

**SYMPOSIUM ON THE TWENTY-FIFTH ANNIVERSARY OF
THE JOURNAL OF LAND USE & ENVIRONMENTAL LAW
DISTINGUISHED LECTURE SERIES:
A FOCUS ON OCEAN AND COASTAL LAW ISSUES**

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Twenty-five years ago, the Florida State University College of Law introduced the Annual Distinguished Lecture in Environmental and Land Use Law to bring the most prestigious scholars in these fields from the United States and around the world to the halls of our institution and the pages of the *Journal of Land Use & Environmental Law*. The series has been a great success in introducing the students of Florida State and the readers of the *Journal* to outstanding scholars and cutting-edge scholarship. This year, to celebrate this important milestone, the *Journal* has the honor of hosting a number of distinguished scholars for a symposium that highlights legal developments and issues affecting oceans and the coasts—areas on which I have focused my scholarship during my thirty-one years at the College of Law.

Ocean policy and planning have become issues that have engaged the attention of policy makers, legislatures, and the citizenry of the United States only relatively recently. Although the United States was a pioneer in extending jurisdiction over the resources of the continental shelf in 1945¹ and over fisheries to 200 miles offshore in 1976,² management and regulation has been largely limited to single-sector management.³ But beyond creation of exploitation regimes for fisheries and the oil and gas resources of the continental shelf, the United States took few steps to elaborate a comprehensive ocean policy or to foster conservation or stewardship of the oceans and its resources. Evolution of the concept of ecosystem-based management, the decline and collapse of many living marine species, the emergence of “dead zones” around the coasts, the advent of new uses of the oceans (such as windpower production or other new energy sources), the impacts of exploitation of offshore oil and gas (including oil spills and discharges), and the effects of climate change on the seas and polar ice are among

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1. Truman Proclamation, Exec. Order No. 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945).
2. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (2006).
3. U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 52 (2004), available at http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

the many developments that have heightened the awareness of the public and recent government administrations of the need to develop a more comprehensive approach to ocean management and use.

Professor Alison Rieser, a Pew Oceans Fellow, currently a professor and director of the Graduate Ocean Policy Program at the University of Hawaii and formerly a professor and director of the Marine Law Institute at the University of Maine, speculates on the future of U.S. ocean policy in light of the developments during the Clinton and Bush administrations.⁴ She presents a history of relevant actions and decisions of these administrations from the policy initiatives of President Clinton to the creation of the Papahānaumokuākea Marine National Monument, the nation's largest marine reserve, by executive order of President Bush—an act that assured his unlikely “blue legacy.”⁵

Archiving across the Clinton and Bush administrations, the Oceans Act of 2000⁶ called for creation of a bi-partisan commission that would review the state of the oceans and assess the effects of ocean degradation on the nation.⁷ The U.S. Commission on Ocean Policy (USCOP), appointed by President Bush, concluded that ocean systems have been severely stressed by human activities and that major changes in ocean governance, based on principles of sustainability and stewardship and policies directed to preservation of marine biodiversity, and an ecosystem-based approach to management, are necessary.⁸ Implementation of the recommendations of USCOP began during the Bush Administration and continues during the current administration. On July 19, 2010, President Obama signed an executive order establishing a national ocean policy directed at ensuring oceans that are “healthy and resilient, safe and productive, and understood and treasured so as to promote the well-being, prosperity, and security of present and future generations.”⁹ The order also adopted the recommendations of an Interagency Ocean Policy Task Force that the administration had appointed to propose implementation strategies for the nation’s new ocean policy objectives.¹⁰ A major recommendation of the Task Force was the development of regional coastal and marine

4. Alison Rieser, *The Unexpected Ark: The Blue Legacies of the Clinton and Bush Presidencies 1993 to 2006*, 28 J. LAND USE & ENVTL. L. 5 (2012).

5. *Id.*

6. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644.

7. *Id.* §§ 2-3.

8. See generally U.S. COMM’N ON OCEAN POLICY, *supra* note 3, at 1-26.

9. Stewardship of the Ocean, Our Coasts, and the Great Lakes, Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,023 (July 19, 2010), available at <http://www.whitehouse.gov/the-press-office/executive-order-stewardship-ocean-our-coasts-and-great-lakes>.

10. *Id.*

spatial plans (CMSP)—a method for integrated, ecosystem-based planning to facilitate decision-making for sustainable ocean use and conservation—with the voluntary participation and cooperation of coastal states.¹¹ While supporting the need for moving away from current single-sector and multiple-use regimes, Professor Josh Eagle, Associate Professor at the University of South Carolina School of Law and an Associate with both USC’s Marine Sciences Program and its School of Earth, Ocean and Environment, argues that CMSP, as currently proposed, is a flawed attempt at place-based management.¹² He explains the nature of “durable, dominant-use” rules and why they are indispensable for successful ocean management.

In *Giving Voice to Rachel Carson*, Professor William H. Rodgers, the Stimson Bullitt Endowed Professor of Environmental Law at the University of Washington and often referred to as a “founder of environmental law,” focuses on the relation between environmental law and science.¹³ While the concept of “best available science” is now incorporated in a plethora of environmental laws,¹⁴ Professor Rodgers explains that failures in incorporating science into law still arise because of questions about who determines what is the best science, the reliability of “purchased science,” whether agencies should be entitled to deference when dealing with scientific “truths,” and whether economics deserves to be treated as science. As usual, he provocatively challenges the law and the courts to pursue “truth” rather than “advantage” in applying best available science.

Use of “best available science” inevitably leads to the conclusion that the rise in ocean temperatures and melting polar caps will result in sea level rise and retreating coastlines.¹⁵ Just as inevitably, coastal property owners will want to protect their land from the encroaching sea by armoring the coastline and attempting to hold back the sea. A recent Ninth Circuit Court of Appeals case, *United States v. Milner*,¹⁶ held that although coastal defense

11. See generally THE WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE 6, 41-66 (July 19, 2010), available at http://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf.

12. Josh Eagle, *Complex and Murky Spatial Planning*, 28 J. LAND USE & ENVTL. L. 35 (2012).

13. William H. Rodgers, Jr., *Giving Voice to Rachel Carson: Putting Science into Environmental Law*, 28 J. LAND USE & ENVTL. L. 61 (2012).

14. *Id.* at 63 (listing a variety of statutes which have incorporated the “best available science” clause).

15. See generally *Future Sea Level Change*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/climatechange/science/future.html#sealevel> (last visited Feb. 7, 2013); see also Wendy Koch, *NOAA Sees Sea Level Rise of up to 6.6 feet by 2100*, USA TODAY, Dec. 6, 2012, <http://www.usatoday.com/story/news/nation/2012/12/06/noaa-sea-level-rise/1750945/>.

16. 583 F.3d 1174 (9th Cir. 2009), *cert denied*, 130 S. Ct. 3273 (2010).

structures may hold back an encroaching sea, the boundary line between publicly-owned tidelands and private upland will still migrate landward with the rise of the level of the mean high tide line¹⁷—a conclusion that could have significant consequences for coastal management and far-reaching economic effects if adopted by state courts. While the court's holding is one logical application of the common law of water boundaries, Professor John Echeverria of the Vermont Law School, formerly director of Georgetown Law Center's Environmental Law & Policy Institute and one the country's foremost authorities on takings law, questions the logic of applying traditional legal doctrine in the era of climate change.¹⁸ He then explores the extensive policy and administrative challenges posed by the *Milner* case and critiques possible outcomes of application of the rule.

The *Journal* is honored to present this symposium and thanks these outstanding scholars for their contributions to our twenty-fifth anniversary commemoration.

17. *Id.* at 1189-90.

18. John D. Echeverria, *Managing Lands Behind Shore Protection Structures in the Era of Climate Change*, 28 J. LAND USE & ENVTL. L. 71 (2012).

**THE UNEXPECTED ARK: THE BLUE LEGACY OF THE
CLINTON AND BUSH PRESIDENCIES, 1993 to 2006**

ALISON RIESER*

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If we want our children to inherit the gift of living oceans, we must make the 21st century a great century of stewardship of our oceans.

President Bill Clinton, June 12, 1998

This is a big deal.

President George W. Bush, June 15, 2006

I. INTRODUCTION

In an era of unprecedented change in the oceans, it is challenging to try to predict the future of ocean policy. From today’s vantage point, it would seem safe only to say that the future of U.S. ocean policy depends on the outcome of the November 2012 elections, which are important not only for the White House, but also for the Congress, and for the governors’ mansions in coastal

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states around the United States. In 2012, U.S. ocean policy reflects the stalemate in Congress over the reality and necessity for a response to global warming, the national ambivalence toward energy development in the Arctic seas, and consumers' confusion over the sustainability of commercial fisheries, both in the U.S. Exclusive Economic Zone (EEZ) and around the globe.

In trying to predict the ocean policy of the Obama administration, it can be helpful to look back at previous administrations: where did they leave matters concerning the state of the oceans; was any able to change permanently our fundamental beliefs about the ocean? In our era, it is particularly instructive to consider the so-called "blue legacy" of George W. Bush: the creation of the world's largest, fully-protected marine reserve around the Northwestern Hawaiian Islands. As a political figure, George W. Bush was by nature skeptical of science and environmental regulation¹ despite hailing from a coastal state and being rooted in a family with a love of recreational fishing.² His philosophical commitment to free enterprise and the unrestricted development of fossil fuels was unhindered by a sense of obligation to pass on the world in better condition than his generation had received it in.³ Because he did not believe that climate change was human-caused, he saw no need to reduce U.S. greenhouse gas emissions to prevent sea level rise and ocean acidification.⁴ Therefore, President Bush entered his presidency with no particular ocean protection agenda.⁵ Yet, he left his presidency having created the largest marine reserve to date. How did this happen?

1. See generally Maurie J. Cohen, *George Bush and the Environmental Protection Agency: A Midterm Appraisal*, 17 SOC'Y AND NAT. RESOURCES 69 (2004).

2. Residents of coastal Maine, where the Bush family has had a summer house for decades, are accustomed to seeing newspaper photographs of former President George H. W. Bush and his sons sport fishing in Maine waters. For a discussion of George W. Bush's attitudes toward environmental policy see DONALD C. LORD, *DUBYA: THE TOXIC TEXAN: GEORGE W. BUSH AND ENVIRONMENTAL DEGRADATION* (2005).

3. See Michael Abramowitz and Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST (July 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.htm> (last visited Dec. 15, 2012).

4. See *Groups Say Scientists Pressured on Warming*, CBSNEWS, (Feb. 11, 2009 5:25 PM), <http://www.cbsnews.com/stories/2007/01/30/politics/main2413400.shtml> ("Sens. John McCain, R-Ariz., and Barack Obama, D-Ill. . . . favor mandatory reductions in greenhouse gas emissions, something opposed by President Bush, who argues such requirements would threaten economic growth"). George W. Bush's opponent in the 2000 presidential election was Vice President Al Gore, for whom the environmental crisis was a signature issue. See generally AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

5. When the Bush administration issued an ocean policy action plan in 2004, it did not include measures to mitigate the effects of climate change on the oceans or coasts; it included only a call for research on climate change and its socio-economic consequences. See U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy, available at http://data.nodc.noaa.gov/coris/library/NOAA/other/us_ocean_action_plan_2004.pdf [hereinafter Bush Ocean Action Plan].

The blue legacy of George W. Bush was actually set in motion by policy initiatives of the Clinton administration.⁶ Secretary of Interior Bruce Babbitt in particular sought to respond to the moral failures he believed were reflected in the growing extinction crisis and pro-resource extraction paradigm of the agencies that made up his department, particularly the Bureau of Land Management.⁷ Public pressure forced other Clinton cabinet members to respond to the collapse of fish stocks in the U.S. EEZ and the scientific backlash against the maximum sustainable yield paradigm.⁸ Prominent marine scientists were calling on leaders to create marine reserves, to serve as sentinel research sites and as refugia for species buffeted by overfishing and climate change.⁹

This article is a brief history of a presidential decision that turns out to have been the most significant ocean policy action of the United States in a generation.¹⁰ The 2006 declaration of the marine national monument around the Northwestern Hawaiian Islands set an international policy precedent for reversing the presumption of resource extraction from a marine ecosystem in favor of ecosystem-scale preservation.¹¹ The story begins with the decision by President George W. Bush to create by executive fiat the first marine national monument rather than to announce the release of a proposed management plan for a national marine sanctuary. To demonstrate how this action was the culmination of policy initiatives begun in the previous administration, the article describes the ocean-related efforts of President Bill Clinton, whose ocean-policy actions were intended to help secure the election of his Vice President, Al Gore, but, ironically, ended up giving Gore's rival, George W. Bush, a blue legacy.

In this article, the past is used to consider briefly what the next ten years of ocean policy will look like, taking us on an narrated excursion through the blue legacies of the presidencies of William J. Clinton and George W. Bush. These Presidents were

6. See discussion *infra* Part II. See also William Brown, Commentary, *Sanctuary a Victory Long in Making*, HONOLULU ADVERTISER (June 18, 2006) [hereinafter Brown, Commentary], available at <http://the.honoluluadvertiser.com/article/2006/Jun/18/op/FP606180306.html>.

7. See discussion *infra* Part II.B.

8. See discussion *infra* Part II.C.

9. See, e.g., Jane Lubchenco et al., *Plugging a Hole in the Ocean: The Emerging Science of Marine Reserves*, 13(1) ECOL. APPLICATIONS S3 (2003). See also COMM'N ON GEOSCIENCES, ENV'T & RES, ET AL., MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS (2001).

10. See Donna R. Christie, *From Stratton to USCOP: Environmental Law Floundering at Sea*, 82 WASH. L. REV. 533, 537 (2007) [hereinafter Christie, *From Stratton to USCOP*].

11. Alison Rieser, *The Papahānaumokuākea Precedent: Ecosystem-scale Marine Protected Areas in the EEZ*, 13 ASIAN-PAC. L. & POL'Y J. 210, 211 (2012) [hereinafter Rieser, *Papahānaumokuākea Precedent*].

con-strained by the legislative legacies of the 1970s: the Fishery Conservation and Management Act of 1976, with its bold goal of “Americanizing” offshore fisheries through the concept of “optimum yield,” and the National Marine Sanctuaries Act of 1972, with its modest goal of protecting special places in the oceans. To help them achieve these goals, the Clinton and Bush administrations were often guided by judicial review of their decisions under other legislation of the environmental era, the National Environmental Policy Act of 1969 and the Endangered Species Act of 1973.

This history demonstrates the dynamic interplay of congressional and executive responses to human changes of the oceans: changes in public values, in geopolitical and economic conditions, and the emergence of new scientific paradigms and consensus on the state of the oceans. While the record of each administration reflects varying degrees of effectiveness in harnessing interagency rivalries and competing policy agendas toward a singular policy legacy, this history shows that, just as the oceans reflect the cumulative impact of present and historic human activities, the blue legacy of each administration is the cumulative result of decisions taken and not taken by predecessors and of visions seen and left unfulfilled.

II. WITH THE STROKE OF A PEN

On June 15, 2006, the atmosphere in the White House ballroom was a heady mix of anticipation and self-satisfaction. Witnessed by a small group of conservation activists, staffers, and lobbyists, President George W. Bush signed a proclamation creating the largest marine conservation area in the world, designating a 362,073 square kilometers protected area around the Northwestern Hawaiian Islands.¹² Known in Hawaii as the leeward or kapuna (elders) islands, this area is a remote chain of coral atolls, reefs, and islands extending 1200 miles seaward of the main islands of the State of Hawaii.¹³ The size and condition

12. See *First Lady Photo Essays: June 2006*, THE WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/firstlady/photoessays/2006/jun-2/05.html> (last visited Jan. 7, 2013).

13. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006) (establishing the Northwestern Hawaiian Islands Marine National Monument, which was later renamed in Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007), as the Papahānaumokuākea Marine National Monument). In 2009, President Bush designated additional national monuments in the Pacific, including submerged lands within the Marianas Trench, the Rose Atoll, and the waters surrounding the U.S. Line Islands, bringing the total area under monument status to over 850,000 square kilometers. See Rieser, *Papahānaumokuākea Precedent*, *supra* note 11, at 211 n.2; Alison Rieser & Jon M. Van Dyke, *New Marine National Monuments Settle Issues*, 24 NAT. RES. & ENV'T 50 (2009).

of the coral reef ecosystem protected by the proclamation made this action indeed a “big deal.”¹⁴

Despite their presence in the room, the action was a surprise to many who witnessed this event and to scores of outside observers.¹⁵ The schedule for the President’s day had included a very different policy action: the announcement of the release of a draft management plan and environmental impact statement for a proposed marine sanctuary at the Northwestern Hawaiian Islands.¹⁶ This act would have been an almost routine executive branch action implementing a congressional directive added to the National Marine Sanctuaries Act in the days just prior to George W. Bush’s election in November 2000.¹⁷ Instead of following this directive, however, the President used the executive power of the Antiquities Act of 1906¹⁸ to create a massive marine reserve in the middle of the Pacific Ocean.

Why did President Bush decide to switch the legal basis for protecting this remote ecosystem? Was it his desire, or that of his advisors, to forge an environmental legacy for his administration? If he sought a blue legacy, did he realize that it would be due in large measure to policy decisions of the previous administration, some of which were completed, others that were left unfinished?

The clues to why President Bush used the Antiquities Act are reflected in the list of guests who joined him and the First Lady on the stage in the ballroom: marine biologist and National Geographic explorer-in-residence, Sylvia Earle; Jean-Michel Cousteau, a documentary filmmaker and son of Jacques Cousteau, the famed inventor of SCUBA; Secretary of Interior, Dirk Kempthorne; Secretary of Commerce, Carlos Gutierrez; Hawaii’s Republican governor Linda Lingle; and three members of Hawaii’s congressional delegation, Representative Neil Abercrombie, Representative Ed Case, and Senator Daniel Akaka, all Democrats.¹⁹ Conspicuous by his absence was Senator Daniel Inouye, the senior member of the Hawaiian delegation and then chair of the Senate Committee on Commerce, Science, and Transportation, which had jurisdiction over ocean matters.

14. *President Bush Establishes Northwestern Hawaiian Island National Monument*, THE WHITE HOUSE (June 15, 2006, 2:34 PM) [hereinafter *President Bush Establishes*], <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060615-6.html>.

15. See Christopher Pala, *A Long Struggle to Preserve a Hawaiian Archipelago and its Varied Wildlife*, N.Y. TIMES, Dec. 19, 2006, at D3.

16. *Id.*

17. National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106-513, § 6(g), 114 Stat. 2385 (codified at 16 U.S.C. §1431).

18. 34 Stat. 225 (codified as amended at 16 U.S.C. §§431-433 (2006)).

19. *First Lady Photo Essays*, *supra* note 12.

According to contemporaneous accounts of the event, the switch was brought about by a video.²⁰ At least two months before, the President had been given a private screening of a documentary on the Northwestern Hawaiian Islands (NWHI) written by and starred in by Jean-Michel Cousteau.²¹ President Bush reportedly asked the assembled guests, what could be done to end the dispute over fishing and to fully and permanently protect the fishes, sea turtles, monk seals, and seabirds of these coral reefs, whose struggle to survive was the documentary's theme.²² But what looks like presidential decisiveness in response to the emotional impact of a wildlife video was actually the culmination of a policy process that had begun during the Clinton administration, as officials in the White House and the Commerce and Interior Departments grappled with the 1995 decision of the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,²³ the congressional agenda to repeal the Endangered Species Act,²⁴ and the 1996 reauthorization amendments of the Magnuson-Stevens Fishery Conservation and Management Act.²⁵

A. The Rollback

As a man who made his fortune in the oil business, the appointment by George W. Bush early in 2001 of Gale Norton to head the Department of Interior was not surprising.²⁶ As a staunch proponent of natural resource development, one of Secretary Norton's first orders of business was to reverse the Clinton admin-

20. Jim Connaughton, *Ask the White House*, THE WHITE HOUSE (June 20, 2006), <http://georgewbush-whitehouse.archives.gov/ask/print/20060620.html>; Andrew C. Revkin, *Bush Plans Vast Protected Sea Area in Hawaii*, N.Y. TIMES (June 15, 2006), <http://www.nytimes.com/2006/06/15/science/earth/15hawaii.html>; Kenneth Weiss, *Turnaround as Bush Creates Huge Aquatic Eden*, L.A. TIMES (June 16, 2006), available at <http://www.smh.com.au/news/world/turnaround-as-bush-creates-huge-aquatic-eden/2006/06/15/1149964675837.html#>.

21. See Connaughton, *supra* note 20. See also Pala, *supra* note 15.

22. Pala, *supra* note 15; Shannon Switzer, *Cousteau Praises Bush's Marine Monuments*, SANTA BARBARA INDEPENDENT, (Jan. 15, 2009), available at <http://www.independent.com/news/2009/jan/15/cousteau-praises-bushs-marine-monuments/>.

23. 515 U.S. 687 (1995).

24. See John D. Lesly, *The Babbitt Legacy at the Department of Interior: A Preliminary View*, 31 ENVTL. L. 199, 204 (2001).

25. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996) (amending Magnuson Fishery Conservation and Management Act). See generally, Shi-Ling Hsu & James E. Wilen, *Ecosystem Management and the 1996 Sustainable Fisheries Act*, 24 ECOLOGY L.Q. 799 (1997). The Interior Department was also considering how to implement the Supreme Court's 1997 decision in *United States v. Alaska*, 521 U.S. 1 (1997), concerning ownership of submerged lands in the eastern Beaufort Sea. See *infra* notes 128-131.

26. Gale Norton, *Secretary of the Interior, 2001-2006*, THE WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/government/norton-bio.html> (last visited Jan. 7, 2013).

istration directives that restricted oil and gas development in the Alaska National Wildlife Refuge and other public lands.²⁷ This meant the new Interior Secretary had to undo former Interior Secretary Bruce Babbitt's policies to reform the Endangered Species Act (ESA) so that federal land management agencies could expand oil and gas drilling.²⁸ She also sought to undo her predecessor Bruce Babbitt's legacy of western landscape monuments that had locked up public lands and prohibited entry for mineral development.²⁹

When it came to the oceans, the first items on the Bush regulatory review plan³⁰ were the congressional and executive directives that put much of the U.S. outer continental shelf (OCS) off-limits to oil drilling.³¹ This would require weakening President Clinton's executive order calling upon executive agencies to develop a system of marine protected areas, with their virtually automatic ban on oil drilling and potential for restricting fishing.³² The biggest rollback target was the huge, precedent-setting coral reef ecosystem reserve President Clinton created in December 2000,³³ just days after the Supreme Court had ended the Florida ballot recount, allowing George W. Bush to become the 43rd President of the United States.³⁴

But President Bush had problems with some of Secretary of Interior Gale Norton's offshore oil drilling plans: his brother Jeb, the governor of Florida, opposed further OCS leasing in the eastern Gulf of Mexico.³⁵ Governor Bush and Florida's congressional delegation also insisted that the Interior Department cancel existing leases offshore of Pensacola, Florida.³⁶ President Bush had pledged to expand domestic energy development during his campaign in 2000, but once he took office he agreed to maintain the

27. Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1009 (2003).

28. *See id.* at 1008-09.

29. *Id.*

30. Immediately upon assuming office, President Bush adopted a regulatory review plan which, *inter alia*, delayed implementation of President Clinton's MPA executive order. *See* Robin Kundis Craig, *Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 MCGEORGE L. REV. 155, 210 n.424 (2003).

31. *See generally* Edward A. Fitzgerald, *The Seaweed Rebellion: Florida's Experience With Offshore Energy Development*, 18 J. LAND USE & ENVTL. L. 1 (2002) (discussing the "conflict between the federal and coastal state governments regarding offshore energy development").

32. *See* Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000); JEFFREY ZINN & EUGENE H. BUCK, CONG. RESEARCH SERV., RS20810, MARINE PROTECTED AREAS: AN OVERVIEW (2001).

33. Pala, *supra* note 15.

34. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

35. Fitzgerald, *supra* note 31, at 62-67.

36. *Id.* at 66.

drilling moratorium off Florida.³⁷ After Secretary Norton announced a new lease sale for the eastern Gulf in 2001 protracted negotiations ensued.³⁸ President Bush bowed to his brother's opposition and reelection imperatives and announced in 2002 that he would "buy back [all] the leases off the Florida Panhandle."³⁹

The politics of ocean conservation had earlier crept into President Bush's awareness when, in March 2001, the National Oceanic and Atmospheric Administration (NOAA) established the Tortugas Ecological Reserve as part of the Florida Keys National Marine Sanctuary.⁴⁰ The new reserve became the largest fully-protected marine reserve in U.S. waters; prohibition of fishing would allow the reserve to serve as a refuge for many marine species, including the reef-building corals so important to the economy and identity of southern Florida.⁴¹ The President and his advisors took notice of the popularity and relatively low political cost of marine conservation actions when Governor Jeb Bush got credit for establishing the largest U.S. marine reserve in a place where few fishermen would be adversely affected.⁴²

Soon thereafter, advisors to the President, including Ted Kassinger, the general counsel of the Commerce Department, and James Connaughton, chair of the White House's Council on Environmental Quality, counseled that he not roll back the Clinton orders on the NWHI with its no-take areas and caps on fishing.⁴³ They noted, among other things, that Congress had created a U.S. Commission on Ocean Policy in the Oceans Act of 2000, and that the Commission, chaired by a former Secretary of the Navy, was building a credible set of findings concerning the poor condition of U.S. marine ecosystems and the ocean-dependent economy, including ports, popular tourism beaches, and commer-

37. *See id.* at 62-63.

38. *See id.* at 62-67.

39. *Id.* at 67.

40. Florida Keys National Marine Sanctuary Regulations; Announcement of Effective Date in Florida State Waters, 66 Fed. Reg. 33,462 (June 22, 2001).

41. *See* Michelle Baldwin et al., *A Review of Recent Developments in Ocean and Coastal Law 1999-2000*, 5 OCEAN & COASTAL L.J. 367, 392 (2000).

42. Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protected Areas and Marine Reserves in America*, 29 ECOLOGY L.Q. 71, 111-14 (2002).

43. Brown, *Commentary*, *supra* note 6. *See also* Pala, *supra* note 15.

cial fisheries.⁴⁴ Under the terms of the Oceans Act, the President would need eventually to respond to the commission's recommendations.⁴⁵

Moreover, early in President Bush's first term of office, NOAA officials told the President's appointees in the Commerce Department that the commercial fishermen who used the NWHI numbered fewer than a dozen and were the staunch supporters of the senior democrat in the Senate, Daniel Inouye.⁴⁶ The NWHI fisheries, managed under the risk-prone, "maximum yield"-driven policies of the Western Pacific Regional Fishery Management Council, were already shutting down by virtue of stock collapse, litigation under the ESA, and the stock rebuilding mandates of the 1996 Sustainable Fisheries Act,⁴⁷ which environmental groups were suing to enforce. The Clinton administration had already done the heavy lifting on this policy action; there would be little political cost to President Bush in keeping the NWHI Coral Reef Ecosystem Reserve intact.⁴⁸

B. A Voyage to Kure

From 2001 to 2004, the ocean policy of the Bush administration continued in this vein, as the administration, having decided to retain the President Clinton's NWHI coral reef ecosystem reserve, struggled to implement the details of the executive orders that had created it.⁴⁹ The struggle was due only in part to the politics of ocean conservation and fisheries; legal issues that were the legacy of past clashes of the competing policies of resource extraction and marine conservation had to be resolved by lawyers advising programs within agencies with often competing missions. For the Secretary of Commerce, the new ecosystem-based mandates of the Sustainable Fisheries Act of 1996 conflicted with the "optimum yield" and single-species paradigm of the 1976 Fishery Conservation and Management Act.⁵⁰ In addition, the 2000 amendments to the National Marine Sanctuaries

44. See Christie, *From Stratton to USCOP*, *supra* note 10, at 537-538.

45. Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644. Section 4(a) requires the President to respond to the Commission's report. Presidential Statement on Signing the Oceans Act of 2000, 36 Weekly Comp. Pres. Doc. 1805 (Aug. 7, 2000).

46. Telephone interview with NOAA official who requested anonymity, NOAA (Apr. 25, 2008) (notes on file with the author).

47. See Hsu & Wilen, *supra* note 25, at 801, 805-06. See also Greenpeace Foundation v. Mineta, 122 F. Supp. 2d 1123 (D. Hawaii, 2000).

48. *Id.* See also Matthew Chapman, *Northwest Hawaiian Islands Coral Reef Ecosystem Reserve: Ephemeral Protection*, 29 *ECOLOGY L.Q.* 347, 358-59 (2002).

49. See Chapman, *supra* note 48.

50. See Hsu & Wilen, *supra* note 25, at 801, 805-06.

Act,⁵¹ calling on the President to designate the NWHI as a national marine sanctuary consistent with the Coral Reef Ecosystem Reserve, seemed to conflict with the requirement that the Secretary allow the fishery councils to set policy on fishing regulations within a proposed national marine sanctuary.⁵² Within the Department of Interior, biologists and refuge managers at the Fish and Wildlife Service were anxious to increase, not lessen, their ability to protect the wilderness values of the Hawaiian Islands National Wildlife Refuge, without the interference of the State of Hawaii's pro-fishing policies, which had so plagued past administrations.⁵³

Having embraced the policy rhetoric of an ecosystem approach to the oceans which kept the Coral Reef Ecosystem Reserve alive, the Bush administration was finding it difficult to keep the fishery councils on the same page, especially with respect to fisheries around the Northwestern Hawaiian Islands. The Western Pacific Fishery Management Council, too, had caught the ecosystem wave and turned the new ecosystem provisions of 1996 Sustainable Fisheries Act to its advantage. Between 1999 and 2002, the council drafted, approved, and submitted to the Secretary of Commerce a new management plan that purported to be the first ecosystem-based fishery management plan for all coral reef ecosystems in the Central and Western Pacific under U.S. jurisdiction.⁵⁴ This plan, however, envisioned expansion of the scope and intensity of fishery extractions from these ecosystems and not a precautionary closing of fisheries to enhance the survival prospects for the endangered and non-fisheries species residing there.⁵⁵

After months of discussion and negotiation, the NOAA administration sent a letter notifying the council on behalf of the Secretary of Commerce that they were only partially approving the coral reef ecosystems FMP; the part of the plan intended to apply to the waters around the NWHI would not be ap-

51. National Marine Sanctuaries Amendments Act of 2000, Pub. L. 106-513, § 6(g), 114 Stat. 2385 (codified at 16 U.S.C. §1431). See discussion *infra* Part II.D.

52. Section 304 of the National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1434(a)(5), requires the Secretary of Commerce to ask the regional fishery councils to submit draft fishing regulations for the national marine sanctuaries. The secretary must accept the proposed rules "unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of [the NMSA]" or to meet "the goals and objectives of the proposed designation." Section 304(a)(5) was added to the NMSA in 1992. Oceans Act of 1992, Pub. L. No. 102-587, § 2104(a)(3)(B), 106 Stat. 5039. See generally Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711 (2003).

53. See Rieser, *Papahānaumokuākea Precedent*, *supra* note 11, at 227-29.

54. Fisheries of West Coast States and in the Western Pacific; Coral Reef Ecosystems Fishery Management Plan for the Western Pacific, 67 Fed. Reg. 59813, 59813-14 (proposed Sept. 24, 2002) [hereinafter NOAA, Coral Reef Ecosystem FMP].

55. See *id.* See also Chapman, *supra* note 48.

proved.⁵⁶ The reason given was the conflict with the executive orders creating the Coral Reef Ecosystem Reserve, which included a system of reserve protected areas in which no fishing would be allowed and had capped fishing effort.⁵⁷ However, the question of fishing at the NWHI remained alive as the sanctuary designation process moved forward, when NOAA asked the Western Pacific Regional Fishery Management Council for recommendations on fishing regulations pursuant to section 304 of the National Marine Sanctuaries Act.⁵⁸ When the Council responded in 2003 with proposed regulations that would ultimately expand fishing at the NWHI, NOAA declined to accept them.⁵⁹

The Bush administration then renewed its commitment to establishing a national marine sanctuary around the NWHI based on the Clinton executive orders on December 17, 2004, when it released its Ocean Action Plan, just a few days before the final deadline under the Oceans Act of 2000.⁶⁰ The issue of future fisheries at the NWHI appeared to be closed. But in early 2006, after bravely reiterating its commitment to following the Clinton executive orders on the issue of fisheries, NOAA then appeared to open the door to perpetual fishing at the NWHI, snatching defeat from the jaws of victory. In the draft environmental impact statement accompanying the proposed management plan for the national marine sanctuary, NOAA included an alternative that would allow the council to propose future fishing regulations there.⁶¹

On the evening that “Voyage to Kure” was screened at the White House, President Bush was introduced to two prominent

56. NOAA, Coral Reef Ecosystem FMP, *supra* note 54, at 59.813. The Magnuson-Stevens Fishery Conservation and Management Act requires the Secretary of Commerce to disapprove all or portions of a council’s fishery management plan if it does not meet one or more of the national standards under the Act or is not otherwise in accordance with the law. 16 U.S.C. 1853(a)(1)(c) (2006).

57. NOAA, Coral Reef Ecosystem FMP, *supra* note 54.

58. NOAA, PROPOSED NORTHWESTERN HAWAIIAN ISLANDS NATIONAL MARINE SANCTUARY, ADVICE AND RECOMMENDATIONS ON DEVELOPMENT OF DRAFT FISHING REGULATIONS UNDER THE NATIONAL MARINE SANCTUARIES ACT SECTION 304(A)(5) (2004), available at http://www.papahanaumokuakea.gov/management/designation/pdfs/Final_NMSA_304a5.pdf.

59. NOAA, FINDINGS ON THE RECOMMENDATION OF THE WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL REGARDING THE MANAGEMENT OF FISHERIES WITHIN THE PROPOSED NORTHWESTERN HAWAIIAN ISLANDS NATIONAL MARINE SANCTUARY (2005), available at <http://www.papahanaumokuakea.gov/management/designation/pdfs/NWHIfindings.pdf>.

60. Exec. Order 13,366, 69 Fed. Reg. 76,591 (Dec. 21, 2004); Bush Ocean Action Plan, *supra* note 5.

61. NOAA, DRAFT ENVIRONMENTAL IMPACT STATEMENT AND PRELIMINARY DRAFT MANAGEMENT PLAN DEVELOPED FOR THE PROPOSED NWHI NATIONAL MARINE SANCTUARY, VOL. I AND II (2006). Only volume I, the Draft Management Plan, is available online at http://www.papahanaumokuakea.gov/PDFs/NWHI_OLD_MP1_042006.pdf. See also Robin Kundis Craig, *Coral Reefs, Fishing, and Tourism: Tensions in U.S. Ocean Law and Policy Reform*, 27 STAN. ENVTL. L.J. 3 (2008).

ocean explorers who wholeheartedly supported the permanent and total protection of the marine ecosystem of the Northwestern Hawaii Islands. Sylvia Earle had been the chief scientist of NOAA and was a supporter of the national marine sanctuaries program. But having personally disavowed consumption of seafood out of concern for the survival of all marine life,⁶² she lamented NOAA's seeming powerlessness to say no to the fishery councils.⁶³ Jean-Michel Cousteau believed the marine waters of the NWHI should be a national wildlife refuge under the sole jurisdiction of the Interior Department's Fish and Wildlife Service.⁶⁴ On his voyage through the islands and atolls, he had invited none of the NOAA scientists associated with the Coral Reef Ecosystem Reserve.⁶⁵ Instead he asked Beth Flint and James Maragos, the Fish and Wildlife Service's chief seabird and coral reef biologists, respectively, to accompany him and play a role in his documentary.⁶⁶ Cousteau told the President that protecting the NWHI would be a gift to the children of the future and an act of global significance.⁶⁷

Another guest at the screening was also on hand to advise the President. Six months previously, Governor Linda Lingle had accepted the recommendation of Peter Young, the chair of the Hawaii Department of Land and Natural Resources. She had signed a set of administrative rules creating a marine refuge in the state waters surrounding every atoll, reef, and island in the Northwestern Hawaiian Islands.⁶⁸ Like the President's brother Jeb,⁶⁹ it appears that Governor Lingle had been convinced by her advisors that the benefit to her political ambitions from such a blue legacy would more than outweigh the temporary political costs of closing off future fishing in the area.⁷⁰ She also believed that the most vocal of the fishermen who held permits for NWHI fisheries, the lobster and bottomfish fishers, whom she had nominated for seats on the council due in recommendations to

62. Sylvia Earle, Keynote address at the National Association of Environmental Law Societies Conference on Oceans and Environmental Law (March 10, 2000). See also SYLVIA EARLE, *SEA CHANGE: A MESSAGE OF THE OCEANS* (1996).

63. Interview with NOAA official, *supra* note 46.

64. *Id.*

65. *Id.* Interview with State of Haw., Dep't of Land & Natural Res. official who requested anonymity.

66. Interview with NOAA official, *supra* note 46.

67. *Transcript: President Bush Declares National Monument in Hawaii*, PBS.ORG (June 15, 2006) [hereinafter *Transcript: President Bush Declares*] http://www.pbs.org/newshour/bb/environment/jan-june06/hawaii_06-15.html.

68. See HAW. CODE R. §13-60.5-5 (Oct. 10, 2005).

69. See *supra* text accompanying notes 40-42.

70. See Chapman, *supra* note 48.

the Commerce Secretary,⁷¹ would in due course receive ample compensation from the Congress for the loss of their permits.⁷²

When the President reportedly asked the guests what the federal government could do to protect the seabirds, monk seals, and sea turtles of the Northwestern Hawaiian Islands permanently, it was gently suggested that he consider using the Antiquities Act of 1906,⁷³ which he had used two months prior when he created the African Slaves Burial Ground National Monument in New York City.⁷⁴

C. A Big Deal

Two months later, the guests at the screening of Jean-Michel Cousteau's video were reunited in the White House ballroom, smiling knowingly at each other as they shook hands with the President after he had signed the proclamation.⁷⁵ In his remarks, the President emphasized the size of the area.

The national monument we're establishing today covers nearly 140,000 square miles. To put this area in context, this national monument is more than 100 times larger than Yosemite National Park, larger than 46 of our 50 states, and more than seven times larger than all our national marine sanctuaries combined. This is a big deal.⁷⁶

The President's decision to terminate the sanctuary designation process and its unending debate over fishing at the NWHI was bold and popular, heralded as an act worthy of Teddy Roosevelt, the President whose use of the Antiquities Act of 1906 to create Yellowstone National Park triggered a global conservation movement.⁷⁷ But was it legal to use the Antiquities Act to create so-called marine national monuments? If the President

71. The authority of the governors to recommend council members is in section 302 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1852(b)(2)(C).

72. In 2005, Pew Charitable Trusts had a representative in Honolulu who was offering compensation in the form of a private "buy-out" of the permits. See Pala, *supra* note 15. For the eventual compensation that was awarded, see Fisheries in the Western Pacific; Compensation to Federal Commercial Bottomfish and Lobster Fishermen Due to Fishery Closures in the Papahānaumokuākea Marine National Monument, Northwestern Hawaiian Islands, 74 Fed. Reg. 47,119 (Sept. 15, 2009) (to be codified at 50 C.F.R. pat. 665).

73. Connaughton, *supra* note 20; Pala, *supra* note 15.

74. Proclamation No. 7984, 71 Fed. Reg. 10,793 (Feb. 27, 2006).

75. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006); Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007).

76. *President Bush Establishes*, *supra* note 14.

77. *Transcript: President Bush Declares*, *supra* note 67.

was aware of the pitched battle waged over this question within his administration,⁷⁸ he nonetheless made no reference to it in his remarks at the signing ceremony.

III. BETWEEN THE FLOOD AND THE RAINBOW

Simply stated, President Bush's blue legacy at the Northwestern Hawaiian Islands was the result of senior legal advisors in his administration who were not tied to resource extraction industry and had fallen in love with coral reefs. To these individuals, coral reefs and the experience of swimming among schools of brightly colored fish and catching a glimpse of sea turtles and other marine life in their natural habitat was a life-changing experience.⁷⁹ But their ability to influence the President to use his singular powers under the Antiquities Act owed much to the power that the charismatic landscapes of the western and southwestern states had over an earlier cabinet official, Bruce Babbitt, the former governor and attorney general of the State of Arizona.

A. *The Year of the Ocean: "Get Into It"*

When Bill Clinton stood to give the address at San Carlos Park, with the blue waters of the Monterey Bay National Marine Sanctuary shimmering in the background, he was not thinking about blue legacy. His 1996 proclamation of a landscape-scale national monument in Utah⁸⁰ helped close the deal with environmentalists on his reelection.⁸¹ Soon he would again use the Antiquities Act to create monuments around coral reefs in the Virgin Islands and along the California coast, urged on by Secretary Babbitt.⁸² On this day, by attending the National Ocean

78. See discussion *infra* Part II.D.

79. Interview with NOAA official, *supra* note 46. Biologists from NOAA's National Oceans Service took the Chairman of the White House Council on Environmental Quality (CEQ), James Connaughton, on dives to the coral reefs of the Florida Keys National Marine Sanctuary, which the President's brother, Governor Jeb Bush had helped to protect. See *supra* text accompanying notes 35-39. But Connaughton likely got the idea for President George W. Bush to take a monumental action to protect America's coral reefs when he was taken diving on the Great Barrier Reef, at the time the largest coral reef marine reserve in the world, and visited the Great Barrier Reef Marine Park Authority (GBRMPA) in Townsville, Queensland, Australia in March 2005. Interview with science director, GBRMPA, in Queensland, Austl. (Apr. 20, 2005) (notes on file with author).

80. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sep. 18, 1996).

81. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 473 (2003).

82. *Id.* at 507-09. The coastal monuments were the 12,708-acre Virgin Islands Coral Reef National Monument, adjacent to the existing Virgin Islands National Park, St. John, V.I., Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001); the 18,135-acre expansion of the Buck Island Reef National Monument, St. Croix, V.I., Proclamation No. 7392, 66 Fed. Reg. 7,335 (Jan. 17, 2001); and the California Coastal National Monument, comprising all

Conference,⁸³ the President was trying to assist the presidential aspirations of his Vice President, Al Gore, who was planning to run largely on his environmental record, and the senatorial campaign of Senator Barbara Boxer, whose grandson was the nephew of the First Lady, Hillary Rodham Clinton.⁸⁴ Clinton evoked the notion of an environmental legacy when he said, “If we want our children to inherit the gift of the living oceans, we must make the 21st century a great century of stewardship of our seas.”⁸⁵

President Clinton began his remarks with the customary long list of guests to acknowledge and thank by name. He recalled the phone call he had made to then-Senator Al Gore inviting him to join his ticket in 1992, just after the senator had returned from the Earth Summit in Rio de Janeiro.⁸⁶ But his thoughts turned to his more recent experience with the Vice President standing in front of the Grand Canyon, just prior to their reelection in 1996, when he announced the creation of the Grand Staircase-Escalante National Monument, the centerpiece of his administration’s project of protecting iconic American landscapes through the Antiquities Act of 1906.⁸⁷ As he thanked his Secretary of Commerce, William M. Daley, and his Secretary of the Navy, John H. Dalton, who were the co-sponsors of the oceans conference, he did not see the face of Bruce Babbitt, his Secretary of Interior, who was not in attendance at Monterey. It was Babbitt who suggested creating the Utah monument under the Antiquities Act, after the President’s pollster, Dick Morris had urged him to take a big pro-environment action that did not require the action of Congress and would land him on the front page of the *New York Times* just in time for the fall 1996 elections.⁸⁸ The ocean conference had been announced in January 1998 by Commerce Secretary William M. Daley, at the launch of the International Year of the Ocean, standing in front of the huge

unappropriated islands, rocks, pinnacles, and exposed reefs in waters under U.S. jurisdiction along 841 miles of the California coastline. Squillace, *supra* note 81, at 508.

83. See *National Ocean Conference*, NOAA.GOV (June 11-12, 1998), www.yoto98.noaa.gov/oceanc2/.

84. Tony Rodham and Nicole Boxer were wed at a White House ceremony in 1994; the parents of son, Zachary, they divorced in 2000. Anne E. Kornblut, *Ex-Clinton In-Law Skips Endorsement*, WASH. POST, July 26, 2007.

85. *William J. Clinton: Remarks to the National Oceans Conference in Monterey, California*, THE AMERICAN PRESIDENCY PROJECT (June 12, 1998), <http://www.presidency.ucsb.edu/ws/index.php?pid=56132>.

86. *Id.*

87. 34 Stat. 225 (codified as amended at 16 U.S.C. 431-433 (2006)).

88. Interview by John Howe with Bruce Babbitt, former Secretary of Interior, Univ. of Utah (2010) [hereinafter Babbitt Interview], available at <http://www.kued.org/productions/wilderness/pdfs/bruceBabbitt.pdf>.

tank at the Monterey Bay Aquarium, while Dr. Sylvia Earle swam in the tank breathing through her SCUBA.⁸⁹

President Clinton's advisors believed his administration had a relatively good record on ocean policy upon which the Vice President could campaign. This was especially so in California where, ever since the Santa Barbara oil spill, the status of the ocean and the coast had presented potent political issues.⁹⁰ For instance, the President had signed the 1994 United Nations agreement on deep seabed mining⁹¹ and the 1982 Law of the Sea Convention,⁹² previously rejected by the Reagan administration⁹³ despite endorsement by the military establishment in Washington, DC.⁹⁴ Clinton sent both agreements to the U.S. Senate for ratification, just in time for the Convention's entry into force upon the one-year anniversary of the deposit of the 60th instrument of ratification.⁹⁵ The Senate had yet to take action, but the Clinton administration had done more to advance U.S. accession to the Convention.⁹⁶

Also, to strengthen the nation's stewardship of the living resources in the 200 mile EEZ, the Clinton Commerce Department joined forces with a coalition of marine fisheries and conservation groups to shepherd strengthening amendments to the Magnuson-Stevens Fishery Conservation and Management Act

89. *Daley Announces National Ocean Conference at International Year of the Ocean Launch*, NOAA.GOV (Jan. 28, 1998), <http://www.publicaffairs.noaa.gov/pr98/jan98/yoto.html>. Vice President Al Gore gave the conference's opening address on June 11, 1998, at the Naval Postgraduate School in Monterey, the same day that he announced that the President had signed the executive order creating the U.S. Coral Reef Task Force that would coordinate agency policies respecting the coral reefs of Hawaii, Florida, and the U.S. territories of Guam, the Virgin Islands, and Puerto Rico. Exec. Order No. 13,089, 63 Fed. Reg. 32,701 (1998). See *National Ocean Conference*, *supra* note 83.

90. See generally Harvey Molotch, *Oil in Santa Barbara and Power in America*, 40 SOC. INQUIRY 131-32 (1970); ROBERT G. HEALY, *PROTECTING THE GOLDEN SHORE: LESSONS FROM THE CALIFORNIA COASTAL COMMISSIONS* (1978).

91. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, U.N. Doc. A/RES/48/263 (1994).

92. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982).

93. Presidential Statement on United States Ocean Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). See generally George D. Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151 (1989).

94. *U.N. Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 2 (2003) (statement of Admiral James D. Watkins, USN (ret.), Chairman, U.S. Comm'n on Ocean Pol'y), available at <http://www.foreign.senate.gov/imo/media/doc/WatkinsTestimony031014.pdf>.

95. S. TREATY DOC. NO. 103-39, 103d Cong., 2d Sess. (1994); *Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI upon Their Transmittal to the United States Senate for its Advice and Consent*, 7 GEO. INT'L. ENVTL. L. REV. 77, 77-79 (1994) [hereinafter *Clinton's Message to the Senate*].

96. See generally S. TREATY DOC. NO. 103-39, *supra* note 95; *Clinton's Message to the Senate*, *supra* note 95.

through the 104th Congress.⁹⁷ President Clinton also extended the OCS moratorium on oil drilling.⁹⁸ In a show-down with the Congress, President Clinton vetoed a budget act in 1995 that included a provision to allow oil drilling in the Alaska Refuge.⁹⁹ The future use of the Refuge's coastal plain was a perennial hot-button environmental issue as the current law required a congressional decision to open it up for energy development.¹⁰⁰ The oil discoveries of the 1960s on the North Slope of Alaska supplied the crude oil that so severely fouled the ocean waters and shoreline of the Alaska peninsula in 1989, when the Exxon Valdez ran aground at Bligh Reef, near the terminus of the Trans-Alaskan Pipeline at Valdez, Alaska, the legacy of the Nixon administration.¹⁰¹

97. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996) (amending Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884 (1976)).

98. Fitzgerald, *supra* note 31, at 45.

99. *Potential Impacts of Proposed Oil and Gas Development on the Arctic Refuge's Coastal Plain: Historical Overview and Issues of Concern*, U.S. FISH & WILDLIFE SERV. (Jan. 17, 2001), <http://arctic.fws.gov/issues1.htm#section1>.

100. Alaska National Interest Lands Conservation Act, Publ. L. No. 96-487, 94 Stat. 2371 (1980) (partially codified in 16 U.S.C. § 3101 and in scattered sections of 16 U.S.C. and 43 U.S.C.). See MICHAEL J. BEAN AND MELANIE ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 304-05 (3d ed., Greenwood Publishing Group 1997). The conflict over designating the Arctic National Wildlife Refuge's (ANWR) coastal plain as "wilderness" or opening portions of oil and gas leasing waxed and waned, depending on support for one's position from the Executive Branch and the party in control of the Congress. See *id.* Passage of ANILCA in 1980 was prompted by President Jimmy Carter's use of the Antiquities Act of 1906. Squillace, *supra* note 81, at 504. President Carter's monuments in Alaska were challenged by private industry and the State of Alaska but were upheld by the courts. *Id.* at 506-07. In *Alaska v. Carter*, the court held that the president did not have to prepare an environmental impact statement before accepting the interior secretary's recommendation of a national monument. 462 F. Supp. 1155, 1158 (D. Alaska 1978). During the Clinton administration, environmental groups lobbied hard for the establishment of a national monument at ANWR. See Squillace, *supra* note 81, at 505.

101. The Exxon Valdez tanker spilled 11 million gallons of crude oil into Prince William Sound. Zygmunt J. B. Plater, *Learning From Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 ENVTL. L. REP. 11041, 11041 n.2 (2010). When President Richard Nixon signed the Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified at 43 U.S.C. § 1651), he halted all legal challenges to construction of the pipeline and the terminal at Valdez. Earlier in the Nixon administration, Richard Nixon had a spat with his own Secretary of Interior, Walter Hickel of Alaska, over the latter's objection to the Vietnam War. See Dennis Hevesi, *Walter Hickel, Nixon Interior Secretary, Dies at 90*, N.Y. TIMES (May 8, 2010), http://www.nytimes.com/2010/05/09/us/09hickel.html?pagewanted=all&_r=0. Hickel had also sought to delay approval of the pipeline until oil companies agreed to environmental safeguards. *Id.* To spite the dissident Secretary, President Nixon had reorganized the federal government in a manner that removed a large amount of the Secretary's jurisdiction. Nixon's reorganization separated the sibling agencies, the Fish and Wildlife Service, with its system of national wildlife refuges, and the National Marine Fisheries Service. Later, when the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1543), and Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1421h), were enacted, responsibilities for marine species and habitat conservation were allocated somewhat haphazardly, making future ecosystem-based

But Secretary Babbitt was in Monterey that day in spirit and in the tone of the event; the speakers who evoked the commitment to future generations were clearly echoing remarks Secretary Babbitt had made at countless appearances discussing the ESA.¹⁰² Of the two concrete policy actions that Vice President Gore had announced the previous day, one was drafted by Babbitt's department.¹⁰³ President Clinton's extension of the moratorium on OCS leasing for oil development was clearly aimed at the constituencies of Senator Barbara Boxer. But the executive order on coral reefs, penned by William Y. Brown, Secretary Babbitt's science advisor, was part of Babbitt's campaign to save the living ecosystems that species depend upon on a landscape scale.¹⁰⁴

B. "Because We Can"

One of Bruce Babbitt's principal goals when he took office as Secretary of the Interior in 1993 was to transform the management paradigm of the federal land management agencies from resource extraction to ecosystem conservation.¹⁰⁵ He also wanted to vastly improve the prospects for endangered species by finding a way to protect the ecosystems they depended upon so that "death-bed" intervention through listing under the Endangered Species Act would not be necessary.¹⁰⁶ Very early in his time as Secretary of Interior, Babbitt participated in the release by FWS biologists of a female gray wolf into Yellowstone National Park in January 1993.¹⁰⁷ Wolves were being reintroduced into Yellowstone, in an effort to restore the ecosystem on a landscape-scale.¹⁰⁸ The Secretary's resolve to find a way to protect entire

approaches very difficult. When Congress enacted the Federal Coastal Zone Management Act in 1972, Pub. L. No. 92-583, 86 Stat. 1,280 (codified at 16 U.S.C. §§ 1451-1456), the authority to administer this program of grants and state land use planning went to NOAA instead of the Department of Interior.

102. See discussion *infra* Part II.B.

103. See discussion *supra* note 89. See also Brown, Commentary, *supra* note 6.

104. See generally discussion *supra* note 89; Brown, Commentary, *supra* note 6.

105. Bruce Babbitt, U.S. Sec'y of the Interior, Our Covenant: To Protect the Whole of Creation, Speech to the National Press Club (Dec. 13, 1995) [hereinafter *Our Covenant*], in U.S. FOREST SERV. Dec. 18, 1995, <http://www.fs.fed.us/eco/eco-watch/ew951218.htm>. See also Babbitt Interview, *supra* note 88.

106. Our Covenant, *supra* note 105. *Exit Interview: Bruce Babbitt*, PBS.ORG (Jan. 5, 2001) http://www.pbs.org/newshour/bb/environment/jan-june01/babbitt_01-05.html [hereinafter *Exit Interview*] (announcing President Clinton's orders establishing a rule prohibiting roads on approximately one-third of the national forest lands, the Secretary was most proud of "breathing life into the Endangered Species Act," reintroducing wolves to Yellowstone National Park, "restoring the salmon in the rivers of the Pacific Northwest," and fashioning a landscape protection record "second to no one").

107. Our Covenant, *supra* note 105.

108. *Id.*

landscapes was heightened after the Supreme Court ruled in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* on June 29, 1995, upholding regulations adopted by the Fish and Wildlife Service, that the term “harm” shall include significant damage to the habitat of a listed species that results in the death of an individual of that species.¹⁰⁹ This interpretation of the ESA would be critical in the looming fight over the old growth forests of the Pacific Northwest, the water systems of the Sacramento River delta and the Florida Everglades, and throughout the federal lands of the western states.¹¹⁰

This job, however, would be a tough one. The 106th Congress, which was elected in the mid-term elections of 1994, included strident opponents of the Endangered Species Act, who campaigned on a promise to repeal the act.¹¹¹ In a speech to the National Press Club in December 1995, Babbitt recounted his experience of seeing the green eyes of the female wolf, his recollections of the blue mountain near his boyhood home that was sacred to the Hopi Indians, and his attachment to the Colorado plateau with its layer-cake colors that revealed the Earth’s geological history.¹¹² He recalled an account he read of an “Eco-Expo” where students were asked to answer the question why we should save endangered species.¹¹³ The response he recalled most vividly had stated simply, “Because we can.”¹¹⁴

Babbitt took every opportunity he could to remind President Clinton to think about his environmental legacy.¹¹⁵ At a reception prior to the election, he showed the President an index card.¹¹⁶ On one side was a list of the eighteen national monuments that Teddy Roosevelt had created by proclamation during his presidency.¹¹⁷ On the other side, was the number nineteen, the number of monuments that Clinton would create by proclamation under

109. 515 U.S. 687, 708. Endangered and Threatened Wildlife and Plants; Final Re-definition of “Harm,” 46 Fed. Reg. 54,748-01 (Nov. 4, 1981) (to be codified at 50 C.F.R. pt. 17).

110. See Leshy, *supra* note 24, at 214-15.

111. See *id.* at 214.

112. Our Covenant, *supra* note 105.

113. *Id.*

114. *Id.*

115. See Squillace, *supra* note 81, at 474 n. 5. Professor Mark Squillace notes that after November 1998, when the President sent the Secretary a letter asking for recommendations under the Antiquities Act, Secretary Babbitt made a habit of presenting an index card to President Clinton whenever he was in his presence. *Id.* Professor Squillace was the special assistant to John Leshy, Solicitor General of the Interior Department, during the last year of the Clinton administration, when the President established most of the monuments recommended by Secretary Babbitt. *Id.* at 473 n.1. See also Leshy, *supra* note 24, at 216-21.

116. Squillace, *supra* note 81, at 474 n.5.

117. *Id.*

the Antiquities Act of 1906.¹¹⁸ President Clinton had liked the idea very much. After Dick Morris had advised the President to take an environmental action, which was significant enough to be pictured on the front page of the *New York Times*, but would not require the cooperation of the Congress, Secretary Babbitt and President Clinton stood at the rim of the Grand Canyon in Babbitt's home state of Arizona and signed the proclamation creating the Grand Staircase-Escalante National Monument.¹¹⁹

Secretary Babbitt carefully compiled a list of national monuments he would recommend to President Clinton, knowing that the mere fact that designation was being contemplated could spur the Congress to enact permanent protection of fragile environments.¹²⁰ He would reserve the President's power under the Antiquities Act only to those areas for which the Congress would not or could not act.¹²¹ Among the landscapes in this category, Babbitt had in mind the biologically rich California coastline containing federally-owned reefs and rock outcroppings.¹²² The Secretary limited the California coast monument to these features because it was unclear whether the Antiquities Act could be used for submerged lands beneath the territorial sea, the lands which were owned by the states under the Submerged Lands Act of 1953.¹²³ His scientific advisor, William

118. *Id.*

119. See discussion *supra* part II.A.

120. See Squillace, *supra* note 81, at 540-42; Leshy, *supra* note 24, at 216-21.

121. See Squillace, *supra* note 81, at 542 n. 417.

122. Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000). The monument covers all emergent features of the entire coastline that are above mean high tide. *Id.* By the terms of the proclamation, the monument comprises

all unappropriated or unreserved lands and interests in lands owned or controlled by the United States in the form of islands, rocks, exposed reefs, and pinnacles above mean high tide within 12 nautical miles of the shoreline of the State of California. The Federal land and interests in land reserved are encompassed in the entire 840 mile Pacific coastline, which is the smallest area compatible with the proper care and management of the objects to be protected

Id. In 1978, the U.S. Supreme Court found that the submerged lands within the Channel Islands National Park belonged to the State of California under the Submerged Lands Act of 1953. *United States v. California*, 436 U.S. 32, 41 (1978). The Attorney General had not yet offered an opinion as to whether the Antiquities Act could be applied to submerged lands. See *infra* text accompanying note 123.

123. Submerged Lands Act of 1953, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-1315 (2002)). The Act granted to the states "all right, title, and interest" over submerged lands from the high water mark to three miles seaward. *Id.* §1311 (cited for its relevance to national monuments under the Antiquities Act). See also Squillace, *supra* note 81, at 518 n.287. As Professor Squillace explains, it was not until September 2000, that the U.S. Department of Justice Office of Legal Counsel (OLC) issued a legal opinion regarding whether the Antiquities Act authorized the president to establish a national monument over submerged lands held by a state under Submerged Lands Act. Squillace, *supra* note 81, at 502 n.182. Memorandum from Randolph D. Moss, Assistant Att'y Gen., U.S. Dep't of Justice, to John Leshy, Solicitor, Dep't of Interior, James Dorskind, Gen. Counsel, Nat'l Oceanic & Atmospheric Admin., and Dinah Bear, Gen. Counsel, Council on Env'tl. Quality, Admin. of Coral Reefs Res. in the Nw. Hawaiian Islands 4-9 (Sept. 15, 2000), *available at*

Y. Brown, suggested that he consider coral reefs in the Caribbean and around certain island possessions in the Pacific, areas that fall within the insular and territorial authority of the Interior Department.¹²⁴ Brown's initial thought was to expand the existing national wildlife refuges on these islands to encompass larger swathes of the marine ecosystem.¹²⁵ He was particularly eager to expand the boundary of the Hawaiian Islands National Wildlife Refuge around the Northwestern Hawaiian Islands, where vast areas of coral reefs were located.¹²⁶ But, Brown recalled from his graduate student days at the University of Hawaii that the seaward boundary of the Hawaiian refuge was hotly contested; it would not be easy to expand the boundary beyond the low water mark without the cooperation of the State of Hawaii and its congressional delegation.¹²⁷

Meanwhile, biologists in the Fish and Wildlife Service were still worried about the impact of energy development on the caribou herds and other wildlife of the coastal plain of the Arctic National Wildlife Refuge.¹²⁸ The State of Alaska was preparing to offer leases for the submerged lands along the coastline, but the ownership of the lands was still in litigation. Then, on June 19, 1997, the Supreme Court handed the Fish and Wildlife Service a victory in its struggles with the State when it ruled

<http://www.justice.gov/olc/coralreef.htm> [hereinafter Administration of Coral Reefs]. The OLC reasoned that the United States retains some measure of "control" over lands below the low tide line out to three nautical miles, *see id.* at n.7, under section 6(a) of the Submerged Lands Act, which provides that the United States retains its "rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a) (2000); *United States v. California*, 436 U.S. 32, 41 n.18 (1978) (holding that the Submerged Lands Act "provides for the retention by the United States of its navigational servitude and its 'rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.' "). The Antiquities Act requires that the federal government retain "control" over the lands in order to allow designation of a national monument. 34 Stat. 225 (codified as amended at 16 U.S.C. §§431-433 (2006)). *See discussion infra* Part II.D.

124. Brown, Commentary, *supra* note 6.

125. *Id.*

126. *Id.*

127. *See generally* Dennis K. Yamase, *State-Federal Jurisdictional Conflict over the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*, 4 U. HAW. L. REV. 139 (1982). *See also* Craig S. Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come*, 25 NAT. RESOURCES J. 317 (1985). Brown obtained his Ph.D. at the University of Hawaii in 1973, before obtaining his J.D. at Harvard Law School. *William Y Brown*, Brookings, <http://www.brookings.edu/experts/brownw> (last visited Jan. 11, 2013). He served as Bruce Babbitt's science advisor from April 1997 to January 2001. *Id.*

128. These worries began in the late 1970s when the State of Alaska made reparations to sell offshore oil and gas drilling rights in the submerged lands in the Beaufort Sea off Alaska's Arctic coast. 3 MICHAEL W. REED, *SHALOWITZ'S SHORE AND SEA BOUNDARIES* 134-60 (2000), available at http://www.nauticalcharts.noaa.gov/hsd/docs/CSE_library_shalowitz_Part_one.pdf. These concerns led to the case of original jurisdiction in the Supreme Court, *United States v. Alaska*, 521 U.S. 1 (1997).

that certain submerged lands between the mainland and the barrier islands fringing Alaska's Arctic coast belonged to the federal government and not the State of Alaska.¹²⁹ The submerged lands of the Alaska National Wildlife Refuge, along the Beaufort Sea, had been effectively withdrawn prior to the Statehood Act.¹³⁰ The lands therefore had not passed to the State of Alaska in 1959 when it took title to the three-mile belt of submerged lands pursuant to the Submerged Lands Act.¹³¹ The decision in the so-called 'Dinkum Sands' case gave the Interior Department biologists hope that they could make a similar argument regarding the seaward boundaries of the Hawaiian Islands National Wildlife Refuge. The Secretary could on his own initiative extend the boundaries of an existing national wildlife refuge to any lands owned by the federal government, but whether this power applied to submerged lands under the National Wildlife Refuge System Administration Act was a difficult question.¹³²

C. The Ecosystem Approach at Sea

Despite these legal conundrums, Babbitt felt he was successful in transforming the land management philosophy of the Department of the Interior by giving it the responsibility to conserve and manage the new ecosystem-scale monuments. This was in sharp contrast with the difficulties the Secretary of Commerce and NOAA administrators had in grafting an ecosystem approach onto the single-species, maximum sustainable yield paradigm of the Magnuson-Stevens Fishery Conservation and Management Act.¹³³

After a lengthy period and many hearings, the House and Senate approved a series of amendments to the Fishery Act.¹³⁴ The Sustainable Fisheries Act of 1996 required the regional fishery management councils to define numerically the point of "overfishing" for each federally managed fish stock, and those stocks which the Secretary of Commerce identified as overfished

129. 521 U.S. at 36-41.; Kirsten M. Fletcher & Richard Brownlow, *Alaska Loses Battle for Submerged Lands*, 17:3 WATER LOG at 7 (1997).

130. Fletcher & Brownlow, *supra* note 129, at 8.

131. *Id.*

132. This question was at the root of the Service's disagreement with the National Ocean Service and National Marine Fisheries Service in administering the Coral Reef Ecosystem Reserve under President Clinton's executive orders of 2000 and 2001. See discussion *infra* Part II.D.

133. 16 U.S.C. §§ 1801-1884 (1976). See generally Hsu & Wilen, *supra* note 25; Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813 (1997) [hereinafter Rieser, *Contracting for the Commons*].

134. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996).

had to be rebuilt in as short a time as possible.¹³⁵ Also, the councils had to amend all their fishery plans to identify the essential habitat for each fish stock and to adopt measures, if necessary, to prevent any adverse effects that fishing gear was having on this habitat.¹³⁶ Finally, the plans had to include measures that would minimize the accidental catch of non-target fish species.¹³⁷ This mortality was called, innocuously enough, “bycatch,” but was a major source of ecosystem damage that was not sufficiently accounted for in the maximum sustainable yield (MSY) paradigm and fishery management plans adopted under the Fishery Conservation and Management Act.¹³⁸

Implementing this transition to an ecosystem approach for the oceans was difficult in the resource agencies within the Commerce Department because of the MSY paradigm. The difficulty was also due to the feature that was the hallmark of the 1976 Fishery Act: the regional fishery management councils. In 1976, supporters of the Act in Congress assumed that commercial fishermen, if given responsibility to do so on the regional councils, would adopt a long-term perspective and work cooperatively to conserve the fish stocks newly placed under exclusive U.S. management.¹³⁹ But this had not happened; the fishing fleets grew in number and fishing power with the exodus of the foreign fishing fleets, and soon, even formerly under-utilized fish stocks were overfished or approaching an overfished condition.¹⁴⁰ In the first twenty years of implementation, many observers came to believe that the Act had insufficient safeguards against members of the fishery councils looking after their own financial interests in devising management plans.¹⁴¹ But requirements strengthening the conflict of interest provisions for voting council members were watered down.¹⁴² This led President Clinton to issue an unusual statement when he signed the Sustainable Fisheries Act, lamenting that the amendments were insufficient to address an

135. Hsu & Wilen, *supra* note 25, at 805.

136. *Id.* at 806.

137. *Id.* at 805-06.

138. *Id.*

139. See generally Eldon V.C. Greensberg & Michael E. Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641 (1982).

140. *Id.* at 645.

141. See generally Teresa M. Cloutier, *Conflicts of Interest on Regional Fishery Management Councils: Corruption or Cooperative Management?*, 2 OCEAN & COASTAL L.J. 101 (1996).

142. Presidential Statement on Signing the Sustainable Fisheries Act 1996, 32 WEEKLY COMP. PRES. DOC. 2040 (Oct. 14, 1996).

important problem with the design of the Act, in essence the short-time horizons of the commercial fishermen.¹⁴³

Other problems with the single-species focus of the Fishery Act were proving equally difficult to remedy. In the 1990s, populations of certain marine mammals whose prey species were the target of rapidly expanding commercial fisheries began to decline precipitously.¹⁴⁴ Because the Fishery Act had no enforceable mandate to protect marine ecosystems for other marine life, conservation groups filed suit under the ESA and NEPA.¹⁴⁵ Two of the fisheries that were the target of this litigation took place at the NWHI—the snapper and lobster fisheries.¹⁴⁶ One protected species whose decline was suspected as being attributable to these fisheries was the endangered Hawaiian monk seal.¹⁴⁷ Until the 1970s, the Fish and Wildlife Service biologists had protected the beaches and nearshore habitat that the monk seal depended upon at the Hawaiian Islands National Wildlife Refuge.¹⁴⁸ But when the monk seal was listed as endangered in 1976, the National Marine Fisheries Service was given responsibility for its recovery.¹⁴⁹

When news of these declines reached the Fish and Wildlife Service, it renewed its biologists' interests in expanding or clarifying the boundaries of the wildlife refuge around the coral reefs of the NWHI.¹⁵⁰ Interior Department officials began discussions with their counterparts in the Department of Commerce and NOAA who were responsible for the national marine sanctuaries program.¹⁵¹ The idea was to make a joint proposal to President Clinton for a seascape-scale marine national monument around the NWHI.¹⁵² Now that NOAA Fisheries had shut down indefinite-

143. *Id.* Christie, *From Stratton to USCOP*, *supra* note 10, at 544.

144. *See* Jerry McBeath, *Management of the Commons for Biodiversity: Lessons from the North Pacific*, 28 *MARINE POL'Y* 523 (2004) (describing the *Greenpeace v. NMFS* cases concerning the Steller sea lion and the Pollock fisheries of the North Pacific).

145. *Id.*

146. *See* *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123 (D. Haw. 2000).

147. *See* Valerie Alter, *Hawaiian Monk Seals: From Controversy to Cooperation, a Case Study of Cooperative Federalism*, 20 *J. ENVTL. L. & LITIG.* 157, 165 (2005).

148. *See id.* at 162-63.

149. *Id.* at 165. Note that the Marine Mammal Protection Act of 1972 had divided responsibilities for different marine mammal taxa between the Department of the Interior's Fish and Wildlife Service and the National Marine Fisheries Service, which had been separated by the 1970 Reorganization Plan. BEAN AND ROWLAND, *supra* note 100, at 112 (citing 16 U.S.C. § 1362(12)(A)(i) and Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970), *reprinted in* 84 Stat. 2090).

150. *See* Brown, *Commentary*, *supra* note 6.

151. *Id.*

152. In the 1970s, the Department of the Interior nominated the Hawaiian Islands National Wildlife Refuge as a candidate for designation under the Wilderness Act of 1964, 16 U.S.C. § 1131 (1964). *See* Yamase, *supra* note 127, at 143-44. In the 2000 negotiations for a marine national monument, this candidate status was an important point of leverage.

ly the spiny and lobster fisheries,¹⁵³ and the bottomfish fisheries were about to be declared overfished,¹⁵⁴ the Interior Department biologists, for the first time in two decades of protecting the Hawaiian Islands National Wildlife Refuge, may have had hope for permanent no-fishing policy at the NWHI.

D. A Legal Memo for the Cabinet

The executive order that President Clinton signed at the National Ocean Conference in 1998 called for increased interagency cooperation in the protection of U.S. coral reef ecosystems.¹⁵⁵ In May 2000, in response to lobbying by conservation groups armed with scientific research and the news that marine fish stocks around the world were crashing,¹⁵⁶ Clinton directed his administration to strengthen the management of the U.S. marine protected areas, to develop a national system of such areas, and to recommend new marine areas for protection.¹⁵⁷ He also requested his Secretary of Interior and Secretary of Commerce to work with the State of Hawaii and the Western Pacific Regional Fishery Management Council to develop recommendations for a new, coordinated management regime “to provide strong and lasting protection for the coral reef ecosystem of the Northwest Hawaiian Islands.”¹⁵⁸ These orders triggered calls by non-governmental organizations and scientists for the creation of a marine protected area around the NWHI.¹⁵⁹ The scientists’ objective was to establish a sentinel research site located at some distance from local or regional-scale sources of anthropogenic impacts in order to assess the effects of global warming and ocean acidification on coral reefs.¹⁶⁰ The conservationists’ goal was to thwart plans to expand precious coral and other fish-

153. *Greenpeace Foundation v. Mineta*, 122 F. Supp. 2d 1123, 1134-35 (D. Haw. 2000).

154. *Id.* at 1136.

155. Exec. Order No. 13,089, 63 Fed. Reg. 32,701 (June 15, 1998). In a subsequent ocean policy action, President Clinton issued a proclamation extending the U.S. contiguous zone to 24 miles seaward of the baseline from which the territorial sea is measured. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999).

156. See COMM’N ON GEOSCIENCES, ENV’T & RES, ET AL., *supra* note 9, at xi, 14; ZINN & BUCK, *supra* note 32.

157. Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000). The Department of Justice memorandum opinion notes that on May 26, 2000, President Clinton directed his secretaries to work cooperatively with the State of Hawaii and consult with the Western Pacific Fishery Management Council to develop recommendations. Administration of Coral Reefs, *supra* note 123, at 1.

158. Administration of Coral Reefs, *supra* note 123, at 1.

159. Telephone interview with Athline Clark, Haw. Dep’t of Land and Natural Res., Honolulu, Haw. (Apr. 23, 2007) (notes on file with author).

160. Erik C. Franklin, *An Assessment of Vessel Traffic Patterns in the Northwestern Hawaiian Islands Between 1994 and 2004*, 56 MARINE POLLUTION BULL. 136, 151 (2008).

eries by the Western Pacific Fishery Management Council, whose coral reef fisheries ecosystem management plan was being circulated for review and approval.¹⁶¹

In the interagency negotiations that President Clinton called for in May 2000, the Fish and Wildlife Service initially wanted to expand the boundaries of the Hawaiian Islands National Wildlife Refuge to encompass the territorial waters around the reefs, atolls, and islands but was unsure the Secretary had authority to do so; NOAA wanted to have Congress designate a national marine sanctuary instead.¹⁶² The CEQ endorsed the notion of a marine national monument with management responsibilities shared by the two agencies.¹⁶³ But there were a number of legal issues that could not be resolved definitively, and discussions began to breakdown as members of Congress got wind of the negotiations and threatened to intervene in the decision through pending bills reauthorizing the National Marine Sanctuaries Act.¹⁶⁴

Unable to agree on the best mechanism for ensuring permanent protection of the NWHI ecosystem, the Departments of Commerce and Interior along with the CEQ referred a number of legal questions to the Office of Legal Counsel at the Department of Justice.¹⁶⁵ The questions revolved around the uncertain authority to protect marine ecosystems under the National Wildlife Refuge System Administration Act, the Antiquities Act of 1906, and the National Marine Sanctuaries Act.¹⁶⁶ The questions posed to the Attorney General included whether the Secretary of Interior could establish a national wildlife refuge in marine waters; whether the Antiquities Act authorized the President to create monuments on the waters of and lands beneath the territorial sea and the EEZ; and whether the Secretary of Commerce's authority over fish stocks in the EEZ was paramount to any action under either the wildlife refuges or antiquities laws.¹⁶⁷ The key question was whether permanent protection could be afforded to marine ecosystems at the NWHI under the Antiquities Act of 1906, which authorizes the President to designate

161. NOAA eventually disapproved portions of the coral reef FMP because it conflicted with the coral reef ecosystem reserve President Clinton established by executive order in December 2000. See Notice of Partial Approval, Western Pacific Fisheries, Precious Corals Fishery Management Plan, 67 Fed. Reg. 11,941 (Mar. 18, 2002) (to be codified at 50 C.F.R. pt. 660).

162. See Pala, *supra* note 15.

163. See *id.*

164. Interview with NOAA official, *supra* note 46.

165. Administration of Coral Reefs, *supra* note 123, at 1.

166. *Id.*

167. *Id.*

monuments around objects of historic or scientific interest that are situated upon the lands owned or controlled by the U.S. government or in waters located on or above such lands.¹⁶⁸ Secretary Babbitt was considering making a recommendation to the President to proclaim a marine national monument encompassing and surrounding the atolls, coral reefs, and islands of the Hawaiian Islands National Wildlife Refuge.¹⁶⁹

The lawyers at the Office of Legal Counsel of the Justice Department concluded that the President could indeed use his authority under the Antiquities Act to establish a national monument in both the territorial sea and the EEZ because these lands and waters are either owned or controlled by the national government under both U.S. law and international law.¹⁷⁰ Noting that the United States possesses substantial authority to regulate the EEZ for the purpose of protecting the marine environment under both customary law and the Law of the Sea Convention, the Justice Department found that the latter “appears not only to allow the United States to take action to protect marine resources, but also to require some such actions,” citing Articles 61, 62, 65, and 194.¹⁷¹

In our view, although a close question, the authority the United States possesses under international law to protect the marine environment in the EEZ, in combination with the overall amount of restraining and directing influence that the United States exerts in the EEZ, . . . give[s] the United States sufficient “control” over the EEZ for the President to invoke the Antiquities Act for the purposes of protecting the marine environment.¹⁷²

168. Antiquities Act of 1906, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (2006)).

169. Squillace, *supra* note 81, at 502 n.182.

170. Administration of Coral Reefs, *supra* note 123, at 2.

171. *Id.* at 9. The memorandum opinion cited Proclamation No. 2667, 3 C.F.R. 67 (1943-1948); Submerged Lands Act of 1953, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-1315 (2002)); Proclamation No. 5928, 3 C.F.R. 547 (1989); Proclamation No. 5030, 3 C.F.R. 22 (1984); and Proclamation No. 7219, 3 C.F.R. 98 (2000).

172. Administration of Coral Reefs, *supra* note 123, at 9. The Justice Department concluded, inter alia, that the President could not use the National Wildlife Refuge Administration Act to establish a refuge in either the territorial sea or the EEZ relying solely on implied authority rooted in practice; that the Secretary of Interior must have management authority over any national monument; that the Fish and Wildlife Service cannot share management authority with another agency for any refuge areas within a national monument; that federal fisheries regulations must be consistent with regulations applicable to national monuments; and that the establishment of a national monument would not preclude establishment of a national marine sanctuary in the same area under the National Marine Sanctuary Act. *Id.*

After the Office of Legal Counsel explained its preliminary findings at a briefing session in early August 2000,¹⁷³ the fishing industry representatives on the Western Pacific Fishery Management Council began to believe that the Council's coral reef ecosystem fishery management plan was about to be superseded by a monument that would be managed by the Interior Department. The Council's staff contacted the staff members working for Hawaii's Senator Daniel Inouye, who was in the process of reviewing bills to reauthorize the National Marine Sanctuaries Act.¹⁷⁴ Although bills had already been reported out of the respective committees, new language was hurriedly drafted to force a showdown with the White House and forestall a monument proclamation being drafted that would end all commercial fishing at the NWHI.¹⁷⁵ The amendments authorized the President to create a "coral reef ecosystem . . . reserve" at the NWHI through an executive order and directed the Secretary of Commerce to begin the process of designating the reserve as a national marine sanctuary.¹⁷⁶

When faced with this showdown, President Clinton blinked. Rather than use the power under the Antiquities Act, President Clinton issued another executive order late in 2000, creating the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, a zone approximately 1200 nautical miles long and 100 nautical miles wide, covering waters seaward of the three-nautical mile boundary of the State of Hawaii.¹⁷⁷ As directed by Congress, this order set in motion a process to designate the waters of the NWHI as a national marine sanctuary under the U.S. National Marine Sanctuaries Act.¹⁷⁸

The public consultation process required by the Sanctuaries Act generated extensive public support for the total protection of the area and for ending the commercial fisheries. Partly in

173. E-mail from Sylvia Liu, former Office of Legal Counsel attorney, to the author (Aug. 28, 2012); Notes from a meeting at Justice Department (Aug. 2000) (on file with the author).

174. In 2000, Secretary Babbitt proposed the idea of a monument at the NWHI to Senator Daniel Inouye (D-HI). Bills to reauthorize the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (2000), were pending in the Congress at that time. After the briefing session at the Justice Department on the memorandum, language was inserted into the reauthorization bill authorizing the President to create a NWHI coral reef ecosystem reserve and requiring the Secretary of Commerce to begin the process to designate a NWHI national marine sanctuary. *See* Pala, *supra* note 15.

175. Colloquy 146 Cong. Rec. S10633 (Oct. 17, 2000).

176. National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106-513, § 6(g), 114 Stat. 2385 (codified at 16 U.S.C. §1431).

177. Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 4, 2000) (establishing the CRE Reserve and requiring a public comment period before the Reserve would be made permanent).

178. National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (2002).

response to this, the Clinton White House revised the executive order in January 2001, just before the President left office, containing extensive areas that would be managed as no-take areas and requiring the Departments of Interior and Commerce to co-manage the huge area in cooperation with the State of Hawaii and pursuant to their individual legal mandates.¹⁷⁹ With these changes, the stage was set for the decision by President George W. Bush to make the protections permanent with a proclamation.¹⁸⁰

IV. CONCLUSION

Under the guidance of Interior Secretary Bruce Babbitt, President Clinton created nineteen monuments under the Antiquities Act before he left office in 2001, one monument more than President Theodore Roosevelt.¹⁸¹ But not one of them was a *marine* national monument. That action fell to President George Bush when he succeeded Bill Clinton to the White House. Opposition to the idea of a national monument by a senior member of the Hawaiian congressional delegation and by some Commerce Department officials was sufficient to convince the President's advisors to give up the idea of using the Antiquities Act to establish a monument around the NWHI coral reef ecosystems.¹⁸²

Judging from this history, if President Obama's party, in his second term, does not hold a majority in both chambers of the U.S. Congress, his blue legacy may be limited to a continuation of the ocean policy confusion, ambivalence, and stalemate, which

179. Exec. Order No. 13,196, 66 Fed. Reg. 7395 (Jan. 18, 2001).

180. President George Bush lifted the prohibition on leasing the outer continental shelf on July 14, 2008, and encouraged Congress to do the same. *President Bush Discusses Outer Continental Shelf Exploration*, THE WHITE HOUSE (July 14, 2008) <http://www.whitehouse.gov/news/releases/2008/07/20080714-4.html>. In September 2008, Congress allowed the OCS moratorium to expire, effectively lifting a three-decades long ban, making Atlantic and Pacific OCS areas eligible for leasing by the Department of the Interior's Minerals Management Service. See Karen Hansen et al., *A Bold New Ocean Agenda: Recommendations for Ocean Governance, Energy Policy, and Health*, 39 ENVTL. L. REP. 10012, 10015 (Jan. 2009). By letting the OCS moratorium lapse, President Bush opened the door to leasing on previously unexplored areas of the outer continental shelf. The Bush administration also accelerated deepwater drilling in the Gulf of Mexico by lessening environmental reviews, ultimately leading to the Deepwater Horizon blowout disaster. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2010).

181. See discussion *supra* Part II.B.

182. See discussion *supra* Part II.B.

arose during the Clinton administration and continued throughout the Bush years, punctuated by the uncharacteristically forward-looking creation of the marine national monuments in the Pacific.

With massive budget and deficit cuts looming, President Obama's ocean legacy may never go beyond his 2010 endorsement of the policy of coastal and marine spatial planning and inter-agency coordination¹⁸³ and his administration's confusing account of the fate of the oil released into the deep waters of the Gulf of Mexico from the BP Deepwater Horizon's Macondo well.¹⁸⁴ With a divided Congress, the President likely will not be able to merge NOAA with the Department of Interior, reuniting the two agencies that were separated in 1970, nor provide funding for the regional marine planning and rebuilding of depleted fish stocks under the Sustainable Fisheries Act.¹⁸⁵ The pace of oil drilling in the Arctic seas will increase but will suffer setbacks as the shifting ice regime challenges conventional technologies for locating and recovering hydrocarbon resources. And all will occur with yet to be accounted for impacts on the fragile, ice-dependent marine ecosystems that are already feeling the impact of the warming oceans.

Without a frank acknowledgment of the uncertainties that surround our predictions of specific conditions in particular ocean regions, as our confidence grows in the data showing downward trends, the ocean policy of the future remains beyond our ability to predict.

183. In July 2010, President Obama adopted the recommendations of the White House Council on Environmental Quality's Interagency Ocean Policy Task Force, which included, *inter alia*, support for U.S. accession to the Law of the Sea Convention. Exec. Order 13,547, 75 Fed. Reg. 43,023 (July 22, 2010). See Josh Eagle, *Complex and Murky Spatial Planning*, 28 J. LAND USE & ENVTL. L., 35 (2012).

184. See *Teleconference Lubchenco May 20*, RESTORETHEGULF.GOV (May 24, 2010, 8:00 PM), <http://app.restorethegulf.gov/release/2010/05/24/teleconference-lubchenco-may-20> (finding that most of the oil spilled from the Deepwater Horizon well had either evaporated or been removed as a result of the clean-up efforts). One month prior to the well blowout, Secretary of Interior Ken Salazar had announced a new five-year OCS leasing plan in March 2010. See *Press Release: Secretary Salazar Announces Comprehensive Strategy for Offshore Oil and Gas Development and Exploration*, U.S. DEPT OF INTERIOR (Mar. 31, 2010), http://www.doi.gov/news/pressreleases/2010_03_31_release.cfm.

185. In January 2012, President Obama announced his intention to consolidate the government agencies that work on trade and to merge NOAA with the Department of the Interior, so that, for example, salmon can be managed by one agency. Laura Meckler, *White House Seeks to Merge Agencies*, WALL ST. J., (Jan. 14, 2012), <http://online.wsj.com/article/SB10001424052970204542404577158361834894658.html>. The salmon comment echoed a similar remark the President made in the 2011 State of the Union address to Congress. See President Barack Obama, *State of the Union Address* (Jan. 25, 2011).

COMPLEX AND MURKY SPATIAL PLANNING

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I. INTRODUCTION

On July 19, 2010, President Obama issued Executive Order 13,547,¹ which creates a process for developing and implementing

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1. Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010). Based on a review of past executive orders, Executive Order 13,547 appears to be rare or unique insofar as it incorporates a lengthy (77 pages, excluding appendices) external document, the Final Recommendations of the Interagency Ocean Policy Task Force. WHITE HOUSE COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (2010) [hereinafter TASK FORCE REPORT]. Executive Order 13,547 "adopts the recommendations of the [task force], except where otherwise provided in this order." Exec. Order No.

what it calls “Coastal and Marine Spatial Planning [CMSP].”² In order to understand what the President might be attempting to accomplish through this sweeping ocean governance reform initiative, it is helpful to compare the legal regimes that currently govern use of public lands and seas.

Public lands law and ocean law are similar insofar as they represent legislatively-created mechanisms for resolving resource allocation disputes among people who seek to use public property, or the resources located on public property, in incompatible ways. The most significant difference between the two bodies of law is in the extent to which Congress has delegated responsibility for resolving those allocation disputes to federal agencies.

On the public lands, Congress employs a combination of high and low degree-of-delegation approaches.³ It governs about sixty percent of federal lands *via* so-called “multiple-use” statutes.⁴ These high-degree-of-delegation laws charge agencies with balancing competing uses within each managed area. The balancing directive is extremely vague, leaving agencies with substantial discretion in allocating resources among uses.⁵ On the other forty per-

13,547, 75 Fed. Reg. at 43,023. Although this type of incorporation by reference may be within the President’s authority, it does create problems for those who attempt to describe and analyze Executive Order 13,547. First, when referring to the action the President has taken, it is awkward to cite to language of the Task Force Report with either a reference to that report or to the executive order. The former approach undersells the fact that the language is, by virtue of the incorporation by reference, part of the executive order and thus equal in importance to language that can actually be found in the order itself. On the other hand, the latter approach seems awkward because the Task Force Report is not an executive order. In an admittedly imperfect solution, I will refer throughout this essay to all measures required by either the executive order or the task force report *qua* executive order either as required by the executive order or as part of “the CMSP initiative.” Citations, however, will be to the source of the measure, that is, to either the report or the order.

2. Exec. Order No. 13,547, 75 Fed. Reg. at 43,024. In the ocean law and policy literature, the term “coastal and marine spatial planning” “is a generic term describing the process leading to place-based marine management.” TUNDI AGARDY, OCEAN ZONING: MAKING MARINE MANAGEMENT MORE EFFECTIVE 13 (2010). As will be discussed later, the President’s CMSP initiative encompasses both planning and the additional zoning-like step of creating enforceable rules. *See infra* Parts III & IV.

3. The Constitution provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST., art. IV, § 3.

4. Josh Eagle, *The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas*, 35 PEPP. L. REV. 835, 848-50 & n.63 (2008).

5. Perhaps the best example of a “pure” multiple-use statute is the Federal Lands Policy and Management Act of 1976. 43 U.S.C. §§ 1701-1782 (2000) [hereinafter FLPMA]. FLPMA provides that, in allocating land to uses, the Bureau of Land Management shall “use and observe the principles of multiple use and sustained yield set forth in this and other applicable law.” *Id.* § 1712(c)(1). The statute defines “multiple use” to mean:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of

cent of federal lands, Congress employs “dominant-use” laws that, within designated areas, allow only a single use or a narrow set of compatible uses.⁶ The role of land management agencies operating under dominant-use mandates involves some discretion⁷ but is primarily one of enforcing the allocation decisions that Congress made when it passed the statutes.

Congress’ relatively active role in making resource allocation decisions on public lands stands in stark contrast to its approach to governing public seas, or “federal waters.”⁸ The public seas are almost four times larger than the combined public lands and about 130 percent larger than the entire terrestrial United States.⁹ And yet, Congress uses multiple-use statutes to manage more than ninety-nine percent of federal waters.¹⁰

Purely owing to their low degree-of-delegation feature, dominant-use laws produce resource allocation decisions with distinc-

balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Id. § 1702(c).

6. Eagle, *supra* note 4, at 848-50 & n.63. Between the two extremes of “pure” multiple-use laws and laws applying the strongest form of dominant-use management, *i.e.*, single use, laws can be located on a continuum in terms of the distribution of power between Congress and the agency in question. *Id.* In other words, there might be laws that allow agencies to permit all but one use, laws that allow agencies to permit only two uses, etc.

7. So, for example, the National Park mandate is to “provide for the enjoyment . . . by such means as will leave them unimpaired for the enjoyment of future generations.” National Park Service Organic Act, 16 U.S.C. § 1 (2006); Harmony A. Mappes, *National Parks: For Use and “Enjoyment” or for “Preservation”? and the Role of the National Park Service Management Policies in That Determination*, 92 IOWA L. REV. 601, 611 (2007). The National Park Service retains discretion to decide whether enjoyable uses, such as jet-skiing or snowmobiling, constitute impairment.

8. As used here, the term “federal waters” refer to those areas of the ocean within three to 200 nautical miles from the coastline of the United States. In the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (2006), Congress gave coastal states primary jurisdiction over natural resources within three miles of their coastlines. (For historical reasons, the state waters of Texas and on the Gulf coast of Florida extend nine nautical miles. *See, e.g.*, *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1, 24-37 (1960)). From an international law perspective, the United States’ claim to jurisdiction over natural resources within 200 miles of shore is based on the Territorial Sea provisions of Part II of the United Nations Convention on the Law of the Sea (0 to 12 miles) and the Exclusive Economic Zone provisions contained in Part V of that treaty (12 to 200 miles). The United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982). Although the United States has not ratified the treaty, it takes the position that it is entitled to its benefits by virtue of the fact that its provisions are customary international law. *See* Proclamation No. 5030, 3 C.F.R. 22 (1984).

9. G.W. HILL, *THE U.S.G.S. MARINE GEOLOGY PROGRAM IN THE EXCLUSIVE ECONOMIC ZONE 1* (1985) (Area of U.S. EEZ about 3 billion acres).

10. Eagle, *supra* note 4, at 848 n.63.

tive characteristics. Because dominant-use rules are enshrined in statutes, they produce durable allocation outcomes: lasting decisions about how the resources of a particular place can be used over time.¹¹ In addition, the fact that dominant-use rules allocate resources to one or a narrow set of uses over an indefinite time horizon means that each dominant-use area maximizes production of one or a few public goods or services. Multiple-use laws, in contrast, maximize only flexibility. As discussed in more detail below, these two features of the “place-based” approach enabled by dominant-use rules generate a range of benefits—benefits that multiple-use laws cannot produce—for both “protected” user groups and the public lands as a whole.¹²

It is worth noting that the multiple-use statutes used in ocean governance do not maximize flexibility to the same extent as their terrestrial counterparts. As opposed to terrestrial multiple-use laws, ocean laws do not permit a single agency to balance all competing uses within any defined sub-area.¹³ Instead, laws governing use of resources in federal waters give each agency authority over a subset of resources, e.g., living resources or minerals, across all federal waters.¹⁴ In a particular sub-area, for example, the fisheries management agency will be balancing requests from commercial fishermen, recreational fishermen, and marine conservation groups while the minerals management agency will be balancing requests from oil and gas companies, alternative energy companies, and marine conservation groups.¹⁵ This “fractured” balancing approach means that, within any given sub-area, ocean governance is particularly aimless, even when compared with terrestrial multiple-use. No single agency can manage any defined place in a comprehensive or coherent manner; an agency does not, for example, have the flexibility to prohibit activities regulated by other agencies.¹⁶

11. While statutes can, of course, be repealed, they are more stable than agency decisions. Perhaps the best example of how a statutory dominant-use rule can withstand intense efforts to alter its prescriptions can be found in the history of the Arctic National Wildlife Refuge. See Lisa J. Booth, *Arctic National Wildlife Refuge: A Crown Jewel in Jeopardy*, 9 PUB. LAND L. REV. 105 (1988).

12. See *infra* Part II.B.

13. There are some exceptions to the general rule that terrestrial multiple-use agencies manage *all* resources and uses within areas under their jurisdiction; most notably, the Bureau of Land Management manages use of subsurface minerals, including oil and gas, on all federal lands. See 30 U.S.C. §§ 181-287 (2006).

14. Josh Eagle, *Regional Ocean Governance: The Perils of Multiple-Use Management and the Promise of Agency Diversity*, 16 DUKE ENVTL. L. & POL'Y F. 143, 150 (2006).

15. The National Oceanic and Atmospheric Administration (NOAA) manages fishery resources, and the Department of the Interior manages mineral resources, across the entire “seascape.” See 16 U.S.C. §§ 1801-1883 (2006); 43 U.S.C. §§ 1331-1356 (2006).

16. See Eagle, *supra* note 14, at 150-52.

The overarching goal of the President's CMSP initiative seems to be to eliminate some of the aimlessness of ocean governance by creating a unique form of place-based management. It attempts to do this in a two-step process. Nine regional planning bodies will produce nine regional plans that will each contain, among other things, "spatial determinations for conservation and uses."¹⁷ After the White House approves these plans,¹⁸ federal and state agencies must ensure that future permitting and other decisions are consistent with those spatial determinations "to the extent permitted by existing laws and regulations."¹⁹ Despite the fact that Executive Order 13,547 and the incorporated Task Force Report devote more than thirty pages to CMSP,²⁰ there is no implied or explicit explanation of the term "spatial determination."²¹ The order does not explain how such determinations might work as rules to which state and federal agencies can hew, whether those determinations are intended to maximize production of goods or services, or the extent to which determinations are meant to be durable.²²

In this paper, I argue that the uncertainty surrounding the ultimate form of rules meant to be produced by the CMSP initiative will prove to be a fatal flaw. The argument proceeds as follows. First, the order's failure to pre-commit to the use of durable, dominant-use rules eliminates most of the incentive for interest groups to convene or to participate in the critical planning phase of this kind of comprehensive process.²³ Incomplete or half-hearted participation will lead to difficulties in obtaining important information from interest groups and in gaining the buy-in necessary for the long-term success of the place-based system. Second, even assuming groups convene and then fully participate—perhaps out of the fear that their absence will somehow lead to

17. TASK FORCE REPORT, *supra* note 1, at 51-54, 59.

18. *See Id.* at 63-64. The executive order creates a White House institution, the National Ocean Council, which will be directly responsible for, among other things, giving final approval to regional plans. Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,024 (July 22, 2010). For a more complete description of the approval process, *see infra* Part III.

19. TASK FORCE REPORT, *supra* note 1, at 66.

20. *Id.* at 41-76; *see also* discussion *infra* Part IV.

21. *See* TASK FORCE REPORT, *supra* note 1, at 59; *see also* discussion *infra* Part IV.A.

22. *See* TASK FORCE REPORT, *supra* note 1, at 59; *see also* discussion *infra* Part IV.A.

23. Scholars of government-mediated mediation processes, such as the planning process in the CMSP initiative, identify the first step in such processes as the "convening" phase. *See* Chris Carlson, *Convening*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 169, 169 (Lawrence Susskind et al., eds., 1999). During this phase, the government mediator must create incentives for the parties to agree to participate in the mediation. "Government agencies can begin by clarifying their objectives in convening the process and stating their commitment to implement the outcomes. . . . [In the convening phase,] government policy makers need to identify the form an agreement should take to make it easy to implement." *Id.* at 195-96.

adverse consequences—the failure to require that the initiative produce a system of durable, dominant-use rules will hinder its ability to produce meaningful reform. Assuming that multiple-use management is the primary cause of current problems, as Executive Order 13,547 does, a greater reliance on the use of durable, dominant-use rules is the only logical solution to those problems.²⁴ Part II lays out the features of an effective approach to developing and implementing an effective, comprehensive place-based ocean governance regime. It then explains why durable, dominant-use rules are needed to provide an incentive for various interest groups to participate in what is certain to be a difficult and time-consuming mediated process, and the ways in which durable, dominant-use rules remediate the problems created by multiple-use management. Part III attempts to briefly describe the structure and function of the complex and murky Executive Order 13,547 CMSP initiative. For purposes of comparison, I provide a description of an alternative and much simpler model. Part IV explores the language of the CMSP initiative and illustrates why the CMSP initiative is unlikely to create the clear expectation that the process will produce the durable, dominant-use rules or to actually generate them. Part V briefly concludes by noting some other ways the President could unilaterally initiate movement toward more effective place-based ocean governance reform.²⁵

24. See TASK FORCE REPORT, *supra* note 1, at 42-46. For a detailed explanation of how dominant-use rules have the potential to mitigate the effects of multiple-use management, see generally Eagle, *supra* note 14.

25. In this essay, I evaluate the CMSP initiative as an attempt to create a functioning place-based governance system. Proponents of the President's initiative might argue that, as use of the word "planning" in its title suggests, the initiative is merely meant to serve as the first stage in the creation of a place-based system. In other words, the CMSP initiative is laying the informational foundation for a later initiative that would mandate the creation of an enforceable set of zones and zone rules. I am not convinced that evaluating the CMSP initiative as a simple planning mechanism makes sense. As described in Part III.B, the executive order goes far beyond mere planning, compelling federal agencies (which make all important decisions with respect to use of federal waters) to comply with the terms of the regional plans developed under the initiative. Even if one were to assume that the CMSP initiative represents pure planning, the concept of conducting a planning exercise in a vacuum, that is, without any indication to participants as to how or whether the products of the exercise will ultimately be used, makes little sense.

II. THE FUNCTION AND PURPOSES OF THE PLACE-BASED APPROACH TO OCEAN GOVERNANCE

A. How Place-Based Systems Work

The United States' existing ocean laws embody a resource-by-resource, multiple-use approach.²⁶ This approach is exemplified by the Magnuson-Stevens Fishery Conservation and Management Act, enacted in 1976.²⁷ In the Act, Congress has delegated to the National Marine Fisheries Service the authority to allocate fish in federal waters to competing interest groups.²⁸ Each of these groups prefers to use those fish for different, incompatible purposes. The three primary uses for still-swimming fish are to catch them for commercial sale, to catch them for recreation, or to leave them in the ocean so that they can continue to perform their ecological roles, such as reproducing or eating (or being eaten by) other marine animals.²⁹ While the Act gives the National Marine Fisheries Service some guidance in how to allocate fish within a given stock among these uses,³⁰ the agency—in large part because of the scientific uncertainty surrounding the status and dynamics of fish populations—maintains significant discretion as to allocation.³¹

26. Eagle, *supra* note 14, at 170-71.

27. 16 U.S.C. §§ 1801-1883 (2006).

28. *Id.* The real authority in the Magnuson-Stevens Act lies with the eight Regional Fishery Management Councils; the statute requires that the Secretary of Commerce approve rules and regulations developed by the councils, but the councils have most of the leverage in this relationship. See Josh Eagle, *Domestic Fishery Management*, in DONALD C. BAUR, ET AL., *OCEAN AND COASTAL LAW AND POLICY* 280-85 (2008); JOSH EAGLE, ET AL., *TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS* 10-19 (2003). Nevertheless, the Department of Commerce's National Marine Fisheries Service is formally responsible for issuing allocation rules and other management measures. 16 U.S.C. § 1854.

29. These are oversimplifications. Within the field of commercial use, for example, there can be a large number of sectors competing to use fish in different ways, that is, to catch them using different types of fishing gear. Both commercial and recreational fisheries have an interest in leaving some fish in the water, in order to sustain future catches. (In this regard, the conflict between these groups and conservation interests is centered on how many fish to leave in the water. See *infra* note 31.) Finally, it is an oversimplification to explain the ecological role of fish only by reference to their role in food webs.

30. The Act contains few guidelines as to the allocation of fish between competing consumptive uses such as recreational and commercial fishing. National Standard Four, for example, simply requires that fishing privileges be allocated in a manner that is "fair and equitable to all . . . fishermen." 16 U.S.C. § 1851(a)(4) (2006). (The Act includes ten National Standards which are meant to provide the policy backbone of the statute.) The Act also contains somewhat more specific guidelines with respect to the allocation of fish between fishing uses and the non-consumptive, conservation use of leaving fish in the sea. See, e.g., 16 U.S.C. § 1854(e) (2006) (prohibiting catch levels that are inconsistent with rebuilding fish stocks to healthy levels within a specified time frame).

31. For a discussion of the role of uncertainty in fisheries decision-making, see generally Josh Eagle & Barton H. Thompson, Jr., *Answering Lord Perry's Question: Dissecting Regulatory Overfishing*, 46 *OCEAN & COASTAL MGMT.* 649 (2003). The lack of certainty about the status and dynamics of fish stocks results in allocation decisions that are similar to

The most important characteristic of the rules that undergird a place-based approach is that, unlike rules found in statutes such as the Act, place-based rules give management agencies explicit guidance on how to prioritize among these competing uses in a specified geographic area. As noted in Part I, the main effect of place-based rules is to limit agency discretion.³² The extent of these limits can vary. So, for example, in a “no-fishing conservation area,” the agency would have no discretion; its only role would be to enforce the no-fishing rule. In a “conservation-friendly fishing area,” the agency would have the discretion to decide whether or not a proposed fishing intensity or method was consistent with maintaining the conservation value of the area: it might allow moderate levels of hook-and-line fishing but ban fishing methods that result in high levels of bycatch or habitat destruction.³³

On the public lands, Congress has established the existing system of dominant-use areas in an unplanned, non-comprehensive manner. Although it has commissioned at least one study of how to integrate management of the public lands,³⁴ Congress has never attempted to ensure, for example, that places within the National Park or Wilderness Area systems represented the full range of diverse ecosystems or recreational opportunities.³⁵ The dominant-use system on the public lands is also non-comprehensive. Nearly all terrestrial dominant-use areas protect a very limited set of interests, mainly recreation and the preservation of natural features.³⁶ By contrast, Executive Order 13,547 seeks to

investment decisions, that is, decisions about the kinds and levels of acceptable risk. Assume that government scientists estimate that a safe catch level for a given stock in a particular year is between 10,000 and 20,000 tons of fish, and that those same scientists estimate that setting the catch at 10,000 tons has a sixty percent chance of maintaining stocks at optimally productive levels, which setting it at 20,000 tons has a forty percent chance of doing so. A choice of 10,000 decreases the risk of harming future stock productivity, but increases the risk that fishermen will forego fishing opportunities (and income) that they did not have to forego. (The true “safe level” is unknown and could be, say, 14,000 tons.) A choice of 20,000 reverses these risks. The most important allocation decisions between conservation and fishing interests are what might be called preference-allocation decisions made within the decision space created by scientific uncertainty. These decisions are extremely difficult to regulate via legislative or judicial controls. See, e.g., *Natural Res. Def. Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

32. See Eagle, *supra* note 4, at 853-57, 870-72.

33. This latter example is more typical of the rules Congress has traditionally used to regulate use of dominant-use public lands. So, for example, the National Park mandate is to “provide for the enjoyment . . . by such means as will leave them unimpaired for the enjoyment of future generations.” National Park Service Organic Act, 16 U.S.C. § 1 (2006); Mappes, *supra* note 7, at 611. The National Park Service retains discretion to decide whether enjoyable uses, such as jet-skiing or snowmobiling, constitute impairment.

34. PUB. LAND LAW REV. COMM’N, ONE THIRD OF THE NATION’S LAND (1970).

35. See J. Michael Scott et al., *Nature Reserves: Do They Capture the Full Range of America’s Biological Diversity?*, 11 *ECOLOGICAL APPLICATIONS* 99, 99-1000 (2001).

36. See Eagle, *supra* note 14, at 168 (“While Congress has designated nearly twenty percent of all public lands as dominant-use wilderness . . . it has designated almost none as dominant-use ‘resource extraction areas.’”).

introduce a preliminary planning phase and the use of dominant-use areas that would maximize extractive uses such as recreational fishing, commercial fishing, alternative energy, and oil and gas.³⁷

The comprehensive nature of the CMSP initiative means that the system will require more than the simple establishment, seriatim, of dominant-use areas. Planning will be required because the planning process for a comprehensive, place-based system is meant to serve as the basis for the resource allocation measures to be embodied in the implementing rules. The planning process is critical because it replaces the ad hoc permitting approach used in multiple-use allocation systems: it *is* the new venue for allocation. Thus, there must be a process for ensuring that places are fairly and efficiently allocated among competing interest groups.

In addition to a planning process focused on the fair and efficient allocation of space, a comprehensive system based on dominant-use rules also requires an effective institutional mechanism for final approval of the allocations developed in the planning process. Specifically, the individual or entity responsible for approving plans must possess a certain amount of political capital.³⁸ The adoption of dominant-use rules means that users will be excluded, for the foreseeable future, from places they are accustomed to using or had expected to use. It also means that some areas will be subject to fewer, though not necessarily less-effective, regulations.³⁹ For this reason, plan approval will have a significant impact on lives, livelihoods, and public debates and will almost always be highly controversial.⁴⁰ The use of an underpolitically-capitalized decision-maker can lead to long delays and to the watering down of beneficial dominant-use rules.⁴¹

In sum, a place-based system differs from the current approach in that it contains rules that limit agency discretion and that are meant to be fairly durable over time. Because they, by definition, will both exclude and “free up” certain uses and because they are meant to last, the new rules are certain to be controversial. The approval of controversial rules requires a certain amount of political capital. A place-based system also front-loads the process

37. See TASK FORCE REPORT, *supra* note 1, at 48.

38. See Eagle, *supra* note 4, at 861-63.

39. Dominant-use areas prioritizing extractive uses would, almost certainly, contain fewer environmental restrictions on the activity in question than the current multiple-use system. The reduction in restrictions would likely be in terms of process, not substance. Without such reductions, place-based management would offer no benefits to extractive industries.

40. See Eagle, *supra* note 4, at 861-63.

41. *Id.* at 869-72 (explaining why unelected officials, who lack the kind of political capital that can be earned only through the ballot box, have incentives to delay making decisions on high-profile, controversial issues).

of allocating resources. While the current system results in a constant and never-ending series of agency-moderated allocation battles, a place-based approach would concentrate these battles into a single, time-limited, *a priori* planning process.

B. Why Place-Based Systems Work

A well-designed, comprehensive place-based system—that is, a system built around durable, dominant-use rules—can lead to more efficient and equitable management of federal waters than multiple-use management. This is by no means an original claim.⁴² The following points highlight the ways in which durable, dominant-use rules create benefits for interest groups and the public, as well as the requisite incentives for interest groups to convene and participate in the planning (allocation) phase.

1. Benefits for Interest Groups

Durable, dominant-use rules (DDRs) would provide some benefits to both concentrated groups, e.g., resource extraction industries, and diffuse groups, e.g., marine conservation interests.⁴³

42. See, e.g., AGARDY, *supra* note 2; Eagle & Thompson, *supra* note 31; Josh Eagle, et al., *Ocean Zoning and Spatial Access Privileges: Rewriting the Tragedy of the Regulated Ocean*, 17 N.Y.U. ENVTL. L.J. 646, 655 (2008); Benjamin S. Halpern, et al., *Managing for Cumulative Impacts in Ecosystem-Based Management Through Ocean Zoning*, 51 OCEAN & COASTAL MGMT. 203, 205 (2008); Kai Lorenzen, et al., *The Spatial Dimensions of Fisheries: Putting it All in Place*, 86 BULL. MARINE SCI. 169, 170-71 (2010); James N. Sanchirico, et al., *Comprehensive Planning, Dominant-Use Zones, and User Rights: A New Era in Ocean Governance*, 86 BULL. MARINE SCI. 273, 273-74 (2010).

43. For an introduction to theories of concentrated and diffuse, or “latent” groups, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* ch. 1 (1971). Schroeder provides a good summary of Olson’s theories:

Arguing that most people would approach the decision to contribute or not by weighing the costs and benefits, Olson predicted that groups would be hard to organize when the group activity promised to produce benefits that were spread out among beneficiaries in amounts that are small compared to the costs of securing them. Each individual would see that her contribution to the group effort was not going to affect her own personal fortunes—either others would contribute enough so that she could free-ride on their efforts or others would not contribute and the minimal amount she was willing to contribute would not put the effort over the top. In either case, no benefits to her would be produced by her contribution, and hence it would be irrational to join in the group effort.

....

Groups whose benefits were diffuse in this sense were labeled “latent” groups by Olson because the shared group benefit was likely to remain unrealized. In contrast, groups that contain members with more concentrated benefits would be more likely to organize, either because a single member has enough at stake in the benefit to underwrite individually the costs of securing the group benefit, or because a subgroup of members within the larger group is small enough so that they can effectively agree to pool sufficient resources to produce the benefit. Compared to latent groups, such groups as these have a comparative advantage with respect to their ability to organize to advance group interests.

All groups should benefit from the fact that the planning process front-loads allocation contests, thus reducing costs. Rather than having to participate repeatedly in a never-ending series of battles, firms and interest groups can concentrate their efforts on a time-limited planning process. The establishment of DDRs at the end of this process effectively ends allocation disputes for an indefinite time-period.

Important for firms, DDRs allow them to make business decisions and investments in the early phases of resource-development against a backdrop of greater certainty, due to the facts that rules allocate them priority in specified areas and that those rules are durable. Firms face a much lower chance that funds expended in preparation of a project will be lost if the project is derailed in the permitting process or in subsequent litigation.⁴⁴

Industry sectors would likely benefit from the fact that DDRs give interest groups a greater stake in managing places in which they are priority users. The argument here is analogous to the arguments in favor of clear private property rules. Where "ownership" is clear, the owner or owners will have more incentive to invest in measures likely to pay future dividends.⁴⁵ Thus, for example, commercial fishermen would have more incentives to ensure that fisheries in an "only commercial fishing" area are managed sustainably. Released from the pressure of contesting allocation with other groups, fishermen would be freed from the more extreme positions they would be forced to take under the adversarial multiple-use system.⁴⁶

DDR's benefit diffuse groups in slightly different ways. The endless string of allocation contests created by multiple-use management favors firms or groups with more resources to spend on monitoring, lobbying, and litigation. By front-loading and condensing the allocation process, a place-based approach puts diffuse groups, as well as weaker industrial sectors, such as alternative energy, on a more even footing with more powerful, well-funded interests.⁴⁷ Once rules are in place, groups with fewer

Christopher H. Schroeder, *Rational Choice Versus Republican Moment--Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29, 33-34 (1998). Schroeder also provides a good synopsis of criticism of Olson's theories.

44. See Eagle, *supra* note 4, at 844-45, 850-51; see also Sanchirico, *supra* note 42, at 277-79.

45. See Eagle, et al., *supra* note 42, at 657-58; Lorenzen, et al., *supra* note 42, at 173-74; Sanchirico, *supra* note 42, at 278-79.

46. See AGARDY, *supra* note 2, at 26; Eagle, *supra* note 4, at 852; Lorenzen, et al., *supra* note 42, at 170-71; Sanchirico, *supra* note 42, at 277-79.

47. It is true that powerful groups would still have an advantage in a condensed public process. However, the degree of that advantage should be smaller as the time period during which lobbying resources could be spent decreased. (This assumes diminishing mar-

resources will be in a much better position than they were under a multiple-use regime, because they will not have to engage in any, or many, allocation contests.⁴⁸

Marine conservation groups would benefit from the fact that DDRs would create areas in which conservation values would not have to be compromised in order to accommodate extractive uses.⁴⁹ Such an outcome has particular value to marine conservation groups, not only because it is an outcome that could not be achieved under multiple-use, but because highly protected natural areas produce qualitatively different conservation benefits than moderately protected areas.⁵⁰

Finally, the planning component of place-based management should lead to a reduction of cross-sectoral impacts. This is the rationale that led to the widespread use of municipal zoning in the United States: locating polluting facilities at a distance from residential areas, for example, can reduce the amount of harm caused by dispersed pollution. Along the same lines, one can easily imagine that siting polluting ocean uses at a safe distance from conservation areas would be one objective of a planning process. In the sea, the need for zoning is even more pronounced because of the fact that there is no dispute resolution mechanism analogous to private nuisance.⁵¹

2. Public Benefits

DDRs would reduce management costs. Because dominant-use rules reduce agency discretion and the number of allocation options, agencies would need to spend fewer resources on the process of making allocation decisions. In addition, reduced discretion should translate to fewer viable opportunities for challenging

ginal lobbying influence from additional dollars spent during any one decision-period.) As a possible analogy, consider the impacts of differently structuring playoff series in sports:

Different lengths of series and formats can also affect eventual outcomes. For example, if the playing strengths of two opponents are, say, .60 and .40, the weaker team has a 40% chance of prevailing in a 1-game playoff. Lengthen the series to the best 2 of 3 and its chances drop to 0.35. For a 5-game or 7-game series, the probability that the weaker team will win is 0.32 and 0.29, respectively.

Allen R. Sanderson, *The Many Dimensions of Competitive Balance*, 3 J. SPORTS ECON. 204, 210 (2002).

48. Groups may still have to monitor agency compliance with applicable dominant-use mandates. Moreover, these groups may have to defend the dominant-use rules themselves in the legislative forum. The best example of this is the long-running battle to alter the rules governing the Arctic National Wildlife Refuge. *See generally* Peter Matthiessen, *Inside the Endangered Arctic Refuge*, THE N.Y. REV. OF BOOKS (Oct. 19, 2006), <http://www.nybooks.com/articles/archives/2006/oct/19/inside-the-endangered-arctic-refuge>.

49. *See generally* Eagle, *supra* note 14, at 158-62, 171.

50. *Id.* at 157-62.

51. AGARDY, *supra* note 2, at 6-7, 18-20; Halpern, et al., *supra* note 42, at 209-10; Sanchirico, *supra* note 42, at 277.

agency decisions in court, again lowering administrative costs. Finally, DDRs simplify, and thus reduce the cost of, agency enforcement efforts.⁵²

To the extent that a place-based approach gives more voice to marine conservation groups, outcomes will lead to increases in social welfare in the form of a healthier marine environment.⁵³ The reason for this is that highly-protected areas can serve an insurance or risk-diversification function, providing a safety net in the case of poor or unlucky management decisions elsewhere on the seascape.⁵⁴

Finally, the process of creating a place-based system should raise the public profile of ocean issues. Increasing public interest and involvement in decisions regarding public resources is a desirable result.

3. Incentives to Participate

An early commitment to DDRs is essential in creating incentives for interest groups to agree to participate in the development of a place-based system. Consider the alternative scenario, that is, a planning process that might result in retention of a multiple-use, or a slightly altered multiple-use, regime. Under this scenario, firms and interest groups might opt not to join the process, instead choosing to save resources for the allocation battles that will continue under the “new” system. In other words, only DDRs can ensure that allocation battles will be limited to the planning period. This is particularly crucial for diffuse groups, which will always be less well-funded than industry groups.⁵⁵

For concentrated groups, an early commitment to the use of DDRs provides other key incentives to join the process. Remember that concentrated groups tend to fare well, or at least enjoy a significant advantage, under multiple-use governance. What would entice them to give up that advantage? The most plausible answer to this question is that a system built around DDRs would give them something they cannot have under multiple-use, that is, the certainty that they will be able to pursue their business in a particular area with fewer restrictions and less complex permitting processes.

Finally, all groups will be more likely to join the process if the potential outcomes of the process are relatively clear and

52. Eagle, *supra* note 4, at 850.

53. *See id.* at 845-47, 851.

54. *See* Eagle, *supra* note 14, at 170.

55. *See* OLSON, *supra* note 43, at 33-34.

constrained.⁵⁶ Even where groups see the current system as flawed, uncertainty as to the outcomes of a reform process may, by itself, provide a disincentive to participation.⁵⁷

III. THE MECHANICS OF THE EXECUTIVE ORDER 13,547 APPROACH

In order to understand why the Executive Order 13,547 approach is complex and murky, it is useful to compare it to a simpler approach, one that has been used for about 100 years to regulate land use in cities and counties.⁵⁸ This model is also similar to the one used in implementing what is, to date, the largest and most successful place-based ocean governance system, that is, the zoning system applied to the Great Barrier Reef Marine Park of Australia.⁵⁹

A. *The Simple Model*

The simple model, applied to federal waters, would distribute responsibilities for the five stages of zoning—framing, planning, plan adoption, enforcement, and alteration—as follows. At the outset, Congress would develop and pass legislation establishing guidelines for each of the four subsequent phases. This framing legislation would authorize the creation of an ocean planning commission which would be required to submit a final product to Congress by a date certain.⁶⁰ In addition, the law would specify the process by which Congress and, perhaps, the President as well, would appoint commission members. The role of the planning commission, assisted by professional staff, would be to gather and consider the best available scientific and economic information about current and future resource use within all or part of federal waters. After assessing the information received and taking public comments on future use, the planning commission would develop a proposed zoning map. The map would be accompanied by a set of proposed zone rules, i.e., a statement of the purpose of each zone together with a list of permitted, conditionally permitted, and prohibited uses. After taking public comments

56. See Carlson, *supra* note 23, at 195-96.

57. See Barton H. Thompson, Jr., *Tragically Difficult: Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 256-57 (2000).

58. DANIEL R. MANDELKER, *LAND USE LAW 1-2* (5th ed. 2003).

59. For a description of the Act's mechanics, see Eagle, *supra* note 4, at 890-93. See also *Great Barrier Reef Marine Park Act 1975* (Cth) ss 33(2), (5) (Austl.), available at <http://www.comlaw.gov.au/Details/C2012C00109>.

60. Congress could charge the ocean planning commission with creating a proposed plan for all federal waters or, in the alternative, could ask it to proceed one region at a time.

into account, the commission would submit the developed map and rules to Congress as a legislative proposal. At this point, Congress would process the proposal under the terms specified in the framing legislation, moving it toward bill form.⁶¹ Once both houses of Congress had voted favorably on the bill, and the President had signed it, one or more agencies would implement and enforce its provisions.⁶² Congress would, of course, retain the option to alter the map and rules in the future.⁶³

B. The Executive Order Model

The language of both the executive order and the incorporated task force report are not especially clear as to the goals of the President's CMSP initiative or as to the structure, content, or implementation of the plans it is intended to produce. What follows is a good faith attempt at, as briefly as possible, explaining the structure and function of the President's CMSP initiative.

1. Framing

Executive Order 13,547 is the framing measure and distributes the remaining four responsibilities—planning, plan adoption, enforcement, and alteration—among the National Ocean Council; a Governance Coordinating Committee; nine Regional Planning Bodies; and federal, state, and tribal agencies.⁶⁴

Created by Executive Order 13,547, the National Ocean Council (NOC) is a sub-office of the White House Council on Environmental Quality, chaired by two White House officials, and composed of fourteen cabinet or cabinet-level officials, ten other high-ranking administration officials, and “such other officers or employees of the Federal Government as the Co-Chairs may from time to time designate.”⁶⁵

61. In order to alleviate (or avoid altogether) some of the political pressure associated with plan approval, the Great Barrier Reef Marine Park Act 1975 contained a provision allowing the plan to be deemed approved by the Australian Parliament if neither house of Parliament passed a resolution disapproving the plan within 15 days of presentation. *Great Barrier Reef Marine Park Act 1975* (Cth) ss 33(2), (5) (Austl.). This is similar to the mechanism used by Congress in the Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623 (codified at 10 U.S.C. § 2687 (1988)).

62. There are a variety of options as to how Congress might delegate implementation and enforcement duties. See Sanchirico, *supra* note 42, at 280-81.

63. In addition, similar to most state municipal zoning enabling acts, legislation might give agencies charged with administering zones the power to grant variances or similar permitted exceptions.

64. See Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,024-26 (July 22, 2010); see also TASK FORCE REPORT, *supra* note 1, at 51-65, 69.

65. Exec. Order No. 13,547, 75 Fed. Reg. at 43,024-25.

Also created by the order, the Governance Coordinating Committee consists of "18 officials from State, tribal, and local governments."⁶⁶ The NOC chooses the eighteen members of the committee, which must include one state government representative from each of nine coastal regions, two state government officials from inland states, one state legislator, three tribal representatives, and three local government officials from coastal states.⁶⁷

The order also calls for the establishment of nine Regional Planning Bodies. (There are nine because, according to the order, there are nine large marine ecosystems spread across federal waters.)⁶⁸ While the order is fairly specific with respect to the membership of the National Ocean Council and slightly less specific with respect to membership of the Governance Coordinating Committee, the only criteria for selection to a Regional Planning Body is that one be an employee of a "Federal, State, [or] tribal authority relevant to CMSP for that region . . . [and] of an appropriate level of responsibility . . . to make decisions and commitments throughout the process."⁶⁹ While "[e]ach regional planning body should make every effort to ensure representation from all States within a region," state participation is optional.⁷⁰ The order does not provide details on the total number of members on each body or require any distribution of members within a particular body by affiliation or geographic tie.⁷¹ The order also does not specify how these members are to be appointed, stating only that "the [council] would work with the States and federally-recognized tribes, including Alaska Native Villages, to create regional planning bodies."⁷²

Roughly speaking, the framing is as follows: the Regional Planning Bodies will be responsible for developing plans; the National Ocean Council will be responsible for certifying, or approving, plans; federal, state, and tribal government agencies will be responsible for implementing plans; the President will be respon

66. *Id.* at 43,026.

67. TASK FORCE REPORT, *supra* note 1, at 26.

68. *Id.* at 51 & n.7, 52-53. The report includes the Great Lakes as a marine ecosystem.

69. *Id.* at 52.

70. *Id.* at 53, 60. The order requires federal agencies to participate in planning. Exec. Order No. 13,547, 75 Fed. Reg. at 43,026.

71. Exec. Order No. 13,547, 75 Fed. Reg. at 43,026.

72. TASK FORCE REPORT, *supra* note 1, at 52. There are no provisions in the executive order or task force report related to the length of members' terms, the number of terms a member can serve, or the grounds on which a member might be removed. *Id.*; Exec. Order No. 13,547, 75 Fed. Reg. at 43,026.

sible for ensuring that federal agencies comply with the plans; and state and tribal signatories will be responsible for ensuring their own plan compliance.⁷³

2. Planning

Each of the nine planning bodies, composed of state and federal agency officials from the region involved, would be responsible for the development of a coastal and marine spatial plan for its region.⁷⁴ The order specifies that “the geographic scope of the planning area . . . includes the territorial sea, the EEZ, and the Continental Shelf. . . . [It] would extend landward to the mean high-water line. . . . [and] would include inland bays and estuaries. . . .”⁷⁵ Thus, plans would include both state and federal waters. The bodies would perform the planning function under a process spelled out in the order and supplemented by *ad hoc* guidance and dispute-resolution services provided by the National Ocean Council and the Governance Coordinating Committee.⁷⁶

3. Plan Adoption

The executive order provides that plans developed by the Regional Planning Bodies must be “certified by the National Ocean Council.”⁷⁷ In deciding whether a particular plan ought to be certified, the council would “review [that] plan to ensure it is consistent with the National Policy, CMSP goals and principles as provided in this framework, any national objectives, performance measures, or guidance the [council] has articulated, and any other relevant national priorities.”⁷⁸

4. Enforcement

As noted, plans are meant to apply to both federal and state waters. The executive order requires that federal agencies “comply with” the final, certified plans “to the fullest extent consistent with applicable law.”⁷⁹ With respect to state agencies, the enforcement mechanism is not as straightforward. The

73. TASK FORCE REPORT, *supra* note 1, at 54, 62-64.

74. *Id.* at 52-60.

75. *Id.* at 49.

76. *Id.* at 52-60.

77. Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,024 (July 22, 2010).

78. TASK FORCE REPORT, *supra* note 1, at 63.

79. Exec. Order No. 13,547, 75 Fed. Reg. at 43,026.

basic idea appears to be that when state agency representatives on the regional planning bodies formally accept final plans, acceptance would represent “an express commitment by the partners to act in accordance with the CMS Plan, within the limits of applicable statutory, regulatory, and other authorities. . . .”⁸⁰ According to the White House report, both “State and Federal regulatory authorities would adhere to, for example, the processes for improved and more efficient permitting, environmental reviews, and other decision-making identified in the CMS Plan to the extent these actions do not conflict with existing legal obligations.”⁸¹ While the order is clear that agencies must honor existing legal obligations, e.g., statutes and regulations, it also indicates that plan signatories would be expected to seek changes to those pre-existing obligations where necessary to “fully implement the CMS Plan.”⁸²

5. Alteration

The executive order does not directly address the question of how or whether certified plans might be later altered.

IV. CLARITY AND DURABILITY OR COMPLEXITY AND MURKINESS

The dense, conflicted, and vague language of the executive order and the task force report makes it difficult, but this part attempts to answer the following question: will the President’s CMSP initiative create durable, dominant-use rules?

A. Will the CMSP Initiative Produce Dominant-Use Rules?

How does the process of establishing a place-based system ensure the creation of clear rules? The framing language must provide guidance to the entity or entities responsible for drafting the place-based rules, to the person or entity responsible for approving the proposed rules, and to the public. As described above, for the system to be effective, it must include places governed by dominant-use rules. Thus, guidance should include a requirement that some or all of the rules be written in such a manner as to give priority to a particular use, or set of compati-

80. TASK FORCE REPORT, *supra* note 1, at 61.

81. *Id.*

82. *Id.* at 61-62.

ble uses, over other uses. The guidance does not have to be so narrow as to unduly constrain the process, e.g., specify the type of possible priority designations or the degree of priority, but it must require that priorities be established by rule. An example of this type of guidance can be found in the zoning provisions of the Great Barrier Reef Marine Park Act 1975: “[t]he plan must do the following in relation to the zone or each of the zones: (a) give the zone a name or other designation; (b) make provision with respect to the purposes for which the zone may be used or entered. . . .”⁸³

Similarly, the Standard State Zoning Enabling Act,⁸⁴ used as a model by most states to authorize and create the framework for municipal zoning efforts in the United States,⁸⁵ provides:

For any or all of [the above-stated purposes of zoning] the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land.

. . . .

Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses. . . .⁸⁶

Under the Great Barrier Reef law, the Australian Parliament ensured the creation of place-based rules by requiring the naming or designation of each place and the adoption of rules consistent with such name or designation. The idea is that rules giving clear priority to a particular use would flow naturally from the naming of place as a “commercial fishing area” or a “conservation area.” Under the SSZEA, the framing language emphasizes the alignment of rules restricting land use with the “character of the district and its particular suitability for particular uses.”⁸⁷ These words strongly imply that rules should prioritize particular uses in districts of suitable character.

83. *Great Barrier Reef Marine Park Act 1975* (Cth) ss 32(B) (Austl.), available at <http://www.comlaw.gov.au/Details/C2012C00109>.

84. ADVISORY COMM. ON ZONING, DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter SSZEA], available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

85. “Every state adopted the [SSZEA], either as published or with minor variations.” MANDELKER, *supra* note 58 at, 1-2.

86. SSZEA, *supra* note 84, at 6-7.

87. *Id.* at 7.

What guidance does Executive Order 13,547 provide to the planning bodies, to the National Ocean Council, and to the public? From the very beginning, the executive order creates confusion: in calling the initiative “Coastal and Marine Spatial Planning,” all parties might rightly wonder whether the initiative is meant to create any rules.⁸⁸ However, the order goes on to require that federal agencies comply with the regional plans. Compliance implies that there will be rules to be followed, but what kinds of rules will they be?

The executive order itself provides few indications of how the plans, or plan components, will function as enforceable rules. In defining the term “coastal and marine spatial planning,” the executive order states that CMSP “identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, [and] facilitate compatible uses. . . .”⁸⁹ “[R]educ[ing] conflict among uses” and “facilitat[ing] compatible uses” are phrases that could have been taken from nearly any state municipal zoning enabling statute or from the preface to a local zoning ordinance. Does identifying these areas mean that they are effectively dominant-use

88. Congressional opponents of the CMSP initiative clearly view it as a zoning enterprise, rather than a planning effort, and seem to want to overstate its zoning potential. An opinion piece published on June 19, 2012, by Congressman Richard Norman “Doc” Hastings (R-WA), Chair of the House Natural Resources Committee, argues that:

President Obama is using the ocean as his latest regulatory weapon to impose new bureaucratic restrictions on nearly every sector of our economy. While marketed as a common sense plan for the development and protection of our oceans, it is instead being used to create a massive new bureaucracy that would harm our economy.

. . . .

Imposing mandatory ocean zoning could place huge portions of our oceans and coasts off-limits, seriously curtailing recreational activities, commercial fishing, and all types of energy development—including renewable energy such as off-shore wind farms.

Rep. Richard Norman “Doc” Hastings, *Obama’s National Ocean Policy Threatens Jobs and Economic Activities Onshore and Off*, FOXNEWS.COM (June 19, 2012), <http://www.foxnews.com/opinion/2012/06/19/obama-national-ocean-policy-threatens-jobs-and-economic-activities-onshore-and/>.

Congressman Hastings’ statement is just the most recent salvo lobbed at the CMSP initiative from Capitol Hill. On May 9, 2012, the U.S. House of Representatives passed an amendment to the FY 2013 Departments of Commerce and Justice, Science, and Related Agencies Appropriations bill that “prohibits the use of funds in the bill for implementation of Executive Order 13,547 which requires that various bureaucracies zone the ocean, the Great Lakes and their sources.” H. Amdt. 1079 to H.R. 5326, 112th Cong. (2012). On April 3, 2012, the Committee held a field hearing in Anchorage, Alaska. *Alaska’s Sovereignty In Peril: The National Ocean Policy’s Goal to Federalize Alaska: Hearing Before the Subcomm. on Fisheries, Oceans, Wildlife and Insular Affairs of the H. Comm. on Nat. Resources*, 112th Cong. (2012). The House Committee on Natural Resources held hearings on Executive Order 13,547 in October of 2011. *The President’s New National Ocean Policy - A Plan for Further Restrictions on Ocean, Coastal and Inland Activities: Hearing Before the H. Comm. on Nat. Resources*, 112th Cong. (2011).

89. Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,024 (July 22, 2010).

zones? How exactly will agencies shape their future decision-making to fit the “most suitable” purposes as described in the plans?

The task force report attempts to provide more detail on plan contents. While the report, as incorporated by the executive order, requires that each plan contain seven “essential elements,” the descriptions of these elements, that is, the specific features that each plan must contain, are vague.⁹⁰ The elements become more and more vague as they move from circumscribing the study phases of planning to describing the types of plan components that might be enforceable. So, for example, the element entitled “Objectives, Strategies, Methods, and Mechanisms for CMSP,” provides that:

This section [of the regional plan] would describe the regional objectives and proposed strategies, methods, and mechanisms for CMSP for the region. It would provide the analysis, evaluation of options, and the basis for the conclusions made in the CMS Plan. It would describe the spatial determinations for conservation and uses, at the appropriate scale, and include any necessary visual representations. The CMS Plan would describe the strategies, methods, and mechanisms for integrated or coordinated decision-making, including addressing use conflicts.⁹¹

On the one hand, this language indicates that a wide-range of unidentified tools might be used to reach the objectives of the plan. Thus, it is not clear what types of rules the plan might embody. On the other hand, some of the language in the third sentence (“spatial determinations for conservation and uses”) implies that the regional bodies would be required to create and define some kind of zones. Are there limits on the kinds of objectives or plans a regional body might develop?

The CMSP initiative is structured so that these kinds of limits will be enforced through the certification process. Recall that the order requires regional plans to be certified by the National Ocean Council. The council would “review each [plan] to ensure it is consistent with the National Policy, CMSP goals and principles as provided in this framework, any national objectives, performance measures, or guidance the [council] has articulated, and any other relevant national priorities.”⁹²

90. See TASK FORCE REPORT, *supra* note 1, at 58-60.

91. *Id.* at 59.

92. *Id.* at 63.

These standards are unintelligible and will create a great deal of uncertainty as the plan is being developed. Pursuant to the language cited above, the council could reject a plan if it answered any one of the following sample questions in the negative:

- Is the plan consistent with the National Policy?: Does the proposed plan “improve the resiliency of ocean, coastal, and Great Lakes ecosystems, communities, and economies”?⁹³ That is, does it strengthen natural systems without impairing the economic stability of local communities likely to be highly economically dependent on historical patterns of resource use?
- Is it consistent with CMSP goals and principles as provided in this framework?: Does the proposed plan “[s]upport sustainable, safe, secure, efficient, and productive uses of the ocean, our coasts, and the Great Lakes, including those that contribute to the economy, commerce, recreation, conservation, homeland and national security, human health, safety, and welfare”?⁹⁴ That is, does it support all possible ocean uses within a region?
- Is the plan consistent with any national objectives, performance measures, or guidance the National Ocean Council has articulated? Is the proposed plan consistent with other objectives, measures, and guidance that the certifying agency announces from time-to-time?
- Is it consistent with any statement of other relevant national priorities? (This is a catch-all that, like the ambiguity inherent in the word “consistent,” would seem to allow the council to reject a plan for any reason it might be able to articulate, but has not yet articulated.)

The enforcement mechanism as laid out in the executive order adds even more uncertainty to the effect of plans *qua* rules. As noted, the order requires that federal agencies “comply with” the final, certified plans “to the fullest extent consistent with applicable law.”⁹⁵ Thus, agencies will have a significant role to play in interpreting the enforceable components of plans. In deciding whether they can legally decide to permit or not permit a proposed activity, agencies will be forced to meld an answer from a mixture of statutory language, existing regulations, established

93. Exec. Order No. 13,547, 75 Fed. Reg. 43,023, 43,023 (July 22, 2010).

94. TASK FORCE REPORT, *supra* note 1, at 48.

95. Exec. Order No. 13,547, 75 Fed. Reg. at 43,026.

practices, and pressure from the White House, Congress, and affected user groups. Even if one assumes that, because agencies are within the Executive Branch and under supervision of the President, the council's answer to the question of whether or not to grant a particular permit would carry the most weight, it is still fair to say that the "rule" governing that decision will not be prospectively clear.

*B. Will the CMSP Initiative
Produce Durable Rules?*

Of course, rules that are inherently murky cannot be durable, except in their murkiness. Let us assume for purposes of argument, though, that the regional plans produce some rules that are clear in giving absolute priority to certain uses in specified areas. Are there any indications that the CMSP initiative intends for those rules to be stable?

In most of the other place-based systems discussed in this paper, rule-durability is assured in two ways. First, and most important, dominant-use rules are adopted as legislation. While not as durable as constitutional provisions, legislation is arguably more difficult to alter than regulations, and certainly more difficult to alter than executive orders. Second, some of these place-based systems, notably municipal zoning, ensure durability by incorporating mechanisms that make small alterations or exemptions relatively simple to obtain. Devices such as variances, while subject to abuse,⁹⁶ can serve to prevent or stave off whole-sale changes to the rule.

Because it is embedded in an executive order, the CMSP initiative could largely disappear with the signature of any future President.⁹⁷ And, it does not make much sense to include provisions for future alteration of plan rules, when there is no commitment to the kinds of rules, i.e., dominant-use rules, which benefit from concomitant flexibility mechanisms.⁹⁸

Finally, it is worth noting the authors of the task force report did not directly confront one of the most difficult conceptual problems facing place-based management. On the one hand, rule-durability is important in producing many benefits of place-

96. Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH U. L. Q. 60, 60 n.1 (1963).

97. In fact, Executive Order 13,547 revoked President George W. Bush's executive order on ocean policy, Executive Order 13,336, 69 Fed. Reg. 76,591 (Dec. 21, 2004). Exec. Order No. 13,547, 75 Fed. Reg. at 43,027.

98. Interestingly, one essential element of the CMS Plans under the CMSP initiative is that each "CMS Plan would also consider a regional process for requesting variances and amendments." TASK FORCE REPORT, *supra* note 1, at 59.

based management. On the other hand, many scholars believe that “adaptive management,” that is, management responsive to new scientific and social science information, is critical to effective environmental governance.⁹⁹ This is a difficult conflict without obvious solutions, but it certainly should be a focal point in discussions of the design and implementation of a place-based system.¹⁰⁰

V. CONCLUSION

The inefficiency and inequity of the current multiple-use system are obvious, and shifting to a place-based system incorporating durable, dominant-use rules is an idea whose time has come. Unfortunately, the CMSP initiative is not designed in a way that will effectively facilitate that shift.

In defense of the White House, it is likely—without a major effort to convince powerful industries and their Congressional supporters that zoning would in fact leave them better off—that the President will have to “zone it alone.” How might a President move place-based ocean governance forward in more effective ways? First, a President could—like Presidents Theodore Roosevelt, Bill Clinton, Jimmy Carter, and George W. Bush—make good use of the Antiquities Act of 1906.¹⁰¹ There is no reason why the Act could not or should not be used to create more marine monuments.¹⁰² The Act allows the President to craft individual management rules for each monument; this is a way to introduce some variety in the kinds of dominant-use areas created. Second, the President could order the National Oceanic and Atmospheric Administration to create more National Marine Sanctuaries¹⁰³

99. For excellent discussions of the promise and pitfalls of adaptive management, see Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 WASH. L. REV. 547, 568 (2007) and J.B. Ruhl and Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010).

100. As indicated in *supra*, note 98, the executive order does mention variances and amendments, two mechanisms that might be used to allow for adaptive management within a place-based system. What is lacking from the order and the task force report are discussions about difficult issues such as the conditions under which future changes or exceptions to the rules should be allowed. Answering these questions requires some understanding of the marginal value of the trade-offs, i.e., adaptability and stability, in the context of ocean governance.

101. These are the top four monument-designating Presidents by acreage. U.S. DEPT OF INTERIOR, NPS ARCHAEOLOGY PROGRAM: ANTIQUITIES ACT 1906-2006, available at <http://www.cr.nps.gov/archeology/sites/antiquities/FAQs.doc>. President Bush is the current leader due mainly to the aforementioned establishment of the 140,000-square-mile Papahānaumokuākea Marine National Monument.

102. See Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 ECOLOGY L.Q. 71, 103-29 (2002).

103. The agency has the authority to create National Marine Sanctuaries pursuant to Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052 (1972).

and to update sanctuary regulations to reflect a more place-based approach.¹⁰⁴ The agency has not designated a new sanctuary since 2000 and has designated only two new sanctuaries since 1992.¹⁰⁵

These approaches admittedly have strengths and weaknesses. On the positive side, each approach, unlike the CMSP initiative, is based on clear authorization from Congress. When compared to the complex and cumbersome structure created by Executive Order 13,547, creating monuments and sanctuaries would be relatively quick and easy. The weakness of this approach is that the purposes for which these dominant-use areas could be created are limited by statute; this would prevent allocation of spatial privileges beyond conservation and certain, conservation-friendly types of fishing. A sea dotted with large dominant-use conservation areas would, as noted, look very similar to the public lands. And, a move to create those areas might be exactly what is needed to motivate Congress toward a more comprehensive approach.

104. For more on the NOAA's reluctance to create sanctuaries and its propensity to interpret the statute to allow multiple uses within those sanctuaries, see generally William J. Chandler & Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 E.L.R. 10,505 (2004); Eagle, *supra* note 4, at 873-77; and Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711 (2003).

105. See *About Your Sanctuaries*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://sanctuaries.noaa.gov/about/welcome.html> (last visited Jan., 30, 2012).

GIVING VOICE TO RACHEL CARSON: PUTTING SCIENCE INTO ENVIRONMENTAL LAW

WILLIAM H. RODGERS, JR.*

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I. INTRODUCTION

Certainly, the most pressing issue of modern times is to develop a body of environmental law (that includes climate change) that is highly responsive to science. Without demeaning the many distinctions between the exercise of science and the practice of law,¹ let me cut to the chase and declare that science is mostly about the “pursuit of truth” and law is mostly about “who wins.”

Anybody who doubts this proposition should examine the radical differences between the “Supreme Court of Science” in the United States and the Supreme Court of Law. The Supreme Court of Science, the National Research Council, is not even an “agency” of the United States.² It is a mad-cap collective of boards, councils, committees, and advisors. It has its own administrative structure, of course, but in behavior, output, and reputation, it does display a decidedly non-structured “pursuit-of-truth” personality.³

The Supreme Court of Law hardly could be more different. In its practices of secrecy, isolation, choice of cases, in-house politick-

* William H. Rodgers, Jr., Stimson Bullitt Professor of Environmental Law, University of Washington School of Law, Box 353020, 408 William H. Gates Hall, Seattle, WA 98195-3020 | (206) 543-5182 | whr@uw.edu. This article is dedicated to two “Rachel Carsons” whose sterling careers have been devoted to protecting the oceans—Donna R. Christie and Alison Rieser.

1. For the differences between science and law, see SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (1995).

2. *Lombardo v. Handler*, 397 F. Supp. 792, 802 (D. D.C. 1975) (the author was an attorney in this case).

3. The National Research Council, often called colloquially “The Academy,” traces its origins to an executive order of President Abraham Lincoln. There are eloquent histories of this extraordinary organization. For a collection of these, see WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW IN INDIAN COUNTRY* § 1:13, at 399-44 & 399 n.7 (2005). See also PHILIP M. BOFFEY, *THE BRAIN BANK OF AMERICA: AN INQUIRY INTO THE POLITICS OF SCIENCE* (1975), for an excellent introduction.

ing, and selection of members, this club is all about control.⁴ The discipline of the legal system is quite remarkable when compared to the non-discipline of the scientific system. Instantly, upon utterance, all courts must fall in line with the latest word or directive. The same is true for attorneys who as officers of the court must implement that which is said without objection, quibbling, or scorn.⁵

Of the two, the Supreme Court of Science and the Supreme Court of Law, the one that looks like the “clique of geniuses” at work in the *Planet of the Apes* is the Supreme Court of Law.⁶ They are “Keepers of the Word.”

Some years ago, I was reminded by my spouse that “sometimes there is no alternative other than to tell the truth.” I’m sure I found a better alternative on that occasion.

But the point is well taken. And it has been taken to heart by the environmental movement. From the earliest times of modern environmentalism, activists have been inspired by the quiet desperation inherent in the idea that “sometimes there is no alternative other than to tell the truth.” Beginning in 1967, the Environmental Defense Fund (EDF) began to challenge the status quo with an “advancement of science” campaign against the old Pesticides Regulation Division of the U.S. Department of Agriculture.⁷ This bureaucracy was not exactly at the “cutting edge” of environmental science,⁸ and it soon would expire in the customary way by being given a new name and a new home (the Environmental Protection Agency). But, meanwhile, the EDF strategy was to “give voice” to Rachel Carson in places that were tone-

4. Literature on the U.S. Supreme Court, of course, is enormous. For a recent valuable text, see MICHAEL ALLAN WOLF, *THE SUPREME COURT AND THE ENVIRONMENT: THE RELUCTANT PROTECTOR* (2012).

5. Having had a small taste of the discipline of law and a smaller taste of the discipline of a military organization (the U.S. Marine Corps), I hope there has been a book written comparing the two. If there has been, I have not read it. There is a book by WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 341 (2000), with these index entries under “Law”—“punishing cowardice and misbehavior before the enemy,” “punishing looting and setting false alarms,” “punishing running away,” “punishing casting away arms,” “punishing failure to engage,” “failure to defend,” and “failure to rescue.” Could this be a short list of legal malpractice?

6. “They are Official Science,” [Zira, female Ape Captor of the protagonist] said. “You must have noticed this already and you’ll have plenty of opportunities to confirm it. They learn an enormous amount from books. They are all decorated. Some of them are looked upon as leading lights in a narrow specialized field that requires a good memory. Apart from that . . .” She made a gesture of contempt. PIERRE BOULLE, *PLANET OF THE APES* 128 (Del Rey Books 2001).

7. See generally William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENVTL. L. 1, 17-18 (2010) [hereinafter *Looked Good on Paper*].

8. See generally WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: PESTICIDES & TOXIC SUBSTANCES*, 3 ENVTL. L. (West) § 5:1 (2012).

deaf to her knowledge on the dreadful consequences of the worldwide dissemination of chlorinated hydrocarbon pesticides.⁹ Rachel Carson was a powerful, passionate, and qualified voice. Any lawyer would be proud to have her as an expert.

This tactical advantage of telling the truth quickly became a recognizable universal advantage that environmentalists strove to write into the “canonical”¹⁰ environmental laws of the 1970s. The National Environmental Policy Act was a near-miss in this regard.¹¹ Then the “best available science” clauses arrived in a great rush, beginning with twelve of them in the Marine Mammal Protection Act of 1972, eight more in the Endangered Species Act of 1973, and several more after that in laws that included the 1976 Magnuson Act that is now known as the Magnuson-Stevens Fishery Conservation and Management Act.¹²

Yet there was a dangerous backlash hiding within this general strategy of giving voice to Rachel Carson. It put her in grave jeopardy in a world that was not content to bow to the rule of “science” with no strings attached.

Predictably, a storm of law would attend the legislative choices to draw “best available science” into the service of advancing environmental policy. Questions might arise, for example, about the (1) Qualifications of Rachel Carson, (2) the Special Status of Purchased Science, (3) the Privileged Position of Defining Science, and (4) the Very Meaning of Science.

9. She cared passionately about the subject of how to maintain a sense of wonder and believed the war was won or lost in childhood. She hoped her book would inspire adults and children alike to experience the sensory and emotional in nature, and knew that if they did, they would have less appetite for those activities that threatened the living world.

Linda Lear, *Introduction to RACHEL CARSON, THE SENSE OF WONDER* 11 (Harper Collins 1998).

10. The term is invented by Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 281 (2010); see also Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505 (2011).

11. 42 U.S.C. § 4332(2)(A) states that “all agencies . . . shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.”

I say a “near miss” because courts do not see within this language the clear direction—and enforceability—of a mandate to use the “best available science.” See *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (noting that NEPA does not require courts to “decide whether an [EIS] is based on the best scientific methodology available”); see also *Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (en banc), *abrogated on other grounds* by *Winter v. Nat’l Res. Def. Council* 55 U.S. 7 (2008).

12. *Looked Good on Paper*, *supra* note 7, at 18.

This law is revealing itself quickly in the nascent world of climate change. It is being defined importantly by the U.S. Supreme Court and, in particular, its strongest “corporatist” members.¹³

II. QUALIFICATIONS OF RACHEL CARSON

This threshold question of who gets to speak on a matter of science is already a well-washed topic in the law books, under the general heading of *Daubert*.¹⁴ Customarily, this “gatekeeping function” is in the good hands of U.S. federal district judges. But, frankly, I worry about it when I see that this rule encourages motions to strike the testimony of world-class scientists (not only the qualified but the “best qualified”) on crucial issues of climate change.¹⁵ This can be done apparently without hesitation, shame, or personal or professional repercussions. This chapter certainly is not closed.

III. THE SPECIAL STATUS OF PURCHASED SCIENCE

One might think that the sensitive question of who pays for the science figures significantly in its fate in court, and it does. In the extraordinary book by Thomas O. McGarity and Wendy E. Wagner, *Bending Science: How Special Interests Corrupt Public Health Research*,¹⁶ sources of funding figure importantly in a full range of corrupting strategies, including “Packaging Science” and “Spinning Science.”¹⁷ Indeed, one of the early defamation cases in the wake of the DDT wars focused on whether the man in question had been “paid to lie.”¹⁸

But have no doubt that giant corporations, such as Exxon-Mobil, insist on their science on vital matters such as climate

13. “Corporatist” is defined as “of or characteristic of a corporative state or its corporations.” WEBSTER’S NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE 409 (2d ed. 1983).

14. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (holding that “‘general acceptance’ is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence”).

15. See, e.g., *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (denying *Daubert* motion to strike testimony of Dr. James Hansen), discussed in WILLIAM H. RODGERS JR. ET. AL., CLIMATE CHANGE: A READER 81-83 (2011) [hereinafter CLIMATE CHANGE: A READER].

16. (2008).

17. See *id.* chs. 8, (subtitled “The Art of Assembling an Expert Group to Advance a Favored Outcome”), 9 (subtitled “The Art of Manipulating Public Perceptions about Credible Science”).

18. See *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113 (2d Cir. 1977) (holding an unsuccessful suit by pro-DDT expert; the alleged defamation was a charge of “liars,” maybe not “paid,” so the N.Y. TIMES was not liable for reporting on the events.).

change¹⁹ or residual oil in the wake of the spill of the *Exxon Valdez*.²⁰ In one of the more ironic concessions to this fact, Justice Souter, in his opinion withdrawing punitive damages from the stricken fishermen in the wake of the Exxon spill, actually cited (but declined to rely upon in the interests of integrity!) a study of jury behavior paid for by Exxon that told us why this institution should be diminished in the interests of decisional fairness.²¹

IV. GIVING DEFERENCE TO CHARLATANS

In *Massachusetts v. EPA*,²² the Supreme Court stopped one vote short of giving deference on climate change to an agency that had become hopelessly politicized and completely wrong on the matter of science.²³ But the Court showed itself quite ready to use its own ignorance of science as an asset, only to act as a handicapper on which part of the bureaucracy to bet. It must be understood that the shield of deference is now an extremely valuable currency within an agency. Managers are anxious to appropriate this asset, especially if they can hide behind the constraints it entails.

Consider the deference that courts might have been inclined to extend to one Julie MacDonald, the former Deputy Assistant Secretary for Fish, Wildlife and Parks, at the United States Department of the Interior. The studies are in on this case,²⁴ and,

19. Mark, would you provide me a slide on the seventeen thousand scientists? [Lee Raymond, Chairman and Chief Executive, Exxon Mobil, 1993-2005] asked an aide.

A slide duly flashed on a wide screen. It depicted a petition organized by anti-Kyoto campaigners and signed by thousands of scientists. The idea was to demonstrate that many respectable scientists doubted key aspects of the I.P.C.C. consensus about the likelihood of human contributions to global warming. The petition's credibility had already been undermined by testimony presented to Congress demonstrating that its signatures included those of pop musicians such as the Spice Girls and James Brown. If Raymond knew about these problems, he did not care.

STEVE COLL, *PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER* 88 (2012).

20. *See id.* ch. 5.

21. Compare *CLIMATE CHANGE: A READER*, *supra* note 15, at 172-75 ("Adequacy of Compensation and the Role of Retribution"), with William H. Rodgers, Jr., *Punitive Decisionmaking*, 7 U. ST. THOMAS L.J. 89-94 (2009). Justice Souter will be aghast when he reads of the calculating ends to which ExxonMobil would go to undermine punitive awards. *See COLL*, *supra* note 19, at 312-14.

22. 549 U.S. 497 (2007).

23. *See id.* at 534-35; *see also CLIMATE CHANGE: A READER*, *supra* note 15, at 60-71.

24. *See generally* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF INTERIOR, REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS (2007).

fortunately, the district judge who heard the case was not yet mesmerized by the doctrine of deference to the unnamed and the unknowable.

In *Western Watersheds Project v. Fish and Wildlife Service*, B. Lynn Winmill, Chief District Judge, Idaho, upheld a challenge to a Fish and Wildlife Service's rejection of a petition to list the greater sage-grouse under the Endangered Species Act.²⁵ Judge Winmill wrote:

[T]he FWS decision was tainted by the inexcusable conduct of one of its own executives. Julie MacDonald, a Deputy Assistant Secretary who was neither a scientist nor a sage-grouse expert, had a well-documented history of intervening in the listing process to ensure that the "best science" supported a decision not to list the species. Her tactics included everything from editing scientific conclusions to intimidating FWS staffers. Her extensive involvement in the sage-grouse listing decision process taints the FWS's decision and requires a reconsideration without her involvement.²⁶

Judge Winmill elaborated:

What an odd process. Right at the moment where the "best science" was most needed, it was locked out of the room. The FWS argues that it cannot be compelled to cede control of a listing decision to experts. But the argument misses the mark. By excluding the experts from making even a recommendation, and then failing to document the experts' discussions (beyond their votes), the FWS cannot demonstrate that is [sic] applied the "best science."²⁷

Judge Winmill added, "MacDonald had extensive involvement in the sage-grouse listing decision, used her intimidation tactics in this case, and altered the 'best science' to fit a not-warranted decision."²⁸ Judge Winmill's decision in the sage-grouse listing case is a reminder of how important a vibrant judicial review is to the survival of the "best science" function. There are hundreds

25. 535 F. Supp. 2d 1173 (D. Idaho 2007); Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1605 (2007-2008).

26. *W. Watersheds Project*, 535 F. Supp 2d at 1176.

27. *Id.* at 1185.

28. *Id.* at 1188; see also *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 2005 WL 2000928, at *15 (N.D. Cal 2005) (setting aside another "irregularity" occasioned by pressure from MacDonald "to reach an 'ordained outcome' regardless of the best science").

of cases raising “best science” issues, and all these matters are vulnerable to being extinguished by casual resort to an undeserved deference.²⁹

V. ECONOMICS IS NOT SCIENCE

If the interpretation of “best science” includes economics, then the entire enterprise would be subject to self-cancellation under some ill-defined balancing standard. People who appreciate this reality—and who would hope to see it implemented—would place any and all written insistences that economics is not a science on a closely held list of banned books. This kind of thought would not be cited, honored, or mentioned. High on this list would be the book by Robert Trivers, *The Folly of Fools: The Logic of Deceit and Self-Deception*.³⁰ Trivers addresses directly the question of whether economics is a science:

The short answer is no. Economics acts like a science and quacks like one—it has developed an impressive mathematical apparatus and awards itself a Nobel Prize each year—but it is not yet a science. It fails to ground itself in underlying knowledge (in this case, biology). This is curious on its face, because models of economic activity must inevitably be based on some notion of what an individual organism is up to. What are we trying to maximize? Here economists play a shell game. . . . [Economists] often implicitly assume . . . that market forces will naturally constrain the cost of deception in social and economic systems, but such a belief fails to correspond with what we know from daily life, much less biology more generally. Yet such is the detachment of this “science” from reality that these contradictions arouse notice only when the entire world is hurtling into an economic depression based on corporate greed wedded to false economic theory.

. . . .

29. *Cf.*, in this regard, *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091 (10th Cir. 2007) (discussing a challenge to the Department of Energy’s Waste Isolation Pilot Project, a nuclear waste repository in southeastern New Mexico.) A qualified hydrologist described the agency characterization of the site as “a pattern of lies and deceptions designed to disguise the true hydrology of the . . . site.” *Id.* at 1095. This is heard by the court of appeals to be, at most, “a dispute among members of the scientific community.” *Id.* at 1099. *See also* Doremus, *supra* note 25, at 1641 (explaining that “[t]he key to enhancing political integrity is to enforce stronger role separation between career scientists, who should be encouraged and enabled to provide their best independent assessments of the facts, and political appointees, who should be required to take political responsibility for the choices they make among available policy options.”).

30. (2011).

Finally, when a science is a pretend science rather than the real thing, it also falls into sloppy and biased systems for evaluating the truth. Consider the following, a common occurrence during the past fifteen years. The World Bank advises developing countries to open their markets to foreign goods, let the markets rule, and slash the welfare state. When the program is implemented and fails, the diagnosis is simple: "Our advice was good but you failed to follow it closely enough." There is little risk of being falsified with this kind of procedure.³¹

Justice Antonin Scalia anticipated Trivers by writing in *Bennett v. Spear*,³² that economic concerns permeate the "best science" clauses.³³ Justice Scalia pronounced that good science must be good economics:

The *obvious* purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA *not be implemented haphazardly, on the basis of speculation or surmise*. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) *is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives*. That economic consequences are an explicit concern of the ESA is evidenced by § 1536(h), which provides exemption from § 1536(a)(2)'s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake *is plainly within the zone of interests that the provision protects*.³⁴

31. *Id.* at 310-11, 313.

32. 520 U.S. 154 (1997).

33. *Id.* at 172, 176-77.

34. *Id.* at 176-77 (emphasis added). The Scalia opinion does not address the peculiar reference in this "best science" clause to "commercial data." See *id.* at 176.

This position has been challenged, even mocked, but not by any source that matters.³⁵ No other Justice has been moved to address this topic.

Thus, in ironic fashion, the rise of environmentalism has brought with it the rise of science in law. The rise of science has buoyed hopes and expectations for addressing the “pressure cooker” of climate change.³⁶ Yet, typical of the times, the largest obstacle to fulfillment of these higher ends is the strongest voice on today’s high court—a bullying, intimidating presence that has no discernible interest in the sweetest corners of science and no obvious commitment to its values. So far, the “best available science” has been shouted down, done away with by the snarling intemperance of the moment.

Can we do better? Almost certainly, we can. The district courts are doing much better.³⁷ In the longer run, the “pursuit of truth” is an odds-on favorite to defeat “the pursuit of advantage.” Lawyers have been attempting to fix the science now for several centuries, but they have come up short.

Rachel Carson will again have her day.

35. My personal parody of this position is:

The *obvious purpose* of the requirement that each agency “use the best scientific and commercial data available” is to ensure that the ESA *not be implemented on the basis of power politics and economic influence*. While this [clause] no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is *to improve the quality of decisionmaking, enhance public confidence, and import technical accuracy so that environmental decisionmaking is not derailed by zealous and misguided interference*. The confinement of economic objection to a rare and radically limited sidebar (§ 1536(h)) is definitive evidence that economic objection should not be smuggled in here under the implausible guise of a citizen suit. *We believe* the “best scientific and commercial data” provision is no way intended, neither in whole nor in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners’ claim that they are victims of such a mistake *is plainly without the zone of interests that the provision protects*.

William H. Rodgers, Jr., *NEPA’s Insatiable Optimism*, 39 ENVTL. L. REP. 10,618, 10,619 n.17 (2009).

36. See generally Cinnamon Carlarne, *Notes From a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351 (2008).

37. For one extraordinary account, see *Aquifer Guardians in Urban Areas v. Federal Highway Administration*, 779 F. Supp. 2d 542 (W.D. Tex. 2011).

THIRD-PARTY PPAs: UNLEASHING AMERICA'S SOLAR POTENTIAL

SAMUEL FARKAS*

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I. INTRODUCTION

Thomas Edison, the father of electricity, once envisioned a future with unlimited energy potential—not from fossil fuels—but from the sun. In 1931, Edison, rather prophetically, commented, “I’d put my money on the sun and solar energy. What a source of power! I hope we don’t have to wait till oil and coal run out before we tackle that.”¹ Yet, almost seventy years later, fossil fuel combustion remains the largest source of electricity generation in the United States, and we are just beginning to see the potential for solar power generation.² Today, in addition to concerns about

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1. Heather Rogers, *Current Thinking*, N.Y. TIMES, June 3, 2007, http://www.nytimes.com/2007/06/03/magazine/03wwln-essay-t.html?_r=0.

2. Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041, 1042 (2010). See also *Summary Statistics for the United States, 1999*

the finite availability of fossil fuel resources, issues like climate change, national security, and rising energy costs are fueling the national debate about how best to harness renewable resources.³

Although renewable energy sources such as wind, biomass, geothermal, and hydro are being pursued in the United States, solar generation, particularly photovoltaic (PV), presents several advantages over these other sources.⁴ First, unlike wind or geothermal energy production, PV panels do not require noisy turbines that involve multiple moving parts.⁵ Second, PV panels can be placed “almost anywhere.”⁶ As a result, property that is already allocated to other uses, such as rooftops⁷ and parking lots, may be utilized to generate solar power. Further, because of the relatively inconspicuous nature of the PV panels, they are less prone to noise and aesthetic nuisance complaints.⁸ Third, compared to wind power, PV panels have higher efficiencies and, unlike biomass, produce no emissions.⁹

PV's most important benefit is its capability to create a new energy generation paradigm—one composed of a myriad of privately owned generation systems distributed across the grid.¹⁰ This model, known as retail distributed generation, encompasses small-scale electricity generating sources sited at the point of use.¹¹ Retail distributed generation is located on the customer's side of the meter and is used to offset the customer's energy load at the site.¹² The customer remains connected to the grid to use

through 2010, UNITED STATES ENERGY INFORMATION ADMINISTRATION, <http://www.eia.gov/electricity/annual/pdf/tables1.pdf> (last visited Oct. 16, 2012).

3. See CONG. BUDGET OFFICE, PROSPECTS FOR DISTRIBUTED ELECTRICITY GENERATION 15-22 (2003), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/45xx/doc4552/09-16-electricity.pdf>.

4. See *Renewable Energy: What Are My Options?*, GREEN ENERGY CHOICE, <http://www.greenenergychoice.com/green-guide/renewable-energy-types.html> (last visited Jan. 3, 2013).

5. *Solar Energy*, ALTERNATIVE ENERGY, <http://www.altenergy.org/renewables/solar.html> (last visited Jan. 3, 2013).

6. Adele, *The Advantages of Solar Energy vs. Other Renewable Energy Sources*, ONE BLOCK OFF THE GRID (July 22, 2010), <http://1bog.org/blog/the-advantages-of-solar-power-vs-other-renewable-energy-sources/>.

7. *Id.*

8. *Id.*

9. *Id.*

10. See Tim Lindl, *Letting Solar Shine: An Argument To Temper the Over-The-Fence Rule*, 36 *ECOLOGICAL* L.Q. 851, 853 (2009).

11. *Colorado Incentive/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=CO24R (last visited Feb. 13, 2013).

12. In contrast to retail distributed generation is wholesale distributed generation, which means that “electricity is produced in order to be sold to utilities or other purchasers for distribution to industrial, commercial, and residential customers.” *Issues & Policies: Wholesale Distributed Generation*, SOLAR ENERGY INDUSTRIES ASS'N, <http://www.seia.org/policy/renewable-energy-deployment/wholesale-distributed-generation> (last visited Jan. 3, 2013). This Comment addresses only retail distributed generation.

utility-generated energy when his demand is greater than his generation and to export any excess generation back to the grid.¹³

Distributed solar generation offers significant advantages when operated as a complement to utility supplied power. A completely utilized distributed generation will be akin to the world wide web; the distributed network would be decentralized and immune from blackouts, fuel price spikes, and acts of terror.¹⁴ Additionally, distributed solar generation “could improve electricity distribution systems by . . . better managing load, reducing transmission degradation, more proficiently expanding capacity, and more extensively utilizing . . . power capabilities.”¹⁵ States have begun recognizing these benefits and have begun focusing on increasing distributed solar capacity through state government economic incentives and solar generation requirements. Likewise, the federal government has provided a plethora of economic incentives to stimulate distributed solar generation.

Yet, solar generation remains less than one percent of the United States’ total generation.¹⁶ The high up-front cost for solar installation continues to be the primary impediment to solar project development.¹⁷ In response to this problem, solar entrepreneurs developed a novel financing model to provide consumers with the benefits of solar power without the costs. This PV financing model, known as the third-party power purchase agreement (third-party PPA), has quickly become the most popular method for financing solar PV.¹⁸

Some states, however, retain laws and regulations that would classify the third-party PPA as a utility, subject to public utility commission regulation.¹⁹ Regulation of the third-party PPA as a utility imposes burdens and costs, which make the model unprofitable for the developer.²⁰ Similarly, some states have not extended net metering capabilities to customers who have financed the solar technology through a third-party PPA.²¹ Thus, many states’ renewable energy policies are schizophrenic—states seek to in-

13. CONG. BUDGET OFFICE, *supra* note 3, at 15; *Issues & Policies: Distributed Solar*, SOLAR ENERGY INDUSTRIES ASS’N, <http://www.seia.org/policy/distributed-solar> (last visited Oct. 20, 2012).

14. Lindl, *supra* note 10, at 853.

15. Anthony Allen, *The Legal Impediments to Distributed Generation*, 23 ENERGY L.J. 505, 505 (2002).

16. *Solar Power*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, <http://www.pewclimate.org/technology/factsheet/solar> (last visited Jan. 3, 2013).

17. KATHARINE KOLLINS, ET AL., U.S. DEP’T OF ENERGY, SOLAR PV PROJECT FINANCING: REGULATORY AND LEGISLATIVE CHALLENGES FOR THIRD-PARTY PPA SYSTEM OWNERS 3 (2010), available at <http://www.nrel.gov/docs/fy10osti/46723.pdf>.

18. *Id.* at 1.

19. *Id.*

20. *Id.* at 7.

21. *Id.* at vi.

crease distributed PV capacity through economic incentives and renewable generation goals, yet many have failed to amend their regulatory structures to promote increased PV development by explicitly exempting third-party developers from burdensome regulation.

This paper explains why the third-party PPA model is a necessary financing tool that states should affirmatively promote. It sets forth the different types of legal impediments that are currently obstructing third-party PPA development in most states. Finally, the paper illustrates how states should amend their laws and regulations in order to create a cohesive solar energy policy that welcomes third-party PPA developers.

Part II of the paper notes how many states have begun laying the foundation to create a strong network of renewable solar distributed generation. Part III explains how the third-party PPA works and why this financing method is a beneficial tool for financing solar installations for both the customer and the third-party contractor. Part IV discusses the types of laws and regulations that inhibit third-party development. Finally, Part V analyzes why the underlying policy function of these types of restrictive regulations should not apply to third-party PPA developers and how states should address their solar policies to facilitate third-party PPA development.

Although restrictive state laws and regulations are the primary obstacles to third-party developer investment in states, there are other barriers, such as burdensome interconnection standards; utility fees and fines; state, municipality, and neighborhood land use regulations; and inadequate net metering compensation policies that impede distributed solar PV. These barriers are outside the scope of this paper, but should be noted as additional obstacles that states should address in order to develop a successful, comprehensive distributed solar policy.

II. THE RISE OF DISTRIBUTED PV

A. State and Federal Monetary Incentives

Perhaps some of the most important catalysts increasing distributed PV are the federal and state government subsidies, which help to defray the costs of distributed PV for owners.²² President Obama in his inaugural address promised to “harness the

22. As will be explained in Part III, while these subsidies make solar PV less costly, there are still substantial costs, such as the large up-front investment and maintenance costs, which often require financing. Also, many non-profit and municipal organizations do not benefit from many of these incentives.

sun and the winds and the soil to fuel our cars and run our factories.”²³ In his 2010 budget, the President “called for doubling the country’s renewable capacity in three years.”²⁴ Congress responded and placed many renewable energy financial incentives for development and utilization in the American Reinvestment and Recovery Act.²⁵ “One of the most important federal incentives for PV is the Investment Tax Credit (ITC),” which reduces the federal income tax liability for system owners based upon amount of capital invested in the PV project.²⁶ Additionally, Congress has implemented the Modified Accelerated Cost Recovery System (MACRS) to allow businesses to recoup investments in property through accelerated asset depreciation by reducing the companies’ tax burden.²⁷ Finally, Congress provides a large number of cash incentives for solar projects through cash grants, such as the Tribal Energy Program Grant and the Department of the Treasury’s Renewable Energy Grants.²⁸

State and local governments, as well as some utilities, provide creative economic incentives for solar projects, ranging from grants and loans to income, property, and sales tax exemptions.²⁹ All fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands provide incentives for renewable energy.³⁰ California, for example, offers an incentive structure known as the California Solar Initiative (CSI), which boasts a goal of achieving 3,000 MW of solar capacity by 2016.³¹ The CSI provides more than \$3,000,000,000 in incentives for solar energy projects.³² State utilities also offer grants, loans, and rebates in addition to the CSI.³³ Similarly, New York promotes solar PV installations with its state rebate program, which is available to all customers of any “investor-owned utility.”³⁴ New York also offers a personal tax

23. FRED BOSSELMAN, ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS, 834 (Robert C. Clark et al. eds., 3rd ed. 2010).

24. *Id.*

25. *Id.*

26. KOLLINS ET AL., *supra* note 17, at 38.

27. *But see id.* at 38 n.16 (indicating that MACRS is not available to residential customers).

28. *Federal Incentives/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/incentives/index.cfm?state=us&re=1&EE=1> (last visited Jan. 3, 2013).

29. *Financial Incentives for Renewable Energy*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/summarytables/finre.cfm> (last visited Jan. 3, 2013).

30. *Id.*

31. KOLLINS ET AL., *supra* note 17, at 39.

32. *Id.*

33. *Id.*

34. *New York: Incentives/Policies for Renewable Energy, PV Incentive Program*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NY10F&re=1&ee=0 (last visited Jan. 3, 2013).

credit program, which provides residential solar system owners a tax credit equal to twenty-five percent of the cost of equipment and installation up to \$5,000.³⁵

B. RPSs

Many states have also implemented policies to promote renewable energy generation.³⁶ The most popular method for increasing renewable generation is through Renewable Portfolio Standards (RPSs). RPSs require utilities to use renewable energy or purchase renewable energy credits (RECs), which are tradable commodities that are not tied to the source of the electricity generation,³⁷ to account for a specified percentage of its retail electricity sales or a certain amount of its generating capacity.³⁸ Several states have imposed monetary penalties on utilities for failing to meet the requisite percentage specified in the state's RPS.³⁹ These penalties are generally high enough to encourage utilities to either purchase renewable energy or RECs.⁴⁰ Similarly, many states provide solar RECs (SRECs), which are generated by solar projects and demand a higher price in states with RPSs that contain solar set-asides.⁴¹ RECs (and particularly SRECs) become a valuable commodity⁴² for the owner of the solar project who is able to sell the credit to a utility.⁴³

Twenty-nine states, the District of Columbia, and Puerto Rico have now enacted RPS policies, and eight states have enacted renewable portfolio goals,⁴⁴ which, unlike RPS policies, are not legally binding.⁴⁵ Moreover, many states' RPS policies contain solar or distributed generation set-asides that specify a specific amount of power that must be derived from solar or renewable

35. *New York: Incentives/Policies for Renewable Energy, Residential Solar Tax*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NY03F&re=1&ee=0 (last visited Jan. 3, 2013).

36. *Glossary: Renewable Portfolio Standards*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/glossary/> (last visited Jan. 3, 2013).

37. KOLLINS ET AL., *supra* note 17, at 40 (noting that RECs may be bundled or sold with the electricity depending on the PPA contract).

38. *Id.* at 39.

39. *Id.* at 40.

40. *Id.*

41. *Id.*

42. *See id.* at 41. For example, in New Jersey, the SREC weighted average trading price of \$308.00 to \$513.00/MWh was a consequence of the penalty price set at \$711.00/MWh. *Id.*

43. *See id.* at 39-41.

44. *See Renewable Portfolio Standard Policies*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/documents/summarymaps/RPS_map.pptx (last visited Jan. 3, 2012).

45. *Glossary: Renewable Portfolio Standards*, *supra* note 36.

distributed generation, respectively.⁴⁶ Currently, sixteen states and the District of Columbia have RPS set-asides specifically for solar-distributed-generation.⁴⁷

Net metering is another mechanism that states are using to encourage distributed PV. Net metering allows utility customers who generate their own electricity to bank excess electricity in the form of a kWh credit when they produce more energy than is used.⁴⁸ The credits can then be used to purchase electricity from the utility when the customer's generation system is not supplying enough power.⁴⁹ The credit the customer receives for the net excess generation (NEG) is valued at the "utility's wholesale rate, the utility's avoided cost, or the customer's retail rate."⁵⁰ Utility customers may use the credits to offset electricity purchased from the utility in the following billing period.⁵¹ Generally, states' net metering regulations require utilities to compensate excess generation at the retail rate provided the customer does not produce net excess generation annually.⁵²

Forty-two states and the District of Columbia currently provide net metering, and all policies specify solar as an available technology.⁵³ Most states provide that the owner retains RECs generated from net-metered systems.⁵⁴ Among the forty-two states, net metering rules and requirements differ, depending on whether the customer is commercial/industrial or residential and depending on the size of the system.⁵⁵ Further, many states attach generation limits for generators.⁵⁶ States also differ in how they compensate customers for NEG.⁵⁷ For example, although most

46. See KOLLINS ET AL., *supra* note 17, at 39-41.

47. See *Renewable Portfolio Standard Policies with Solar/Distributed Generation Provisions*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/documents/summarymaps/Solar_DG_RPS_map.ppt (last visited Jan. 3, 2013).

48. JUSTIN BARNES & LAUREL VARNADO, *THE INTERSECTION OF NET METERING & RETAIL CHOICE: AN OVERVIEW OF POLICY, PRACTICE, AND ISSUES*, INTERSTATE RENEWABLE ENERGY COUNCIL 3 (Dec. 2010), available at <http://irecusa.org/wp-content/uploads/2010/12/FINAL-Intersection-of-Retail-Choice-and-Net-Metering-Report.docx.pdf>.

49. See *id.* at 9-10.

50. KOLLINS ET AL., *supra* note 18, at 36.

51. *Id.* See also DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/> (last visited Jan. 3, 2012) [hereinafter DATABASE OF STATE INCENTIVES] (providing each state's net metering compensation plans).

52. See DATABASE OF STATE INCENTIVES, *supra* note 51 (click on a state; then scroll down to "Rules, Regulations & Policies" and follow "Net Metering" hyperlink).

53. *Net Metering: Status & Trends*, DATABASE OF STATE INCENTIVES FOR RENEWABLE & EFFICIENCY, <http://www.dsireusa.org/solar/solarpolicyguide/?id=17> (last visited Jan. 4, 2013) [hereinafter *Net Metering: Status & Trends*].

54. *Id.*

55. KOLLINS ET AL., *supra* note 17, at 37.

56. See *id.* The limits range from no limits in states like Ohio, to only 80MW in states like New Mexico. *Id.* Other states, such as Arizona and Colorado, allow for percentages in excess of consumption, thereby avoiding restrictions based on capacity. *Id.*

57. See DATABASE OF STATE INCENTIVES, *supra* note 51; see also *supra* text accompanying note 52.

states do not compensate generators for NEG held longer than a year, many states do allow customers to carry NEG credits month to month at the full retail value of a kWh.⁵⁸

III. FINANCING DISTRIBUTED PV—THE THIRD-PARTY POWER PURCHASE AGREEMENT

Even though states have created a fertile environment to spur distributed PV generation,⁵⁹ the largest barrier inhibiting distributed PV development remains financing the PV system.⁶⁰ Additionally, many potential residential or commercial generators are not experts in PV maintenance or interconnection standards and fear investing in the resource as a result.⁶¹ These barriers have prompted a host of different approaches to financing distributed PV.⁶² One of the most popular solutions, the third-party PPA, is quickly becoming the preferential financing method among commercial entities and residential homeowners who wish to invest in solar.⁶³ Under this financing approach, customers contract with a solar “project developer who builds, owns, and operates” the PV system.⁶⁴ The developer, in turn, sells all of the electricity produced at the host site back to the customer under a PPA.⁶⁵ Ultimately, this arrangement allows the customer to receive what it really wants—affordable solar power—without bearing the costs of financing and maintaining the system.⁶⁶

The price for the solar power is negotiated to provide the site host with power at or below the cost the site host would pay for regular service.⁶⁷ The PPA price typically increases by a nominal amount annually; therefore, the price may be either higher or lower than the utility rates at any point in the future.⁶⁸ The length of the PPA varies, but often, longer terms result in more attractive pricing for the customer.⁶⁹ PPAs often include an “early

58. *See Net Metering: Status & Trends*, *supra* note 53.

59. *See* KOLLINS ET AL., *supra* note 17, at 1.

60. *Id.* at 3.

61. *See id.* at 34.

62. *See id.* at 17-24. Depending on the type of site, different models are available, such as balance sheet financing, solar leasing (capital and operations), Clean Renewable Energy Bonds, and utility ownership. *See* MARK BOLINGER, FINANCING NON-RESIDENTIAL PHOTOVOLTAIC PROJECTS: OPTIONS AND IMPLICATIONS ERNEST ORLANDO LAWRENCE BERKELEY NATIONAL LABORATORY, iv, x, 15 (Jan. 2009), available at <http://eetd.lbl.gov/eal/ems/reports/lbnl-1410e.pdf>; *see also* KOLLINS ET AL., *supra* note 17, at vii.

63. *See* KOLLINS ET AL., *supra* note 17, at 1.

64. *Id.* at 3.

65. *Id.*

66. *Id.*; *see also* BOLINGER, *supra* note 62, at 18.

67. BOLINGER, *supra* note 62, at 17.

68. *Id.*

69. *Id.*

buyout option,” which allows the customer to purchase the PV system from the developer at the point when most of the investor’s tax benefits have been exhausted.⁷⁰

A. Advantages of Third-Party PPAs for Customers

The third-party PPA presents several advantages to both the residential and non-residential customer.⁷¹ The reduction, or at least stabilization, of volatile electricity prices is perhaps the largest financial incentive driving distributed PV.⁷² Electricity consumers have witnessed large rate increases throughout the nation in recent years with an average annual increase of 4.1% on U.S. retail electricity costs from 2005 to 2010.⁷³ Third-party PPAs allow customers the opportunity to negotiate a long-term contract that specifies a predetermined price for a twenty to twenty-five year duration.⁷⁴ This predictability in electricity costs is financially attractive to customers, especially for businesses that consume large amounts of electricity, because predictable power costs reduce expenditure risk and provide more certainty when allocating electricity expenses.⁷⁵

The elimination or dramatic reduction in up-front costs for the site host is another key benefit of the third-party PPA for customers.⁷⁶ Under most agreements, the developer bears the capital costs of the PV system, as well as the costs of installation and maintenance,⁷⁷ thereby liberating the customer from having to negotiate the morass of financing, maintenance, and operational issues that accompany PV. If the system malfunctions and electricity is not generated, the customer pays nothing and is not responsible for repairs.⁷⁸ Thus, the developer has a strong market incentive to ensure the proper operation of the PV equipment because the less electricity that is produced, the less electricity the customer can buy.⁷⁹

70. *Id.*

71. KOLLINS ET AL., *supra* note 17, at 33 (explaining that implications of these benefits will vary depending on whether the customer is a residential or commercial customer).

72. *Id.* at 34.

73. Brennan Lou, *The 5 States with the Most Installed Wind and Solar Power Saw the Least Increase in Electricity Prices from 2005-2010*, THINK PROGRESS (Dec. 18, 2011, 6:08 PM), <http://thinkprogress.org/romm/2011/12/18/390865/states-most-installed-wind-solarpower-least-increase-in-electricity-prices/>.

74. KOLLINS ET AL., *supra* note 17, at 34.

75. *Id.*

76. *Id.* at 33.

77. *Id.* at 34.

78. *Id.*

79. *Id.*

B. Advantages of Third-Party PPAs for Developers

Developers are better situated than ordinary power consumers to reap the maximum reward for PV investment. Solar energy developers operate with the advantage of “knowing the business.”⁸⁰ They have solar-project-financing expertise and are able to participate in the niche tax equity financing market⁸¹ to secure less expensive capital for PV installations.⁸² More importantly, solar developers can more effectively capitalize on available tax credits.⁸³ Many of the tax incentives only apply to taxable entities.⁸⁴ For example, only businesses or homeowners with taxable income may seek the ITC⁸⁵ and the residential tax credit. Therefore, non-profit organizations and public entities, which have no tax liabilities, are excluded from these opportunities. Similarly, individuals and entities that do not have a sufficiently large tax bill will not be able to fully maximize the benefits.⁸⁶ Some incentives, such as the MACRS, do not apply to homeowners and non-taxable entities.⁸⁷ Therefore, third-party contractors are better situated to achieve a full utilization of the available benefits, which allows them to transfer the cost savings to the site-host.⁸⁸

Third-party developers are also able to take full advantage of state issued RECs. Under a third-party PPA, the developer retains the RECs (or the more valuable SRECs) to sell into the market.⁸⁹ The corollary profits associated with the sale of RECs and SRECs provide additional returns to developers, which may be passed on to the customer.⁹⁰ Customers who own their own system may not be able to efficiently capitalize on this associated benefit, as residential owners and small commercial entities may not realize the value of such credits in the market.

80. *Id.* at 33.

81. Joel Kirkland, *Cash-Rich Companies Begin to Make Renewable Energy Investments*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/cwire/2011/08/18/18climatewire-cash-rich-companies-begin-to-make-renewable-e-3023.html>. (“Under the tax equity [financing] structure, large lending institutions finance projects in exchange for partial ownership of the company and access to tax credits.”).

82. KOLLINS ET AL., *supra* note 17, at 33.

83. *Id.*

84. *Id.*

85. *Id.* The “ITC” is the federal investment tax credit. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 33-34.

89. *Id.* at 34. RECs must be purchased by any company that markets itself as “solar powered,” as well as utilities in a state with an RPS with a solar set-aside. *Id.* at 35.

90. *Id.* at 40.

IV. STATUTORY AND REGULATORY BARRIERS TO THIRD-PARTY PPAS

The largest barriers to third-party PPAs are state power regulatory systems. Although public utility law varies from jurisdiction to jurisdiction, many overarching themes and issues remain the same.⁹¹ Public utility commissions exercise complete authority over retail sales of electricity.⁹² Thus, states continue to require entities selling retail electricity to be regulated as a utility. Most of these state laws were enacted in a system in which utilities exercised a geographic monopoly for the sale of power to customers and were, thus, “clothed with a public interest.”⁹³ Public utility regulations were promulgated to ensure fair pricing, reliability of an indispensable service, and elimination of unnecessary duplication of electric utility facilities.⁹⁴

There are two general regulatory obstacles for third-party PPAs: state regulation of the PPA as a utility and the state restrictions on net metering for customers using third-party equipment.⁹⁵ Third-party developers are effectively precluded from investing in jurisdictions with either of these restrictive regulations as both render the model economically unattractive.⁹⁶ Regulation of third-party developers as utilities adds enormous administrative costs and time delays, which make the project financially unappealing for the developer. Similarly, preventing utility customers from net metering with a third-party developer’s PV system makes the project financially unappealing for the customer. The mere possibility that either regulation will apply will frighten developers from investing in the state.⁹⁷

A. Regulation as a Utility

Regulation of third-party developers as a “utility” is the primary obstacle restricting third-party developers from investing in a state. Specifically, states that classify regulation of electricity

91. Trevor D. Stiles, *Regulatory Barriers to Clean Energy*, 41 U. TOL. L. REV. 923, 931 (2010).

92. *Id.*

93. See Legal Memorandum from Staff Attorney Bradley Klein, Envtl. Law and Policy Ctr., 1, 2 (Sept. 16, 2011), available at <http://www.scribd.com/doc/69284226/Iowa-Ppa-Memo-9-16-11-Final>.

94. KOLLINS ET AL., *supra* note 17, at 4.

95. *Id.* at 1. The viability of third-party PPAs is most affected in jurisdictions that require regulation for any retail sale of electricity. Similarly, the third-party PPA model is tenuous in jurisdictions that have not revised ambiguous language that does not provide an explicit exemption for third-party PPAs, as the potential for regulation remains.

96. See Lindl, *supra* note 10, at 858.

97. KOLLINS ET AL., *supra* note 17, at 7.

to the public as utilities capture third-party developers because the developer sells power generated from its solar installation directly to the site-owner. Florida, for example, defines “public utility” as

every person, corporation, partnership, association, or other legal entity . . . supplying electricity or gas . . . to or for the public within this state; but the term “public utility” does not include . . . any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers. . . .⁹⁸

The Supreme Court of Florida interpreted this statutory language in 1987 and found that the statute’s “to the public” language encapsulated the sale of electricity to *one person*⁹⁹—a holding that effectively precludes third-party PPAs in Florida. In that case, PW Ventures sought to sell its customer, Pratt and Whitney, electricity from a co-generation project that was to be maintained on Pratt and Whitney’s land.¹⁰⁰ The dispute arose after the Public Service Commission (PSC) denied PW Ventures a declaratory statement that it would not be subject to its regulation.¹⁰¹ The court affirmed the PSC, refusing to limit its interpretation of “to the public” narrowly; instead, the court reasoned that a broader construction of “to the public” was consistent with the legislative scheme because it “contemplates the granting of monopolies in the public interest.”¹⁰² Also, the Court reasoned that because the Legislature created an exemption for direct sales of natural gas, but not electricity, it did not intend to exempt direct electricity sales.¹⁰³ The court rejected PW Ventures’ argument that the result created a distinction without a difference because, as PW Ventures noted, nothing would prevent Pratt and Whitney from purchasing the generation equipment from PW Ventures, instead of purchasing the electricity itself.¹⁰⁴ Although this case did not deal directly with a modern application of third-party PPAs, the holding would seemingly apply to third-party developers because any sale of electricity, even to one entity, would subject the developer to regulation as a utility in Florida.

98. FLA. STAT. § 366.02 (1992).

99. *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 282-84 (Fla. 1988).

100. *Id.* at 282.

101. *Id.*

102. *Id.* at 283.

103. *Id.*

104. *Id.* at 284.

The Florida legislature recently considered exempting third-party developers from regulation as utilities in the 2011 Legislative Session with Proposed House Bill 1349 (Senate Bill 1724). The proposed bill excluded from the definition of “public utility”

[t]he developer of a renewable energy generation facility . . . that is located on the premises of a host consumer or group of host consumers, including, without limitation, residential, commercial, industrial, institutional, or agricultural host customers located on the same or contiguous property, all subject to the aggregate gross power limitation; and that supplies electricity *exclusively for sale to the host consumer or consumers for consumption on the premises only* and contiguous property owned or leased by the host consumer or consumers, regardless of interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.¹⁰⁵

The bill failed to pass through the Energy and Utilities Subcommittee.¹⁰⁶ Thus, Florida continues to effectively exclude third-party PPAs as a potential financing vehicle for site-owners.

Arizona provides another example of how some states’ utility regulations capture third-party developers. Arizona’s constitution defines utilities as any corporation “engaged in furnishing gas, oil, or electricity.”¹⁰⁷ Accordingly, Arizona would require the regulation of a third-party PPA as a utility within the state. The Solar Alliance, which is “a consortium of solar manufactures, integrators, and financiers,” petitioned to the Arizona Corporation Commission in 2008, asking it to provide a declaratory order that solar PPAs not be regarded as public service corporations.¹⁰⁸ Although the Administrative Law Judge dismissed the petition,¹⁰⁹ the Commission has communicated its intent not to subject third-party PPAs to regulation as utilities in limited applications.¹¹⁰ It

105. HB 1349, 2011 Reg. Sess. (Fla. 2011), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1349_.docx&DocumentType=Bill&BillNumber=1349&Session=2011 (emphasis added).

106. *Bill Summary: HB 1349 Relating to Renewable Energy (2011 Session)*, LOBBY TOOLS, <http://apps.lobbytools.com/pub/index.cfm?type=bills&id=32054> (last visited Jan. 4, 2012).

107. Ariz. Const. art. XV, § 2.

108. KOLLINS ET AL., *supra* note 17, at 10.

109. *In re The Application of the Solar Alliance for a Declaratory Order That Providers of Certain Solar Service Agreements Would Not Be Pub. Serv. Corps.*, 2011 WL 140361 (U.S.A.G. Jan. 13, 2011), available at <http://images.edocket.azcc.gov/docketpdf/0000120382.pdf>.

110. *See In re The Application of Solarcity Corp. for A Determination That When It Provides Solar Serv. to Arizona Sch., Gov'ts, & Non-Profit Entities It Is Not Acting As A Pub. Serv. Corp. Pursuant to Art. 15, Section 2 of the Arizona Constitution*, 2010 WL

is doubtful, however, that the commission's position can withstand scrutiny because the state's constitution effectively requires the regulation of third-party developers.¹¹¹

Other states subject third-party developers to regulation because statutes define electric utilities as "those that *use* power generation equipment for purposes other than personal use."¹¹² Third-party developers fit within this definition because the developer owns the solar equipment that produces the electricity that is sold to the customer.¹¹³ As with all three statutory approaches, the mere threat of subjecting third-party developers to regulation as a utility will dissuade the developers from investing.

B. State Barriers to Net Metering

In addition to these regulatory obstacles that regulate third-party developers as utilities, states that prevent customers from net metering with developer-owned equipment similarly chill third-party PPA investment.¹¹⁴ Kentucky, for example, defines an "eligible customer-generator" in statute as "a customer of a retail electric supplier *who owns and operates* an electric generating facility that is located on the customer's premises, for the primary purpose of supplying all or part of the customer's own electricity requirements."¹¹⁵ In January 2009, the Kentucky Public

2864938, 70 (U.S.A.G. July 12, 2010), available at <http://images.edocket.azcc.gov/docketpdf/0000114068.pdf> (finding after "additional analysis of Solarcity's business operation . . . [it is] not clothed with the public interest such that Solarcity is acting as a public service corporation" by serving schools, governmental entities, or non-profits).

111. KOLLINS ET AL., *supra* note 17, at 10.

112. *Id.* at 11 (emphasis added). North Carolina, for example, defines a public utility as [A] person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter *owning or operating in this State equipment or facilities for [p]roducing, generating, transmitting, delivering or furnishing electricity, piped gas, steam . . . to or for the public for compensation.* N.C. GEN. STAT. ANN. § 62-3(23)a1. (West 2011) (emphasis added).

Similarly, Kentucky defines a utility as "any person . . . who *owns, controls, operates, or manages* any facility used or to be used for or in connection with [th]e generation, production, transmission, or distribution of electricity to or for the public . . ." KY. REV. STAT. ANN. § 278.010(3)(a) (West 2011) (emphasis added).

113. KOLLINS ET AL., *supra* note 17, at 11.

114. *Id.* at 16. In addition to regulations that prevent customers from net metering with equipment owned by third-party investors, there are additional burdens on net metering that may restrict distributed PV generation more generally. Seven states currently do not have a net metering policy in place, while others, such as Pennsylvania, New Mexico, and Arizona only require certain utilities, such as investor-owned utilities to net meter. See *Net Metering Map*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/userfiles/image/summarymaps/netmeteringmap.gif> (last visited Jan. 5, 2013) [hereinafter *Net Metering Map*]. Also, some states impose strict net metering standards and load limits, such as limits on generation capacity or the ability to roll NEG credits to the following month. See *id.* The inability to net meter or strict net metering standards make distributed generation less economically attractive for consumers, especially as applied to third-party PPAs.

115. KY. REV. STAT. ANN. § 278.465 (West 2008) (emphasis added).

Service Commission issued an order, which further defined “customer-generator” as one that is “located on the customer’s premises . . . [and is] *owned and operated by the customer.*”¹¹⁶

Similarly, the North Carolina Utilities Commission requires utilities to provide net metering, but restricts its use to customers who own and operate the PV systems.¹¹⁷ Although the Commission has modified its original order three times to account for different interests, the Commission has yet to jettison the requirement that the system be owned and operated by the power consumer.¹¹⁸

Unlike the restrictive regulations discussed above that render the third-party PPAs financially unattractive for the developer, these net metering restrictions make the third-party PPA financially unattractive for the customer because it will require him to “double purchase” electricity. Under most PPAs, the customer is required to purchase all of the solar electricity produced by the PV system from the developer. If he cannot net meter excess generation, he will waste electricity for which he has already paid and will have to purchase the energy from the utility at night or when the system is not producing enough solar energy. The customer has no incentive to use a third-party PPA under these conditions.¹¹⁹

V. REMOVING THE BARRIERS

A. Policy Justifications for Utility Regulation Inapplicable to Third-Party PPAs

As previously noted, states have traditionally subjected utilities to regulation to ensure fair prices, reliability of the electrical grid, and the efficient production of energy. The regulations that this paper has identified as discouraging third-party PPAs

116. *Interconnection and Net Metering Guidelines—Kentucky*, PSC.KY.GOV 1, <http://www.psc.ky.gov/agencies/psc/Industry/Electric/Final%20Net%20Metering-Interconnection%20Guidelines%201-8-09.pdf> (emphasis added). The Public Service Commission further provided, “At its sole discretion, the Utility may provide Net Metering to other customer-generators not meeting all the conditions listed above on a case-by-case basis.” *Id.* Thus, although third-party PPAs are barred in statute and in regulation, the Commission may waive the “owned and operated” requirement in its discretion. It is doubtful, though, whether this discretionary exemption will appease potential third-party developers and customers, as the administrative costs of securing authorization and the potential risk of losing authorization are too great.

117. *In re Investigation of Proposed Net Metering Rule*, 245 P.U.R. 4th 134, 2005 WL 2709031 (N.C.U.C. 2005), available at <http://www.dsireusa.org/documents/Incentives/NC05R.pdf>.

118. *See North Carolina: Incentives/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NC05R&re=1&ee=1 (last visited Jan. 5, 2013).

119. *See KOLLINS ET AL.*, *supra* note 17, at 16.

are meant to serve one of these goals. Although these concerns justify the regulation of utilities, they do not justify regulating third-party PPAs as utilities.¹²⁰ The next subsection of the paper will focus on why third-party PPAs do not have the characteristics of “utilities” and why the policy justifications supporting utility regulation do not apply to third-party PPAs.

In the main,¹²¹ regulation of public utilities remains necessary to protect the public’s interest in receiving affordable power. Courts interpreting statutes that trigger public utility commission regulation of utilities have noted that the practical question is whether the nature of the third-party PPA is such that its operation and its effect on the public interest impose the same considerations justifying state regulation as a utility.¹²² For example, the Iowa Supreme Court concluded that the distinguishing characteristic of a public utility is the degree to which its sales are “clothed with [the] public interest.”¹²³ The nature of the business, the degree to which its services touch the public, and the prospect of reasonably feared abuses are all relevant factors that should be considered when deciding whether the sale of electricity is sufficient to “clothe” the operation with a public interest.¹²⁴ Utilities, therefore, are “clothed” with the public interest because they provide an indispensable service that must be provided indiscriminately to all customers, and the geographic monopoly conferred to utilities for the retail sale of electricity could subject the public to the risk of unrestrained power prices.

Third-party PPA contractors, in contrast, do not provide an indispensable service, as the customer remains interconnected to and dependent upon the primary electric utility for basic electrical service. There is no risk of unequal bargaining power or exorbitant power rates because there is substantial competition among developers offering third-party PPAs.¹²⁵ Similarly, customers

120. As will be discussed *infra*, exempting third-party PPAs from regulation as utilities does not preclude states from regulating PV more generally. This paper exclusively focuses on the two types of burdensome regulations affecting third-party PPAs.

121. For the few states that provide customers with “retail choice,” regulation of utilities to ensure fair power prices is less necessary; however, utilities remain regulated by the PUC in those jurisdictions.

122. See *N. Natural Gas Co. v. Iowa Util. Bd.*, 679 N.W.2d 629, 633-34 (Iowa 2004).

123. *Iowa State Commerce Comm’n v. N. Natural Gas Co.*, 161 N.W.2d 111, 115 (Iowa 1968). Iowa Code defines “public utility” to include “any person, partnership, business association, or corporation, domestic or foreign, owning or operating any facilities for: furnishing . . . electricity to the public for compensation.” IOWA CODE ANN. § 476.1(3)(a) (West 2012). Thus, Iowa classifies all entities that furnish electricity to the public as “public” utilities.

124. See *Chas. Wolff Packing Co. v. Court of Indus. Relations of the State of Kansas*, 262 U.S. 522, 538-39 (1923) (holding that there was an insufficient “fear of monopoly” to justify Kansas’ regulation of rates and wages because there was no monopoly in food preparation, the prices were fixed by competition, and there was little fear of monopolistic concern); see also Legal Memorandum, *supra* note 93.

125. See KOLLINS ET AL., *supra* note 17, at 6.

retain the same protections they are afforded in any other market transaction—namely, the ability to contract and to negotiate terms to best meet their financial and energy needs.¹²⁶ Customers could always resort to the myriad of consumer protection laws and common law causes of action to protect against guileful developers.¹²⁷

On a more basic level, the perversity of classifying third-party developers as utilities is underscored by the fact that customer-purchased PV systems and solar leases are not captured by these regulations.¹²⁸ The only functional difference between these types of financing methods is the allocation of the customer's risk. The Florida Public Service Commission has distinguished the solar lease from the PPA on these grounds.¹²⁹ However, as a functional matter, the distinction is hollow. Shifting the burden of operations and maintenance of the PV system to the developer does not "clothe" the operation with the public interest. The service does not become more indispensable, nor is there a stronger potential for price abuse where the customer assumes the operating risk. Furthermore, the solar lease, like the third-party PPA, is a private arrangement and imputes no duty upon the developer to provide service indiscriminately. Ultimately, the allocation of operating risk is better viewed as a contractual term, rather than the *sine qua non* for regulation as a utility. Other states' public service commissions that have considered the issue have not carved such a distinction and do not require solar lease customers to carry the burden of operation and maintenance costs.¹³⁰

Second, regulation of third-party contractors as utilities is not necessary to ensure reliability and safety of the grid. Regulating utilities to ensure reliable delivery of electricity is necessary because customers are dependent upon the utility to supply it. Under a third-party PPA, however, customers are not dependent on the generation of power supplied by the developer's PV system because customers remain connected to the utility and continue

126. *See id.*

127. *See id.*

128. *See id.* at 17. Under a solar lease, the customer enters into a service contract with the developer who owns the PV system and agrees to make fixed monthly lease payments regardless of solar generation. *Id.* The customer consumes whatever electricity the system produces and net meters the excess as he would under a third-party PPA or cash-purchase. *Id.*

Although solar leases are a potential work-around for jurisdictions that require the regulation of third-party PPAs as utilities, there are drawbacks to the financing method for both customers and developers. *See id.* at 16-17. First, more operating risk is transferred to the customer, unless the contract provides differently. *Id.* at 18. Second, the customer becomes responsible for insuring the system. *Id.* Third, developers may not be able to receive certain government incentives because of the arrangement. *See id.* at 19.

129. *See id.* at 20.

130. *See id.*

to use utility power. Furthermore, the developer has a strong market incentive to ensure that the system is efficiently producing electricity at the system's capacity because its profits are tied to the amount of solar energy produced at the host-site.

States may assert that regulation of third-party PPAs as utilities is necessary to ensure that regulated utilities continue to produce reliable power. One can imagine a situation in which a market became saturated with PV systems to such an extent that the utility responded by decreasing its power supply. However, these potential risks will arise from the increased installation of distributed PV in general and may manifest regardless of the financing vehicle utilized to install it; regulation of the third-party PPAs as a utility, but not other PV financing methods, does nothing to address such reliability concerns on the system. These concerns are better addressed through rules and direction from public utility commissions.¹³¹

A related argument used to justify the regulation of third-party PPAs as utilities on the basis of reliability is the management of the number of generators that introduce electricity on transmission lines. This justification addresses a concern that delivering "electricity into the grid requires technical compatibility to match the generated electricity to the electricity in the grid, which in turn must match the electricity demanded by consumers."¹³² However, "interconnection standards, smart meters, and grid management programs can manage" these concerns.¹³³ Most states already have interconnection standards to ensure that generators comply with standards to match the distributed power to grid power.¹³⁴ Third-party developers are able to bring expertise on these matters to the table as part of the delivery of their service.¹³⁵ Indeed, the third-party developer's technical expertise on interconnection standards and how to correctly

131. California's Public Utility Commission has addressed these issues and has provided direction for how utilities should incorporate distributed generation into their future energy distribution planning. California's PUC determined that there was insufficient evidence to find that distributed generation necessitated long-term distribution upgrade deferrals,

regardless of ownership of the distributed generation asset, because distribution circuits have a limited capacity to connect additional generation units. In other words, distributed generation, as a substitute for distribution system upgrades is likely to have limited application and be time limited because of long-term growth on the distribution system.

In re Instituting Rulemaking Into Distributed Generation, 2003 WL 1235580, at *4 (Cal. P.U.C. Feb. 27, 2003) (emphasis added).

132. Lindl, *supra* note 10, at 885.

133. *Id.*

134. *Id.*

135. Stiles, *supra* note 91, at 936.

connect the system to the grid is one of the primary benefits to a site-host under third-party PPA.

Second, congested distribution nodes result from a lack of transmission capability in a high-demand area.¹³⁶ Distributed generation alleviates congestion by “reducing the amount of electricity that utilities must transmit across congested lines,” relieves constrained distribution systems, decreases upgrades to such distribution systems, and helps to meet peak demand.¹³⁷ In this respect, increasing distributed generation in general contributes to increased reliability, and restricting third-party PPAs through burdensome regulation hinders grid reliability by impeding the growth of distributed PV generation.¹³⁸

Finally, regulation of third-party PPAs as utilities will not lead to an unnecessary duplication of assets. As previously stated, third-party PPAs are best viewed as a financing vehicle for distributed PV, which is primarily used to offset a single user’s energy consumption rather than generating electricity for the grid. Thus, behind-the-meter generation of renewable energy is “similar to other energy efficiency technologies when viewed from the load-serving utility’s perspective.”¹³⁹ The Iowa Utilities Board noted that it could “discern no difference between the use of renewable technologies and classic energy efficiency measures when those activities take place on the customers’ side of the meter . . . [because] the use of renewable technologies reduces a customers’ [sic] demand and energy use from the utility.”¹⁴⁰ No state requires energy efficiency services to be regulated as utilities. As the Iowa Utilities Board noted, “third-party developers . . . provide customers with the same service, albeit by different means.”¹⁴¹ Therefore, regulating third-party developers as utilities simply because the site-host chooses to reduce its demand by installing on-site PV financed by a third-party PPA instead of installing energy efficiency measures is incongruous.

Also, most states have addressed this concern more generally through net metering regulations on PV by incorporating capacity limits on PV systems.¹⁴² Therefore, in order for site-owners to qualify for net metering, they must fall within the required gener-

136. Lindl, *supra* note 10, at 886.

137. *Id.*

138. *Id.*

139. Legal Memorandum, *supra* note 93, at 8.

140. *Id.*

141. *Id.*

142. See *Rules, Regulations & Policies for Renewable Energy*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, <http://www.dsireusa.org/summarytables/rrpre.cfm> (last visited Jan. 5, 2013).

ation limits set forth by the net metering standards.¹⁴³ In addition to these net-metering limitations, third-party PPA customers are more incentivized to restrain excess generation than are site-owners using solar leases or site-owners that purchase the PV system because third-party PPA customers must purchase all the electricity from the developer. Many states' net metering regulations compensate NEG at the retail rate provided the customer consumes a net amount of utility energy at the end of the year.¹⁴⁴ Where the customer generates a net amount of energy at the end of the year, some states do not require utilities to provide any compensation, whereas other states only require utilities to compensate NEG at the utility's avoided cost or wholesale rate. Therefore, the customer has little economic incentive to generate more electricity than can be consumed over the course of a year.

*B. Policy Justifications for Restricting
Net-Metering to "Customer-Owners" are Unnecessary*

Like restrictive regulations classifying third-party PPAs as utilities, some states indirectly restrict customer's use of the third-party PPA as a financing vehicle for PV by preventing the customer from net metering with third-party owned equipment. As previously discussed, net metering provides customer-generators the ability to sell excess power back to the grid without becoming regulated as a public utility.¹⁴⁵ Yet, many states confine this exemption to customer-owned equipment only, thereby substantially reducing the economic attractiveness of the third-party PPA model to the site-host. The primary argument advanced for retaining such regulations concerns third-party contractors installing oversized PV systems and posing as customer-generators, while actually acting as merchant generators.¹⁴⁶

These concerns are overstated as there are other solutions already in effect in most states that sufficiently address this issue, and these solutions do not indirectly restrict customers from using the third-party PPAs to finance PV. Most states that

143. In addition to net-metering limits, some state PUCs exempt smaller, non-exporting distributed generation as the most beneficial to the system and thus exempt these installations from application fees. Allen, *supra* note 15, at 519.

144. See *Net Metering: Status & Trends*, *supra* note 53.

145. Furthermore, customer-generators are able to avoid Federal Energy Regulatory Commission (FERC) jurisdiction as long as the host facility consumes more energy than it generates over the course of the applicable billing period. Stiles, *supra* note 91, at 933; see, e.g., Sun Edison LLC, 129 F.E.R.C. 61146 (2009).

146. See *Net Metering—Use of Third Party Operators*, Docket No. M02011-2249441, Final Order 8, 9 (2012), available at www.puc.pa.gov/pdocs/1170832.docx.

allow net metering cap generation.¹⁴⁷ These net metering caps generally restrict generation to a certain percentage of the site's total energy demand.¹⁴⁸ Also, many public utility commissions incentivize net consumption of utility power through reimbursements of NEG at the utility's retail rate, while deterring net-production of PV power by reimbursing the site-host at the utility's avoided cost or wholesale rate.¹⁴⁹ Finally, third-party contractors may face potential regulation by the Federal Energy Regulatory Commission (FERC) as a wholesaler if the customer makes a net sale of electricity to the utility.¹⁵⁰ FERC has recently clarified that as long as "the net metering participant . . . does not, in turn, make a net sale to a utility, the sale of electric energy by SunEdison to the end-use customer is not a sale for resale, and our jurisdiction under the FPA is not implicated."¹⁵¹

Furthermore, there is little, if any, justification for excluding net metering for third-party owned equipment when the same risk of overproduction exists with cash-purchases or with solar leases. These types of overbroad regulation are both under-inclusive and over-inclusive—the regulation "which strain[s] at a gnat, and swallow[s] a camel."¹⁵²

C. Legislative Solutions

With the exception of Florida in *PW Ventures, Inc. v. Nichols*, every other state court or public utilities commission that has considered the status of third-party PPA developers has rejected the notion that it is a utility.¹⁵³ Most of these states have codified this clarification in statute, although others have simply depended on administrative orders.¹⁵⁴ The California Legislature, for example, amended its restrictive statute to specifically exclude third-party PPAs from regulation as utilities. In California, an "[e]lectrical corporation" does not include an "independent solar energy producer," which is defined as

a corporation or person employing one or more solar energy systems for the generation of electricity for . . . [i]ts own use or the use of its tenants[;] [t]he use of, or sale to, not more

147. *See Net Metering Map*, *supra* note 114.

148. KOLLINS ET AL., *supra* note 17, at 37.

149. *Id.* at 36. Reimbursements at these rates should be considered in conjunction with the applicable fees and other interconnection charges by the utility.

150. Stiles, *supra* note 91, at 937.

151. Sun Edison, *supra* note 145, at *61621.

152. *Matthew 23:34* (King James).

153. Legal Memorandum, *supra* note 93, at 9.

154. *Id.*

than two other entities or persons per generation system solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto.¹⁵⁵

California, therefore, permits third-party developers to not only sell to a residential and commercial owner, but also multi-family housing developments and multi-tenant commercial and industrial buildings. Thus, third-party developers in California can enter into two PPAs based on the investment from one installation.

California's net metering rules also promote the use of third-party PPAs.¹⁵⁶ California does not restrict net metering to customer-owned PV systems.¹⁵⁷ California extends net metering to an "eligible customer-generator," who is a

residential customer, small commercial customer . . . or commercial, industrial, or agricultural customer . . . who uses a renewable electrical generating facility . . . that is located on the customer's owned, leased, or rented premises, and is interconnected and operates in parallel with the electric grid, and is intended primarily to offset part or all of the customer's own electrical requirements.¹⁵⁸

As a result of these statutory amendments, California has experienced a dramatic increase in third-party PPAs for residential and non-residential site owners. Among homeowners, California now has more citizens choosing third-party PPAs rather than cash purchases.¹⁵⁹ The explosion of third-party PPAs is not limited to the residential market in California. Non-residential solar PV capacity provided by third-party PPAs increased to 17.6 megawatts in the first quarter of 2011, an increase of seven mega-

155. CAL. PUB. UTIL. CODE § 2868(b) (2008).

156. In addition to allowing customers to net meter with developer-owned PV systems, California's net metering requirement applies to all utilities, except the Los Angeles Department of Water and Power. *California: Incentives/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=CA02R&re=1&ee=1 (last visited Jan. 6, 2013). The state places a liberal cap on generation of five percent of the utility's aggregate customer peak demand, and it allows customers to roll-over NEG credits to the next billing period. *Id.*, "After a twelve month cycle, the customer may opt to roll over credit indefinitely or to receive payment for credit at a rate equal to the 12-month average spot market price for the hours of 7 am to 5 pm for the year in which the surplus power was generated." *Id.*

157. *See* CAL. PUB. UTIL. CODE § 2827(a) (1995).

158. *Id.* § 2827(b)(4).

159. Eric Wesoff, *Third-Party-Owned Solar Dominates the California Market*, GREEN TECH SOLAR (Sept. 30, 2011), <http://www.greentechmedia.com/articles/read/Third-Party-Owned-Solar-Drives-California-Market/>.

watts from the previous quarter.¹⁶⁰ Third-party PPAs “now represent over 60% of the non-residential solar market in California.”¹⁶¹ As of 2010, California has created more than 175MW of additional PV capacity and is currently ranked number one in the United States in terms of grid-connected PV cumulative capacity.¹⁶² In 2009, “BP Solar announced that it had entered into a [PPA] with Wal-Mart to install up to 10MW of solar capacity.”¹⁶³ SunEdison announced in 2007 a PPA with Kohl’s Department Stores to install up to 25MW of solar capacity at a majority of its California stores.¹⁶⁴

New Jersey is another example of a state that has harmonized its laws and regulations to successfully stimulate solar PV capacity financed by third-party PPAs. New Jersey defines an “on-site generation facility” as “a generation facility . . . and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility.”¹⁶⁵ This statute not only exempts third-party developers from regulation as utilities, but it also liberates developers from having to host the solar PV system at the site of consumption. Likewise, the state’s net metering laws are favorable to third-party PPAs.¹⁶⁶ The

160. Kirsten Korosec, *Chart: How Are Homeowners Paying For Solar?*, SMARTPLANET (Oct. 19, 2011), <http://www.smartplanet.com/blog/intelligent-energy/chart-how-are-homeowners-paying-for-solar/9734>.

161. Preston Ropers, *Earth Toys Interview—Going Solar with a PPA*, ALTERNATIVEENERGYMAG.COM (Feb. 2008), http://www.altenergymag.com/emagazine.php?issue_number=08.02.01&article=tioga.

162. LARRY SHERWOOD, U.S. SOLAR MARKET TRENDS 2010, INTERSTATE RENEWABLE ENERGY COUNCIL 8, 10 (June 2011), available at <http://www.irecusa.org/wp-content/uploads/2011/06/IREC-Solar-Market-Trends-Report-June-2011-web.pdf>.

163. Frederick R. Fucci, et al., *Alternative Energy Options for Buildings: Distributed Generation—Power Generation at or Near Buildings*, in THE LAW OF GREEN BUILDINGS 125, 137 (J. Cullen Howe and Michael B. Gerrard, eds., 2010).

164. *Id.*

165. N.J. STAT. ANN. § 48:3-51 (West 1999).

166. In addition to providing customers the ability to net meter with developer-owned equipment, New Jersey imposes no net metering limits and requires all investor-owned utilities and energy suppliers to net meter. See N.J. STAT. ANN. § 48:3-87 (West 1999); see also *New Jersey: Incentives/Policies for Renewables & Efficiency*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NJ03R&re=1&ee=1 (last visited Jan. 6, 2013). New Jersey also provides customers with several compensation methods for NEG credits: they may either receive a month-to-month credit for NEG at the full retail rate and “cash out” remaining NEG credits at the end of the year at the wholesale rate; they may be compensated for all NEG on a real-time basis according to a specified marginal pricing rate “adjusted for losses, for the respective zone in the PJM electric power pool”; or, they may enter into “a bilateral agreement with an electric power supplier or basic generation service provider for the sale and purchase of the customer-generator’s excess generation.” § 48:3-87(e)(1).

New Jersey Administrative Code extends net metering to customer-generator facilities, which are defined as “equipment *used* by a customer-generator to generate . . . electricity.”¹⁶⁷

New Jersey’s proactive policies facilitating third-party solar development have helped to increase distributed PV distributed generation within the state.¹⁶⁸ New Jersey currently ranks second in the nation (behind California) in terms of total distributed PV capacity.¹⁶⁹ In June 2011, New Jersey set a new single-month record for the total amount of distributed PV solar capacity installed that month, bringing the states’ total number of solar arrays to 10,000.¹⁷⁰ There have been several high-profile third-party PPA installations, such as the Atlantic City Convention and Visitors Authority, which entered into a PPA with Pepco Energy Services to install a 2.36MW PV system, and Merk Chemical, which entered into a PPA to create 1.6MW in solar capacity.¹⁷¹ Whole Foods also installed PV at some of its New Jersey stores under a SunEdison PPA, which has saved Whole Foods about twenty-five percent on its electricity bill.¹⁷²

The same trend presents itself in other states that do not restrict third-party PPAs with potential regulation as utilities or restrictions on customers’ net-metering ability. “Approximately 95 percent of total cumulative installed solar capacity exists in 10 states nationwide,” each of which explicitly exempts third-party PPAs from state regulation as utilities and allows customers to net meter with contractor-owned equipment.¹⁷³ Third-party PPAs have played a significant role in increasing solar capacity in many of these states.¹⁷⁴

D. Proposed Solutions

In order to create more solar PV capacity, states should follow California’s and New Jersey’s lead and legislatively exempt third-party developers from regulation as state utilities. Although

167. N.J. ADMIN. CODE §14:8-4.1 (2008) (emphasis added).

168. In addition to friendly third-party PPA policies, the average cost per kilowatt hour and the state’s solar incentive structure also drive growth of solar in the state.

169. SHERWOOD, *supra* note 162, at 8, 9.

170. *New Jersey Solar Energy Installations Reached Record Numbers in June*, SOLAR-NEW-JERSEY.ORG, (July 27, 2011) <http://www.solar-new-jersey.org/2011/07/27/new-jersey-solar-energy-installations-reached-record-numbers-in-june/>.

171. Fucci et al., *supra* note 163, at 137.

172. Kerry A. Dolan, *Paying for Panels*, FORBES.COM (Aug. 7, 2007, 6:00 PM), http://www.forbes.com/2007/08/16/financing-solar-energy-tech-07egang-cz_kd_0816solar_finance.html.

173. *Q&As from the Green Power Partnership’s Webinar on Solar Power Purchase Agreements*, EPA.GOV 6, http://www.epa.gov/greenpower/documents/events/sppa_webinar_qa.pdf.

174. *Id.*

a favorable public utilities commission order exempting third-party PPAs from regulation as utilities is sufficient in most states,¹⁷⁵ the best approach to dispel third-party developer investment fear is to provide an exemption in statute to avoid the possibility of a state utility commission reversing course after the developer has invested substantial capital within the state.

Exempting third-party PPAs from regulation as utilities, however, does not suggest that the state cannot or should not maintain some oversight authority over the developer. California, for example, exempts third-party PPAs from burdensome regulation as a utility, but the state requires contractors to perform certain duties, such as disclose particular information to customers.¹⁷⁶ In California, third-party PPA developers must provide: an estimate of the kilowatt hours to be delivered; an estimate of how “the pricing will be calculated over the life of the contract and a[n] . . . estimate of the price per kilowatthour”; an “explanation of operation and maintenance responsibilities of the contract parties”; an explanation of the disposition of the generation system at the end of the contract; and an explanation of “provisions regulating the disposition or transfer of the contract in the event of a transfer of ownership of the residence.”¹⁷⁷

Furthermore, California requires third-party developers to disclose the existence of the third-party PPA with the county recorder.¹⁷⁸ California also requires distributed generators to register with the Public Utilities Commission, which allows the System Operator to know which properties are generating electricity in the event of a problem.¹⁷⁹

States concerned about consumer protection should adopt California’s approach by exempting third-party PPAs from regulation as utilities, but maintain oversight authority over the developers to protect consumers. Similarly, states can address reliability and efficient use of resource concerns through general public utilities commission guidance and regulation of distributed PV, which will allow states to strike the appropriate balance of regulation to receive the benefits of distributed PV without the costs of unrestrained use.¹⁸⁰

175. In both Florida, which has a state supreme court decision construing the definition of “utilities” to encompass third-party PPAs, and Arizona, where the constitution requires the inclusion of third-party PPAs as utilities, the only solution is a legislative exemption and a constitutional amendment, respectively.

176. See CAL. PUB. UTIL. CODE § 2869 (West 2008).

177. *Id.* (a)(1).

178. *Id.* at (c)(1).

179. *Id.* at (e).

180. See *In re Instituting Rulemaking Into Distributed Generation*, 2003 WL 1235580, at *1 (Cal. P.U.C. Feb. 27, 2003) (authorizing utilities “to establish memorandum accounts

Similarly, states should allow site-owners to net meter, regardless of whether the customer owns the system. State legislatures should encourage regulation that supports net metering for third-party PPA systems by amending their RPSs or public utilities code to either require the promulgation of these regulations or at least evidence support for it.¹⁸¹

States concerned that allowing customers to net meter with developer-owned equipment will result in over-generation should implement generation limits. In July of 2011, the Pennsylvania Public Utilities Commission issued a tentative order seeking comments on whether to amend its net metering rules to allow the use of third-party owned models.¹⁸² The tentative order proposes to allow customers to net meter with third-party owned systems provided that the system produces no more than 110% of on-site electricity needs.¹⁸³ States concerned that third-party contractors will profit from over production should follow other states, like Pennsylvania, that allow customers with third-party PPAs to net meter, but address this issue through narrow generation restrictions.

VI. CONCLUSION

Although the price of PV equipment has steadily decreased, and numerous financial incentives remain available to offset the cost of PV, securing the necessary capital to install PV remains the largest obstacle inhibiting PV installation. Over the past few years, the third-party PPA has become the preferred financing tool among residential, non-residential, and commercial site-hosts, and has become a successful business and investment enterprise. The third-party PPA provides the site-owner with a turnkey solar installation by providing the up-front capital, continued maintenance and service on the equipment, and ensured compliance with the state's interconnection standards. Ultimately, the third-party PPA promises the customer solar power without the associated costs, burdens, and risks typically accompanying the project.

The largest barrier for the third-party PPAs lays not with the lack of demand, but with states' regulatory environment. Most states express a desire to increase distributed PV capacity as evidenced by RPSs, monetary incentives, and renewable genera-

to track distributed generation implementation costs that cannot be attributed to specific distributed generation projects and are not part of the utilities' existing budgets").

181. See KOLLINS ET AL., *supra* note 17, at 16.

182. Net Metering—Use of Third Party Operators, *supra* note 146, at 1, 2.

183. *Id.*

tion requirements; however, many states have not eliminated burdensome regulations that prevent third-party developer investment. These regulations either regulate the third-party developer as a utility based upon the state's definition of "utility," or fail to extend net metering ability to utility customers using third-party owned equipment. While no state explicitly precludes third-party PPAs, many states effectively preclude it by failing to remove either of these regulations that impose burdens and costs on the third-party developer, making the project economically untenable.

Statutes regulating third-party PPAs as utilities are either a fortuitous consequence resulting from the state's broadly worded definition of "utility," or an intentional imposition to achieve a specific result. While regulation of utilities remains a necessary means to ensure consumer protection, grid reliability, and effective utilization of resources, regulation of third-party PPAs as utilities is wholly unnecessary to achieve these objectives. When viewed for what the third-party PPA really is—a financing vehicle—the absurdity of subjecting the developer to regulation as a utility is particularly clear. The fact that these regulations would not subject other financing approaches, such as the solar lease or site-host-financed PV system to regulation as a utility, further demonstrates the futility of such regulations.

Exempting third-party developers from these types of burdensome regulation does not suggest that states should not seek to regulate third-party PPAs in any capacity. In fact, PPA regulations may become necessary, particularly as states begin to understand better the particular issues presented by the third-party PPA. On a more general level, as distributed PV capacity continues to increase, states may find it necessary to craft regulations to address the corresponding effects of such extra capacity on the system. These regulations, however, should address PV, regardless of the method of financing.

In contrast to regulating third-party developers as utilities, net metering regulations restricting utility customers from net metering with third-party owned equipment is designed to protect against a narrow harm: third-party developers profiting as wholesalers, but masquerading as customer-generators. These concerns, though, are better addressed, and indeed are already being addressed, with net metering generation caps, NEG compensation schedules, and potential federal regulation by FERC.

Removing these types of regulatory obstacles is the crucial first step in welcoming PV investment. As illustrated by both California and New Jersey's lead, third-party PPAs comprise a

key component of successfully increasing distributed PV capacity. Although there are other PV financing methods, it is clear that the third-party PPA is a viable financing tool. The sooner states begin to reform their regulatory approach by removing the types of burdensome regulation presented in this paper, the sooner America will begin to realize Edison's vision and unleash America's solar potential.

RECENT DEVELOPMENTS

FORREST S. PITTMAN*

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I. NOTABLE FEDERAL CASES

A. *Sackett v. Environmental Protection Agency*

EPA-issued administrative compliance orders constitute final agency action and qualify for review under federal APA; the CWA does not preclude APA review of these orders.

* J.D. anticipated May 2013, Florida State University College of Law.

This case arose from the Sacketts' ("Petitioners") challenge to an administrative compliance order ("ACO") issued by the Environmental Protection Agency ("EPA") under § 309(a) of the Clean Water Act ("CWA" or "Act").¹ Upon determining that the Petitioners had violated the CWA by dumping fill materials into navigable waters of the United States during a construction project on their land—a violation of § 301 of the CWA²—the EPA issued the ACO at issue in lieu of commencing a civil enforcement action.³ The Petitioners sought declarative and injunctive relief in federal court, arguing that the ACO should be declared arbitrary and capricious under the Administrative Procedure Act ("APA"), and also that the order constituted a violation of their due process rights under the Fifth Amendment.⁴ The District Court dismissed the claims, and the Ninth Circuit affirmed, stating that the CWA precluded pre-enforcement judicial review of ACOs.⁵ The Supreme Court overturned this ruling, holding that the Petitioners were entitled to bring a civil action under the APA to challenge the EPA's issuance of an ACO.⁶

When the EPA discovers a violation of the CWA, the agency can either initiate a civil enforcement action immediately, or may issue an ACO—requiring that the offending party come into compliance with the Act.⁷ While the ACO itself contains no enforcement mechanism, should the EPA prevail in a civil enforcement action against a party who had previously been issued a compliance order, fines for non-compliance with the ACO may be added to those available under the civil enforcement action alone.⁸ The Petitioners' case arose from a dispute as to whether or not their property was subject to CWA regulation as a part of the "navigable waters" of the United States.⁹ The Court noted the substantial history of litigation on this matter and noted that the current status of wetland-delineation law was unclear;¹⁰

1. *Sackett v. Env'tl. Prot. Agency*, 132 S.Ct. 1367, 1368 (2012).

2. 33 U.S.C. § 1311 (2006).

3. 33 U.S.C. § 1319(a) (2006). Section 309 of the CWA allows several different enforcement options, from ACOs to civil penalties, to criminal enforcement actions. *Id.* § 1319(a)-(c).

4. *Sackett*, 132 S.Ct. at 1368.

5. *Id.*

6. *Id.*

7. *Id.* at 1369-70 (citing § 1319 of the Act).

8. *Id.* at 1370. At the time the ACO was issued in *Sackett*, § 309 allowed the EPA to impose up to \$37,500 per day per violation, and an additional \$37,500 per day of non-compliance with the ACO. 33 U.S.C. § 1319 (2006).

9. *Sackett*, 132 S.Ct. at 1370.

10. *Id.* The Court cited various cases, tracing the arc of case law regarding wetlands regulation as navigable waters under the CWA. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Rapanos v. United States*, 547 U.S. 715 (2006).

the Chief Justice had written an opinion in the most recent CWA case to come before the Court that “interested parties would lack guidance ‘on precisely how to read Congress’ limits on the reach of the Clean Water Act.’”¹¹

The Petitioners’ land lies close to a clearly navigable waterway,¹² but is separated from the waters by several lots.¹³ After filling in a portion of their land prior to constructing a house, the Petitioners received an ACO from the EPA that included the following findings: that the Petitioners’ property contained wetlands within the definition found in 33 C.F.R. § 328.4(8)(b), the wetlands were adjacent to a navigable waterway and thus subject to regulation under the CWA, and that the Petitioner’s discharge of pollutants into the waters constituted a violation of § 301 of the CWA.¹⁴ The ACO directed the Petitioners to undertake restoration activities on the wetlands.¹⁵ The Petitioners, who did not believe that their property was subject to the CWA, requested a hearing with the EPA, which the agency denied.¹⁶ The Petitioners claimed that EPA’s issuance of the ACO was arbitrary and capricious under the APA, and that it deprived them of property without due process of law.¹⁷ The District Court dismissed the claims, and on Appeal the Ninth Circuit affirmed the ruling, holding that the CWA precluded pre-enforcement judicial review of compliance orders, and that such preclusion did not violate the Petitioners’ rights to due process.¹⁸ The Supreme Court granted certiorari in 2011.¹⁹

The Court first examined the question of whether or not ACOs constitute final agency action and would thus be subject to judicial review under the APA.²⁰ The Court noted that under the APA even “failure to act” constitutes agency action, and quickly held that the ACO was an agency action.²¹ Regarding the finality of the action, the Court applied *Bennett v. Spear*, and determined that the EPA “determined” “rights or obligations” by issuing the ACO.²² The ACO required that the Petitioners restore their land “according to an agency-approved Restoration

11. *Sackett*, 132 S.Ct. at 1370.

12. *Id.* The land is near Priest Lake in Bonner County, Idaho.

13. *Id.*

14. *Id.* at 1370-71.

15. *Id.* at 1371.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Sackett v. Envtl. Prot. Agency*, 131 S.Ct. 3092, 3092 (2011).

20. *Sackett*, 132 S.Ct. at 1371.

21. *Id.*

22. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Work Plan, and must give the EPA access to their property” and records relating to the site.²³ Additionally, the Court found that “‘legal consequences. . . flow’ ”²⁴ as a result of the increased penalties available for the Petitioners’ violation of the ACO.²⁵ Applying *Bennett* once more, the Court found that the ACO marked the consummation of the EPA’s decisionmaking process, as the agency had previously denied the Petitioners a hearing.²⁶ Importantly, the Court stated that “the mere possibility that an agency might reconsider in light of ‘informal discussion’ ” did not make “an otherwise informal agency action nonfinal.”²⁷ The APA also requires that a party seeking review have “no other adequate remedy in a court.”²⁸ The only review of ACOs prior to the instant decision was through the EPA’s civil enforcement action, which the Petitioners could not initiate themselves.²⁹

Regarding the question of whether or not the CWA precluded judicial review of ACOs, the Court quoted *Block v. Community Nutrition Institute*, stating that the APA “creates a ‘presumption favoring judicial review of administrative action,’ ”³⁰ and proceeded to dismiss the EPA’s several arguments for preclusion.³¹ The first argument, that Congress intended to give the EPA a choice between administrative and judicial proceedings and that allowing judicial review of the former would undermine the CWA was dismissed by the Court.³² EPA’s argument that ACOs as non-self-executing “step[s] in the deliberative process” are not “coercive sanction[s]” was similarly quickly dismissed by the Court.³³ As the ACO effectively ended EPA’s deliberation over whether the Petitioners had violated the Act, the Agency’s later decision to initiate litigation was not relevant to the Court’s analysis.³⁴ The Court was not persuaded by the EPA’s argument that the CWA implicitly precluded judicial review of

23. *Id.* at 1371-72.

24. *Id.* (citing *Bennett*, 520 U.S. at 178).

25. *Id.* Additionally, the Court noted that the issuance of an ACO “severely limits the Sacketts’ ability to obtain a permit” for their filling activities. *Id.* at 1372.

26. *Id.*

27. *Id.* The EPA argued that its invitation to the Petitioners to participate in informal discussion of the terms and allegations of the ACO served to make the action non-final. *Id.*

28. 5 U.S.C. § 704 (2006).

29. *Sackett*, 132 S.Ct. at 1372.

30. *Id.* at 1372-73 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

31. *Id.* at 1373.

32. *Id.* The Court noted that ACOs could be used to resolve issues through voluntary compliance, and that the CWA did not “guarantee the EPA that issuing a compliance order will always be the most effective choice.” *Id.*

33. *Id.*

34. *Id.* (noting that “the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject”).

ACOs by expressly providing for judicial review once administrative penalties had been issued under § 309(g)(8) of the CWA.³⁵ The cases cited by the EPA generally dealt with express statutory preclusion of judicial review for other agency actions.³⁶ Lastly, the Court repudiated the EPA's argument that the CWA was passed to increase the efficiency of regulation of the nation's waters.³⁷ The mere fact that the EPA would be less likely to use ACOs if the orders were subject to judicial review is repudiated by the APA's presumption of judicial review for all agency actions.³⁸ The Court held that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."³⁹ With the conclusion that ACOs constitute final agency action, and that the CWA did not preclude judicial review of the orders, the Court reversed the Ninth Circuit and remanded the case for further proceedings.⁴⁰

Justice Ginsburg penned a concurrence, joining the majority only in allowing the Petitioners to immediately litigate the question of whether their land was subject to EPA jurisdiction, and withholding her opinion regarding the Petitioners' right to challenge the terms and conditions of the ACO before enforcement.⁴¹

B. PPL Montana, LLC v. Montana

Montana misapplied the equal-footing doctrine in an attempt to gain title to segments of riverbed within the state. Navigability for purposes of state acquisition of title is determined segment-by-segment and is assessed at the time of statehood.

This case arose as a dispute over whether segments of three rivers flowing through Montana were navigable, and thus whether the state of Montana acquired title to the underlying riverbeds at the time of admission to the Union.⁴² The segments in question posed serious and often insurmountable

35. *Id.* at 1373-74.

36. *Id.* See also, e.g., *United States v. Erika, Inc.*, 456 U.S. 201 (1982) (Medicare statute "precluded review of awards under Part B," but "expressly provided for judicial review of awards under Part A").

37. *Sackett*, 132 S.Ct. at 1374.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1374-75 (Ginsburg, J. concurring). Justice Alito also wrote a concurring opinion. *Id.* at 1375-76.

42. *PPL Mont., LLC v. Montana*, 132 S.Ct. 1215, 1222 (2012).

challenges to navigation; the Upper Missouri River contains one seventeen-mile stretch of falls and rapids where the Lewis and Clark expedition observed numerous buffalo swept over the cataracts to their deaths.⁴³ The Clark Fork and Madison Rivers also consist of waterfalls, canyons, and rapids in significant sections.⁴⁴ PPL Montana, LLC (“PPL”) owns and operates a series of hydroelectric facilities that are situated in these deep canyons.⁴⁵ All of the facilities have existed for multiple decades—some for more than a century—and have operated without any objection from Montana regarding title to the underlying riverbeds.⁴⁶ PPL and its predecessors paid rent to the United States for use of the riverbeds and also for land flooded by building of the dams.⁴⁷ Following a suit by parents of schoolchildren—claiming that the riverbeds were state-owned and thus part of school trust lands—the state of Montana joined the suit, seeking rents for PPL’s use of the lands in question.⁴⁸

Several power companies, including PPL, sued Montana in state court seeking a declaration that the state was barred from seeking rents for use of the riverbeds.⁴⁹ The State counter-claimed that the equal-footing doctrine granted title to the riverbeds to Montana.⁵⁰ With regards to using present navigability to determine ownership of title, the trial court granted summary judgment to Montana, and ordered PPL to pay rents for use of the riverbeds.⁵¹ The Montana Supreme Court affirmed the decision, reasoning that “ ‘navigability for title purposes is very liberally construed,’ ” and chose to apply a whole-river approach, rather than the segment-by-segment approach previously applied.⁵² While recognizing that certain segments of the rivers at issue were non-navigable, the Montana Supreme Court declared such portions to be “ ‘merely short interruptions,’ ” and relying upon evidence of present-day usage of the Madison River found that as a matter of law the Madison was navigable.⁵³ The Supreme Court granted certiorari.⁵⁴

43. *Id.* at 1223-24.

44. *Id.* at 1224.

45. *Id.* at 1225.

46. *Id.*

47. *Id.*

48. *Id.* The suit initiated by the parents was dismissed for lack of diversity jurisdiction. *See Dolan v. PPL Montana, LLC*, No. 9:030-cv-0167 (D. Mont. Sept. 27, 2005).

49. *PPL Mont.*, 132 S.Ct. at 1225-26.

50. *Id.* at 1225.

51. *Id.* at 1225-1226.

52. *Id.* at 1226 (citing *PPL Mont., LLC v. Mont.*, 355 Mont. 402, 438 (2010)).

53. *Id.*

54. *PPL Mont., LLC v. Mont.*, 131 S.Ct. 3019 (2011).

The Court began by explaining the legal principles controlling the case.⁵⁵ Originating in English common law, the principle that the state holds title to riverbeds and tidal lands was redefined in the United States to reflect the large number of rivers across the continent.⁵⁶ In 1842, *Martin v. Lessee of Waddell* determined that the original thirteen states held sovereignty over the navigable waters within the state, as well as the soil underneath said waters⁵⁷—a principle later extended to the other states.⁵⁸ *Oregon v. Corvallis Sand & Gravel Co.* extended this “equal-footing doctrine,” holding that a state’s title to navigable waters and associated riverbeds was conferred by the U.S. Constitution.⁵⁹ The Court summarized the doctrine as conferring title to those waters navigable at the time of statehood to the states, subject only to the “‘paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.’”⁶⁰

In determining the navigability of particular waters, the Court has long used a “navigability in fact” approach for federal regulation in many different issues.⁶¹ The test is also utilized in determining title to water beds under the equal footing doctrine.⁶² In contrast to other areas of law in which navigability limits federal jurisdiction, for purposes of title determination, only those waters navigable at the time of statehood are subject to the equal-footing doctrine’s grants.⁶³ The Court found that the Montana Supreme Court erred on three points of reasoning, as follows.⁶⁴

The first error identified by the Court was Montana’s failure to treat dissimilar segments of the rivers differently when determining navigability.⁶⁵ Citing again to *United States v. Utah*, the Court emphasized the importance of determining points at which navigability end and return.⁶⁶ While Montana chose to

55. *PPL Mont.*, 132 S.Ct. at 1226-27.

56. *Id.*

57. *Id.* at 1227 (citing *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (U.S. 1842)).

58. *Id.* (citing a line of cases, *see, e.g., Lessee of Pollard v. Hagan*, 3 How. 212, 228-29 (U.S. 1845)).

59. *Id.* (citing *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

60. *Id.* at 1228 (citing *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

61. *Id.* (citing *The Daniel Ball*, 10 Wall. 557 (U.S. 1871)(regulation of navigation); *Rapanos v. United States*, 547 U.S. 715 (2006) (Clean Water Act); among others).

62. *PPL Mont.*, 132 S.Ct. at 1228 (citing *United States v. Utah*, 283 U.S. 64, 75 (1931)).

63. *Id.* at 1228-29.

64. *Id.* at 1229.

65. *Id.*

66. *Id.* (citing *Utah*, 283 U.S. at 77; *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77 (1922)).

disregard the segment-by-segment approach, the Court specifically upheld the approach, looking both to case law as well as to “[p]ractical considerations” originating from times before the title to riverbeds lay with the sovereign.⁶⁷ Montana’s application of *Utah* emphasized that a segment-by-segment approach was inapplicable where navigability was only interrupted by short segments of non-navigability; the Court held this reading of precedent was mistaken.⁶⁸ The Court in *Utah* made no allowance for short interruptions, and the Court in the instant case noted that in any event the state courts had been able to divide the river and riverbed when determining the amount of rents PPL owed to Montana.⁶⁹ Additionally, the Court held that the Montana Supreme Court also misapplied *The Montello*—a case in which a river that required portage around a non-navigable section was still subject to boat regulations.⁷⁰ While the segment-by-segment approach to determining navigability is used only for purposes of determining title under the equal-footing doctrine, the approach is valid, thus preventing Montana from taking title to the segments of river in question.⁷¹

The second error of the Montana Supreme Court resulted from that court’s use of evidence regarding present-day recreational use of the Madison River.⁷² The evidence was irrelevant for determining navigability at the time of statehood, but the Court turned to *Utah*, which only examined a river’s usefulness for “‘trade and travel.’”⁷³ While present-day use, both recreational and trade, may be used as an indicator of historical use,⁷⁴ the Court held that Montana had not made the necessary findings to support historical use patterns with present-day evidence.⁷⁵ The Court also noted that the Montana Supreme Court had entirely ignored evidence suggesting that the conditions of the river and riverbed had changed in such a way as to make navigation easier at present than at time of admission to the Union.⁷⁶

67. *Id.* at 1229-30.

68. *Id.* at 1230 (noting additionally that the stretches of river in question were substantially more than “short interruptions”).

69. *Id.* at 1230-31. Many of the segments in question are physically discrete, with definite boundaries defined by waterfalls or other natural features. *Id.* at 1231.

70. *Id.* at 1231-32 (citing *The Montello*, 20 Wall. 430 (U.S. 1874)).

71. *Id.* at 1231-32.

72. *Id.* at 1233.

73. *Id.* (citing *Utah*, 283 U.S. at 75-76).

74. *Id.* at 1233.

75. *Id.* at 1233-34.

76. *Id.* at 1234. The changes resulted primarily from the dams constructed on the river channel.

Montana's final argument—that denying the state title to the riverbeds would undermine the public trust doctrine—was dismissed by the Court as a similar misunderstanding of the equal-footing doctrine.⁷⁷ While the public trust doctrine does grant the states power to determine the scope of public trust over navigable waters within their borders, “federal law determines riverbed title under the equal-footing doctrine.”⁷⁸ The Court also briefly scrutinized the state of Montana's long failure to assert title to the riverbeds, and PPL's reliance upon the state's position to deny claims of laches and estoppel.⁷⁹ In conclusion, the Court reversed the Montana Supreme Court, holding that states may not adopt retroactive rules for determining navigability where doing so would enlarge what passed to the state at time of statehood.⁸⁰

*C. EME Homer City Generation, L.P. v.
U.S. Environmental Protection Agency*

EPA's CAA Transport Rule exceeded statutory authority. The agency may not simply issue limits on total emissions prior to giving states an opportunity to implement their own SIPs.

This split decision in the United States Court of Appeals in the District of Columbia Circuit ruled that EPA's August 2011 enactment of the Cross-State Air Pollution Rule (the “Transport Rule”) violated federal law.⁸¹ Under the Clean Air Act, the Federal Government is charged with setting the National Ambient Air Quality Standards (“NAAQS”), but leaves primary responsibility to the States for choosing how to attain those standards, unless the state refuses to participate, in which case the federal government assumes direct regulation of pollution sources.⁸² The EPA sets “nonattainment areas” in each state that designate regions where pollutant levels exceed NAAQS, which the states must implement via State Implementation Plans (“SIPs”).⁸³ One provision required in SIPs is found in § 110(a)(2)(D)(i)(I), known as the “good neighbor” provision, and requires that states

77. *Id.* at 1234.

78. *Id.* at 1235.

79. *Id.*

80. *Id.*

81. *EME Homer City Generation, L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7, 11-12 (D.C. Cir. 2012).

82. *Id.* at 12.

83. *Id.* at 12-13. States have considerable choice in implementing SIPs, and may impose different emissions requirements on different types of emitters—e.g. natural gas vs. coal-burning power plants. *Id.*

generally prevent emissions within their borders from contributing to nonattainment or increased maintenance of SIPs in other states.⁸⁴ If the state submits an inadequate SIP to the EPA, the federal agency will promulgate a Federal Implementation Plan (“FIP”) to implement the NAAQS for the state.⁸⁵ In *Michigan v. EPA*, the D.C. Circuit Court determined that the EPA could take cost considerations into consideration and lower the obligations for SIPs in “upwind” states.⁸⁶ In *North Carolina v. EPA*, the same court limited *Michigan*, holding that “EPA may not use cost to increase an upwind State’s obligations under the good neighbor provision”—essentially, each state is at most responsible for cleaning its own share of air pollution, not those of other states further upwind.⁸⁷ The Transport Rule arose out of EPA’s attempt to deal with upwind contributions to pollution in compliance with the *North Carolina* ruling.⁸⁸

The Transport Rule has two basic components: (1) a determination of each state’s emissions reduction obligations under the good neighbor provision and (2) FIPs to implement those goals at the state level.⁸⁹ The first stage of the EPA’s determination process linked “significantly contributing” upwind states to downwind nonattainment areas for various types of pollutants.⁹⁰ The second stage of determination did not make use of NAAQS to determine the changes that upwind states would be required to implement.⁹¹ Rather, the EPA created various models that predicted how far emissions would fall if all sources of pollution within an upwind state were required to implement control technologies of varying prices—expressing the results in terms of “cost per ton of pollutant reduced.”⁹² Using these models, the EPA predicted improvement of air quality in downwind states with different cost-per-ton regulations in upwind states and selected the levels of pollution predicted to accompany those regulations as thresholds—pollution budgets—for upwind states.⁹³

In the second component of the Transport Rule, the EPA did not allow states to implement the reductions required by the

84. *Id.* at 13 (citing 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

85. *Id.* at 13-14.

86. *Id.* at 14 (citing *Michigan v. Env’tl. Prot. Agency*, 213 F.3d 663 (D.C. Cir. 2000)).

87. *Id.* at 14-15 (citing *North Carolina v. Env’tl. Prot. Agency*, 531 F.3d 896 (D.C. Cir. 2008)).

88. *Id.* at 15.

89. *Id.*

90. *Id.* at 15-16.

91. *Id.* at 16-17.

92. *Id.* at 17.

93. *Id.* at 18.

aforementioned thresholds;⁹⁴ the agency directly promulgated FIPs requiring individual sources in upwind states to make the necessary reductions and created a trading plan for the affected sources.⁹⁵ The Court of Appeals in the instant case summarized the situation, stating that “[u]nder the FIPs, it is EPA, and not the States, that decides how to distribute the [emissions] allowances” among sources in each state.⁹⁶ States were left the option of promulgating SIPs that could modify or replace the FIPs, but only after a “case-by-case” review by EPA.⁹⁷ A number of power companies, coal companies, unions, States, and other parties petitioned for review of the Transport Rule.⁹⁸

After reviewing the *Michigan* and *North Carolina* rulings in more detail, the court reiterated its point that the EPA could not require any upwind state to reduce its emissions by more than the amount necessary to comply with downwind NAAQS.⁹⁹ Rebuking the EPA’s overzealous application of the Transport Rule, the court held that “the good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS.”¹⁰⁰ Therefore, if reductions in upwind pollution would result in more downwind benefit than necessary, the EPA must dial back regulation requirements in upwind states.¹⁰¹

The court identified three legal flaws in the EPA’s Transport Rule approach to implementing the good neighbor provision.¹⁰² The first problem named by the court was that the Transport Rule regulations for upwind states were not based on the “amounts” from upwind States “that contribute significantly to nonattainment” in downwind states.¹⁰³ While the EPA’s decision to include upwind states under the Transport Rule if they contributed significantly to downwind states’ air pollution was acceptable, the regional models EPA used to determine appropriate restrictions caused problems.¹⁰⁴ The restrictions created by regional models could result in upwind states being required

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 18-19.

98. *Id.* at 19.

99. *Id.* at 19-22.

100. *Id.* at 22.

101. *Id.* The court recognized that some “over-control” would be unavoidable as a result of reducing upwind states’ emissions, and that the EPA thus had some discretion over how to regulate emissions through FIPs. *Id.*

102. *Id.* at 23. The court realized that all three legal issues were intertwined. *Id.*

103. *Id.* at 23.

104. *Id.* at 25.

to reduce emissions by more than their amount of total contribution.¹⁰⁵ Secondly, the court found that the EPA had violated *North Carolina* by forcing some upwind states “to share the burden of reducing other upwind states’ emissions,” as well as reducing the downwind states’ own regulatory burden.¹⁰⁶ The third flaw in the EPA’s reasoning resulted from the agency’s failure to ensure that the combined effect of upwind regulation did not result in over-control.¹⁰⁷ The court stated that the EPA had also violated its authority by promulgating a rule that would fundamentally change the regulatory scheme of the CAA through “ ‘ancillary provisions’ ” like the good neighbor provision.¹⁰⁸ The EPA was not allowed to “transform the narrow good neighbor provision into a ‘broad and unusual authority’ ” that would overshadow other aspects of CAA regulation.¹⁰⁹

The court also identified another problem with the Transport Rule: the EPA’s failure to allow states an opportunity to implement the rule.¹¹⁰ While the EPA may set standards, the CAA reserves a “first-implementer” role to the states.¹¹¹ Citing *Train v. NRDC*, the court held that the EPA was prohibited from using the new rule to force states to adopt specific pollution control measures.¹¹² So long as a state’s emissions would result in compliance with NAAQS—both within the states’ borders and downwind under the good neighbor provision—the EPA cannot question state methods.¹¹³ While the aspects of the Transport Rule setting state pollution “budgets” was valid, the EPA’s failure to allow states to submit SIPs via “required submissions,” which the EPA could potentially reject, was not.¹¹⁴ Essentially, the EPA was determining that the state SIPs were inadequate prior to even issuing numerical pollution targets for the states.¹¹⁵ Another section of the CAA did authorize the EPA to directly regulate interstate pollution from single sources, a fact that

105. *Id.* at 25-26.

106. *Id.* at 26-27.

107. *Id.* at 27.

108. *Id.* at 27-28 (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

109. *Id.* at 28.

110. *Id.*

111. *Id.*

112. *Id.* at 29 (citing *Train v. NRDC*, 421 U.S. 60, 63-67 (1975)).

113. *Id.* at 29-30.

114. *Id.* at 30-31.

115. *Id.* at 31. The court spoke at length regarding EPA’s decision to effectively define pollution targets after state SIPs had failed to meet said targets. Citing a number of cases, the court made clear that any attempt to define goals under the good neighbor provision and simultaneously issue FIPs for implementation of the goals would upend the process of federalism. *Id.* at 33.

caused the court to conclude that direct federal regulation was not contemplated for the good neighbor provision.¹¹⁶

The court pointed out various prior regulations in which the EPA had explicitly provided assurance to states that their discretion in “ ‘determin[ing] the mix of controls’ ” would not be violated.¹¹⁷ But by failing to issue the Transport Rule and upwind states’ pollution obligations until after the period that states were given to comply with NAAQS set in 2006, the EPA overstepped its bounds.¹¹⁸ The court found several of the EPA’s arguments unpersuasive.¹¹⁹ Neither the argument that states should have taken a “stab in the dark at defining” significant contribution, nor the EPA’s contention that only FIPs could effectively implement regulation were accepted by the court.¹²⁰ The court concluded that the EPA’s faulty construction of the Transport Rule was an error so fundamental that no portion of the rule could be preserved and remanded the rulemaking action to EPA.¹²¹ The EPA was directed to continue administering the Clean Air Interstate Rule—the 2005 rule at issue in *North Carolina* which defined the good neighbor obligations of many upwind states—until a valid replacement for the Transport Rule could be promulgated.¹²² Justice Rogers penned a lengthy dissent, arguing that in deciding the case the court had failed to consider limits on jurisdictional review enacted by Congress, among other points.¹²³

*D. Coalition for Responsible Regulation,
Inc. v. Environmental Protection Agency*

EPA’s Endangerment Finding that climate change threatens public health and the Tailpipe Rule were not arbitrary and capricious. Additionally, states and regulated parties lack standing to challenge Timing and Tailoring Rules for phasing in greenhouse gas regulation programs.

In this per curiam decision, the United States Court of Appeals for the District of Columbia upheld the EPA’s Endangerment Finding (“EF”) and Tailpipe Rule (“TR”), and denied all challenges

116. *Id.* at 34 (citing 42 U.S.C. § 7426(b)-(c)).

117. *Id.* at 34-35 (citing, among others, the EPA’s 1998 NOx Rule addressed in *Michigan v. Env’tl. Prot. Agency*, 213 F.3d 663 (D.C. Cir. 2000)).

118. *Id.* at 35.

119. *Id.*

120. *Id.* at 35-36.

121. *Id.* at 37.

122. *Id.* at 37-38.

123. *Id.* at 38-61.

to the Timing and Tailoring Rules (“TTRs”).¹²⁴ The court briefly discussed the problems posed by the emission of greenhouse gases (“GHGs”), as well as the 2007 Supreme Court case *Massachusetts v. EPA*, which ruled that GHGs were included within the Clean Air Act’s (“CAA”) definition of air pollutants.¹²⁵ After that case, the EPA initiated a series of GHG related rules and regulations, the first of which was the EF that defined an “‘aggregate group of six long-lived and directly-emitted’ ” GHGs as a single air pollutant under the CAA, and tied their impact on global warming to a “‘carbon dioxide equivalent basis.’ ”¹²⁶ After determining that emission of these GHGs from motor vehicles would pose a risk to public health and welfare, the EPA promulgated the TR, which set emission standards for cars and light trucks.¹²⁷ Due to EPA’s prior interpretations of the CAA, the TR also required sources with the potential to emit over 100/250 tons per year (“tpy”) of GHGs (“Major Stationary Emitters” or “MSEs”) to seek a permit.¹²⁸ The EPA then enacted the Timing portion of the TTRs, concluding that MSEs would be subject to the new regulations when the TR came into effect.¹²⁹ The Tailoring portion of the TTRs was enacted to relieve “‘overwhelming permitting burdens,’ ” as the TR would have subjected millions of small industrial, commercial, and even residential sources of GHGs to the CAA’s permitting requirements.¹³⁰ The TTRs accomplished this reduction in permitting burden by raising the CAA’s normal 100/250 tpy threshold to 75,000/100,000 tpy of CO₂ equivalent (“CO₂e”).¹³¹

A number of states and regulated parties (collectively the “Petitioners”) challenged the new rules, alleging that the EPA had misconstrued the CAA and acted arbitrarily and capriciously

124. *Coal. for Responsible Regulation, Inc. v. Env’tl. Prot. Agency*, 684 F.3d 102, 113-14 (D.C. Cir. 2012).

125. *Id.* at 114 (citing *Mass. v. Env’tl. Prot. Agency*, 549 U.S. 497 (2012)).

126. *Id.* (citing *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009)). The six GHGs aggregated were carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*

127. *Id.* at 114-15 (citing *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule* 75 Fed. Reg. 25,324 (May 7, 2010)). The TR was enacted along with fuel-efficiency standards promulgated by the National Highway Traffic Safety Administration. *Id.* (citing 75 Fed. Reg. at 25,326).

128. *Id.* at 115. The two different limits result from two different portions of the CAA: the first threshold requires a state-issued building permit, the second requires a permit under Title V of the CAA, a PSD permit. *Id.*

129. *Id.* (citing *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)). The TR came into effect on January 2, 2011. *Id.*

130. *Id.* at 133.

131. *Id.*

when enacting the rules.¹³² The court first examined challenges to the EF, beginning with the Petitioners' claim that the EPA misinterpreted § 202(a)(1) of the CAA by failing to consider a number of policy considerations of GHG regulation.¹³³ The court held that the ruling in *Massachusetts* required only that the EPA make a scientific judgment regarding the risks posed by GHGs, not policy discussions.¹³⁴ Even the Petitioners' argument that the EF would result in "absurd results"—the regulation of "hundreds of thousands" of small sources—was dismissed by the court as irrelevant under *Massachusetts*.¹³⁵ The Petitioners' second argument—that the EF relied on improper evidence and discounted "significant scientific uncertainty"—was also dismissed by the court.¹³⁶ EPA's decision to synthesize existing scientific literature was deemed acceptable, and were used not as substitutes for EPA judgment but rather just as evidence for that judgment.¹³⁷ The court also stated that so long as the EPA had presented a rational basis for its conclusions that GHG emissions would pose significant risks to public health and welfare, the conclusions would be presumed valid.¹³⁸ The EPA was not required to provide a " 'rigorous step-by-step proof of cause and effect' " to support an EF, thus any uncertainty in the evidence record was not fatal to EPA's conclusion.¹³⁹ The court refused to reweigh the scientific evidence EPA relied on in making the EF.¹⁴⁰

Petitioners' third argument, that the EF is arbitrary and capricious due to EPA's failure to quantify the concentration of GHGs that endanger public health and welfare, was quickly dismissed by the court.¹⁴¹ The CAA does not require a numerical value for risk when making an EF determination.¹⁴² The fourth argument against the EF that two of the six chemicals included in the GHG aggregate are not emitted by automobiles was dismissed for lack of standing.¹⁴³ None of the petitioners ever

132. *Id.* at 116.

133. *Id.* at 116-17.

134. *Id.* at 117-18 (citing *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 534 (2012)).

135. *Id.* at 119. The court did note that the TTRs "may indicate that the CAA is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases." *Id.*

136. *Id.*

137. *Id.* at 119-120.

138. *Id.* at 120.

139. *Id.* at 121 (citing *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 28 (D.C. Cir. 1976)).

140. *Id.* at 122.

141. *Id.* at 122-23.

142. *Id.* at 122.

143. *Id.* at 123. (stating that the two gases in question were sulfur hexafluoride and perfluorocarbons).

demonstrated that utility companies, whose transformers did emit the two gases in question, would not be subject to regulation but for the inclusion of the two gases in the EF.¹⁴⁴ Absent standing, the court refused jurisdiction to address the merits of the argument.¹⁴⁵ The fifth argument alleged that EPA did not submit the EF for review by its Science Advisory Board, as required by 42 U.S.C. § 4365(c)(1).¹⁴⁶ The court held that even if EPA had violated this requirement, the Petitioners had failed to show that the error was “ ‘of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.’ ”¹⁴⁷ The Petitioners’ last argument that EPA’s denial of all petitions for reconsideration of the EF was erroneous failed for lack of substantial support.¹⁴⁸ While some of the evidence considered by EPA was based on non-peer-reviewed studies, the same pieces of evidence challenged by the Petitioners also relied on more than 18,000 peer-reviewed studies; the limited inaccuracy present was insufficient to undermine the general thrust of support for the EF.¹⁴⁹

The court next dismissed the Petitioners’ challenges to the TR.¹⁵⁰ As to the argument that the EPA had discretion to defer issuance of the TR and other vehicle emission regulations on the basis of cost, the court cited § 202(a)(1) of the CAA.¹⁵¹ Under both the wording of the statute and the ruling in *Massachusetts*, the EPA was required to regulate GHG emissions after making the EF.¹⁵² The court ruled that the second argument against the TR that the EPA had failed to demonstrate that the regulations would actually mitigate the alleged risks determined in the EF relied improperly upon the *Small Refiner Lead Phase-Down Task Force v. EPA* case.¹⁵³ The EPA did not need to demonstrate factual proof of harm in order to regulate, but rather only needed to show that the regulations would reach significant contributions, and could base these regulations on “signifi-

144. *Id.* at 123.

145. *Id.* at 124.

146. *Id.* (citing 42 U.S.C. § 4365(c)(1) (2006)).

147. *Id.* (citing *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188-89 (D.C. Cir. 1981)).

148. *Id.* at 124-255.

149. *Id.* at 125.

150. *Id.* at 126-27 (citing *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 534 (2012)).

151. *Id.* (citing 42 U.S.C. § 7521(a) (2006)).

152. *Id.*

153. *Id.* at 127 (citing *Small Refiner Lead Phase-Down Task Force v. Env'tl. Prot. Agency*, 705 F.2d 506, 525 (D.C. Cir. 1983)).

cant risk[s] of harm.”¹⁵⁴ The third argument from Petitioners alleged that EPA failed to consider compliance costs for stationary sources, an argument the court dismissed by citing prior case law.¹⁵⁵ The CAA only requires that costs to entities directly governed by TR be considered.¹⁵⁶ The final argument against the TR also failed, due to the court’s earlier upholding of the EF.¹⁵⁷

The court determined that the Petitioners’ challenges to the new GHG emissions thresholds were ripened on promulgation of the TR, and proceeded to address the merits of the arguments.¹⁵⁸ The dispute resulted from the fact that under other CAA regulations, certain listed sources constituted “major emitting facilities” if they had the potential to emit over 100 tpy of any air pollutant, and any facility with the ability to emit more than 250 tpy was classified as such.¹⁵⁹ As this would cause an overwhelming number of sources to come under CAA regulation, the Petitioners argued that the meaning of the phrase “any air pollutant regulated under the CAA” should have a far more limited meaning.¹⁶⁰ After conducting a lengthy statutory analysis, the court concluded that the term was in fact unambiguous, and had been correctly interpreted by EPA to extend CAA regulation to GHGs.¹⁶¹ The court found no merit in any of the Petitioners’ three alternative definitions.¹⁶²

The court finally turned to consider the TTRs, noting that the Petitioners failed to make any real arguments against the Timing portion of the rules.¹⁶³ Concluding that all Petitioners lacked standing to challenge either the Timing or Tailoring Rules, the court considered the challenges to both in conjunction.¹⁶⁴ The Tailoring rule was enacted to relieve the permitting burdens

154. *Id.* at 127-28 (citing *Ethyl Corp. v. Env’tl. Prot. Agency*, 541 F.2d 1, 13 (D.C. Cir. 1976)).

155. *Id.* at 128 (citing *Motor & Equip. Mfrs. Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 1095, 1118 (D.C. Cir.1979)).

156. *Id.*

157. *Id.* at 128-29.

158. *Id.* at 129-32.

159. *Id.* at 132-33.

160. *Id.* at 133-34 (citing *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010)).

161. *Id.* at 134-36.

162. *Id.* at 136-44. The first alternative interpretation offered by Petitioners was that the CAA is focused upon local pollution, not global as in this case. *Id.* at 136-38. The second alternative argued that major emitting facilities could only be designated as such if the pollutant that source emitted was present in the geographic region in amounts that caused non-attainment of the NAAQS for the region. *Id.* at 138-43. The final alternative offered was that EPA failed to follow the necessary steps in designating a new pollutant for which NAAQS apply. *Id.* at 143-44.

163. *Id.* at 144.

164. *Id.*

that would result from applying the 100/250 tpy thresholds to GHGs: permit applications under the CAA with these low thresholds would jump from 281 to more than 81,000 annually.¹⁶⁵ Regulation would thus be phased in, with only those sources subject to CAA regulation for non-GHG pollutants requiring a new permit at first; the second step would extend permitting to those sources emitting more than 100,000 tpy CO₂e.¹⁶⁶ Before considering the Petitioners' arguments against the TTRs, the court applied the three-part constitutional standing test from *Lujan v. Defenders of Wildlife*, determining that the Petitioners met none of the necessary elements.¹⁶⁷ The court also noted that several challenges to EPA's rules requiring states to revise their CAA SIPs to accommodate GHGs were pending before the court in other cases, and refused to grant jurisdiction over SIP related rules in the instant case.¹⁶⁸

*E. Conservancy of Southwest Florida v.
U.S. Fish & Wildlife Service*

U.S. Fish & Wildlife Service's decision to deny a petition to designate critical habitat for the Florida panther is committed to agency discretion. Federal APA does not authorize judicial review of denial of petitions to designate critical habitat.

This case arose as a challenge to the United States Fish and Wildlife Service's ("Service") denial of a petition submitted by several environmental advocacy groups (collectively the "Groups") to designate critical habitat for the endangered Florida panther under the Endangered Species Act ("ESA").¹⁶⁹ The Groups claimed that this denial was arbitrary and capricious under the APA.¹⁷⁰ The United States Court of Appeals for the Eleventh Circuit concluded that the Service's denial of the petition was not subject to judicial review under the APA, as it was "committed to agency discretion by law."¹⁷¹

165. *Id.*

166. *Id.* at 145.

167. *Id.* at 146-48 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The three part test required that "a petitioner must have suffered an 'injury in fact' that 1) is 'concrete and particularized . . . [and] actual or imminent, not conjectural or hypothetical,' 2) was caused by the conduct complained of, and 3) is 'likely, as opposed to merely speculative [to] be redressed by a favorable decision.'" *Id.*

168. *Id.* at 149.

169. *Conserv. of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1074 (11th Cir. 2012) (citing the Endangered Species Act, 16 U.S.C. §§ 1532(5)(B), 1533(a)(3)(A) (2006)).

170. *Id.* (citing 5 U.S.C. § 706(2)(A) (2006)).

171. *Id.*

The court explained some of the background of the ESA, noting that while both that act and its predecessor allowed the Service to list a species as endangered because of habitat loss, there was no requirement to designate critical habitat for those species until 1978.¹⁷² In that year, Congress amended the ESA, requiring the Service to specify critical habitat of any species listed as endangered or threatened.¹⁷³ The ESA currently requires that the Service must designate critical habitat concurrently with the designation of a species as endangered or threatened.¹⁷⁴ However, for those species, like the Florida panther, listed prior to enactment of the ESA's concurrency co-requisite, no such critical habitat designation is required.¹⁷⁵ While the Service may establish critical habitat for these prior-listed species, no habitat for the Florida panther has ever been designated.¹⁷⁶ The Groups filed petitions to initiate rulemaking to list habitat for the species, citing several studies "detailing the decline of the Florida panther population due to the gradual loss, degradation, and fragmentation of its habitat."¹⁷⁷ The Service denied the petitions, explaining that current efforts to protect the Florida panther were sufficient and did not require the designation of critical habitat.¹⁷⁸

The Groups filed suit in the United States District Court for the Middle District of Florida under the ESA's citizen suit provision.¹⁷⁹ The Seminole Tribe and a group of property owners (together with the Service, "Intervenor-Defendants") successfully interceded.¹⁸⁰ The suit alleged that the Service's denial of the petitions was arbitrary and capricious under the APA, that the denial was contrary to evidence before the Service, and that the Service failed to provide a rational explanation for its decision to pursue other protection efforts for the Florida panther.¹⁸¹ The Groups also asserted that the Service had failed to consider specific factors under 50 C.F.R. § 424.12(b), in denying the petitions.¹⁸² The district court found that the Groups had standing to bring the suit, but that none of the applicable laws or

172. *Id.* at 1075 (citing Endangered Species Preservation Act, Pub. L. No. 89-669, 80 Stat. 926 (1966); Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892).

173. *Id.*

174. *Id.* at 1075-76.

175. *Id.*

176. *Id.* at 1076.

177. *Id.* at 1076-77.

178. *Id.* at 1077.

179. *Id.* (citing 16 U.S.C. § 1540(g)(1)(C)).

180. *Id.*

181. *Id.*

182. *Id.* at 1077-78 n. 10 (citing *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir.1986) ("agency's failure to follow its own regulations is arbitrary and capricious")).

regulations required the Service to designate habitat for the Florida panther.¹⁸³ Without standards to limit the Service's discretion, the denial was committed to the agency's discretion and thus unreviewable under the APA.¹⁸⁴

The Eleventh Circuit cited *Heckler v. Chaney* in holding that § 701(a)(2) of the APA precludes judicial review of agency action where "the statute under which the agency acts 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" ¹⁸⁵ The court of appeals then examined the Groups' claim that 50 C.F.R. § 424.12 required the Service to conduct a review and designate habitat for listed species in accordance with a detailed set of requirements.¹⁸⁶ The court dismissed the argument, stating that 50 C.F.R. § 424.12's requirement that habitat be designated concurrently with the listing of species indicated that the entire section did not apply to those species listed prior to the ESA's 1978 amendments.¹⁸⁷ Additionally, the court ruled that the detailed requirements found in 50 C.F.R. § 424.12 applied only to the selection of *which* habitat should be designated, not whether habitat should be designated at all.¹⁸⁸ Neither 50 C.F.R. § 424.12 nor § 424.19¹⁸⁹ applied to the Service's initial decision of whether to initiate rulemaking procedures to designate habitat in the first place.¹⁹⁰

The court also dismissed the Groups' arguments that 15 U.S.C. § 1533(b)(2), which requires the Service to consider the best available science when designating critical habitat under subsection (a)(3) of the same section, applied to the Florida panther.¹⁹¹ But subsection (a)(3) itself represents only the requirement to concurrently designate habitat when listing a species, a provision that the court had already determined did not apply to species listed before 1978.¹⁹² The Groups also argued that their petitions to designate critical habitat constituted a "proposed regulation," which would subject the Service to the procedures of 15 U.S.C.

183. *Id.* at 1078.

184. *Id.*

185. *Id.* (citing *Hecker v. Chaney*, 470 U.S. 821, 830 (1985)).

186. *Id.* at 1079 (citing 50 C.F.R. §§ 424.14(d), 424.12 (b)).

187. *Id.*

188. *Id.* at 1079-80.

189. *Id.* at 1080 (noting the Groups also alleged that this provision required not only that the Service consider economic impact of designating habitat, but also that the Service must designate some habitat for species).

190. *Id.*

191. *Id.* at 1080-81.

192. *Id.* at 1081.

§ 1533.¹⁹³ The court disagreed, holding that the statute refers to regulations proposed by the Service itself, not to those proposed in petitions for rulemaking submitted to the Service.¹⁹⁴

In holding that neither the ESA nor any regulations promulgated under the Act provided a standard against which the Service's discretion to deny the petitions could be judged, the court proceeded to conclude that judicial review was precluded.¹⁹⁵ The court cited numerous examples of similar cases denying APA review where applicable statutes and regulations failed to provide legal standards limiting agency discretion.¹⁹⁶ The court bolstered its conclusion by looking to the permissive language of the 1978 amendments to the ESA, which state only that the Service *may* designate critical habitat for species listed prior to the amendments.¹⁹⁷ The court limited the decision in the instant case, stating that “[w]e do not suggest that the denial of a petition for rulemaking is always unreviewable, or even presumptively unreviewable.”¹⁹⁸ The Eleventh Circuit affirmed the district court's granting of the Defendants' motions to dismiss.¹⁹⁹

II. NOTABLE FLORIDA CASES

A. *Donovan v. Okaloosa County*

Proposed beach renourishment project served a paramount public purpose, constituting a special benefit that justifies county's taxing power to issue bonds. Circuit court had jurisdiction to validate the bonds.

This case arose out of Okaloosa County's ("County") development of a plan to renourish a beach and another part of the County. After obtaining the proper permits from the Florida Department of Environmental Protection ("FDEP"), the County decided to use funding from both a tourist development tax as well as an assessment ("Assessment") on a designated Municipal Service Benefit Unit ("MSBU") created under authority of section

193. *Id.*

194. *Id.* at 1081-82.

195. *Id.* at 1082.

196. *Id.* at 1082-83 (citing *Greenwood Utils. Comm'n v. Hodel*, 764 F.2d 1459, 1464 (11th Cir. 1985)).

197. *Id.* at 1083 (citing *Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that a statute's permissive language committed a decision to agency discretion).

198. *Id.* at 1085 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007) as an example of a reviewable refusal to promulgate rules).

199. *Id.*

125.01, Florida Statutes.²⁰⁰ The ordinance creating the MSBU designated two subassessment areas, based upon an earlier study (“Feasibility Study”) which determined that properties in the assessment area received a special benefit from the restoration project.²⁰¹ The County also developed a methodology for computing the assessments on the properties within the assessment area.²⁰² The MSBU and assessment area boundaries were both altered by a later county ordinance in compliance with the recent Supreme Court ruling in *Walton County v. Stop the Beach Renourishment, Inc.*—a case that determined the state legislature and FDEP alone have power to determine which beaches are “ ‘critically eroded and in need of restoration and nourishment.’ ”²⁰³

In October 2008, the County issued revenue bonds in the amount of \$20,000,000, pledging the tourist development tax and MSBU towards repayment.²⁰⁴ Shortly thereafter, the County filed a bond validation complaint in the circuit court, as required by chapter 75, Florida Statutes.²⁰⁵ The circuit court validated the bonds in March 2010, determining that the County was authorized to both issue the bonds and begin the beach renourishment program.²⁰⁶ Property owners within the MSBU (“Appellants”) filed an appeal to the Florida Supreme Court, as required by section 75.08, Florida Statutes, in cases of bond validation.²⁰⁷ The court began its analysis by limiting the scope of the bond validation hearing to three issues: “(1) whether the public body has authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of law.”²⁰⁸

The court first considered the Appellants’ argument that the county did not follow proper procedure when adopting the resolution (“Resolution”) that created the Assessment.²⁰⁹ In addition to erroneous claims that the circuit court did not have jurisdiction

200. *Donovan v. Okaloosa Cnty.*, 82 So. 3d 801, 804 (Fla. 2012).

201. *Id.*

202. *Id.*

203. *Id.* at 804-05 (quoting Fla. Stat. § 161.101(1) (2012)).

204. *Id.* at 805.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (citing *Strand v. Escambia Cnty.*, 992 So. 2d 150, 154 (Fla. 2008)). Additionally, the court noted that the Appellants had the burden of demonstrating that the bond validation was incorrect. *Id.*

209. *Id.* at 806.

to hear the bond validation issue,²¹⁰ the essential argument of the Appellants was that the Resolution was enacted without a separate hearing for the initial and final versions thereof.²¹¹ However, the court stated that the County's interpretation of its own ordinance was controlling on the matter.²¹² After an initial noticed hearing, the County's ordinance authorized it to adopt the initial and final Resolutions together.²¹³ As the Appellants could not show any due process deprivation, the court dismissed this first argument.²¹⁴ Next, the court dealt with the Appellants' assertion that the bond validation was premature as a result of the pending nature of the FDEP permits.²¹⁵ Although there is no statutory requirement that a permit be issued prior to bond validation, the Appellants relied upon *Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro Beach* for the claim that the County was required to demonstrate that FDEP would in fact issue the permits.²¹⁶ In addition to finding that the County had demonstrated significant likelihood that the permits would be issued, the court also noted that *Hillsboro Island* did not require bond validation hearings to consider details of the actual renourishment projects.²¹⁷ Furthermore, in the event that the permits were not issued, the County would be required to reimburse those owners within the MSBU, as special benefits would no longer accrue to those same owners.²¹⁸

The court examined the Appellants' third claim that the bonds "served no paramount public purpose" as required by *Orange County Industrial Development Authority v. State*.²¹⁹ Under that requirement, the benefit of the bond-financed project to a private party must be only incidental, while the public benefit must be sufficiently strong to justify the issuance of bonds.²²⁰ Following precedent—giving deference to the legislative deter-

210. *Id.* (noting that "regardless of how the circuit court ruled on the issue, the [circuit] court would not be deprived of jurisdiction").

211. *Id.* at 806-07.

212. *Id.* at 807.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* (citing *Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209 (Fla. 1972)).

217. *Id.* at 807-08.

218. *Id.* at 808 (noting that these reimbursements did in fact take place when the MSBU was amended).

219. *Id.* at 809 (citing *Orange Cnty. Indus. Dev. Auth. v. State*, 427 So. 2d 174, 178 (Fla. 1983)). The two part test for bond validity in *Orange County* is required only where a statute does not expressly authorize the issuance of bonds, as required by Article VII, section 10 of the Florida Constitution. *Id.*

220. *Id.* at 809-10.

mination of public purpose—and distinguishing the case at hand from *Orange County*, the court held that the special benefits of renourishment within the MSBU did “not ‘tarnish’ the public nature of the project.”²²¹ The fact that special benefits flowed to some private properties in the MSBU was insufficient to overcome the public character of the project.²²²

In response to the straightforward fourth assertion that the Assessment was invalid, the court looked to the two-prong test of *City of Winter Springs v. State*.²²³ The first prong required that an improvement like the beach renourishment in the instant case must provide a special benefit to the properties assessed within the MSBU.²²⁴ The court found that the County’s legislative findings of benefits to properties within the MSBU were supported by “competent, substantial evidence,” and that the cost-benefit analysis conducted sufficiently supported the determination that the renourishment provided special benefits.²²⁵ The second prong required that the Assessment be “fairly apportioned among the specially benefitting properties.”²²⁶ As the County’s apportionment method would only have been overturned if the court determined it to be arbitrary, based on the specific findings made by the County, the court determined that the apportionment methodology was fair and reasonable.²²⁷

The final argument advanced by the Appellants was that the Assessment would fund improvements outside of the MSBU.²²⁸ In dismissing the argument, the court noted that section 125.01(1)(q) did not require that the project actually be located within the area assessed, but rather only that the benefit of the project would provide a special benefit to the area.²²⁹ To require otherwise would ignore the realities of such renourishment projects, as erosion control could not be accomplished by renourishing only within the MSBU.²³⁰ The court affirmed the circuit court’s validation of the bonds to be issued in furtherance of the County’s beach renourishment case.²³¹

221. *Id.* at 810-11.

222. *Id.* at 811.

223. *Id.* (citing *City of Winter Springs v. State*, 776 So. 2d 255, 257 (Fla. 2001)).

224. *Id.* at 812.

225. *Id.* at 812-13.

226. *Id.* at 813.

227. *Id.* at 813-14.

228. *Id.* at 814. Specifically, the Appellants asserted that the renourishment would create new beach area that would be owned by the State, and this new area would thus be outside of the MSBU. *Id.*

229. *Id.* at 814-15.

230. *Id.* at 815.

231. *Id.*

*B. North Port Road & Drainage District v.
West Villages Improvement District*

Dependent special districts may not levy special assessments against properties owned by independent special districts under Florida's municipal home rule authority.

This case arose from a conflict over the powers of a special district, the North Port Road and Drainage District ("NPRDD").²³² In considering it, the Supreme Court of Florida first looked to the Florida Constitution and section 189.403, Florida Statutes, which provide for two different types of special district: independent and dependent.²³³ West Villages Improvement District ("West Villages") is an independent special district, created by a special legislative act, while NPRDD is a dependent special district and thus subject to additional controls over its budget.²³⁴ In 2008, NPRDD amended its ordinances to provide for the levy of non-ad valorem assessments against property owned by governmental entities, one of which was West Villages.²³⁵ NPRDD published notice for a public hearing to determine which properties would be assessed by the new ordinance; West Villages filed objections to the proposed assessments and argued that NPRDD had no legislative authorization to impose the assessments.²³⁶ NPRDD passed a resolution establishing the assessment, and West Villages subsequently filed a petition to the circuit court after its appeals to NPRDD had been exhausted.²³⁷ The circuit court denied West Villages' petition, citing *City of Boca Raton v. State* for the proposition that special dependent districts could levy non-ad valorem assessments on properties receiving special benefits under both statutory authority and Florida's home rule authority.²³⁸ The Second District Court of Appeal ("Second DCA") reversed, holding that NPRDD could not impose the assessment without specific statutory authority.²³⁹

232. *N. Port Road & Drainage Dist. v. W. Vills. Improvement Dist.*, 82 So. 3d 69, 70 (Fla. 2012).

233. *Id.* (citing FLA. CONST., art. VII; FLA. STAT. § 180.403 (2008)).

234. *Id.* at 70 (citing Act effective Jun. 17, 2004, ch. 2004-456, 2004 Fla. Laws). Specifically, NPRDD and other dependent special districts' budgets require approval through an affirmative vote and are subject to a veto from the municipality or county on which the special district "depends." FLA. STAT. § 189.403(2)(d).

235. *N. Port Road & Drainage Dist.*, 82 So. 3d at 71.

236. *Id.*

237. *Id.*

238. *Id.* (citing *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992)).

239. *Id.* at 70 (citing *W. Vills. Improvement Dist. v. N. Port Road & Drainage Dist.*, 36 So. 3d 837, 840 (Fla. 2d DCA 2010)).

The supreme court began its analysis by approving the Second DCA's holding, but under the rationale that NPRDD's home rule powers did not authorize it to levy a special assessment as in the present instance.²⁴⁰ The court rejected the argument that West Villages was not subject to the levy due to sovereign immunity, and chose not to consider the rest of West Villages' alternative arguments.²⁴¹ While the Second DCA held that the opinion in *Blake v. City of Tampa* prevented NPRDD from levying the assessment under the theory that no statute had authorized the assessment, the supreme court chose not to even consider *Blake's* applicability.²⁴²

Reviewing the history of the Florida Constitution's grant of home rule powers to municipalities, the court explained that municipalities may not legislate on "subjects expressly preempted to state or county government by the constitution, by general law, or by county charter."²⁴³ The primary block preventing NPRDD from levying the assessment on West Villages resulted from West Villages' own home rule limits.²⁴⁴ While West Villages' enabling statute permitted it to levy non-ad valorem assessments on properties for services provided by West Villages itself, no similar assessments could be levied to pay NPRDD's separate assessments as any services provided would not be provided by the independent special district but rather by another entity: NPRDD.²⁴⁵ Additionally, West Villages' enabling act only allowed the special district to pay special assessments on those properties owned by West Villages that "are used for nonpublic or private commercial purposes. . . . as would be applicable if said property were privately owned."²⁴⁶ As the properties owned by West Villages that would be subject to NPRDD's assessment were used for public purposes, the independent special district was not authorized by law to pay the assessments of the dependent special district.²⁴⁷ The court also noted that Article VII, section 1(c) of the Florida Constitution also prevented NPRDD from "reach[ing] through West Villages into the state treasury."²⁴⁸ In conclusion, the court held that municipal dependent special districts may

240. *Id.*

241. *Id.* at 71 n.3.

242. *Id.* (citing *West Villages*, 36 So. 3d at 839-40).

243. *Id.* at 72.

244. *Id.*

245. *Id.*

246. *Id.* at 73 (citing Act effective Jun. 17, 2004, ch. 2004-456, § 3(2)(d), 2004 Fla. Laws).

247. *Id.*

248. *Id.* (citing FLA. CONST. art. VII, § 1(c)).

not levy non-ad valorem assessments upon real property owned by an independent special district of the state.²⁴⁹

C. City of Venice v. Gwynn

Circuit court's failure to consider other permissible uses under a city ordinance was a departure from the essential requirements of the law. No unconstitutional taking occurs where a landowner has not been denied substantially all economically viable uses of property.

This opinion from the Second DCA arose after the City of Venice ("City") passed an ordinance amending its Land Development Code ("LDC") to prohibit owners of single family dwellings in residential neighborhoods from renting those properties for short periods of time.²⁵⁰ The amended LDC allowed only owners to rent a property for fewer than thirty days, three times a year.²⁵¹ The amendments grandfathered in those owners who had complied with the requirements of the LDC prior to July 14, 2009—provided that the owners had obtained all necessary state and local registrations and permits.²⁵² Gwynn had purchased her property in 2004, but had not taken efforts to comply with the former requirements of the LDC in order to rent to seasonal visitors.²⁵³ Subsequent to amending the LDC, the City ordered Gwynn to stop the nonconforming use of her property as a "resort dwelling," and initiated a hearing on the violations.²⁵⁴ At hearing, Gwynn did not contest the validity of the ordinance amending the LDC, instead arguing that she was not in violation as the rental agreements for the violations had been executed prior to the ordinance came into effect.²⁵⁵ The City's Code Enforcement Board ordered Gwynn to come into compliance with the amended LDC; Gwynn appealed the decision to the circuit court.²⁵⁶

On appeal, Gwynn argued that the amendments to the LDC were unconstitutional both facially and as applied to her property on the grounds that the amendments constituted an unconstitutional taking.²⁵⁷ Her argument was that the ordinance had

249. *Id.*

250. *City of Venice v. Gwynn*, 76 So. 3d 401, 402-03 (Fla. 2d DCA 2011).

251. *Id.* at 403.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 403-04.

interfered with “her rightful use of and reasonable expectation for her property . . . without a legitimate government interest.”²⁵⁸ The City responded by noting that the ordinance did not deprive Gwynn of all “economically viable uses” of the property.²⁵⁹ The circuit court held that the new ordinance was not facially unconstitutional, but that it was unconstitutional as applied against Gwynn’s property.²⁶⁰ The City appealed the ruling to the Second DCA.²⁶¹

The Second DCA limited its review to determining whether or not the circuit court had provided procedural due process and to whether the lower court had “departed from the essential requirements of the law.”²⁶² This review was further limited by the fact that the City had not alleged any due process violation.²⁶³ Citing *Penn Central Transport Co. v. City of New York*, the court listed three issues that must be considered in determining whether a taking had occurred: “(1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion.”²⁶⁴ In considering the first issue, the court noted that an intensive comparison must be made of the uses available to a property owner before and after the regulation in question was enacted.²⁶⁵ A comparison between the value removed from the property to that which remains is also necessary.²⁶⁶ The Second DCA concluded that the circuit court had failed to properly apply the economic impact factor from *Penn Central* by focusing upon Gwynn’s expectations for the property.²⁶⁷ No consideration had been given to other uses—such as monthly rentals, the short term rentals allowed by the new LDC, or as an investment property.²⁶⁸ By focusing on Gwynn’s losses, the circuit court “depart[ed] from the essential require-

258. *Id.* at 404.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* A circuit court reviewing an administrative action is limited to determining “whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.” *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla.1982).

263. *Gwynn*, 76 So. 3d at 404.

264. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978)).

265. *Id.* at 405.

266. *Id.*

267. *Id.*

268. *Id.*

ments of the law,” and the Second DCA ruled to reinstate the City’s order against Gwynn.²⁶⁹

D. Village of North Palm Beach v. S & H Foster’s, Inc.

Where a property is voluntarily annexed into a municipality, it must comply with the ordinances of the annexing municipal government; tenants of such properties are not eligible to be grandfathered under the ordinances.

This case from the Fourth District Court of Appeal (“Fourth DCA”) arose after a property owner (“Owner”) petitioned the Village of North Palm Beach (“Village”) for voluntary annexation.²⁷⁰ The Village passed an ordinance pursuant to section 171.044, Florida Statutes, granting the petition for annexation.²⁷¹ One of the tenants on the annexed property was S & H Foster’s (“Pub”) that had “[f]or many years prior to the annexation . . . serv[ed] alcoholic beverages until 5:00 a.m.”²⁷² The Village Code of Ordinances (“Code”) prohibited the sale of alcoholic beverages after 2:00 a.m.; the lease agreement between the Owner and the Pub required the Pub to comply with all laws and regulations.²⁷³ Once the annexation came into effect, the Pub petitioned the circuit court to grant the Pub continued operation “under its grandfather status” and to prevent the Village from enforcing the Code against the Pub.²⁷⁴ The circuit court granted a temporary injunction against the Village’s enforcement, and the Fourth DCA affirmed the injunction per curiam.²⁷⁵ The circuit court based its decision on the determinations that the Pub would be subject to serious financial harm from the enforcement of the Code and that the Pub had a protected interest in the property until the expiration of the lease agreement at the end of 2015.²⁷⁶ Although the Pub had no fee simple property rights, the circuit court relied on a series of “ ‘cases in which a restrictive ordinance was passed and enforced against the *then-existing residents* within the *existing boundaries* of a municipality.’ ”²⁷⁷

269. *Id.*

270. *Vill. of N. Palm Beach v. S & H Foster’s, Inc.*, 80 So. 3d 433, 434 (Fla. 4th DCA 2012).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 435.

275. *Id.* (citing *Vill. of N. Palm Beach v. S & H Foster’s, Inc.*, 5 So. 3d 686 (Fla. 4th DCA 2009)).

276. *Id.*

277. *Id.* (citation omitted).

On appeal, the Fourth DCA addressed whether its prior per curiam affirmation of the temporary injunction had determined that equitable relief was proper in the case.²⁷⁸ The court dismissed this argument, stating that “[f]actual findings and legal conclusions made by the court at a temporary injunction hearing are not binding on the trial court at final hearing where the parties present more evidence.”²⁷⁹ The court next addressed the question of whether the circuit court’s grant of equitable relief until the expiration of the lease in 2015 was proper.²⁸⁰ Citing several cases, the court held that the Village was permitted to enact the Code provisions regulating the sale of alcoholic beverages by section 562.14(1), Florida Statutes.²⁸¹ Additionally, the Pub’s citation of *Lewis v. City of Atlantic Beach* was held to be inapplicable to the instant case.²⁸² In *Lewis*, a bar was allowed to keep its grandfathered nonconforming use even after ownership of the bar changed.²⁸³ In the instant case, “the Pub [did] not dispute that the Village [had properly] followed procedures for voluntary annexation.”²⁸⁴ Thus, the Fourth DCA held that the circuit court had granted the Pub grandfather status in error and remanded the case for entry of a judgment in favor of the Village.²⁸⁵

E. Pruitt v. Sands

Courts must defer to a local government interpretation of its land development code when private parties bring suit to enforce the code, but are not required to defer to a local government’s interpretation of its comprehensive plan.

This appeal to the Fourth DCA originated from a dispute between two Martin County property owners over whether clusters of areca palm trees constituted a “hedge.”²⁸⁶ The county’s Land Development Code (“LDC”) requires any hedge between two homeowners to be six feet or less in height or to comply with set-

278. *Id.* at 436

279. *Id.* at 436-37 (citing *Kozich v. DeBrino*, 837 So. 2d 1041, 1043-44 (Fla. 4th DCA 2002)).

280. *Id.* at 437.

281. *Id.* (citing *Playpen S., Inc. v. City of Oakland Park*, 396 So. 2d 830 (Fla. 4th DCA 1981)).

282. *Id.* at 437-38 (citing *Lewis v. City of Atl. Beach*, 467 So. 2d 751 (Fla. 1st DCA 1985)).

283. *Id.* at 438.

284. *Id.*

285. *Id.*

286. *Pruitt v. Sands*, 84 So. 3d 1267, 1268 (Fla. 4th DCA 2012).

back requirements.²⁸⁷ The trees in question were much taller than six feet; one of the homeowners brought suit in circuit court to enforce the LDC's hedge provision.²⁸⁸ During the trial, several county officials testified regarding the LDCs.²⁸⁹ The circuit court deferred to the interpretations of the county officials in denying enforcement.²⁹⁰

Citing a line of cases, the court concluded that the circuit court did not err by deferring to the county's interpretation of its LDCs.²⁹¹ The court noted that an agency charged with enforcement and interpretation of a statute, in this case the county, will be given great deference in construction of that statute.²⁹² So long as the county's interpretation was " 'within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed.' " ²⁹³ As the LDC mentioned areca palms under provisions dealing generally with trees, the county's interpretation regarding use of the trees along a property line was not clearly erroneous.²⁹⁴ Although the Fourth DCA disagreed with the county's interpretation of the LDC as a whole, the court ruled that the circuit court had properly deferred.²⁹⁵ The court was careful to distinguish the present case from its earlier ruling in *Pinecrest Lakes, Inc. v. Shidel*.²⁹⁶ Whereas the instant case involved only a county's interpretation of its LDC, *Pinecrest Lakes* involved a suit to contest the consistency of a development order with the county's comprehensive plan.²⁹⁷ The instant case only required that a court determine an interpretation of an ordinance, while *Pinecrest Lakes* required the court to determine if an action of county officers—promulgating a development order—was improper.²⁹⁸ The Fourth DCA affirmed the trial court's deference to the county that areca palm trees did not violate the county's hedge ordinance.²⁹⁹

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* (citing *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla.1988)).

293. *Id.* (citing *Fla. Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003)).

294. *Id.* at 1268-69.

295. *Id.*

296. *Id.* (citing *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001)).

297. *Id.*

298. *Id.*

299. *Id.*

III. NOTABLE FLORIDA LEGISLATION

A. Statewide Environmental Resource Permitting Chapter 2012-94 / House Bill No. 7003

This act required the creation of rules for environmental resource permitting applicable statewide.³⁰⁰ FDEP and the water management districts (“WMDs”) were required to initiate a rule-making proceeding to provide consistent regulation of activity requiring environmental resource permits (“ERPs”).³⁰¹ The rules promulgated by FDEP are required to include various standardized conditions for issuance, forms, notices, and fees.³⁰² The WMDs are given jurisdiction to implement FDEP’s rules in compliance with guidance from FDEP.³⁰³ Local governments with delegated ERP authority are required to amend any existing regulations to incorporate the new rules within twelve months of the effective date of said rules.³⁰⁴ Permits for existing activities are to be governed by regulations enacted prior to the enactment of the new rules, although any modification to existing permits are to comply with the new rules.³⁰⁵ The act additionally requires that FDEP conduct regular training of WMD staff to ensure consistent implementation and interpretation of the new rules.³⁰⁶ The act also reenacted a provision exempting the act from causes of action for the purpose of a cross-reference in the newly created section.³⁰⁷

B. Repeal of Cap and Trade Provisions Chapter 2012-89 / House Bill No. 4001

This short act repealed Section 403.44, Florida Statutes, the Florida Climate Change Protection Act (“FCCPA”).³⁰⁸ The statute previously declared that it was in the best interest of the state to limit greenhouse gas emissions via a “cap and trade” rule.³⁰⁹ Had such rules ever been adopted by state agencies,

300. Act effective July 1, 2012, ch. 2012-94, § 1, 2012 Fla. Laws (creating FLA. STAT. § 373.4131 (2012)).

301. *Id.* (creating FLA. STAT. § 373.4131(1)(a)).

302. *Id.* (creating FLA. STAT. § 373.4131(1)).

303. *Id.* (creating FLA. STAT. § 373.4131(2)(a)).

304. *Id.* (creating FLA. STAT. § 373.4131(2)(b)).

305. *Id.* (creating FLA. STAT. § 373.4131(4)).

306. *Id.* (creating FLA. STAT. § 373.4131(5)).

307. *Id.* § 2 (reenacting FLA. STAT. § 70.001).

308. Act effective July 1, 2012, ch. 2012-89, § 1, 2012 Fla. Laws (repealing FLA. STAT. § 403.44).

309. FLA. STAT. § 403.44 (2011) (repealed 2012).

the Legislature would have been required to ratify them prior to the rules taking effect.³¹⁰ Although none of the rules authorized by the statute were ever enacted, the Legislature removed the entire FCCPA from the books.³¹¹ The act also removed a cross reference to the FCCPA from an environmental cost recovery statute, which had previously allowed electric utilities to charge for recovery of costs incurred in reaching compliance with section 403.44, Florida Statutes.³¹²

C. Energy

Chapter 2012-117 / House Bill No. 7117

This act consists of a number of provisions relating to energy production. Notably, many provisions relate to the promotion of renewable energy within the state. The FDEP must now consider the amount of renewable energy resources produced or purchased when evaluating ten-year site plans submitted by electric utilities.³¹³ “Energy efficiency improvement” was defined by the act to include a number of different changes and items.³¹⁴ Numerous tax credits were provided for equipment, machinery, and materials for renewable energy technologies, expiring July 1, 2016.³¹⁵ The definition of “new facility” with regard to renewable energy facilities was expanded to include those facilities that implement upgrades with a cost exceeding fifty percent of the facilities’ value.³¹⁶ An obsolete requirement for the Public Service Commission to adopt rules implementing a renewable energy portfolio standard were removed.³¹⁷ Section 366.94, Florida Statutes—governing electric vehicle charging stations—was created.³¹⁸ The Department of Agriculture and Consumer Services (“DACS”) was charged with preparing an annual assessment of the tax credits provided for earlier in the act.³¹⁹ The definitions of several “alternative fuels,” such as “blended gasoline,” were also changed.³²⁰ The cultivation of nonnative plants and algae

310. *Id.* § 403.44(3).

311. Act effective July 1, 2012, ch. 2012-89, § 1, 2012 Fla. Laws (repealing FLA. STAT. § 403.44).

312. *Id.* § 2 (amending FLA. STAT. § 366.8255(1)(d)).

313. Act effective July 1, 2012, ch. 2012-117, § 2, 2012 Fla. Laws (amending FLA. STAT. § 186.801(2)).

314. *Id.* § 3 (creating FLA. STAT. § 212.055(2)(d)(2)).

315. *Id.* § 4 (creating FLA. STAT. § 212.08(7)(h)); § 6 (amending FLA. STAT. § 220.192).

316. *Id.* § 7 (amending FLA. STAT. § 220.193).

317. *Id.* § 10 (amending FLA. STAT. § 366.92).

318. *Id.* § 11 (creating FLA. STAT. § 366.94).

319. *Id.* § 12 (creating FLA. STAT. § 377.703(2)(n)).

320. *Id.* § 13 (amending FLA. STAT. § 526.203(1)).

was prohibited, except under special permitting; DACS and Institute of Food and Agricultural Sciences at the University of Florida were authorized to adopt exemptions to this prohibition.³²¹ DACS was also charged with conducting a comprehensive state-wide forest inventory and study.³²² The Office of Energy was charged with developing a clearinghouse of information regarding cost savings for various energy efficiency measures.³²³

*D. Developments of Regional Impact
Chapter 2012-75 / House Bill No. 979*

This act alters the application of comprehensive plans with regard to Developments of Regional Impact (“DRI”).³²⁴ Under the new act, regional planning agencies (“RPAs”) reviewing a DRI are now limited to only making recommendations about the proposed development that are consistent with state statutes, rules, and the local ordinances where the development would be located.³²⁵ Requirements for regional reports under section 380.06, Florida Statutes, were altered to require recommendations consistent with water management district rules,³²⁶ and to only require a report on impacts to affordable housing where an RPA has adopted an affordable housing policy.³²⁷ The act excluded changes to a DRI that would not increase the “number of external peak hour trips” from the definition of “substantial deviations” that would have to be reported to the state and regional planning agencies.³²⁸ The act also exempted from regulation under section 380.06, Florida Statutes, those DRIs that meet certain density requirements.³²⁹ Local governments may now rescind a DRI development order if all required mitigation efforts will be completed, whilst formerly these mitigation efforts must have been completed prior to the rescission.³³⁰ The act also encoded a presumption that certain types of agricultural land would not

321. *Id.* § 14 (amending FLA. STAT. § 581.083(4)).

322. *Id.* § 15.

323. *Id.* § 16.

324. Act effective July 1, 2012, ch. 2012-75, 2012 Fla. Laws. DRIs are defined as “any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.” FLA. STAT. § 380.06(1) (2012).

325. Act effective July 1, 2012, ch. 2012-75, § 2, 2012 Fla. Laws (amending FLA. STAT. § 380.06(7)(a)).

326. *Id.* (amending FLA. STAT. § 380.06(12)(b)).

327. *Id.* (amending FLA. STAT. § 380.06(12)(a)(3)).

328. *Id.* (amending FLA. STAT. § 380.06(19)(e)(2)(k)).

329. *Id.* (creating FLA. STAT. § 380.06(24)(x)). *See also* FLA. STAT. § 380.06(29) (2012).

330. Ch. 2012-75, § 3, 2012 Fla. Laws (amending FLA. STAT. § 380.115(1)(b)).

constitute urban sprawl, and designated means of establishing those areas.³³¹

E. Environmental Resource Permits and Development
Chapter 2012-205 / House Bill No. 503

This act had numerous effects on the issuance of ERPs. A main effect was that counties and municipalities may not condition the issuance of a development permit on an applicant's obtaining a permit or approval from any state or federal agency.³³² FDEP may also now issue an ERP prior to the issuance of an incidental take permit provided under the Endangered Species Act, although activities authorized by the ERP may not begin until the incidental take permit is issued.³³³ FDEP is also required to expand internet-based certification services for permits issued.³³⁴ Underground injection wells of Class I, II, III, IV, and V Groups 2-9 are exempted from ERP permitting under section 373.326, Florida Statutes.³³⁵ ERPs must now be issued or denied within 60 days, as opposed to the previous 90 day limit.³³⁶ The act also supplied legislative intent with respect to the ERP regulatory duties of the various state and federal agencies to avoid administrative redundancies.³³⁷

The Inland Protection Trust Fund was altered to increase the "priority ranking score" required for sites to participate in the voluntary restoration program.³³⁸ The act also provided that a change in ownership of a property subject to the innocent victim petroleum storage system site would not disqualify the site for financial assistance under section 376.305, Florida Statutes.³³⁹ Intermodal logistics centers are now eligible for expedited permitting.³⁴⁰ Certain types of zones of discharge for existing facilities are no longer subject to liability pursuant to chapters 403 and 376, Florida Statutes.³⁴¹ The population threshold for small community sewer construction assistance was raised to 10,000.³⁴² All

331. *Id.* § 4.

332. Act effective July 1, 2012, ch. 2012-205, § 1, 2012 Fla. Laws (amending FLA. STAT. § 125.022); § 3 (amending FLA. STAT. § 166.033).

333. *Id.* § 2 (creating FLA. STAT. § 161.041(5)).

334. *Id.* § 5 (creating FLA. STAT. § 373.026(10)).

335. *Id.* § 6 (creating FLA. STAT. § 373.326(3)).

336. *Id.* § 7 (amending FLA. STAT. § 373.4141(2)).

337. *Id.* § 8 (amending FLA. STAT. § 373.4144).

338. *Id.* § 9 (amending FLA. STAT. § 376.3071(11)).

339. *Id.* § 10 (amending FLA. STAT. § 376.30715).

340. *Id.* § 11 (amending FLA. STAT. § 380.0657(1)).

341. *Id.* § 12 (amending FLA. STAT. § 403.061(11)).

342. *Id.* § 14 (amending FLA. STAT. § 403.1838(2)).

byproducts resulting from solid waste-utilizing renewable energy projects now count towards county recycling goals.³⁴³ FDEP is required to allow such waste-to-energy projects to accept nonhazardous solid and liquid waste; the permitting process for some qualifying solid waste management facilities was altered.³⁴⁴ Solid waste management facility operators are required to provide financial assurance for the cost of completing corrective actions resulting from violations.³⁴⁵ A list of criteria was provided for those construction projects granted a general ERP, which, if met, grant the project a rebuttable presumption that discharge systems will comply with state water quality standards.³⁴⁶ Expedited permitting was extended to development projects that would create at least fifty jobs.³⁴⁷ Finally, all building permits issued by FDEP under Chapter 373, Florida Statutes, expiring between January 1, 2012, and January 1, 2014, were extended for a period of two years.³⁴⁸

F. Reclaimed Water
Chapter 2012-150 / House Bill No. 639

This act begins by defining “reclaimed water” and “reclaimed water distribution system.”³⁴⁹ The act then inserts various legislative findings about the use of reclaimed water as well as provisions allowing for water supply funding to go towards development of reclaimed water uses.³⁵⁰ WMDs may not require a permit for the use of reclaimed water but may include conditions in groundwater and surface water permits that govern use in relation to the use of reclaimed water.³⁵¹ WMDs may not specify any party to which a reclaimed water utility must provide water, except in certain cases.³⁵² WMDs may not give preference to any users who do not use reclaimed water over those that do.³⁵³ FDEP is required to initiate rulemaking to address changes in reclaimed water statutes, including revisions to WMD con-

343. *Id.* § 16 (amending FLA. STAT. § 403.706(4)(a)).

344. *Id.* § 17 (amending FLA. STAT. § 403.707).

345. *Id.* § 18 (amending FLA. STAT. § 403.7125(5)).

346. *Id.* § 19 (creating FLA. STAT. § 403.814(12)).

347. *Id.* § 21 (amending FLA. STAT. § 403.973(3)(a)(1)).

348. *Id.* § 24.

349. Act effective July 1, 2012, ch. 2012-150, § 1, 2012 Fla. Laws (creating FLA. STAT. § 373.019(17)–(18)).

350. *Id.* § 2 (creating FLA. STAT. § 373.250(1)(b), (2)).

351. *Id.* (amending FLA. STAT. § 373.250(3)(b)).

352. *Id.* (amending FLA. STAT. § 373.250(3)(c)).

353. *Id.* (creating FLA. STAT. § 373.250(4)(c)).

sumptive use permits and withdrawal limits.³⁵⁴ The act makes clear that none of the changes affect FDEP's ability to regulate water quality with regard to reclaimed water.³⁵⁵ The act also amends several sections of the Florida Statutes to ensure that all cross references are accurate after the passing of this act.³⁵⁶

354. *Id.* (creating FLA. STAT. § 373.250(5)).

355. *Id.* § 3.

356. *Id.* § 4 (amending FLA. STAT. § 373.036); § 5 (amending FLA. STAT. § 373.421); § 6 (amending FLA. STAT. § 403.813); § 7 (amending FLA. STAT. § 556.102).