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# ENVIRONMENTAL LAW AND POLICY ANNUAL REVIEW

2013-2014

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Manuscripts should be submitted by e-mail attachment to [schang@eli.org](mailto:schang@eli.org). We prefer that the file be in WordPerfect® or 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 law and policy-relevant ideas on the environment 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 strong 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 induce academicians to generate new policy-relevant ideas and to improve theoretical scholarship by providing incentives for them to account for the hard choices and constraints faced by policymakers. The third and most important goal is to provide a first-rate educational experience to law students interested in environmental law and policy.

To nominate articles to be included in ELPAR, 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, 2011, until July 31, 2012, in the law reviews from the top 100 *U.S. News and World Report*-ranked law schools and environmental law journals ranked by the Washington & Lee School of Law. Journals that are solely published online were searched separately. Student scholarship and non-substantive content were excluded.

The students then screened articles for consistency with the ELPAR selection criteria. Only those articles that met the threshold criteria of addressing an issue of environmental quality importance and offering a law or policy-relevant solution were included. The readability and persuasiveness of the articles, including feasibility and creativity, also were considered.

Through discussion and consultation, the students ultimately chose 20 articles for review by the ELPAR Advisory Board. The Advisory Board provided invaluable insights to the students on article selection. Vanderbilt University Law School Prof. Michael Vandenbergh, ELI Senior Attorney Linda Breggin, and ELR Editor-in-Chief Scott Schang also assisted the students in the final selection process. Comments on the selected papers then were solicited from practicing experts in both the private and public sectors.

On April 4, 2014, on Capitol Hill, ELI and Vanderbilt cosponsored a conference at which some of the authors of the articles and responses presented their ideas to an audience of business, government (federal, state, and local), think tank, media, and nonprofit representatives. The conference was structured in a manner that encouraged 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 presented as ELPAR, which is also the August issue of *ELR*. Also included in ELPAR is an article on trends in environmental legal scholarship that is based on the data collected through the ELPAR review process.

Linda K. Breggin, Senior Attorney, Environmental Law Institute,  
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# NEPA Deskbook

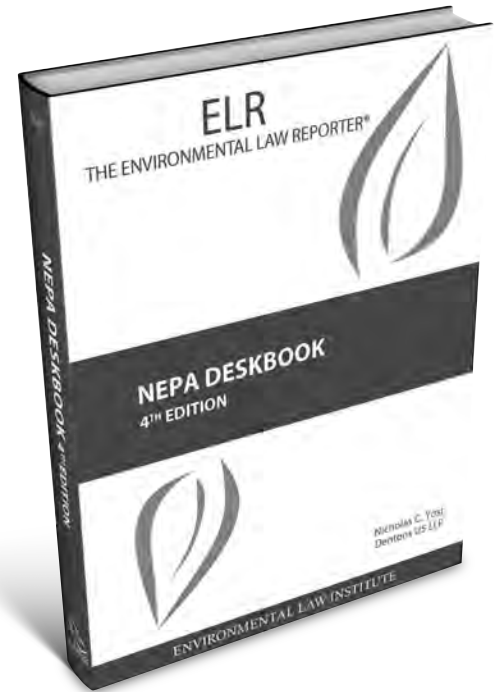
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### By Nicholas C. Yost

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### About the Author

**Nicholas C. Yost** is a partner in the firm of Dentons US LLP in San Francisco, California, from which he conducts a nationwide practice of environmental and natural resources law, with a focus on the National Environmental Policy Act. His practice includes counseling clients on environmental leadership and compliance with state and federal environmental laws, obtaining permits and authorizations, litigation, and representing clients before federal and state agencies on environmental impacts. Mr. Yost formerly served as General Counsel of CEQ, where he was the lead draftsman of the governmentwide NEPA regulations.



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C O M M E N T

# Trends in Environmental Law Scholarship 2008-2013

by Linda K. Breggin, David L. Staab, Emma T. Doineau, and  
Michael P. Vandenberg

Linda K. Breggin is a Senior Attorney with the Environmental Law Institute and an Adjunct Professor at Vanderbilt University Law School. David L. Staab is a recent graduate of Vanderbilt University Law School. Emma T. Doineau is a recent graduate of Vanderbilt University Law School. Michael P. Vandenberg is the David Daniels Allen Distinguished Professor of Law and Co-Director of the Energy, Environment, and Land Use Program at 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. ELPAR provides a forum for the presentation and discussion of the best ideas about environmental law and policy from the legal academic literature.

As part of the article selection process each year, Vanderbilt University Law School students assemble and review the environmental law articles published during the previous academic year. In this Article, we draw on the results of the ELPAR article selection process to report on trends in environmental legal scholarship for academic years 2008-2013.

Specifically, this Article reports on the number of environmental law articles published in general law reviews and environmental law journals. We find that although the total varied somewhat from year to year, more than 400 environmental law articles were published each year during the 2008-2013 period.<sup>1</sup> Additionally, this Article provides data on the topics covered in the environmental law articles reviewed by the ELPAR staff. The goal is to provide an empirical snapshot of the environmental legal literature and to track trends over time.

## I. Methodology

A detailed description of the methodology is posted on the Vanderbilt University Law School and Environmental Law Institute ELPAR websites.<sup>2</sup> In brief, the ELPAR Editorial Board and Staff start with a keyword search for

“environment!” in an electronic legal scholarship database. The search is limited to articles published from August 1 of the prior year to July 31 of the current year, roughly corresponding to the academic year. The search is conducted in law reviews from the top 100 law schools as ranked by *U.S. News and World Report* in its most recent report and in environmental law journals as listed most recently by Washington & Lee University School of Law, with certain modifications.<sup>3</sup> Articles without a connection to the natural environment (e.g., “work environment” or “political environment”) are removed, as are book reviews, eulogies, non-substantive symposia introductions, case studies, editors’ notes, and student scholarship. We recognize that all ranking systems have shortcomings and that only examining top journals imposes limitations on the value of our results. Nevertheless, this approach provides a snapshot of leading scholarship in the field.

The keyword search is the first step in the process of selecting articles for inclusion in ELPAR each year. The full article selection process is described in the letter that introduces this issue of ELPAR. For purposes of tracking trends in environmental scholarship, the next step is to cull the list generated from the initial search in an effort to ensure that the list contains only those articles that qualify as environmental law articles.

Determining whether an article qualifies as an environmental article is more of an art than a science, and our conclusions should be interpreted in that light. We have attempted, however, to use a rigorous, transparent process. Specifically, an article is considered an “environmental law article” if environmental law and policy are a substantial focus of the article. The article need not focus exclusively

1. See Linda K. Breggin et. al., *Trends in Environmental Law Scholarship 2008-2012*, 43 ELR 10643 (Aug. 2013) (comparing ELPAR results with other assessments of the quantity of environmental law scholarship).  
2. *Environmental Law & Policy Annual Review, Online Supplements*, VANDERBILT LAW SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php> (last visited June 9, 2014); *Environmental Law & Policy An-*

*nual Review*, ENVTL. L. INST., <http://www.eli.org/environmental-law-and-policy-annual-review/publications> (last visited Feb. 18, 2014).

3. *Law Journals, Submissions, and Rankings Explained*, WASHINGTON & LEE UNIV. SCH. OF LAW, <http://www.lawlib.wlu.edu/LJ/method/asp> (last visited Apr. 12, 2014).

on environmental law, but environmental topics should be given more than incidental treatment and should be integral to the main thrust of the article. Many articles in the initial pool, for example, address subjects that influence environmental law, including administrative law topics (e.g., executive power and standing), or tort law topics (e.g., punitive damages). Although these articles may be considered for inclusion in ELPAR, they are not included for purposes of tracking environmental law scholarship because the main thrust of the articles is not environmental law.

Each article in the data set is categorized by environmental topic to allow for tracking of trends by topic area. The ten topic categories are from the *Environmental Law Reporter's* subject-matter index: air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.<sup>4</sup> ELPAR editors assign articles into a primary topic category and, if appropriate, a secondary category.

The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenbergh and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the articles by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on lists posted on the Vanderbilt University Law School and ELI ELPAR websites.<sup>5</sup>

## II. Data Analysis on Environmental Legal Scholarship

During the 2012-2013 ELPAR review period (July 31, 2012 to August 1, 2013), 402 environmental law articles written by professors or practitioners were published in top law reviews and environmental law journals. This is a decrease of 11 percent from the 452 articles in the previous ELPAR review cycle (2011-2012). By comparison,

512 articles were published in 2010-2011, 475 articles were published in 2009-2010, and 455 articles were published in 2008-2009.

Of the 402 total environmental law articles published in 2012-2013, 309 were published in journals that focus on environmental law and 93 were published in general law reviews. The 93 environmental law articles published in general law reviews in 2012-2013 compares to 115 articles in 2011-2012, 80 articles in 2010-2011, 97 articles in 2009-2010, and 47 articles in 2008-2009.

The primary topics of the 402 articles published in 2012-2013 were as follows: governance<sup>6</sup> (95), energy (64), water (53), climate change (52), natural resources (33), land use (32), wildlife (29), toxic substances (19), air (17), and waste (8). When counting both primary and secondary topic categories of articles, there were 111 articles in governance, 89 in energy, 77 in climate change, 64 in water, 45 in natural resources, 41 in wildlife, 41 in land use, 24 in air, 24 in toxic substances, and 11 in waste.

From 2008-2011, the data on trends in primary topic categories indicates that climate change was the most common topic. Governance was the second most common topic area, followed by water and land use, which alternated as the third and fourth most common. In 2011-2012, governance overtook climate change as the most common topic category and energy broke into the ranks of the top four by displacing land use.

In 2012-2013, governance remained the most common topic category. Energy was the second most common topic area, improving two positions from the previous year. Water maintained its ranking as the third most common topic category. Climate change continued to decline since its peak in 2009-2010, dropping from second to fourth in the rankings. Natural resources improved one position from 2011-2012 and was the fifth most common topic for 2012-2013.

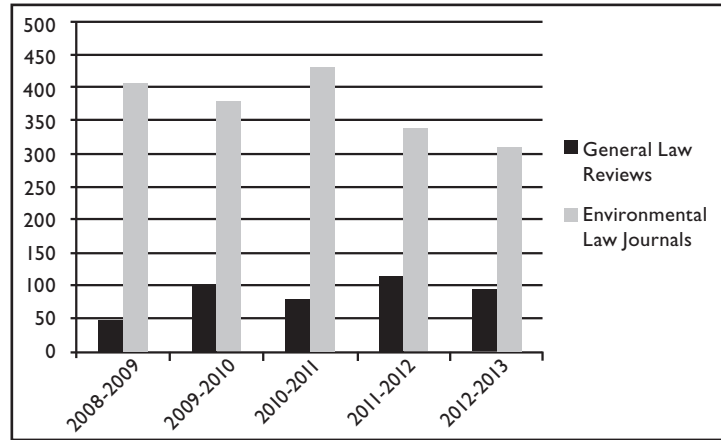
4. ENVIRONMENTAL LAW REPORTER, <http://www.elr.info/subject-matter-index> (last visited Apr. 12, 2014).

5. *Environmental Law & Policy Annual Review Online Supplements*, VANDERBILT LAW SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php> (last visited June 9, 2014).

6. The ELR subject matter index includes subtopics for each topic. Subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement and compliance, environmental justice, environmental law and policy, Equal Access to Justice Act, False Claims Act, Federal Advisory Committee Act, federal facilities, federal jurisdiction, Freedom of Information Act, human rights, indigenous people, indoor environments, infrastructure, institutional controls, insurance, international, liability, public health, public participation, risk assessment, stakeholder engagement, states, sustainability, tax, tort law, trade, tribes, and U.S. government. ENVIRONMENTAL LAW REPORTER, <http://www.elr.info/subject-matter-index> (last visited Apr. 12, 2014).



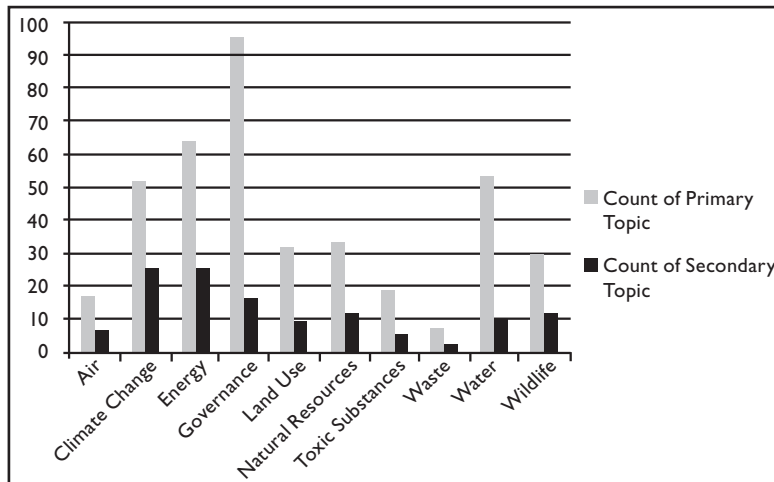
### Number of Environmental Law Articles by Year



### Trends in Environmental Legal Scholarship

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013
General Law Reviews	47	97	80	115	93
Environmental Law Journals	408	378	432	337	309
<b>Total</b>	<b>455</b>	<b>475</b>	<b>512</b>	<b>452</b>	<b>402</b>

### 2012-2013 Trends Topics by Category



### Number of Articles in Topic Categories by Year

Topics	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013
Air	5	7	10	17	17
Climate Change	126	151	91	71	52
Energy	28	44	60	52	64
Governance	116	87	82	125	95
Land Use	46	56	65	48	32
Natural Resources	26	22	26	27	33
Toxic Substances	12	20	57	22	19
Waste	11	14	13	13	8
Water	54	43	76	60	53
Wildlife	31	31	32	17	29
<b>Total</b>	<b>455</b>	<b>475</b>	<b>512</b>	<b>452</b>	<b>402</b>

## ARTICLE

# A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites

by Cary Coglianese

Cary Coglianese is the Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Law School.

One of the most significant powers exercised by federal agencies in the United States is their power to make rules. These regulations bind millions of individuals and businesses, imposing substantial compliance costs in an attempt to advance important societal goals. The nation’s economic prosperity, public health, and security are significantly affected by rules issued by administrative agencies. Given the substantive importance of agency rulemaking, the process by which agencies develop regulations has long been subject to procedural requirements aiming to advance democratic values of openness and public participation. The Administrative Procedure Act of 1946 (APA), for example, mandates that agencies provide members of the public with notice of proposed rules and allow them an opportunity to comment on these proposals before they take final effect.<sup>1</sup> Since 1966, the Freedom of Information Act (FOIA) has established the public’s right to access certain information held by the government.<sup>2</sup> Similarly, court decisions reviewing agency rules have tended to reinforce the principles of openness and public participation in the rulemaking process.<sup>3</sup>

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*The full version of this article was originally published as: Cary Coglianese, Enhancing Public Access to Online Rulemaking Information, 2 MICH. J. ENVTL. & ADMIN. L. 1 (2012). It has been excerpted and updated with permission of Michigan Journal of Environmental and Administrative Law and Cary Coglianese. The author incorporates and reaffirms here the acknowledgments contained in the full version, and expresses his further gratitude to Matthew J. McCabe for assistance in preparing this abridged version. This article draws on a report originally prepared for the Administrative Conference of the United States (ACUS), which led to the adoption of formal recommendations in December 2011. ACUS, Adoption of Recommendations, 77 Fed. Reg. 2257, 2264-65 (Jan. 17, 2012). The views expressed in this article are those of the author and do not necessarily reflect those of the members of the Conference or its committees.*

1. 5 U.S.C. §553 (2006).
2. Freedom of Information Act of 1966, Pub. L. No. 88-554, 80 Stat. 383 (codified as amended at 5 U.S.C. §552 (2006)).
3. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981).

With the advent of the digital age, government agencies have encountered new opportunities and challenges in putting these longstanding principles into practice. The development of the Internet has resulted in special efforts to elicit public participation in the rulemaking process via electronic communication and to expand the availability of rulemaking information. The most dominant method of increasing governmental transparency has been to provide extensive information on each agency’s website. Just as the website has increasingly become the face of retail business, it has increasingly become the government’s “front door” to the public.<sup>4</sup> Accordingly, public officials and scholars have increasingly recognized government websites as an important location for public access and participation in the governmental process. However, despite a growing body of research on agency websites, researchers have so far ignored agency websites as a method of public contact over rulemaking.

In this article, I report results from two systematic surveys conducted on regulatory agencies’ websites which reveal how much more agencies could do to improve public access to rulemaking. Agencies commonly succumb to pressures to organize their websites around their “top tasks”<sup>5</sup>—but, regrettably, they too often define these key tasks in terms of the volume of user demand for information and functionality. Although such an emphasis on user demand makes sense in other settings and for other purposes, rulemaking is entirely different. The profound power agencies wield in a democracy makes rulemaking a

4. Telephone Interview with Rachel Flagg, Co-Chair, Federal Web Managers Council (July 1, 2011).
5. As part of the federal government’s strategy for overhauling agencies’ websites, each agency has been required to provide an inventory of its domain names and other information about its sites, including a listing of each site’s “top tasks.” See Kasie Coccaro, *What You Missed: Live Chat on Improving Federal Websites*, WHITE HOUSE (July 13, 2011), <http://www.whitehouse.gov/blog/2011/07/13/what-you-missed-live-chat-improving-federal-websites> (video feed starting at about 12:00) (statement by Sheila Campbell, General Services Administration’s Director of the Center for Excellence in Digital Government); see also FED. WEB MANAGERS COUNCIL, <http://www.howto.gov/communities/federal-web-managers-council> (describing the Council’s membership as including agencies “that deliver top citizen tasks” and its goals as including assisting the public in completing “their most critical tasks online”). A mindset that emphasized top tasks was also apparent in responses from among the more than 15 interviews with agency managers from 10 different agencies conducted as part of the research for this article.

substantively top task no matter what the relative volume of user demand. Regulatory agencies can and should do more to improve public access to the regulatory process by treating rulemaking as a truly top task.

## I. Agency Rulemaking on the Web

In 2003, the federal government rolled out a centralized, web-based portal for rulemaking information known as Regulations.gov. This web portal was envisioned both as a one-stop shop for information about rulemaking across the entire federal government as well as a central site for submitting public comments. Two years later, Regulations.gov came to be supported by a new electronic Federal Docket Management System that was designed to house rulemaking information in one central online location, bringing together material that had been kept in disparate paper and electronic dockets scattered across the federal government. By 2008, more than 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions were using a common database for rulemaking documents, a universal docket management interface, and a single public website for viewing proposed rules and accepting online comments. Regulations.gov has been modified considerably over the years, and the site's functionality has markedly improved over its initial design.

Regulations.gov has garnered considerable attention from academic observers as well as governmental practitioners. Although Regulations.gov has received many plaudits,<sup>6</sup> it has been subjected to its share of criticism too. Some observers, for example, have faulted the completeness of the information Regulations.gov purports to contain, the usability of its search function, and the overall complexity of its design.<sup>7</sup> Agency officials, governmental auditors, and independent expert panels have scrutinized Regulations.gov, offering numerous recommendations for improving its management, functionality, and design.<sup>8</sup> Although Regulations.gov's functionality has improved

markedly in response to these suggestions, it remains only part of regulatory agencies' public outreach on the World-wide Web, and perhaps only a small part at that. After all, members of the public still can be expected to go to an agency's "front door" when looking for information about new rulemakings and seeking to comment on them.

A few individual regulatory agencies have constructed new websites specifically to support public access to and participation in their rulemaking proceedings. For example, the Environmental Protection Agency (EPA) has created a website that the agency initially called its "Rulemaking Gateway" but now calls a "Regulatory Development and Retrospective Review Tracker"—or "Reg DaRRT" for short. As the agency has described it, Reg DaRRT "provides information to the public on the status of the EPA's priority rulemakings and retrospective reviews of existing regulations."<sup>9</sup> Priority rulemakings appear on Reg DaRRT soon after the EPA's Regulatory Policy Officer approves their commencement, typically appearing online well in advance of the appearance of any notice of the rulemaking in the semiannual regulatory agenda or in the *Federal Register*.<sup>10</sup> Reg DaRRT enables the public to track priority rulemakings from the earliest pre-proposal stage through to completion.<sup>11</sup> To facilitate commenting, Reg DaRRT provides users with instructions on how to comment on a regulation via Regulations.gov.<sup>12</sup> Users may view all Reg DaRRT rules in one list or may sort through them by their phase in the rulemaking process or by other criteria.<sup>13</sup> In response to Executive Order 13563,<sup>14</sup> Reg DaRRT also allows users to view the EPA's retrospective reviews of current regulations.<sup>15</sup>

How common are websites like Reg DaRRT? When I conducted a study a few years ago for the Administrative Conference of the United States (ACUS), I could find only one other agency—the Commodities Futures Trading

6. A page on the Regulations.gov website lists its awards. *About Us: Awards and Recognition*, REGULATIONS.GOV, <http://www.regulations.gov/#!aboutAwards> (last visited July 13, 2011). Additionally, the General Services Administration and the Federal Web Managers Council have listed Regulations.gov as an example of a "best practice" in a governmental website for its effort to consolidate regulatory information and reduce duplication across agencies. See *Agency Examples*, HOWTO.GOV, <http://www.howto.gov/web-content/requirements-and-best-practices/agency-examples> (last visited June 16, 2011).

7. For a summary of such complaints, see Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAAMI L. REV. 395, 403-04 (2011).

8. Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451 (2010); Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 939-41 (2009); CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 37-42 (2008), available at <http://www.fas.org/spp/crs/misc/RL34210.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-872T, ELECTRONIC RULEMAKING: EFFORTS TO FACILITATE PUBLIC PARTICIPATION

CAN BE IMPROVED 29 (2003), available at <http://www.gao.gov/new.items/d03901.pdf>.

9. *Reg DaRRT*, U.S. ENVTL. PROT. AGENCY, <http://yosemite.epa.gov/opei/RuleGate.nsf/> (last visited Oct. 14, 2011). Reg DaRRT was previously named the Rulemaking Gateway, but was renamed on August 22, 2011. See *Recent Upgrades*, U.S. ENVTL. PROT. AGENCY, <http://yosemite.epa.gov/opei/RuleGate.nsf/content/upgrades.html> (last visited Oct. 14, 2011). Reg DaRRT contains the same basic design as the Gateway and much of the same features. It differs in that Reg DaRRT no longer provides an easy way to identify and provide input on EPA proposed rules open for comment, but it does allow users to view the Agency's retrospective reviews of existing regulations. *Id.* Reg DaRRT's focus on "priority" rulemakings also means that it does not provide information on all the Agency's proposed rules, just a select group.

10. *About Reg DaRRT*, U.S. ENVTL. PROT. AGENCY, <http://yosemite.epa.gov/opei/RuleGate.nsf/content/about.html?opendocument> (last visited Oct. 14, 2011).

11. *Reg DaRRT*, *supra* note 9.

12. *Comment on a Regulation*, U.S. ENVTL. PROT. AGENCY, <http://yosemite.epa.gov/opei/RuleGate.nsf/content/phasescomments.html?opendocument> (last visited Oct. 14, 2011).

13. *Reg DaRRT*, *supra* note 9.

14. Exec. Order No. 13563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

15. *Reg DaRRT*, *supra* note 9.

Commission (CFTC)—that had a similar site. True, many other agency websites do contain pages dedicated to regulations. However, the EPA and CFTC sites are distinctive in that they provide an easily accessible, yet comprehensive list of the agencies' proposed rules. The U.S. Department of Labor's website, by contrast, included a page devoted to regulations where users could find links to the Department's regulatory agenda and other helpful information. The "featured items" on the Labor Department's page included only a subset of actions from the agency's regulatory agenda, presumably those that agency managers thought would be of greatest interest to the public.<sup>16</sup> Only toward the bottom of the webpage did a box appear that was labeled "Other Regulations Currently Open for Comment," and as of July 2011, it contained an incomplete list comprising only three of the agency's active rulemakings.

## II. The 2005 Website Survey

In an earlier study of agency websites, I sought to gain the first systemic understanding of the accessibility of rulemaking information on the Internet. Working with Prof. Stuart Shapiro, I surveyed agency website features in 2005, specifically looking for information related to rulemaking.<sup>17</sup> Until that time, most of the research on e-rulemaking focused on ways to use the Internet to allow the electronic submission of public comments, ranging from the advent of e-mail submission to the one-stop, governmentwide comment funnel, Regulations.gov.<sup>18</sup> Other scholarship tended to play out scenarios by which digital government would "transform" or "revolutionize" the relationship between the public and agency decisionmakers.<sup>19</sup>

In our study, Shapiro and I proceeded on the premise that any transformation in rulemaking would presumably begin with, or at least involve, the ubiquitous agency website. We selected 89 federal regulatory agency websites to study, drawing on agencies that had completed rulemakings with some regularity during the preceding two years.<sup>20</sup> We recruited graduate students to code each agency website according to a uniform protocol we created. The protocol was designed to collect website information in three broad categories: (1) the ease of finding the agency's website, such as by typing in the agency name or acronym directly or using Google; (2) general website features, including the presence of a search engine, a site map, help or feedback options, other languages, and disability friendly features; and (3) the availability and access

to regulatory information, such as the kind of material that the public could otherwise find in a paper rulemaking docket.<sup>21</sup>

Although we learned that agency websites could be easily located,<sup>22</sup> the general features of agency websites were not as consistently favorable. Search engines were present on the home pages of almost all the agency websites, and user feedback and help features could be found on a majority of sites. But less than one-half of the sites were readable in a language other than English, and only four of the 89 sites surveyed had what we deemed "disability friendly" features.<sup>23</sup> More notably, regulatory information was too often lacking. Although more than one-half of the websites included one or more words related to rulemaking on the home pages (e.g., "rule," "rulemaking," "regulation," or "standard"), other keywords related to participation in rulemaking—like "comment," "proposed rule," and "docket"—could not be found on most of the agency home pages.<sup>24</sup>

Strikingly, rulemaking dockets either did not exist online or were not easy to locate. Our 2005 study was conducted before the governmentwide adoption of the Federal Docket Management System that underlies Regulations.gov, so online dockets, if they existed at that time, would have only been found on agency websites. Only 44% of the agencies surveyed had a link to some type of docket on their home page.<sup>25</sup> Dockets were found on the site maps of only three agencies' websites, and the coders could find dockets on only two additional sites through the use of the websites' search engines.<sup>26</sup> If the coders could find no reference to a docket on an agency's home page or by using a site map and search engine, we asked them to take two minutes to try to locate a docket for that agency by whatever means possible; however, even with this additional instruction and time, they could find only seven more dockets.<sup>27</sup>

We also compared websites across different agencies. We ranked agencies' sites based on three scores: (1) the ease of finding the website and the general website characteristics; (2) the regulatory content on the website; and (3) the sum of the first and second scores.<sup>28</sup> We found that agencies that promulgated more rules tended to have websites that were slightly easier to find, but they did not tend to have sites with more features.<sup>29</sup> Remarkably, we found no major difference in accessibility to regulatory information between agencies that frequently and less frequently issued rules—with the one exception being that it was actually easier to find a link to a docket for agencies that regulated less frequently.<sup>30</sup>

16. *DOL Regulations*, U.S. DEP'T OF LABOR, <http://www.dol.gov/regulations> (last visited July 17, 2011).

17. Stuart Shapiro & Cary Coglianese, *First Generation E-Rulemaking: An Assessment of Regulatory Agency Websites* (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-15, 2007), available at <http://papers.ssrn.com/abstract=980247>.

18. Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46, 60 (2007).

19. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 433 (2004); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 320 (1998).

20. Shapiro & Coglianese, *supra* note 17.

21. *Id.* at 3.

22. *Id.*

23. *Id.*

24. *Id.* at 3-4.

25. *Id.* at 3.

26. *Id.*

27. *Id.*

28. *Id.* at 5.

29. *Id.* at 4.

30. *Id.*

We concluded that agency websites had much untapped room for improvement. Consequently, we urged that greater attention be given to websites as an important mediating juncture between the public and the agency with respect to rulemaking, suggesting that “at the same time scholars and government managers justifiably focus on new tools, some thought also be given to standards or best practices for the accessibility of regulatory information on the first generation tool”—the website.<sup>31</sup>

### III. The 2011 Website Survey

Agencies admittedly have many governmental responsibilities besides rulemaking. Nevertheless, from our 2005 coding of agency websites, Shapiro and I observed “a comparative lack of availability of regulatory information on the agencies’ home pages.”<sup>32</sup> Despite the fact that the agencies included in our sample had engaged in rulemaking with some regularity, much of the information on their websites had little to do with rulemaking. With only a few exceptions, less than one-half of the home pages contained the regulatory terms we asked our coders to find.

If those results were striking in 2005, it is perhaps even more striking that they remained stable over time. To assess more recent agency use of the Internet in support of rulemaking, I undertook to replicate and extend the 2005 study to determine whether agencies had made progress in the intervening years, as well as to identify both new developments and any new concerns. This second study, conducted in March 2011, followed the earlier one in its design and in most of the coding protocols, but it also included additional coding for each agency’s use of social media, such as Facebook and Twitter, which were not in widespread use at the time data were collected for the 2005 study.

As with the earlier study, I drew upon the semiannual regulatory agenda to construct a sample of agencies to include in the study. Out of about 180 agencies reporting some final rulemaking over the course of the preceding two years (2009-2010), a total of 90 agencies were included in the study because they reported an average of two or more rulemakings completed during each six-month period covered by the agenda. Sixteen law students coded the websites on a single day in March 2011, each using a uniform coding protocol and following a collective training session. Each coder separately collected data on two websites—the Federal Communica-

tions Commission’s (FCC) and the U.S. Department of Transportation’s (DOT)—to ensure a high level of consistency across coders.

Table 1 compares the results of the 2005 coding with the results of the same coding in 2011. With only relatively minor fluctuations, the frequencies are remarkably alike across the two time periods. Perhaps most striking of all, references to Regulations.gov continue to appear infrequently on agency home pages, having actually declined since our 2005 coding. This finding is all the more puzzling when one considers that our 2005 coding took place at a time when Regulations.gov was still in its infancy. For whatever reason, federal agencies appear not to have grabbed hold of the Regulations.gov “brand” by incorporating it on their home pages. Instead, they have used other words to link to Regulations.gov: 53% of the home pages contained a link to a rulemaking-related word (e.g., “rules,” “regulations,” etc.) that took the user to Regulations.gov. Agencies apparently do not believe that using the term “Regulations.gov” is itself very helpful in directing users to

**Table 1. Frequency of Links From Agency Home Pages**

Word or Phrase	% Agencies With Home Page Link (2005 Coding)	% Agencies With Home Page Link (2011 Coding)
Code of Federal Regulations	7%	6%
Federal Register	10%	10%
Regulations.gov	27%	21%
Information Quality Act	18%	23%
Freedom of Information Act	79%	83%
Rule, rulemaking, regulation, or standard	67%	64%
Law, legislation	31%	36%
Comment	15%	26%
Proposed Rules	15%	23%
Docket	10%	4%

the Regulations.gov website.

Just about as many sites that linked to Regulations.gov also linked to some agency-specific page related to rulemaking (54%), with some agencies providing links to an agency page and to Regulations.gov. When coders used the search engine on the website, in 51% of the cases they found some agency page related to rulemaking in one of the “top ten” search results; however, in only three cases did they find a link to Regulations.gov in one of the top 10 search results. Thirty percent of the websites had a central rulemaking page listed on the site map, while only 13% had a link to Regulations.gov on their site map.

In about a third of the agency websites (34%), coders found a webpage, graphic, or video that explained the rulemaking process to a lay audience. Strikingly, only about one-fifth of the home pages (22%) mentioned even one specific proposed rule, and a similar minority of home pages (23%) had a dedicated link or section devoted to proposed rules or rules open for comment. About 40% of the websites did not have any link to the *Federal Register*, the

31. *Id.* at 6.

32. *Id.* at 3.

*Code of Federal Regulations*, Regulations.gov, any proposed rule, or a section dedicated to rules.

As shown in Table 1, the availability or visibility of agency rulemaking dockets, which was already slight in 2005, diminished still further by 2011. Only six agency home pages in 2011 included the word “docket,” with only four websites containing a link on that word (a drop from about nine websites in the 2005 study). None of these four links connected the user to Regulations.gov.

Given the scant attention given to dockets on the agencies’ home pages, I asked all the coders to see if they could find something that looked like a rulemaking docket. About 17% of coders were able to find a central rulemaking docket in one of the top 10 results by using the agency website’s search engine. In 29% of the websites, coders found something that looked to them like a docket but did not use the word “docket.”

#### IV. Rulemaking Information for All

Agencies increasingly use the Internet for many different purposes, including using their websites to communicate with the public not only about rulemaking but also about a variety of other issues and activities. A proliferation of competing demands for communication makes rulemaking only one—and to some managers within agencies, a relatively minor one—of the many priorities under consideration when agency officials make decisions about the design and functionality of their websites. As a result, the risk exists that agencies will make website design decisions without giving due consideration to the values of public participation reflected in the various laws and executive orders that have called upon agencies to use electronic media to enhance the public’s understanding of and role in rulemaking. Indeed, an emerging approach to government website design focuses on giving prominence to “top tasks” sought most frequently by members of the public.<sup>33</sup> Such an approach certainly has much to be said for it. But an exclusive focus on current website use or demand will probably push information about rulemaking, and online opportunities for public commenting on rulemaking, far into the background, simply because the volume of website traffic generated by various online government services dwarfs the traffic related to rulemaking. Rulemaking may perhaps never be a “top task” in terms of the numbers of web users who visit an agency website, but in a democracy, few tasks compare in significance with the ability of government agencies to create binding law backed up with the threat of civil, and even criminal, penalties.

For this reason, officials who make decisions about the design and content of their agencies’ websites should ensure that rulemaking information is easily accessible to ordinary individuals—not just displayed in a way that compares with current traffic or usage patterns. Consider, as an example, the FCC’s website.<sup>34</sup> The FCC’s website recently

received a major redesign, making it perhaps the most up-to-date website design of any federal agency, with many appropriate and useful improvements to the site made after extensive public input. Nevertheless, from the standpoint of making rulemaking information accessible to ordinary citizens, it is striking that the website is not as clear and accessible as the agency’s former site. The new site does not list “rulemaking” or “regulation” prominently on the home page.<sup>35</sup> Instead, the new site includes a tab for “rulemaking” as one of several pull-down options under the heading “Business and Licensing.”<sup>36</sup>

Should a typical citizen visit the FCC website seeking to find out about the FCC’s new regulatory policy work, she might be forgiven for not looking under a tab labeled “Business and Licensing.” She might instead be expected first to click on the tab for “Our Work”—but she will not see any option for rulemaking there. Only if she clicks further under “Our Work,” on a pull-down labeled “Consumers,” and then goes to another webpage, will she find a section toward the bottom for rulemaking. There she will find—under a heading obliquely called “Related Content for Consumers”—an incomplete list of the agency’s proposed rules.<sup>37</sup> Alternatively, if she clicks the “Take Action”<sup>38</sup> button on the home page and then further chooses the pull-down menu item for filing a public comment, she will find a list of the Commission’s “Most Active Proceedings”<sup>39</sup> (Figure 1)—although when the site was reviewed in 2011 some of these proceedings appeared to be largely if not fully completed already, such as with the listing for the FCC’s National Broadband Plan.<sup>40</sup> Other entries found at that time in the “Most Active Proceedings” list contained no description whatsoever, which made it hard for ordinary citizens to use. For example, a listing for the AT&T/T-Mobile merger—while perhaps self-explanatory at a certain level—offered no summary or other information about the proceeding, such as deadlines, standards for agency decisions, or links to any other supporting materials.<sup>41</sup> The user presumably could not even glean from the website that the AT&T/T-Mobile proceeding was not a rulemaking, to the extent that matters. Of course, it *is* pos-

35. *Id.* A link for “Rulemaking” does appear in tiny font at the bottom of the site under the heading “Business and Licensing.”

36. *Id.*

37. For example, on a day when 15 rulemakings dating back to December 29, 2010 appeared under “Related Content for Consumers,” a total of 59 proposed rules could be found for the same period via a search for FCC proposed rules on Regulations.gov. *Compare Related Content for Consumers*, FED. COMM’NS COMM’N, [http://www.fcc.gov/related/44?categories\[0\]=proceeding](http://www.fcc.gov/related/44?categories[0]=proceeding) (last visited July 14, 2011), with *Search Results*, REGULATIONS.GOV, <http://www.regulations.gov/#/searchResults;a=FCC;det=PR;pd=12|29|10-07|14|11;pp=10;so=DESC;sb=postedDate;po=0> (last visited July 14, 2011).

38. FED. COMM’NS COMM’N, *supra* note 34.

39. *Send Us Your Comments*, FED. COMM’NS COMM’N, <http://www.fcc.gov/comments> (last visited June 9, 2011).

40. *A National Broadband Plan for Our Future*, FED. COMM’NS COMM’N, <http://www.fcc.gov/rulemaking/09-51-0> (last visited June 9, 2011).

41. The link for “AT&T/T-Mobile” takes users to a form for filing a comment, which provides no further information about the merger. *ECFS Express Upload Form*, FED. COMM’NS COMM’N, <http://hfallfoss.fcc.gov/ecfs/upload/display;jsessionid=NwPQnfwQY1f6zy4kjmjj02M3KhmjwFTn06G3QYWhTyHl6ky946qD!271039122!206283283?z=mko6v> (last visited June 9, 2011).

33. See Cocco, *supra* note 5.

34. FED. COMM’NS COMM’N, <http://www.fcc.gov> (last visited July 14, 2011).

sible to go to the search page for all FCC proceedings,<sup>42</sup> type in the proceeding number for the AT&T/T-Mobile merger, and find relevant FCC notices and documents. But surely it would also be helpful for members of the public to see a summary or more descriptive account of the proceeding at the outset—especially since the proceeding appears on a list ostensibly designed to attract attention and that same kind of summary information can already be found elsewhere in the system.

**Figure 1: Federal Communications Commission's Listing of Most Active Proceedings**



Source: <http://www.fcc.gov/comments> (last visited June 10, 2011).

The point here is not to single out the FCC or its website for any special criticism. To the agency's credit, its website provides a prominent access point for general feedback, lists some of the more significant proceedings, and includes (albeit in hard-to-reach locations) precisely the kind of summaries helpful to a layperson for at least some proceedings.<sup>43</sup> Other agencies do not provide anything close to the same level of accessibility—and that *is* the point. If it can be cumbersome for ordinary citizens to find rulemaking information on a recently updated, if not state-of-the-art, agency website, then presumably more work remains across the entire federal government.

Web designers have an understandable, if not desirable, tendency to create sites that meet the needs of their most frequent users. This is perfectly sensible in most contexts. In the context of government agencies making binding laws, however, a commitment to well-accepted democratic principles should lead agency web designers to create sites that are at least neutral across user types—if not even *more* accessible to less sophisticated or one-shot participants in the rulemaking process. Placing a primary link to rulemaking information under a tab labeled “business”—to use the FCC again as an illustration—may well reflect the reality that businesses are both the most frequent users of

agency websites and commenters on agency rulemaking.<sup>44</sup> But such thinking does not fit with the ideal of making the rulemaking process as accessible to ordinary citizens as it is to sophisticated repeat players.

Agency webpages providing up-to-date information about rulemaking, like the CFTC and EPA efforts described at the beginning of this article, are steps in the right direction of providing easy public access to rulemaking information. Yet, asking other agencies to do what the CFTC and EPA have done would be asking a lot. The CFTC and EPA have added this rulemaking information and functionality to their websites by creating and maintaining their own separate databases of rules. Other agencies need not go to such effort and expense. A highly feasible, cost-effective approach for all federal agencies would be to follow a practice many members of Congress have adopted. Members of Congress display on their websites lists of legislation they are currently sponsoring simply by executing an easy interface with the THOMAS database of all legislation currently pending in Congress. Members of Congress do not need to maintain their own lists of legislation or build their own databases.

Rather, on a member's home page, the user merely clicks a button for sponsored legislation and is shown a display containing a list of sponsored bills automatically extracted from THOMAS. At the click of the button, the computer executes what is essentially a “canned” or predetermined search and extracts from the THOMAS database only those bills that are sponsored or cosponsored by that Member of Congress, sending that information for display on the member's website.

Federal agencies can do much the same by adding links that run canned searches of Regulations.gov and automatically extract lists of rules open for public comment. If this functionality can be implemented by the relatively small offices of members of Congress, it can surely be adopted by the much larger federal agencies that also create binding law through the rulemaking process. Indeed, the Penn Program on Regulation has developed a proof-of-concept website—Rulefinder.org—that shows how easy it would be for every rulemaking agency to add this functionality via a link on its home page.<sup>45</sup>

42. *Search for Proceedings*, FED. COMM'NS COMM'N, [http://fallfoss.fcc.gov/ecfs/proceeding\\_search/input?z=gr9c5](http://fallfoss.fcc.gov/ecfs/proceeding_search/input?z=gr9c5) (last visited June 9, 2011).

43. See, e.g., *A National Broadband Plan for Our Future*, *supra* note 40.

44. For data on the frequency of business participation in rulemaking, see, e.g., Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735 (1996).

45. Rulefinder.org shows how easy it is to create canned searches of all rules open for comment. Unfortunately, the administrators of Regulations.gov do not currently allow external entities to extract search results and display the results on their own webpages. Thus, if agencies were to implement website functionality similar to what some members of Congress have for their legislation, the team administering Regulations.gov would need to

## V. Conclusion

People spend an increasing amount of time online, whether for social interaction, online shopping, entertainment, or work. Corresponding with this overall trend in online activity, agency websites have become a key vehicle for public interaction with the federal government over the last fifteen years. Agencies will continue to use electronic media to support all of their services and activities, but it is equally certain that making rules to solve society's problems will remain one of government's most fundamental responsibilities. In this article, I have focused on ways that agencies could use their websites to improve the accessibility of the rulemaking process. Until recently, this process that generates thousands of binding rules each year was generally impenetrable for the average member of the public. The Internet has now made possible ways of organizing and disseminating rulemaking information as well as soliciting public input.

Yet, agencies need to use wisely the opportunities the Internet provides to advance the quality and legitimacy

of the rulemaking process. This article has provided the results from new research identifying the highly varied levels of rulemaking information available on federal agency websites. It has identified the practices of some agencies—such as the development of the EPA's Rulemaking Gateway or Reg DaRRT—that merit replication by other agencies.<sup>46</sup> But it has also revealed gaps and concerns that any agency should consider when undertaking future efforts at web design. Agencies should resist the temptation to define the “top tasks” receiving priority placement on an agency's home page solely in terms of the tasks that are the most popular. Some tasks—like rulemaking—may not generate large volumes of visitors to agencies' websites, but they do very much rank as truly top tasks in terms of substantive importance. Rulemaking by agencies is one of the most profound, if not also democratically problematic, powers exercised by government, so regulatory agencies should seek to improve the use and design of their websites to make the rulemaking process more accessible to all.

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allow each agency to extract information and display it on the agency's own webpage, without users being redirected to Regulations.gov. Of course, even if users were to be redirected to Regulations.gov, as Rulefinder.org currently must, this would still be an advance in the ease of public accessibility to agency rulemaking information.

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46. This is not to say that Reg DaRRT lacks potential for improvement. *See supra* note 10. In changing from Rulemaking Gateway to Reg DaRRT, the EPA eliminated from under its banner called “Top Tasks” a link specifically designated as “Comment on a Regulation.” With Reg DaRRT, it would appear that the EPA no longer considers commenting on a regulation as a “top task.” Nor does Reg DaRRT provide a list of all agency rules open for comment—despite the ease with which it could do so through the use of a canned search. *See supra* note 45 and accompanying text. Instead, Reg DaRRT simply gives the user a hyperlink to Regulations.gov, along with a set of instructions on a further multistep process of using Regulations.gov to find all EPA rules open for comment.



C O M M E N T

# Comments on *A Truly “Top Task”*: Rulemaking and Its Accessibility on Agency Websites

by Andrea Bear Field

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Prof. Cary Coglianese’s article—*A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*—explains the importance of the agency rulemaking process and describes obstacles encountered by members of the public who wish to participate in that process. In particular, the article focuses on the role of government websites in making relevant information more accessible to the public and on the ways in which agency websites can make it easier—or more difficult—for the public to get timely access to information in individual agency proceedings.

During the almost 40 years, I have been practicing administrative law, I have participated in hundreds of agency proceedings, including scores of formal agency rulemakings conducted by the U.S. Environmental Protection Agency (EPA) and other federal agencies.<sup>1</sup> As part of the process of preparing rulemaking comments in those proceedings, I have often needed to find and review documents prepared by the agency conducting the rulemaking, by other affected federal and state agencies, and by other interested parties. Over the years, agencies have improved the procedures for obtaining such information, but there is still room for improvement. Let me here provide a brief historical perspective and then—relying on experience gained in participating in CAA proceedings—let me address some of the challenges still encountered by members of the public trying to participate meaningfully in agency proceedings.

## I. In Olden Days

Professor Coglianese’s article praises EPA for making the rulemaking process more accessible. One key reason for EPA’s success is that Congress set out a blueprint for accessibility to rulemaking information when it amended the

Clean Air Act in 1977. At that time, it added §307(d), which contains a panoply of procedures for EPA to follow when conducting notice and comment rulemaking.<sup>2</sup> Among the key provisions of §307(d) are those requiring EPA to (a) establish a rulemaking docket for each rulemaking it undertakes (CAA §307(d)(2)); (b) publish in the *Federal Register* notice of the rulemaking, specify the period available for public comment on the proposed rule, provide a docket number for the rulemaking and indicate when and where the docket will be available for public review, and provide a statement of basis and purpose containing the factual data on which the proposed rule is based and major legal interpretations and policy considerations underlying the proposal (CAA §307(d)(3)); and (c) allow for the submission of written comments and presentation of oral testimony on rulemaking proposals and ensure that all written comments, transcripts of hearings, and documentary information are promptly included in the docket and that all such docket information is open for public inspection and copying (CAA §307(d)(4) and (5)).

Following enactment of the 1977 Clean Air Act Amendments, EPA did indeed establish dockets for Clean Air Act rulemakings, the Agency included in those dockets the information spelled out in CAA §307(d), and the public had access to that information. During the “low tech” two decades following passage of the 1977 Amendments, though, “access” meant that anyone learning about an EPA rulemaking had to go to EPA’s docket center; sign in; request and review a copy of the index to that rulemaking docket; and then ask to see—and be able to copy—specific index-listed documents. This paper-based system worked well enough for those who happened to live in or near the places where EPA maintained its rulemaking dockets, but it certainly was not an ideal system for those geographi-

1. Although I have no precise data on the overall number of rulemakings EPA has conducted in the past four decades, the attached table—which lists the number of pages in the *Federal Register* devoted to EPA rules promulgated between 1972 and 2012—amply demonstrates that EPA has indeed produced many, many rules over that time period.

2. Those writing §307(d) relied in large part on the comprehensive approach laid out in a law review article by William Pedersen, then an EPA lawyer familiar with the complexities and occasional haphazardness of the rulemaking process. See William Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

cally remote from where the dockets were stored,<sup>3</sup> and it had other flaws.

For example, the system of the mid-1970s to 1990s relied heavily on human beings to take many time-consuming steps—rather than typing relatively few keystrokes—to get documents from a commenter's hands into the relevant rulemaking docket. During that time, it could take a week or longer after mailing for comments and attachments to appear in rulemaking dockets.

Also, practitioners from decades ago recall instances in which not all submitted documents would be put in the agency-established rulemaking dockets. In particular, they recall instances in which they filed legal comments and attached thereto a variety of technical support documents but subsequently discovered that EPA—the arbiter of what did or did not get included in rulemaking dockets—tended to put in their dockets only legal comments and declined to include supplemental attached documents.

That all changed in the early 2000s, when the federal government set up Regulations.gov and a new electronic Federal Docket Management System to house rulemaking information in one central online location. As a result of these improvements, individuals no longer have to make physical trips to docket rooms, and commenters may have more confidence that everything they properly submit will be included in rulemaking dockets. These improvements, however, did not (and do not) eliminate all problems of public access to rulemaking materials.

For example, in the early days of Regulations.gov, commenters could encounter significant delays between the time when they sent materials to Regulations.gov and the time when those comments showed up in the designated rulemaking dockets for others to review. Over time, this issue has been substantially addressed.

Also, in the early days of Regulations.gov, it was difficult to determine if and when new documents were added to dockets because documents did not always appear in the order in which they were submitted for posting. That problem, too, was subsequently addressed. An improvement to the search function of Regulations.gov means that those now roaming through dockets on Regulations.gov can find materials recently added to dockets by searching for everything posted after a specific designated date.

Some of my colleagues who must more frequently roam through Regulations.gov have suggested an additional way in which to make that site's search function more robust. Specifically, they note that it is now possible to look for any comments filed in a rulemaking docket by a specific entity, say Sierra Club. And it is possible to search a docket for any documents posted after a specific date, say January 1, 2014. But it is not yet possible to combine these two searches and look for all information posted by Sierra Club after January 1, 2014.

Another way to improve the ease with which one navigates Regulations.gov would be to establish a separate category to house comments sent in response to advocacy groups' now-standard practice of sending blast emails to their constituencies, urging followers to submit rulemaking comments and often including form response cards that can be filed directly in rulemakings. It is certainly appropriate to encourage such public participation in rulemakings so that agencies will know the extent of the public's interest in the rulemakings. But note-card comments—particularly when they arrive in the thousands or tens of thousands—can take up many screens on the docket sheet. One screen defaults to showing 25 entries. Going through hundreds of screens can take a significant amount of time. This makes it difficult for interested parties to find, analyze, and respond to substantive comments in the docket. Again, such comments should be included in rulemaking dockets, but putting them in a separate category of comments would make it easier for all parties to search for—and find—the more detailed comments filed by both those supporting and opposing particular actions.

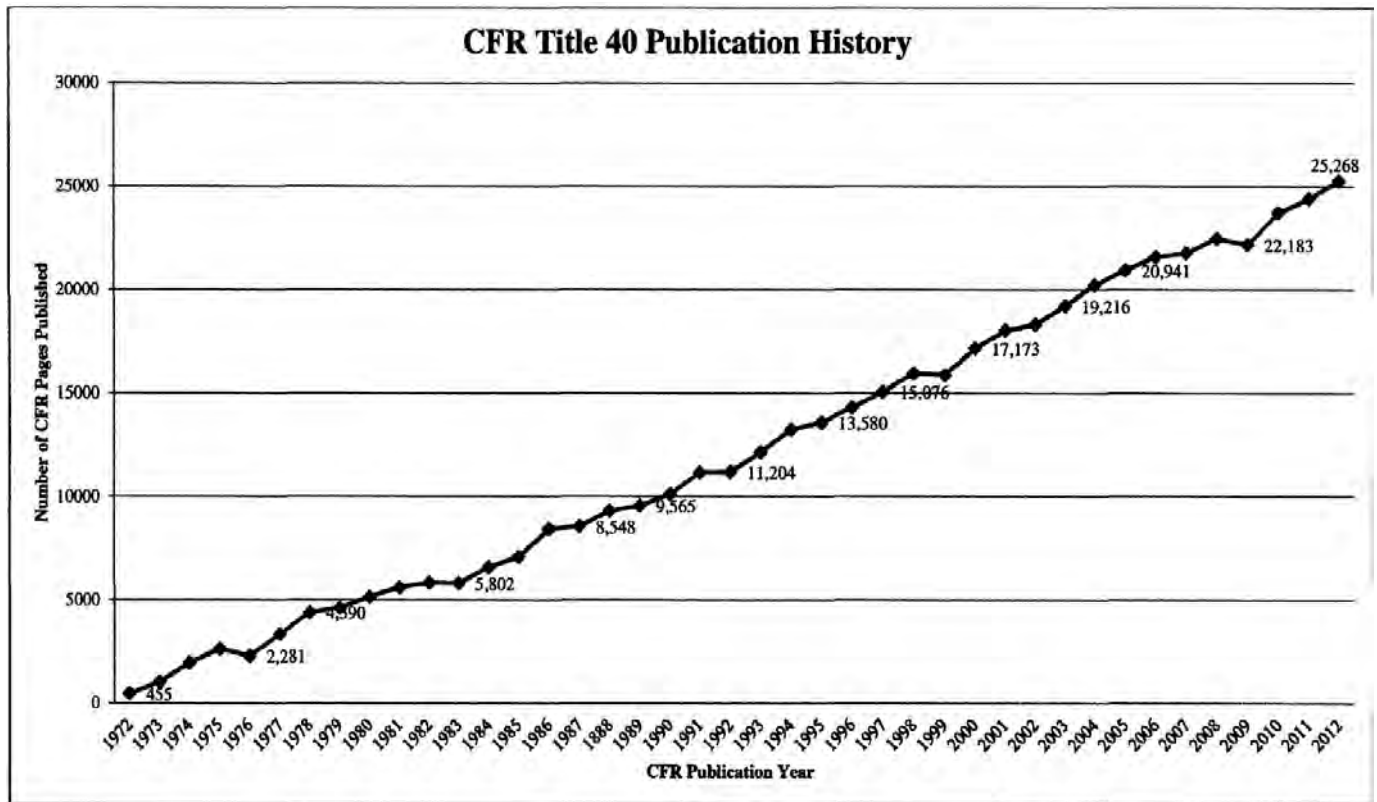
## II. Larger Problems That Still Remain

Even if Regulations.gov can be made to work perfectly, however, the public will still not have the desired access to agency decisionmaking processes unless decisionmaking entities widely use Regulations.gov. As noted in Professor Coglianese's article, some agencies still have not established robust systems for using Regulations.gov when they conduct rulemakings. Just as large a problem, though, is that even those agencies that use Regulations.gov in formal notice-and-comment rulemakings can avoid the transparency of that process when they avoid the notice-and-comment rulemaking process altogether and opt instead to set policy through other mechanisms.

For example, when EPA—the agency with which I am most familiar—chooses to set policy through the issuance of guidance documents, rather than through formal rulemaking, there is no set process ensuring that the public will have access to or be able to comment on what goes into EPA's policy. The following are just a few difficulties I have encountered in trying to track EPA's decisionmaking process when EPA avoids the notice-and-comment rulemaking process.

- The agency website's search engine fails me. When I first hear that EPA is thinking about developing a policy on a particular topic (Topic X), I want to get background information about that topic and about what EPA has previously done on related topics. Years ago, I would start my investigations by going to EPA's website and searching for Topic X. Over the years, I have often found that to be a dead end because the website's search engine is not a particularly robust one. For me, a better way of finding information about Topic X on EPA's website is to do a Google search of Topic X. That approach has frequently turned up

3. Interested parties could also request copies of the docket index and specific docket materials by mail if they paid "the expenses, including the personnel costs to do the copying." CAA §307(d)(4)(A).



helpful links to key information, including links to places on EPA's website that I was unable to find using the search engine on EPA's website.

- The agency may not create a docket where all relevant information is placed. Or it may establish multiple dockets, each of which houses some—but not all—of the information it is considering in its development of a guidance or policy memorandum. Or a docket—if one exists—may be housed within a regional office of EPA. Obviously, any or all of these things can make it hard to find key documents and comment on them.
- The agency may make major or minor changes to its website—an event that seems to happen at the beginning of each new administration and sometimes more often than that. Or the agency may post a document and then decide at a later time to remove

that posting. Due to things like this, that a gem of a document—found and carefully bookmarked one day—seems to vanish the next day. (At one point, I thought I was the only one to whom this happened. Chatting with colleagues has convinced me that this is a more widespread problem.) Because of things like this, the agency's website does not serve as a complete history of regulatory decisionmaking.

In summary, much has happened in the past forty years to make it easier for both experienced and not-so-experienced members of the public to participate meaningfully in agency rulemakings. However, more could be done to improve both the tools used to provide information in individual rulemakings and the mindsets of agencies that now often prefer to avoid the lengthy, often-contentious rulemaking process.

A R T I C L E

# Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

by Cynthia R. Farina, Mary Newhart, and Josiah Heidt

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An underlying assumption of many open government enthusiasts is that more public participation will necessarily lead to better government policymaking: If we use technology to give people easier opportunities to participate in public policymaking, they will use these opportunities to participate effectively. Yet, experience thus far with technology-enabled rulemaking (e-rulemaking) has not confirmed this “if-then” causal link. Such causal assumptions<sup>1</sup> include several strands: If we give people the opportunity to participate, they will participate. If we alert people that government is making decisions important to them, they will engage with that decisionmaking. If we make relevant information available, they will use that information meaningfully. If we build it, they will come. If they come, we will get better government policy.

This Article considers how this flawed causal reasoning around technology has permeated efforts to increase public participation in rulemaking. The observations and suggestions made here flow from conceptual work and practical experience in the Regulation Room project. Regulation Room is an ongoing research effort by the Cornell eRulemaking Initiative (CeRI), a multidisciplinary group of researchers who partner with the U.S. Department of Transportation (DOT) and other federal agencies.<sup>2</sup> At the

core is an experimental online public participation platform that offers selected “live” agency rulemakings.<sup>3</sup> The goal is discovering how information and communication technologies (ICTs) can be used most effectively to engender broader, better participation in rulemaking and similar types of policymaking.<sup>4</sup>

This Article begins by explaining how the belief that new ICTs would result in broadscale popular participation eclipsed the question “*why* is more public participation in rulemaking a good thing?” Perhaps democracies inevitably conflate more participation with better government. However, treating the value of more participation as self-evident has left us without guidance on how to value the new participation that technology brings, and on how to deploy technology to get the participation we really want. Part II analyzes the differences between how participation is valued in electoral democracy and in rulemaking. Part III discusses implications of these differences for designing rulemaking participation systems.

## I. The Drive for E-Participation

Federal agencies have used emerging ICTs to increase public participation in rulemaking. Regulations.gov has enabled the public to view rulemaking documents online and added governmentwide online comment submission to the previous options of fax and e-mail, although observers have called for system improvements.<sup>5</sup> The motivating

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1. Fallacies of this kind (sometimes referred to as “magical thinking”) refer to nonscientific causal reasoning, and can be associated with a number of cognitive biases (i.e., mistakes human beings make in reasoning, evaluating, remembering, or other cognitive processes) and include attentional bias and confirmation bias. See BEHAVIORAL LAW AND ECONOMICS 1-10 (Cass Sunstein ed., Cambridge University Press 2000), for an introduction to cognitive biases.
2. See CORNELL eRULEMAKING INITIATIVE (CeRI), <http://www.lawschool.cornell.edu/cei/> (last visited Aug. 3, 2012).

3. REG. ROOM, <http://www.regulationroom.org> (last visited July 28, 2012).
4. See Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) [hereinafter *Rulemaking in 140 Characters*]. The Planning Room ([planningroom.org](http://planningroom.org)) will apply the technology and techniques developed to support public participation in rulemaking in a different complex policy environment: updating an agency’s strategic plan.
5. E.g., CYNTHIA R. FARINA, COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* (2008); Cary Coglianese et al., *Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System*, 57 ADMIN. L. REV. 621 (2005).

Web 2.0 idea is not simply that users *make* rather than retrieve content, but that “Web 2.0 offers *all* users the *same* freedom to contribute.”<sup>6</sup> Advocacy groups have used the Internet to mount membership “calls to action” for high profile rulemakings. Technology and participation are no longer linked, but fused, and technology becomes political. In this techno-political environment, participation is axiomatically good, and more participation is necessarily better.

## II. What Kind of Participation Should We Value?

Federal e-government leaders’ conviction that Web 2.0 would enable government to tap dispersed citizen knowledge subsumed any more particularized assessment of how, in the complex and demanding policy environment of rulemaking, more public participation would add value. Without such reflective assessment, technology-enabled commenting often leads to increased participation that only expresses opinions or preferences without elaboration or deliberation. For example, calls to action launched by established advocacy organizations have resulted in mass e-mail comments that are numerous and duplicative.<sup>7</sup> While the incidence of mass commenting is low relative to the number of new rules proposed each year, when a rulemaking does prompt mass commenting the impact on the agency can be immense.<sup>8</sup>

Examining such mass e-mail campaigns, Professor Nina Mendelson found that “agency officials appear to be discounting these [preference]-laden comments, even when they are numerous.”<sup>9</sup> Rulemaking is not supposed to be a plebiscite.<sup>10</sup> It would be troubling if the agency *were* making decisions based on the numerical weight of outcome preferences.<sup>11</sup> Mendelson takes on this conventional view with a challenging set of questions.<sup>12</sup> Increasingly, we rec-

ognize that regulatory decisions are heavily preference- or value-laden, even when they also require use of scientific or other specialized knowledge.<sup>13</sup> If this is so, why shouldn’t the agency take account of citizens’ value preferences? When choices among competing values must be made, government should be attending to citizens’ value preferences at least until they impinge on other values protected from majoritarian override. Even if agencies ought not give *decisive* weight to numbers of mass comments, why shouldn’t such participation count as evidence of values citizens want favored in regulatory decisionmaking?<sup>14</sup> This argument challenges us to think more deeply about the relationship of rulemaking to democratic government and how the value of participation in each is related.

### A. All Preferences Are Not Created Equal

Citizens’ preferences about public policy outcomes may be grounded in very different amounts and kinds of information. The following typology, while oversimplified, captures differences in the information quality and deliberativeness of heuristic preference formation:

1. *Spontaneous Preferences*: The preferences a citizen expresses when she has neither focused on the issue, nor been targeted by efforts to persuade her about the issue. Sometimes described as “top-of-the-head”<sup>15</sup> or “re-active”<sup>16</sup>—generally derived from the individual’s general knowledge, underlying value system, and worldview.
2. *Group-Framed Preferences*: Groups (like the Environmental Defense Fund or National Rifle Association) can play a powerful role in the formation of citizens’ public policy preferences. They become important components of an individual’s civic identity and serve the valuable function of signaling when an issue “deserves” attention by those who share the group’s values.<sup>17</sup> Mass communication campaigns rely on group-framed preferences.

6. *Web 2.0: Characteristics*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Web\\_2.0#Characteristics](http://en.wikipedia.org/wiki/Web_2.0#Characteristics) (last modified Aug. 6, 2012 at 5:55 AM) (emphasis added).

7. See Stuart W. Shulman, *The Case Against Mass E-Mails: Perverse Incentives and Low Quality Public Participation in the U.S. Federal Rulemaking*, 1 POL’Y & INTERNET 23, 34 fig. 4, 35 (2009) [hereinafter *Case Against Mass E-Mails*].

8. John M. Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 988-99 (2006); *The Case Against Mass E-Mails*, *supra* note 7, at 46.

9. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

10. See *Rulemaking in 140 Characters*, *supra* note 4, at 436-37 (describing “regulatory rationality” rulemaking requirements).

11. Some have expressed concern about e-rulemaking because it might push agencies toward plebiscitary decisionmaking. See, e.g., David Schlosberg & John S. Dryzek, *Digital Democracy: Virtual or Real?*, 115 ORGAN. & ENV’T 332 (2002); Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPRBLOG, CTR. FOR PROGRESSIVE REFORM (Apr. 13, 2010), <http://progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B638 09E>.

12. Mendelson, *supra* note 9, at 1371-79.

13. See, e.g., Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review of Agency Science*, 109 MICH. L. REV. 733, 735-36 (2011); Stephen Zavestoski et al., *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI, TECH, & HUM. VALUES 383 (2006); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 461-68 (2005).

14. Mendelson, *supra* note 9, at 1371-79.

15. E.g., James Fishkin & Robert Luskin, *Experimenting With a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 287 (2005); John Zaller & Stanley Feldman, *A Simple Theory of the Survey Response: Answering Questions Versus Revealing Preferences*, 36 AM. J. POL. SCI. 579 (1992).

16. “Reactive” is in contrast to “reflective.” E.g., Julie S. Weber et al., *Multi-Format Notifications for Multi-Tasking, in HUMAN-COMPUTER INTERACTION—INTERACT 2009*, at 247 (2009).

17. E.g., Michael A. Hogg & Scott A. Reid, *Social Identity, Self-Categorization, and the Communication of Group Norms*, 16 COMM. THEORY 7, 7-8, 18-21 (2006).

3. *Informed Preferences*: These are preferences based on exposure to, and consideration of, reasonably full and accurate factual information and fairly representative arguments for both sides of the issue.
4. *Adaptive Preferences*:<sup>18</sup> These are informed preferences modified by an assessment of the larger socio-political environment, legal and organizational constraints, and the claims of competing preferences. These are choices of the workable over the ideal. Voluntary conflict resolution processes often build consensus through adaptive preferences.

## B. Preference Valuing in Democracy vs. Rulemaking

In electoral democracy, participation based on *any* of these preferences is valued. Voters are asked for outcomes, not reasons. Many voters are unaware of, or mistaken about, the record and positions of candidates for major office *even on policy issues that they identify as important*.<sup>19</sup> In contrast, rulemaking is a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation. Agencies are expected to produce data-driven cost and risk analyses, to identify the facts they consider relevant and entertain claims that these facts are wrong or incomplete, to assess alternative approaches, to respond to questions and criticism, and to explain why their proposed solutions are the best choices within the bounds of what their statutory authority says they can, must, or may not consider. Participation that counts in rulemaking requires reasoning, and this privileges some types of preferences. Citizens must invest the time and cognitive resources required to form preferences that enable their engagement in reasoned decisionmaking. But informed participation comes at the cost of inclusiveness; not every interested member of the public will have resources to process the voluminous and legally, technically and linguistically complex information produced by a rulemaking.

## C. Are Value Preferences Different?

Mendelson posed the question, even if mass public comments have little weight generally, why shouldn't these "value-focused comments"<sup>20</sup> count when rulemaking decisions depend on value choices? We believe the answer is that the preferences expressed in such mass

comments may suffice for electoral democracy, but not for rulemaking, even when a rulemaking is heavily laden with value choices.

Importantly, the contrast between the electoral democracy and rulemaking models of participation can be drawn even *within* the administrative process. Agency rulewriters, often career officials with substantive, scientific, technical, legal or economic expertise, typically draft rulemaking proposals, read and summarize comments, and prepare final rules. Their work is reviewed at various levels, within and outside of the agency, that are headed by presidential appointees who are susceptible to political oversight and media scrutiny. Additionally, significant rules must be cleared by the Office of Information and Regulatory Affairs (OIRA), whose job includes ensuring that the rule is consistent with the President's priorities. A draft preamble that merely describes the receipt of mass public comments is enough to put politically attuned actors on notice that the rulemaking might draw the attention of White House staff, members of Congress, and the media.

Determining the extent to which review by these actors shapes the rule that emerges from "the agency" is notoriously difficult.<sup>21</sup> It is implausible that mass public comments are ignored by the agency's political leadership and OIRA.<sup>22</sup> Rather, the administration may simply be pursuing a set of value preferences at odds with preferences expressed by most of the mass commenters. For agency political leadership, it seems appropriate for mass public comments to simply generate whatever pressure they can on Congress, the media, or competing power centers within the administration.

But what about at the rulewriter's level, where reasoned decisionmaking is supposed to happen? Professor Peter Strauss has written of the culture of administrative legality, whose norms impel rulewriters to justify regulatory outcomes on more than political preference.<sup>23</sup> To the extent rulemaking is "democratic," we expect it to be a *deliberative* process, rather than an electoral one.<sup>24</sup> Agencies are expected to acknowledge conflicting interests and values, thoughtfully consider solutions, and clearly explain why some interests and values ought to have priority over others. This account of reasoned decisionmaking is an ideal rather than a reality. Still, the value of participatory inputs must be gauged by the process we *expect* the agency to engage in. By that measure, mass public comments will rarely deserve much value. Though the individuals submit-

18. We use this term despite the Sen/Nussbaum critique of "adaptive preferences." See MARTHA NUSSBAUM, WOMAN AND HUMAN DEVELOPMENT 112-66 (2000); Amartya Sen, *Women, Technology and Sexual Division*, 6 TRADE & DEV. 195 (1985). Adaptation can be a positive, as well as a negative, phenomenon. *E.g.*, Miriam Teschl & Flavio Comim, *Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations*, 63 REV. SOC. ECON. 229 (2005) (arguing that the adaptive preference critique has a particular, narrow view on adaptation).

19. See MICHAEL X. DELLI-CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 2663-64 (1996); MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980s, at 123-26 (1991); Kate Kenski & Kathleen Hall Jamieson, *Issue Knowledge and Perceptions of Agreement in the 2004 Presidential General Election*, 36 PRESIDENTIAL STUD. Q. 243 (2006).

20. Mendelson, *supra* note 9, at 1362.

21. See Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149-54 (2010).

22. *Cf.* William F. West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655, 662 (2005) (describing public comments as "a fire alarm that alerts politicians to agency actions"); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004) (concluding that public comments inform political overseers of constituent views).

23. Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

24. "Deliberative" here signifies characteristics such as reflection, reasonably full information, and genuine engagement with interests and values of all stakeholders.

ting comments through mass calls to action may genuinely hold the expressed preferences, and though those preferences may be relevant to the rulemaking, neither genuineness nor broad relevance is sufficient to create comments of value to the agency.

First, an agency could not assume these comments are fairly representative of citizens' preferences in general. Also, given the standard brief, conclusory mass-comment text these campaigns usually produce, the agency would not be able to tell if an individual commenter holds informed or adaptive preferences. Instead, the agency must assume that the preferences: (i) are based on incomplete, perhaps erroneous, information; (ii) have not taken account of competing arguments, interests, and policy considerations; and (iii) have not considered the workability or acceptability of regulatory outcomes more nuanced than absolute acceptance or rejection of the values asserted.

Thus, a reasonable agency would assume that mass comments suffer from the kinds of fundamental defects in information and judgment that would (justifiably) prompt judicial reversal were such flaws found in the agency's own decisionmaking. Why would we want government decisionmakers to attend to such flawed preferences?<sup>25</sup> Moreover, would mass public commenters maintain the same preferences were they to have more complete information? The reasonable agency simply could not know.

### III. Designing for Public Participation That Counts

Unpacking the statement "Rulemaking is not a plebiscite" in this way helps us answer the question identified at the outset: "Why is more public participation a good thing in rulemaking?" *More* public participation in rulemaking is not a good thing. Rather, the goal of a Rulemaking 2.0 system<sup>26</sup> should be more participation that satisfies three conditions:

1. Participation by stakeholders and interested members of the public who have traditionally been under-voiced in the rulemaking process (*Who*)
2. Participation that takes the form of germane "situated knowledge" and informed or adaptive preferences (*What*)
3. Participation in rulemakings in which the existence of the first two conditions can reasonably be predicted to exist, and the value is reasonably likely to outweigh the costs of getting the desired participation (*When*)

In this section, we explain these conditions and offer specific design principles that follow from them. Importantly, here we focus exclusively on participation by "the public." Different design strategies would attend Rulemaking 2.0 systems targeting other groups such as non-affiliated experts.

#### A. Recognizing the Knowledge in the People

The logic of crowdsourcing<sup>27</sup> may be compelling, but we believe it cannot be the guide for a Rulemaking 2.0 system. A goal to get more participation may result in many additional comments, but there is no guarantee these comments will contain valuable information for the agency. Instead, we would frame the goal as getting more informed participation, particularly in the kinds of rulemakings that need what historically silent voices can add.

Many rulemakings do not need more public participation. The topics are too specialized, technical, or narrow to generate public interest or the affected stakeholder groups are already participating in the conventional process.<sup>28</sup> Still, there are rulemakings in which it is possible to identify groups of individuals or entities who will be directly affected by the regulation but who have not historically participated in the conventional process.

Our experience on Regulation Room reveals that in these types of rulemakings, historically "silent" stakeholders can bring "situated knowledge" that the agency itself may not possess. Additionally, organizations purporting to represent these stakeholders may not sufficiently convey the full complexity of individuals' situated knowledge. By situated knowledge, we mean *information about impacts, problems, enforceability, contributory causes, unintended consequences, etc. that is known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced.* We discuss situated knowledge in more detail elsewhere,<sup>29</sup> but here are conclusions drawn from two Regulation Room rulemakings:

1. *Situated knowledge can reveal and explore tensions and complexities within what may otherwise appear a unitary set of interests.*
2. *Sometimes, situated knowledge identifies contributory causes that may not be within the agency's regulatory authority but could affect the impact of new regulatory measures.*
3. *Sometimes, situated knowledge reframes the regulatory issues.*

Situated knowledge is often conveyed through stories. Stories played a central role in a Regulation Room discus-

25. Cf. David Hudson & Jennifer VanHeerde-Hudson, "A Mile Wide and an Inch Deep": *Surveys of Public Attitudes Towards Development Aid*, 4 INT'L J. DEV. EDUC. & GLOBAL LEARNING 5 (2012) (arguing that surveys regarding global poverty are unreliable because they fail to control for knowledge-levels and perceptions of aid effectiveness).

26. Rulemaking 2.0 is a second-generation e-rulemaking system that employs Web 2.0 information and communication technologies.

27. "Crowdsourcing" is simply a method of distributed problem solving: issuing a call to a group for solutions.

28. Our experiential base is discussion over the course of two years with DOT and other agencies that was aimed at identifying suitable rules for Regulation Room.

29. See Cynthia R. Farina et al., *Knowledge in the People: Rethinking the Value of Public Participation in Rulemaking*, 47 WAKE FOREST L. REV. 1185 (2012).

sion of a proposed DOT regulation on requirements for the use of electronic time management systems by commercial motor vehicle (CMV) operators. There, drivers shared stories revealing that their opposition to the proposed rule was rooted in concerns about the counterproductive inflexibility of such systems. Several truckers described occasions when driving with these systems had forced them to stop when close to home, or to pull over in an unsafe location, because unexpected traffic or weather conditions had spent all their legal driving time. While stories of this kind may not often radically shift agency thinking, they can provide relevant contextual information that could help the agency understand more fully the impact its proposal is likely to have “on the ground.”<sup>30</sup>

## B. Principles of Rulemaking 2.0 Design

Several principles of participation system design flow from this conception of when more public participation might benefit the rulemaking process. The idea is not to have a Rulemaking 2.0 participation platform *displace* first generation e-rulemaking systems; rather, the focus is on when and how *additional* Web 2.0 outreach and content creation technologies should be deployed.

### Principle I. No Bread and Circuses<sup>31</sup>

A democratic government should not actively facilitate public participation that it does not value. Agencies cannot simply ignore mass comments; given the strong organizational interests such campaigns serve irrespective of any rulemaking impact, mass public commenting will likely continue. Agencies understand, however, both the participation that matters to the process in general and the amount of effort needed to participate effectively in a particular rulemaking. For government to solicit new participants without providing adequate support, or to hold out participation methods that are easy but have little value, is political showmanship, not open government.

The degree of purposeful participation design called for by the “No Bread and Circuses” principle is a counterweight to the “all-participation-has-value” philosophy instantiated in Web 2.0. This principle requires intentionality when selecting participation *opportunities* and *methods*:

#### *1.A. Rulemakings for expanded public participation efforts should be selected with care, to identify those in which dispersed, situated knowledge is both likely to exist and practicable to obtain.*

As long as Regulations.gov provides the opportunity for everyone to comment on all rules, there is no legal reason why the agency cannot be selective in the rules that it also offers through a Rulemaking 2.0 system. That said, the actual selection of good candidates for expanded public participation can be problematic: Agency rulewriters tend to be over-quick to dismiss the need for more participation, while e-government leaders seem over-quick to insist that more participation could always help. Asking the following questions can help identify rulemakings where the enhanced participation opportunities of a Rulemaking 2.0 system are likely to add value:

1. *Are there identifiable types of stakeholders that do not customarily or effectively participate in the rulemaking process or whose only participation is via representative organizations?* Examples of such stakeholders from a Regulation Room rule on airline passenger rights included airline flight crews, gate agents, and individual air travelers.
2. *Are these types of stakeholders likely to have useful situated knowledge?* For example, women of childbearing age arguably represent a distinct stakeholder group in mercury pollution rulemakings because of mercury’s impacts on fetal development. But what could such stakeholders add by way of situated knowledge germane to setting emission limits? By contrast, park rangers might be able to contribute to rulemakings on restricting vehicle access to underdeveloped areas by particularizing benefits and harms, and improving workability of possible restrictions.
3. *Is it reasonably possible to convey the information these stakeholders need to form informed or adaptive preferences that ought to be given weight in deliberative decisionmaking?* The NPRM, draft Regulatory Impact Assessment, and other documents provide information, but their audience is lawyers, sophisticated entities, and courts. Consider the difficulty of providing reasonably complete and balanced information about adjusting mercury pollution limits in a form useful to laypeople; compare this to the far simpler analogous task in the airline passenger rights rulemaking.

Even if the selection process is imperfect, the alternative (i.e., acting as if all rules would benefit from expanded public participation) is worse, for it heightens the risk that Rulemaking 2.0 merely fobs citizens off with the shadow of engagement, rather than making it possible for them to meaningfully participate in self-government.

30. Because conventional rulemaking discourse takes a more objective form, the personalized and narrative forms may interfere with the agency’s ability to “hear” the knowledge conveyed. *See id.*

31. “Bread and circuses,” traced to Roman satirist Juvenal, refers to the strategy of Roman officials currying favor through free food and entertainment, thus debasing democracy by discouraging the difficult work of meaningful political involvement.



***1.B. Only participation methods likely to lead to valuable participatory outputs should be included in a Rulemaking 2.0 system.***

Web 2.0 facilitates crowdsourcing by prominently encouraging users to vote, rate, and rank content. Voting, rating, and ranking are frequently part of Web 2.0 participation platforms now offered to agencies because they are low-effort and highly scalable. Rulemaking, however, is not like rating consumer products. Participant voting, rating, and ranking has no place in a Rulemaking 2.0 system unless *use of such participation methods is affirmatively justified by the designer*. Here are situations in which justification could be found:

1. *Effectiveness of consumer information proposals.* Although low-thought spontaneous preferences generally have no rulemaking value, there are exceptions. For example, Congress required DOT to provide consumers information on how tire choice could affect automobile energy efficiency. A rulemaking sought comment on which label designs most effectively informed consumers.<sup>32</sup> Here, voting or ranking seems desirable.
2. *To nudge more useful forms of participation.* Research has shown that inducing people to take initial steps in a task or process can create investment in completing it.<sup>33</sup> Low-effort and familiar acts like voting might be used to encourage the more effortful participation of informed commenting.<sup>34</sup>

**Principle 2. Abandon the Equal Treatment Norm**

The equation of government fairness and neutrality with equal treatment is engrained in our political culture. However, adopting a single model of outreach and information for all is the regulatory equivalent of forbidding rich and poor alike to sleep under bridges. Agencies are understandably risk-averse about any departure from conventional rulemaking practice that might open them to judicial reversal. Nonetheless, a Rulemaking 2.0 system will not significantly broaden meaningful public participation unless both outreach and information efforts are tailored to the needs of new potential participants.

***2.A. They will not come just because you build it, or even just because you tell them about it.***

Getting new participants into rulemaking requires informing novices that rulemaking is happening, they have a right

32. Tire Fuel Efficiency Consumer Information Program, 74 Fed. Reg. 29542 (proposed June 22, 2009) (to be codified at 49 C.F.R. §575).
33. See John W. Atkinson & David Birch, *The Dynamics of Achievement-Oriented Activity*, in *MOTIVATION AND ACHIEVEMENT* 271 (J.W. Atkinson & J.O. Raynor eds., 1974).
34. Cf. B.J. FOGG, *PERSUASIVE TECHNOLOGY: USING COMPUTERS TO CHANGE WHAT WE THINK AND DO* 34-37 (2003) (describing “tunneling” design as a form of guided persuasion).

to participate, and they should exercise that right. Publication in the Federal Register performs these functions for sophisticated stakeholders, but not for traditionally under-voiced stakeholders. Getting newcomers to participate requires deliberate outreach that (i) is targeted to where such stakeholders or interested persons get information, (ii) employs media that they are accustomed to, and (iii) explains what is going on in terms that make clear why they should care.

This kind of targeted “social marketing”<sup>35</sup> will not be easy for agencies steeped in the equal-treatment norm. Admittedly, there is a fine line between targeted motivational outreach and taking sides; but it is hardly clear that it is inappropriate to imply to the beneficiaries of proposed regulation that their interests are likely different from those of regulated entities, and urge them to speak up for themselves in the public comment process. We cannot be sure that a reviewing court, also steeped in the equal-treatment norm, would not consider targeted outreach reversible error. It would appear difficult, however, for sophisticated commenters to demonstrate actual harm. Moreover, it seems perverse to fault an agency charged with regulating for the public good for soliciting participation from those likely to benefit from its rulemaking.

***2.B. Information must be tailored to different participant needs.***

Reasonably balanced information about the problem the agency is addressing, limits on its authority, and the relevant factual and policy arguments involved is probably the most important condition for valuable participation. Yet the potential participants that we most want to bring into the process are the least likely to obtain such information from current rulemaking materials. The conventions of the NPRM have been shaped by the analytic demands of statute and Executive Order, risk-aversion in the face of judicial reversal, and the nature and capacity of sophisticated stakeholders. These materials simultaneously assume a great deal of knowledge and overwhelm the intelligent lay reader with information.

Regulation Room uses a number of information repackaging strategies to create a series of “issue posts” that present the important aspects of the proposed rule in relatively manageable segments and fairly plain language. We “layer” information so participants who seek more detail can readily access the original text, while those who want more help can get it through a glossary of unfamiliar terms and separate pages explaining the regulatory background. The more fundamental problem for agencies is the idea of creating a second text, parallel to the NPRM, that is shorter, simpler in language, and set up to facilitate discussion by laypeople. Would any variance in content between the formal version and “the people’s version” create grounds for challenge? One pos-

35. See Matthew Wood, *Marketing Social Marketing*, 2 J. SOC. MARKETING 94 (2012).

sibility for managing this risk is to include a “people’s version” in the NPRM itself, following the formal version. Any variance should then be treated no differently than if any other two parts of the NPRM seemed ambiguous or inconsistent: commenters have the chance to ask and the agency has the chance to clarify.

**2.C. To enable meaningful new participation, there may be no substitute for human assistance.**

Effective participation in rulemaking is hard. The volume and complexity of materials, *even with* tailored information, makes it difficult for newcomers to articulate informed or adaptive preferences. For situated knowledge, participants need enough understanding of the context and issues to recognize which aspects of their experience are applicable, and they may require help communicating so that relevance and value are apparent.

In parallel to the role of facilitators in offline civic engagement settings, using a skilled moderator online can help foster norms of deliberative discourse, aid those with less participatory experience in contributing to the discussion, and constructively manage conflicts. Regulation Room uses trained and supervised law students as facilitative moderators; our experiences have shown that human moderation is essential in engaging undervoiced stakeholders and interested citizens. Currently, the level of citizen familiarity with effective participation is too low to expect newcomers to participate usefully without additional help. Because committing moderators for significant time is costly, we emphasize careful selection of rules, *i.e.*, determining when the anticipated value from new participants is reasonably likely to outweigh the costs. Further, we also recommend using facilitators from outside the responsible agency to avoid perception of the moderator as censoring, lacking genuine commitment, or becoming defensive in the face of criticism.<sup>36</sup>

**Principle 3. Means Should Change; Ends Should Not**

The design of Rulemaking 2.0 systems should be a continuing, mindful effort to strike the balance, well-recognized by offline democratic deliberation theorists and practitioners, between “more” and “better”—that is, between inclusiveness and what Robert Dahl called “enlightened understanding.”<sup>37</sup>

36. *E.g.*, Scott Wright, *Government-Run Online Discussion Fora: Moderation, Censorship and the Shadow of Control*, 8 BRIT. J. POL. & INT’L REL., 550, 556 (2006). A very apt analogy from existing regulatory processes is the procedure for negotiated rulemaking.

37. Robert Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 POL. SCI. Q. 23, 30 (1994); *see also* JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 32-64 (2009).

**3.A. Do not try to make participation easy; try to make opportunities for meaningful participation available to everyone.**

Low-effort participation tends to be worth about as much as it costs. Rather, the purpose of Rulemaking 2.0 systems should be on making it possible for the broadest range of citizens to engage meaningfully in policy decisions that affect them. The focus on increasing *opportunity*, rather than *participation*, reminds designers of the agency of citizens. The designer’s responsibility is to create the best environment for users of different ages, education levels, and socio-economic circumstances to recognize, understand, and effectively participate in rulemaking. The designer should search for effective ways to alert, inform, educate, motivate, and support new participants, and should reflect on criticisms and suggestions of outsiders.

**3.B. Measures of success should align with what the system is trying to achieve.**

Quantitative metrics—how many “hits,” visitors, page views, comments, etc.—are seductive. They can give designers useful information, and we regularly use and report them in Regulation Room. But, if more is not the same as better, then success can’t be defined by numbers.

The problem—to which we confess no satisfactory solution—is what metrics should be used instead. What seemingly is required is some measure of comment quality that can compare comments from different participation methods, moderator interventions, etc. Difficulty in developing a solution led us to question more fundamentally how to conceptualize the value that inexperienced stakeholders and interested citizens can be expected to bring to the process. At this point, our principal contribution is a warning: Just as system designers should not encourage forms of participation that have no value, so success should not be judged by metrics that do not in fact measure the value Rulemaking 2.0 systems seek to add.

**IV. Conclusion**

Here we have challenged builders of civic engagement systems to reject the assumption, common in both Web 2.0 design and open-government thinking, that more participation is better. Instead, we have argued, responsible e-participation design begins with the hard question of what types of public participation are (and should be) valued in the particular policymaking context.

The question is hard because the answer will often be kinds of participation that are more informed and thoughtful, *and hence more effortful and rare*, than the participation that we accept in electoral democracy and that is enabled by popular Web 2.0 mechanisms. For this reason, those who build and those who choose to use Rulemaking 2.0 platforms must be prepared to resist the pressure to facilitate cheap and easy participation.

Design that supports and nudges citizens toward reasonably informed participation in complex public policy-making is undeniably difficult and resource-intensive. But

the alternative is deceptive and irresponsible. There is no such thing as neutral design.

C O M M E N T

# Comments on Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

by Avi Garbow and Marna McDermott

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The U.S. Environmental Protection Agency (EPA or the Agency) receives millions of public comments each year on actions ranging from nationwide rules to facility-specific petitions. This level of engagement and interest reflects the fact that the Agency's mission, to protect human health and the environment, touches all Americans. There is no doubt that informed comments from individuals with situational knowledge as well as fair-minded comments from legally and technically sophisticated stakeholders are incredibly valuable to the Agency, and also to the individuals and entities ultimately affected by the EPA's actions. We receive many of these types of comments and they help to inform analyses, identify the best options, and, most importantly, allow the Agency to make better decisions. We also receive many comments through mass comment campaigns that express a preference for a particular approach or outcome. These are usually electronic submissions with largely repetitive text, but submitted by many different individuals.

In answer to the question "What kind of participation should we value?" our response would be: "All of it." While nudging public participation that provides substantive feedback is certainly a worthwhile effort, agencies should also continue to facilitate the "cheap and easy" participation that Farina et al. characterize as to-be-resisted and of little value. We do not have to choose: public participation is not a zero-sum game.

## I. Not a Zero-Sum Game

Mass mailer type comment submissions do not serve the same purpose as unique, substantive comment submissions, but they do have value in the rulemaking process. And agencies can and do accept and consider all types of comments. While large numbers of comments sometimes come with logistical challenges—we have heard stories of government offices being crippled for days during rulemaking efforts in the 1990s because fax machines were occupied unendingly with reams of identical comments—this

should not be seen as a basis for discouraging them. And, the logistical challenges may soon be a thing of the past; current technologies available to agency users of Regulations.gov have gone a long way toward solving them.

Agencies can accept, sort, and compile comments so that they may all be considered. For example, identical comments can be grouped and counted with little investment of staff time. Certainly this has gotten easier since the days of the fax machine and will continue to get easier as information and communication technologies (ICT) continue to develop and evolve symbiotically with the many ways the public participates in government decision making. So, we would like to begin by putting aside the notion that accepting mass comments somehow detracts from more substantive comments, and focus on what the mass comments themselves have to offer.

## II. Value of Mass Comments

The "bread and circuses" description offered by Farina et al. rests at least in part on the false premise that the average submitter of a mass comment is laboring—or perhaps *not* laboring, but rather taking a few moments to sign or click and then moving on with their day—under the impression that they are being granted a "vote" in an outcome. While we agree that a regulatory outcome should not be determined by majority vote, we disagree with this premise.

Rather, we expect the motives of individual commenters are likely to be numerous and widely varied, and we will touch on three purposes that comments received in connection with mass comment campaigns can serve: (1) adding weight to the more informed and detailed comments provided by the group facilitating the comment campaign, (2) revealing the level of public awareness of a given issue, and (3) providing a voice where there might otherwise be silence.

Finally, we recognize that the public participation process itself has intrinsic value, both to the government decision makers, and to those participating in the process.

## A. Adding Weight

The first function is analogous to the “agree” or “support” type options that Farina et al. describe as being useful in the Web 2.0 context. Providing this sort of “proxy” vote where an individual has confidence in the analysis and policy positions of a given nongovernmental organization (NGO) is an entirely legitimate way for individuals to participate in the public process when they do not have the time, ability, or inclination to tackle the analysis themselves. From our perspective, these individuals are giving the NGO that provided the link and stock language their “agree!” And that tells us more than how that particular NGO is faring in fundraising; it tells us how persuasive or important the commenters find its articulated positions on the given issue to be. To be clear, it doesn’t make the underlying analysis more likely to be accurate, but it tells us something about how widely it is valued. While not useful in the same way information about the feasibility of retrofitting with a particular pollution control technology may be, it is nonetheless a valid type of information, and one agencies should continue to facilitate.

For the most part this sort of “adding weight” amounts to what Farina et al. describe as a group-framed preference. And frequently, these preferences are in large part value preferences. While we agree with Farina et al. that rule-making is not an electoral process, and that these expressed preferences should not determine final rules, they do have a rightful role in the process. In fact, the Administrative Procedure Act requires that agencies accept “views” as part of the opportunity for interested persons to participate: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . .” 5 U.S.C. §553(c) (2012).

EPA’s work may be particularly susceptible to being the basis for group-framed value preferences because the Agency’s mission is about improving the environment and public health: outcomes that directly affect the entire public, despite the fact that the expertise about the details of *how* such outcomes are best reached may reside with a select few. While determining the details of a given standard or method may be divorced in some measure from the content or objective of mass comment campaigns, we must, and can easily, accept these views.

## B. Revealing Awareness

In addition to the deliberate aligning of their views with a given policy position or value preference, mass commenters tell us something about the *level* of awareness on an issue. The number of comments, irrespective of the content, gives us a sense of how many people care and how widely dispersed that interest is. For some actions, where the Agency

has worked hard to engage the public and to raise awareness, a large number of public comments can be an indication of successful outward engagement. For others, where perhaps the Agency had thought there to be a narrower set of stakeholders or interested parties, a large number of public comments can be a wake-up call.

From mass comments, we have at least some indication of how a specific issue has penetrated into public discourse. For example, the Agency received three million comments in support of reducing carbon pollution, hundreds of thousands in support of limiting mercury and other toxics from power plant emissions, and tens of thousands in support of reducing nutrient pollution in Florida’s waters. To the extent mass comments provide a sense of the geographical or demographic distribution of commenters, this too can be of value, if not in formulating an agency action, perhaps in formulating an agency’s approach to informing and educating the public and stakeholders about the action.

## C. Providing a Voice

Third, knowledge is indeed widely dispersed, and on any given issue, interest may be widely dispersed as well. While we routinely hear from the more sophisticated stakeholders—the multinational companies, the industry groups, larger NGOs, and the lawyers who represent them—we may hear less frequently from the communities where the facilities reside, the very places where individuals may be most directly affected.

Farina et al. do include this value in their preferred “who.” They attribute situational knowledge, and thereby valuable comments, to individuals who have “traditionally been under-voiced” in the process. Farina et al. describe anecdotes provided as comments that have the ability to highlight complexities, identify contributory causes, and reframe regulatory issues. These comments can do all of that, and are incredibly valuable for those reasons. But even a simple expression of value preference, provided by comment with little else, especially from those communities who may have previously been less engaged, is valuable.

## D. Engaging the Public

Perhaps most importantly, we believe there is inherent value in public participation: the value of an engaged citizenry. Congress itself called for this in the National Environmental Policy Act, recognizing that “each person should enjoy a healthful environment and that *each person has a responsibility to contribute to the preservation and enhancement of the environment.*” 42 U.S.C. §4331(c) (emphasis added). Broad-based, mass commenting campaigns provide one opportunity to realize that goal.

There is an educational element associated with each comment, because the individual who takes the time to

learn a little about an issue still knows a little more than they did before they made that effort, and because they learn a bit about how participation itself works.

There is value to the participating person in being afforded the opportunity to comment. While hitting send on a prepackaged comment may not ultimately change the outcome of the regulatory process, it may be for that individual the beginning of a self-identity as a person who cares about the actions and activities of his or her government and a person who values the opportunity to voice his or her opinion. It is the regulatory equivalent of the sticker that says "I voted." It may be the gateway to a more substantive role in an issue, for example, a letter to the local zoning commission or remarks at a public listening session. An individual with such experiences may indeed go on to become the commenter who takes the time to read the materials on Regulations.gov, or to provide much needed situational knowledge when a rule comes along that he or she recognizes as benefitting from some dispersed piece of information or experience they happen to have.

Finally, there is value to the public servants who are made aware that a larger segment of the public cares about the work they are doing.

### III. Conclusion

In a long-term view of the development of processes for public decision making, the development of ICT has been relatively recent and extraordinarily rapid. In the space of approximately two decades, the tools and techniques that the average American uses to interface with the government have been fundamentally transformed. As these tools and the way people use them evolve, we will no doubt have days where the "fax machines" are down. But when we begin drawing lines and making judgments about "the kind" of participation the government should value, we begin to walk down a dangerous path. In our democratic system, the sitting government is *not* the arbiter of what public participation counts. And while we see the wisdom in targeting resources where we expect to gain the most relevant input, the assigning of value on the front end of the public participation process is not a path we would recommend. The value of a commenter's views should not be prejudged, and the price of participation should not be a J.D., a Ph.D., or hours of preparatory reading. Fundamentally, people should be encouraged to tell their government what they think.

C O M M E N T

# Comments on Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

by Michael Halpern

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For more than ten years, researchers have tried to evaluate the influence of electronic public participation on rulemaking. Some have expressed concern about the drive for more public participation; mass comments can slow down the rulemaking process, they suggest, and inappropriately influence the development of a rule. There is evidence that mass comments do influence their targets. For example, Andrei Kirilenko et al. developed an algorithm they call RegRank which found that a financial regulatory agency developed final rules that took into account “comments that reflect organized public efforts.”<sup>1</sup> Overall, this is a good thing, as effective rules will incorporate different types of knowledge.

The better question is, how do we enrich mass engagement? Farina et al. mostly concentrate on the value of mass comments to the agency rule writer, and seem resigned to the fact that mass comments will continue. They suggest an intriguing, multi-tiered system called Regulation Room that can help rule writers distinguish between comments that express preferences and comments that provide expertise. But that isn’t the whole story. In this response, I argue that public participation should both facilitate meaningful input into a rule and help shape public dialogue around the rule. Further, the benefits of more participation in public comment periods extend far beyond those afforded to the individual rule writer. Finally, while more sophisticated ways of processing public comments would be helpful, and Regulation Room could be one such system, the most comprehensive and responsive governing will require policymakers to embrace experimentation with participatory democracy, both online and offline, throughout the rulemaking process.

## I. Mass Comments Are Not All Created Equal

Mass comments generated by all types of groups can selectively use or misrepresent evidence to support ideological posi-

1. See Andrei A. Kirilenko et al., *Do U.S. Regulators Listen to the Public?: Testing the Regulatory Process With the RegRank Algorithm* (Robert H. Smith Sch. of Bus. Research Paper Series, Jan. 12, 2014, last revised Mar. 28, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2377826](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377826).

tions. Some mass comments do include a significant amount of specificity, however, and do not simply profess ideological preferences. For example, members of the Science Network at the Union of Concerned Scientists (UCS), a nationwide network of 17,000 subject matter experts from a variety of scientific disciplines, use primary source material as well as UCS analysis and talking points to inform their comments.

While some busy scientists cut and paste talking points, many others use this material as a starting point and adapt the material to their own areas of expertise. In this vein, a distinction should be made between mass comments that are brief form letters and mass comments that are derived from a more complete body of research and resources and reflect unique perspectives and expertise.

## II. Secondary Benefits of More Participation

Sometimes, secondary benefits to mass public comments are more important than generating additional input. Even a blunt instrument of public participation is critical to the rulemaking process. First, comment periods give an organization a concrete, finite opportunity to bring a proposed rule to the attention of its constituents and supporters and explain the rule’s import. Often, this is the only opportunity that the public has to weigh in.

Second, participating in a mass comment process can lead to more meaningful engagement. Running a mass comment campaign enables organizations to identify those who are willing to engage more substantively. If a citizen is willing to submit a form public comment, she may be more likely to participate in a public hearing or meet with a legislator, or provide more specialized expertise to agencies in the future. Further, experts who have unique experiences and perspectives assist organizations in explaining a rule’s (or a future related rule’s) potential impact.

Notably, better access to high-quality, expert participation does not guarantee better decisions. While *more* public participation in rulemaking might not help the rule writer, *more varied* public participation in rulemaking can bring perspectives from people with diverse knowledge *and* skills not only to the

regulatory agency but also to others who read the comments. The authors' stated goal of improving rule writers' access to situated knowledge—provided by those affected by a rule—is an important one, as this knowledge can also identify additional impacts that rule writers may have not considered.

### III. Bringing Attention to Political Interference

The rulemaking process is designed to value evidence and devalue preferences, sometimes leading to tortured decisions and definitions when the statute or science does not conform to administration priorities. Often, highly contentious rulemakings need public attention so that there is not undue special interest influence on the process.

It is clear, moreover, that arguments made during a public comment period can be helpful in influencing not only the rule writer but also agency leadership as well as the Office of Management and Budget (OMB) and other parts of the White House. On more controversial proposals, the OMB has a track record of changing both draft and final rules after they are submitted by agencies, almost always in a way that favors less regulation; in this way and others, both the Bush and Obama White Houses inappropriately interfered in agency rulemaking (such as the EPA's determination of acceptable levels of ground-level ozone pollution under the Clean Air Act). Mass comments can signal to the rule writer and political appointees that their conduct will be scrutinized, and can thus play a moderating role.

Sometimes, public interest or industry organizations focus attention on a rule precisely so that there will be less chance that the rule will be subsumed by ideology. This provides a direct benefit to rule writers; they are less likely to feel pressure to make inappropriate changes to a rule, and it is less likely that their superiors will tamper with their work down the line. We shouldn't assume that anyone—from rule writers to commenters to political appointees—is immune to political influence.

We should be careful, too, not to design a system of feedback that can be used to further delay regulatory decision-making. Often, those who oppose a new or updated rule claim that we do not know enough about a given topic to develop a credible rule, and that further (often redundant) studies are necessary. Comment periods and many other mechanisms are used by all sides to delay the process while the government is blamed for being "bureaucratic." Regulators are asked to make decisions based on the best available information recognizing that in the future they will have access to even more knowledge.

### IV. Transparency Builds Legitimacy

Transparency is critical to any rulemaking. A task force convened by OMB Watch (now the Center for Effective Government) suggested that a transparent rulemaking process is substantially more likely to lead to rules that are considered

both high quality and legitimate.<sup>2</sup> The need to foster legitimacy cannot be understated: an opaque process fosters a lack of faith in government, which undermines a rule's effectiveness.

The Occupational Health and Safety Administration is using a novel approach to transparency in its long-awaited silica rulemaking, requesting that commenters disclose financial conflicts of interest. This practice, which allows rule makers to ensure they have a balance of research to consider, should become the norm and be extended throughout the government. "It takes a willed obliviousness not to recognize just how harmful interested-science has been across the history of federal regulation—not always, but sometimes," writes Harvard Law Professor Lawrence Lessig.<sup>3</sup>

The public comment period also allows the public to understand and analyze arguments made by affected populations and industries, and to compare their public comments to previous positions. A recent UCS analysis found that there can be inconsistencies between a company's public comments and other public statements. For example, ConocoPhillips has acknowledged on its website that "human activity . . . is contributing to increased concentrations of greenhouse gases in the atmosphere that can lead to adverse changes in global climate."<sup>4</sup> Yet in its comments on the 2009 EPA Endangerment Finding, the company claimed that, "the support for the effects of climate change on public health and welfare is limited and is typified by a high degree of uncertainty."<sup>5</sup>

Written public comments are not the only place that influence can be hidden; stakeholders also use public hearings to attempt to demonstrate "grassroots" support for their positions. At a 2012 hearing in Chicago on the EPA's proposed carbon pollution standard, several individuals were secretly given lunch and \$50 each to appear in t-shirts supporting the coal industry.<sup>6</sup>

### V. Cultural Changes Can Improve Input

Better input requires cultural change with expert communities. Public engagement should be incentivized by employers and cultural institutions of experts, such as universities or scientific societies. Currently, career advancement in science is determined primarily by the strength of one's peer-reviewed publications portfolio, not on the quality of one's public service (including public comments submitted, op-eds published, meetings with government officials held, etc.).

2. See Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 925 (2009).

3. Lawrence Lessig, *The Republican Street Fight Over Transparency in Government*, DAILY BEAST (Mar. 26, 2014), <http://www.thedailybeast.com/articles/2014/03/26/the-republican-street-fight-over-transparency-in-government.html>.

4. See THE SCIENTIFIC INTEGRITY PROGRAM OF THE UNION OF CONCERNED SCIENTISTS, A CLIMATE OF CORPORATE CONTROL: HOW CORPORATIONS HAVE INFLUENCED THE U.S. DIALOGUE ON CLIMATE SCIENCE AND POLICY 28 fig. 10 (2012), available at [http://www.ucsusa.org/assets/documents/scientific\\_integrity/a-climate-of-corporate-control-report.pdf](http://www.ucsusa.org/assets/documents/scientific_integrity/a-climate-of-corporate-control-report.pdf).

5. *Id.*

6. Heather Moyer, *Pro-Coal Group Pays People to Wear Its Shirts at EPA Hearing*, COMPASS (May 24, 2012), <http://sierraclub.typepad.com/compass/2012/05/pro-coal-astrotrufing.html>.



In addition, the ways in which non-profits and industry groups use the Internet must improve. Current technologies and content management systems employed by many advocacy organizations are disastrously behind the curve; these systems tend to put a premium on accessibility and ease of use at the cost of innovation, and the vast majority of organizations work with just a few mediocre platforms. These outdated technologies make it easy to generate form letters, but more difficult to facilitate comments that incorporate expertise.

Bloggers and the media should also assume more responsibility. Reporters who cover public comment periods should, when reporting on raw numbers of comments, indicate whether there were any organizations behind mass comments and, if so, if those organizations' constituents stand to financially benefit from or be hurt by a rule. They can also link to resources that encourage readers to file their own comments.

Finally, advocacy organizations should look to become more effective at fully harnessing the contributions their supporters can make. Vanity metrics—sometimes meaningless measurements that look good but are not sufficient to measure actual impact—should be discouraged by those who support advocacy organizations and industry groups. Foundations and donors that fund advocacy organizations should ask for more sophisticated ways to measure success than numbers of comments submitted. Many advocacy organizations can easily rally supporters online, but have yet to effectively harness that energy into social movements.

## VI. Reinventing the Process of Decisionmaking

The authors are smart to continue to pursue questions related to quality public participation in rulemaking. Regulation Room is one way to open up the process and curate good information, and there will (and should) be many others. To substantially improve how information is used to govern, we need to think in terms of new systems of collaboration.

Convening people digitally brings tremendous opportunities. “This linking together in turn lets us tap our cognitive surplus, the trillion hours a year of free time the educated population of the planet has to spend doing things they care about,” wrote Clay Shirky, a Fellow at the Berkman Center for Internet and Society.<sup>7</sup> “[O]ur cognitive surplus is so enormous that diverting even a tiny fraction of time from consumption to participation can create enormous positive effects.”<sup>8</sup>

So far, policymakers and advocates have tried to tap into this cognitive surplus through electronic means with limited success. We have the opportunity to radically transform how government curates expertise and turns it into rules that create a level playing field and protect our health and environment while encouraging innovation. It is clear that people want to engage. And the Internet can help them do it. Those who

accept the current model of mass comments as being the only, or even main, way to engage large numbers of people in governance are simply not being sufficiently creative.

“The best minds of my generation are thinking about how to make people click ads,” said former Facebook research scientist Jeff Hammerbacher.<sup>9</sup> He wasn't satisfied, nor are countless social entrepreneurs who are working to transform how information is delivered and considered.

In *The End of Big*, Harvard Kennedy School Lecturer Nicco Mele looks at how government can be disrupted—in a good way—by technology and the people who yield it.<sup>10</sup> “I still worry about . . . the absolute volume that our leaders and our institutions have to deal with,” he told an audience at the Personal Democracy Forum in 2013.<sup>11</sup> “We have to build an infrastructure of participation. We have to build process and politics that understand the new distribution of power.”<sup>12</sup>

Hundreds of start-ups and thousands of hackers are working on open-source programming to develop this infrastructure. The government can facilitate this process by going beyond transparency and reexamining how it allocates IT resources to improve input. This doesn't mean more physical infrastructure, however. It means developing a digital public square and lowering barriers to experimentation, where citizens and rule writers can innovate collaboratively and transparently.

Change, ultimately, will be dependent not on the adoption of new technologies but of new behaviors. Yet those who are experimenting with participation don't have legislative power, and those who possess this power are not experimenting with participation. “And being given a dashboard without a steering wheel,” says Shirky, “has never been a promise that a democracy makes to its citizens.”<sup>13</sup>

With more varied, robust methods of public input and collaboration, we could reduce the need and desire for mass public comments. The practice can go the way of the forwarded email petition, but only with better alternatives.

We should make this transformation happen quickly. The challenges we face, from climate change to sustainability, are increasingly global, complex, and interdisciplinary, and our existing institutions are not proving up to the task. All of this collective power is wasted if we can't figure out how to efficiently deploy it. Better access to high-quality, expert participation does not guarantee better decisions. But ultimately, more innovative projects and systems can build both the quality and legitimacy of government rules.

7. Clay Shirky, *Does the Internet Make You Smarter?*, WALL ST. J. (June 4, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704025304575284973472694334>.

8. *Id.*

9. Ashlee Vance, *This Tech Bubble Is Different*, BLOOMBERGBUSINESSWEEK MAG. (Apr. 14, 2011), [http://www.businessweek.com/magazine/content/11\\_17/b4225060960537.htm](http://www.businessweek.com/magazine/content/11_17/b4225060960537.htm) (quoting Jeff Hammerbacher).

10. See generally NICCO MELE, *THE END OF BIG: HOW THE INTERNET MAKES DAVID THE NEW GOLIATH* (2013).

11. Nicco Mele, *The Unwritten Future of Personal Democracy*, PERSONAL DEMOCRACY MEDIA: PDM VIDEOS at 9:02-9:27 (June 6, 2013), <http://personaldemocracy.com/media/unwritten-future-personal-democracy>.

12. *Id.*

13. Clay Shirky, *How the Internet Will (One Day) Transform Government*, TED (June 2012), [http://www.ted.com/talks/clay\\_shirky\\_how\\_the\\_internet\\_will\\_one\\_day\\_transform\\_government](http://www.ted.com/talks/clay_shirky_how_the_internet_will_one_day_transform_government).

C O M M E N T

# Comments on Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

by Michael Walls

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Cynthia Farina and her colleagues provide a sensible analysis of the problems attendant increased public participation in rulemaking.<sup>1</sup> The “magical thinking” they address—more public engagement in rulemaking equals better policies and regulatory outcomes—strikes at the very heart of democratic access to decisions and decision-makers. Their analysis provides a strong basis for concluding that there is some public input that is, or perhaps should be, more highly valued than other public input.<sup>2</sup> While the conclusion that *more* public participation is not a good thing in rulemaking may be jarring, the conditions Professor Farina outlines for participation that counts are a sound basis for principles that should be addressed in designing public outreach in rulemaking. The three basic principles they argue will ensure that additional public participation benefits the rulemaking process make a great deal of sense, particularly on when and how additional information and communication technologies (ICTs) should be deployed.

The focus on the “under-voiced” in the regulatory process, while important, needs to be better distinguished from the “under-voiced” in an electoral context. Identifying the “under-voiced” is not itself sufficient to ensure that the particular stakeholder knowledge we wish to extract and utilize in rulemaking will emerge. Rulemaking must account for the type of situated knowledge that stakeholders might have, and adopt methodologies for addressing the relevancy of that knowledge to the regulatory problem

at hand. There is a potential challenge in this approach, for the technology that may help create and increase the opportunities for public participation in rulemaking may also increase the range of “situated knowledge” some stakeholders may wish to impart. I suggest a rather low-tech and modest approach that may have some value in helping identify and leverage the situated knowledge held by key stakeholders.

## I. The Right Public Participation Counts

One of the important contributions Professor Farina and her colleagues have made is in articulating three necessary conditions for effective public participation, addressing the “who, what, when” of rulemaking. The “who” element addresses the “stakeholders and interested members of the public who have traditionally been under-voiced in the rulemaking process.”<sup>3</sup>

It is important to understand that the concept of the “under-voiced” as used here is not exclusively referring to those members of the public whose educational, occupational, or economic status puts them outside the groups of stakeholders that historically participate in the regulatory process. The problem of mass participation in rulemaking, characterized by e-mail or letter campaigns that seek an advantage on the quantity of input rather than their technical or policy value, suggests that there are some stakeholders who are not “under-voiced,” at least in the sense that there is some institutional bias against their participation. And just because there may be an under-voiced stakeholder in the regulatory process does not necessarily mean that their input is relevant to the problem.

As Professor Farina notes, the reference to “under-voiced” stakeholders is best understood to mean those stakeholders who have some knowledge relevant to the regulatory policy and options at hand. They are stakeholders possess-

1. Cynthia Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012).  
2. The analysis has some interesting implications for the *weight* a regulatory agency might ascribe to input from a particular source. At least one study has found strong evidence that regulatory agencies adjust final regulations in the direction suggested in public comments. See Andrei A. Kirilenko, Shawn Mankad & George Michailidis, *Do U.S. Regulators Listen to the Public?: Testing the Regulatory Process With the RegRank Algorithm* (Robert H. Smith Sch. of Bus. Research Paper Series, Jan. 12, 2014, last revised Mar. 28, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2377826](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377826). Perhaps there are cases where the agencies should not adjust the final regulations.

3. Farina et al., *supra* note 1, at 145.

ing particular “situated knowledge”—“information about impacts, problems, enforceability, contributory causes, unintended consequences, etc. . . . known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced.”<sup>4</sup> But as Butch Cassidy (played by Paul Newman) in the iconic 1969 movie asks about the posse chasing him: “Who are those guys?”<sup>5</sup>

In an increasingly complex regulatory world, stakeholders with “situated knowledge” should be understood to mean those with particular technical and policy insight that would not ordinarily be expected to participate in a given rulemaking. The under-voiced, then, might well be members of one community or another, from local residents, to a group of manufacturers, to recognized scientific and technical experts. Many of them will (hopefully) already be aware of the participatory opportunities available to them. Understood as such, perhaps the problem of identifying the under-voiced may not be as broad or complex as it might be. If that is the case, perhaps we need to be less concerned with using new ICTs and more concerned with ensuring that regulatory agencies ask the right questions upfront.

## II. Identifying Relevant Situated Knowledge

Professor Farina and her colleagues make a persuasive case that Rulemaking 2.0<sup>6</sup> approaches can enhance public participation opportunities. In my view, they have asked the right questions about the effectiveness of some Rulemaking 2.0 design options, such as questions about the value of particular techniques (like voting/ranking/rating approaches).<sup>7</sup> While I agree that Rulemaking 2.0 is not necessarily appropriate in every regulatory proceeding, the approach holds important promise for more meaningful participation in major rulemakings by stakeholder groups that may not be aware of or included in the regulatory process.

One question that persists, however, is whether a technologically advanced Rulemaking 2.0 system is really necessary in order to engage those with situated knowledge and encourage their participation. Are there tools available

to an agency right now that can accomplish much the same objective? I believe there are.

The central challenge may well be ensuring that those with situated knowledge are well aware of a particular regulatory rulemaking. One relatively easy, low-cost and low-burden approach to enhancing awareness may be for agencies to make more use of the Advance Notice of Proposed Rulemaking (ANPRM) process. As described by the Office of the Federal Register, an ANPRM is “a formal invitation to participate in shaping the proposed rule and starts the notice-and-comment process in motion.”<sup>8</sup> Perhaps more importantly, an ANPRM process can constitute an agency’s first meaningful opportunity to articulate the design and implications of a rulemaking, and to do targeted outreach (perhaps using Rulemaking 2.0 approaches) to ensure that appropriate stakeholders are engaged.

With appropriate outreach at an earlier stage in the rulemaking process, and with the right information about scope and questions about impacts, it would appear that agencies could increase the chances of reaching those stakeholders with knowledge relevant to the proposal. The resulting stakeholder input can then be assessed and considered, and a more refined proposal produced in the Notice of Proposed Rulemaking (NPRM) stage.

It is critical that an agency appropriately describe the problem it is trying to solve in regulation, and to describe how the agency proposal addresses the concern. At this stage in the rulemaking process there is a corollary to the “charge” step in the peer review process. The charge questions to a peer review panel provide important guidance defining the scope, problems, and issues expected to be addressed.<sup>9</sup> Importantly, the charge questions help define what kinds of experts and expertise are needed to conduct an effective peer review.

Charge questions to a peer review panel can therefore help determine the make-up of the panel, the scope and depth of the review, and the required “situated knowledge” necessary to carry out the charge. Although there has typically been far less transparency and public comment on peer review panel charge questions than there should be, the use of an ANPRM process could help an agency initiate the development of questions similar to a peer review charge, and therefore help in identifying the knowledge and expertise necessary in that rulemaking.

This approach would seem to be particularly useful in rulemakings involving the consideration of alternative plausible scientific opinions by facilitating the identifica-

4. *Id.* at 148.

5. BUTCH CASSIDY AND THE SUNDANCE KID (Twentieth Century Fox Film Corporation 1969). For a short compilation of relevant clips from the movie, see SilenYoda, *Butch Cassidy in 5 Seconds*, YOUTUBE (Nov. 2, 2007), <http://www.youtube.com/watch?v=Zlie9OosnEM>.

6. Rulemaking 2.0 as outlined by Professor Farina differs substantially from Web 2.0, as she notes. See Farina et al., *supra* note 1, at 153. Indeed, Rulemaking 2.0 appears to be an important contrast to a “wiki” approach to government that simply contends “more is better.” See, e.g., BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* (2010).

7. Farina, *supra* note 1, at 153-56.

8. OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS, available at [http://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Mar. 17, 2014).

9. ENVIRONMENTAL PROTECTION AGENCY, OVERVIEW OF THE PANEL FORMATION PROCESS AT THE ENVIRONMENTAL PROTECTION AGENCY SCIENTIFIC ADVISORY BOARD, EPA-SAB-EC-02-010, at 9 (Sept. 2002), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/\\$File/ec02010.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/$File/ec02010.pdf).

tion and engagement of scientists and technical experts with differing views. Note that this is a different question than reviewing the scientific sufficiency underlying a regulatory proposal; the concept here is that a more explicit description of the scope, basis, and implications of a rule-making proposal, in advance of a formal proposal, could help unlock access to situated knowledge. As Professor Farina notes, there is no reason why an agency cannot be selective about the rules it processes through a Rulemaking 2.0 approach.<sup>10</sup> At a minimum, it would seem that a more focused ANPRM and appropriate Rulemaking 2.0 approaches might be viable for major rulemakings (those anticipated to have more than \$100 million in economic impact) or those raising novel or difficult scientific or technical questions.

### III. The Continuing Challenge

Another important lesson from Professor Farina's work is that technology will continue to enable stakeholder access to the rulemaking process. It would appear that technology also has the capacity to influence the degree to which "situated knowledge" is obtained and, perhaps, reflected in rulemaking.

A new generation of smart-phone enabled environmental sensing technologies is emerging. In 2012, "Sensordrone" successfully obtained \$175,000 in start-up funds on Kickstarter, the web-based crowd-funding system.<sup>11</sup> Among other attributes, the Sensordrone measures ambient temperatures, VOC emissions, and CO<sub>2</sub> levels. "Livestrong" bracelets are now being used as passive environmental sampling devices.<sup>12</sup> Can we be far from the day when personal electronic devices measure emissions in real-time—say at the fence-line of a manufacturing facility—and influence the future direction of regulatory policy? The information so recorded may well be "situated knowledge," but what should regulators make of it?

The continuing challenge in regulation is not only who participates, but *what* information they are bringing to the discussion, and what *value* that information has. In the scientific arena, the weight-of-the-evidence concept emerged as a means to ensure that all relevant information is considered, but that some evidence is more relevant and reliable and should be given greater weight in a decision.<sup>13</sup> Professor Farina and her colleagues have once again made a valuable contribution in addressing who participates in the regulatory process but important questions still remain about whether and how that participation results in better rulemaking outcomes.

10. See Farina et al., *supra* note 1, at 151-53.

11. See Sensorcon, *Sensordrone: The 6th Sense of Your Smartphone... & Beyond!*, KICKSTARTER, <https://www.kickstarter.com/projects/453951341/sensordrone-the-6th-sense-of-your-smartphoneand-be> (last visited Mar. 20, 2014).

12. See Emily Levy, *A New Use for Your Livestrong Bracelet: Monitoring Pollutants*, VOACTIV (Mar. 4, 2013, 2:23 PM, updated Mar. 5, 2014, 3:04 PM), <http://www.vocativ.com/culture/health-culture/new-use-old-livestrong-bracelet-monitoring-pollutants>.

13. See, e.g., EUROPEAN CHEMICALS AGENCY, PRACTICAL GUIDE 2: HOW TO REPORT THE WEIGHT OF THE EVIDENCE 2 (2010) (defining the weight of the evidence as a "process of considering the strengths and weaknesses of various pieces of information in reaching and supporting a conclusion").

A R T I C L E

# Our Place in the World: A New Relationship for Environmental Ethics and Law

by Jedediah Purdy

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Toward the end of *A Theory of Justice*, John Rawls turns briefly to the topic of “right conduct in regard to animals and the rest of nature.”<sup>1</sup> His remarks address important moral questions that fall, Rawls says, outside the scope of justice, that is, questions that cannot find their answer in reflection on how a society of equals can respect the freedom and moral standing of each member.<sup>2</sup> The question of nature is about something else. Rawls asserts that “[a] correct conception of our relations to animals and to nature” would depend on “metaphysics,” which he defines as “a theory of the natural order and our place in it.”<sup>3</sup>

In the decades following the 1971 publication of *Theory of Justice*, ethics parted ways from more concrete fields such as politics and law. Environmental philosophers asked questions that Rawls envisioned: what kind of value the natural world presents and how humans should approach it. At the same time, official decisionmaking pivoted increasingly on cost-benefit calculations, which try to avoid metaphysicians’ vast and ultimate questions. Normative work in environmental law and policy followed, revolving around the use and limits of cost-benefit analysis (CBA).

## I. A New Relationship Between Law and Ethics

The lesson of these changes is not that environmental law has been without an ethical stance. CBA is not just a practical tool of policy but also a version of an ethical theory,

welfarism.<sup>4</sup> The question is not how environmental law and policy got free of ethics, but how they got so heavily invested in one mode of ethics, to the exclusion of the rest.

Environmental law needs ethics because it is blind without values. Law is action oriented, made to guide decisions, and decision is impossible without a key to better and worse.<sup>5</sup> Decision requires orienting value, whether it is established at the personal, legislative, or administrative level. CBA, the most would-be neutral of procedures, works only on the basis of prior judgments about what counts as good and bad.<sup>6</sup> A relatively mechanical, seemingly neutral decision procedure is possible as an administrative technique only because it takes its normative substance from decisions made at other levels.

### A. A New Place for Law

Law can and should contribute to the development of environmental values. It can do so in conjunction with an ethics that begins from experience and perception.

Law creates a *geography of experience*. It shapes landscapes on which certain kinds of identity, perception, and encounters with the non-human world are possible. This point provides a way to get hold of the history of U.S. law-

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1. JOHN RAWLS, A THEORY OF JUSTICE 512 (1971).

2. *See id.*

3. *Id.*

4. Welfarism takes well-being as the consequence that is relevant for ethical assessment. In the version that CBA represents, consequences are assessed by the total social wealth produced under alternative policies, measured by various techniques for attaching prices to valued and disvalued outcomes.

5. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 25-52 (1989) (suggesting that moral decisionmaking is guided by frameworks that distinguish between alternatives).

6. *See* DOUGLAS KYSSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 6-67 (2010) (discussing CBA as a specific and debatable formulation and application of welfarist theory); Alyson Flournoy, *Building an Environmental Ethic From the Ground Up*, 37 U.C. DAVIS L. REV. 53, 57-62 (2003) (explaining that environmental law contains implicit ethical commitments which require interpretation and excavation); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1180-90 (2010) (showing how the substantive debates over the goals of antipollution statutes set the terms for later application of CBA); Lee Talbot, *Does Public Policy Reflect Environmental Ethics? If So, How Does It Happen?*, 37 U.C. DAVIS L. REV. 269, 279-80 (2004) (concluding that ethical commitments pervade the policymaking process, although they are often not explicit).

making around nature. For the first one hundred years, U.S. law worked relentlessly to make Americans into economically productive settlers of the continent.<sup>7</sup> The Homestead Acts<sup>8</sup> and other land-disposal statutes,<sup>9</sup> beginning with the General Land Ordinance of 1785,<sup>10</sup> aimed to make citizens into forest clearers and farmers, forests and grasslands into fields.<sup>11</sup>

The second great moral vocabulary of nature in American life, the Romantic one, was also rooted in a mode of experience and perception and dependent on law to make that experience real. From this perspective, nature's most extreme and dramatic places inspire epiphany: flashes of insight into the order of things and one's place in it.<sup>12</sup>

From the 1920s forward, Romantic recreationists built a movement dedicated to preserving "wilderness." Wilderness advocates both made wilderness something to prize and gave it a precise definition: land in which a solitary individual could encounter nature as it would have developed without human exploitation or development.<sup>13</sup> Such solitude, they insisted, prompted reflection on one's own smallness and lack of power before a vast and ancient natural world.<sup>14</sup>

The 1964 Wilderness Act,<sup>15</sup> which followed eight years of focused advocacy, gave the concept of wilderness legal operation. In developing a language to defend wilderness, advocates found words for their own experience and in turn made that experience available to others. These encounters, in turn, produced new rounds of advocacy and reform.<sup>16</sup>

Environmental law, then, contributes most to the development of environmental ethics by shaping experience far outside the courtroom: it is encounters with nature that provide much of the material for shifts in perception and imagination.

## B. Ways of Understanding Change in Environmental Ethics

The history of environmental politics and law reveals certain patterns. Environmental values have taken shape around clusters of ethical issues that they share with other, nonenvironmental questions. Environmental values have especially engaged five themes in ethical experience.

### 1. Hippocrates' Restraint: On Not Harming Another

Reluctance to harm another is a basic moral experience and easy to identify in nearly any moral theory. While evident in duty-based deontological theories, the commitment to averting others' suffering is also a root of utilitarianism. This approach to ethics makes sense only if one accepts the starting point that every person matters equally in a moral sense.

The same logic is at work in what one might call the "personalizing" of natural phenomena other than animals. Trees, rivers and mountains, species, and ecosystems have all achieved some status as entities that (some) people recoil from harming.<sup>17</sup>

### 2. Who We Are Together: The Ethics of Solidarity

Environmental ethics has also tapped what I would call *solidarity*: the sense of obligation connected with group membership, including the willingness to make sacrifices to benefit other members and vigilance against betrayal of the group from within.

The rise of conservation politics at the turn of the last century was closely tied to a particular version of patriotism. Theodore Roosevelt and other Progressives recast American civic identity as requiring a strong and extensive state. Natural resources exemplified why regulation was necessary: without it, private greed would waste the national patrimony.<sup>18</sup> Hence, public administration of parks, forests, and other natural resources formed a paradigm for progressive regulation.<sup>19</sup>

7. See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) (providing a comprehensive history of the role of law in the westward development of the United States).

8. Stock-Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (codified as amended at 43 U.S.C. §§299, 301 (2006)); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§1701-1782 (2006 & Supp. IV 2011))); Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed by Federal Land Policy and Management Act of 1976, 90 Stat. 2743).

9. Arid Land Act, ch. 1069, 25 Stat. 526 (1888) (codified as amended at 43 U.S.C. §662 (2006)); Timber and Stone Act, ch. 151, 20 Stat. 89 (1878) (repealed by Act of Aug. 1, 1955, ch. 448, 69 Stat. 434).

10. The General Land Ordinance of 1785, reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 375 (John C. Fitzpatrick ed., 1933).

11. See generally WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956) (arguing that the federal design of settlement carried out a policy of unleashing human energy and initiative).

12. See JOHN MUIR, *My First Summer in the Sierra*, in MY FIRST SUMMER IN THE SIERRA AND SELECTED ESSAYS 1, 78 ("South Dome . . . seems full of thought, clothed with living light, no sense of dead stone about it, all spiritualized, neither heavy looking nor light, steadfast in serene strength like a god."); *id.* ("From form to form, beauty to beauty, ever changing, never resting, [raindrops] all are speeding on with love's enthusiasm, singing with the stars the eternal song of creation.").

13. See Purdy, *supra* note 6, at 1160-73 (setting out the political, legal, and conceptual development of wilderness in the twentieth century).

14. See *id.* at 1168 ("[Nature] awes us because it is always more complex, older, and stranger than we can understand.").

15. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§1131-1136 (2006)).

16. See Purdy, *supra* note 6, at 1160-73 (describing the interaction of advocacy, argument, and experience in the wilderness-preservation movement).

17. See, e.g., Wilderness Act, 16 U.S.C. §§1131-1136 (2006); Endangered Species Act, 16 U.S.C. §§1531-1544 (2006 & Supp. IV 2011).

18. See GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION 48-49 (1910) (Discussing the role of conservation in allocating "the greatest good to the greatest number for the longest time" and "proclaim[ing] the right and duty of the people to act for the benefit of the people").

19. See Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 HARV. ENVTL. L. REV. 169, 189-99 (describing the paradigmatic place of natural-resource conservation within the larger reform agenda of Progressives of the late nineteenth and early twentieth centuries).

Public recreational areas, especially, parks, also became symbols of national identity. Parks advocates invited Americans to identify with emblems on the landscape that marked the continent as belonging to the nation.<sup>20</sup>

### 3. Being Who One Is: Personal Ethics

Environmental value has been closely involved with two ideas that are central to modern personal identity: *dignity* and *authenticity*.<sup>21</sup>

Dignity encompasses qualities that command the respect of others and the sense of oneself as commanding that respect.<sup>22</sup> It was a centerpiece of the U.S. settler identity: the pioneer, a free man who freely labored on free land, was an admirable figure in a republican community of equals.<sup>23</sup> Using land and other resources productively became a touchstone of American dignity.

Authenticity is being oneself, not someone else's image or a congeries of borrowed habits and styles.<sup>24</sup> It remains the heart of Romantic environmental imagination: the wilderness has long promised clarity about who one is, a liberation from the unreflective attitudes and habits of the lowlands.<sup>25</sup>

### 4. Aesthetic Response and Ethics

Aesthetic response involves qualities in objects, landscapes, and natural systems, and also the qualities of mind and emotion that these call forth. The three most influential aesthetic experiences are *beauty*, *sublimity*, and *uncanniness*.

Beauty, connected with "gratitude and a sense of peace,"<sup>26</sup> is associated with landscapes and other natural objects that display regularity, gradual transitions, soft lines, and evidence of the mildness and fertility of a terrain that could support human life richly in answer to a modicum of work.<sup>27</sup>

Sublimity involves not being at home, but instead being thrown into a world of alien character and overwhelming dimensions, a world potentially hostile, but, more basi-

cally, indifferent and—past a point—incomprehensible.<sup>28</sup> It is associated with vast and dangerous landscapes such as high mountains and crevasses, and with cataracts and the ocean.

Uncanniness refers to the bewildering experience of uncertainty about whether something is alive or conscious, another intelligence looking back at the watching person. One might experience it with an animal, or in a shadow at the edge of a forest at nightfall.

### 5. Acting, Being, and Seeing: Virtue Ethics

The central concern of virtue ethics is the character of individuals.<sup>29</sup> Virtues are qualities of character that tend to produce actions of a certain kind.<sup>30</sup> The actions that a virtue supports constitute *practices*, forms of ongoing, usually shared, activity that contain ways of assessing one's participation.<sup>31</sup> Practices, in turn, help to make up forms of life and shared understandings of what constitutes a good existence.

Virtuous conduct is not motivated by an ambition to *be* virtuous, but by the perception that courage, reflectiveness, or another quality of conduct fits the situation.<sup>32</sup> The motivation is to respond appropriately to the circumstances in which one finds oneself.

## II. An Environmental Law of Ethical Change: Three Applications and the Case for Ethical Change, Revisited

This dynamic history of environmental values did not end in the 1970s. At least three areas of contemporary environmental law display openness to changing values. These areas find people unsure of what to make of key encounters with the natural world, and experimenting in the face of that uncertainty. These experiments might produce a change in ethical vocabulary. They also present an opportunity to reflect on how law can foster, or inhibit, this ethical development.

20. See *id.* at 205-06 (noting the absorption of civic and Romantic language into parks advocacy).

21. For an extremely valuable discussion of these ideas and their place in modern moral culture, see CHARLES TAYLOR, *The Politics of Recognition*, in *PHILOSOPHICAL ARGUMENTS* 225, 225-33 (1995).

22. See *id.* at 226-27 (tracing the roots of "due recognition").

23. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11 (1970) ("[T]he concept of 'free labor' lay at the heart of the Republican ideology . . ."); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, 358-62 (2009) (discussing the civic ideology of free soil and free labor).

24. See TAYLOR, *supra* note 21, at 228-29 (discussing the origin and development of the ideal of authenticity).

25. See Purdy, *supra* note 19, at 203-05 (discussing the cultural and psychological appeal of the Romantic attitude to nature, prominently including authenticity).

26. *Id.*

27. See EDMUND BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* 112-18 (James T. Boulton ed., Univ. of Notre Dame Press 1968) (1759) (describing what makes things beautiful); IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 42-89 (James Creed Meredith trans., Oxford Univ. Press 1989) (1790) (describing the inputs and processes that determine beauty).

28. See BURKE, *supra* note 27, at 39-70 ("When danger or pain press too nearly, they are incapable of giving any delight, and are simply terrible; but at certain distances, and with certain modifications, they may be, and they are delightful . . ."); KANT, *supra* note 27, at 114 ("Sublimity, therefore, does not reside in any of the things of nature, but only in our own mind, in so far as we may become conscious of our superiority over nature within, and thus also over nature without us (as exerting influence upon us).").

29. See BERNARD WILLIAMS, *Acting as the Virtuous Person Acts*, in *THE SENSE OF THE PAST* 189, 189-95 (Myles Burnyeat ed., 2006) (stating that "[a] (fully) [virtuous] act is what a [virtuous] person would do, but only if it is done as the [virtuous] person does such a thing" and describing the manner in which a virtuous person does the act).

30. See *id.* at 193 ("We say that the agent did the generous (e.g.) thing because it was the generous thing to do . . .").

31. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 187-91 (2d ed. 1984) (setting out the definition and working of practices).

32. See WILLIAMS, *supra* note 29, at 189-97 (making this point and observing some of its difficulties for a theory of "moral realism," a theory that is not an issue in this discussion, which does not engage meta-ethical questions).

### A. Food, Agriculture, and the Value of Work

The food movement views some physical work, including cooking, gathering food, and raising livestock, as an affirmative source of satisfaction.<sup>33</sup> Knowledge of the ecological, chemical, and other processes that make the work a successful engagement with the natural world generates that satisfaction. In this view, work done with informed appreciation is qualitatively better than work that is less informed, even if the latter may be more efficient if measured, for instance, by calories produced per unit of input.<sup>34</sup>

The food movement also values work that preserves, even enhances, natural processes, rather than exhaust them.<sup>35</sup> The movement embraces integrated agriculture that returns crop and animal waste to the soil to preserve the cycle of fertility. It also laments *industrial* farming that makes animal waste a water pollutant while, at the same time, drawing soil fertility from separately manufactured chemical fertilizers and, in some cases, literally mined to replace the fertility lost through discarded animal waste.<sup>36</sup>

This image of food presents something different from the standard case for reforming farm policy, which concentrates on the polluting side effects of fertilizers, pesticides, and fossil fuels.<sup>37</sup> The ideal that I have described makes knowledgeable, sustainable work in natural processes a freestanding value, a reason to pursue a food economy that fosters such work.

On this view, agricultural policy is cultural policy, like establishing national parks. Parks policy is an investment in a relation to nature. It generates thinking about humanity's place in the world. Similarly, agricultural policy that supports small-scale, participatory food raising would be an investment in developing environmental ethics.

### B. Animals and the Ethics of Encounters Across Species

The debate over the treatment of animals is deep and important.<sup>38</sup> Arguments against factory farming and meat eating imply that many Americans are engaged in a massive violation of basic morality.<sup>39</sup> There are two prominent approaches to this issue. The first view is broadly abolitionist, contending that there is no moral defense for most of the present human use of animals, and that we should stop

taking their flesh, hides, and lives.<sup>40</sup> The second approach is *reformist*: it seeks to renovate human relations with animals while preserving domestication and meat-eating.<sup>41</sup>

Both reformism and abolitionism confidently ascribe specific moral significance to animals. Each side has concluded judgment on a question that has not been concluded in the larger ethical, political, and legal argument.<sup>42</sup>

The continuing dispute reflects the difficulty of interpreting animal experience, which we cannot know except through speculation. Law might make this problem more palpable and so perhaps more generative.

The public argument around factory farming is inhibited by concealment of the practice itself, an enforced invisibility that collaborates with the human tendency to avoid what is unpleasant. The concealment rests on the property right of exclusion—the power to keep others out of the place one owns.

The most straightforward way to foster reflection on how we use animals would be to create a “right to know” the sources of one's food. This could mean a right of public access, under controlled conditions, to industrial food operations.<sup>43</sup> Depending on considerations of safety and convenience, physical access could be supplemented or replaced outright by video technology. Labeling requirements for meat could include a web address where buyers could look inside the facilities where the animal was raised and slaughtered.

For smaller-scale and neo-traditional operations, providing public access might be a condition of participating in support policies, or it might just be required outright. Outside the industrial setting, such observations would test by experience whether the right kind of farming can produce an ethically attractive relation between people and animals.<sup>44</sup>

### C. Climate Change, Rationality, and Vision

Climate change is hard to address effectively when viewed through standard accounts of how rationally self-interested people make decisions and the problems they encounter when trying to solve problems together.<sup>45</sup> Because climate change is a complex global problem with a very long clock, the benefits of doing anything to stop it are uncertain and, if they materialize, will often help only people far away and far in the future.<sup>46</sup> The costs of addressing it, by contrast,

33. See *id.* at 138-40 (seeing labor to produce food as a positive good).

34. See *id.* at 87, 138 (“In gardening, for instance, one works with the body to feed the body. The work, if it is knowledgeable, makes for excellent food.”).

35. See *id.* at 85-86 (discussing the value of agriculture that returns its sources of energy and fertility to the soil that first produced them).

36. Cf. *id.* at 136-37 (stating that industrial agriculture “transforms fertility into pollution”).

37. See JASON CLAY, *WORLD AGRICULTURE AND THE ENVIRONMENT: A COMMODITY-BY-COMMODITY GUIDE TO IMPACTS AND PRACTICES* 45-62 (2004) (quantifying the environmental effects of present agricultural practices).

38. See PETER SINGER, *ANIMAL LIBERATION* 1-24 (1975) (setting out the argument for equality of moral concern for animals based on suffering).

39. See *id.* at 94-158 (detailing farming practices as a massive violation of morality).

40. See GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION?* 1-102 (2010) (setting out the case for abolition of human exploitation of nonhuman animals).

41. See *id.* at 103-74 (setting out the case for reform rather than abolition of human-animal exploitation).

42. See generally JONATHAN SAFRAN FOER, *EATING ANIMALS* 123-43 (2009) (exploring the continuing cultural irresolution on the topic of eating animals).

43. See MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* 332-33 (2006) (suggesting, somewhat fancifully, that the walls of slaughterhouses be replaced with glass).

44. See *id.* at 333 (noting the desirability of public knowledge of slaughtering practices).

45. See generally RICHARD TUCK, *FREE RIDING* (2008).

46. See STEPHEN M. GARDINER, *A PERFECT MORAL STORM: UNDERSTANDING THE ETHICAL TRAGEDY OF CLIMATE CHANGE* 24-48 (2011).



tend to come quickly, be fairly concrete, and affect the person trying to solve the problem.

Familiar ethical frameworks run aground on climate change, and making progress on the issue might imply changing our ethical vocabulary.

What kinds of specifically environmental values are involved in climate change? Does climate change confound these? If so, can we reformulate these values, or develop new ones, in a way that would help make sense of the problem?

Basic perceptions of wrong are connected with palpable A → B transactions.<sup>47</sup> Perceptions of harm weaken as the effect of one's action becomes less direct and corporeal. Little wonder, then, if climate change proceeds without stirring much sense that anyone is doing any harm. Greenhouse-gas emissions by billions of individuals produce a globally dispersed, systemic change that intensifies certain atmospheric processes in a complex global phenomenon, all against a naturally unstable baseline.<sup>48</sup>

Because of this complexity, ethical appeals that have worked to organize our sense of other complex environmental problems may be less effective here. A classic environmental problem—"pollution"—introduces a harmful, alien agent to an otherwise healthy system, sickening animals and people and weakening the underlying system.<sup>49</sup> This simple narrative captures most of the public discussion around antipollution statutes: human effluents were seen as violating the order of a clean world, making it unhealthy and unsafe.<sup>50</sup>

Climate change is different. The major greenhouse gases, notably carbon, are already pervasive in the atmosphere, and their processing is part of global cycles integral to life.<sup>51</sup> Moreover, they do not, by themselves, harm individuals by exposure in concentrations remotely resembling their present atmospheric levels.

47. See Jonathan Haidt & Selin Kesebir, *Morality*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 797, 822 (Susan T. Fiske, Daniel T. Gilbert, & Gardner Lindzey eds., 5th ed. 2010).

48. See David Archer & Stefan Rahmstorf, *The Climate Crisis: An Introductory Guide to Climate Change 16-38* (2010) (setting out the basic science of the problem).

49. This description smacks of a "foundation" of environmental ethics that Professor Jonathan Haidt calls "purity/sanctity," a motive that encompasses "[c]oncerns about physical and spiritual contagion, including virtues of chastity, wholesomeness, and control of desires." Haidt & Kesebir, *supra* note 47, at 822. See MARY DOUGLAS, *PURITY AND DANGER*, at x-xi (Routledge 2002) (1966) (discussing the idea of "pollution" in the religious and ritual sense: the taboo, the untouchable, the urgent barrier between the sacred and the profane); see also John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 28 (2009) (arguing for a broad idea of pollution that participates in the purity/sanctity divide). Nonetheless, the concept of harm seems more useful to me here.

50. See *id.* at 7 ("The rapidity of change and the speed with which new situations are created follow the impetuous and heedless pace of man rather than the deliberate pace of nature."); see also Essay, *The Age of Effluence*, TIME, May 10, 1968, at 52 ("[M]any scholars of the biosphere are now seriously concerned that human pollution may trigger some ecological disaster.").

51. See TED NORDHAUS & MICHAEL SHELLENBERGER, *BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY* 111-13 (2007) (arguing that the "pollution paradigm" is inappropriate for dealing with the issue of global climate change). But see Carl Pope, *There Is Something Different About Global Warming*, GRIST (Jan. 14, 2005), <http://grist.org/politics/pope-reprint> (arguing that the pollution paradigm largely holds for greenhouse gases).

Is there a way of finding motivation in the same ecological complexity that confounds familiar moral appeals? One possible path would start from the traditional aesthetic register of beauty and turn that familiar pleasure into a more complex appreciation of the interdependence of living and nonliving systems. That our whole way of life tends to unsettle the global climate system, and that this general point is also true of a myriad of individual acts, from driving to burning coal, are incontrovertible points. If we learned to feel them in the way we have learned to feel the harm of pollution or extinction, we would have become different people.

This standard also avoids the need for fixed baselines, such as the condition of undisturbed "natural" systems. This ethical approach does not rely on any thought of a "world without us" from which to measure our effect. It assumes an inhabited world already shaped by our use.

Approaching the ethics of climate change in these terms is a cultural and imaginative challenge: to find a way to prize the beauty, integrity, and stability of global and largely invisible processes.

How might law contribute to this possible cultural development? Reform efforts may make essential cultural contributions even if they seem futile when we ask simply whether they will likely succeed as lawmaking or regulatory strategies. For instance, municipal efforts to address greenhouse-gas emissions and community-level attempts to define a personal ethics of low-carbon living, although palpably ineffective in one way—they will not directly contribute much to reducing global emissions—may nonetheless turn out to be effective in somewhat the way Sierra Club excursions were: as new ways of experiencing climate change as mattering, and in new shared vocabularies for expressing and elaborating its importance.<sup>52</sup>

### III. Convergent Reasons for Law to Support Ethical Innovation

There are, though, at least three kinds of reason to think that law should support ethical change, which correspond to three prominent approaches to environmental ethics generally.

The first argument starts from the liberal-humanist approach that marked much of the legal and philosophical discussion of ethical change in the early 1970s. Moral perception is an essential aspect of freedom, in which we at once experience ourselves as responding to genuine values and choose those values by accepting their claim on us.<sup>53</sup> Developing moral perception cultivates a special blend of human capacities in which we are responsible

52. Purdy, *supra* note 6, at 1198-99; see also Sarah Krakoff, *Planetarian Identity Formation and the Relocalization of Environmental Law*, 64 FLA. L. REV. 87, 107 (2012) (arguing that community-level activism can still "provide a blueprint for individual and community action, even in a world where state coordination and enforcement either never fully materialize, or do and nonetheless fail to achieve their stated goals").

53. See Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

and creative, free enough to remake the world and fixed enough to keep our footing. So seen, environmental ethics is centrally an expression of something *about us*, a set of powers we can put to appropriate use. In this view, the development of environmental ethics is something like an intrinsic goods, an exercise of essential human powers, which law should facilitate.

In a second perspective, environmental ethics is not about us: it is the attempt to see and honor accurately the value present in the natural world. The point of environmental ethics is not what it enables us to do, but what it puts us in touch with or shows us. Here, too, by promoting ethical development, law can help us nearer to the right characterization of value.

The third approach regards ethical perception as instrumental to functional ends, rather than as essentially about the perception of value. Ethical responses enable humans to solve collective-action problems, “suppress selfishness” and achieve widespread cooperation.

From a social-functional perspective, it would seem that our moral psychology has enabled us to produce a form of social cooperation that generates collective-action problems larger than any of those that the same psychology has previously helped to overcome, and which that psychology, at present, cannot prevent. One way reformation might

happen is through the development of ethical perceptions that can motivate a different set of personal and political responses to climate change. Laws that facilitate ethical development would represent a self-aware effort to create conditions in which the functional account of ethics would describe a success rather than a devastating paradox.

#### **IV. Conclusion**

The values that orient a political community are the products of that community’s struggles and efforts at persuasion and discernment. The history of environmental law and politics and a structured sense of the vocabulary of ethical change can guide us in this terrain. Environmental law will inevitably shape the experiences and inflect the interpretations that will give these issues their shape in the next generation of what John Rawls would have called our metaphysics—a common yet contested view of the world, which we cannot do without but should not expect ever to resolve into just one form. Shaping the law to play this role actively would mean embracing both our creative ethical capacity and our sense of responsibility to make sense of and do justice, in every sense of that word, to the natural world.

C O M M E N T

# Comments on *Our Place in the World: A New Relationship for Environmental Ethics and Law*

by E. Donald Elliott

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Prof. Jed Purdy makes a valuable contribution by pointing out that environmental law shapes public values, with votes in Congress and decisions by courts merely chapters in a longer story.<sup>1</sup> His is a valid, interesting and important point, although not as original as his subtitle (“*A New Relationship for Environmental Ethics and Law*”) lets on.

## I. The Roles of Law in Promoting Changes in Public Values

Historians have often portrayed social movements as using lawsuits to develop public support, with setbacks and wins along the way, but gradually carrying the day by winning over the public mind. This vision that cases and statutes are not the end but one means by which we transform public values is commonplace in accounts of the civil rights movement, for example.<sup>2</sup> Similarly, the on-going transformation of the law relating to same sex marriage was accomplished not in a moment, but by a gradual process of many legal and social acts that changed public attitudes. Lawyers can be important contributors to this on-going process of social change.

The gradualist school of social movements and legal reform, of which Purdy is a part, sees law and public values as influencing one another, back and forth, in what cultural anthropologists and evolutionary theorists call “co-evolution.”<sup>3</sup> While this vision of values shaping law,

but law also shaping social values at the same time, is well understood, even commonplace, for many other legal and social movements, it has been less obvious for environmentalism. Perhaps because the initial legislative victories came so quickly after Earth Day 1970, environmental lawyers and scholars have generally lost sight of the interactive relationship between law and building public support for the environment. This is ironic because one of environmental law’s founding moments, the creation of the Environmental Defense Fund, grew out of a lawsuit against spraying DDT on Long Island.<sup>4</sup> Nonetheless, the conventional account in environmental law scholarship is typically that public support translates into law and legislation.<sup>5</sup> Where the public support came from is usually left unexplained.

In contrast, it is conventional wisdom in other areas of law that law shapes public values; a famous example is Justice Brandeis’ dissent in *Olmstead v. United States*, in which he argues that law-breaking by government will breed disrespect and lawlessness.<sup>6</sup> But until Purdy, how the law shapes public values was rarely discussed in environmental law scholarship. One environmental law scholar did observe in 1994 that “The purpose of law in the activist mode [including environmental law] is to change the norms and behavior of a community or subcommunity.”<sup>7</sup> The thesis was that one of the goals of environmental law is to transform public values so that people are more supportive of protecting the environment, even when not legally compelled to do so. That has actually occurred to some degree. For example, corporate sustainability efforts have outpaced government regulatory requirements in some areas. Today

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*Author’s Note: Climate Change is a complex subject, and a comment on someone else’s work is not the place to lay out my views on it. No one should misunderstand my comments as support or opposition for any particular proposal.*

1. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857 (2013).
2. BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014). For a good short summary, see <http://www.naacp.org/pages/naacp-legal-history>.
3. WILLIAM H. DURHAM, *COEVOLUTION: GENES, CULTURE AND HUMAN DESTINY* vii (1991) (“I have called the theory ‘coevolution’ . . . to emphasize the

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fact that genes and culture are copartners in shaping human diversity . . . .”); compare Mark Greenberg, *The Moral Theory Impact of Law*, 123 YALE L.J. 1288 (2014).

4. Environmental Defense Fund, *Our Mission and History*, <http://www.edf.org/about/our-mission-and-history>.
5. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 43-44 (2004).
6. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
7. E. Donald Elliott, *Environmental TQM: A Pollution Control Program That Works!*, 92 MICH. L. REV. 1840, 1840 (1994).

some large companies such as Wal-Mart, Ford, and IBM put pressure on their supply chains to reduce or eliminate environmentally troublesome substances and to adopt energy efficient practices and Greenhouse Gas reductions that go beyond regulatory compliance.

But living in the wake of the Senate's failure to enact cap-and-trade legislation for carbon during Obama's first term, Professor Purdy's vision in 2013 is not as optimistic about the possibilities for environmental law to lead public values in a positive way as was Professor Elliott in 1993, fresh off the successful enactment of cap-and-trade legislation for sulfur dioxide on bipartisan basis in the first Bush Administration, while he was serving as General Counsel of EPA. Purdy sees law not as leading, as did Brandeis and Elliott, but rather primarily as a negative force "precluding" certain kinds of experiences of nature.<sup>8</sup> Professor Purdy does not provide many examples of how law "precludes" encounters with nature, but he does discuss at length a modern version of the Jeffersonian ideal of small subsistence farming as supposedly shaping human character in desirable ways.<sup>9</sup> According to Purdy, "Farming offers its own experiential value",<sup>10</sup> at least if it is done right; he embraces "an integrated agriculture that returns crop and animal waste to the soil to preserve the cycle of fertility" but "lament[s] . . . industrial farming . . ."<sup>11</sup>

To someone who grew up in a farm state, Indiana, Professor Purdy's encomium to the virtues of "tending land and animals" brings to mind the quip by literary critic William Empson that people who actually live in the country do not write pastoral poetry extolling the virtues of the country life.<sup>12</sup> But as I was chopping wood, adding my compost to the soil to put in my garden and tending to the wants of two cats, it occurred to me that one cannot really deny Purdy's point that the modalities of how we live our daily lives help to shape who we are and what we value. The move that Purdy makes in environmental law is similar to that made by the inventor of the so-called "new history" in the 1920s, James Harvey Robinson. History, since Herodotus, had been defined as the doing of kings and armies, how many they smote and what lands they conquered. Robinson changed the focus to the life experiences of ordinary people and how they lived. So too Purdy, who switches the focus from Congress and EPA to how we live our daily lives.

How the law figures into Purdy's theory is less clear. At one point Purdy seems to imply that agricultural subsidy policy is somehow responsible for the decline of the family farm in America, primarily because most of the farm subsidies today go to agribusiness.<sup>13</sup> Most of the commentary maintains just the opposite: that the political justification for farm subsidy policies was to try to save the family farm

for political and social reasons after it was no longer able to compete economically with the "factory farm." Agricultural policy seems a better fit to the Hayek-Stigler story of government programs passed in the name of benefitting the little guy being taken over and warped to benefit the politically well-connected and powerful<sup>14</sup> than to Purdy's story of law precluding wholesome, inspiring experiences of nature, but perhaps both are true at once.

Purdy's point may be that the law did not go far enough (in his view) to preclude the techniques that gave factory farms an economic advantage over Purdy's romantic vision of virtuous yeoman farmers "tending land and animals" in bucolic harmony with nature. One wonders, however, where he would draw the line. Are mechanized tractors permissible, or would we respect our bodies and those of animals more if many more of us had to plow the earth for ourselves behind a team of oxen, as the Amish do?

## II. Purdy's Methods Are Poetic, Not Empirical

Perhaps the most conspicuous omission from Professor Purdy's 75 page article is his failure to discuss the results of a large scale experiment with the type of public policy that he favors: using law to "nudge"<sup>15</sup> people to have the experiences of nature that we, as a supposedly more enlightened elite, believe will make them better people, namely, wilderness policy. In *Mountains Without Handrails*,<sup>16</sup> the late Joseph Sax, an eminent environmental law scholar whom Purdy regrettably does not cite, mounted an extended argument for the same type of policy that Professor Purdy seems to favor: using law to promote the experience of nature up close and personal in the belief that experiencing nature will make us into better people. Purdy acknowledges that American law has made a major commitment to preserving wilderness, having set aside 107 million acres in perpetuity as statutory wilderness.<sup>17</sup> One might expect Purdy to provide a retrospective empirical assessment of this extensive policy experiment to see whether it actually provided the benefits in improving human nature and public values that are envisioned by Professors Sax and Purdy.<sup>18</sup>

But Professor Purdy is not interested in whether past experiments with the types of policies he advocates have actually worked. His methods are not empirical, but rather rhetorical and poetic, even evangelical. He has a wonderful way with words. My personal favorite is that climate change "threatens to become the collective-action prob-

8. *Supra* note 1, at 891.

9. *Supra* note 1, at 902.

10. *Supra* note 1, at 911.

11. *Supra* note 1, at 906.

12. William Empson, *Proletarian Literature in Some Versions of Pastoral* 6 (1938).

13. *Supra* note 1, at 910.

14. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

15. I use this freighted term advisedly. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

16. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980), *passim* but esp. pp. 47-77 (Chapters 3 and 4).

17. *Supra* note 1, at 890.

18. For an example of the kind of retrospective assessment of public programs against their declared goals that Purdy avoids, see PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* (2014).

lem that ate the planet.”<sup>19</sup> His 75 pages are full of turns of phrase that are at once erudite, sophisticated and engaging. It is academic prose at its best (or worst, depending upon one’s taste for the genre).

Purdy discusses three main areas in which he believes that we need an awakening of new environmental ethics: “Food, Agriculture, and the Value of Work,”<sup>20</sup> “Animals and the Ethics of Encounters Across Species,”<sup>21</sup> and “Climate Change, Rationality, and Vision.”<sup>22</sup> Most of what he says about the first two is derivative, as he readily acknowledges with frequent citation and sage commentary on the work of his intellectual progenitors such as Thoreau, Aldo Leopold, Michael Pollan, and Peter Singer. Professor Purdy’s most original ideas come with regard to climate change, which he explicitly analogizes to the first two.

### III. Climate Change and Legal Change

Professor Purdy’s discussion of climate change is sophisticated and longer than this comment, so I cannot do justice to it, but instead commend it to readers to read for themselves. It culminates in this interesting passage, which is a précis of Professor Purdy’s argument as a whole:

Climate change is not the first problem to present the challenge of palpably expressing elusive, frequently invisible ecological processes. . . .

How might law contribute to this possible cultural development? One modest step is *for scholars to hold themselves open to this thought: reform efforts may make essential cultural contributions even if they seem futile when we ask simply whether they will likely succeed as lawmaking or regulatory strategies*. For instance, municipal efforts to address greenhouse-gas emissions and community-level attempts to define a personal ethics of low-carbon living, although palpably ineffective in one way—they will not directly contribute much to reducing global emissions—may nonetheless turn out to be effective in somewhat the way Sierra Club excursions were: as essays in new ways of experiencing climate change as mattering, and in new shared vocabularies for expressing and elaborating its importance. That is, *we might regard law and lawmaking as forums in which a cultural and imaginative argument proceeds*, an argument that will help to lay the foundation of any legal regime that effectively addresses climate change.<sup>23</sup>

As poetry, Purdy’s vision that by living low-carbon lives at the local level we will “help to lay the foundation” for “a legal regime that effectively addresses climate change” is appealing, particularly to people who are concerned about the failure of Washington to address problems about which they care deeply. Purdy’s vision that we can change the world simply by changing our collec-

tive heads is reminiscent of John Lennon’s beautiful, but utopian, lyrics in his 1971 hit single *Imagine*: “you may say I’m a dreamer, but I’m not the only one; I hope some day you’ll join us and the world will be as one.”<sup>24</sup> Or the concept, also popular in the 1970s and 1980s, that legislating “nuclear-free zones” in local communities such as Berkeley, California and Takoma Park, Maryland, would somehow lay the foundation for world peace. However appealing the vision may be that our beliefs and experiences can magically change the world, as a serious theory of how effective regimes in environmental law develop, at best Professor Purdy leaves out several important intermediate steps between personal experience of low-carbon lives at the local level and an effective international legal regimes to address climate change.

First, note that Purdy addresses his plea to “hold themselves open to this thought” to his fellow “scholars.” As do most of us who contribute to law reviews, Purdy evidently subscribes to John Maynard Keynes’ dictum/hope that political leaders will eventually be influenced by “some academic scribbler of a few years back.”<sup>25</sup> Keynes, however, at least had an explicit two-step theory of how ideas promote legal change; he contended that the idea of academics eventually influence the thoughts and actions of the next generation of political leaders who were our students. Purdy seems to maintain that using law to compel more people to have the experience of low-carbon lives through municipal regulation will in some unspecified way “lay the foundation” for effective international legal regimes to address climate change.

Other scholars addressing the problem of why some societies manage to address environmental problems effectively, but other societies do not, have posited three steps: (1) perception of the problem by “Cassandras” (those who see what others do not), (2) dissemination and acceptance of Cassandra’s vision by the populace and/or governing elites, and (3) putting in place law or other mechanisms of social control (such as religions or morality) that are effective to address the issue.<sup>26</sup> These theorists argue that the process of developing regimes to address an environmental problem can go off the rails at any one of the three stages. Purdy focuses on stage two, disseminating ideas (or in his case, “experiences” which he contends shape ideas) to a broader populace. Purdy assumes naïvely that stage three (implementing effective legal regimes) will somehow happen automatically if we only lay the proper foundation by using local law to require people to have experience with low-carbon living. Today some individuals choose to live a low-carbon lifestyle, or to buy carbon offsets to compensate for their sins, even if not compelled by government to do so. But it is not clear that the redemptive quality is

19. *Supra* note 1, at 917.

20. *Supra* note 1, at 905-12.

21. *Supra* note 1, at 912-17.

22. *Supra* note 1, at 917-27.

23. *Supra* note 1, at 925-26 (emphasis supplied).

24. JOHN LENNON, *Imagine*, on *IMAGINE* (Apple Records 1971).

25. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1935).

26. E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 VA. ENVTL. L.J. 17 (2001); see also JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2004).

equivalent when people are compelled by municipal law to adopt low-carbon living, as Purdy advocates. The history of blue laws, such as the one passed in Virginia in 1617 requiring church attendance on Sundays, is not encouraging that law can make people more virtuous by compelling them to have allegedly uplifting experiences.<sup>27</sup>

Purdy's romantic vision that changing mentalities through personal experience will change the world appeals to the narcissism in all of us,<sup>28</sup> particularly the young and idealistic and those who feel powerless to affect public policy. As appealing as it may sound, Purdy's theory undervalues the importance of people who care about the environment actually getting involved in political activity and government service and having workable strategies to change laws and regulations for the better.

While Professor Purdy himself characterizes his as an "undeniably thin proposal"<sup>29</sup> for combating climate change in the short run, it encapsulates his essential and distinctive vision that "law and lawmaking [are] forums in which a cultural and imaginative argument proceeds."<sup>30</sup> Professor Purdy does not even attempt to spell out how experience of "a personal ethics of low-carbon living" at the municipal level will supposedly eventually translate into effective legal measures at the national and international levels. He asserts, however, that effective legal measures on climate are just not possible without a fundamental change in the way that people think and feel about climate change.

Purdy's assertion that bottom-up social change is the only possible route seriously undervalues the contributions of political leadership. For example, although climate change still remains relatively low on the priority list for most Americans,<sup>31</sup> in 2012, the Obama Administration dramatically increased the CAFE fuel economy standards for automobiles.<sup>32</sup> This one act of government policy, which when fully implemented will produce one of the largest reductions in greenhouse gases ever by any country, equivalent to shutting down 194 coal-fired power plants,<sup>33</sup> is not well-explained by Purdy's theory that changing the hearts and minds of the public through personal experience at the municipal level is "essential" and the only viable route to putting in place effective measures to address climate change. Other theories of how environmental laws are passed give greater emphasis to the role of political actors than does Purdy's, and they also emphasize actions that the Executive may take without new legislation or even broad public support.

At the end of the day, Professor Purdy's work is refreshing and innovative. His bottom-up theory of remaking the world through personal experience is not the whole story, perhaps not even the main story, but it captures an important and under-appreciated "view of the cathedral"<sup>34</sup> that is missing from conventional accounts of the role of environmental law in shaping our shared public values.

27. David J. Hanson, *Blue Laws*, <http://www2.potsdam.edu/alcohol/Controversies/1095380608.html#.U0mojIDizPs>.

28. Of course the same point is applicable to my perspective. As a Washington lawyer and former government official, as well as a professor, I think that the kinds of things that I do are important. E. Donald Elliott, *Lessons From Implementing the 1990 CAA Amendments*, 40 ELR 10592 (June 2010).

29. *Id.*

30. *Id.*

31. For example, a PEW research poll in January, 2012, ranked climate change as the lowest of 22 national priorities among voters, with only 25% ranking it as a "top priority," a decline of 13% since 2007. Scott Keeter, Director of Survey Research Pew Research Center, Public Attitudes About Energy, Environment and Global Warming, February 22, 2012.

32. Department of Transportation National Highway Traffic Safety Administration, Final Rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012).

33. Larry West, The Obama Administration's CAFE Standards: President Obama's CAFE Standards Require New Cars to Average 35.5 mpg by 2016, <http://environment.about.com/od/environmentallawpolicy/a/obama-sets-new-fuel-efficiency-standards.htm>.

34. Compare, for the title, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

C O M M E N T

# Comments on *Our Place in the World: A New Relationship for Environmental Ethics and Law*

by Susan Casey-Lefkowitz

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Professor Purdy's interesting article, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, provides a nice springboard to examine his points in more depth in the context of climate change. Professor Purdy argues that ethics and law is a two-way street, and they feed each other and interact with each other. In my experience, this is very true. In fact, Professor Purdy talks in his article about setting a moral vocabulary, and that is an approach we use at Natural Resources Defense Council and with our partners as part of our advocacy. This approach is especially important for climate change, where Professor Purdy notes that we are at a moment when things are changing very rapidly not only with climate change, but with perceptions of climate change and the laws that deal with climate change. In this moment of change, it is important to try to understand what is happening with perceptions of our values and how we think about climate change, in addition to how that translates into law, and how law in turn can influence those perceptions and values.

Many would agree that the key issue with climate change is the huge risk it presents. Many of us would also agree that we have the tools to deal with it but that what we are lacking is political will. Mr. Elliott, in his comments at the Environmental Law and Policy Annual Review conference in Washington D.C.,<sup>1</sup> mentioned that a key issue is to look at where political will comes from. This is especially important because a lot of political will ends up coming from our moral vocabulary, our moral judgments and where we see our ethics developing. It is interesting when you look at what international leaders identify as the place that real change is needed: it is in political will. Christiana Figures, for example, who is the Director of the UN Climate Treaty system, often talks about the need for politi-

cal will. With climate change, we have seen a huge change just in the last few years. Whereas, a few years ago, even possibly when Professor Purdy first wrote his article, the perception was that climate change was difficult to address as an issue that affected people's value systems, because it was perceived as happening in the far future, rather than immediately—especially here in the United States.

This has changed. Right now, climate change is being felt immediately in communities all around the world. Through the droughts in Texas, the recent drought in California, and Hurricane Sandy, people are connecting extreme weather to climate change, or at the very least, to the way climate change might look in the future. This is a big difference. Another big difference is that people are no longer thinking about climate change as something that will just affect future generations. We had a discussion internally with staff at the NRDC about this and a young program assistant in her early twenties said: "I get so sick of hearing people always saying that climate change is about protecting future generations, but it is not—it is about protecting my generation. . . . I am the future generation." We have reached a new level of immediacy in terms of climate change and how people perceive it.

On a related note, Professor Purdy queries whether we are going towards a post-apocalyptic fortress. If you have children who are teenagers or in their early twenties, you have noticed that much of children's literature right now, and many movies as well, are about post-apocalyptic worlds. This is one more symbol or place that we can look to see how people are thinking morally and ethically about what is happening with the world. Because so much of teenage literature right now is focused exactly on the kinds of damage that can come from climate change, it is one more example of how fast sensibilities are changing.

Another change relates to the challenge Professor Purdy identifies—how to turn the issue of climate change into a value if people see it as something that is happening to a remote, natural system. Today, because the impacts of climate change are being experienced across America and around the world, people no longer see it as something that

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*Author's Note: Based on a transcription of remarks made at the Environmental Law and Policy Annual Review conference in Washington, D.C., on April 4, 2014.*

1. E. Donald Elliott, *Comments at the Environmental Law and Policy Annual Review Conference 2014*, Apr. 4, 2014, available at <http://www.eli.org/2013-2014-environmental-law-and-policy-annual-review-conference>.

is just about ice floes in the Arctic or sea level rise. It is about their health, it is about their home and their property, and it is about their pocketbooks. It is about what is happening in their communities and that leads to a more immediate way of expressing values around climate change. In the recent Intergovernmental Panel on Climate Change report, they talk about climate change affecting every ecosystem and critical services, such as electricity, water and health. Again, this is a different way of thinking about climate change than even two, three, four years ago.

The campaign to limit expansion of tar sands oil extraction is an example of a place where NRDC advocacy touches on the interaction between ethics and law. Tar sands are a form of carbon, bitumen, which is found deep under the Boreal forest in Canada. The oil industry strip mines it or drills it out of the earth, and turns it into gasoline and diesel. It is a newer form of much more carbon-intensive, water-intensive, damaging fuel which is why there is a major international campaign to fight it.

The Keystone XL pipeline would bring tar sands from Canada down to the Gulf Coast. When we started structuring the tar sands campaign eight or nine years ago, one of the major pillars was the issue of questioning the oil industry's social license to operate in such a damaging fashion, in addition to limiting market access for expanded tar sands production through tackling pipeline projects that would take tar sands overseas to new markets. Advocating around 'social license' is about shining a spotlight on the kind of harm that certain activities can do to raise the moral and ethical issues. It is trying to make sure that through that spotlight, which Professor Purdy discusses in his article in the context of agriculture, you end up developing a value system that in turn can lead to the political will that can in turn lead to changes in law and practice.

Of course moral and ethical concerns are best raised by the most credible voices. For example, we have worked with Nobel Peace Prize Laureates to write letters about the moral imperative to protect the climate and the rights of First Nations from tar sands expansion. We work closely with Canadian First Nations whose communities are directly affected by tar sands extraction, refining and transportation. We work closely with farming communities along the proposed pipeline pathway who are concerned about what an oil spill would mean. These are the communities on the frontline of the damage from tar sands extraction and transportation. Their voices have a moral weight based on how directly their families and communities are affected by fossil fuel development.

Another example is the divestment movement. The divestment movement is helping to change the way people think about fossil fuels, building a new moral vocabulary. In the divestment movement, which builds upon similar past movements such as the effort to abolish apartheid, front and center is whether people are going to walk the

talk and put their money where their values are. It is essentially a campaign about values.

Finally, an additional example is the climate change negotiations. In early 2014, Archbishop Desmond Tutu and Mary Robinson, who is the former High Commissioner for Human Rights, wrote an article in which they say that they come at this from a position of having a shared moral compass. They say climate change is on Europe's doorstep and Europe has to act now to set strong targets for a fair and strong climate agreement in 2015. This is, again, a case in which they are highlighting a direct connection between climate change and the values that it is threatening and making it a moral issue that leads to the need to change law.

In fact, there are indications that political will is changing as the urgency of tackling climate change becomes more clear. Every month we see new actions being taken to reduce climate pollution. The challenge will be to get the changes in political will that allow us to act quickly and on all fronts of clean and dirty energy decisions. If we take stock, we can point to new fuel efficiency standards that have reduced the demand for oil in the United States—a huge achievement. We also have pending carbon standards for existing power plants from EPA. In India, where NRDC does a lot of work, strong regulations are moving forward on solar energy and on energy efficiency. These could make a real difference. In China, in part because of the extreme air pollution threatening health as a core value, the government is looking very seriously at putting a cap on coal consumption. In addition, we have seen a strong movement internationally to stop public financing for coal from the international financial agencies. And, in the international discussions around how to limit the super greenhouse gases like HFCs, we are making steady progress. This progress would not be happening but for some of the changes we have seen in political will and in moral compass.

There is no question that so much more needs to be done and that the barriers are very high. We have an entrenched fossil fuel industry. We have an energy system around the world that depends very strongly on fossil fuels, and so even though there is an opportunity to switch to a clean energy economy, it is a difficult switch for the world to make. Indeed, when you look at political will, what is it except something that has its roots in our core values? Changing the vocabulary, changing the way we think and talk about climate change is critical for building that political will. And, political will is necessary, if we are to see that the most difficult changes in law take place that will allow us to address and curb greenhouse gas emissions at the same time that we deal with critical needs in terms of adaptation.

In summary, there are intense interactions between ethics and law that are happening in real time. Climate change presents a place of real opportunity and we are not passively watching. We are actively engaged now in using the connection between ethics and law to address climate change.



C O M M E N T

# Comments on *Our Place in the World: A New Relationship for Environmental Ethics and Law*

by W. David Bridgers and Chanelle A. Johnson

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In *Our Place in the World: A New Relationship for Environmental Ethics and Law*, Jedediah Purdy proposes a path for the reconciliation of environmental law and environmental ethics in order to cure the separation of the two that occurred shortly after the passage of the major pollution control statutes in the early 1970s. Purdy's thesis is that reconciliation is necessary to confront future environmental challenges. The article traces the history of "U.S. lawmaking around nature"<sup>1</sup> via changing moral and ethical vocabularies that shaped the human experience. Purdy carries the history forward to the late 1960s and early 1970s, a high-water mark of public commitment to protecting the environment. Although this "peculiar cultural moment"<sup>2</sup> was the impetus behind the passage of major environmental statutes,<sup>3</sup> that consensus quickly gave way to renewed conflict over nature's value and our relationship to it.<sup>4</sup> Environmental law and policymakers responded by seeking "neutral" standards to manage that conflict in the administration of the environmental laws and the formulation of environmental policy.<sup>5</sup> Their search for neutral standards led to the ascendancy of cost-benefit analysis (CBA) as the principal mode of environmental decisionmaking in the implementation of the environmental statutes.<sup>6</sup>

## I. The Issue

In *Our Place in the World*, Purdy laments the resort to CBA as the primary functional tool in policy and decisionmaking<sup>7</sup> and encourages the creation of a new way of thinking about environmental ethics. At various points in the paper,

Purdy identifies knowledge,<sup>8</sup> preservation/enhancement of natural processes,<sup>9</sup> experience,<sup>10</sup> and right to know<sup>11</sup> as possible new values with which to conceptualize environmental ethics and to acknowledge the value/rights of the environment. He argues that by recognizing the intrinsic value/rights of nature and ecology, we can create the perception that the environment matters in a "moral" sense, and trigger the aversion to harm similar to the aversion to the harm of persons. This, he believes, would remove environmental policy and decisionmaking from the realm of CBA.<sup>12</sup>

The issue with Purdy's argument is that he characterizes CBA as the inadequate alternative left over when environmental lawyers and policymakers turned away from the questions the ethicists were pursuing early in the modern environmental movement. By characterizing CBA as such, however, Purdy both recreates and illustrates the very dilemma that he seeks to resolve. Environmental ethics became artificially divorced from legal decisionmaking because of the conceptual distortion created by conceiving of the environment's rights as spontaneously created or existing in some regime separate from its relationship to us (what we will call "intrinsic right theory"). Environmental law and policy must necessarily be separate from environmental ethics when ethics is dominated by intrinsic right theory, because intrinsic right conceptualization leaves no room for decisionmaking beyond the determination of how to identify and vindicate those rights.

Below, we examine and dismiss three potential alternative sources of rights/value, and discuss why the rights and

1. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 887 (2013).

2. *Id.* at 886.

3. Including the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Clean Air Act (CAA). *See id.* at 866-69.

4. *Id.* at 861.

5. *See id.* (noting that the conflict between clashing values "motivated the search for neutral standards in administering environmental law").

6. *See id.* at 860-61.

7. *See id.* at 883 ("Environmental law needs ethics.").

8. *See id.* at 906.

9. *See id.* at 906 ("Another value for the food movement is work that preserves, even enhances, natural processes.").

10. *See id.* at 886 ("[T]he most important role of law in the development of environmental values may well be in shaping experience itself.").

11. *See id.* at 916 ("The most straightforward way to foster reflection on how we use animals would be to create a 'right to know' the sources of one's food.").

12. *See id.* at 930 ("One way this reformation might happen is through the development of ethical perceptions that can motivate a different set of personal and political responses to climate change.").

value of nature are necessarily dependent on, and conferred by, human actors (not within the “theatre of the mind”).<sup>13</sup> We then examine the five themes in ethical thought that, Purdy argues, inform the development of environmental values, all five of which fit within the paradigm of social-contract theory. Finally, we argue that the real distortion in environmental law occurred when the “value-givers” (i.e. the individual human citizens) were excluded from the binary arrangement of actors within the statutory scheme. Current environmental regulation pits industry against regulators, without a continuing role for the individual as value-giver. It is the removal of the individual who confers value from the ongoing dialogue within the regulatory scheme that causes the inadequacy of CBA with which Purdy grapples in his article.

## II. Origin of Rights

Any meaningful discussion about environmental policy-making must begin with the origin of the rights and value of nature and the environment. There are four possible sources of value/rights for any given entity: intrinsic, spiritual, reciprocal, and value-based.

Intrinsic value/rights can broadly be described as an entity having value and rights simply because it exists.<sup>14</sup> While attractive, this conceptualization of value and rights has no place in any sort of ethical engagement in a legal or policymaking arena. If nature has intrinsic rights<sup>15</sup> or value separate from the rights and values ascribed it by human actors,<sup>16</sup> any pollution or destruction of a naturally occurring phenomenon would be a violation of that entity’s rights. If policymakers are ethically prohibited from engaging in CBA, then the rights of environmental entities take primacy and the only question is how to prevent harm. Thus, unless we are prepared to cap all outfalls, desist from the purchase of any product that creates toxic effluents in its production, cease emitting carbon,<sup>17</sup> and no longer consume natural resources in any form, intrinsic rights theory can provide no useful guidance to environmental policymaking.

The second potential origin for environmental value/rights could be derived from a spiritual entity which has bestowed upon natural things a divine value and inalienable divine rights.<sup>18</sup> In this thought regime, the harm

caused by pollution or destruction is “bad” because of what it says about us as spiritual beings in a spiritual hierarchy. Again, however, this construct provides no meaningful way to guide the discussion of environmental ethics or environmental law. If value and rights are divinely determined, then the only reasonable mental exercise is to discern those rights and work to prevent their violation as a spiritual and moral imperative.<sup>19</sup> Much like the abolitionist approach in *The Omnivore’s Dilemma*,<sup>20</sup> these first two approaches are too polarized to provide any real way for ethics to engage in the environmental policy discussion or to reform currently existing environmental practices.

The third possible origin of value and rights is as a reciprocal arrangement between entities. We assume herein the well-worn contention that human value and human rights are a legal fiction created in order to protect certain areas from incursion by other individuals and/or government.<sup>21</sup> Whether these are divine<sup>22</sup> or exist purely as a part of a social contract,<sup>23</sup> the fact is that what we call “human rights” exist only vis-à-vis other individuals or government.<sup>24</sup> Indeed, these rights exist only because of the mutual recognition of the rights and value of each entity, and the executive functions ascribed to the parties therein.<sup>25</sup> One cannot, and in fact does not, have rights vis-à-vis nature. Because human rights are created by mutual recognition of entities, and those rights cannot be reciprocally recognized by nature, reciprocal recognition cannot be the source of nature’s rights.

Since we have discarded the ideas that environmental rights are intrinsic or divine as untenable, determined that reciprocity is impossible, and also that rights are neces-

13. See *id.* 873 (“[V]alue is a phenomenon in the human mind.”). *Contra id.* at 873 (“The mind is the theater, so to speak, in which we experience value; but that does not make the mind value’s source.”).

14. See *id.* at 865 (“Legal and moral concepts such as rights assumed that rights holders mattered, regardless of whether their existence satisfied any human preferences.”).

15. See Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 52 (1985) (explaining how, under a theory of intrinsic rights, “destruction [of an endangered species] would be condemned because the existence of the species is a good, and its destruction wrong, irrespective of consequences for the virtue or welfare of humans or for anything else.”).

16. See Purdy, *supra* note 1, at 871-72 (detailing the “ecocentric” view).

17. Suboptimal for continued health and well being of most carbon-based organisms.

18. See, e.g., ROBERT FILMER, *PATRIARCHA, OR THE NATURAL POWER OF KINGS* (Peter Laslet, ed., 1987) (arguing for the divine right of kings to rule).

19. As seen, for example, in many Christian abolitionist circles in antebellum America. See generally HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT: ABOLITIONISM AND AMERICAN RELIGION (John R. McKivigan ed., 1999).

20. See MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 319 (2006) (imagining “a whole platoon of animal people in chicken suits bent on breaking in and liberating the inmates” of industrial animal farms).

21. See THOMAS HOBBS, *LEVIATHAN* 80 (Ian Shapiro ed., 2010) (“From this Fundamental Law of Nature, by which men are commanded to endeavor Peace, is derived this second Law; *That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe as he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself.* For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war.”).

22. See William Uzgalis, *John Locke 4.2 Human Nature and Gods’ Purposes*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/locke/#SecIreGov> (noting John Locke’s argument in *The Second Treatise on Government* that man, since he was created by God and is therefore His property, “has not liberty to destroy himself,” and therefore must enter into a social contract to ensure this divine right to survival by means of health, liberty, and property).

23. See JEAN-JACQUES ROUSSEAU, *SOCIAL CONTRACT & DISCOURSES* 12 (G.D.H. Cole trans., 1946) (“The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.’ This is the fundamental problem of which the Social Contract provides the solution.”).

24. For example, one does not jail the perpetrator if a man is eaten by a bear. One cannot sue an earthquake.

25. An analogy can be drawn here to the Realist theoretical conception of the nation-state, which posits that a state exists only because of its existence and the prerogative that conveys (e.g., recognition of established border, autonomy of force within those borders, etc.).

sarily a construct created by sentient beings, then we, as humans, must be the source of these rights; and we confer these rights based on the environment's value to us, however defined. We determine value, we do not acknowledge it; but value is not necessarily, or even primarily, economic. Humans place value on many things, including other humans, and create a bundle of "rights" for an entity they choose to value (consider the "rights" of a corporation). Assuming, then, that we do not want all entities to have value parity, thus paralyzing *any* action, we must have a mechanism by which to hierarchically organize the value and the rights of various entities. That mechanism is CBA.

### III. The Five Themes

The ethical framework that Purdy proposes for reintegrating environmental ethics into law is comprised of five themes in ethical thought that inform the development of environmental values. Each of the five can be seen as an expression of the social contract through which we identify, acknowledge, and evolve rights. The reluctance to harm another, which he labels Hippocrates' Restraint, is a primary rationale for the social contract—we mutually agree not to harm one another to the individual benefit of all.<sup>26</sup> Solidarity, the sense of mutual obligation that helps bind us together,<sup>27</sup> is closely related to Hippocrates' Restraint and is also a core component of the social contract in that it discourages violation of the terms of the contract. Dignity and authenticity also flow from the social contract in that through the contract we reserve for ourselves that space. Similarly, we reserve for ourselves the space to respond aesthetically to the world. Finally, virtue ethics, which is concerned with our individual character as expressed through our actions, is a direct outgrowth of and expression of the social contract, for our conception of what constitutes virtuous behavior is a function of our understanding of our mutual rights and obligations to one another.

When applied to the environmental values setting, Purdy's framework can help structure the debate about our proper relationship to nature, what value we assign to nature, and how we integrate those into, and reconcile them with, the rights and obligations of the rest of society's actors. Significantly, in contrast to the sweeping theories of earlier environmental ethicists, who sought to discern timeless truths about nature and our place in it, experience-based environmental ethics is a dynamic conversation through which we constantly examine, challenge and refine our values based on our changing experiences.

### IV. The Effect

The problem, then, is not that environmental policymaking engages in CBA, it is that major environmental statutes, particularly the major pollution control statutes that were enacted at the high-water mark of public commitment to environmental protection, create a binary system that pits industry against regulators and leaves no continuing role for individual citizens. Indeed, the only way that individual values are part of the policymaking process is their codification within a given statute, typically as lofty goals or "statements of purpose." Even these imbedded values are by definition static and unchanging, and therefore cannot evolve and keep pace with the moral and value shifts of the population.<sup>28</sup> Without an ongoing participatory role for citizens within the environmental law and policymaking arena, we have essentially said to the two sides "you duke it out, and come to us with the result." This set-up ensures that *only the costs and benefits to the regulator and the regulated industry are considered*.

Democratic government ensures that popular morals and social values are constantly changing. As discussed above, it is the individual human citizen that both creates rights and confers value upon a non-human entity, i.e., nature. Without an established mechanism by which the individual citizen (who creates value) can participate as value-giver in the administration of environmental law and policy (which ideally reflects value), environmental ethics and laws will diverge exponentially.

The issue is not the use of CBA as a decisionmaking mechanism. In fact, as we have discussed above, unless we grant nature primacy, environmental law and policy must include some form of balancing of rights and interests. Rather, the issue that causes Purdy discomfort is that the value-givers have no ongoing role in the analysis. CBA can, and should, continue to be used, but a formal mechanism should be created to provide the value-givers a meaningful "seat at the table" during the implementation process. When that happens, environmental law will more closely reflect current moral thinking on environmental issues, and both the individual and current environmental ethical thinking will inform the administration of environmental law.

26. See Purdy, *supra* note 1, at 892-93.

27. See *id.* at 894-95.

28. To be certain, the statutes grant citizens varying degrees of participation through citizen suit provisions, rights to comment on and challenge prolonged regulation, and rights to know. See Clean Water Act, 33 U.S.C. §1365 (2012); Resource Conservation and Recovery Act, 42 U.S.C. §6972 (2012); Clean Air Act, 42 U.S.C. §7604 (2012); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9659 (2012). That participation, however, is bounded by the static statutory provisions that to some degree reflected the predominant environmental values at the time of enactment. Those provisions do not, however, grant citizens the right to bring to bear their evolving environmental priorities to reexamine the wisdom of the values embedded in the statutory provisions that guide the CBA process in individual cases.

H O N O R A B L E M E N T I O N

# Well-Being Analysis vs. Cost-Benefit Analysis

by John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur

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Every proposed law raises the question: Would its benefits outweigh its costs? To answer that question, lawmakers need a way of comparing seemingly incommensurable things like health and buying power. The most common method is to ask how much people are willing to pay for goods. This approach is called cost-benefit analysis (CBA), and it has long been the dominant method of systematic analysis for evaluating government policy. Despite CBA's prominence, it has been criticized harshly from the moment it was first required by executive order to the present day, and countless times in between.

In this Article, we propose an alternative method for comparing consequences of a law. This method, which we label "well-being analysis" (WBA), directly analyzes effects of proposed laws on people's quality of life. To make this a reality, a methodology must be created for using data from hedonic psychology to evaluate prospective laws.<sup>1</sup> We create such a methodology in this Article, and explain the way in which many of the flaws of CBA would be corrected by WBA.

## I. Well-Being Analysis

We propose here an alternative method for analyzing regulatory policy: well-being analysis (WBA). WBA shares the basic framework of CBA, but it differs in the data and tools it employs to make comparisons. Our contribution is to try to improve upon the way in which the welfare effects of a policy are measured.

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1. See John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583, 1628-41 (2010); Anthony Vitarelli, Note, *Happiness Metrics in Federal Rulemaking*, 27 YALE J. ON REG. 115, 133 (2010).

## A. The Core Advantage of WBA Over CBA

When someone buys a thing in the hope of improving her welfare, she makes a prediction about how the thing will affect her. That prediction may be wrong because people are not particularly good at making such predictions. By contrast, people are good at reporting how they feel right now. A decision tool will be better at approximating welfare if it is based on self-assessments of how people feel now than if it is based on predictions of how people will feel in the future. This is the central insight behind well-being analysis and its primary advantage over cost-benefit analysis.

## B. WBA: The Basic Framework

WBA utilizes individuals' personal assessments of well-being at a particular moment. Individuals' self-assessments indicate their level of subjective well-being (SWB). Psychologists and economists have developed sophisticated surveying and statistical methods enabling collection and analysis of well-being data on a large scale.<sup>2</sup> WBA uses these data to evaluate welfare consequences of regulations by comparing well-being gains and losses.

WBA relies on the same basic cost-benefit-weighting principle that undergirds CBA: all else equal, regulations whose benefits exceed their costs are valuable because they enhance overall welfare. Regulations involve both market and nonmarket costs and benefits. Nonmarket effects are difficult for CBA, because goods that are not normally assessed monetarily need to be given monetary values. WBA avoids many of these difficulties by looking directly to a regulation's effects on people's experiences and lives. In WBA, all effects of a regulation are hedonized, converted into units measuring their impact on the subjective well-being of the affected parties. The positive and negative hedonic impacts are the relevant costs and benefits.

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2. Daniel Kahneman et al., *Preface to WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY*, at ix, xii (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., 1999).

Instead of converting regulatory effects into monetary values, WBA converts them into well-being units (WBUs). WBUs are intended to be subjective, hedonic, cardinal, and interpersonally comparable units that indicate the degree of a person's happiness for a given period of time.

WBA maps a person's SWB onto a scale that would ideally run from -10 to 10, in which 10 indicates perfect happiness (subjectively defined), -10 indicates perfect misery, and 0 indicates neutrality or the absence of experience. This scale allows individuals to register experiences that are worse than nonexperience and simplifies the comparison between experience and nonexperience.

Each decile of the scale is equivalent and indicates a 10 percent change in the person's SWB. We treat the scale as identical across individuals, although the kinds of things that affect different individuals' SWB may not be. One WBU is equivalent to 1.0 on the scale for a period of one year. If a person lives to the age of 100 and has an SWB of 7.0 for each year, that person has experienced 700 WBUs (7.0 WBU/year × 100 years). If an event causes a person's SWB to drop from 7.0 to 5.5 for a period of 10 years, that person loses 15 WBUs (1.5 WBU/year × 10 years) over her lifetime. This scale enables the direct comparison of the hedonic impact of proposed policy changes.

WBA would analyze proposed laws in the same general fashion as CBA but with different analytical data. The results are likely to be different from those determined by CBA. For example, studies show individuals who lose limbs often adapt substantially to their new condition, recovering most of their lost happiness within a few years. This result is contrary to the predictions of healthy people.<sup>3</sup> Accordingly, the welfare benefits of the regulation may be overstated by CBA if contingent valuation or revealed preference surveys rely on mispredictions about hedonic adaptation.

### C. The Data of WBA

Social scientists have long been attracted to the idea of measuring human welfare directly, but they have had difficulty securing valid, reliable data. WBA is now feasible because new social science techniques have emerged.

1. *Life Satisfaction Surveys.* The oldest method of measuring SWB is the life satisfaction survey. Respondents answer questions such as, "How satisfied with your life are you these days?"<sup>4</sup> on a scale ranging from "not very happy" to "very happy." Using analyses controlling for different circumstances, researchers estimate the strength of the correlations between SWB and other factors. Life satisfaction surveys are

3. Peter A. Ubel et al., *Disability and Sunshine: Can Hedonic Predictions Be Improved by Drawing Attention to Focusing Illusions or Emotional Adaptation?*, 11 J. EXPERIMENTAL PSYCHOL.: APPLIED 111, 111 (2005).

4. See William Pavot & Ed Diener, *Review of the Satisfaction With Life Scale*, 5 PSYCHOL. ASSESSMENT 164, 164 (1993).

most valuable as sources of large-scale data and of longitudinal data about changes in SWB over time.

2. *Experience Sampling Methods.* Researchers sought to overcome the limitations of life satisfaction surveys by developing techniques enabling them to more directly measure people's emotions while those emotions are being experienced. The gold standard of such measures is the experience sampling method (ESM), which uses handheld computers and iPhones to survey people about experiences.

3. *The Quality of Well-Being Data.* Meta-analyses of different SWB measurement tools have found high levels of reliability for both life satisfaction and experience sampling methods. Well-being measures also tend to be fairly stable over time and exhibit high test-retest reliability.<sup>5</sup> But despite their overall stability, they are sensitive to changes in life circumstances. Moreover, well-being scales can detect the relative magnitude of life events.<sup>6</sup>

4. *Criticisms of Well-Being Data.* Defenders of CBA have raised a number of objections to well-being data. Most importantly, they claim that well-being data lack interpersonal cardinality because individuals may interpret scales differently.<sup>7</sup> However, this claim neglects the point that variations among individuals in how they rate happiness are likely to be random, not biased, and that these random variations should wash out across large numbers of people.<sup>8</sup> Further, cost-benefit analysis is equally subject to concerns about cardinality. Two individuals with differing levels of personal wealth can obtain vastly different amounts of welfare from the same gain of income.

## II. Willingness to Pay and Well-Being

Cost-benefit analysis relies upon measures of how much individuals are willing to pay to acquire benefits or avoid harms.<sup>9</sup> These so-called "willingness to pay" measures are determined in two ways. In some cases, economists attempt to measure individual valuations through studies of revealed preferences.<sup>10</sup> In other cases, economists rely upon surveys that ask respondents hypothetically how

5. See Ed Diener & Richard E. Lucas, *Personality and Subjective Well-Being*, in WELL-BEING, *supra* note 2, at 213, 213-14.

6. See Andrew J. Oswald & Nattavudh Powdthavee, *Does Happiness Adapt? A Longitudinal Study of Disability With Implications for Economists and Judges*, 92 J. PUB. ECON. 1061, 1066 (2008).

7. See Matthew Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J. LEGAL STUD. S253, S280-81.

8. See Rafael Di Tella & Robert MacCulloch, *Some Uses of Happiness Data in Economics*, J. ECON. PERSP., Winter 2006, at 25, 29-32.

9. Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 945 (2000).

10. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 76 (1995).

much they would be willing to pay to procure a particular benefit.

Both revealed preference studies and contingent valuation studies are fraught with difficulties. These difficulties are widely cited as undermining the validity and reliability of CBA. WBA would ameliorate or eliminate many of the difficulties endemic to willingness-to-pay measures.

CBA has great difficulties in pricing costs and benefits via either revealed preference or contingent valuation studies. This is significant because the pricing of nonmonetary goods is essential to CBA. Nearly every governmental regulation will produce some nonmonetary benefits and costs, and in many cases, nonmonetary benefits form the entire basis for the regulation. The difficulties inherent in converting costs and benefits to dollars limit the accuracy and usefulness of CBA.

WBA has no such problem. WBA simply adds up the positive experiences of life that individuals stand to lose or gain under a given project. Although WBA's process is imperfect in practice, relying on estimated outcomes is as

much a feature of CBA or anything else as it is of WBA: no one can predict the future with certainty. The only unique disadvantage of WBA is its reliance on self-reports as proxies, but that imperfection is outweighed by those of CBA, which uses proxies such as the wage premium that are far more removed from actual well-being.

### **III. Conclusion**

CBA persists because no compelling rival has emerged to replace it. We offer well-being analysis as an alternative. Instead of introducing the distortions created by using money as a proxy for people's quality of life, WBA analyzes that quality directly. Although WBA is not meant to answer the ultimate question of what policies should be chosen, it improves upon CBA in assessing policies' effects on the quality of human life. The question is not whether WBA is perfect—no tool of social policy is—but rather whether it constitutes an improvement upon the status quo. The answer may well be yes.

H O N O R A B L E M E N T I O N

# Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch

by Alexandra B. Klass and Elizabeth J. Wilson

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It is impossible to talk about developing renewable energy resources in the United States, especially wind power, without also talking about developing electric transmission infrastructure. New transmission lines are needed to link dispersed renewable energy resources with electric load centers, but the traditional approach to transmission planning and siting is ineffective—and, in some cases, obsolete. A new approach to integrate sources of renewable energy into the transmission grid is necessary. This Article addresses the regional- and state-level challenges of planning, siting, and paying for large-scale transmission lines to support renewable energy development. We favor a shift away from single state authority for interstate transmission siting, which would recognize the regional and national nature of today's transmission grid. Such a shift could result from the following policy adoptions: (1) enhanced federal siting authority for interstate transmission lines; (2) a more limited “process preemption” approach to transmission siting, modeled after the Telecommunications Act of 1996 (“TCA”); (3) additional incentives for states to join interstate, regional compacts with permitting authority for interstate transmission; and (4) enhanced authority to spread the cost of transmission over larger areas.

## I. Renewable Energy and the Electric Transmission Grid

In the absence of comprehensive federal policies to reduce greenhouse gas emissions and with few federal policies to require renewable energy development, states have taken

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an active role in developing their own policies to promote renewable energy. Thirty-eight states currently have adopted renewable portfolio standards (“RPSs”), alternative energy portfolios, or voluntary goals to spur additional renewable energy development. Many states have additional policies to promote renewable energy such as renewable energy credits, feed-in tariffs, tax incentives, and taxes.

Historically, just a small fraction of electricity produced in the United States was generated from renewable energy sources. After 2005, growth in renewable energy—primarily wind power—increased significantly, with non-hydro-power renewable energy in 2011 accounting for 5% of all electricity nationwide and over 10% in several states. There are currently over 60,000 megawatts of installed wind power, and that scale is having a demonstrable effect on transmission planning and decisions in certain regions.

Unlike traditional forms of energy, wind energy is variable in that wind turbines only produce power when the wind blows. Because electricity cannot be easily stored, the generated electricity must match electricity demand. While small amounts of wind energy can be integrated into the existing grid, large amounts of wind energy in the system require new approaches to manage and integrate variable wind power on the grid.

Moreover, as the best wind resources are often located far from electricity demand centers, bringing wind resources to market involves an expansion of the interstate electric transmission grid. While the “first generation” of wind development was often sited where transmission capacity was available, “second-generation” wind development requires new, interstate transmission lines that connect areas of commercially viable wind resource to the grid. Just as importantly, unlike traditional sources of electric power that can be transported to demand centers by rail, truck, or pipeline, wind resources can currently be transported to demand centers *only* through transmission lines. This makes grid expansion absolutely critical to a significant increase in the utilization of wind resources in this country.

## II. Transmission Policy in the Twenty-First Century

In the contiguous United States, there are three separate grids or subregions—the Eastern Interconnection, the Western Interconnection, and the grid serving Texas—yet most of the planning, siting, and approvals of transmission lines are managed by state-level public utility commissions. Congress has given the Federal Energy Regulatory Commission (“FERC”) only limited authority over the siting of transmission lines that are not on federal lands and, for the most part, stakeholders and the courts have thwarted recent efforts by FERC to exercise its siting authority. Most recently, Congress passed the Energy Policy Act of 2005 (“EPAAct 2005”), which established national interest electric transmission corridors, federal “backstop” siting authority, and a framework for interstate compacts. Although many hoped this additional federal authority would have a significant impact on overcoming roadblocks to transmission siting, the actual impact has been extremely limited to date.

The states, by contrast, currently exercise the bulk of authority over transmission line siting. For the most part, each state manages its own siting procedures for transmission lines, with some regional cooperation and limited federal oversight, and then interacts with the regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) where applicable,<sup>1</sup> with regard to grid management. Because siting and permitting authority for transmission lines continue to rest primarily with the states, it is impossible to talk about renewable energy or interstate transmission without placing a significant focus on state action.<sup>2</sup>

Several states in the Midwest are leaders in developing both wind energy and regional transmission to integrate wind energy into the transmission system. Minnesota, North Dakota, and Iowa in particular have experienced rapid development of renewable energy projects. Renewable energy development in these three states appears to be a function of abundant wind resources coupled with individual state policies to encourage renewable energy development by either setting state mandates (Minnesota), providing generous tax credits (Iowa and North Dakota), or encouraging development of wind for export (Iowa and North Dakota). In order to realize such growth, utilities in those states as well as developers in other states have collaborated and invested to create new, interstate trans-

mission lines and to distribute that power both within the Midwest and to eastern states that, for the most part, have had much more difficulty siting new transmission lines. In doing so, the states and the utilities within those states are creating the groundwork for new regional networks to form. If states reach a comfort level with such regional cooperation, perhaps a transfer of some authority to a defined regional entity with regard to planning, siting, or both is politically feasible.

The federal government has also encouraged states and utilities within states to participate in regional collaborations for planning new transmission lines—and many utilities and states have done so. Although participation in these regional organizations is currently voluntary, they have begun to play a more central role in recent years in transmission planning and grid operating. The Midcontinent ISO (“MISO”)<sup>3</sup> is the RTO covering a region of mid-western and southern states including Minnesota, North Dakota, and Iowa. In total, the MISO footprint serves over 48 million people.<sup>4</sup>

While MISO does not have the ability to itself adopt or impose an RPS or site transmission lines, it has engaged in regional transmission planning that recognizes and supports state RPS policies. For instance, the Upper Midwest Transmission Development Initiative was a subregional MISO planning effort initiated by the governors of Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin to identify renewable energy zones (“REZs”) and associated transmission needs in the Upper Midwest. The creation of REZs is significant because they were approved by each state and thus allowed MISO to engage in long-term planning of zones that already had state support. Also in 2010, MISO proposed a Multi Value Project (“MVP”) pricing model, which was designed in part to encourage investment in transmission by facilitating the ability of investors to recoup costs. After consideration, FERC approved the MVP model in December 2010, and the MISO Board approved the projects in December 2011.<sup>5</sup> The pricing model allows regional oriented projects to have their costs allocated across the MISO region on a “postage stamp” (load-ratio share) basis.

## III. New Directions for Transmission Policy

In light of the current regulatory regime, there are significant obstacles associated with creating large-scale systems that span many jurisdictions. Some of these challenges include transmission siting and permitting structures that exist primarily at the state level; lack of robust federal authority or regional coordinating authority to plan and site transmission infrastructure when states fail to

1. RTOs and ISOs are voluntary organizations authorized by FERC to manage the grid and regional markets for wholesale power for most of the country's population. But many states are not part of a RTO or an ISO.

2. In this excerpt, we focus primarily on wind energy and transmission line siting in states and regions in the Midwest, examining the recent renewable energy-related transmission projects in Minnesota, North Dakota, and Iowa and discussing a regional effort to plan for transmission and share costs by the Midcontinent ISO service territory. In the full version of our article, we discuss wind energy and transmission line siting in two additional key regions: California and Oregon, and Texas. We also discuss regional planning by more loosely formed power organizations in the West, specifically the Western Electricity Coordinating Council and the Western Area Power Administration.

3. MISO was formerly known as the Midwest ISO.

4. MISO *At a Glance*, MIDCONTINENT ISO (Nov. 2013), available at [https://www.misoenergy.org/Library/Repository/Communication%20Material/Corporate/At-A-Glance/2013\\_At\\_A\\_Glance.pdf](https://www.misoenergy.org/Library/Repository/Communication%20Material/Corporate/At-A-Glance/2013_At_A_Glance.pdf).

5. The U.S. Court of Appeals for the Seventh Circuit affirmed FERC's decision to approve the MVP model. *See* Ill. Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013).



approve projects as a result of citizen opposition, politics, or cost; and difficulty in determining which electricity users should pay for new transmission lines, particularly where those lines need to be built in states with significant wind resources, small populations, and low electricity demand.

Clean energy advocates as well as some state utility regulators look to federal preemption of state siting authority as a way to break down current barriers to developing interstate transmission lines to meet state renewable energy goals.<sup>6</sup> Beyond the backstop authority that Congress granted FERC in the EAct 2005, however, Congress declined to expand FERC authority over the siting of transmission lines. Although members of Congress have introduced bills in recent years to strengthen FERC's backstop authority, passage of any of these or similar bills is unlikely at the present time. However, other options include a "process preemption" approach using the current federal model for siting cell phone towers under the TCA, or a movement toward regional collaborations such as interstate compacts with an ultimate transfer of at least some state siting authority to regional organizations through interstate compacts or other legal mechanisms.

The TCA provides a model for the siting of cell phone towers that leaves siting authority in local hands, but constrains local decision-making and provides federal remedies for those who are denied approval. Thus, its siting policy partially preempts the state siting process but without disempowering state and local governments, balancing local concerns against broader national interests. This so-called "process preemption" retains a mix of federal and state control for the siting processes, preventing state or local authorities from banning facilities outright or discriminating among providers.<sup>7</sup> Authorities are required to respond to siting requests within a reasonable period of time and decisions must be in writing and supported by substantial evidence.

Although the TCA provides one model of federal siting authority that Congress could adopt or modify in order to encourage transport of renewable energy from resource-rich states to population centers, Congressional adoption of such a model is unlikely until the country is faced with a significant transmission crisis, major blackouts, or both. In the meantime, however, states, groups of states, and RTOs can use their own tools to encourage more effective interstate transmission development. As noted earlier, although RTOs such as MISO are already engaged in interstate transmission line *planning*, the authority for actual *siting* of lines remains with the states. There is an opportunity through the EAct 2005, however, to create regional transmission-siting agencies through interstate compacts. The EAct 2005 authorized three or more contiguous states to enter into an interstate compact, subject to approval by Congress, which would establish a regional transmission-

siting agency to determine need for future electric transmission facilities within those states and to carry out the transmission-siting responsibilities of those states. Under the law, the regional transmission-siting agency would have authority to "review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States)."<sup>8</sup>

So far, no states have entered into such compacts. But if states were to do so, it could allow for better and more efficient planning and construction of transmission lines, particularly regional transmission lines. Unfortunately, there are few successful models in this area for states to follow. In one notable example, Congress granted states power to site low-level radioactive waste disposal facilities individually or through interstate compacts, but the process resulted in no new waste facilities. One can certainly argue that transmission lines, while not generally welcome in a community, do not raise the same public health, environmental, and safety concerns as nuclear waste facilities. Nevertheless, the difficulty that states have faced in siting transmission lines during the past decades does raise questions over whether an interstate compact approach will be effective without significant financial incentives or penalties.

Another limitation of the interstate compact framework is that regional transmission-siting agencies do not possess eminent domain authority. Thus, even if a regional transmission-siting agency approved a project, it would still have to utilize state eminent domain authority to acquire easements from potential "holdouts." A better solution would be to vest federal eminent domain authority in the regional transmission-siting agency, and streamline the siting process such that permits and approvals obtained through the process also provide eminent domain authority to the regional agency. This would allow for concurrent planning and siting authority at the level where transmission-facility management occurs.

Meanwhile, the question of cost allocation underlies virtually all debates surrounding regulatory authority for siting interstate transmission lines. Benefits of new transmission lines may be hard to estimate, and some entities may feel that they are paying more for a line than they will gain in benefits. Sometimes costs may be spread across a RTO, but benefits might be conferred upon neighboring regions that do not have to pay. In light of this, different regions in the United States have taken different approaches to allocating transmission costs for large-scale transmission upgrades.

The most promising development has been the recently approved MISO MVP plan, discussed in Part II. MISO's MVP plan recognizes that benefits accrue not just due to reliability and economic impacts, but also due to the achievement of various state and regional policy goals and mandates such as RPSs. Not only did FERC approve the MISO MVP pricing, it endorsed similar cost-allocation

6. An obvious potential model is the federal structure in place for interstate natural gas pipelines, where FERC (or its predecessor agencies) has served as the primary siting authority for over sixty years.

7. Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1090 (2009) (quoting 47 U.S.C. §332(c)(7)(B)(i) (2006)).

8. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, §216(i) (codified at 16 U.S.C. §824p (2006)).

principles on a nationwide basis in its landmark Order 1000.<sup>9</sup> As it stands, all indicators are that the MVP pricing model may be the best plan to date to facilitate transmission line build-out and to meet renewable energy needs.

#### **IV. Conclusion**

Developing the interstate electricity transmission infrastructure necessary to significantly increase renewable energy use in this country is a challenge of massive proportions. While the technological choices are well understood,

implementing them requires policy development and implementation on the state, regional, and federal levels. This Article highlights current state and regional efforts to create greater interstate transmission capacity for renewable power. It shows that they may serve as models for the increased collaboration required to create that capacity and realize the attendant benefits. These developments illustrate how states are attempting to serve as “laboratories of democracy” in the realm of interstate transmission; to achieve success, however, they must do so cooperatively rather than independently.

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9. See FERC Order 1000, 76 Fed. Reg. 49842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

# RECENT DEVELOPMENTS

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## In the Congress

“In the Congress” entries cover activities reported in the *Congressional Record* from June 1, 2014, through June 30, 2014. 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://www.elr.info/legislative>.

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### Public Laws

**S. 611 (land use)**, which makes a technical amendment to the T’uf Shur Bien Preservation Trust Area Act, was signed into law on June 9, 2014. 160 Cong. Rec. D639, Pub. L. No. 113-119 (daily ed. June 11, 2014).

**H.R. 724 (air)**, which amends the CAA to remove the requirement for dealer certification of new light-duty motor vehicles, was signed into law on June 9, 2014. 160 Cong. Rec. D638, Pub. L. No. 113-109 (daily ed. June 11, 2014).

**H.R. 862 (land use)**, which would authorize the conveyance of two small parcels of land within the boundaries of the Coconino National Forest containing private improvements that were developed based upon the reliance of the landowners in an erroneous survey conducted in May 1960, was signed into law on May 24, 2014. 160 Cong. Rec. D588, Pub. L. No. 113-107 (daily ed. June 2, 2014).

**H.R. 3080 (water)**, which provides for improvements to the rivers and harbors of the United States and for the conservation and development of water and related resources, was signed into law on June 10, 2014. 160 Cong. Rec. D639, Pub. L. No. 113-121 (daily ed. June 11, 2014).

**H.R. 4032 (wildlife)**, which exempts from the Lacey Act Amendments of 1981 certain water transfers by the North Texas Municipal Water District and the Greater Texoma Utility Authority, was signed into law on June

9, 2014. 160 Cong. Rec. D638-39, Pub. L. No. 113-117 (daily ed. June 11, 2014).

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### Chamber Action

**S. 1254 (wildlife)**, which would amend the Harmful Algal Blooms and Hypoxia Research and Control Act of 1998, was passed by the House. 160 Cong. Rec. H5072 (daily ed. June 5, 2014).

**S. 1603 (governance)**, which would reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, was passed by the Senate. 160 Cong. Rec. S3884 (daily ed. June 19, 2014).

**S. 2086 (energy)**, which would address current emergency shortages of propane and other home heating fuels and would provide greater flexibility and information for governors to address such emergencies in the future, was passed by the House. 160 Cong. Rec. H5602 (daily ed. June 23, 2014).

**H.R. 6 (natural resources)**, which would provide for expedited approval of exportation of natural gas to World Trade Organization countries, was passed by the House. 160 Cong. Rec. H5741 (daily ed. June 25, 2014).

**H.R. 412 (water)**, which would amend the Wild and Scenic Rivers Act to designate segments of the mainstem of the Nashua River and its tributaries in Massachusetts for study for potential addition to the National Wild and Scenic Rivers System, was passed by the

House. 160 Cong. Rec. H5609 (daily ed. June 23, 2014).

**H.R. 3786 (land use)**, which would direct the Administrator of General Services, on behalf of the Archivist of the United States, to convey certain federal property located in Alaska to the municipality of Anchorage, Alaska, was passed by the House. 160 Cong. Rec. H5379 (daily ed. June 17, 2014).

**H.R. 4092 (energy)**, which would amend the Energy Policy and Conservation Act to establish the Office of Energy Efficiency and Renewable Energy as the lead federal agency for coordinating federal, state, and local assistance provided to promote the energy retrofitting of schools, was passed by the House. 160 Cong. Rec. H5602 (daily ed. June 23, 2014).

**H.R. 4801 (energy)**, which would require the Secretary of Energy to prepare a report on the impact of thermal insulation on both energy and water use for potable hot water, was passed by the House. 160 Cong. Rec. H5606 (daily ed. June 23, 2014).

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### Committee Action

**S. 51 (wildlife)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-183, 160 Cong. Rec. S3474 (daily ed. June 5, 2015). The bill would reauthorize and amend the National Fish and Wildlife Foundation Establishment Act.

**S. 212 (land use)** was reported by the Committee on Environment and

Public Works. S. Rep. No. 113-184, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would approve the transfer of Yellow Creek Port properties in Iuka, Mississippi.

**S. 224 (water)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-185, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would amend the Federal Water Pollution Control Act to establish a grant program to support the restoration of San Francisco Bay.

**S. 364 (land use)** was reported by the Committee on Energy and Natural Resources. S. Rep. No. 113-177, 160 Cong. Rec. S3341 (daily ed. June 2, 2014). The bill would establish the Rocky Mountain Front Conservation Management Area, designate certain federal land as wilderness, and improve the management of noxious weeds in the Lewis and Clark National Forest.

**S. 491 (waste)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-186, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would amend CERCLA to modify provisions relating to grants.

**S. 741 (water)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-187, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would extend the authorization of appropriations to carry out approved wetlands conservation projects under the North American Wetlands Conservation Act through fiscal year 2017.

**S. 969 (wildlife)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-188, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would amend the Neotropical Migratory Bird Conservation Act to reauthorize the Act.

**S. 974 (land use)** was reported by the Committee on Energy and Natural Resources. S. Rep. No. 113-178, 160 Cong. Rec. S3341 (daily ed. June 2, 2014). The bill would provide for certain land conveyances in Nevada.

**S. 1077 (water)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-189, 160 Cong.

Rec. S3474 (daily ed. June 5, 2014). The bill would amend the Chesapeake Bay Initiative Act of 1998 to provide for the reauthorization of the Chesapeake Bay Gateways and Watertrails Network.

**S. 1080 (natural resources)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-190, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would amend and reauthorize certain provisions relating to Long Island Sound restoration and stewardship.

**S. 1300 (natural resources)** was reported by the Committee on Energy and Natural Resources. S. Rep. No. 113-179, 160 Cong. Rec. S3341 (daily ed. June 2, 2014). The bill would amend the Healthy Forests Restoration Act of 2003 to provide for the conduct of stewardship end-result contracting projects.

**S. 1301 (natural resources)** was reported by the Committee on Energy and Natural Resources. S. Rep. No. 113-180, 160 Cong. Rec. S3341 (daily ed. June 2, 2014). The bill would provide for the restoration of forest landscapes, protection of old growth forests, and management of national forests in the eastside forests of Oregon.

**S. 1451 (wildlife)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-191, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would provide for environmental restoration activities and forest management activities in the Lake Tahoe Basin and amend Title 18 of the U.S. Code to prohibit the importation or shipment of quagga mussels.

**S. 1603 (governance)** was reported by the Committee on Indian Affairs. S. Rep. No. 113-194, 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill would reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians.

**S. 2080 (wildlife)** was reported by the Committee on Environment and Public Works. S. Rep. No. 113-192, 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill would conserve fish and aquatic communities in the United States.

**H.R. 6 (natural resources)** was reported by the Committee on Energy and Commerce. H. Rep. No. 113-477, 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill would provide for expedited approval of exportation of natural gas to World Trade Organization countries.

**H.R. 83 (energy)** was reported by the Committee on Energy and Commerce. H. Rep. No. 113-483, 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill would require the Secretary of the Interior to assemble a team of technical, policy, and financial experts to address the energy needs of the insular areas of the United States and the Freely Associated States through the development of action plans aimed at reducing reliance on imported fossil fuels and increasing use of indigenous clean energy resources.

**H.R. 524 (water)** was reported by the Committee on Transportation and Infrastructure. H. Rep. No. 113-485, 160 Cong. Rec. H5596 (daily ed. June 20, 2014). The bill would amend the Federal Water Pollution Control Act to clarify that the Administrator of EPA does not have the authority to disapprove a permit after it has been issued by the Secretary of the Army under CWA §404.

**H.R. 935 (water)** was reported by the Committee on Transportation and Infrastructure and the Committee on Agriculture. H. Rep. No. 113-467, 160 Cong. Rec. H5068 (daily ed. June 2, 2014). The bill would amend FIFRA and the Federal Water Pollution Control Act to clarify congressional intent regarding the regulation of the use of pesticides in or near navigable waters.

**H.R. 2208 (water)** was reported by the Committee on Natural Resources. H. Rep. No. 113-501, 160 Cong. Rec. H5823 (daily ed. June 30, 2014). The bill would extend the authorization of appropriations for allocations to carry out approved wetlands conservation projects under the North American Wetlands Conservation Act through fiscal year 2017.

**H.R. 2388 (governance)** was reported by the Committee on Indian Affairs. S. Rep. No. 113-197, 160 Cong. Rec. H3935 (daily ed. June 24, 2014). The

bill would take certain federal lands located in El Dorado County, California, into trust for the benefit of the Shingle Springs Band of Miwok Indians.

**H.R. 2569 (water)** was reported by the Committee on Natural Resources. H. Rep. No. 113-502, 160 Cong. Rec. H5823 (daily ed. June 30, 2014). The bill would amend the Wild and Scenic Rivers Act to designate segments of the Missisquoi River and the Trout River in Vermont as components of the National Wild and Scenic Rivers System.

**H.R. 2687 (land use)** was reported by the Committee on Natural Resources. H. Rep. No. 113-503, 160 Cong. Rec. H5823 (daily ed. June 30, 2014). The bill would amend the National Historic Preservation Act to provide that if the head of the agency managing federal property objects to the inclusion of certain property on the National Register or its designation as a National Historic Landmark for reasons of national security, the federal property shall be neither included nor designated until the objection is withdrawn.

**H.R. 3301 (natural resources)** was reported by the Committee on Energy and Commerce. H. Rep. No. 113-482, 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill would require approval for the construction, connection, operation, or maintenance of oil or natural gas pipelines or electric transmission facilities at the national boundary of the United States for the import or export of oil, natural gas, or electricity to or from Canada or Mexico.

**H.R. 4017 (land use)** was reported by the Committee on Natural Resources. H. Rep. No. 113-505, 160 Cong. Rec. H5823 (daily ed. June 30, 2014). The bill would designate a peak located in Nevada as "Mount Reagan."

**H.R. 4092 (energy)** was reported by the Committee on Energy and Commerce. H. Rep. No. 113-479, 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill would amend the Energy Policy and Conservation Act to establish the Office of Energy Efficiency and Renewable Energy as the lead federal agency for coordinating federal, state, and local assistance provided to promote the energy retrofitting of schools.

**H.R. 4801 (water)** was reported by the Committee on Energy and Commerce. H. Rep. No. 113-489, 160 Cong. Rec. H5639 (daily ed. June 23, 2014). The bill would require the Secretary of Energy to prepare a report on the impact of thermal insulation on both energy and water use for potable hot water.

**H.R. 4923 (governance)** was reported by the Committee on Appropriations. H. Rep. No. 113-486, 160 Cong. Rec. H5597 (daily ed. June 20, 2014). The bill would make appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2015.

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## Bills Introduced

**S. 2414 (McConnell, R-Ky.) (air)** would amend the CAA to prohibit the regulation of emissions of carbon dioxide from new or existing power plants under certain circumstances. 160 Cong. Rec. S3367 (daily ed. June 3, 2014). The bill was referred to the Committee on Environment and Public Works.

**S. 2427 (Barrasso, R-Wyo.) (water)** 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 designate the Bureau of Reclamation as the lead agency for permit processing. 160 Cong. Rec. S3424 (daily ed. June 2, 2014). The bill was referred to the Committee on Energy and Natural Resources.

**S. 2433 (Markey, D-Mass.) (natural resources)** would provide assistance to Ukraine to reduce the dependence of Ukraine on imports of natural gas from the Russian Federation. 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill was referred to the Committee on Foreign Relations.

**S. 2440 (Udall, D-N.M.) (land use)** would expand and extend the program to improve permit coordination by BLM. 160 Cong. Rec. S3474 (daily ed.

June 5, 2014). The bill was referred to the Committee on Energy and Natural Resources.

**S. 2442 (Walsh, D-Mont.) (governance)** would direct the Secretary of the Interior to take certain land and mineral rights on the reservation of the Northern Cheyenne Tribe of Montana and other culturally important land into trust for the benefit of the Northern Cheyenne Tribe. 160 Cong. Rec. S3474 (daily ed. June 5, 2014). The bill was referred to the Committee on Indian Affairs.

**S. 2457 (Cardin, D-Md.) (water)** would require states to establish high-way stormwater management programs. 160 Cong. Rec. S3544 (daily ed. June 10, 2014). The bill was referred to the Committee on Environment and Public Works.

**S. 2464 (Johnson, D-S.D.) (wildlife)** would adopt the bison as the national mammal of the United States. 160 Cong. Rec. S3604 (daily ed. June 11, 2014). The bill was referred to the Committee on Judiciary.

**S. 2465 (Udall, D-N.M.) (governance)** would require the Secretary of the Interior to take into trust four parcels of federal land for the benefit of certain Indian Pueblos in New Mexico. 160 Cong. Rec. S3604 (daily ed. June 11, 2014). The bill was referred to the Committee on Indian Affairs.

**S. 2470 (Udall, D-N.M.) (water)** would provide for drought relief measures in New Mexico. 160 Cong. Rec. S3668 (daily ed. June 12, 2014). The bill was referred to the Committee on Energy and Natural Resources.

**S. 2479 (Reid, D-Nev.) (land use)** would provide for a land conveyance in Nevada. 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill was referred to the Committee on Indian Affairs.

**S. 2480 (Reid, D-Nev.) (land use)** would require the Secretary of the Interior to convey certain federal land to Elko County, Nevada, and to take land into trust for certain Indian tribes. 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill was referred to the Committee on Indian Affairs.

**S. 2482 (Begich, D-Alaska) (wildlife)** would implement the Convention on the Conservation and Management of the High Seas Fisheries Resources in the North Pacific Ocean, as adopted at Tokyo on February 24, 2012. 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill was referred to the Committee on Commerce, Science, and Transportation.

**S. 2484 (Schatz, D-Haw.) (wildlife)** would implement the Convention on the Conservation and Management of the High Seas Fishery Resources in the South Pacific Ocean, as adopted at Auckland on November 14, 2009. 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill was referred to the Committee on Commerce, Science, and Transportation.

**S. 2485 (Markey, D-Mass.) (wildlife)** would implement the amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, as adopted at Lisbon on September 28, 2007. 160 Cong. Rec. S3719 (daily ed. June 17, 2014). The bill was referred to the Committee on Commerce, Science, and Transportation.

**S. 2494 (Udall, D-Colo.) (natural resources)** would expedite applications to export natural gas and would require the public disclosure of liquefied natural gas export destinations. 160 Cong. Rec. S3811 (daily ed. June 18, 2014). The bill was referred to the Committee on Energy and Natural Resources.

**S. 2496 (Barrasso, R-Wyo.) (water)** would preserve existing rights and responsibilities with respect to waters of the United States. 160 Cong. Rec. S3863 (daily ed. June 19, 2014). The bill was referred to the Committee on Environment and Public Works.

**S. 2503 (Flake, R-Ariz.) (governance)** would direct the Secretary of the Interior to enter into the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, provide for the lease of certain land located within Planet Ranch on the Bill Williams River in Arizona to benefit the Lower Colorado River Multi-Species Conservation Pro-

gram, and provide for the settlement of specific water rights claims in the Bill Williams River Watershed in Arizona. 160 Cong. Rec. S3863 (daily ed. June 19, 2014). The bill was referred to the Committee on Indian Affairs.

**S. 2508 (Menendez, D-N.J.) (energy)** would establish a comprehensive U.S. government policy to assist countries in sub-Saharan Africa to improve access to and the affordability, reliability, and sustainability of power. 160 Cong. Rec. S3863 (daily ed. June 19, 2014). The bill was referred to the Committee on Foreign Relations.

**S. 2514 (Flake, R-Ariz.) (air)** would amend the CAA to delay the review and revision of NAAQS for ozone. 160 Cong. Rec. S3938 (daily ed. June 24, 2014). The bill was referred to the Committee on Environment and Public Works.

**S. 2526 (Flake, R-Ariz.) (air)** would amend the CAA with respect to exceptional event demonstrations. 160 Cong. Rec. S4003 (daily ed. June 25, 2014). The bill was referred to the Committee on Environment and Public Works.

**H.R. 4785 (Daines, R-Mont.) (natural resources)** would amend the Internal Revenue Code of 1986 to extend and improve the Indian coal production tax credit. 160 Cong. Rec. H5063 (daily ed. May 30, 2014). The bill was referred to the Committee on Ways and Means.

**H.R. 4790 (Hastings, D-Fla.) (wildlife)** would amend Title 23 of the U.S. Code to encourage and facilitate efforts by states and other transportation rights-of-way managers to adopt integrated vegetation management practices, including enhancing plantings of native forbs and grasses that provide habitats and forage for Monarch butterflies and other native pollinators and honey bees. 160 Cong. Rec. H5063 (daily ed. May 30, 2014). The bill was referred to the Committee on Transportation and Infrastructure.

**H.R. 4797 (Duncan, R-S.C.) (wildlife)** would update avian protection laws in order to support an all-of-the-above domestic energy strategy. 160 Cong. Rec. H5068 (daily ed. June

2, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4799 (Olson, R-Tex.) (air)** would amend the CAA to give states adequate time to revise their SIPs to prevent emissions activity within such states from contributing significantly to nonattainment in, or interfering with maintenance by, any other state with respect to any NAAQS. 160 Cong. Rec. H5068 (daily ed. June 2, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4801 (Kinzinger, R-Ill.) (energy)** would require the Secretary of Energy to prepare a report on the impact of thermal insulation on both energy and water use for potable hot water. 160 Cong. Rec. H5072 (daily ed. June 5, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4813 (McKinley, R-W. Va.) (air)** would nullify certain EPA rules relating to greenhouse gas emissions from existing, new, and modified or reconstructed electric utility generating units. 160 Cong. Rec. H5185 (daily ed. June 9, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4844 (Mullin, R-Okla.) (governance)** would take certain property in McIntosh County, Oklahoma, into trust for the benefit of the Muscogee (Creek) Nation. 160 Cong. Rec. H5318 (daily ed. June 11, 2014). The bill was referred to the Committee on Transportation and Infrastructure.

**H.R. 4846 (Polis, D-Colo.) (natural resources)** would adjust the boundary of the Arapaho National Forest in Colorado. 160 Cong. Rec. H5318 (daily ed. June 11, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4848 (DeFazio, D-Or.) (governance)** would amend the Internal Revenue Code of 1986 to repeal the gas tax and rebuild our roads and bridges. 160 Cong. Rec. H5318 (daily ed. June 11, 2014). The bill was referred to the Committee on Ways and Means.

**H.R. 4849 (Lankford, R-Okla.) (air)** would amend the CAA to allow advanced biofuel, biomass-based diesel, and cellulosic biofuel to satisfy

the mandates of the renewable fuel program only if domestically produced and eliminate the corn ethanol mandate under such program. 160 Cong. Rec. H5362 (daily ed. June 12, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4850 (Daines, R-Mont.) (air)** would amend the CAA to prohibit the regulation of emissions of carbon dioxide from new or existing power plants under certain circumstances. 160 Cong. Rec. H5362 (daily ed. June 12, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4854 (Gibbs, R-Ohio) (water)** would amend the Federal Water Pollution Control Act to clarify when the Administrator of EPA 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 CWA §404. 160 Cong. Rec. H5363 (daily ed. June 12, 2014). The bill was referred to the Committee on Transportation and Infrastructure.

**H.R. 4858 (Chu, D-Cal.) (land use)** would establish the San Gabriel National Recreation Area as a unit of the National Park System in California. 160 Cong. Rec. H5363 (daily ed. June 12, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4866 (Mullin, R-Okla.) (wild-life)** would reverse DOI's listing of the lesser prairie chicken as a threatened species under the ESA and prevent further consideration of listing of such species as a threatened species or endangered species under that Act pending implementation of the Western Association of Fish and Wildlife Agencies' Lesser Prairie-Chicken Range-Wide Conservation Plan and other conservation measures. 160 Cong. Rec. H5363 (daily ed. June 12, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4867 (Ruiz, D-Cal.) (land use)** would provide for certain land to be taken into trust for the benefit of Morongo Band of Mission Indians. 160 Cong. Rec. H5363 (daily ed. June 12, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4869 (Lummis, R-Wyo.) (energy)** would provide for DOE fundamental science, basic research activities, and applied energy research and development. 160 Cong. Rec. H5368 (daily ed. June 13, 2014). The bill was referred to the Committee on Science, Space, and Technology.

**H.R. 4883 (Stockman, R-Tex.) (natural resources)** would provide for the establishment of a National Rare-Earth Refinery Cooperative. 160 Cong. Rec. H5398 (daily ed. June 17, 2014). The bill was referred to the Committee on Armed Services.

**H.R. 4886 (Lummis, R-Wyo.) (forests)** would direct the Secretary of Agriculture to publish in the *Federal Register* a strategy to significantly increase the role of volunteers and partners in National Forest System trail maintenance. 160 Cong. Rec. H5493 (daily ed. June 18, 2014). The bill was referred to the Committee on Agriculture.

**H.R. 4889 (Cohen, D-Tenn.) (land use)** would amend Title 23, U.S. Code, to require states to dedicate 5% of certain funds to projects that reduce emissions to public safety vehicles. 160 Cong. Rec. H5494 (daily ed. June 18, 2014). The bill was referred to the Committee on Transportation and Infrastructure.

**H.R. 4890 (Horsford, D-Nev.) (land use)** would provide for a land conveyance in Nevada. 160 Cong. Rec. H5494 (daily ed. June 18, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4899 (Hastings, R-Wash.) (energy)** would increase domestic onshore and offshore energy exploration and production and streamline and improve onshore and offshore energy permitting and administration. 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4901 (Bishop, R-Utah) (land use)** would maximize land management efficiencies, promote land conservation, and generate education funding. 160 Cong. Rec. H5556 (daily ed. June 19, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4916 (Schwartz, D-Pa.) (energy)** would amend the Internal Revenue Code of 1986 to modify the energy credit to provide greater incentives for industrial energy efficiency. 160 Cong. Rec. H5557 (daily ed. June 19, 2014). The bill was referred to the Committee on Ways and Means.

**H.R. 4923 (Simpson, R-Idaho) (governance)** would make appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2015. 160 Cong. Rec. H5597 (daily ed. June 20, 2014). The bill was referred to the Committee on Appropriations.

**H.R. 4924 (Gosar, R-Ariz.) (water)** would direct the Secretary of the Interior to enter into the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, provide for the lease of certain land located within Planet Ranch on the Bill Williams River in Arizona to benefit the Lower Colorado River Multi-Species Conservation Program, and provide for the settlement of specific water rights claims in the Bill Williams River Watershed in Arizona. 160 Cong. Rec. H5597 (daily ed. June 20, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4947 (Salmon, R-Ariz.) (air)** would amend the CAA to delay the review and revision of the NAAQS for ozone. 160 Cong. Rec. H5723 (daily ed. June 24, 2014). The bill was referred to the Committee on Energy and Commerce.

**H.R. 4956 (Walz, D-Minn.) (energy)** would seek to conserve energy use; promote innovation; achieve lower emissions, cleaner air, cleaner water, and cleaner land; and rebuild roads, bridges, locks, and dams. 160 Cong. Rec. H5724 (daily ed. June 24, 2014). The bill was referred to the Committee on Natural Resources.

**H.R. 4957 (Olson, R-Tex.) (air)** would amend the CAA with respect to exceptional event demonstrations. 160 Cong. Rec. H5767 (daily ed. June 25, 2014). The bill was referred to the Committee on Energy and Commerce.

## In the Courts

These entries summarize recent cases under the following categories: Air, Climate Change, Energy, Governance, Land Use, 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>.

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### AIR

*Center for Biological Diversity v. Environmental Protection Agency*, No. 12-1238, 44 ELR 20119 (D.C. Cir. May 27, 2014). The D.C. Circuit upheld EPA's decision to defer adopting new secondary NAAQS for oxides of sulfur and nitrogen pending further scientific study.

*Masias v. Colorado Springs Utilities*, No. 14-cv-01403, 44 ELR 20121 (D. Colo. May 21, 2014). A district court dismissed an individual's CAA lawsuit against a Colorado utility and the state's environmental agency in which he alleged that toxic fumes were emitted into his neighborhood following a fire at a nearby power plant.

*National Environmental Development Ass'n's Clean Air Project v. Environmental Protection Agency*, No. 13-1035, 44 ELR 20123 (D.C. Cir. May 30, 2014). The D.C. Circuit vacated an EPA memorandum directing regional air districts to apply different criteria when making source determinations in its Title V or new source review permitting decisions for facilities located in areas within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit.

*Sierra Club v. Environmental Protection Agency*, No. 13-1014, 44 ELR 20133 (D.C. Cir. June 13, 2014). The D.C. Circuit held that environmental groups lacked standing to challenge an EPA memo issued to regional directors in response to an earlier court decision vacating the Agency's 2011 Cross-State Air Pollution Rule (the "transport rule"), which sets sulfur dioxide and nitrogen oxides emissions limits for 28 upwind states based on those states' contributions to downwind states' air quality problems.

*Sierra Club v. FutureGen Industrial Alliance*, No. 13-CV-3408, 44 ELR 20131 (C.D. Ill. June 9, 2014). A district court dismissed an environmental group's citizen suit in which it alleged a power company was attempting to construct a major modification of its coal-fired power plant in Illinois without a PSD permit in violation of the CAA.

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### CLIMATE CHANGE

*Alec L. v. McCarthy*, No. 13-5192, 44 ELR 20130 (D.C. Cir. June 5, 2014). The D.C. Circuit dismissed teenagers' lawsuit against the federal government for failing to cap greenhouse gas emissions.

*Utility Air Regulatory Group v. Environmental Protection Agency*, No. 12-1146, 44 ELR 20132 (U.S. June 23, 2014). The U.S. Supreme Court held that EPA's regulation of greenhouse gas (GHG) emissions from new motor vehicles did not automatically trigger the CAA's permitting requirements for stationary sources that emit GHGs.

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### ENERGY

*Border Farm Trust v. Samson Resources Co.*, No. 4:13-cv-141, 44 ELR 20117 (D.N.D. May 14, 2014). A district court, in three separate opinions, dismissed several mineral rights owners' lawsuits against a number of energy companies that operate oil and gas wells in North Dakota's Bakken Shale region.

*Delaware Riverkeeper Network v. Federal Energy Regulatory Comm'n*, No. 13-1015, 44 ELR 20126 (D.C. Cir. June 6, 2014). The D.C. Circuit held that FERC violated NEPA when it approved the expansion of a natural gas pipeline in the Northeast.

*Electric Power Supply Ass'n v. Federal Energy Regulatory Commission*, No. 11-1486, 44 ELR 20118 (D.C. Cir. May 23, 2014). The D.C. Circuit vacated FERC's "demand response" order, which seeks to incentivize retail customers to reduce electricity consumption when economically efficient.

*Illinois Commerce Commission v. Federal Energy Regulatory Commission*, Nos. 13-1674 et al., 44 ELR 20137 (7th Cir. June 25, 2014). The Seventh Circuit, for the second time, vacated a FERC order that allocates costs for certain new high-voltage network transmission lines in the Mid-Atlantic and Midwest.

*Key Operating & Equipment, Inc. v. Hegar*, No. 13-0156, 44 ELR 20134 (Tex. June 20, 2014). The Supreme Court of Texas held that an oil and gas company may use a road on landowner's property to access its underground mineral rights.

*Klein v. United States Department of Energy*, No. 13-1165, 44 ELR 20114 (6th Cir. May 21, 2014). The Sixth Circuit held that DOE's environmental review of a proposed plant that would convert lumber into ethanol complied with NEPA.

*Sorenson v. Burlington Resources Oil & Gas Co., L.P.*, No. 4:13-cv-132, 44 ELR 20115 (D.N.D. May 14, 2014). A district court, in three separate opinions, dismissed several mineral rights owners' lawsuits against a number of energy companies that operate oil and gas wells in North Dakota's Bakken Shale region.

*Wisdahl v. XTO Energy, Inc.*, No. 4:13-cv-136, 44 ELR 20116 (D.N.D. May 14, 2014). A district court, in three separate opinions, dismissed several mineral rights owners' lawsuits against a number of energy companies that



operate oil and gas wells in North Dakota's Bakken Shale region.

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## GOVERNANCE

*Hughes v. Treadwell*, No. S-15468, 44 ELR 20135 (Alaska June 23, 2014). The Supreme Court of Alaska upheld a ballot initiative that would require legislative approval of the any new large-scale metallic sulfide mining operation—the Pebble Mine gold and copper project—in the Bristol Bay Watershed.

*Pacific Hide & Fur Depot v. Great American Insurance Co.*, No. CV 12-36-BU-DLC, 44 ELR 20122 (D. Mont. May 23, 2014). A district court held that an insurance company breached its duty to defend a steel company in an underlying contribution case under Montana's Comprehensive Environmental Cleanup and Responsibility Act stemming from the company's alleged release or threatened release of hazardous substances at a site in Bozeman, Montana.

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## LAND USE

*Cape Hatteras Access Preservation Alliance v. Jewell*, No. 2:13-CV-1-BO, 44 ELR 20136 (E.D.N.C. June 20, 2014). A district court upheld National Park Service regulations restricting off-road vehicle use in North Carolina's Cape Hatteras National Seashore at certain times of the year.

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## WASTE

*CTS Corp. v. Waldburger*, No. 13-339, 44 ELR 20125 (U.S. June 9, 2014). The U.S. Supreme Court held that CERCLA §309 does not preempt a state's statute of repose.

*Sacramento Municipal Utility District v. United States*, Nos. 2013-5086, -5087, 44 ELR 20138 (Fed. Cir. June 20, 2014). The Federal Circuit held that the United States must pay a California utility \$53,159,863 for DOE's failure to accept and dispose of spent nuclear fuel and high-level radioactive waste.

*Thompson Corners, LLC v. New York State Department of Environmental Conservation*, No. 516042, 44 ELR 20113 (N.Y. App. Div. May 15, 2014). A New York appellate court held that the subsequent owner of property formerly used as a permitted hazardous waste treatment, storage, or disposal facility need not provide financial assurance for the ongoing performance of corrective action on the property.

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## WATER

*Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, No. 2:13-CV-02136, 44 ELR 20120 (N.D. Ala. May 21, 2014). A district court dismissed an environmental group's lawsuit challenging the U.S. Army Corps of Engineers' 2012 reissuance of Nationwide Permit 21, a five-year general permit authorizing surface coal mining operations to discharge dredged or fill material into waters of the United States if the operations meet certain requirements.

*Cook Inletkeeper v. United States Army Corps of Engineers*, No. 3:12-cv-0205, 44 ELR 20129 (D. Alaska May 27, 2014). A district court upheld a U.S. Army Corps of Engineers permit issued under CWA §404 for a railroad extension project in an area surrounded by wetlands.

*Hawai'i Wildlife Fund v. Maui, County of*, No. 12-00198, 44 ELR 20128 (D. Haw. May 30, 2014). A district court held that a Hawaiian county illegally discharged wastewater into the ocean through groundwater injection wells in violation of the CWA.

*Kunaknana v. United States Army Corps of Engineers*, Nos. 3:13-cv-00044, -00095, 44 ELR 20127 (D. Alaska May 27, 2014). A district court held that an environmental group lacked standing to challenge a U.S. Army Corps of Engineers permit issued to an oil company to fill certain wetlands in the National Petroleum Reserve-Alaska for a future drill site.

*Living Rivers v. U.S. Oil Sands, Inc.*, No. 20121009, 44 ELR 20140 (Utah June 24, 2014). The Supreme Court of Utah dismissed an environmental group's lawsuit challenging the state's issuance of a discharge permit for a tar sands bitumen-extraction project in the Uintah Basin.

*Lubbock, Texas, City of v. Coyote Lake Ranch, LLC*, No. 07-14-00006-CV, 44 ELR 20139 (Tex. Ct. App. June 17, 2014). A Texas appellate court reversed a lower court decision enjoining a city from undertaking certain activities relating to further development of its proposed water well plan on a landowner's property.

*Ohio Valley Environmental Coalition v. Elk Run Coal Co.*, No. 3:12-0785, 44 ELR 20124 (S.D. W. Va. June 4, 2014). A district court held that mining companies discharged excessive amounts of ionic pollution, measured as conductivity, into the waters of West Virginia in violation of their federal NPDES and state surface mining permits.

## In the Federal Agencies

These entries cover the period June 1, 2014, through June 30, 2014. 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 subject matter area, with entries listed chronologically. This material is updated monthly. For archived materials, visit <http://www.eli.info/daily-update/archives>.

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### Final Rules

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#### AIR

EPA, in response to a court remand in *Natural Resources Defense Council v. EPA*, 706 F.3d 428, 43 ELR 20001 (D.C. Cir. Jan. 4, 2013), issued a rule that identifies the classification of fine particulate matter areas currently designated nonattainment for the 1997 and 2006 NAAQS as “moderate” and set deadlines for the states to meet the requirements of CAA subpart 4 as well as the nonattainment new source review requirements of that subpart. 79 FR 31565 (6/2/14).

EPA approved New York’s CAA §§111(d)/129 plan for implementing and enforcing the emission guidelines for existing sewage sludge incineration units. 79 FR 33456 (6/11/14).

EPA amended the Federal Minor New Source Review Program in Indian Country by extending the permitting and registration deadlines in the oil and natural gas sector to March 2, 2016. 79 FR 34231 (6/16/14).

EPA extended the compliance demonstration deadline for the 2013 renewable fuel standards to September 30, 2014, and the associated deadline for submission of attest engagement reports to January 30, 2015. 79 FR 34242 (6/16/14).

**SIP Approvals:** Alabama (“volatile organic compound” definition) 79 FR 33116 (6/10/14). Arizona (2012 Five Percent Plan for the Maricopa County particulate matter nonattainment area) 79 FR 33107 (6/10/14). California (particulate matter emissions from agricultural sources in the Great Basin unified air pollution control district) 79 FR 34240

(6/16/14). Connecticut (reasonably available control technology for volatile organic compounds) 79 FR 32873 (6/9/14). Delaware (ambient air quality standards for sulfur dioxide, ozone, nitrogen dioxide, lead, and particulate matter) 79 FR 34441 (6/17/14). Georgia (2006 NAAQS for particulate matter). 79 FR 36218 (6/26/14). Indiana (emission control requirements for coating operations and exemptions) 79 FR 34435 (6/17/14). Kentucky (emissions during startups, shutdowns, and malfunctions) 79 FR 33101 (6/10/14). Nevada (update of materials incorporated by reference). 79 FR 35050 (6/19/14). North Carolina (2006 NAAQS for particulate matter) 79 FR 36655 (6/30/14). Pennsylvania (removal of state portable fuel container regulations in favor of 2007 federal regulations) 79 FR 34432 (6/17/14). South Dakota (partial approval of revisions to rules on issuance of air quality permits). 79 FR 36419 (6/27/14). Tennessee (2006 24-hr. fine particulate matter 2008 base-year emissions inventory) 79 FR 33097 (6/10/14). Washington (regional haze implementation plan, best available retrofit technology, and federal implementation plan for disapproved elements of the SIP) 79 FR 33438 (6/11/14).

**SIP Withdrawals:** Illinois (revision to the 1997 eight-hr. ozone maintenance plan for the Chicago area due to an adverse comment). 79 FR 36220 (6/26/14). Wisconsin (revision to the nitrogen oxide combustion turbine rule for the Milwaukee-Racine former non-attainment area due to adverse comment). 79 FR 35956 (6/25/14).

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#### LAND USE

The U.S. Forest Service modified the boundaries for the Big Creek, Grandmother Mountain, Pinchot Butte, Roland Point, and Wonderful Peak Idaho Roadless Areas on the Idaho Panhandle

National Forests to include lands acquired within and/or adjacent to these roadless areas after the Idaho Roadless Rule was finalized. 79 FR 33436 (6/11/14).

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#### NATURAL RESOURCES

OSM approved an amendment to North Dakota’s regulatory program under SMCRA concerning letter of credit provisions. 79 FR 32645 (6/6/14).

OSM approved an amendment to Utah’s regulatory program under SMCRA regarding rules on ownership and control. 79 FR 32648 (6/6/14).

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#### TOXIC SUBSTANCES

EPA issued a partial exemption from reporting additional information under the Chemical Data Reporting rule for 1,3-Propanediol, oils, palm kernel, and bentonite, acid-leached. 79 FR 35096 (6/19/14).

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#### WATER

EPA announced its approval of 21 alternative testing methods for measuring the levels of contaminants in drinking water and determining compliance under the SDWA. 79 FR 35081 (6/19/14).

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#### WILDLIFE

FWS determined threatened status under the ESA for Webber’s ivesia, a flowering plant in the rose family, in five counties of California and Nevada. 79 FR 31878 (6/3/14).

FWS designated approximately 2,170 acres in northeastern California and northwestern Nevada as critical habitat under the ESA for Webber’s ivesia, a

flowering plant in the rose family. 79 FR 32125 (6/3/14).

FWS determined endangered species status for the New Mexico meadow jumping mouse, found in Arizona, Colorado, and New Mexico. 79 FR 33119 (6/10/14).

FWS established regulations for seasons, harvest limits, and methods and means related to the taking of wildlife for subsistence uses in Alaska during the 2014-15 and 2015-16 regulatory years. 79 FR 35231 (6/19/14).

NOAA-Fisheries amended the regulations that implement the Atlantic Large Whale Take Reduction Plan in order to reduce the incidental mortality and serious injury to several species of whales in commercial trap/pot and gillnet fisheries. 79 FR 36585 (6/27/14).

FWS reclassified the U.S. breeding population of the wood stork from endangered to threatened under the ESA due to improvement in its overall status and established a distinct population segment in Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina. 79 FR 37077 (6/30/14).

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## Proposed Rules

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### AIR

EPA seeks public comment on how to effectively manage and address emissions from proposed new and modified oil and natural gas production activities in Indian country. 79 FR 32502 (6/5/14).

EPA proposed to withdraw any prior determination or presumption, for the ozone and final particulate matter NAAQS, that compliance with the Clean Air Interstate Rule or the nitrogen oxide SIP call automatically constitutes reasonably available control technology or reasonably available control measures for oxides of nitrogen or sulfur dioxide emissions from electric generating unit sources. 79 FR 32892 (6/9/14).

EPA proposed amendments to the NE-SHAPs and new source performance standards for petroleum refineries dur-

ing periods of startup, shutdown, and malfunction. 79 FR 36879 (6/30/14).

**SIP Proposals:** Alabama (“volatile organic compound” definition) 79 FR 33159 (6/10/14). California (particulate matter emissions from agricultural sources in the Great Basin unified air pollution control district) 79 FR 34272 (6/16/14). Delaware (ambient air quality standards for sulfur dioxide, ozone, nitrogen dioxide, lead, and particulate matter) 79 FR 34480 (6/17/14). Indiana (disapproval of redesignation request for attainment of the 2008 eight-hr. ozone NAAQS in Lake and Porter Counties) 79 FR 36692 (6/30/14). Missouri (infrastructure requirements for the 2008 NAAQS for lead) 79 FR 32200 (6/4/14). Pennsylvania (removal of state portable fuel container regulations superseded by new, more stringent federal regulations) 79 FR 34479 (6/17/14). Tennessee (2006 24-hr. fine particulate matter 2008 base-year emissions inventory) 79 FR 33159 (6/10/14). Wisconsin (revisions to PSD program for particulate matter) 79 FR 36689 (6/30/14).

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## GOVERNANCE

The federal agencies issued their semi-annual regulatory agendas to update the public about regulations and major policies currently under development, reviews of existing regulations and major policies, and rules and major policymakings completed or canceled since the last agenda. EPA’s agenda can be found at 79 FR 34115 (6/13/14).

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## LAND USE

The Bureau of Indian Affairs proposed rulemaking to update and streamline the process for obtaining grants of rights-of-way on Indian land. 79 FR 34455 (6/17/14).

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## WASTE

EPA proposed to amend the 2005 standards and practices used for conducting all appropriate inquiries under CERCLA by replacing them with an updated version. 79 FR 34480 (6/17/14).

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## WILDLIFE

FWS announced 90-day findings on two petitions to list the flat-tailed and spider tortoises as endangered or threatened under the ESA and one petition to list a species of three-toed sloth as endangered; the agency found that listing may be warranted and initiated status reviews. 79 FR 32900 (6/9/14).

NOAA-Fisheries proposed to implement a resolution of the Inter-American Tropical Tuna Commission to conserve whale sharks in the Eastern Pacific Ocean by restricting the use of purse seine nets. 79 FR 32903 (6/9/14).

FWS seeks public comment on a proposal to revise the designation of critical habitat for the contiguous U.S. distinct population segment of the Canada lynx under the ESA and related draft documents and determinations. 79 FR 35303 (6/20/14).

FWS requested information on a petition to list the Humboldt marten as endangered or threatened under the ESA in coastal northern California and Oregon. 79 FR 35509 (6/23/14).

NOAA-Fisheries announced a 90-day finding on a petition to identify and to delist the Central North Pacific population of humpback whale as a distinct population segment under the ESA; the agency found that the petitioned action may be warranted and will continue its status review. 79 FR 36281 (6/26/14).

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## Notices

### AIR

EPA entered into a proposed consent decree under the CAA in *Sierra Club v. McCarthy*, No. 3:13-cv-3953-SI (N.D. Cal.), that establishes deadlines for the Agency to take final action on the remaining area designations of several states for the 2010 revised primary NAAQS for sulfur dioxide. 79 FR 31325 (6/2/14).

EPA Region 6 issued a greenhouse gas PSD permit to the ExxonMobil

Chemical Company for a construction project in Baytown, Texas. 79 FR 32283 (6/4/14).

EPA released information on submitting applications for essential use exemptions on the phaseout of production and import of controlled Class I ozone-depleting substances as authorized by the Montreal Protocol and the CAA. 79 FR 32728 (6/6/14).

EPA Region 9 issued a final PSD permit to Sierra Pacific Industries for its facility in Anderson, California. 79 FR 35543 (6/23/14).

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## CLIMATE CHANGE

EPA announced what criteria it will use to determine whether confidential data collected under the Greenhouse Gas Reporting Program are sufficiently aggregated such that publishing them would provide useful information while protecting confidentiality. 79 FR 32948 (6/9/14).

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## LAND USE

The Forest Service proposed to amend its internal directives for ski area concessions on National Forest System lands by adding two clauses on water rights. 79 FR 35513 (6/23/14).

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## TOXIC SUBSTANCES

EPA seeks public comment on a proposed stipulated injunction that would reinstitute streamside no-spray buffer zones to protect endangered or threatened Pacific salmon and steelhead in California, Oregon, and Washington from several pesticides. 79 FR 32732 (6/6/14).

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## WASTE

EPA entered into a proposed administrative settlement agreement under CERCLA requiring the settling parties to pay \$85,000.00 in past response costs incurred at the Absco Scrap Yard site in Philadelphia County, Pennsylvania. 79 FR 33750 (6/12/14).

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## WATER

EPA Region 2 announced the availability of a draft NPDES general permit for discharges from small municipal separate storm sewer systems from urbanized areas within the commonwealth of Puerto Rico. 79 FR 33548 (6/11/14).

EPA made a final affirmative determination under CWA §312(f)(3) that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are available for the waters of the New York State area of Lake Erie. 79 FR 35347 (6/20/14).

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## WILDLIFE

The National Marine Fisheries Service announced its 12-month finding on two petitions to list the entire population of great hammerhead shark and the northwest Atlantic population or any distinct population segments of great hammerhead sharks as threatened or endangered under the ESA; the agency determined listing is not warranted at this time. 79 FR 33509 (6/11/14).

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## DOJ NOTICES OF SETTLEMENT

*United States v. Roberts & Bucksnot R.R. Ranch, LLC*, No. 3:09-812 (M.D. Tenn. May 23, 2014). Settling CWA defendants that violated CWA §§301 and 404 must pay a civil penalty, must perform restoration work, must conserve riparian areas, and must provide funding to benefit water quality in the Lower Duck River Watershed of Tennessee. 79 FR 31348 (6/2/14).

*United States v. Landfill Technologies of Arecibo Corp.*, No. 3:14-cv-01438 (D.P.R. May 29, 2014). A settling CAA defendant that failed to timely install a gas collection and control system at the municipal solid waste landfill in Arecibo, Puerto Rico, must pay civil penalties totaling \$350,000, must comply with the applicable regulations, must improve landfill operations, and must implement a recycling and composting plan. 79 FR 32573 (6/5/14).

*United States v. Hampton Roads Sanitation District*, No. 2:09-cv-481 (E.D. Va. May 30, 2014). Under a proposed third amendment to a consent decree, a settling CWA defendant responsible for sanitary sewer overflows in the Hampton Roads area of Virginia will design, fund, and implement the projects in the Regional Wet Weather Management Plan, which will be extended to 2017. 79 FR 32998 (6/9/14).

*United States v. United Water, Inc.*, No. 2:14-cv-00193 (N.D. Ind. June 3, 2014). A settling CWA defendant that unlawfully discharged pollutants, failed to comply with its NPDES permit, and failed to submit information requested by EPA in connection with its operation of a publicly owned wastewater treatment system in Gary, Indiana, between 1998 and 2010 must pay a \$645,000 civil penalty. 79 FR 33216 (6/10/14).

*United States v. U.S. Steel Corp.*, No. 14-cv 5078 (W.D. Mo. June 9, 2014). A settling CERCLA defendant responsible for natural resource damages at the Waco Designated Area of Oronogo-Duenweg Mining Belt Superfund site in Jasper County, Missouri, must pay \$222,462.64 into a joint state/federal fund to replace, restore, or acquire equivalent natural resources and must pay \$35,432.62 in past natural damage assessment costs to the United States and \$8,375.74 to Missouri. 79 FR 34359 (6/16/14).

*United States v. Albemarle Corp.*, No. 5:11-cv-00991-JMC (D.S.C. June 12, 2014). A settling CAA defendant responsible for violations at its facility in Orangeburg, South Carolina, must pay a \$331,995.50 civil penalty to the United States and must demonstrate compliance with the CAA and the South Carolina Pollution Control Act. 79 FR 35185 (6/19/14).

*United States v. Ivory Homes, Ltd.*, No. 2:14-cv-00460-BCW (D. Utah June 23, 2014). A settling CWA defendant that illegally discharged stormwater at five construction sites in Utah must pay a \$250,000 civil penalty and must perform injunctive relief by implementing a management and reporting system for increased oversight and greater compliance with regulations. 79 FR 36821 (6/30/14).

## In the State Agencies

The entries below cover state regulatory developments during the month of June 2014. The entries are arranged by state, and within each section, entries are further subdivided by subject matter area. For material previously reported, visit <http://www.elr.info/administrative/state-updates/archive>.

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### ARKANSAS

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#### WASTE

The Pollution Control and Ecology Commission amended Regulation 11, Solid Waste Disposal Fees, Landfill Post-Closure Trust Fund, and Recycling Grants Program. Changes took effect June 8, 2014. *See* <http://www.sos.arkansas.gov/rulesRegs/Arkansas%20Register/2014/june2014/June2014.pdf> (p. 5).

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### CALIFORNIA

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#### TOXIC SUBSTANCES

The Department of Environmental Health Hazard Assessment amended 27 CAL. CODE REGS. §25306 in order to remove chlorsulfuron from the list of chemicals known to the state to cause reproductive toxicity. Changes took effect June 6, 2014. *See* <http://www.oal.ca.gov/res/docs/pdf/notice/23z-2014.pdf> (p. 1061).

The Department of Environmental Health Hazard Assessment amended 27 CAL. CODE REGS. §25249.5 in order to change the basis for listing hexafluoroacetone and phenylphosphine as chemicals known to the state to cause reproductive toxicity. Changes took effect June 6, 2014. *See* <http://www.oal.ca.gov/res/docs/pdf/notice/23z-2014.pdf> (pp. 1080-81).

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### COLORADO

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#### AIR

The Department of Public Health and Environment proposed to amend 5 COLO. CODE REGS. §1001.5, Stationary Source Permitting and Air Pollutant Emission Notice Requirements. Changes pertain to greenhouse gas plantwide applicability limitations, PSD permitting, and permitting emissions of small particulate matter. A public hearing will be held on August 21, 2014. *See* <http://www.sos.state.co.us/CCR/DisplayHearingDetails.do?trackingNumber=2014-00484>.

The Department of Public Health and Environment proposed to amend 5 COLO. CODE REGS. §1001.8, Standards of Performance for New Stationary Sources. Amendments would incorporate by reference changes EPA made to its new source performance standards rules. The deadline for comment is August 4, and a public hearing will be held on August 21, 2014. *See* <http://www.sos.state.co.us/CCR/DisplayHearingDetails.do?trackingNumber=2014-00484>.

The Department of Public Health and Environment proposed to amend 5 COLO. CODE REGS. §1001.10, Control of Hazardous Air Pollutants. Changes would incorporate by reference existing, new, and revised NESHAPs. The deadline for comment is August 4, and a public hearing will be held on August 21, 2014. *See* <http://www.sos.state.co.us/CCR/DisplayHearingDetails.do?trackingNumber=2014-00486>.

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### WASTE

The Department of Public Health and Environment amended 6 COLO. CODE REGS. §1007.1.3, pertaining to the licensing of radioactive materials. Changes took effect June 14, 2014. *See* <http://www.sos.state.co.us/CCR/Opinion.do?forview=true&trackingNum=2014-00190>.

The Department of Public Health and Environment amended 5 COLO. CODE REGS. §1002.64, Biosolids Regulation. Changes seek to make phosphorous values and references consistent with other federal and state programs and to allow more flexibility for determining the depth of groundwater and the depth of suitable soil. *See* <http://www.sos.state.co.us/CCR/Opinion.do?forview=true&trackingNum=2014-00054>.

The Department of Public Health and Environment amended 6 COLO. CODE REGS. §1007.3, pertaining to hazardous waste fees. Changes remove a temporary fee decrease for small and large quantity generators. *See* <http://www.sos.state.co.us/CCR/Opinion.do?forview=true&trackingNum=2014-00291>.

The Department of Public Health and Environment amended 6 COLO. CODE REGS. §1007.3, pertaining to solid and hazardous waste. Changes update the annual commission fee. *See* <http://www.sos.state.co.us/CCR/Opinion.do?forview=true&trackingNum=2014-00293>.

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### ILLINOIS

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#### WASTE

The Pollution Control Board amended 35 ILL. ADMIN. CODE §720, Hazardous

Waste Management System: General. Changes update the Illinois RCRA Subtitle C hazardous waste rules in order to maintain consistency with EPA amendments. Changes took effect May 27, 2014. *See* [http://www.cyberdriveillinois.com/departments/index/register/register\\_volume38\\_issue24.pdf](http://www.cyberdriveillinois.com/departments/index/register/register_volume38_issue24.pdf).

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## IOWA

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### WATER

The Environmental Protection Commission amended IOWA ADMIN. CODE Ch. 61, Water Quality Standards. Changes provide the water quality certification required by §401 of the CWA for the reissuance of the U.S. Army Corps of Engineers Regional Permit 7. *See* <https://www.legis.iowa.gov/docs/aco/bulletin/06-11-2014.pdf> (pp. 2303-04).

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## MAINE

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### AIR

The Department of Environmental Protection amended ME. CODE REGS. Ch. 106, Low Sulfur Fuel. Changes allow for alternative sulfur reduction strategies that provide the same emission reduction as the use of low-sulfur fuels. The amendments took effect June 27, 2014. *See* <http://www.maine.gov/sos/cec/rules/notices/2014/060414.html>.

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### TOXIC SUBSTANCES

The Department of Marine Resources amended ME. CODE REGS. Ch. 25, Lobster and Crab, and 25.65, Lobster and Crab Closure in Penobscot River. Changes would make permanent the emergency rulemaking that had closed off an area at the mouth of the Penobscot River for crab and lobster fishing in order to protect the public from the threat of mercury contamination. Changes took effect May 19, 2014. *See* <http://www.maine.gov/sos/cec/rules/notices/2014/052114.html>.

The Department of Environmental Protection amended ME. CODE REGS. Ch. 159, Control of Volatile Organic Compounds From Adhesives and Sealants. Changes delay compliance requirements for single-ply roof membrane adhesives, sealants, and adhesive primers until January 1, 2016. The amendments took effect June 2, 2014. *See* <http://www.maine.gov/sos/cec/rules/notices/2014/060414.html>.

The Department of Environmental Protection amended ME. CODE REGS. Chs. 884, 886, and 887. Changes would designate cadmium, mercury, and arsenic as priority chemicals and would require manufacturers to report the use of these substances above de minimis levels in children's products. The amendments took effect June 2, 2014. *See* <http://www.maine.gov/sos/cec/rules/notices/2014/060414.html>.

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## MARYLAND

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### TOXIC SUBSTANCES

The Department of the Environment amended MD. CODE REGS. 26.11.19, Volatile Organic Compounds From Specific Processes. Changes adopt the requirements of EPA's Control Techniques Guidelines. *See* [http://www.dsd.state.md.us/mdregister/4110/Assembled.htm#\\_Toc387238494](http://www.dsd.state.md.us/mdregister/4110/Assembled.htm#_Toc387238494).

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### WASTE

The Department of the Environment amended MD. CODE REGS. 26.04.06, Sewage Sludge Management. Changes incorporate Department of Agriculture and federal requirements. *See* [http://www.dsd.state.md.us/mdregister/4110/Assembled.htm#\\_Toc387238492](http://www.dsd.state.md.us/mdregister/4110/Assembled.htm#_Toc387238492).

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### WATER

The Department of the Environment amended MD. CODE REGS. 26.03.13, pertaining to the implementation of the Bay Restoration Fund. Changes took effect June 23, 2014. *See* [http://www.dsd.state.md.us/mdregister/4112/Assembled.htm#\\_Toc390159896](http://www.dsd.state.md.us/mdregister/4112/Assembled.htm#_Toc390159896).

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## MASSACHUSETTS

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### TOXIC SUBSTANCES

The Department of Environmental Protection amended 310 MASS. CODE REGS. §§7.00 and 7.15. Changes seek to prevent the release of asbestos fibers during demolition and construction activities and to maintain consistency with the federal asbestos NESHAP. *See* <http://www.mass.gov/eea/agencies/massdep/air/regulations/310-cmr-7-00-air-pollution-control-regulation.html#3>.

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## MISSOURI

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### AIR

The Department of Natural Resources amended MO. CODE REGS. tit. 10, §10.6.010. The amendments update the ambient air quality standards in order to reflect changes in NAAQS. *See* <http://www.sos.mo.gov/adrules/moreg/current/v39n11/v39n11.pdf> (pp. 1085-87).

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## MONTANA

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### AIR

The Board of Environmental Review amended MONT. ADMIN. R. 17.8.102, pertaining to air quality. Changes would incorporate by reference revisions to federal laws and regulations. *See* <http://sos.mt.gov/arm/Register/archives/MAR2014/MAR14-11.pdf> (pp. 1256-57).

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## NEVADA

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### AIR

The State Environmental Commission amended NEV. ADMIN. CODE §§445B.22097 and .311. Changes update the minimum ambient air

quality standards and revise provisions governing environmental evaluations. *See* <http://www.leg.state.nv.us/register/2013Register/R145-13A.pdf>.

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## WATER

The State Engineer proposed to amend NEV. ADMIN. CODE §§532 and 535, pertaining to dams. Changes include revising provisions relating to the hazard classifications of dams, the abandonment of dams, and emergency action plans for dams. *See* <http://www.leg.state.nv.us/register/2014Register/R054-14P.pdf>.

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## NEW HAMPSHIRE

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### LAND USE

The Pesticide Control Board proposed to amend Pes. 700, 800, and 900. The rules place restrictions on the use of certain pesticides in the state, specify requirements for mixing and loading pesticides, and establish standards for pesticide recordkeeping. A public hearing will be held on August 4, and the deadline for comment is August 15, 2014. *See* <http://www.gencourt.state.nh.us/rules/register/2014/May-22-14.pdf> (pp. 5-6).

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## NEW YORK

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### ENERGY

The Department of State proposed to repeal and replace N.Y. COMP. CODE R. & REGS. tit. 19, §1240. Changes seek to reduce energy use in commercial buildings. Public hearings will be held on August 11 and 15, and the deadline for comment is August 20, 2014. *See* <http://docs.dos.ny.gov/info/register/2014/june18/pdf/rulemaking.pdf> (pp. 19-23).

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### WATER

The Delaware River Basin Commission amended legal provisions included

in N.Y. COMP. CODE R. & REGS. tit. 21, §860, pertaining to water quality. Changes update stream quality objectives for pH in interstate tidal and non-tidal reaches of the main stem Delaware River. *See* <http://docs.dos.ny.gov/info/register/2014/may21/pdf/rulemaking.pdf> (pp. 3-5).

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### WILDLIFE

The Department of Environmental Conservation proposed to amend N.Y. COMP. CODE R. & REGS. tit. 6, §§59.4 and 190.24. Changes seek to prevent the spread of aquatic invasive species to and from boat launches. Changes took effect June 4, 2014. *See* <http://docs.dos.ny.gov/info/register/2014/june4/pdf/rulemaking.pdf> (pp. 14-16).

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## NORTH CAROLINA

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### WATER

The Department of Environment and Natural Resources proposed to amend 15A N.C. ADMIN. CODE 02B.0206, .0211, .0212, .0214-.0216, .0218, and .0220. Changes would amend surface water quality standards for various substances. A public hearing was held on July 16, and the deadline for comment is August 22, 2014. *See* <http://www.ncoah.com/rules/register/Volume%2028%20Issue%2024%20June%2016%202014.pdf> (pp. 3004-05).

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## OREGON

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### ENERGY

The Department of Energy amended OR. ADMIN. R. 330.070.0073, pertaining to the Residential Energy Tax Credit program. Changes lower the minimum heating season performance factor for eligible high-efficiency air source heat pump systems. *See* [http://arweb.sos.state.or.us/doc/rules/bulletin/June2014\\_Bulletin.pdf](http://arweb.sos.state.or.us/doc/rules/bulletin/June2014_Bulletin.pdf) (pp. 51-53).

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## TENNESSEE

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### WATER

The Department of Environment and Conservation proposed to amend TENN. ADMIN. CODE §§400.49.01, 1200.05.03, and 1200.05.06. Changes include bringing the regulation in line with the Water and Wastewater Operator Certification Act and amending the education requirements for operators of certified water treatment plants, water distribution systems, and wastewater treatment plants. The amendments will take effect August 19, 2014. *See* [http://www.tn.gov/sos/rules\\_filings/05-15-14.pdf](http://www.tn.gov/sos/rules_filings/05-15-14.pdf).

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## TEXAS

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### TOXIC SUBSTANCES

The Department of Agriculture proposed to amend TEX. ADMIN. CODE §65.6, pertaining to the distribution of ammonium nitrate or ammonium nitrate material. Changes seek to protect the public from the use of ammonium nitrate as an explosive material and prevent ammonium nitrate storage facility explosions. *See* <http://www.sos.state.tx.us/texreg/archive/May232014/Proposed%20Rules/4.AGRICULTURE.html#9>.

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### WILDLIFE

The Department of Agriculture amended TEX. ADMIN. CODE §19.161 in order to expand the quarantined area for the Diaprepes root weevil. *See* <http://www.sos.state.tx.us/texreg/archive/June132014/Emergency%20Rules/4.AGRICULTURE.html#4>.

The Department of Parks and Wildlife amended TEX. ADMIN. CODE §57.1001 in order to prevent the spread of the zebra mussel. Changes took effect June 26, 2014. *See* <http://www.sos.state.tx.us/texreg/archive/June202014/Adopted%20Rules/31.NATURAL%20>

RESOURCES%20AND%20CONSERVATION.html#80.

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## WASHINGTON

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### AIR

The Department of Ecology adopted WASH. ADMIN. CODE §173.485, pertaining to petroleum refinery greenhouse gas emission requirements. Changes establish reasonably available control technology to limit emissions from petroleum refineries. The amendments took effect June 28, 2014. *See* <http://apps.leg.wa.gov/documents/laws/wsr/2014/12/14-12-038.htm>.

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## WEST VIRGINIA

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### AIR

The Department of Environmental Protection amended W. VA. ADMIN. CODE §45.14, pertaining to construction permits and the modification of major stationary sources in order to prevent significant deterioration of air quality. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

The Department of Environmental Protection amended W. VA. ADMIN. CODE

§45.16, pertaining to standards of performance for new stationary sources. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

The Department of Environmental Protection amended W. VA. ADMIN. CODE §45.18, pertaining to the control of air pollution from the combustion of solid waste. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

The Department of Environmental Protection amended W. VA. ADMIN. CODE §45.19, pertaining to construction permits and the modification of major stationary sources that contribute to non-attainment areas. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

The Department of Environmental Protection amended W. VA. ADMIN. CODE §45.25, pertaining to the control of air pollution from hazardous waste treatment, storage, and disposal facilities. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

The Department of Environmental Protection amended W. VA. ADMIN. CODE §45.34, pertaining to emission standards for hazardous air pollutants. Changes took effect June 1, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

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## WATER

The Division of Water and Waste Management amended W. VA. ADMIN. CODE §47.2, pertaining to water quality standards requirements. Changes took effect June 21, 2014. *See* <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1608>.

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## WISCONSIN

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### AIR

The Department of Natural Resources amended WIS. ADMIN. CODE NR §§400, 405, 408, and 410 in order to revise air pollution control rules. Changes took effect August 1, 2014. *See* [http://docs.legis.wisconsin.gov/code/register/2014/702b/rules\\_filed/4/1](http://docs.legis.wisconsin.gov/code/register/2014/702b/rules_filed/4/1).

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## TOXIC SUBSTANCES

The Department of Natural Resources amended WIS. ADMIN. CODE NR §446, pertaining to the control of mercury emitted by coal-fired electric-generating units. Changes took effect August 1, 2014. *See* [http://docs.legis.wisconsin.gov/code/register/2014/702b/rules\\_filed/5/1](http://docs.legis.wisconsin.gov/code/register/2014/702b/rules_filed/5/1).



# RECENT JOURNAL LITERATURE

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“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.

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