inconsistency means detect-

45. FORD MOTOR COMPANY, *supra* note 2, at 3.

46. Jagul Lee et al., *Forcing Technological Change: A Case of Automobile Emissions Control Technology Development in the U.S.*, 30 *TECHNOVATION* 249, 251 (2010) ("As a result, the timetable for the attainment of the emission reductions was, therefore, delayed several times.")

ing exaggeration, ambiguity, and omission.

To tease out differential emphases, this study catalogues every statement and prediction about the Renewable Fuel Standard made by each of the 36 companies represented in the 56 comment-10-K pairings that were filed from 2010 to 2013. This study compares each year's comments with the first Form 10-K that the company filed after that year's standard was finalized. So far, EPA has never finalized a rule that prescribed significantly different volumes than those proposed. So by the time each company filed its 10-K disclosure, it generally knew that the rule it commented on would come into effect.⁴⁷ This provided us with 56 matched pairs of comments to EPA and Form 10-K securities disclosures.

The study uses 59 codes to represent every kind of prediction and statement that companies made related to the Renewable Fuel Standard.⁴⁸ The most important codes were those that predicted an impact on the company from the standard, because those codes appeared both in company comments and company 10-K disclosures. Some coded statements appeared only in comments, such as company positions on how provisions of the Renewable Fuel Standard should be modified or retained, endorsements of the comments of a trade association, and predictions about how the Renewable Fuel Standard would affect stakeholders apart from the company. Finally, some coded statements appeared only in securities disclosures such as positive and negative impacts from climate regulation in general, or other descriptions of regulatory risk that may be meant to include the Renewable Fuel Standard, but do not single it out.

The submissions revealed 739 coded statements related to the Renewable Fuel Standard. The most crucial codes were 218 separate predictions about how the Renewable Fuel Standard would affect the company making the statements. To determine how companies used different

47. The one exception to this rule is the 2013 standard, which was not finalized until August 2013. Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards; Final Rule, 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013). Nevertheless, by 2013, the Agency had established a pattern of sticking to its proposed volumes, so companies probably would not have expected major deviations in the final rule.

48. These codes are reported in Appendices A and B of the original, unabridged version of this article. See James W. Coleman, *How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures*, 40 *HARV. ENVTL. L. REV.* 47 (2016).

emphasis in the different settings, I calculated how many separate negative impacts each company predicted it would suffer due to the Renewable Fuel Standard in its comments and how many it predicted it would suffer in its 10-K.⁴⁹

The 36 companies were analyzed as two distinct sample groups. The first group comprises anti-ethanol companies that perceive the Renewable Fuel Standard as a risk. The second group comprises pro-ethanol groups that perceive the Renewable Fuel Standard as beneficial to their industry. The companies were classified into one of the two groups based on the number of positive and negative impact predictions identified in their communications to EPA and their statements of support or opposition to the Standard.

Companies had to be separated into two groups because these groups face dramatically different incentives in their comments and securities disclosures. The companies that view the Renewable Fuel Standard as a risk are also referred to here as “anti-ethanol” companies and “oil companies” because most are oil companies that oppose ethanol mandates, even if they produce some biofuels as a sideline to their main business in oil.⁵⁰ Similarly, companies that favor the Renewable Fuel Standard are sometimes referred to as “ethanol companies” even though some are merely companies that benefit from the ethanol industry indirectly.

The comments and Form 10-K of all 36 companies were then coded by one coder. Paired t-tests and a Wilcoxon-Mann-Whitney test were performed to determine whether there was a significant difference between how many company-specific risks and benefits were identified in the companies’ comments to EPA and their Form 10-K disclosures.

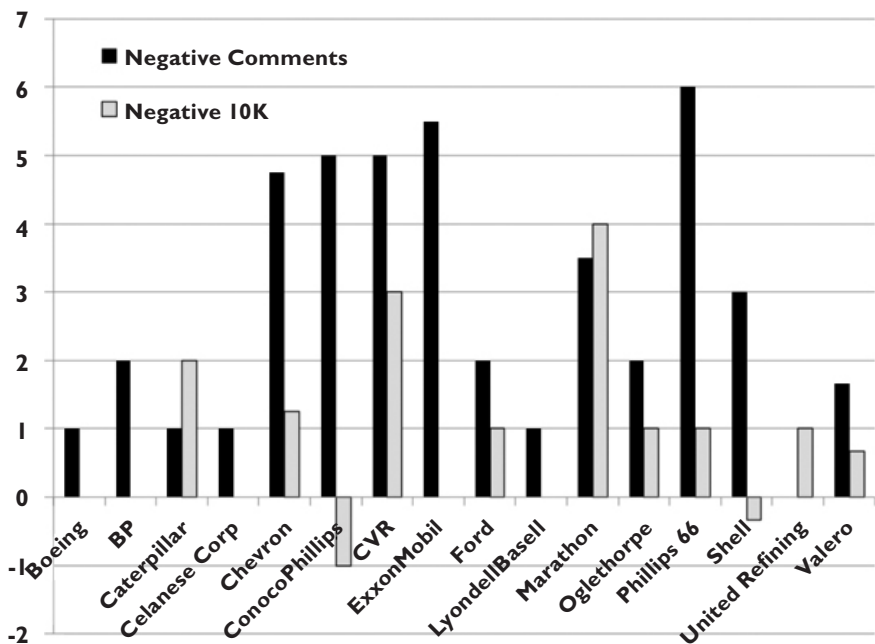
V. Results: Oil Companies Warn Regulators and Reassure Investors

The study confirms the hypothesis that oil companies tell regulators that the Renewable Fuel Standard will harm them financially while simultaneously assuring investors that the company is well positioned to comply. When these companies submitted comments, they identified more than three times as many ways that the standard would harm them as were identified in their contemporaneous securities disclosures. Figure 4 shows the average number of negative comments that these companies reported dur-

ing the entire period studied. Of the 16 companies with a negative view of the Renewable Fuel Standard, 13 identified more negative impacts in their comments than in their securities disclosures.

In fact, some oil companies even identified the Renewable Fuel Standard as a boon in their 10-K disclosures and as a bane in their comments. For example, Shell told EPA that without major changes the Renewable Fuel Standard would “limit the supply of gasoline,”⁵¹ which would prevent it from serving customers and cause “severe economic harm.”⁵² In contrast, the only thing it told its investors about the Renewable Fuel Standard was that the standard would boost biofuels, which it implied was good because in addition to its primary business as an oil company it was also one of the “largest biofuels producers.”⁵³ These comments are shown as negative values in Figure 4.

Figure 4. Average negative impacts identified by companies that perceive the Renewable Fuel Standard as a risk in comments and Forms 10-K filed from 2010-2013



In contrast, companies that favor the Renewable Fuel Standard, such as ethanol interests, actually identified slightly more impacts from the Renewable Fuel Standard in their 10-K disclosures. This confirms that the result for oil companies is not driven by an inherent difference

49. To focus on separate predictions, each code was counted just once per document. For example, if a company stated that the Renewable Fuel Standard was infeasible in the introduction, body, and conclusion of its comment that was only counted as one prediction.

50. As noted above, *supra* note 30, three of these companies are actually companies who are dependent on oil—Boeing, Caterpillar, and Ford—not oil companies per se.

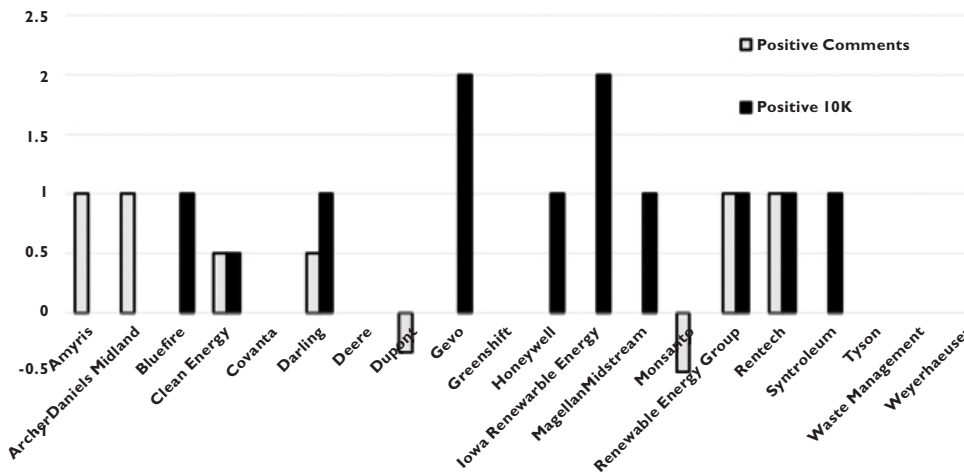
51. Shell Oil Product US, Letter to EPA on Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards (proposed rule), EPA-HQ-OAR-2012-0546-0085, 8, Apr. 5, 2013, <http://www.regulations.gov> (accessed March 18, 2015) at 2. (“If the blend wall is not appropriately addressed, it will limit the supply of gasoline and diesel fuel and have significant adverse impacts on consumers.”).

52. *Id.* at 3 (“EPA should use its general waiver authority to adjust the standards down to reasonably achievable levels to avoid severe economic harm.”).

53. Royal Dutch Shell plc, Annual Report (Form 20-F), at 57 (Feb. 24, 2013) (“The international market for biofuels is growing, driven largely by the introduction of new energy policies in Europe and the USA that call for more renewable, lower-carbon fuels for transport. . . . We are one of the world’s largest biofuels producers.”).

between the format of comments and 10-K disclosures. Together these results instead suggest that oil companies send inconsistent messages because, unlike ethanol companies, they face different incentives when they address these different audiences. In fact, the ethanol company result is a kind of flip-side of the oil company result; together these results suggest that oil companies send inconsistent messages because, unlike ethanol companies, they face different incentives when they address these different audiences.

Figure 5. Positive impacts identified by companies that perceive the Renewable Fuel Standard as a benefit in comments and Form 10-K



VI. How Securities Disclosures Can Be Used to Assess Accuracy of Warnings in Regulatory Comments and Vice Versa

The methodology developed here will be a crucial tool for environmental regulators, public and private enforcers of security disclosures, and corporate counsel. First, environmental regulators should compare the comments they receive with companies’ security disclosures, to gain a more realistic view of the economic harm that their regulations can cause. Regulators cannot ignore corporate comments because setting technology-based or feasibility-driven standards requires massive amounts of private information best known by these companies. But, as this study demonstrates, comments from private companies can present a very exaggerated picture of the cost of regulation.

A. Environmental Regulators Should Assess the Accuracy of Comments by Comparing Them With Contemporaneous Security Disclosures

Regulators can retain the benefit of private information, but improve its accuracy, by matching comments with contemporaneous security disclosures. Even when comments and securities disclosures are not technically inconsistent, they often leave very different impressions about how feasible a proposed rule will be for industry. Thus, securities

disclosures can be an interpretive aid for regulators, helping them suss out which regulations actually may be infeasible.

Regulators should also request that companies submit excerpts from their securities disclosures that show exactly how seriously they take the threat of regulation. The burden of this requirement would be minimal because companies have already drafted these disclosures. Regulators could simply offer to give particular consideration to comments that were accompanied by these excerpts from securities disclosures. No further sanction would be necessary; if a company failed to make this submission, a regulator could answer the comment by noting that it was unsupported by the company’s own security disclosures.

B. Securities Regulators and Plaintiffs’ Counsel Can Use Comments on Environmental Regulations to Audit the Completeness of Securities Disclosures

Securities regulators and plaintiffs’ counsel can also use this study’s methodology to improve corporate disclosures because they can use public companies’ comments to identify material risks absent from their securities disclosures. Pursuant to existing disclosure requirements, the Securities and Exchange Commission should insist that companies’ securities disclosures include the risks that they identify in their comments to regulators. The Commission should use its existing authority to enforce its disclosure requirements through escalating sanctions beginning with comment letters and progressing to enforcement actions. Moreover, when a company is harmed by environmental regulations, injured investors can also sue companies under Securities and Exchange Commission Rule 10b-5 when their disclosures did not present a complete picture of the company’s exposure to regulatory risk. By scrutinizing corporate comments, private plaintiffs can give public companies an incentive to make their securities disclosures consistent with their comments to regulators.

C. Corporate Counsel Should Ensure Corporate Comments on Regulations Are Consistent

Finally, if corporations’ comments on public regulation can be compared to corporate securities disclosures, there is no longer any advantage to presenting inconsistent messages to the two audiences. To avoid liability and enhance the credibility of company comments on regulation, corporate counsel should ensure that the company is not tel-

ing different audiences different stories about the potential impact of regulation.⁵⁴ Indeed, companies should consider voluntarily including relevant excerpts from their securities disclosures with their comments to agencies to demonstrate how seriously they take the dangers of overregulation that they are combating. Due to past exaggerations, regulators may dismiss unsupported warnings. Companies can restore their credibility by showing regulators that they take their warnings seriously enough to share them with investors as well.

VII. Conclusion

Two audiences—environmental regulators and investors—both need to know how regulations may impact

public companies. But when they face adverse regulations, corporate talk is cheap: oil companies made very different predictions about the impact of the Renewable Fuel Standard in their comments and securities disclosures.

Fortunately, by measuring this discrepancy, this study will help regulators, investors, and companies to cure it. Regulators must integrate review of securities disclosures into their rulemaking process to gain a more accurate picture of the risks they are imposing on industry. On the flip-side, securities regulators and investors should review comments on regulation to identify regulatory risks that companies are not disclosing. Finally, corporate counsel should anticipate this scrutiny by harmonizing the messages it sends in comments and disclosures.

54. One reason for inconsistent messages could be that different lawyers are drafting comments and security disclosures. If this is the case, corporate counsel will have to take extra precautions to ensure these different drafters produce consistent messages.

C O M M E N T

More Walk, Less Talk: Comment on *How Cheap Is Corporate Talk?*

by Alan Horowitz

Alan Horowitz is the former Vice President of Global Safety, Health & Environment at AstraZeneca Pharmaceuticals.

Life in a public company can, at times, feel schizophrenic. Capital investments compete with cash flow targets; stretch performance goals compete with personal development and wellness initiatives; and short-term profitability expectations compete with long-term value creation opportunities. Perhaps not surprisingly, these tensions often manifest into wicked challenges and, at times, contradictions: Ambitious public financial, social, and environmental targets belie the nervousness and uncertainty that dominate board room discussions. A CEO's morning email to staff sounds curiously different from the answer to an analyst's "difficult" question during a quarterly earnings call. And yes, company statements in SEC 10-K filings about the potential implications of emerging public policy developments can sound quite different than contemporaneous comments on proposed rulemaking. Surprising? No. Resolvable? Perhaps.

James Coleman's illumination of one specific manifestation of this corporate dilemma—the "two audience problem"—is timely and important. Using the notice and comment process behind the Renewable Fuel Standard as his data source, Coleman observes that public companies can on the one hand raise fierce objection and even doomsday-like concerns during the rulemaking process yet remain sanguine in the context of SEC securities filings. Similarly, companies may convert a rule with modest—and even uncertain—upsides into compelling statements of long-term opportunity for investors. His conclusion, using carefully coded data comparing rulemaking comments with contemporaneous SEC documents, is that the truth is at best hard to discern and at worst, masked by "cheap talk" and even bad faith.

Yet, what Coleman exposes is more a manifestation of organizational complexity and conflict than rampant misdirection or duplicity. In fact, instead of relying exclusively on the presence of inconsistency between SEC filings and rulemaking submissions to gauge the credibility and trustworthiness of public companies, we should look more deeply into the way a company recognizes, navigates, and reconciles these natural organizational tensions. Reputable companies make decisions in a transparent and principled

manner, informed by the entity's core purpose, values, and long-term strategy. They are guided by authentic leaders who acknowledge complexity and reduce it to its simplest forms. They are governed by formal structures and informal networks that tackle these issues openly and constructively. And they recognize that their ability to create long-term value will be dictated by the company's willingness to balance and reconcile business growth opportunities with the needs of society and the limitations of our planet. Simply put, legitimate questions arise when these internal business management conflicts spill into the public domain, and it is incumbent upon companies who want to effectively engage in the policymaking process to resolve the sources of these discrepancies.

In a very recent study that in some ways parallels Coleman's work, the World Business Council for Sustainable Development (WBCSD) examines the frequent disconnect between company sustainability reports and risk statements in their Annual Reports.¹ WBCSD identifies several factors behind what it calls the "breakdown" in sustainability risk management, including: limited knowledge of sustainability risks within companies, longer time horizons for sustainability risks, and differing purposes for sustainability compared to risk disclosures. Some of these challenges or hurdles can be extrapolated to the "two audience" problem exposed by Coleman and could offer a roadmap for mitigation, if not resolution.

(1) The Organization Hurdle: Much of the complexity that is found in large public companies is associated with their size, their organizational structures and, to be sure, the big, and often competing, personalities, perspectives, and ambitions of their people. For example, Environmental, Health & Safety technical professionals tasked with evaluating the costs and benefits of proposed rules are disconnected from the Corporate Secretary and Investor Relations teams. Lawyers drafting the comments do not coordinate their work with their colleagues in the

1. WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, SUSTAINABILITY AND ENTERPRISE RISK MANAGEMENT: THE FIRST STEP TOWARDS INTEGRATION (2017), available at <http://www.wbcd.org/Projects/Non-financial-Measurement-and-Valuation/Resources/Sustainability-and-enterprise-risk-management-The-first-step-towards-integration>.

Corporate Secretary's office. These disjointed teams don't understand each other's language, speak to vastly different internal and external audiences, and use different and even conflicting risk assessment and management tools. These dynamics have practical and even embarrassing consequences when perspectives are not shared, individuals are uninformed, and teams lack joined-up perspectives. This hurdle can be overcome through better governance, stronger internal networks, and a stronger appreciation that the company's credibility may depend on improved coordination, alignment and collaboration.

(2) The Purpose Hurdle: In the context of a rulemaking initiative, a company is an advocate, looking to promote its interests and, presumably, what it considers sound public policy. The language of the proposed rule is parsed, cost-benefit analysis is performed, and positions are taken. In contrast, the SEC filing process is about assessing and communicating company "risk factors," defining what is or is not "material" (an endless debate), and otherwise searching for the level of transparency required by law and demanded by investors. Consequently, the processes are managed with disparate, if not conflicting, lenses in the context of different legal frameworks and for vastly different audiences. The consequence, as Coleman shows, is an opaque, if not obscure, window on a company's analysis, perspectives, and policy positions.

Change will arise when investors demand, or regulators compel, greater transparency on how companies view longer-term environmental and social threats and opportunities. This transformation is beginning: Sustainable Accounting Standards Board (SASB) disclosure standards are being developed; institutional investors are showing ever-increasing interest in the "Environmental, Societal and Governance" performance of organizations; and companies are making strategic shifts that recognize—whether they believe it or not—the interconnection between their growth prospects and a changing planet. In these ways, the bridges between traditional disclosures of quantifiable

financial risks and more qualitative "sustainability" risks are being built and the communication gaps exposed by Coleman should, over time, subside.

(3) The Leadership Hurdle: As feckless politicians and disaffected electorates turn their nation states inward, the world increasingly needs civil society and the private sector to fill the void. CEOs must build cultures and drive incentives that promote a more holistic sense of corporate responsibility, driving toward delivery of the UN Sustainable Development Goals. CFOs must back public commitments to environmental protection with capital investments. And General Counsel must ensure that forward-looking statements of risks in SEC filings are not contradicted by responses to proposed rulemaking, lobbying efforts or other public actions taken to promote shorter-term challenges. In other words, companies need leaders who create cultures where "doing the right thing" for the long-term health of the company, society and the planet is valued, demanded and rewarded. Those companies are much less likely to suffer from the form of corporate schizophrenia that Coleman illuminates.

Coleman's core prescriptions for improvement—advising regulators to compare comments with securities disclosures; counseling plaintiff's lawyers to audit SEC filings for accuracy and completeness; and encouraging corporate counsel to drive alignment between comments and disclosures—are sensible. Yet, they largely address the symptoms of the behavior, not the underlying causes. More effective, and predictable, alignment across public filings; greater trust in institutions; and more sustainable public policy will be achieved when companies are able and willing to acknowledge, address, and surmount their "organization," "purpose" and "leadership" hurdles. Those that fail to do so will continue to put both their short-term reputation and prospects at risk. Those that do will turn their "cheap talk" into a valued and trusted voice of reason. These are the companies that will be around for the long term, and deservedly so!

C O M M E N T

A Bridge Too Near: Response to How Cheap Is Corporate Talk?

by Jeffrey A. Smith

Jeffrey Smith is an Adjunct Professor at Fordham Law School, a co-director of the Fordham Law School Sustainability Initiative, and a retired partner at Cravath, Swaine & Moore LLP.

Professor James Coleman has a keen eye, and he has constructed a useful methodology to take full advantage of a rare opportunity to parse “corporate talk,” assessing the so-called “two audience” problem in a way not previously achieved by others. Circumstances served up a laboratory, and Professor Coleman has created what likely will prove to be a benchmark study.

His immediate topic—the ongoing implementation of the Renewable Fuels Standard (RFS)—is unique raw material, because it sits at the crowded crossroads of the RFS approval process where several powerful forces meet on a regular basis. Each year brings a new set of regulatory implementation challenges and industry comment on those challenges. Each year the same companies also file their 10-K reports, in which they address the material aspects of the same issues for the capital marketplace. The net result is a matrix of assertions, over time, by highly interested parties in two very different contexts and intended, nominally, for two very different audiences. They can be compared at all points of the compass with statements made by the same company at a different time and, most revealingly, with statements made for a different audience and in a different regulatory context.

Professor Coleman’s language coding methodology, which tracks both stated nuances and differences in emphasis, allows him to record a unique level of resolution regarding the details of such corporate communication. It is at this point, however, that “Cheap Talk,” by illuminating the entrenched challenges of the past, indirectly poses but does not answer the growing challenges of the future in corporate communication on complex environmental regulatory issues.

Professor Coleman is, of course, keenly aware that he neither invented nor discovered the “dual audience” issue.¹ Twenty-five years ago, for example, in a case not cited by Professor Coleman, *International Paper* was called to task not for cheap talk, but for “corporate happy-talk” in a deci-

sion that analyzed the adequacy of the company’s statements about its environmental performance in the proxy statement context, which has since become a prominent battleground.² Today, many companies are at risk of being in the same basic position as *International Paper*; telling their own story in environmental reports, website postings and through other media in a manner that contrasts sharply, in substance and tone, with the story they tell investors in their mandatory filings or in opposing their proposals.³ This is a dual audience problem at its base, but splintered to multiple audiences in multiple media.

At issue in the *International Paper* case was a shareholder resolution calling on the company to implement the Valdez Principles and to cooperate with shareholders and the public in matters of “public environmental accountability.”⁴ *International Paper* distributed a proxy statement opposing the resolution, asserting that: the company had addressed environmental matters “in an appropriate and timely manner” and was in the “forefront” of industry; the Valdez Principles were not applicable to the company’s operations, would not provide “any greater protection than now exists” and could impose unjustifiable costs on shareholders; the company had already adopted comprehensive industry-specific principles on environmental matters and had invested heavily in pollution control equipment; a committee of the Board of Directors had been established to advise the Board broadly on the company’s diverse environmental programs and policies.⁵

The shareholder group alleged that the proxy statement included misleading statements and omitted material facts in violation of Section 14(a) of the Securities Exchange Act and Rule 14a-9, and relied on statements made in the company’s 10-K, which revealed that the company had been accused of numerous environmental offenses, had pled guilty to felonies, had agreed to pay substantial fines, and

1. See James W. Coleman, *How Cheap Is Corporate Talk? Comparing Companies’ Comments on Regulations With Their Securities Disclosures*, 40 HARV. ENVTL. L. REV. 47, 49–53 nn.4–8 (2016) (citing extensive historical and ongoing scholarship).

2. See *United Paperworkers International Union v. International Paper Co.*, 985 F.2d 1190 (2d Cir. 1993) [hereinafter *International Paper I*].
3. For example, over 60% of shareholder resolutions for Fortune 500 companies in 2015 concerned environmental, social policy, or sustainability issues.
4. *International Paper II* at 1193.
5. *United Paperworkers International Union v. International Paper Co.*, 801 F. Supp. 1134, 1137 (S.D.N.Y. 1992) [hereinafter *International Paper I*].

had been the target of numerous environmental administrative complaints.⁶

The trial court sided with plaintiffs, finding that International Paper's argument that the proxy statement was not misleading was "palpably without merit."⁷ Comparing the company's actual experience in environmental litigation to the Company's statement that it has a "strong environmental compliance program," the court found that the company's proxy statement was "to put it charitably, inconsistent with the serious and ongoing environmental challenges that the Company has endured."⁸ Further, the court characterized the company's statements as "flowery corporate happy-talk," included to defeat the shareholders' proposal.⁹

The judicial exercise of comparing and contrasting the words in affidavits and administrative consent orders on the one hand, with statements of corporate policy (and pride) on the other, foreshadows the opportunity afforded to Professor Coleman by the RFS proceedings. For the trial court, there was no contest—and no mercy. The Second Circuit affirmed, holding that the proxy statement, standing alone, was materially misleading about the company's environmental record. According to the Court, the company's self-laudatory remarks "conveyed an impression that was entirely false,"¹⁰ and that the Annual Report did not cure the misleading statements in the proxy statement. In the Court's view, the level of disclosure in the Annual Report, and the nature of the details that were omitted, were insufficient to put a reasonable shareholder on notice that the falsely "pristine picture" painted in the proxy statement was misleading.¹¹

In the regulatory context, at about the same time as *International Paper* was being decided, various agencies were making the first attempts to break down the silos in which useful information, reported by companies to different agencies for different purposes, was being stored. For instance, as environmental databases became substantially more robust—to address regulatory requirements (e.g., the toxic release inventory, TRIS); optimize the use of existing data¹²; and respond to public pressure for access, transparency, and informational tools for deci-

sionmaking—these databases provided increasingly broad and accessible sources of detailed information for use by stakeholders. Just as mandatory reporting of the results of wastewater discharge and air emissions monitoring became the basis for citizens' suits in the 1980s, and the instantaneous transmission of news of environmental catastrophes dramatically increased public awareness while reducing risk tolerance in the 1990s, the wide availability of substantial environmental performance data has already had a profound effect on discussions of global corporate environmental behavior.

In the securities fraud arena of today, high profile environmental calamities and a torrent of corporate information issued to multiple audiences have provided a flash point of comparison that is arguably more explosive and complex in its consequences than the similar RFS communications matrix examined by Professor Coleman.

In the Ninth Circuit's recent ruling in *Reese v. Malone*, for example, the complexities of a publicly-traded oil company's responsive positioning to a crisis are in full view.¹³ In *Reese*, the Ninth Circuit allowed shareholder damage suits to continue after examining the discrepancies between BP's public and private records concerning leaks in two areas of BP's Alaskan pipeline system, one of which spilled 200,000 gallons of oil in March 2006 and the other, five months later, in a different transit line. Both leaks were the product of pipeline corrosion that had been exacerbated by what BP subsequently admitted were substandard corrosion detection protocols.

The first spill prompted an investigation by the Pipeline and Hazardous Materials Safety Administration (PHMSA), which issued a Corrective Action Order that contained several findings which contrasted markedly with some of BP's public statements about the events. The second spill, which resulted in a temporary shutdown of BP's Prudhoe Bay oil field, prompted investigations by both the Senate and the House. At these hearings, testimony both from regulatory authorities and private sector pipeline maintenance executives also contrasted unfavorably with BP's own public statements.

In their securities fraud case, the plaintiffs focused on three types of communication: (1) press statements by BP's senior executive in charge of the Prudhoe Bay pipeline project; (2) the general statement by BP's CEO to the press that the March spill had occurred notwithstanding "BP's world-class corrosion monitoring and leak detection systems;" and (3) statements in BP's annual reports, one concerning management's belief about BP's material compliance with applicable environmental laws and regulations and one touting BP's "environmental best practices."

While each communication proved damaging to BP in different elements of the case, the Court specifically took BP to task for the boilerplate disclosure in its Annual Report, which stated that "Management believes that [its] activities are in compliance in all material respects with applicable environmental laws and regulations." According

6. *Id.* at 1138-1139.

7. *Id.* at 1140.

8. *Id.* The source of the court's information was, in part, the company's own 10-K filings, and, in part, affidavits from current and former International Paper employees.

9. *Id.* at 1144.

10. *Id.* at 1200. A slightly different dynamic prevailed two decades later in *Reese v. Malone*, discussed *infra*.

11. *Id.*

12. EPA's Enforcement and Compliance History Online or "ECHO" database, for example, was designed to address concerns that public companies were under reporting environmental enforcement actions. The database, which was made available on the EPA website, identified companies' compliance history and listed formal enforcement actions and related penalties on a facility-by-facility basis. The database was also shared with the SEC, and the two agencies implemented procedures designed to foster sharing of information regarding company specific environmental liabilities. This information could then be compared to a company's SEC filings to verify compliance with SEC disclosure obligations. In a series of widely-reported speeches in the early 1990s, then SEC Commissioner Roberts highlighted significant disclosure shortcomings, particularly with respect to the requirements of Item 303 of Reg. S-K, involving environmental legal proceedings.

13. See *Reese v. Malone*, 747 F.3d 557 (9th Cir. 2014).

to the Court, the egregious nature of the violations, all of which had occurred before the annual report was formally issued, the ongoing discussions with PHMSA in the context of violations of the Corrective Action Order, and BP's comparatively poor performance compared to industry norms belied the assertion of "material compliance."

In light of the prominence and magnitude of the violations, the Ninth Circuit reasoned that it would be "absurd" to suggest that top management was unaware of the compliance issues that rendered the annual report statement misleading. Not satisfied with tearing through the veil of these standard qualifiers, the Ninth Circuit also contrasted the specific statements with BP's broad boilerplate language concerning general environmental risks facing the company. The Court concluded that BP's statement concerning management's belief that there had been general compliance actually misdirected shareholders away from the specific problems that BP was facing as a result of the corrosion of the pipelines and the resulting leaks. Rather than providing general cover, these two elements of the annual report compounded the falsity of the statements.

In another case highlighting the perils of communicating into the headwinds of an environmental calamity in a matter involving technical complexity, *In re BP p.l.c. Sec. Litig.*¹⁴ Plaintiffs alleged that, in connection with the Deepwater Horizon well blowout, BP had misrepresented the range of its internal oil spill flow rate estimates in its public statements.¹⁵ The court concluded that facts omitted by BP about the spill's volume did not "fairly align" with what a reasonable investor could have concluded based on the company's statement.¹⁶ The degree of specificity of the company's stated opinion, the absence of hedges and disclaimers, the unequivocal nature of the statements, and the absence of comparable experiential data which a reasonable investor might have used to benchmark BP's estimates obscured for a reasonable investor to what was, in fact, the tentative nature of the company's flow estimate.¹⁷

For as apt, and sometimes stark, as Professor Coleman's conclusions are about the duality of corporate messaging on the RFS, the disclosure issues that have already arisen that transcend the "two audience problem" suggest that the article's insights—and its suggested remedies—are just the beginning of the journey that must be undertaken to remedy the underlying communications problems and reconcile the sources of the tensions.

Professor Coleman suggests that regulators "integrate review of securities disclosure into their rulemaking" to gain a "more accurate picture" of the risks.¹⁸ He also sug-

gests that securities regulators (and investors) review corporate comments on regulation to identify "regulatory risks that companies are not disclosing" and urges corporate counsel to "harmoniz[e] the messages."¹⁹

At other places in his discussion, Professor Coleman suggests that securities disclosure can be used to "audit corporations' regulatory submissions,"²⁰ "easing the regulator's dilemma"²¹ and that they can be used as an "interpretive aid for regulators, helping them suss out which regulations actually may be infeasible,"²² and make them reluctant to accept industry's "exaggerated picture of the cost of regulation"²³ by shedding light on the "very different impressions" that securities disclosure may create of the same topic.²⁴

Let's leave aside quibbles about whether the regulatory and securities law lexicons are necessarily so different—in level of detail, technical focus, political intent or otherwise—that even seemingly dramatic inconsistencies in substance or tone turn out to be ill-adapted tools to accomplish any of these worthy objectives when they are actually applied to a regulatory problem. The larger issue may be that they are all deckchairs on the information and data *Titanic*. Shifting two of them to align them may indeed give some of the passengers a better view, at least for a while, but the massive amounts of data that now exist on the same topics; the ultimate accessibility of that data; the pressure on companies from multiple sources to render it in a digestible form to multiple marketplaces, both in times of crisis and as part of the ordinary course of business; and the absence of any universal framework—or even agreed-upon common language—for much of that communication combine to suggest that this ship is headed for an inglorious end with all passengers aboard, unless the marketplace can change how it navigates.

Put differently, the "harmonization" that Professor Coleman sensibly urges corporate counsel to undertake to reconcile the bilateral two audience problem is only the necessary beginning of more far-reaching and universal issues of corporate communication which have been manifested with increasing frequency in the global capital marketplace.

This is not to criticize Professor Coleman's article for failing to be something that he never intended. Nor is it to slight the deftness and importance of finding an ideally illustrative set of facts, and creating a rigorous and nuanced way to measure the outcomes. Rather, after benefitting from the bright light that Professor Coleman shines in the dark lower decks of disclosure, it is to exclaim, "We have a much bigger problem than we imagined!"

14. See *In re BP p.l.c. Secs. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 99,108 (May 31, 2016) (citing *In re Velti PLC Sec. Litig.*, 2015 WL 5736589, at 38 (N.D. Cal. 2015)).

15. *In re BP p.l.c. Fed. Secs. Litig.*, at 1.

16. *Id.* at 14.

17. See *id.* at 12–13 ("The Court is not holding that, as a general rule, speakers must expressly disclose the full range of every estimate To the contrary, the Court's holding is driven by the unique factual contours of the case—specifically, the unusual asymmetry of information between BP and its investors—which demand a bespoke pattern rather than a blanket approach.")

18. Coleman, *supra* note 1, at 81.

19. *Id.*

20. *Id.* at 54.

21. *Id.*

22. *Id.* at 76.

23. *Id.*

24. *Id.*

C O M M E N T

Puffery or Promises: When Is Cheap Talk Actionable?

by Brian J. Wong

Brian J. Wong is senior counsel at the U.S. Securities and Exchange Commission (SEC). As a matter of policy, the SEC disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission, of individual Commissioners, or of the author's colleagues on the staff of the Commission.

Prof. James Coleman argues that a comparison of statements made by the same company to investors in securities disclosures as opposed to environmental regulators in comments could check the “crying wolf” problem and ferret out when a proposed regulation is genuinely too burdensome or infeasible to implement.¹

Professor Coleman's thoughtful proposal warrants careful attention. There is no doubt that using a person's own words to respond to their arguments is a deft rhetorical gambit.² Yet it is not obvious that corporate disclosures to investors would routinely contain detailed, quantitative projections about the cost and feasibility of proposed regulation, so as to make systematic cross-checks practical. The meticulous empirical analysis that is the centerpiece of Professor Coleman's article sheds light on one aspect of the challenge. It convincingly shows that some companies made *different* statements to the EPA and to investors about the Renewable Fuel Standard and that there were *differences* in tone.³ But measuring the aggregate number of positive as opposed to negative statements cannot by itself show that any particular statement was *false* or that any required disclosure was deficient.

This comment takes a step back and provides an overview of the securities disclosures framework and how upcoming regulations might fit in. It then looks at how courts distinguish between facts, opinions, forward-looking statements, and puffery when they evaluate fraud claims brought by

private litigants. Finally, it concludes with some observations about how differences in tone or emphasis could provide valuable information even when they do not amount to actionable fraud.

I. Why Disclosure and What Disclosures?

Companies will often make predictions to investors about the business impact of proposed regulations. But not all such disclosures are of equal use for environmental regulators. For instance, a heavily caveated, qualitative sentiment couched in conditional terms does little to ease the “regulator's dilemma,” unlike concrete, quantitative data about the “monetary cost and practical feasibility” of a proposal.⁴

Disclosure is one of the fundamental underpinnings of securities regulation. In the wake of the Great Depression, many urged a comprehensive system of federal “merit review” in which a securities offering would be allowed only if it was judged that the business was sound and that the investment was not unfair, unjust, or inequitable.⁵ A competing view was championed by Justice (then Mr.) Louis Brandeis, who urged publicity and sunlight as the best of disinfectants to ills social and industrial. Carried forward by President Franklin Delano Roosevelt, Brandeis's philosophy of disclosure largely won out.

At bottom, the disclosure requirements are designed to arm investors with information to allow them to make informed decisions, which, in turn, fosters confidence in the markets and promotes the efficient allocation of capital. They represent, in F.D.R.'s words, a complement to the “ancient rule of *caveat emptor*”⁶ by not only prohibiting affirmative frauds, such as misrepresentations and mislead-

1. James W. Coleman, *How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures*, 40 HARV. ENVTL. L. REV. 47 (2016)).

2. See generally William Shakespeare, *Hamlet*, act III, scene 4, lines 206–207 (“For 'tis the sport to have the engineer/Hoist with his own petar . . .”).

3. Coleman, *supra* note 1, at 70–75. A significant number of companies endorsed comments submitted by industry trade associations, which do not typically themselves file securities disclosures. Trade association participation can be an attractive way to compile sectorwide information about current practices and modeling about the impact of proposed regulation, while at the same time creating distance from what may be unpopular stances. Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 181 (2012); Timothy F. Malloy, *The Social Construction of Regulation: Lessons From the War Against Command and Control*, 58 BUFF. L. REV. 267, 337–41 (2010).

4. Cf. Coleman, *supra* note 1, at 51.

5. See 1 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* §1C at p. 45 (6th ed. 2011).

6. H.R. REP. NO. 85, at 2, 73d Cong. 1st Sess. (1933); see, e.g., SEC v. Zandford, 535 U.S. 813, 819 (2002).

ing-by-omission half-truths, but also by mandating disclosure of specified, pertinent information.⁷

What follows speaks in generalities, recognizing that the rules are peppered with special cases, exceptions, exemptions, and exceptions to the exemptions—all, happily, of no import for present purposes. Suffice it to say, many of the stakeholders that would be motivated to submit comments in connection with proposed environmental regulation are public companies that file annual reports (Form 10-K), quarterly reports (Form 10-Q), and reports when certain events occur (Form 8-K).⁸

Regulation S-K describes what must be included in these filings.⁹ For example, Item 503(c) instructs a company to discuss the “most significant factors that make the offering speculative or risky.”¹⁰ Item 303 asks for narrative information “necessary to an understanding of [the company’s] financial condition,” including the company’s future prospects.¹¹ That item requires a discussion and analysis of “known trends or uncertainties that have had or that the [company] reasonably expects will have a material” impact on revenues.¹² And as an overarching matter, Exchange Act Rule 12b-20 requires, in addition to anything expressly required to be disclosed, “such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they [were] made not misleading.”¹³

It is easy to see why proposed or pending regulations could trigger these standards and thus require disclosure.¹⁴ Yet, such a discussion would not necessarily contain the level of detail and specificity that the company might include in comments—especially if it was trying to persuade EPA that a proposal was not technically feasible. These disclosure items are largely principles-based in that they identify general topics and rely on context-specific judgments about what discussion is necessary.¹⁵ The touchstone is materiality: Whether there is objectively a “substantial likelihood” that a “reasonable investor” would attach importance to the information in making an investment decision.¹⁶

Just as airing pertinent information can empower investors, unnecessary detail can, as Justice Thurgood Marshall wrote, “bury . . . shareholders in an avalanche of trivial information.”¹⁷ Disclosure guidance has therefore consistently encouraged companies to “emphasize material information and de-emphasize” the immaterial.¹⁸ This guidance has also stated that, in some cases, “[q]uantification of the material effects of known material trends and uncertainties can promote understanding” and “may be required to the extent material if quantitative information is reasonably available.”¹⁹ At the same time, it has recognized that not all the “substantial amount of financial and non-financial information available” to companies in evaluating such trends and uncertainties is itself material, and supplying this unfiltered, underlying data might result in “information overload” from the perspective of investors.²⁰ Such judgments must be made on a case-by-case basis, considering not only the underlying facts and circumstances, but also what has already been said and what is already widely known.²¹

There is, in sum, ample reason to expect that many companies would address exposure to regulatory risk in their investor communications. Often, such disclosures will be mandatory and, in any event, conspicuously ignoring the elephant in the room may lead shareholders to assume the worst.²² But it is by no means clear that these disclosures would address issues with the level of detail, specificity, and quantification that environmental regulators would find most useful.²³

II. Facts, Opinions, Predictions, or Puffery?

If a company asserts directly contradictory, concrete, and material facts to two different audiences, it might expect to receive a fair bit of attention from regulators and the private securities bar alike. But what about statements like:

7. See RESTATEMENT (SECOND) OF TORTS §551 (stating the common-law rule).

8. See 15 U.S.C. §78m; 17 C.F.R. §§240.13a-1, 240.13a-11, 240.13a-13; 1 Loss & Seligman, *supra* note 5, §6B(1)(a)-(b) at pp. 670–78.

9. See Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380 (Mar. 3, 1982).

10. 17 C.F.R. §229.503(c).

11. 17 C.F.R. §229.303(a); Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056, 75,056 (Dec. 19, 2003) [hereinafter 2003 Guidance].

12. 17 C.F.R. §229.303(a)(3)(ii).

13. 17 C.F.R. §240.12b-20.

14. Whether these requirements create an actionable duty to disclose in a private fraud case is currently before the Supreme Court. See *Leidos, Inc. v. Ind. Pub. Retirement Sys.*, 818 F.3d 85 (2d Cir. 2016), *cert. granted*, No. 16-581 (Mar. 27, 2017).

15. Concept Release: Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,925, 23,954 (Apr. 13, 2016) [hereinafter 2016 Concept Release]; 2003 Guidance, *supra* note 11, at 75,060–61.

16. *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976); 17 C.F.R. §240.12b-6. Item 303 contains its own, two-step materiality standard.

Interpretive Release: Management’s Discussion and Analysis of Financial Condition and Results of Operations, 54 Fed. Reg. 22,427, 22,430 & n.27 (May 18, 1989) [hereinafter 1989 Interpretive Release].

17. *TSC Indus.*, 426 U.S. at 448–49.

18. 2016 Concept Release, *supra* note 15, at 23,942; 2003 Guidance, *supra* note 11, at 75,057, 75,060–62.

19. 2003 Guidance, *supra* note 11, at 75,062; 1989 Interpretive Release, *supra* note 16, at 22,429.

20. 2003 Guidance, *supra* note 11, at 75,057, 75,061–62.

21. Compare, e.g., *Pension Fund Group v. Tempur-Pedic Int’l, Inc.*, 614 F. App’x 237, 244 (6th Cir. 2015); *J&R Mktg. v. Gen. Motors Corp.*, 549 F.3d 384, 394 (6th Cir. 2008); *In re Lyondell Petrochem. Co. Sec. Litig.*, 984 F.2d 1050, 1052–53 (9th Cir. 1993), *with Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 718–19 (2d Cir.2011); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 561 (6th Cir. 2001) (en banc).

22. See generally George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 74 Q.J. ECON. 488 (1970).

23. For example, one study found that most climate change disclosures did not attempt to quantify impacts or risks. See ROBERT G. ECCLES & MICHAEL P. KRZUS, *THE INTEGRATED REPORTING MOVEMENT: MEANING, MOMENTUM, MOTIVES, AND MATERIALITY* 138 (2014). The sufficiency of such disclosures cannot, of course, be evaluated without more information and analysis.

We're proud of our flexibility and we believe we're better positioned than competitors to adapt the proposed regulation.

A rule identical to the proposed regulation increased widget production costs by 37% for our overseas factory.

No doubt it would be uncomfortable for a CEO to be confronted with these statements at a hearing on the Hill. Yet is the first statement necessarily false (and fraudulently so) if the second one is true? These potential conceptual mismatches may make it difficult to rely on securities disclosures as a self-implementing check on the accuracy of comments to regulators. Courts have distinguished between various categories of representations in assessing whether they may be the basis for a fraud action by an aggrieved investor.²⁴ Four are pertinent here: Assertions of fact, opinions, forward-looking statements, and puffery.

Facts: A "fact is 'a thing done or existing' or '[a]n actual happening,'"²⁵ which may include presently existing or past states of mind.²⁶ It is a straightforward enough matter that misstatements of fact can be actionable as fraud, subject to the usual requirements of materiality, scienter (if applicable), and the like.

Opinions: An opinion is "a belief,"²⁷ and, unlike a fact, an opinion "does not imply . . . definiteness . . . or certainty."²⁸ It may involve matters for which "individual judgments may be expected to differ."²⁹ An opinion is not false merely because it turns out to be wrong; still, an opinion may be fraudulent if it is not sincerely believed or it contains embedded false statements of fact.³⁰ And an opinion can also be misleading in virtue of what has been *omitted*, if under the circumstances it impliedly and falsely represents that there is a sufficient basis for the belief and that no known, undisclosed facts are incompatible with it.³¹

*Predictions:*³² For decades, the disclosure of forward-looking information was generally unlawful, due to the perception "that such information was inherently unreliable, and that unsophisticated investors would place undue

emphasis" on it.³³ Beginning in the 1970s, that policy began to change so as to foster discussion of future plans or risks, while not inviting litigation over good-faith predictions proven incorrect in hindsight. Courts developed the "bespeaks caution" doctrine, under which a predictive statement may be immaterial (or cannot reasonably be relied upon) if accompanied by sufficiently substantive and tailored cautionary language.³⁴ Regulators³⁵ and eventually Congress devised safe harbors as well, culminating in the Private Securities Litigation Reform Act of 1995's "forward-looking statements" provision.³⁶

Puffery: Finally, courts have concluded that certain kinds of statements are so vague or indefinite as to be inactionable. Puffery includes buzzword-filled "general statements" about whether a company "set[s] the standard"³⁷ or broad expressions of "corporate optimism" about leveraging "compelling opportunities."³⁸ The rationale is that puffery does not convey any substance that a reasonable person would deem important to, and rely upon in making, an investment decision.³⁹

III. Conclusion

If projections or predictions were too easily re-characterized as promises or guarantees, the resultant chilling effect could lead to less information being available to regulators and investors alike. Nor does every inconsistency in tone or shift in emphasis amount to fraud. But it does not follow that environmental regulators, or others with an interest in assessing how companies adapt to proposed regulation, should neglect Professor Coleman's proposal.

After all, an agency engaged in rulemaking need not prove that a commenter's feasibility projections are fraudulent. Regulators decide how much weight to give each comment. Under the Administrative Procedure Act's "arbitrary and capricious" standard of judicial review,⁴⁰ the agency should consider significant comments, but ultimately the record need only reasonably support the premises for the agency's decision.⁴¹ Further, in making "judgmental or predictive" determinations, the agency receives more deference still, and may rely on the informed forecasts of its own

24. Unlike a private plaintiff, the government need not show "justifiable reliance," *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012), and is not subject to various statutory safe harbors and heightened pleading requirements, e.g., 15 U.S.C. §77z-2(c)(1); *SEC v. Tambone*, 550 F.3d 106, 119 (1st Cir. 2008), *reinstated in relevant part on reh'g*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc).

25. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1325 (2015) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 782 (1927)).

26. RESTATEMENT (SECOND) OF TORTS §525 cmts. d–e.

27. *Omnicare*, 135 S. Ct. at 1325 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1509 (1927)).

28. *Id.* (internal quotation marks omitted).

29. RESTATEMENT (SECOND) OF TORTS §538A cmt. b.

30. *Omnicare*, 135 S. Ct. at 1326–27; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991); RESTATEMENT (SECOND) OF TORTS §525 cmt. d.

31. *Omnicare*, 135 S. Ct. at 1328–30; RESTATEMENT (SECOND) OF TORTS §539(1); RESTATEMENT (SECOND) OF CONTRACTS §168.

32. Some opinions are also forward-looking statements (or vice versa), but the inquiries are analytically distinct. In *re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 243–44 (2d Cir. 2016). Likewise, "some predictions about the future can represent interpretations of present facts." *Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 143 n.13 (2d Cir. 2010).

33. Concept Release: Safe Harbor for Forward-Looking Statements, 59 Fed. Reg. 52,723, 52,723–24 (Oct. 19, 1994).

34. *Id.* 52,727–28; *see, e.g.*, *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993); LOSS & SELIGMAN, *supra* note 5, §6C(5)(b) at 787–90.

35. *See, e.g.*, Safe Harbor for Projections, 44 Fed. Reg. 38,810 (July 2, 1979); 17 C.F.R. §229.303(a), **INSTRUCTION 7** (specifying that "forward-looking information supplied [in Item 303] is expressly covered by the safe harbor rule," 17 C.F.R. §240.3b-6); LOSS & SELIGMAN, *supra* note 5, §2D(2)(a) at 230–35.

36. 15 U.S.C. §§77z-2(c)(1)(A), (i)(1), 78u-5(c)(1); *see, e.g.*, *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 772 (2d Cir. 2010) (collecting cases).

37. *ECA, Local 134 v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009).

38. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119–21 (10th Cir. 1997).

39. *See, e.g.*, *City of Monroe Employee Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005); *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993).

40. 5 U.S.C. §706(2)(A).

41. *See, e.g.*, *CTS Corp. v. EPA*, 759 F.3d 52, 62 (D.C. Cir. 2014); *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994).

experts.⁴² As Professor Coleman recognizes, even when comments and securities disclosures are not *technically* inconsistent, it could be reasonable for environmental regulators to discount doom-and-gloom predictions coming from a company simultaneously making rosy reassurances to investors.⁴³ Other audiences exist as well. Today, virtu-

ally all federal rulemaking dockets are online and searchable through the [regulations.gov](http://www.regulations.gov) web portal,⁴⁴ and there is no reason to believe that investors will ignore this potential source of information about the competitive impact of proposed or pending rules.⁴⁵

42. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978); *see also Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Chamber of Com. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005).

43. Coleman, *supra* note 1, at 76–78.

44. ABA COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 3 (2008).

45. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2410 (2014) (endorsing “premise that market professionals generally consider most publicly announced material statements about companies”) (internal quotation marks omitted); *cf.* Jonathan L. Rogers et al., *Run EDGAR Run* (Chicago Booth School of Business Research Paper No. 14-36, 2014) (describing computerized analysis of company filings on another government website).

A R T I C L E

The President's Budget as a Source of Agency Policy Control

by Eloise Pasachoff

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I. Introduction

One of the secrets only the initiated know is that those who labor here [at the Office of Management and Budget] for long do so because the numbers are the keys to the doors of everything. Spending for the arts, the sciences, foreign policy and defense, health and welfare, education, agriculture, the environment, everything—and revenues from every source—all are reflected, recorded, and battled over—in numbers. And the sums of the numbers produce fiscal and monetary policy. If it matters—there are numbers that define it. And if you are responsible for advising the president about numbers, you are—de facto—in the stream of every policy decision made by the federal government.

—Paul O'Neill, Former Deputy Director of OMB.¹

Scholarship on administrative law is replete with analysis of presidential control of executive agencies through centralized review of regulations in the Office of Information and Regulatory Affairs (OIRA), part of the White House's Office of Management and Budget (OMB). While the literature is sharply divided as to whether OIRA's control is salutary or dangerous, the literature largely shares an underlying framework within which the subject matter is discussed: it tends to focus on regulations as the primary lever through which OMB affects agencies' policy choices.

This portrayal of OMB as an institution for asserting presidential control over the administrative state is incomplete. Reviewing regulations is not the only policy lever OMB has to control executive agencies' policy choices. In fact, it may not even be the main one. The budget itself—the core reason for OMB's existence—is a key tool for controlling agencies.

This Article expands the view of centralized control of the administrative state by describing, categorizing, and analyzing the processes by which OMB uses the budget to get “in the stream of every policy decision made by the federal government.”² The Article then assesses OMB's budget work against administrative law values and offers recommendations for how this work can better foster accountability.

II. OMB's Control of Agency Policymaking Through the Budget Process

At the core of OMB's budget work are five Resource Management Offices (RMOs). Together, the RMOs oversee the entire administrative state—cabinet departments, other executive agencies, and independent agencies—in groups organized by subject matter: Natural Resource Programs; Education, Income Maintenance, and Labor Programs; Health Programs; General Government Programs; and National Security Programs.³

Almost half of OMB's 435 employees work in the RMOs.⁴ At the helm of each RMO is a political appointee—not Senate confirmed—called a Program Associate Director or PAD.⁵ The RMOs are further organized into distinct divisions, each run by a career member of the Senior Executive Service, called a Deputy Associate Director, or DAD.⁶ Each division is then split into branches run by a career official called a branch chief.⁷ The remainder of the staff members within each branch are called program examiners, with primary oversight responsibility over part of a large agency, several smaller agencies, or some combination thereof.⁸ In keeping with the high expectations for RMO staff in general, program examiners tend to be

*This Article is adapted from Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016), and is reprinted with permission.*

1. Bernard H. Martin, *Office of Management and Budget*, in *GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES* 72 (Mark A. Abramson et al. eds., 2013).

2. *See id.*

3. Office of Management and Budget Organizational Chart, U.S. GOV'T MANUAL, <http://perma.cc/YWL6-LBT9>.

4. *See* SHELLEY LYNNE TOMKIN, *INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET* 12 (1998).

5. *See id.*

6. *See id.* at 12–13.

7. *See id.* at 13.

8. *See id.*

highly credentialed.⁹ They are also often (although not always) relatively junior in their careers.¹⁰

The core of the RMOs' work tracks three distinct parts of the budget process: *budget preparation*, during which the RMOs work with the agencies under their authority to guide the development of their budget proposals; *budget execution*, during which the RMOs ensure that agencies implement the budget in accordance with legislative requirements and the President's priorities; and *management implementation*, which requires the RMOs to ensure that agencies implement various management requirements as the new budget is prepared and the previous budget is executed.¹¹ These three aspects of the budget process structure give the RMOs a great deal of authority over agency action.

A. The Mechanisms of Control Through Budget Preparation

The Congressional Budget Act of 1974 requires the President to submit a detailed budget proposal early each year.¹² In anticipation of this deadline, agencies submit their budget requests to OMB in early fall. OMB then spends the next few months considering these requests, asking agencies to justify them, and often ultimately modifying them as OMB consolidates a budget proposal for the whole federal government.¹³

OMB has three levers that affect agency policymaking during the budget-preparation process: (1) a *form-and-content lever*, under which OMB sets *ex ante* requirements for the budget and policy proposals that agencies must submit for OMB's review; (2) an *approval lever*, under which OMB must consent to those budget and policy requests *ex post*; and (3) a *confidentiality lever*, under which OMB restricts what agencies may disclose about this process.

I. The Form-and-Content Lever

The first lever that OMB can use to control agency policymaking through budget preparation is the ability to tell agencies what they should put in their budget requests in the first place (the content) and how they should convey this information (the form).

OMB operationalizes its form-and-content lever through two sets of documents. The first is OMB Circular

lar A-11, titled *The Preparation, Submission, and Execution of the Budget*.¹⁴ With two major exceptions discussed below,¹⁵ large parts of this 900-page document are technical and do not play a substantial role in controlling agency policymaking.

However, the other set of documents through which OMB uses the form-and-content lever—memoranda issued by the OMB Director to provide more specific guidance to agencies on what their budget submissions should include—can play a significant role in shaping agency policymaking.¹⁶ Among other things, Directors' budget memoranda can instruct agencies to justify their programs in light of particular presidential priorities. Not surprisingly, these initiatives vary significantly according to the preferences of the current President.

2. The Approval Lever

The form-and-content lever derives its strength from the fact that OMB must ultimately approve the agencies' budget requests. In other words, under the form-and-content lever, OMB tells agencies what to include in their budget requests before agencies draft them, while under the approval lever, OMB tells agencies how those initial drafts must be modified before they can be transmitted to Congress. The approval lever functions both at a broad level, securing overall agency compliance with the President's general policy preferences, and at a narrow level, governing budget and policy choices in discrete line items.

3. The Confidentiality Lever

A third lever OMB uses to control agency policymaking through the budget preparation process is the confidentiality lever: the requirement that agency officials silence their own differing preferences and, if those preferences become known, distance themselves from them.¹⁷ As a result, the confidentiality lever limits agencies' ability to state publicly their own views of alternative budget and policy priorities.

B. The Mechanisms of Control Through Budget Execution

OMB's role in the budget process does not end when Congress passes and the President signs the annual appropriations bills (or, in more recent years, continuing resolutions). OMB is intimately involved in budget execution—the way

9. See Gordon Adams, *The Office of Management and Budget: The President's Policy Tool*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 55, 61 (Roger Z. George & Harvey Rishikof eds., 2011).

10. See Tomkin, *supra* note 4, at 13, 23–24.

11. Office of Mgmt. & Budget, Exec. Office of the President, *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, <http://perma.cc/RQX4-PRRP>.

12. See 31 U.S.C. §1102, §1105(a) (2012).

13. See, e.g., ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 97–99 (3d ed. 2007).

14. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2014), <http://perma.cc/M3QW-7M5N>.

15. See *infra* Part II.A.3. (discussing the confidentiality lever) and II.C.2. (discussing the budget-nexus lever).

16. See Schick, *supra* note 13, at 96.

17. See OMB Circular No. A-11, *supra* note 14, §22, at 1.

federal agencies carry out their work under the budgetary authority they have been granted. OMB affects budget execution through two different levers: the formal *specification lever*, through which it “apportions” and otherwise defines how agencies spend the funds Congress has appropriated, and the informal *monitoring lever*, through which it oversees agencies’ implementation of their programs.

I. The Specification Lever

Before agencies can spend the funds that Congress has appropriated, OMB must “apportion” them by specifying how much may be expended, when it may be expended, and even to some extent how it may be expended.¹⁸ The apportionment power gives OMB a regular opportunity to control how agencies conduct their operations. The RMOs take the lead in this responsibility.¹⁹

Another tool of the specification lever allows OMB to exert influence when agencies seek to change an aspect of Congress’s appropriation. For example, agencies may seek to transfer funds from one account to another or to reprogram funds from one purpose to another within the same account.²⁰ OMB must approve the request before the agency can discuss transferring or reprogramming funds with the relevant congressional committees.²¹ This process, too, gives the RMOs a way to influence where the agency directs its funds.

The specification lever is also at work in the less frequent instances when the President proposes to defer or rescind the use of appropriated funds under the Congressional Budget and Impoundment Control Act of 1974.²² Deferrals and rescissions are a way for the White House to control agencies, as an individual agency must provide OMB with the material it requests in support of the President’s formal “special message” to Congress requesting deferral or rescission.²³

2. The Monitoring Lever

The RMOs also become intimately involved with agencies’ policy choices using the monitoring lever, through which the RMOs oversee agencies’ implementation of their programs. This lever is among the most ambiguous because it is informal; it is not governed by any particular legal source but exists in light of the RMOs’ formal duties.

The monitoring lever can manifest itself in frequent communication between agency policymaking officials and RMO program examiners.²⁴ Agency documents

reflecting policy choices, such as grant criteria and other allocative decisions, may be significantly revised by the RMOs and sent back to the agency to incorporate changes.²⁵ Even when not actively changing documents, the program examiner may ask questions that require agency policy officials to justify or modify their initial decisions.²⁶ Agency policy officials may also reach decisions in anticipation of the RMOs’ requests or collaboratively, as part of a regular phone call or meeting.²⁷

C. The Mechanisms of Control Through Management Initiatives

Over the last 25 years, management has become a more integral part of OMB’s work, “provid[ing] a way for the White House to influence the implementation of its policy agenda.”²⁸ Two such levers exist: the *Presidential Management Agenda lever*, which sets forth presidential initiatives ostensibly designed to improve the administration of government but that often have a substantive policy overlay, and the *budget-nexus lever*, which connects these management initiatives to the budget process.

I. The Presidential Management Agenda Lever

Management initiatives are not simply neutral, technocratic procedures. As political scientist Andrew Rudalevidge put it when describing the way President Nixon’s political advisors originally viewed the “M” in OMB, management was not to be “boring public administration theory” but rather “management in the get-the-Secretary-to-do-what-the-President-needs-and-wants-him-to-do-whether-he-likes-it-or-not sense.”²⁹ To that end, management initiatives often either explicitly contemplate substantive policy choices or implicitly lead to them. Management initiatives are also intricately intertwined with political decisions. The Presidential Management Agenda (PMA) exemplifies this dynamic.

2. The Budget-Nexus Lever

Management initiatives also serve as a form of policymaking control because they are directly tied to the RMOs’ work on the budget, and the budget has the levers for policymaking control described in Sections II.A and II.B above.

The PMA is tied to the budget in part because OMB’s budget instructions direct agencies to embed the initiatives set forth in the PMA in their budget requests.³⁰ The PMA

18. SCHICK, *supra* note 13, at 276–77.

19. OMB CIRCULAR No. A-11, *supra* note 14, §120.15, 120.19, 120.29, 120.33, 120.61, at 10, 12, 14, 16, 24.

20. SCHICK, *supra* note 13, at 281–82.

21. OMB CIRCULAR No. A-11, *supra* note 14, §22.3, at 2–3.

22. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.); SCHICK, *supra* note 13, at 284–89 (explaining that a deferral “delays the use of funds” while “rescission cancels budget authority”).

23. OMB CIRCULAR No. A-11, *supra* note 14, §112.6, at 3.

24. See JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 171–73 (2014).

25. See *id.* at 172.

26. See Martin, *supra* note 1, at 72.

27. See HUDAK, *supra* note 24, at 171–72.

28. Beryl A. Radin, *Overhead Agencies and Permanent Government: The Office of Management and Budget in the Obama Administration*, 7 FORUM, no. 4, at 5 (2009).

29. ANDREW RUDALEVIDGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 61 (2005).

30. OMB CIRCULAR No. A-11, *supra* note 14, §31.8, at 4.

is also tied to the budget because of requirements in the PMA itself to link budget and management.

III. Assessing OMB's Control of Agency Policymaking Through the Budget Process

While there are some salutary aspects of OMB's control of agency policymaking through the budget process, several aspects of the RMOs' work nonetheless raise accountability concerns.

A. Salutary Aspects

I. Legality

Unlike the OIRA regulatory review process, the legality of which continues to be debated,³¹ there is little doubt that the RMOs' work on budgets and management is legal.

The RMOs' work is defensible under both major understandings of executive power. Proponents of the unitary executive, focusing on the "pre-ratification historical context" as an aid to understanding the original public meaning of the Constitution, might point to Alexander Hamilton's listing with "no distinction" the "command of foreign negotiations, preparation of a budget, spending appropriations, direction of the army and navy, direction of a war, 'and other matters of a like nature'" as core to the executive power of Article II.³²

The RMOs' work would likely pass muster with pluralists as well. Focusing on the extent to which Congress has invested the President with authority to "control the policy discretion of other administrators,"³³ a pluralist might point to the delegation to the President to "prepare budgets of the U.S. Government," "prescribe the contents . . . in the budget," and "change agency appropriation requests."³⁴ The President has statutory authority to delegate these tasks to the Director of OMB, as a Senate-confirmed official, under the Presidential Subdelegation Act of 1950.³⁵ OMB further has specific statutory authority both to work under the President's "direction" to administer the office³⁶ and to promulgate and oversee management policies for the executive branch.³⁷

2. Coordination

OMB's control of agency policymaking through the budget process can also be praised for coordinating across the vast administrative state. From the perspective of administrative law values, coordination is useful to the extent it furthers other goals supporting the legitimacy of the administrative state, such as efficiency, effectiveness, and accountability.³⁸ Much of the RMOs' coordinating work supports the first two of these values and to some extent the last one as well.

For example, some of the RMOs' coordinating work promotes *efficiency*, both within OMB itself and within agencies. The RMOs' coordinating work may also support the *effectiveness* of agency action. The whole point of this work is to ensure that agencies have the resources they need to do their jobs well and that they are managed and monitored appropriately. The high caliber of the OMB staff helps further this goal.³⁹

Still other aspects of the RMOs' coordinating work support some form of *accountability*, including the public nature of the President's budget, PMA, and agency budget justification materials. However, the RMOs' coordinating work supports accountability only at a high level of generality related to the published products that result. As the rest of this Part argues, the RMOs' work raises significant accountability concerns in terms of its process.

B. Troublesome Aspects

There are three troublesome aspects of the RMOs' work related to the issue of accountability—that is, "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation."⁴⁰ First, there is a lack of transparency in the way the RMOs' work is conducted and the substance of what they discuss. Second, the RMOs' work can elevate OMB's civil servants and lower-level political appointees over Senate-confirmed agency officials, and the ultimate lines of responsibility are ill-defined. Third, the RMOs' seemingly technocratic work on the budget can obscure value-driven or partisan decisionmaking. All three issues make it difficult for Congress and the American public to hold agencies, OMB, and the White House more generally accountable.

I. The Lack of Transparency

Many parts of the budget process remain hidden. We do not know, for example, when, which kind, and how many meetings between the RMOs and agencies occur;

31. See, e.g., Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 *PACE ENVTL. L. REV.* 325, 367 (2014); Peter L. Strauss, *Overseer, or 'the Decider'?* *The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 703 (2007).

32. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 603, 615 (1994).

33. PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 35 (2009).

34. 31 U.S.C. §§1104(a), 1104(b), 1108(b)(1) (2012).

35. 3 U.S.C. §301 (2012).

36. 31 U.S.C. §502(a) (2012).

37. *Id.* §503(b).

38. See Kate Andrias, *The President's Enforcement Power*, 88 *N.Y.U. L. REV.* 1031, 1083–94; Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *HARV. L. REV.* 1131, 1181–91 (2012).

39. TOMKIN, *supra* note 4, at 23–24; Adams, *supra* note 9, at 61.

40. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 *MICH. L. REV.* 2073, 2119 (2005).

what interest groups or other administration officials meet with the RMOs, what the meetings are about, and who is present during such meetings; what kinds of agency policy work interest the RMOs; how often and what kind of apportionment conditions are used; and how all of the above might vary by administration, by OMB Director, by PAD, by program examiner, or by agency.

Much of the substance of these interactions remains hidden, too. For example, only the agency and its RMO see the contents of the agency's original budget request to OMB. PADs offer no public statement of their different priorities when they step into their roles. Additionally, there is no public documentation or acknowledgment when agency policies change in response to the RMOs' encouragement or requirement.

OMB offers two rationales for the confidentiality it requires of agencies. First, it contends that "[p]olicy consistency" is necessary within the executive branch.⁴¹ Second, it suggests that the "institutional interests . . . implicated by [the] disclosure" of confidential budget documents militate in favor of confidentiality.⁴² Such institutional interests include protecting "the deliberative process of the government" by permitting government officials "to express their opinions freely . . . without fear of publicity [that might] . . . inhibit frank discussion of policy matters and likely impair the quality of decisions."⁴³ To that end, the Freedom of Information Act (FOIA) exempts from disclosure documents that are deliberative and predecisional,⁴⁴ like agency-OMB budget discussions.

While each of these rationales has some validity, neither can justify the extent of opacity in the budget process. In addition, neither rationale appropriately distinguishes the substance of predecisional deliberation from information about the procedural aspects of deliberation and the final post-deliberation decisions.

a. Protecting Policy Consistency

First, "policy consistency" does not require a pretense that an agency and OMB never diverged over the appropriate agency budget and policy request. Currently, OMB directs agency witnesses testifying before Congress, if asked about their interest in appropriations beyond the scope of the President's request, to explain that such interest is "not appropriate," since "witnesses are responsible for one or a few programs, whereas the President is responsible for all the needs of the Federal Government."⁴⁵ This explanation, however, could also disclose the backstory of the agency's budget request.

Witnesses could note prior views while avowing conversion to the President's proposals.

In some cases, though, masking disagreements about the implications of budgetary choices might place agency officials in the position of speaking untruths to Congress. Officials do not always come to believe that the final decision was right. Agency officials could say that they understand the President's request for their agency in light of the entire government's needs without having to claim that the President's request for their agency will accomplish what they believe it will not. OMB's current confidentiality requirements discourage this kind of honesty.

A second reason that greater disclosure of the intra-executive budget process may promote accountability is that such disclosure could deter self-dealing or one-sided dealing.⁴⁶ Recent political science scholarship has shown a correlation between the President's political interests and the distribution of federal funds. One study found that swing states receive more grants and a greater dollar amount in grants than non-swing states, especially around presidential election cycles.⁴⁷ As the author of this study concludes, "[P]residents engage in pork barrel politics."⁴⁸ Another group of political scientists found that districts receive more federal funding when they are represented in Congress by members of the President's own party.⁴⁹ These authors explain, "For an artful president intent upon redirecting federal outlays to a preferred constituency, the opportunity for mischief is substantial."⁵⁰

b. Protecting the Deliberative Process

OMB's second rationale for requiring secrecy in the intra-executive budget context—protecting the integrity of the government's decisionmaking process—similarly does not justify the full extent of secrecy employed.

The mere existence of a FOIA exemption for documents that reveal the government's deliberative process is no reason to require withholding of those documents. As Attorney General Holder explained in a memorandum sent to agency heads early in the Obama Administration, "an agency should not withhold information simply because it may do so legally."⁵¹

The real question is whether it would help or hinder deliberation to disclose predecisional budget documents that reveal the development of OMB's and agencies' thinking. The deliberative costs associated with too much transparency include entrenching positions rather than letting parties develop more nuanced ideas through conversation; silencing good ideas for fear of being publicly

41. OMB CIRCULAR NO. A-11, *supra* note 14, §22.3, at 2.

42. *Id.* §22.5, at 3.

43. Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (internal quotations omitted).

44. FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5) (2012).

45. OMB CIRCULAR NO. A-11, *supra* note 14, §22.2, at 2.

46. ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 181 (2007).

47. HUDAK, *supra* note 24, at 46, 50.

48. *Id.* at 3.

49. Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010).

50. *Id.* at 786 (internal quotation marks omitted).

51. Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, to Heads of Exec. Dep'ts & Agencies, *The Freedom of Information Act (FOIA) 1* (Mar. 19, 2009), <http://perma.cc/GUP4-D9KJ>.

rejected or pilloried; and driving deliberation underground, further out of sight, through mechanisms developed to avoid whatever transparency regime is imposed on unwilling participants.⁵²

These are serious concerns. However, there are costs to the current system of opacity. As Lisa Heinzerling has noted in the context of OIRA's lack of transparency, opacity in government limits "people from understanding the way their government operates, how they can intervene and at what points, what the government is up to, who is making important decisions, [and] why the government has made those decisions."⁵³

These costs suggest that some recalibration of the current regime is worthwhile. At the very least, OMB's reliance on the interests implicated by the deliberative process applies only to the content of documents. It does not apply to the confidentiality that exists around procedural aspects of the intra-executive budget process. Similarly, OMB's confidentiality rationales do not extend to post-deliberative decisions like budget execution decisions.

2. The Role of Civil Servants and Political Officials

A second concern involves the players engaged in effectuating OMB's control. Contrary to the usual understanding of power in the administrative state, where higher-level political officials have authority over both lower-level political officials and the civil service, OMB civil servants and lower-level political appointees can supersede the policy goals of Senate-confirmed agency officials. This reversal of expectations impedes accountability and is exacerbated by the lack of transparency discussed above.

One conventional concern about White House control over agency policymaking is that high-level presidential advisors may direct agency officials to take actions that are illegitimate.⁵⁴ Another view is that the White House achieves some of these same goals by nominating ideologically partisan political appointees who will head agencies without being swayed by "civil-service-led resistance to their preferred policies."⁵⁵

Relatedly, the value of civil servants in agencies is thought to be their ability to "resist and redirect agency leaders intent on shortchanging procedures, ignoring or downplaying congressional directives or scientific findings, or championing unvarnished partisan causes."⁵⁶

The RMOs complicate this view. On the one hand, it is civil servants, not political appointees, who take a front-

line position in directing agency action. To be sure, these civil servants are also bound by professional norms, with loyalty to the institution of the presidency rather than to any political party. And most of the time, RMO staff work with agency civil servants. But RMO staff hardly serve a checking function over political or politicized activity; to the contrary, their very job is to ensure that agency policy is consistent with presidential priorities.

On the other hand, while there are political appointees at the top of the RMOs, they are not Senate-confirmed. The PADs are even less transparent and more powerful than the so-called "czars" that received so much attention, much of it negative, in the early Obama Administration.⁵⁷

The relationship between RMO staff and agency staff has troubling implications for accountability, especially in light of the transparency problems discussed above. At the agency level, one "[k]ey element[] of accountability" is "the requirement[] that administrators appear annually before Congress in order to justify their budget requests and respond to periodic demands from congressional oversight committees to explain and justify their decision making in public testimony."⁵⁸ But if all agency officials can offer is what OMB has told or permitted them to say, any reward or punishment the agency receives will not be fully grounded in reality. Accountability is also compromised within OMB itself, because the public and Congress have no way of knowing what the RMO are doing behind the scenes.

The President can also use the RMOs to avoid accountability. As Richard Neustadt observed almost sixty years ago, when "[t]he voice that speaks is not the President's . . . [but] the Budget Bureau's[.] . . . when need be, the Budget serves as whipping-boy."⁵⁹ Instead of claiming the RMOs' decisions, the President can "blam[e] a nameless OMB bureaucrat five levels down from the top."⁶⁰

3. The Policy and Political Implications of Technocratic Decisions

These critiques would matter less if the budget were simply a dry, neutral document about numbers. But, of course, that is not the case: "[B]udgeting is a political decision influenced by the political content of programs themselves and the political predispositions of key actors in the budgeting process."⁶¹ This reality underscores a third problem with the RMOs' work: its complexity allows a technocratic appearance to obscure underlying substantive choices.

52. See, e.g., VERMEULE, *supra* note 46, at 11–12, 181–82.

53. Heinzerling, *supra* note 31, at 364–65.

54. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141–46 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 56 (2009).

55. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1127, 1121–33 (2008).

56. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015).

57. See, e.g., Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–79, 2583–95 (2011).

58. SHANE, *supra* note 33, at 159–60.

59. Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 671 (1954).

60. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1772 (2009) (internal quotation marks omitted).

61. John B. Gilmour & David E. Lewis, *Assessing Performance Budgeting at OMB: The Influence of Politics, Performance, and Program Size*, 16 J. PUBL. ADMIN. RES. & THEORY 169, 171 (2006).

Some substantive choices, such as tradeoffs among competing interests, might be appropriate for a budget because it is a public statement of national priorities. At the same time, it is not clear that those who are making the decisions are the right people to make those decisions, especially given the broad scope of authority held by the RMOs' civil servants. Alternatively, even if making these decisions is a valid part of their job, it might not always be clear, even to them, that the decisions they are making are actually policy choices.⁶²

Sometimes, however, substantive choices made in the budget are more problematic, such as those based on "pure partisanship"⁶³ or political pressure beyond the public interest, at least when made by the RMOs and couched in the language of technocracy.⁶⁴

To be clear, value-laden decisions are perfectly appropriate in—indeed, inseparable from—the budget process. The problem arises when the language of technocracy obscures value choices, whether intentionally or unintentionally. Such technocratic cover hides the fact that people are making choices, conceals who is making them, and opens the door to partisan decisionmaking. Under any of these scenarios, accountability suffers.

IV. Responding to OMB's Control of Agency Policymaking Through the Budget Process

Any response to OMB's control of agency policymaking through the budget process must be nuanced, mitigating the system's problematic lack of accountability while protecting its valuable coordinating work. Opportunities for reform exist both inside and outside the executive branch.

A. Inside the Executive Branch

To increase accountability of the RMOs, the President could issue an executive order governing the RMOs' work. At a smaller scale, OMB could also take steps to increase its own transparency and engagement with the public.

I. The President

An executive order governing the RMOs' work would enhance accountability in two ways. First, the mere fact of its existence would provide an opportunity for Presidents to claim the RMOs' work as their own. The executive order would parallel Presidents' other executive orders detailing how they intend to use OIRA for regulatory review.⁶⁵ For

all of the criticisms of its substance and implementation,⁶⁶ the executive order governing OIRA's regulatory review at least provides a sequence and scope of activities that the public can expect. The absence of such a document on the RMO side means that a set of offices more than four times as large as OIRA, with oversight over more of the federal executive establishment, operates with more opacity.

Second, an executive order's transparency requirements could provide opportunities for the public to better monitor the RMOs' work. Transparency requirements might focus solely on procedural aspects of the budget process, such as the disclosure of meetings the RMOs have with entities outside the executive branch. Another option might require increased transparency about final budget execution decisions under formal mechanisms such as apportionment. A third, more controversial, option would increase transparency about the substance of interactions between the RMOs and agencies as to predecisional budget and policy deliberations. Different administrations would likely take different positions on these transparency options.

2. OMB

OMB itself can improve its transparency and increase its accountability.

First, OMB could provide more and better information online. Despite valid charges that OIRA's regulatory dashboard is incomplete,⁶⁷ it is nonetheless valuable for capturing some important information about OIRA's interaction with agencies.⁶⁸ This information both informs the public and allows for better public critique and engagement.⁶⁹ In a similar capacity, OMB could present in visually helpful ways where the budget process is. OMB would not have to disclose the substance of the RMOs' work with agencies to make such a dashboard valuable; information about process and scope alone would be a big improvement.

Second, OMB could solicit input from the public on its major management-related policy choices. The challenges of both engaging the public and gleaning information that is likely to be useful for government decisionmaking are well documented.⁷⁰ But OMB could do more than it currently does, particularly with respect to policies that are governmentwide.

62. Cf. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1631–32 (1995) (describing "the unintentional science charade").

63. Cf. Watts, *supra* note 55, at 54.

64. Cf. Mendelson, *supra* note 55, at 1144; Wagner, *supra* note 62, at 1640–50 (describing the "intentional" and "premeditated science charade").

65. See, e.g., Exec. Order No. 13,563 (setting forth President Obama's agenda for OIRA); Exec. Order No. 12,866 (President Clinton's OIRA order); Exec. Order No. 12,291 (President Reagan's original OIRA order).

66. See Heinzerling, *supra* note 31; Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012).

67. See Heinzerling, *supra* note 31, at 363–64.

68. See *Regulatory Review Dashboard*, OFFICE OF INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>.

69. *White House Safeguard Tracker*, PUB. CITIZEN, <http://perma.cc/XEA6-9UCK>.

70. See Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012); Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

B. Outside the Executive Branch

Both Congress and civil society have an important role to play in mitigating accountability concerns related to OMB's ability to control policy through the budget process.

I. Congress

The scope of the RMOs' policymaking effect is large, and the potential for politicization is present. Congress should therefore increase its monitoring and oversight across administrations and do so in a public forum.

Congress might attempt to get more information about the extent of the RMOs' work by requesting that agencies provide information about policy alternatives that were considered and rejected during the preparation of the President's overall budget. Given the confidentiality lever, however, these requests are not likely to produce much information.

Congress might instead turn to the PADs, seeking to learn through their testimony how the RMOs influenced agency policy goals. The PADs are not currently among the OMB officials who testify before Congress. Typically, as is the case with White House staff members in general, congressional testimony is reserved for, or at least standard for, those officials who are confirmed by the Senate. Occasionally, though, Congress has created an OMB position that is subject only to presidential appointment, and yet the official in that position is still expected to testify.⁷¹ Accordingly, Congress could choose to require PADs to testify before Congress when asked. This requirement would speak to two of the three accountability concerns discussed above: it would make the scope of the RMOs' work more transparent by bringing to light the work that these offices do, and it would help make more perceptible the values-based decisions underlying seemingly technocratic budget work.

Alternatively, Congress could also require Senate confirmation for the PADs, which would additionally address the third accountability concern: it would limit the elevation of a low-level political appointee over Senate-confirmed officials in agencies. Senate confirmation would provide an opportunity to probe the PADs' different policy commitments and goals. In so doing, it would increase both the transparency and the accountability of the RMOs' work. While newly requiring Senate confirmation would run counter to trend and has downsides,⁷² the possibility is worth further discussion, especially in light of precedent for turning OMB's high-level policy positions into Senate-confirmed ones. Congress turned

71. See, e.g., 44 U.S.C. 3602(a)-(b) (2012) (establishing in OMB the Office of Electronic Government and providing for its administrator to be subject only to presidential appointment); Office of Mgmt. & Budget, Exec. Office of the President, Testimony, WHITE HOUSE, <http://perma.cc/R955-CW8M> (listing testimony from that office's administrator during the Bush II Administration).

72. See, e.g., Paul C. Light, *Back to the Future on Presidential Appointments*, 64 DUKE L.J. 1499 (2015) (describing trends and scholarship on the appointment process).

the Director and Deputy Director of OMB into Senate-confirmed positions as the scope of their policymaking authority grew and as the President started to use OMB more politically.⁷³ Congress similarly turned the Administrator of OIRA into a Senate-confirmed position out of concern that the position's vast authority required more congressional oversight.⁷⁴ Two other Senate-confirmed positions in OMB oversee offices that are much smaller than the RMOs and have a narrower purview.⁷⁵ Against this backdrop, making the PAD positions Senate-confirmed in an effort to enhance transparency and accountability could be a natural evolution.

2. Civil Society Organizations

Civil society organizations could expand their oversight of what is already public about OMB's actions through the budget process. For example, it is typically a major news story when the President releases the budget, but the OMB directors' release of budget or other memoranda is not often a story, at least not outside the Beltway. It should be. Civil society organizations should also call for more transparency in the RMOs' process overall.

Moreover, if the RMOs are making policy, it is important to ensure the RMOs are hearing from a broad base of interests. OMB budget review is an insider's game.⁷⁶ Civil society organizations could help expand access.

C. A Cautionary Note

Critics of OIRA, concerned that it has become too powerful, have sometimes suggested returning final rulemaking authority to agencies.⁷⁷ Understanding the broader scope of OMB's work through the RMOs should give these critics pause in suggesting the elimination of OIRA's review of regulations as a cure for its ills.

Much of the effect OIRA currently has on agencies' regulations could be implemented through the RMOs' work on budget preparation, budget execution, and management. The approval lever and form-and-content lever could direct which regulations agencies should and should not prioritize. The monitoring lever could ensure that agencies take the steps OMB directs. The Presidential Management Agenda lever could demand that particular regulations receive more attention than others. And the confidentiality

73. See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 51–55 (1975).

74. See Wendy L. Gramm, *Regulatory Review Issues, October 1985-February 1988*, 63 ADMIN. L. REV. 27, 29–30 (2011).

75. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *FISCAL YEAR 2016 BUDGET* 11 (2015), <http://perma.cc/EW76-DTR8> (comparing staff numbers within OMB offices); CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., *RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS* 36 (2013) (listing the six positions in OMB requiring Senate confirmation).

76. See T.R. Goldman, *Lobbying the OMB: The Inside Game*, INFLUENCE (Aug. 22, 2001), <http://perma.cc/SQE2-XB8L>.

77. See, e.g., Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1071–72 (1986); Steinzor, *supra* note 66, at 277.

lever could keep much of this secret. Affecting agencies' regulations through these other means instead of through OIRA would simply drive OMB's policy control even further underground.

Discussions about reforming OIRA should thus incorporate analysis of the RMOs' authority to avoid the "whack-a-mole" effect, where a restriction on agency practice simply leads to experimentation to get around the restriction.⁷⁸ Attention to the RMOs' work more generally is critical for understanding OMB's capacity to control the administrative state.

V. Conclusion

This Article began with the observation from Paul O'Neill, former deputy director of OMB, that policy debates are "reflected, recorded, and battled over" in budget numbers and that "the numbers are the keys to

the doors of everything."⁷⁹ By identifying and elucidating the levers OMB has at its disposal to control agency policymaking through the President's budget process, I have sought to show that this observation is correct. It is through the budget that OMB finds itself "in the stream of every policy decision made by the federal government."⁸⁰ While OIRA's control of agency policymaking through regulatory review is important, it is only one mechanism through which OMB may exercise policymaking authority over federal agencies.

Beyond this descriptive analysis, the Article sketched the various ways in which OMB's budget work is simultaneously salutary and concerning, and offered a series of potential reforms that would improve accountability while still maintaining OMB's beneficial coordinating role. In the end, however, the Article is not intended to provide the last word, but rather to open a conversation, on the President's budget as a source of agency policy control.

78. Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 526 (2014).

79. Martin, *supra* note 1, at 72.

80. *Id.*

C O M M E N T

Comment on *The President's Budget as a Source of Agency Policy Control*

by Russell Shay

Russell Shay is Director of Policy for the Land Trust Alliance.

From the perspective of a lobbyist for a conservation nonprofit organization in Washington, D.C., for three decades, Prof. Eloise Pasachoff's article—particularly the descriptive part—is truly insightful and an excellent look at how the Office of Management and Budget (OMB) works and the amount of influence it has. The budget part of OMB controls what the government actually does; whereas, the Office of Information and Regulatory Affairs, the regulatory part, controls (or tries to control) what people outside the government do.

For a number of reasons, I am a little skeptical about Professor Pasachoff's recommendations for reforms. Unlike countries with parliamentary systems and multiparty coalitions, where there are largely independent ministers who are not of the same party of the president, here in the United States, the president is the boss and someone has to see that his orders get implemented. James Q. Wilson's book *Bureaucracy* is a great work about government and, in particular, American government. One of the anecdotes in his book describes how when Theodore Roosevelt was President there were six levels of command between President Roosevelt and a ranger in Yellowstone National Park; when Wilson wrote the book in the 1980s, there were 24 levels.

The size and complexity of the U.S. Government is such that it is a very difficult job to reconcile a lot of differing opinions. But, the role of government is to make decisions, and that works best when people can come to agreements with give and take. When people are unable to speak freely and figure out what is really important to them (and horse trade), it really impairs the ability of people with disparate viewpoints to agree to move forward. But the ability to keep those discussions internal is important to getting the best decisions—and, indeed, to actually getting a decision made.

Accordingly, I am skeptical of too much disclosure in certain situations. For example, disclosure is appropriate when the president discusses his agenda, but when the details of the budget that reflects his agenda are developed—all of that does not all need to be public. I can see recording and publishing who comes in to talk with OMB;

that is a great idea and relatively easy to implement. This would disclose what everyone should know, but tends to be obscured—that people who have money at stake seek out and talk to the people who control the government. Whereas, for others who are merely interested in good policy decisions, we sometimes ignore the budget staff—at our own peril.

In addition, it is probably not appropriate to use policy cures to address the fact that the current members of Congress are not using their oversight authority very responsibly. Today, there is no John Dingell, the former Chairman of the House Energy and Commerce Committee, who will bring a deputy assistant secretary of Energy up the Hill to aggressively grill him or her about the rationale for their decisions, and about alternatives. Congress has the power to do this and it is a power that they probably should be using more. Congress also has the whip hand on the budget. When Congress puts funding in the budget and requires the money is spent in a certain way, then it will be spent that way.

What we are seeing in Congress are irreconcilable arguments over and over again on the same subject. What you want in the budget is to make a decision so the government can move forward. But, to do that, you cannot allow participants in the decisionmaking to say what they would have done because that just takes you backwards and reinforces outsiders who wish to re-argue the same question.

There are a lot of points of view represented in the current budget process, both from outsiders and from within the federal agencies. For example, everyone thinks their job is important—which is great, because it means that they are trying really hard to get their jobs done. But someone has to decide which of those jobs receives more resources than others. And, that someone has a very tough job.

In sum, Professor Pasachoff's article is a great addition to the literature. Her article will focus more attention on these issues and could increase accountability. But we have to be cautious, so that we don't end up making Administrative decisions more like the current state of Congressional decisions, where compromise and balance and final resolution are less and less rewarded and broad-based support for these decisions become rarer and rarer.

This Comment is based on a transcription of remarks at the Environmental Law and Policy Annual Review conference on March 31, 2017, in Washington, D.C.

C O M M E N T

Optimizing OMB: Response to The President's Budget as a Source of Agency Policy Control

by Ali A. Zaidi

Ali A. Zaidi is a Senior Advisor to Morrison & Foerster, a Precourt Energy Scholar at Stanford University, and a non-resident Fellow at Columbia University. Mr. Zaidi formerly served in the Obama Administration, and President Obama appointed Mr. Zaidi to be the Associate Director for Natural Resources, Energy, and Science at the White House Office of Management and Budget in 2014. The views expressed in this Comment are exclusively the author's own.

No single value defines a budget. Rather, a budget is many values, competing and clashing over common currency, suspended for a moment to showcase a normative expression of where we intend to go as a nation—and how. In our government, the budget is also a proposal, the President's pitch deck to the holders of the purse strings. And until Congress acts, there is no billing to the budget. 'We the People' use this annual process to determine how we tax ourselves, pay off our debts, and invest in our future—how we come together as a one people around shared challenges and opportunities. In all of this, we have help: the Office of Management and Budget (OMB).

Despite the budget's existential tie to the administrative state and OMB's central role in the annual process surrounding the budget—from development to execution, legal literature devotes little attention to either. In her article, Prof. Eloise Pasachoff attempts to reverse this inattentiveness. The treatment is trenchant and thoughtful. Yet, perhaps borne of epistemological reasons rooted in the OMB-opacity her article bemoans, the treatment—at times—flattens context and complexity. With aim at adding more completeness by acknowledging context and complexity that the article either misses or minimizes, I offer three global comments regarding: (I) atomization, (II) accountability, and (III) agenda setting. The first focuses primarily on OMB's budget execution role, the last focuses on OMB's budget development role, and the comment on accountability has application across both.

I. In the Atomized Administrative State, OMB Must Orchestrate Harmony

Today's administrative state is a bottom-up development; each new bill adds or subtracts, often with ambivalence about implementation impacts on the overall enterprise. The result is clear—an atomization of authorities. Yet, why

this comes to be remains unclear. Explanations range from cynical to optimistic to unintentional: perhaps, atomization exists because Congress seeks to inhibit rapid change or limit any one president's influence.¹ Maybe, Congress is motivated by the complexity of systemwide change and, as a result, is assembling—not atomizing—all hands on deck for our biggest problems.² Or possibly, the atomization is “mostly accidental,” the fallout from “a legislative process that occurs on a rolling basis over time, producing inconsistencies, inefficiencies, and unintended consequences.”³

Whatever the genesis story for our atomized administrative state, OMB must orchestrate harmony. The task is not easy, but it is increasingly important. The effects of the atomized administrative state are accentuated by the world we live in—one growingly defined by the ubiquity of data and connecting technology, decentralization of power and governance, and unpredictability of threats. If it were not enough that the administrative state developed in an atomized fashion, the world in which it operates is dominated by a centrifugal force, pulling each atom away from the center and making the problem worse.

To be sure, the full frenzy that furrows the OMB brow cannot be within scope for Professor Pasachoff's treatment. However, the atomized nature of our administrative state, the centrifugal force accentuating the effects of atomization, and the increasingly demanding task of harmonization all belong in a complete conversation about OMB's budget execution function for three reasons.

First, with similar or conflicting authorities placed at different agencies across government, OMB must—during the kinetic process of budget execution—attempt to orchestrate real-time harmonization. Second, OMB must complete its harmonization task in the face of non-linear

1. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) 1138-43.

2. *Id.*

3. *Id.* at 1143.

and stochastic challenges—complicating variables generated either by government or non-government actors. Third, OMB must advance the president’s vision for the overall enterprise through engagement at moments systematic and serendipitous, dealing with single agencies or authorities, and limited by constraints imposed by designers who were likely agnostic or ambivalent about how the pieces fit together.

When Professor Pasachoff raises concerns with the poorly defined or inconsistent ‘elevation’ of Resource Management Offices (RMOs) above Senate-confirmed agency officials, these three reasons become particularly salient: the poor, *ex ante* definition flows from the kinetic or real-time aspect of the task. The inconsistency flows from the non-linearity and stochasticity of the challenges to completing the task. And the ‘elevation’ is of the president’s overall vision rather than the RMOs’ policy preference. This context and complexity is critical for a complete conversation.

II. Ends-Accountability Exists; Means-Accountability Could Be Bolstered

Atomization does not offer an out for accountability. More directly: OMB is a component unit within the Executive Office of the *President*, and the last word is key. Holders of the Oval Office own OMB’s decisions. For a President, there is no avoiding the ends that OMB pursues; accountability always attaches. That accountability holds both inside and outside the Executive Branch. Inside the Executive, appeals to OMB decisions are taken to the President and the President’s senior advisors. At that table, OMB is not an arbiter; it is a respondent. After that table, the parochial fades and each participant adopts the President’s—not necessarily OMB’s—view. This is the only view that leaves the Executive. And again, those dissatisfied hold the President accountable.

Clearly, I diverge from some of Professor Pasachoff’s observations on accountability, specifically on ends-accountability, but I agree with this: accountability around the means OMB that uses to carry its budget execution and budget development roles could be bolstered. In particular, I carry forward the conversation Professor Pasachoff begins on two approaches to bolster means-accountability.

First, despite the heterogeneous composition of OMB’s task, the use of an evidence-based decisionmaking framework, where appropriate, is commendable and presents an opportunity to bolster means-accountability. As Professor Pasachoff notes, recent presidents advanced a series of initiatives to leverage evidence-based decisionmaking, albeit without sufficiently engaging the public. Although the engagement may have been more involved than what Professor Pasachoff portrays, there is certainly headroom. Not only would such engagement benefit the public, which

would be presented with an opportunity to shape a key OMB heuristic, or means, but the engagement would also benefit OMB by stoking the interest of academics to build out this fledgling field.

Second, Professor Pasachoff rightfully draws a comparison between OMB’s Office of Information and Regulatory Affairs (OIRA) and the RMOs regarding disclosure of public meetings. When OIRA meets with stakeholders regarding a rule under review, it posts publicly the names of attendees as well as any material the attendees shared with OIRA. Until the Obama Administration, this type of transparency did not exist at all for RMO meetings. This changed when the Administration instituted a policy of disclosing White House visitor records on a regular basis.⁴ Even so, materials marshaled by attendees were still not made public. A future administration may consider that opportunity to bolster means-accountability. Just as OIRA posts materials from nongovernmental stakeholders for meetings taken on live rules under review, the RMOs might post materials from nongovernmental stakeholders for meetings on live matters of budget development.

Ultimately, both of these approaches seeks to expand the awareness that ‘We the People’ possess about OMB’s means—how the agency helps us determine how we tax ourselves, pay off our debts, and invest in our future.

III. OMB’s Agenda Setting and Administrative Functions Materially Differ

Increased awareness can aid in bolstering means-accountability for RMOs. However, the RMOs’ dual function—budget development and budget execution—suggests different levels of awareness may be appropriate for different aspects of the RMOs work. Professor Pasachoff draws many comparisons between OMB’s OIRA and RMOs; while some are apt, others are overextended. This overextension results because Professor Pasachoff appears to conflate the RMOs’ dual functions and apply a common, heightened awareness expectation across the board.

To be sure, where the RMOs act like OIRA—where the baton is not handed to Congress and authority is concentrated in the Executive—more awareness is necessary. This is not budget development. In budget development, RMOs develop a proposal that Congress scrutinizes on behalf of ‘We the People.’ After receipt of the proposal, Congress can hold hearings; ask for specific analyses, such as *impact statements*, which present the Executive Branch with what-if hypotheticals regarding different funding scenarios; or demand answers to *questions for the record*. And Congress does so. By comparison, in budget execution, RMOs exer-

4. White House, *White House Voluntary Disclosure Policy Visitor Access Records* (2017), <https://obamawhitehouse.archives.gov/VoluntaryDisclosure>.

cise discretion within the degrees of freedom Congress has provided. Here, RMOs act like rulemakers. They both propose and execute. Authority is concreted. And appropriately, the need for awareness is heightened.

Already, RMOs use traditional rulemaking processes, such as those governed by the Administrative Procedures Act (APA), to carry out certain budget execution functions; this can be expanded. Take for example, federal credit programs like the direct loans offered by the Department of Agriculture or the loan guarantees offered by the Department of Energy. These programs—the operation of which clearly constitutes budget execution—are already governed by rules that run through APA's notice and comment requirements. Similarly, APA or APA-lite processes also often govern procurement, the process by which the federal government buys goods and services. Certainly, there must be other aspects of the RMOs work that could be governed by processes that resemble processes already associated with federal credit programs and aspects of procurement. Where RMOs predictably and regularly exercise discretion within the degrees of freedom Congress has provided, I am certain we would find candidates for application of APA or APA-lite processes. Surely, such an effort could bolster means-accountability in the RMOs' work.

Yet, the same effort applied to budget development could be deleterious. Although Professor Pasachoff is quick to dismiss the importance of 'policy consistency' or of protecting the 'deliberative process,' these concepts are

not pretexts for opacity—they represent the real struggle of a president to present one coherent vision for the country. Remember, a budget is many values, competing and clashing over common currency, suspended for a moment to showcase a normative expression of where we intend to go as a nation and how. To ask the president to decompose that budget is to take away the power to present that coherent vision and preemptively negotiate against it, rather than seek to persuade the Congress of its merits. In this way, OMB's agenda setting and administrative functions materially differ. The implications for awareness and accountability follow.

IV. Conclusion

Professor Pasachoff attempts to reverse the legal literature's inattentiveness to the budget's existential tie to the administrative state and OMB's central role in the annual process surrounding the budget. The treatment starts an important conversation about how 'We the People' might strengthen the processes and institutions we use to determine how we tax ourselves, pay off our debts, and invest in our future. Taking this hard look makes more sense now than ever before: the atomized nature of our administrative state, the centrifugal force accentuating the effects of atomization, and the increasingly demanding task of harmonization make OMB's task today both more difficult and more important.

RECENT DEVELOPMENTS

In the Congress

“In the Congress” entries cover activities reported in the *Congressional Record* from June 1, 2017, through June 30, 2017. Entries are arranged by bill number, with Senate bills listed first. “In the Congress” covers all environment-related bills that are introduced, reported out of committee, passed by either house, or signed by the president. “In the Congress” also covers all environmental treaties ratified by the Senate. This material is updated monthly. For archived materials, visit <http://elr.info/legislative/congressional-update/archive>.

Chamber Action

S. 826 (wildlife), which would reauthorize the Partners for Fish and Wildlife Program and certain wildlife conservation funds, was passed by the Senate. 163 Cong. Rec. S3375 (daily ed. June 8, 2017).

H.R. 338 (energy), which promotes a 21st-century energy and manufacturing workforce, was passed by the House. 163 Cong. Rec. H4831 (daily ed. June 12, 2017).

H.R. 1654 (water), which would authorize the Secretary of the Interior to coordinate federal and state permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency for permit processing, was passed by the House. 163 Cong. Rec. H5082 (daily ed. June 22, 2017).

H.R. 1684 (natural resources), which would approve the Disaster Assistance Support for Communities and Homeowners Act of 2017, was passed by the House. 163 Cong. Rec. H5144 (daily ed. June 26, 2017).

H.R. 1967 (energy), which would approve the Bureau of Reclamation Pumped Storage Hydropower Development Act, was passed by the House. 163 Cong. Rec. H5210 (daily ed. June 27, 2017).

H.R. 2274 (energy), which would amend the Federal Power Act to pro-

vide for extended periods relating to preliminary permits and commencement of construction, was passed by the House. 163 Cong. Rec. H4828 (daily ed. June 12, 2017).

H.R. Res. 392 (land use), which would provide for consideration of H.R. 1873 and H.R. 1654, was passed by the House. 163 Cong. Rec. H5089 (daily ed. June 22, 2017).

Committee Action

S. 97 (energy) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-115, 163 Cong. Rec. S3686 (daily ed. June 21, 2017). The bill would approve the Nuclear Energy Innovation Capabilities Act.

S. 713 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-118, 163 Cong. Rec. S3765 (daily ed. June 26, 2017). The bill would establish the Mountains to Sound Greenway National Heritage Area in the state of Washington.

H.R. 46 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-110, 163 Cong. Rec. S3487 (daily ed. June 14, 2017). The bill would approve the Fort Ontario Study Act.

H.R. 220 (energy) was reported by the Committee on Natural Resources. H. Rep. 115-154, 163 Cong. Rec. H4621 (daily ed. June 2, 2017). The bill would authorize the expansion of an existing hydroelectric project.

H.R. 338 (energy) was reported by the Committee on Energy and Commerce. H. Rep. 115-168, 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill would promote a 21st-century energy and manufacturing workforce.

H.R. 494 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-114, 163 Cong. Rec. S3648 (daily ed. June 20, 2017). The bill would expand the boundary of Fort Frederica National Monument.

H.R. 497 (land use) was reported by the Committee on Natural Resources. H. Rep. 115-155, 163 Cong. Rec. H4621 (daily ed. June 2, 2017). The bill would authorize the Santa Ana River Wash Plan Land Exchange Act.

H.R. 1029 (air) was reported by the Committee on Agriculture, Nutrition, and Forestry. H. Rep. 115-49, 163 Cong. Rec. S3857 (daily ed. June 29, 2017). The bill would amend FIFRA to improve pesticide registration.

H.R. 1654 (water) was reported by the Committee on Natural Resources. H. Rep. 115-166, 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill would approve the Water Supply Permitting Coordination Act.

H.R. 1684 (natural resources) was reported by the Committee on Transportation and Infrastructure. H. Rep. 115-193, 163 Cong. Rec. H5178 (daily ed. June 26, 2017). The bill would approve the Disaster Assistance Support for Communities and Homeowners Act of 2017.

H.R. 1873 (energy) was reported by the Committee on Natural Resources.

H. Rep. 115-165, 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill would approve the Electricity Reliability and Forest Protection Act.

H.R. 1873 (energy) was reported by the Committee on Natural Resources. H. Rep. 115-165, 163 Cong. Rec. H5005 (daily ed. June 21, 2017). The bill would amend FLPMA to enhance the reliability of the electricity grid and reduce the threat of wildfires to and from electric transmission and distribution facilities on federal lands by facilitating vegetation management.

H.R. 2274 (energy) was reported by the Committee on Energy and Commerce. H. Rep. 115-173, 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill would amend the Federal Power Act to provide for extended periods relating to preliminary permits and commencement of construction.

H.R. 2292 (land use) was reported by the Committee on Energy and Commerce. H. Rep. 115-173, 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill would extend a FERC project involving the Cannonsville Dam.

H.R. 2548 (natural resources) was reported by the Committee on Transportation and Infrastructure. H. Rep. 115-191, 163 Cong. Rec. H5140 (daily ed. June 23, 2017). The bill would approve the FEMA Reauthorization Act of 2017.

H.R. Res. 392 (land use) was reported by the Committee on Rules. H. Rep. 115-186, 163 Cong. Rec. H4991 (daily ed. June 20, 2017). The bill would provide for consideration of H.R. 1873 and H.R. 1654.

S. 55 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-104, 163 Cong. Rec. S3456 (daily ed. June 13, 2017). The bill would approve the Fort Ontario Study Act.

S. 213 (wildlife) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-108, 163 Cong. Rec. S3487 (daily ed. June 14, 2017). The bill would approve the Jay S. Hammond Wilderness Act.

S. 217 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-109, 163 Cong. Rec. S3487 (daily ed. June 14, 2017). The bill would amend the Denali National Park Improvement Act to clarify certain provisions relating to the natural gas pipeline authorized in the Denali National Park and Preserve.

S. 346 (natural resources) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-113, 163 Cong. Rec. S3554 (daily ed. June 15, 2017). The bill would approve the National Volcano Early Warning and Monitoring System Act.

S. 566 (land use) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-106, 163 Cong. Rec. S3456 (daily ed. June 13, 2017). The bill would approve the Methow Headwaters Protection Act.

S. 714 (water) was reported by the Committee on Energy and Natural Resources. S. Rep. 115-107, 163 Cong. Rec. S3456 (daily ed. June 13, 2017). The bill would approve the Yakima River Basin Water Enhancement Project Phase III Act.

Bills Introduced

S. 1298 (Paul, R-Ky.) (water) would modify the criteria used by the Corps of Engineers to dredge small ports. 163 Cong. Rec. S3327 (daily ed. June 7, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1314 (Kaine, D-Va.) (natural resources) would amend the Natural Gas Act to bolster fairness and transparency in consideration of interstate natural gas pipelines, to provide for greater public input opportunities. 163 Cong. Rec. S3328 (daily ed. June 7, 2017). The bill was referred to the Committee on Commerce, Science, and Transportation.

S. 1332 (Stabenow, D-Mich.) (water) would establish the Great Lakes Aquatic Connectivity and Infrastructure Program. 163 Cong. Rec. S3362 (daily ed. June 8, 2017). The bill was referred

to the Committee on Environment and Public Works.

S. 1336 (Gardner, R-Colo.) (energy) would amend the Energy Policy Act to reauthorize hydroelectric production incentives and hydroelectric efficiency improvement incentives. 163 Cong. Rec. S3395 (daily ed. June 12, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1340 (Capito, R-W. Va.) (energy) would provide for an expedited permitting process for critical energy infrastructure projects relating to the establishment of a regional energy hub in Appalachia. 163 Cong. Rec. S3396 (daily ed. June 12, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1367 (Warren, D-Mass.) (energy) would require the Secretary of Energy to conduct a study and issue a report that quantifies the energy savings benefits of operational efficiency programs and services for commercial, institutional, industrial, and governmental entities. 163 Cong. Rec. S3554 (daily ed. June 15, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1368 (Menendez, D-N.J.) (natural resources) would reauthorize the National Flood Insurance Program. 163 Cong. Rec. S3554 (daily ed. June 15, 2017). The bill was referred to the Committee on Banking, Housing, and Urban Affairs.

S. 1395 (Carper, D-Del.) (land use) would revise the boundaries of certain John H. Chafee Coastal Barrier Resources System units in Delaware. 163 Cong. Rec. S3686 (daily ed. June 21, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1401 (Duckworth, D-Ill.) (water) would amend the SDWA to address lead contamination in school drinking water. 163 Cong. Rec. S3686 (daily ed. June 21, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1417 (Hatch, R-Utah) (wildlife) would require the Secretary of the In-

terior to develop a categorical exclusion for covered vegetative management activities carried out to establish or improve habitat for greater sage-grouse and mule deer. 163 Cong. Rec. S3731 (daily ed. June 22, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1425 (Wicker, R-Mo.) (natural resources) would reauthorize the Integrated Coastal and Ocean Observation System Act. 163 Cong. Rec. S3731 (daily ed. June 22, 2017). The bill was referred to the Committee on Commerce, Science, and Transportation.

S. 1429 (Cardin, D-Md.) (water) would amend the Federal Water Pollution Control Act to reauthorize the Chesapeake Bay Program. 163 Cong. Rec. S3765 (daily ed. June 26, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1430 (Cardin, D-Md.) (water) would amend the Chesapeake Bay Initiative Act of 1998 to reauthorize the Chesapeake Bay Gateways and Water-trails Network. 163 Cong. Rec. S3765 (daily ed. June 26, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1445 (Scott, R-S.C.) (natural resources) would amend the National Flood Insurance Act to ensure community accountability for areas repetitively damaged by floods. 163 Cong. Rec. S3801 (daily ed. June 27, 2017). The bill was referred to the Committee on Banking, Housing, and Urban Affairs.

S. 1447 (Carper, D-Del.) (air) would reauthorize the diesel emissions reduction program. 163 Cong. Rec. S3801 (daily ed. June 27, 2017). The bill was referred to the Committee on Environment and Public Works.

S. 1448 (Portman, R-Ohio) (governance) would affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies. 163 Cong. Rec. S3801 (daily ed. June 27, 2017). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

S. 1455 (Flake, R-Ariz.) (energy) would amend the United States Energy Storage Competitiveness Act to direct the Secretary of Energy to establish new goals for the Department of Energy relating to energy storage and to carry out certain demonstration projects relating to energy storage. 163 Cong. Rec. S3829 (daily ed. June 28, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1457 (Flake, R-Ariz.) (energy) would amend the Energy Policy Act to direct the Secretary of Energy to carry out demonstration projects relating to advanced nuclear reactor technologies to support domestic energy needs. 163 Cong. Rec. S3830 (daily ed. June 28, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1459 (Scott, R-S.C.) (land use) would establish Fort Sumter and Fort Moultrie National Park. 163 Cong. Rec. S3830 (daily ed. June 28, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1460 (Murkowski, R-Ark.) (governance) would provide for the modernization of energy and natural resources policies. 163 Cong. Rec. S3830 (daily ed. June 28, 2017). The bill was referred to the Committee on Energy and Natural Resources.

S. 1507 (Reed, D-R.I.) (natural resources) would amend the National Flood Insurance Act to allow the FEMA Administrator to provide capitalization grants to states to establish revolving funds to provide assistance to reduce flood risks. 163 Cong. Rec. S3858 (daily ed. June 29, 2017). The bill was referred to the Committee on Banking, Housing, and Urban Affairs.

S. 1512 (Lankford, R-Okla.) (governance, air) would prohibit the Secretary of Energy, the EPA Administrator, the Secretary of the Interior, the Secretary of Transportation, and the Chair of the Council on Environmental Quality from considering, in taking any action, the social cost of carbon, the social cost of methane, the social cost of nitrous oxide, or the social cost of any other greenhouse gas,

unless compliant with OMB guidance. 163 Cong. Rec. S3858 (daily ed. June 29, 2017). The bill was referred to the Committee on Environment and Public Works.

H.R. 2799 (McNerney, D-Cal.) (water) would amend the Reclamation Wastewater and Groundwater Study and Facilities Act to authorize certain recycled water projects. 163 Cong. Rec. H4700 (daily ed. June 7, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 2830 (Veasey, D-Tex.) (energy) would approve the Methane Emissions Mitigation Act. 163 Cong. Rec. H4817 (daily ed. June 8, 2017). The bill was referred to the Committee on Science, Space, and Technology.

H.R. 2853 (Kind, D-Wis.) (waste) would approve the Agriculture Environmental Stewardship Act of 2017. 163 Cong. Rec. H4818 (daily ed. June 8, 2017). The bill was referred to the Committee on Science, Space, and Technology and the Committee on Ways and Means.

H.R. 2868 (Zeldin, R-N.Y.) (natural resources) would approve the National Flood Insurance Program Policyholder Protection Act. 163 Cong. Rec. H4818 (daily ed. June 8, 2017). The bill was referred to the Committee on Financial Services.

H.R. 2872 (Bucshon, R-Ind.) (energy) would approve the Promoting Hydropower Development at Existing Nonpowered Dams Act. 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 2874 (Duffy, R-Wis.) (natural resources) would approve the 21st Century Flood Reform Act. 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill was referred to the Committee on Financial Services.

H.R. 2875 (Velazquez, D-N.Y.) (natural resources) would approve the National Flood Insurance Program Administrative Reform Act. 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill was referred to the Committee on Financial Services.

H.R. 2877 (Blumenauer, D-Or.) (natural resources) would amend the National Flood Insurance Act of 1968 to prohibit any subsidy for flood insurance coverage for any property owned or operated by the president. 163 Cong. Rec. H4853 (daily ed. June 12, 2017). The bill was referred to the Committee on Financial Services.

H.R. 2880 (Griffith, R-Va.) (energy) would approve the Promoting Closed-Loop Pumped Storage Hydro-power Act. 163 Cong. Rec. H4854 (daily ed. June 12, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 2897 (Norton, D-D.C.) (land use) would authorize the mayor of the District of Columbia and the director of the National Park Service to enter into cooperative management agreements for the operation, maintenance, and management of units of the National Park System in the District of Columbia. 163 Cong. Rec. H4912 (daily ed. June 13, 2017). The bill was referred to the Committee on Natural Resources and the Committee on Oversight and Government Reform.

H.R. 2907 (Tipton, R-Colo.) (natural resources) would amend the Mineral Leasing Act to require the Secretary of the Interior to develop and publish an all-of-the-above quadrennial federal onshore energy production strategy to meet domestic energy needs. 163 Cong. Rec. H4936 (daily ed. June 15, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 2908 (Lynch, D-Mass.) (climate change) would direct federal departments and agencies to perform certain functions to ensure that climate change-related impacts are fully considered in the development of national security doctrine, policies, and plans. 163 Cong. Rec. H4936 (daily ed. June 15, 2017). The bill was referred to the Committee on Energy and Commerce, the Committee on the Armed Services, the Committee on Foreign Affairs, the Committee on Science, Space, and Technology, and the Committee on Intelligence.

H.R. 2910 (Flores, R-Tex.) (governance) would provide for federal and

state agency coordination in the approval of certain authorizations under the Natural Gas Act. 163 Cong. Rec. H4936 (daily ed. June 15, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 2917 (Gibbs, R-Ohio) (water) would amend the Federal Water Pollution Control Act to clarify when the EPA Administrator has the authority to prohibit the specification of a defined area, or deny or restrict the use of a defined area for specification, as a disposal site under §404 of such Act. 163 Cong. Rec. H4936 (daily ed. June 15, 2017). The bill was referred to the Committee on Transportation and Infrastructure.

H.R. 2921 (Cramer, R-N.D.) (governance) would establish a vegetation management pilot program on National Forest System land to better protect utility infrastructure from passing wildfires. 163 Cong. Rec. H4937 (daily ed. June 15, 2017). The bill was referred to the Committee on Natural Resources and the Committee on Agriculture.

H.R. 2922 (Donovan, R-N.Y.) (governance) would reform and improve FEMA, the Office of Emergency Communications, and the Office of Health Affairs of the Department of Homeland Security. 163 Cong. Rec. H4937 (daily ed. June 15, 2017). The bill was referred to the Committee on Homeland Security, the Committee on Transportation and Infrastructure, and the Committee on Energy and Commerce.

H.R. 2923 (Graves, R-La.) (governance) would designate the Gulf of Mexico Alliance as a regional coordination partnership of federal and state actions related to the management of the Gulf of Mexico ecosystem. 163 Cong. Rec. H4937 (daily ed. June 15, 2017). The bill was referred to the Committee on Transportation and Infrastructure, the Committee on Natural Resources, and the Committee on Science, Space, and Technology.

H.R. 2936 (Westerman, R-Ark.) (land use) would approve the Resilient Federal Forests Act. 163 Cong. Rec. H4991 (daily ed. June 20, 2017). The bill was referred to the Committee on Agriculture, the Committee on

Natural Resources, the Committee on Education and the Workforce, and the Committee on Transportation and Infrastructure.

H.R. 2937 (LaHood, R-Ill.) (natural resource, water) would approve the Community Reclamation Partnership Act. 163 Cong. Rec. H4991 (daily ed. June 20, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 2939 (Tipton, R-Colo.) (water) would approve the Water Rights Protection Act. 163 Cong. Rec. H4992 (daily ed. June 20, 2017). The bill was referred to the Committee on Agriculture and the Committee on Natural Resources.

H.R. 2943 (Barragan, D-Cal.) (land use) would provide grants for projects to acquire land and water for parks and other outdoor recreation purposes and to develop new or renovate existing outdoor recreation facilities. 163 Cong. Rec. H4992 (daily ed. June 20, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 2958 (Lieu, D-Cal.) (air, climate change) would reduce greenhouse gas emissions and protect the climate. 163 Cong. Rec. H4993 (daily ed. June 20, 2017). The bill was referred to the Committee on Energy and Commerce and the Committee on Foreign Affairs.

H.R. 2987 (McSally, R-Ariz.) (governance, natural resources) would approve the 21st Century Conservation Service Corps Act, which would place youth and veterans in national service positions to conserve, restore, and enhance the great outdoors of the United States. 163 Cong. Rec. H5048 (daily ed. June 21, 2017). The bill was referred to the Committee on Natural Resources, the Committee on Education and the Workforce, the Committee on Agriculture, the Committee on Transportation and Infrastructure, and the Committee on Energy and Commerce.

H.R. 2991 (Smucker, R-Pa.) (land use) would approve the Susquehanna National Heritage Area Act. 163 Cong. Rec. H5048 (daily ed. June 21, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3005 (Gosar, R-Ariz.) (wildlife) would direct the Secretary of the Interior to establish a bison management plan for Grand Canyon National Park. 163 Cong. Rec. H5108 (daily ed. June 22, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3017 (McKinley, R-W. Va.) (waste) would reauthorize the brown-fields program under CERCLA. 163 Cong. Rec. H5109 (daily ed. June 22, 2017). The bill was referred to the Committee on Energy and Commerce and the Committee on Transportation and Infrastructure.

H.R. 3039 (Chu, D-Cal.) (land use) would designate certain federal lands in the state of California as wilderness areas and as components of the National Wilderness Preservation System, to designate portions of the San Gabriel River and Little Rock Creek in that state as components of the National Wild and Scenic Rivers System. 163 Cong. Rec. H5138 (daily ed. June 23, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3040 (Conyers, D-Mich.) (air, wildlife, governance) would direct the EPA Administrator to take certain actions related to pesticides that may affect pollinators. 163 Cong. Rec. H5139 (daily ed. June 23, 2017). The bill was referred to the Committee on Agriculture.

H.R. 3043 (McMorris, R-Wash.) (governance) would modernize hydropower policy. 163 Cong. Rec. H5139 (daily ed. June 23, 2017). The bill was referred to the Committee on Energy and Commerce and the Committee on Oversight and Government Reform.

H.R. 3045 (Messer, R-Ind.) (land use) would amend the National Trails System Act to extend the Lewis and Clark National Historic Trail. 163 Cong. Rec. H5139 (daily ed. June 23, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3050 (Upton, R-Mich.) (energy) would approve the Enhancing State Energy Security Planning and Emergency Preparedness Act of 2017. 163 Cong. Rec. H5139 (daily ed. June 23, 2017).

The bill was referred to the Committee on Energy and Commerce.

H.R. 3053 (Shimkus, R-Ill.) (waste) would amend the Nuclear Waste Policy Act. 163 Cong. Rec. H5178 (daily ed. June 26, 2017). The bill was referred to the Committee on Energy and Commerce, the Committee on Natural Resources, and the Committee on the Armed Services.

H.R. 3063 (Sarbanes, D-Md.) (water) would amend the Chesapeake Bay Initiative Act of 1998 to reauthorize the Chesapeake Bay Gateways and Watertrails Network. 163 Cong. Rec. H5179 (daily ed. June 26, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3099 (Sanford, R-S.C.) (land use) would establish Fort Sumter and Fort Moultrie National Park. 163 Cong. Rec. H5295 (daily ed. June 28, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3106 (Boyle, D-Pa.) (water) would amend the SDWA to require the EPA Administrator to publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for perfluorinated compounds (including perfluorooctanesulfonic acid and perfluorooctanoic acid). 163 Cong. Rec. H5373 (daily ed. June 29, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 3107 (Poe, R-Tex.) (air) would reauthorize the diesel emissions reduction program. 163 Cong. Rec. H5373 (daily ed. June 29, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 3117 (Jenkins, R-W. Va.) (air) would prohibit the Secretary of Energy, the EPA Administrator, the Secretary of the Interior, the Secretary of Transportation, and the Chair of the Council on Environmental Quality from considering, in taking any action, the social cost of carbon, the social cost of methane, the social cost of nitrous oxide, or the social cost of any other greenhouse gas, unless compliant with OMB guidance. 163 Cong. Rec. H5374 (daily ed. June 29, 2017). The

bill was referred to the Committee on Energy and Commerce and the Committee on Natural Resources.

H.R. 3127 (Griffith, R-Va.) (air) would amend the CAA to exclude energy-efficiency projects, pollution-control projects, and reliability projects from the definition of a modification. 163 Cong. Rec. H5374 (daily ed. June 29, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 3128 (Griffith, R-Va.) (air) would amend the CAA to clarify when a physical change in, or change in the method of operation of, a stationary source constitutes a modification. 163 Cong. Rec. H5374 (daily ed. June 29, 2017). The bill was referred to the Committee on Energy and Commerce.

H.R. 3131 (Huizenga, R-Mich.) (wildlife) would amend the ESA to conform citizen suits with existing law. 163 Cong. Rec. H5374 (daily ed. June 29, 2017). The bill was referred to the Committee on Natural Resources and the Committee on the Judiciary.

H.R. 3133 (Johnson, R-La.) (wildlife) would amend the Marine Mammal Protection Act to reduce unnecessary permitting delays by clarifying associated procedures to increase economic development and support coastal restoration programs. 163 Cong. Rec. H5375 (daily ed. June 29, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3135 (Keating, D-Mass.) (natural resources) would authorize the FEMA Administrator to make grants to consortia of states and communities to hire individuals to coordinate the Community Rating System program under the National Flood Insurance Program for the states and communities who are members of the consortia. 163 Cong. Rec. H5375 (daily ed. June 29, 2017). The bill was referred to the Committee on Financial Services.

H.R. 3142 (McKinley, R-W. Va.) (land use) would establish the Appalachian Forest National Heritage Area. 163 Cong. Rec. H5375 (daily ed. June 29, 2017). The bill was referred to the Committee on Natural Resources.

H.R. 3156 (Soto, D-Fla.) (water) would establish the Water Science Centers within the United States Geological Survey. 163 Cong. Rec. H5376 (daily ed. June 29, 2017). The

bill was referred to the Committee on Natural Resources.

H.R. Res. 383 (Heck, D-Wash.) (wildlife) would express support for

recognition of June 2017 as National Orca Protection Month. 163 Cong. Rec. H4913 (daily ed. June 13, 2017). The bill was referred to the Committee on Oversight and Government Reform.

In the Courts

These entries summarize recent cases under the following categories: Governance, Land Use, Toxic Substances, Waste, and Water. The entries are arranged alphabetically by case name within each category. This material is updated monthly. For archived materials, visit <http://www.elr.info/judicial>.

GOVERNANCE

Pa. Envtl. Def. Found. v. Pennsylvania, No. 10 MAP 2015, 47 ELR 20081 (Pa. June 20, 2017). The Pennsylvania Supreme Court held that the legislature's diversion of oil and gas royalties from public lands to the general fund for non-conservation purposes violated the state constitution.

LAND USE

Murr v. Wisconsin, No. 15-214, 47 ELR 20082 (U.S. June 23, 2017). The Supreme Court, in a 5-3 decision, decided that the owners of a family cottage were not entitled to compensation over development regulations that bar the sale of the family's adjacent lot.

TOXIC SUBSTANCES

NRDC v. EPA, Nos. 15-72308 & -72312, 47 ELR 20072 (9th Cir. May 30, 2017). The Ninth Circuit vacated EPA's conditional registration of a pesticide because the Agency failed to support its requisite finding that registration was in the public interest.

WASTE

Cincinnati Insurance Co. v. Roy's Plumbing, Inc., No. 16-2511, 47 ELR 20076 (2d Cir. May 31, 2017). The Second Circuit, in a summary order, affirmed a lower court decision that an insurance company has no duty to defend a plumbing company in an underlying state suit related to chemical contamination at Love Canal near Niagara Falls, New York.

Dixon Lumber Co. v. Austinville Limestone Co., No. 7:16-cv-00130, 47 ELR 20078 (W.D. Va. June 9, 2017). A district court held that a mining company will not face CERCLA liability as a successor to another company because there was no overlap in ownership.

Hampton Rds. Sanitation Dist. v. Va. Dep't of Envtl. Quality, No. 0979-16-1, 47 ELR 20079 (Va. Ct. App. June 6, 2017). A Virginia appeals court held that ash from incineration of biosolids at a wastewater treatment plant cannot be used to raise the ground level of a flood-prone agricultural field.

United States v. Federal Resources Corp., No. 15-35192, 47 ELR 20075 (9th Cir. May 25, 2017). The Ninth Circuit, in an unpublished opinion, held that the United States is not liable under CERCLA for hazardous waste contamination at a former mine site in Idaho.

WATER

Save Our Cabinets v. Department of Agriculture, Nos. CV 16-53-M & CV 16-56-M, 47 ELR 20073 (D. Mont. May 30, 2017). A district court held that the approval of a mining project in Montana violated NEPA, the CWA, and the National Forest Management Act.

Save Our Cabinets v. FWS, No. CV 15-69-M, 47 ELR 20074 (D. Mont. May 30, 2017). A district court held that the approval of a mining project in Montana violated the ESA.

In re Taylor, No. 15-02730-5, 47 ELR 20077 (Bankr. E.D.N.C. May 31, 2017). A federal bankruptcy court issued a supplementary opinion to clarify its prior ruling that environmental groups' claims for declaratory and injunctive relief under the CWA and RCRA would not be "debts" as defined by the Bankruptcy Code.

West McDonald Lake Ass'n v. Minn. Dep't of Nat. Res., No. A16-1469, 47 ELR 20080 (Minn. Ct. App. June 19, 2017). A Minnesota appeals court held that the state Department of Natural Resources erred by not obtaining a federal permit for a construction project that affected a lake's water level.

In the Federal Agencies

These entries cover the period June 1, 2017, through June 30, 2017. Citations are to the *Federal Register* (FR). Entries below are organized by Final Rules, Proposed Rules, and Notices. Within each section, entries are further subdivided by the subject matter area, with entries listed chronologically. This material is updated monthly. For archived material, visit <http://elr.info/daily-update/archives>.

Final Rules

AIR

EPA granted reconsideration of the final rule, “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,” and stayed the implementation of additional requirements under the rule for three months pending the reconsideration. 82 FR 25730 (6/5/17).

EPA approved negative declarations submitted by the states of Colorado, Montana, North Dakota, South Dakota, and Wyoming, which certify that no small or large municipal waste combustor units or solid waste incinerators subject to §§111(d) and 129 of the CAA exist in those states. 82 FR 25734 (6/5/17).

EPA approved negative declarations for commercial and industrial solid waste incinerators for the states of Connecticut, New Hampshire, Rhode Island, and Vermont; negative declarations for hospital/medical/infectious waste incinerators for the state of Rhode Island; and revisions to the state plan for existing large and small municipal waste combustors for the state of New Hampshire. 82 FR 25969 (6/6/17).

EPA amended NESHAPs from Portland Cement Manufacturing Industry that temporarily revises the testing and monitoring requirements for hydrochloric acid (HCl) due to the current unavailability of HCl calibration gases used for quality assurance purposes. 82 FR 28562 (6/23/17).

EPA granted the Tennessee Department of Environment and Conservation the authority to implement and enforce alternative permit terms and conditions

for plating and polishing operations that substitute for NESHAPs. 82 FR 29432 (6/29/17).

SIP Approvals: Arizona (deferment of sanctions imposed by 2015 disapproval of state new source review permitting program) 82 FR 25203 (6/1/17). California (revisions to the Imperial County Air Pollution Control District portion of the state SIP concerning emissions of volatile organic compounds and particulate matter from large confined animal facilities) 82 FR 26594 (6/8/17); (Imperial County Air Pollution Control District’s new source review permitting program for new and modified sources of air pollution) 82 FR 26854 (6/12/17); (revisions to new source review permitting program in the Imperial County Air Pollution Control District) 82 FR 27125 (6/14/17); (revisions to the Mojave Desert Air Quality Management District, Northern Sierra Air Quality Management District, and San Diego County Air Pollution Control District portions of the state SIP concerning aerospace assembly, rework, and component manufacturing operations; emissions statements and recordkeeping; and definitions) 82 FR 28240 (6/21/17); (initial six-year 15% rate of progress demonstration to address requirements for the 1997 eight-hour ozone NAAQS) 82 FR 28560 (6/23/17); (revisions to the Great Basin Unified Air Pollution Control District and the town of Mammoth Lakes portion of the SIP concerning particulate matter emissions from wood-burning devices and road dust) 82 FR 29762 (6/30/17). Georgia (redesignated the Atlanta area to attainment for the 2008 eight-hour ozone NAAQS) 82 FR 25523 (6/2/17); (revisions to definitions related to fine particulate matter and amendment to state rules to reflect the 2008 NAAQS) 82 FR 29414 (6/29/17); (changes to existing minor source permitting exemptions and to

approve a definition related to minor source permitting exemptions) 82 FR 29418 (6/29/17). Nevada (revisions to Lake Tahoe carbon monoxide area 10-year maintenance plan) 82 FR 26351 (6/7/17); (particulate matter emissions from fugitive dust and wood burning) 82 FR 27622 (6/16/17). New Mexico (regional haze progress report) 82 FR 27127 (6/14/17). Oklahoma (2012 fine particulate matter NAAQS) 82 FR 27121 (6/14/17); (establishment of a new minor new source review (NSR) general construction permitting program; changes to the minor NSR Public Participation requirements; and the addition of exemptions from minor NSR permitting for inconsequential emission sources and activities; and conditionally approving the provisions establishing accelerated review and technical permit revisions) 82 FR 29421 (6/29/17). South Carolina (revisions to the 2010 sulfur dioxide, 2010 nitrogen dioxide, 2012 fine particulate matter, and the 2015 eight-hour ozone NAAQS; removes the 1997 eight-hour ozone NAAQS; and removes the standard for gaseous fluorides from the SIP) 82 FR 29414 (6/29/17). Tennessee (conditional approval of visibility transport portions of the state’s 2010 one-hour nitrogen dioxide, 2010 one-hour sulfur dioxide, and 2012 annual fine particulate matter infrastructure SIP submission) 82 FR 27428 (6/15/17). Texas (revisions to general definition of volatile organic compounds, aligning the lead reporting threshold with EPA’s Annual Emissions Reporting Rule (AERR), shortening the distance from the shoreline for applicable offshore sources to report an emission inventory, and revising terminology and definitions for clarity or consistency with EPA’s AERR) 82 FR 26596 (6/8/17); (control of air pollution from motor vehicles with mobile incentive programs) 82 FR 26754 (6/9/17); (2008 eight-hour ozone NAAQS for vehicle inspection

and maintenance and nonattainment new source review in the Dallas/Fort Worth ozone nonattainment area) 82 FR 27122 (6/14/17); (redesignate the Collin County nonattainment area to attainment for the 2008 lead NAAQS) 82 FR 29426 (6/29/17). Vermont (infrastructure requirements for the 1997 fine particle matter, 1997 ozone, 2006 fine particulate matter, 2008 lead, 2008 ozone, 2010 nitrogen dioxide, and 2010 sulfur dioxide NAAQS) 82 FR 29005 (6/27/17).

WASTE

EPA amended the All Appropriate Inquiries Rule to reference ASTM International's E2247-16 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property" and allow for its use to satisfy the statutory requirements for conducting all appropriate inquiries under CERCLA. 82 FR 28009 (6/20/17).

WATER

EPA postponed compliance dates in the effluent limitations guidelines and standards for the steam electric point source category under the CWA. 82 FR 26017 (6/6/17).

EPA approved the state of Washington's Public Water Supply Supervision Primacy Program. 82 FR 26089 (6/6/17).

EPA established fees for water infrastructure project applications under the Water Infrastructure Finance and Innovation Act. 82 FR 29242 (6/28/17).

WILDLIFE

FWS will establish a nonessential experimental population of the Oregon silverspot butterfly within Saddle Mountain State Natural Area and the Nestucca Bay National Wildlife Refuge. 82 FR 28567 (6/23/17).

FWS removed the Hualapai Mexican vole from the endangered species list under the ESA because the best available scientific and commercial information indicates that the subspecies is not

a valid taxonomic entity. 82 FR 28582 (6/23/17).

FWS removed the Greater Yellowstone Ecosystem population of grizzly bears from the endangered species list under the ESA because the population has increased in size and more than tripled its occupied range since being listed as threatened under the Act in 1975 and that threats to the population are sufficiently minimized. 82 FR 30502 (6/30/17).

Proposed Rules

AIR

EPA proposed approving negative declarations submitted by the states of Colorado, Montana, North Dakota, South Dakota, and Wyoming, which certify that no small or large municipal waste combustor units or solid waste incinerators subject to §§111(d) and 129 of the CAA exist in those states. 82 FR 25753 (6/5/17).

EPA is proposing to approve negative declarations for commercial and industrial solid waste incinerators for the states of Connecticut, New Hampshire, Rhode Island, and Vermont; negative declarations for hospital/medical/infectious waste incinerators for the state of Rhode Island; and revisions to the state plan for existing large and small municipal waste combustors for the state of New Hampshire. 82 FR 26016 (6/6/17).

EPA proposed to stay for three months portions of a 2016 rule that established new source performance standards for greenhouse gas emissions and volatile organic compound emissions from the oil and natural gas sector; the stay applies to provisions not under reconsideration by the Agency. 82 FR 27641 (6/16/17).

EPA proposed to stay for two years portions of a 2016 rule that established new source performance standards for greenhouse gas emissions and volatile organic compound emissions from the oil and natural gas sector; the stay applies to provisions concerning fugitive

emissions requirements, well site pneumatic pump standards, and requirements for certification of closed vent systems by a professional engineer. 82 FR 27645 (6/16/17).

EPA proposed amending NESHAPs from Portland Cement Manufacturing Industry that temporarily revises the testing and monitoring requirements for hydrochloric acid (HCl) due to the current unavailability of HCl calibration gases used for quality assurance purposes. 82 FR 28616 (6/23/17).

EPA proposed granting the Tennessee Department of Environment and Conservation the authority to implement and enforce alternative permit terms and conditions that substitute for NESHAPs. 82 FR 29470 (6/29/17).

SIP Proposals: Alabama (infrastructure requirements for the 2012 fine particulate matter NAAQS) 82 FR 29448 (6/29/17). Alaska (adoption updates and revisions to general and transportation conformity regulations and minor source permitting requirements) 82 FR 27031 (6/13/17). Arizona (revisions to new source review permits for stationary sources) 82 FR 25213 (6/1/17). California (revisions to South Coast Air Quality Management District nitrogen oxide emissions from facilities that emit four or more tons per year of nitrogen oxides or oxides of sulfur) 82 FR 25996 (6/6/17); (Imperial County Air Pollution Control District's new source review permitting program for new and modified sources of air pollution) 82 FR 26883 (6/12/17); (reasonably available control technology requirements for the 2008 eight-hour ozone NAAQS in the South Coast Air Basin and Coachella Valley ozone nonattainment areas) 82 FR 27451 (6/15/17); (reasonably available control technology requirements for the 1997 and 2008 eight-hour ozone NAAQS and negative declarations for the polyester resin source category for the 2008 eight-hour ozone standard for the Placer County Air Pollution Control District) 82 FR 27456 (6/15/17); (revisions to the Mojave Desert Air Quality Management District, Northern Sierra Air Quality Management District, and San Diego County Air Pollution Control District

portions of the state SIP concerning aerospace assembly, rework, and component manufacturing operations; emissions statements and recordkeeping; and definitions) 82 FR 28292 (6/21/17); (revisions to the Great Basin Unified Air Pollution Control District and the town of Mammoth Lakes portion of the SIP concerning particulate matter emissions from wood-burning devices and road dust) 82 FR 29809 (6/30/17). Colorado (revisions to the infrastructure requirements for the 2010 sulfur dioxide and 2012 fine particulate matter NAAQS) 82 FR 25999 (6/6/17). Delaware (infrastructure requirements for the 2012 fine particulate matter NAAQS) 82 FR 25211 (6/1/17). Georgia (revisions to definitions related to fine particulate matter and amendment to state rules to reflect the 2008 NAAQS) 82 FR 29466 (6/29/17); (approve changes to existing minor source permitting exemptions and to approve a definition related to minor source permitting exemptions) 82 FR 29469 (6/29/17). Idaho (attainment demonstration for the 2014 motor vehicle emissions budgets for the Logan, Utah-Idaho, fine particulate matter nonattainment area) 82 FR 25208 (6/1/17). Indiana (redesignating the Indiana portion of the Cincinnati-Hamilton, OH-IN-KY, area to attainment of the 1997 fine particulate matter NAAQS) 82 FR 28435 (6/22/17). Kentucky (revisions to the Kentucky Division for Air Quality stationary source emissions monitoring and reporting requirements) 82 FR 29467 (6/29/17). Maine (revisions to new motor vehicle emission standards) 82 FR 28611 (6/23/17). Maryland (revisions to administrative procedures for the issuance, denial, and appeal of permits issued by the Department of the Environment) 82 FR 28614 (6/23/17). Missouri (Jefferson County nonattainment area has attained the 2010 one-hour primary sulfur dioxide NAAQS) 82 FR 28605 (6/23/17). Nevada (rescission of the visibility protection federal implementation plan) 82 FR 28432 (6/22/17). North Dakota (infrastructure requirements for the 2010 sulfur dioxide and the 2012 fine particulate matter NAAQS) 82 FR 29457 (6/29/17). South Carolina (revisions to the 2010 sulfur dioxide, 2010 nitrogen dioxide, 2012 fine particulate matter, and the 2015 eight-hour ozone

NAAQS; removes the 1997 eight-hour ozone NAAQS; and removes the standard for gaseous fluorides from the SIP) 82 FR 29466 (6/29/17). South Dakota (revisions to the infrastructure requirements for the 2010 sulfur dioxide and 2012 fine particulate matter NAAQS) 82 FR 26007 (6/6/17). Texas (revisions to general definition of volatile organic compounds, aligning the lead reporting threshold with EPA's Annual Emissions Reporting Rule (AERR), shortening the distance from the shoreline for applicable offshore sources to report an emission inventory, and revising terminology and definitions for clarity or consistency with EPA's AERR) 82 FR 26634 (6/8/17); (revisions to Emissions Banking and Trading Programs that clarify and expand the existing provisions for the generation and use of emission credits from area and mobile sources) 82 FR 26634 (6/8/17); (control of air pollution from motor vehicles with mobile incentive programs) 82 FR 26762 (6/9/17); (2008 eight-hour ozone NAAQS for vehicle inspection and maintenance and nonattainment new source review in the Dallas/Fort Worth ozone nonattainment area) 82 FR 27221 (6/14/17); (redesignate the Collin County nonattainment area to attainment for the 2008 lead NAAQS) 82 FR 29469 (6/29/17). Utah (granted two, one-year extensions to the moderate attainment date 2006 24-hour fine particulate matter NAAQS for the Logan, Utah-Idaho, nonattainment area) 82 FR 25992 (6/6/17); (one-year extension of the moderate attainment date for the 24-hour fine particulate matter NAAQS for the Logan, Utah-Idaho, nonattainment area) 82 FR 26638 (6/8/17).

WASTE

EPA proposed approving and is seeking public comment on an alternative final cover for Phase 2 of the city of Wolf Point landfill located in Wolf Point, Montana, on the Assiniboine and Sioux Tribes' Fort Peck Reservation in Montana. 82 FR 25568 (6/2/17).

EPA proposed amending the All Appropriate Inquiries Rule to reference ASTM International's E2247-16 "Standard Practice for Environmental

Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property" and allow for its use to satisfy the statutory requirements for conducting all appropriate inquiries under CERCLA. 82 FR 28040 (6/20/17).

WILDLIFE

NMFS proposed listing the Taiwanese humpback dolphin as endangered under the ESA. 82 FR 28802 (6/26/17).

Notices

AIR

EPA designated one new reference method for measuring concentrations of carbon monoxide, and one new equivalent method for measuring concentrations of nitrogen dioxide in ambient air. 82 FR 27816 (6/19/17).

EPA is requesting comment on applications from BMW, Ford, and Hyundai for off-cycle carbon dioxide credits under the Agency's light-duty vehicle greenhouse gas emissions standards. 82 FR 27819 (6/19/17).

EPA announced the availability of data on emission allowance allocations to certain units under the Cross-State Air Pollution Rule. 82 FR 28243 (6/21/17).

GOVERNANCE

DOI is seeking public comment on ways it can improve implementation of its regulatory reform initiatives in accordance with Executive Order No. 13777, "Enforcing the Regulatory Reform Agenda." 82 FR 28429 (6/22/17).

LAND USE

The president issued Proclamation No. 9619 on May 31, 2017, which establishes June 2017 as Great Outdoors Month and urges all Americans to explore the great outdoors while acting as stewards of the lands and waters. 82 FR 25923 (6/5/17).

WASTE

EPA entered into a proposed settlement agreement under CERCLA with Puerto Rico Electric Power Authority (PREPA) concerning the PREPA Palo Seco Superfund site in Toa Baja, Puerto Rico, in which PREPA agrees to reimburse the Agency \$1,000,000 plus interest in connection with response costs at the site. 82 FR 26482 (6/7/17).

EPA entered into a cost recovery settlement under CERCLA with the city of Beatrice, Nebraska, and Centel Corp., for past response costs concerning the Beatrice Former Manufactured Gas Plant Superfund site in Beatrice, Nebraska. 82 FR 28314 (6/21/17).

EPA entered into a proposed settlement agreement under CERCLA concerning the Stony Hill Road Superfund site located in Wake Forest, North Carolina, for recovery costs the Agency performed at the site. 82 FR 28487 (6/22/17).

EPA entered into a proposed de minimis settlement agreement under CERCLA pertaining to the Lammers Barrel Superfund site in the Beaver Creek, Ohio, that requires the settling party to pay \$85,253.85 for remedial design and action. 82 FR 29293 (6/28/17).

WATER

The president issued Proclamation No. 9622 on May 31, 2017, establishing June 2017 as National Ocean Month and encouraging Americans to reflect on the economic and recreational opportunities the oceans provide. 82 FR 25929 (6/5/17).

WILDLIFE

NMFS will initiate status reviews for seven giant clam species to determine if they should be listed as endangered or threatened under the ESA. 82 FR 28946 (6/26/17).

NMFS announced a five-year review of the North Pacific right whale under the ESA and is requesting submission of any such information on these whales that has become available since the last status review in 2012. 82 FR 29842 (6/30/17).

DOJ NOTICES OF SETTLEMENT

United States v. Alon USA, LP, No. 1:17-cv-00087 (N.D. Tex. May 30, 2017). A settling CAA defendant who violated NESHAPs for benzene and leak detection and repair requirements for volatile organic compounds must perform a supplemental environmental project to reduce emissions of nitrogen oxides and pay a civil penalty of \$456,250. 82 FR 26119 (6/6/17).

United States v. Port Stewart GmbH & Co., No. 3:17-cv-01742 (D.P.R. June 1, 2017). A settling OPA defendant who caused damage to a coral reef habitat near the entrance to Yabucoa Channel due to the grounding of an oil tanker that it owned and operated must pay \$560,000 to restore the injured coral reefs in the area. 82 FR 26518 (6/7/17).

United States v. Cyril V. Francois Associates, L.L.C., No. 3:17-cv-38 (D.V.I. June 1, 2017). A settling CERCLA defendant responsible for a release at the Tutu Wellfield Superfund site in

St. Thomas, U.S. Virgin Islands, must pay \$300,000 in reimbursement to the United States for past response costs. 82 FR 26713 (6/8/17).

United States v. Johnson Controls, Inc., No. 6:17-cv-01028-RBD-DCI (M.D. Fla. June 7, 2017). A settling CERCLA defendant must pay \$3,300,000 in U.S. response costs incurred at certain Installation Restoration Program sites at the Cape Canaveral Air Force Station in Brevard County, Florida. 82 FR 27526 (6/15/17).

United States v. NVR, Inc., No. 2:17-cv-04346 (D.N.J. June 15, 2017). A settling CWA defendant that discharged pollutants in stormwater without permit coverage, and failed to comply with the conditions of permits at a number of construction sites in New Jersey and New York, must perform injunctive relief consisting of a nationwide management, inspection, reporting, and training program to improve compliance with stormwater requirements at its current and future construction sites, and pay a civil penalty of \$425,000. 82 FR 28095 (6/20/17).

Evergreen Power, LLC v. United States, No. 3:14-cv-01537-WWE (D. Conn. June 19, 2017). Settling CWA and OPA defendants responsible for releases at the English Station site in New Haven, Connecticut, must reimburse the United States for oil removal costs and pay a \$246,000 civil penalty. 82 FR 29097 (6/27/17).

United States v. Lima Refining Co., No. 3:17-cv-01320-JZ (N.D. Ohio June 22, 2017). A settling CAA defendant must pay \$1,000,000 in stipulated penalties for violating a 2007 consent decree. 82 FR 29582 (6/29/17).

In the State Agencies

The entries below cover state regulatory developments during the month of June 2017. The entries are arranged by state, and within each section, entries are further subdivided by subject matter. For material previously reported, visit <http://elr.info/administrative/state-updates/archive>.

FLORIDA

WILDLIFE

The Fish and Wildlife Conservation Commission proposed amendments to FLA. ADMIN. CODE ANN. r. 68A-15.062, Type I Wildlife Management Areas. The proposed rule amendments would revise specific area regulations to expand small game hunting opportunities on Wildlife Management Areas in the North Central Region. Written comments were accepted until June 30, 2017. *See* https://www.flrules.org/Gateway/View_notice.asp?id=19064785.

INDIANA

TOXIC SUBSTANCES

The Pesticide Review Board proposed amendments to 357 IND. ADMIN. CODE 1-17-1, State Restricted Pesticides. The amendment would expand the list of state restricted use pesticide products to include certain herbicides containing the active ingredient dicamba. A public hearing was held July 6, 2017. *See* <http://www.in.gov/legislative/iac/irtoc.htm?view=list&lsadocnum=17-180>.

MAINE

WATER

The Department of Environmental Protection proposed amendments to ME. REV. STAT. ANN. tit. 502, Direct

Watersheds of Lakes Most at Risk From New Development, and Urban Impaired Streams. The proposed amendments would reflect current water quality, and identify those lakes that are now most at risk from development activities and urban impaired streams. A public hearing was held on June 15, 2017. Written comments were accepted until June 26, 2017. *See* <http://www.maine.gov/sos/cec/rules/notices/2017/052417.html>.

MARYLAND

AIR

The Department of Environment proposed amendments to MD. CODE REGS. 26.11.09, Control of Fuel-Burning Equipment, Stationary Internal Combustion Engines, and Certain Fuel-Burning Installations. The amendments would update regulations to be current with federal regulations for residential hydronic heaters. A public hearing was held July 17, 2017. Written comments were accepted until July 17, 2017. *See* <http://www.dsd.state.md.us/MDR/4412.pdf> (p. 600).

The Department of Environment proposed to add a new regulation at MD. CODE ANN. ENVIR. §26.11.32, Control of Emissions of Volatile Organic Compounds From Consumer Products. The amendment establishes new volatile organic compound standards for 11 new consumer products and strengthens VOC standards for 15 existing consumer products. A public hearing was held on June 27, 2017. Written comments were accepted until June 27, 2017. *See* http://www.dsd.state.md.us/MDR/4411/Assembled.htm#_Toc483212130.

NEW HAMPSHIRE

WASTE

The Department of Environmental Services proposed amendments to N.H. REV. STAT. ANN. §§146-C:9, X & XII, Test Methods for Primary Containment System Testing of Diesel Fuel UST Systems. The proposed rule would validate any pressure decay testing done on or after April 15, 2016. A public hearing was held on June 29, 2017. Written comments were accepted until July 14, 2017. *See* <http://www.gencourt.state.nh.us/rules/register/2017/june-8-17.pdf> (p. 4).

NEW YORK

WILDLIFE

The Department of Environmental Conservation proposed the addition of N.Y. COMP. CODES R. & REGS. tit. 6, §190.37, Lower Salmon River State Forest. The new section would establish the Lower Salmon River State Forest. Written comments were accepted until July 29, 2017. *See* <https://docs.dos.ny.gov/info/register/2017/june14/Rule%20Making%20Activities.pdf>.

PENNSYLVANIA

AIR

The Environmental Quality Board proposed amendments to 25 PA. CODE chs. 121 and 129, Control of VOC Emissions From Industrial Cleaning

Solvents; General Provisions; Aerospace Manufacturing and Rework; Additional RACT Requirements for Major Sources of NO_x and VOCs. The proposed amendments would adopt reasonably available control technology requirements and emission limitations for stationary sources of volatile organic compound emissions from industrial cleaning solvents that are not regulated elsewhere in Chapter 129 or Chapter 130. Public hearings were held July 18, 19, and 20, 2017. Written comments will be accepted until August 21, 2017. See <http://www.pabulletin.com/secure/data/vol47/47-24/993.html>.

UTAH

AIR

The Department of Environmental Quality proposed amendments to UTAH CODE ANN. Rule R307-122, Heavy Duty Vehicle Tax Credit. The amendments would update the definition of a “qualified heavy duty vehicle” to include heavy-duty vehicles that have hydrogen-electric and 100% electric drivetrains. Written comments were accepted until July 7, 2017. See https://rules.utah.gov/publicat/bull_pdf/2017/b20170601.pdf (pp. 30-32).

VERMONT

WASTE

The Agency of Natural Resources proposed to amend VT. STAT. ANN. tit. 10, §6615d(c), Natural Resource Damage Assessment and Restoration Rule. The rule establishes the process for review and selection of restoration activities deemed necessary to make the public whole following an injury to natural resources. Written comments were accepted until July 7, 2017. See <https://secure.vermont.gov/SOS/rules/results.php>.

RECENT JOURNAL LITERATURE

“Recent Journal Literature” lists recently published law review and other legal periodical articles. Within subject-matter categories, entries are listed alphabetically by author or title. Articles are listed first, followed by comments, notes, symposia, surveys, and bibliographies.

AIR

- Dellafosse, Daniel, *Drone Regulation: Will It Fly?*, 50 U.S.F. L. REV. 509 (2016).
- Rhodes, Ashleigh B., *Legislating Agency Use of Unmanned Aerial Vehicles in Washington State*, 91 WASH. L. REV. 887 (2016).
- Woodsmall, David, *Targeting Fugitive Emissions: Regulating Methane Emissions From the Oil and Natural Gas Industry Under Section 111 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 531 (2016).
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CLIMATE CHANGE

- Applegate, Devon, *The Intersection of the Takings Clause and Rising Sea Levels: Justice O'Connor's Concurrence in Palazzolo Could Prevent Climate Change Chaos*, 43 B.C. ENVTL. AFF. L. REV. 511 (2016).
- Burns, Wil, *Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Control*, 22 ILSA J. INT'L & COMP. L. 415 (2016).
- Byrne, J. Peter & Kathryn A. Zyla, *Climate Exactions*, 47 ELR 10666 (Aug. 2017).
- Carlyle, Christopher V., *Comment on Climate Exactions*, 47 ELR 10673 (Aug. 2017).
- Freed, Adam & Jake Elder, *Climate Exactions: One Tool in a City's Toolbox*, 47 ELR 10675 (Aug. 2017).
- Shackelford, Scott J., *On Climate Change and Cyber Attacks: Leveraging Polycentric Governance to Mitigate Global Collective Action Problems*, 18 VAND. J. ENT. & TECH. L. 653 (2016).
- Warner, Elizabeth Ann Kronk, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916 (2016).
- Wright, Gwen, *Thoughts on Climate Exactions*, 47 ELR 10678 (Aug. 2017).
- Symposium, *Who Will Pay: The Public & Private Insurance Implications of Climate Change's Drastic Challenges*, 43 B.C. ENVTL. AFF. L. REV. 251 (2016).
-

ENERGY

- Farah, Paolo D. & Riccardo Tremolada, *A Comparison Between Shale Gas in China and Unconventional Fuel Development in the United States: Water, Environmental Protection, and Sustainable Development*, 41 BROOK. J. INT'L L. 579 (2016).

- Ginty, Natalie, *SZ Enterprises v. Iowa Utilities Board: Impact on Rural Iowa*, 20 DRAKE J. AGRIC. L. 413 (2015).
- González, Giovanni S. Saarman, *Evolving Jurisdiction Under the Federal Power Act: Promoting Clean Energy Policy*, 63 UCLA L. REV. 1422 (2016).
- Heintz, Alia Y., *What's the Harm in a Subsurface Trespass?*, 51 TULSA L. REV. 777 (2016).
- Kulander, Christopher S. & R. Jordan Shaw, *Comparing Subsurface Trespass Jurisprudence—Geophysical Surveying and Hydraulic Fracturing*, 46 N.M. L. REV. 67 (2016).
- Weathersby, Sydney, *A Deep Dive Into Liquefied Natural Gas (“LNG”): Is LNG a Clean Enough and Positive Energy Source for Globalized Trade or a Port Nuisance?*, 50 VAL. U. L. REV. 367 (2015).
- West, Christopher & Benjamin Robertson, *Oil and Gas Law: 2014-2015*, 48 TEX. TECH. L. REV. 695 (2016).
- Symposium, *48th Annual Sutton Colloquium: Sustainable Development and Sustainable Energy*, 44 DENV. J. INT'L L. & POL'Y 323 (2016).
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- Billings-Ray, Kellie E. et al., *Environmental Law: 2014-2015*, 48 TEX. TECH. L. REV. 619 (2016).
- Breggin, Linda K. et al., *The Environmental Law and Policy Annual Review: Top 20 Articles*, 47 ELR 10649 (Aug. 2017).
- Coleman, James W., *How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures*, 47 ELR 10681 (Aug. 2017).
- Epstein, Richard A., *Property Rights and Governance Strategies: How Best to Deal With Land, Water, Intellectual Property, and Spectrum*, 14 COLO. TECH. L.J. 181 (2016).
- Horowitz, Alan, *More Walk, Less Talk: Comment on How Cheap Is Corporate Talk?*, 47 ELR 10689 (Aug. 2017).
- Lin, Albert C., *The Missing Pieces of Geoengineering Research Governance*, 100 MINN. L. REV. 2509 (2016).
- Pasachoff, Eloise, *The President's Budget as a Source of Agency Policy Control*, 47 ELR 10698 (Aug. 2017).
- Shay, Russell, *Comment on The President's Budget as a Source of Agency Policy Control*, 47 ELR 10707 (Aug. 2017).
- Smith, Jeffrey A., *A Bridge Too Near: Response to How Cheap Is Corporate Talk?*, 47 ELR 10691 (Aug. 2017).
- Sweify, Mohamed F., *Investment-Environment Disputes: Challenges and Proposals*, 14 DEPAUL BUS. & COM. L.J. 133 (2015).
- Wong, Brian J., *Puffery or Promises: When Is Cheap Talk Actionable?*, 47 ELR 10694 (Aug. 2017).
- Zaidi, Ali A., *Optimizing OMB: Response to The President's Budget as a Source of Agency Policy Control*, 47 ELR 10708 (Aug. 2017).

Symposium, *Legal Innovation Within Old Laws: Solving New Environmental Challenges*, 28 GEO. ENVTL. L. REV. 359 (2016).

LAND USE

- Cheever, Federico & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)*, 47 ELR 10655 (Aug. 2017).
- Chen, James Ming, *Anthropocene Agricultural Law*, 3 TEX. A&M L. REV. 745 (2016).
- De Barbieri, Edward W., *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773 (2016).
- Johnston, Craig N. & Gerald Torres, *Normal Farming and Adjacency: A Last Minute Gift for the Farm Bureau?*, 46 ENVTL. L. 385 (2016).
- Kennedy, Angela, *Sustainable Constitutional Growth? The "Right to Farm" and Missouri's Review of Constitutional Amendments*, 81 MO. L. REV. 205 (2016).
- McCoy, Roger, *Comment on Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*, 47 ELR 10661 (Aug. 2017).
- McLaurin, Liz, *Response to Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*, 47 ELR 10663 (Aug. 2017).
- Novack, Erica, *Resurrecting the Public Trust Doctrine: How Rolling Easements Can Adapt to Sea Level Rise and Preserve the United States Coastline*, 43 B.C. ENVTL. AFF. L. REV. 575 (2016).
- Peck, Alison, *The Aftermath of Alt. v. EPA: Unresolved Tensions in Poultry Farm Pollution Control*, 118 W. VA. L. REV. 981 (2016).
- Sylvester, Bill, *Thoughts on Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements*, 47 ELR 10665 (Aug. 2017).
- Symposium, *Farm to Table: Agriculture Law in the Era of Sustainability*, 3 TEX. A&M L. REV. 745 (2016).

NATURAL RESOURCES

- Bieschke, Brian, *Challenging the 2013 Rule Implementing Regulations on Oversnow Vehicle Use in Yellowstone National Park*, 43 B.C. ENVTL. AFF. L. REV. 541 (2016).
- McKinney, Matthew J. et al., *A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin Through the Prism of Tribes and First Nations*, 37 PUB. LAND & RESOURCES L. REV. 157 (2016).
- René, Etienne, *A Colossal Bird's Nest: The Backlash Surrounding the Management of the Gulf of Mexico Red Snapper Fishery*, 4 LSU J. ENERGY L. & RESOURCES 449 (2016).
- Truslow, Davis, *A Fractured Standard: How the Fourth Circuit Granted Expansive Implied Property Rights to Mineral Owners*, 43 B.C. ENVTL. AFF. L. REV. 653 (2016).

Symposium, *Transcending Boundaries: Achieving Success in the Cooperative Management of Natural Resources*, 37 PUB. LAND & RESOURCES L. REV. 1 (2016).

WASTE

- Fullmer, Rachel, *A Cow Palace Coup: Expanding the Reach of RCRA to Combat Agricultural Pollution*, 28 GEO. ENVTL. L. REV. 501 (2016).
- Salvemini, Maria, *Hickory Dickory Dock, the New Jersey Supreme Court Stops the Clock: Legislature Must Reform the Spill Act Following Morristown Associates v. Grant Oil*, 61 VILL. L. REV. 351 (2016).

WATER

- Alcanzare, Daniel, *FRAC to the Future: The Application of the SDWA to Biodiesel Use in Hydraulic Fracturing*, 4 LSU J. ENERGY L. & RESOURCES 407 (2016).
- Bryan, Michelle et al., *A Next, Big Step for the West (Part II): Model Water-Climate Enabling Legislation With Commentary*, 31 J. ENVTL. L. & LITIG. 243 (2016).
- Casado Pérez, Vanessa, *All Dried Out: How Responses to Drought Make Droughts Worse*, 51 TULSA L. REV. 731 (2016).
- Doré, Brent, *Teaching an Old Dog a New Trick: Examining the Intersection of the Accommodation Doctrine and Groundwater Rights Through the Lens of City of Lubbock v. Coyote Lake Ranch, LLC*, 3 TEX. A&M L. REV. 853 (2016).
- Hoyt, Logan, *Standing on Thin Ice: How Nebraska's Standing Doctrine Prevents the Majority of Surface Water Users From Obtaining Judicial Relief Against Groundwater Users Interfering With Their Appropriations*, 94 NEB. L. REV. 1054 (2016).
- Ingber, Matthew, *Paddling in Mr. Potter's Backyard: Navigating New York's Navigable-in-Fact Doctrine*, 32 TOURO L. REV. 453 (2016).
- Kibel, Paul Stanton, *Passage and Flow Considered Anew: Wild Salmon Restoration Via Hydro Relicensing*, 37 PUB. LAND & RESOURCES L. REV. 65 (2016).
- Murthy, Sharmila L., *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159 (2016).
- Shutz, Anthony B., *Defining Sustainability in Nebraska's Republican River Basin: The LB 1057 Task Force*, 3 TEX. A&M L. REV. 771 (2016).
- Worth, Samuel, *Water, Water, Everywhere, and Plenty of Drops to Regulate: Why the Newly Published WOTUS Rule Does Not Violate the Commerce Clause*, 43 B.C. ENVTL. AFF. L. REV. 605 (2016).
- Symposium, *Waters of the United States*, 46 ENVTL. L. 275 (2016).

WILDLIFE

- Furlong, Wesley J., *"Salmon Is Culture, and Culture Is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, 37 PUB. LAND & RESOURCES L. REV. 113 (2016).

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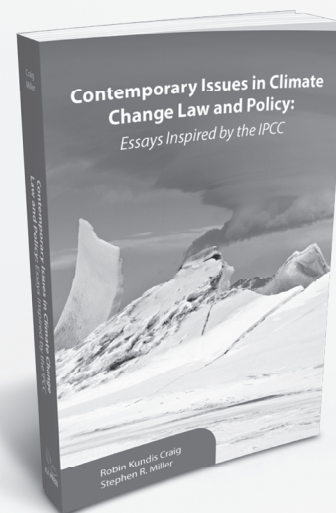
- Save Our Cabinets v. Department of Agriculture*, Nos. CV 16-53-M & CV 16-56-M, 47 ELR 20073 (D. Mont. May 30, 2017) 10716
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Contemporary Issues in Climate Change Law and Policy: *Essays Inspired by the IPCC*

By Robin Kundis Craig and Stephen R. Miller

The Intergovernmental Panel on Climate Change's most recent set of reports, generally referred to collectively as the Fifth Assessment Report, present significant data and findings about climate change. But what role does law play in addressing and responding to these findings? This book, the second by the Environmental Law Collaborative, an affiliation of environmental law professors, focuses on the relationship between law and the Fifth Assessment Report in hopes of bridging this gap.

This book's chapters are illustrative of the overwhelming number of legal issues that climate change creates. Some of the contributions remain directly tied to the text of the IPCC's reports, while others focus on climate change more generally. Together, this volume contributes to a constructive and helpful discussion about how to address the climate change challenge.



Review

"The Environmental Law Collaborative has once again produced a volume of contributions on a theme of vital importance. Contemporary Issues in Climate Change Law and Policy uses the IPCC's latest round of reports as the lens through which to assess the progress and trajectory of law for climate change mitigation and adaptation. The result is a collection of chapters that are remarkably diverse in coverage yet coherent and intent in focus. Topics span the waterfront from national security and water infrastructure to religious perspectives and local community action. Each chapter stands on its own as thorough, insightful, and engaging, as well as a bountiful resource of law and policy update and analysis. Unified in the book through its core theme, the authors provide much to be gained for everyone from a newcomer to the rough and tumble of climate policy to those already steeped in its discourse."

—J.B. Ruhl

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Naturalness and Biodiversity

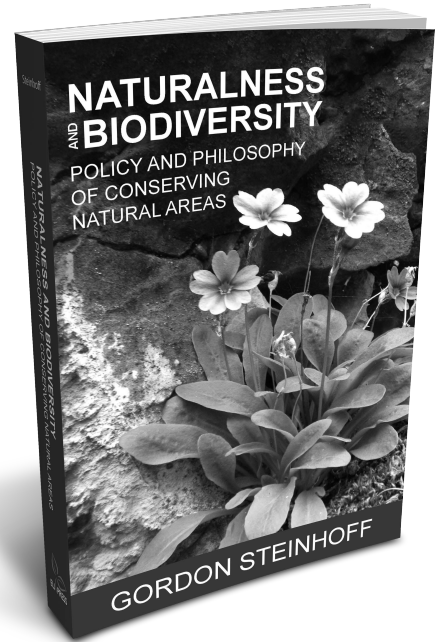
Policy and Philosophy of Conserving Natural Areas

By Gordon Steinhoff

Maintaining natural conditions and processes, or “naturalness,” is an essential goal in the management of wilderness, national parks, and other protected areas. Yet management experts routinely recommend the abandonment of naturalness as a required goal in protected areas. There are many examples of native biodiversity being lost or threatened as a result of managers manipulating protected areas to conserve “what we value” without respect for natural conditions. Too often, agencies seemingly ignore environmental goals expressed within federal law and policy in their efforts to satisfy consumer preferences, resulting in environmental degradation.

Naturalness and Biodiversity: Policy and Philosophy of Conserving Natural Areas is primarily concerned with the preservation of national parks, wilderness, and other legally protected areas through proper interpretation and application of federal environmental law and policy. Philosophers, legal scholars, and land use managers alike will appreciate the interdisciplinary approach Prof. Gordon Steinhoff takes with his discussion of philosophy, ecology, and environmental policy.

Although *Naturalness and Biodiversity* may be controversial, calling into question much that has been written by philosophers and by leading land management and restoration experts, it offers a needed response to much that appears in the current environmental literature, providing thoughtful analysis on why naturalness is essential for the preservation of native biodiversity.



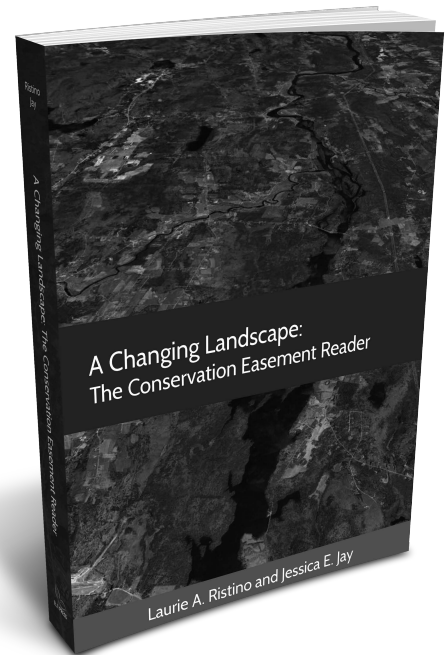
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A Changing Landscape: The Conservation Easement Reader

By Laurie A. Ristino and Jessica E. Jay

Conservation easements are an essential tool for protecting the American landscape. Between 2000 and 2010, the number of acres protected by land trusts grew from 23 million acres to 47 million acres. Conservation easements used by federal, state, and local governments would likely add several million additional acres to this total. Given their widespread use, ongoing innovations, and pressing environmental challenges, the time is ripe to provide a comprehensive review of conservation easements. *A Changing Landscape: The Conservation Easement Reader* does just that, offering conservationists, academics, government officials, and others a nuanced, multifaceted resource.

Featuring excerpts of leading articles and reports in law and in the natural and social sciences, *The Conservation Reader* illuminates various aspects of conservation easements. The book opens with background concepts in real property law, a history of the legal development and use of conservation easements, and examples of how these tools are used to achieve various environmental, conservation, and business goals. *The Conservation Reader* also examines the limitations and critiques of conservation easements, their tax treatment, and how they can be used in strategic resources planning and protection. The book closes with a forward-looking discussion of the evolving use of conservation easements in other countries, touching upon the promise and challenge of adapting this instrument internationally. Throughout, *The Conservation Reader* arms readers with the information they need in determining when and how the use of conservation easements is appropriate to achieve their strategic conservation goals.



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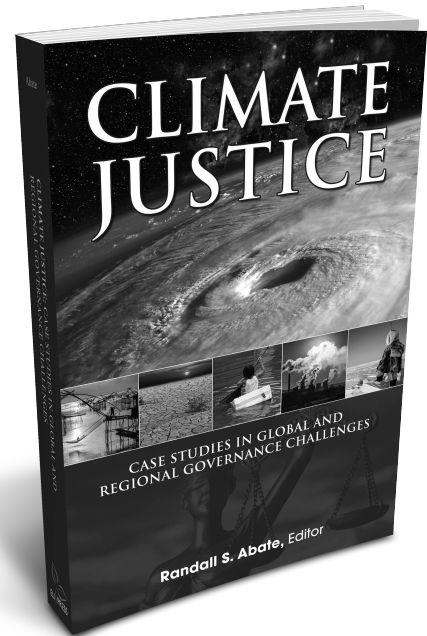
Climate Justice

Case Studies in Global and Regional Governance Challenges

Randall S. Abate, Editor

Climate change is one of the most complex political, social, and environmental issues of this century, and climate change adaptation has become an increasingly large focus of global efforts. The international community's attention on adaptation has been primarily focused on developing countries' needs, with consensus that the world's most vulnerable communities—the urban and rural poor, low-lying island nations, and indigenous peoples—require additional protection. It was in response to this need for equity that “climate justice” emerged.

Climate justice can be defined generally as addressing the disproportionate burden of climate change impacts on poor and marginalized communities. It seeks to promote more equitable allocation of the burdens of these impacts at the local, national, and global levels through proactive regulatory initiatives and reactive judicial remedies that draw on international human rights and domestic environmental justice theories. Yet, efforts to define climate justice as a field of inquiry can be elusive and underinclusive because the concept is so vast in scope.



CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES seeks to fill that void, providing an overview of the landscape of climate justice from a variety of legal and geographic perspectives in a case study format. Drawing on the expertise of 30 contributors from 16 countries, the book analyzes climate justice from an international law perspective and from the perspectives of legal responses to promote climate justice in several regions of the world, including Pacific island nations, South Asia, North America, Africa, and the Middle East. It addresses proposed solutions to a range of regulatory obstacles under international law, U.S. law, and foreign domestic law in seeking to promote climate justice on a global scale.

Randall S. Abate is Professor of Law at Florida Agricultural and Mechanical University College of Law in Orlando, Florida. Professor Abate has published and presented widely on environmental law topics, with a recent emphasis on climate change law and justice. He is the editor of *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* (ELI Press 2015) and *CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES* (2015), and co-editor of *CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES* (2013).



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