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WHEN LESS IS MORE

AN ENERGY EFFICIENCY SET-ASIDE WITHIN THE CLEAN POWER PLAN

BY ARIEL STAVITSKY

On August 3, 2015, President Obama and United States Environmental Protection Agency (EPA) Administrator Gina McCarthy unveiled the final Clean Power Plan (CPP), the Obama administration's "historic step" toward combatting anthropogenic climate change.¹ The CPP sets the first national carbon pollution limits for existing power plants

across the U.S.² With these standards, the EPA aims to reduce U.S. carbon dioxide emissions from 2005 levels by 32% by 2030.³

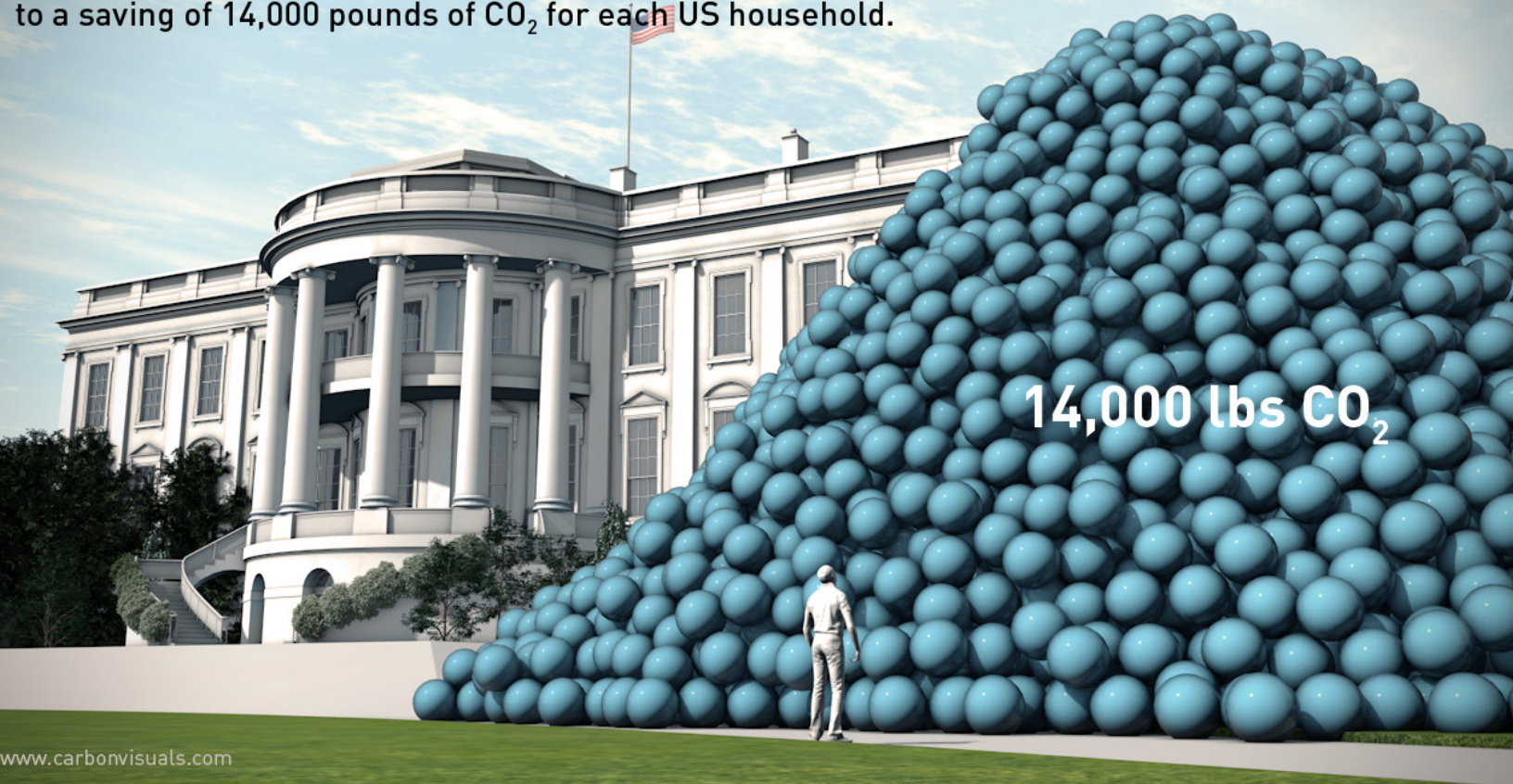
Recently, however, a closely divided U.S. Supreme Court halted this progress when it granted an unprecedented emergency stay of the CPP on February 9, 2016.⁴ With oral arguments addressing the merits of the CPP before an en banc D.C. Circuit now scheduled for late

September,⁵ the challenge is unlikely to make its way back to the Supreme Court until 2018 at the earliest.

Yet, the uncertainty raised by the stay may yield a silver lining. Currently, about half of the 47 states affected by the CPP have issued statements suggesting intent to continue with the CPP compliance planning process.⁶ These states now have an extended timeline by

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730 million metric tons, the EPA reduction target for 2030, equates to a saving of 14,000 pounds of CO₂ for each US household.



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which to comply.

The CPP tasks each state with developing a State Implementation Plan (SIP) demonstrating to the EPA how the state will achieve its required emission goals.⁷ States have much latitude and a myriad of options to choose from in adopting their SIPs,⁸ a threshold question being whether to adopt a rate- or mass-based compliance scheme. Under a rate-based system, compliance centers on the average CO₂ emission rate for affected power plants.⁹ With a mass-based compliance approach, a state's total allowed emissions are capped.¹⁰ States can adopt a mass cap that applies either to only existing power plants or to both existing and new power plants. The state then issues a correlative amount of CO₂ allowances and distributes the allowances to affected power plants through an allocation system of its own choosing.¹¹

A mass-based regime is arguably

simpler to intuit, administer, and monitor. However, mass-based states operating under a mass cap that applies only to existing power plants must make an additional showing to EPA: their SIPs must somehow address and mitigate the potential for emission leakage.¹² Emission leakage refers to the shift in energy generation, and in turn the resulting CO₂ emissions, that occurs when production is dispatched away from existing, regulated sources to new, unregulated sources.¹³ Because new sources operate freely outside of the mass cap, the cap would no longer necessarily be met via the CO₂ allowance system, the emission ceiling rendered meaningless.¹⁴

One way states can mitigate leakage is by setting aside a percentage of CO₂ allowances for the verified delivery of demand-side energy efficiency (EE).¹⁵ Energy efficiency, or the act of using less energy to produce an equivalent

result, provides numerous benefits: additional marginal emission reductions, lower energy costs and rates, higher consumer satisfaction, economic development and job creation, and a more reliable energy grid. EE can be procured through residential, commercial, and industrial energy use.¹⁶ An array of strategies can be used to implement EE programs, including financial incentives like rebates and loans, technical services like audits and retrofits, and educational campaigns that highlight the benefits of EE improvements.¹⁷ This wide breadth of measures and strategies supports an almost boundless supply of technologically accessible EE.

Under an EE set-aside, a certain percentage of a state's CO₂ allowances would be reserved and allocated to EE providers — electric utilities or generators — for each delivered megawatt of EE, i.e., each megawatt avoided.¹⁸ States could distribute these reserved allowances either

directly or through a state-approved third-party EE administrator, which could then grant the allowances to eligible EE providers.¹⁹ The latter approach would take advantage of long-standing and successful EE programs already established in several states, including Oregon and Wisconsin. The EE set-aside would be relatively straightforward to structure, as many of its eligibility and documentation requirements could borrow from analogous provisions elsewhere in the CPP, for example rate-based EE crediting and/or the mass-based set-aside for renewable energy.

Importantly, the CPP final rule already provides for a presumptively approvable EE set-aside. However, the proposed CPP Federal Plan, which, among other applications, serves as a model for states to use in formulating their SIPs, fails to include the EE set-aside. That the EPA would exclude an EE set-aside in the Federal Plan is inconsistent with the broader goals of the CPP: carbon emission reduction, economic revitalization, energy usage and cost savings,²⁰ and state compliance flexibility.²¹ The EE set-aside achieves all that and more. The EPA should therefore continue to develop the framework set forth in the CPP final rule by ultimately including the EE set-aside in the final Federal Plan. Linger uncertainty over the legality of the CPP itself aside, for the many wise states choosing to continue with CPP compliance planning, the EE set-aside can serve as an effective and powerful tool against emission leakage and for emission reduction and a healthier energy future.

Ariel Stavitsky is a rising third-year student at the University of Oregon School of Law. She is an ENR Center Bowerman Fellow in the Energy Law and Policy Project.

Endnotes

1 Press Release, Office of the Press Sec'y, The White House, Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants (Aug. 3, 2015), <https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards>.

2 *President Obama's Plan to Fight Climate Change*, The White House (June 25, 2013), <https://www.whitehouse.gov/share/climate-action-plan>.

3 President Obama's Plan to Fight Climate Change, *supra* note 2.

4 *West Virginia v. EPA*, No. 15A773, 577 U.S. (Feb. 9, 2016) (<http://www.supremecourt.gov/>); *see also* Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. Times, Feb. 10, 2016, at A1. For more on the stay, *see* Jonathan H. Adler, *Placing the Clean Power Plan in Context*, Wash. Post (Feb. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/>.

5 Ellen M. Gilmer, *Clean Power Plan: Court Decides to Bypass Panel, Delays Arguments Until Fall*, E&E Publishing, LLC (May 16, 2016), <http://www.eenews.net/stories/1060037342>.

6 *See E&E's Power Plan Hub, Supreme Court Stay Response*, E&E Publishing, LLC, http://www.eenews.net/interactive/clean_power_plan#planning_status_chart (last visited May 22, 2016).

7 Clean Power Plan, 80 Fed. Reg. 64661, 64820 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter CPP].

8 *Id.* at 64665-66.

9 *Id.* at 64833-34.

10 *Id.* at 64834.

11 *Id.*

12 *Id.* at 64887.

13 Proposed Federal Plan for the Clean Power Plan, 80 Fed. Reg. 64966, 64977 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 78) [hereinafter Federal Plan].

14 Memorandum from the EPA to Docket EPA-HQ-OAR-2015-0199, Allowance Allocation Proposed Rule Technical Support Document 8 (Aug. 2015), <http://www.epa.gov/sites/production/files/2015-11/documents/tsd-fp-allowance-allocations.pdf>.

15 CPP, *supra* note 7, at 64889; *Energy Efficiency and Evaluation, Measurement and Verification in State Plans*, EPA Webinar (Jan. 14, 2016), <https://www.epa.gov/clean-powerplanttoolbox/epa-webinar-energy-efficiency-and-emv>.

16 Lincoln Davies et al., *ENERGY LAW AND POLICY* 161 (1st ed. 2014).

17 *Demand-Side Energy Efficiency Technical Support Document*, EPA 2 (Aug. 2015), <https://www.epa.gov/sites/production/files/2015-11/documents/tsd-cpp-demand-side-ee.pdf>.

18 CPP, *supra* note 7, at 64890.

19 *Comments on EPA's Proposed Clean Power Plan Federal Plan Requirements, Model Trading Rules, and Amendments to Framework Regulations*, Docket ID No. EPA-HQ-OAR-2015-0199, PUBLIC SERVICE COMMISSION OF WISCONSIN, (Jan. 21, 2016), at 27, *available at* <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2015-0199-0640>.

20 President Obama's Plan to Fight Climate Change, *supra* note 2.

21 CPP, *supra* note 7, at 64663.



Events



On September 25, 2015, the ENR Center, Journal for Environmental Law and Litigation, and Oregon Review of International Law presented Drought in the American West: A Symposium on Law, Policy, and Science.

The symposium was a day-long event addressing the western drought crisis from a series of interdisciplinary perspectives within larger questions

of property rights and the role of government in this crisis.

The event featured water resource professionals from a variety of disciplines and backgrounds. Oregon Law professors Adell Amos, Mary Wood, Jennifer Reynolds, and Michelle McKinley participated and presented in the symposium. Dr. Philip W. Mote provided the keynote address. Dr. Mote

is a professor in the College of Earth, Oceanic, and Atmospheric Sciences at Oregon State University, director of the Oregon Climate Change Research Institute, and director of Oregon Climate Services, the official state climate office for Oregon. The symposium sought to incite a robust discussion to inform possible solutions to the complex dynamics and challenges that emerge in the context of drought.

Harney County and the Sagebrush Rebellion

With the Public Law and Policy Program and the Wayne Morse Center for Law and Politics, the ENR Center hosted David Hayes and Amanda Peacher for Harney County and the Sagebrush Rebellion: Past and Present Issues in Federal Land Management on March 16, 2016.

Peacher is a former wildlife ranger, and she has masters degrees in literary nonfiction journalism and environmental studies from the University of Oregon. She works for Oregon Public Broadcasting as a multimedia reporter and producer covering Central Oregon. She covered the occupation of the Malheur Wildlife Refuge and related issues since the occupation began. Peacher presented on the occupation and the perspective of Harney County residents during the incident.

David Hayes is a visiting lecturer at Stanford University. He served as deputy secretary and chief operating officer of the Department of the Interior under Clinton and Obama. Hayes addressed the constitutionality of both the occupation and the grievances of the occupiers.



9th annual Rennard Strickland Lecture



Professor Robert A. Williams, Jr., Professor of Law and Faculty Co-Chair of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law, presented Sovereign is He Who Decides on the Exception: Tribal Jurisdiction, the Supreme Court, and Racially Constructed Reservation Environments for this year's 9th annual Rennard Strickland Lecture.

The Rennard Strickland Lecture Series was established in 2006 to honor the legacy of Dean Rennard Strickland and to build on his contributions to the field of Indian law, to legal education, and to the Environmental and Natural Resources and Indian law programs at the University of Oregon School of Law. The theme of the lecture series is the examination of native leadership and vision for environmental stewardship in the 21st century.

Williams previously served as Harvard Law School's Bennet Boskey Distinguished Visiting Lecturer of Law and was subsequently named the first Oneida Indian Nation Visiting Professor of Law. He has represented indigenous peoples and tribes before the United States Supreme Court, the Supreme Court of Canada, the Inter-American Court of Human Rights, and the United Nations Working Group on Indigenous Peoples.

He served as Chief Justice for the Court of Appeals for the Pascua Yaqui Indian Reservation and as Justice for the Court of Appeals for the Tohono O'odham Nation. Williams has published many articles and books, including his most recent, *Savage Anxieties: The Invention of Western Civilization*, in 2012. Williams received his B.A. from Loyola College and his J.D. from Harvard Law School.



Above, Rennard Strickland enjoys the lecture series named in his honor. Top, Robert Williams presents the lecture, titled Sovereign is He Who Decides on the Exception: Tribal Jurisdiction, the Supreme Court, and Racially Constructed Reservation Environments.

1L Spotlights



Maggie Franquemont

Maggie Franquemont grew up deep in the foothills of Colorado's Front Range, and the love of outdoor spaces led her to Bozeman, Montana for undergraduate. Maggie spent time skiing, rock climbing, and backpacking while working on her BS in Land Rehabilitation. Maggie spent several summers working for Yellowstone and Mount Rainier National Parks.

Maggie's strong background in environmental studies led her to the ENR Center. Growing up in the arid Inter-Mountain West, Maggie knew that her passion in law school would be water law and the Oceans, Coasts, and Watersheds Project has allowed her to start exploring this area. She is enthusiastic to continue to explore the research that she has started this year.

This summer, Maggie will be working for the Washington State Attorney General in Olympia, Washington. She is working for the Natural Resource Division and is excited to get to work on some projects including land use, regulations, and fire recovery legal research.

Sara Brennan grew up in the pristine San Juan Islands of Washington and received her BA in Environmental Studies and Anthropology from Dartmouth College. Sara worked with a land trust prior to her senior year at Dartmouth

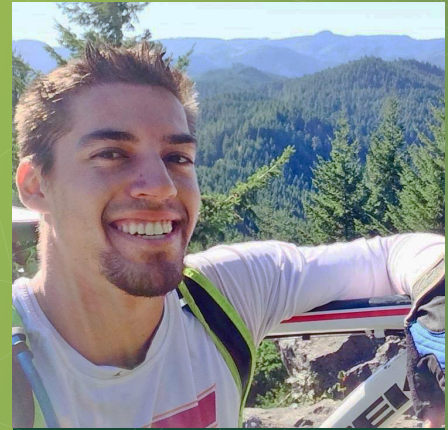


Sara Brennan

on implementing a community-based conservation easement to promote habitat protection along the San Juan Islands shoreline. After graduating in 2013, Sara worked for the Northwest Clean Air Agency in Washington as a compliance intern. For two years, Sara performed annual compliance inspections at two hundred sources and tracked annual emissions from various major pollution sources that included five major oil refining operations in the Pacific Northwest.

Sara was drawn to the ENR center's fellowship program because of her interest in land use, conservation, and air regulation. As a member of the Conservation Trust Project, she worked with research associates, environmental advocates, and other fellows to learn about environmental law outside of the basic first-year classes.

This summer, Sara will be working for the Oregon Department of Justice in the Natural Resources Section. She is excited to work with client agencies such as the Department of Agriculture, Department of Energy, Department of Land Conservation and Development, and more, and providing the agencies with advice and guidance as they attempt to work within their statutory and constitutional responsibilities.



Dan Lawler

Dan Lawler is from Oak Hill, Virginia, and graduated from Virginia Tech in May 2015 with a BS in Environmental Policy and Planning and a minor in Political Science. He has long loved the outdoors and enjoys hiking, mountain biking, and exploring Oregon's many natural environments.

Dan chose University of Oregon to pursue an ENR fellowship in order to leverage law and science to promote the health and sustainability of water resources and to drive positive changes in environmental policy. As a 1L Oceans, Coasts and Watersheds Project Fellow, Dan has worked with other fellows on plastic pollution's impact on water resources and has researched fishery licensing agreements between West African nations and the European Union.

Dan will be working as a law clerk for Midwest Environmental Advocates in Madison, Wisconsin this summer. He will work closely with staff attorneys on case development and litigation, perform legal research, conduct client intake, and attend press conferences and government meetings.

Dan hopes to become an attorney for a private public interest environmental law firm or for a nonprofit organization working towards healthy and sustainable water resources.



Sigvanna Topkok



Rory Isbell



Alexis Biddle

Beyond the Classroom

The ENR Fellowship Program

The ENR Center offers fellowships to fifteen to twenty law students through a competitive application process. Students selected as ENR Fellows are assigned to the ENR Center's seven interdisciplinary projects: Conservation Trust Project, Energy Law and Policy Project, Food Resiliency Project, Global Environmental Democracy Project, Native Environmental Sovereignty Project, Oceans, Coasts and Watersheds Project, and Sustainable Land Use Project. Fellows work with expert faculty members and community stakeholders to address some of the most cutting-edge environmental issues. ENR Fellows engage in project development, substantive research and writing, and community outreach.

ENR students pursue their environmental passions outside of the classroom, oftentimes to success and recognition.

ENR Center Native Environmental Sovereignty Project fellow Sigvanna Topkok worked to pass a resolution to declare the second Monday of October as Indigenous Peoples' Day. Eugene City Council voted unanimously in favor of the resolution. Sig also attended the Federal Bar Association Indian Law Conference in April with the University of Oregon School of Law Native American Law Student Association (NALSA), of which Sig is the codirector. She was elected president of the national chapter of NALSA and will be the leader of this nationwide organization of law students for the 2016-17 academic year.

Rory Isbell, a Sustainable Cities Initiative fellow for the Sustainable Land Use Project and concurrent degree law and Community and

Regional Planning student, was a winner at the University of Oregon's Graduate Student Research Forum. Rory's panel "Adapting to New Trends in Policy and Technology" won the theme "Challenges for New Generations of Leaders." Rory also placed third in the Transportation Three Minute Thesis competition at the Transportation and Communities Summit for his graduate thesis "Follow the Money: Effectiveness of Livability Goals in Shaping Transportation."

Alexis Biddle, an SCI fellow for the Sustainable Land Use Project and a concurrent degree law and Community and Regional Planning student, was selected as an Eno Fellow. Alexis will attend the Eno Future Leaders Development Conference in Washington, D.C. He and nineteen others were identified as top transportation students in the country and will have the opportunity to meet with national leaders in transportation from public, private, and nonprofit organizations.



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ENR GIVING OPPORTUNITIES

**Private gifts are an essential means
of supporting the ENR Center.**

Recently, private donations have allowed us to expand support for students committed to public interest environmental law. In addition to providing funded fellowships for law students that offset the cost of law school tuition, ENR now offers funded post-graduate fellowships and summer stipends for law students interested in pursuing public interest environmental work during the summer following their first year of law school.

To learn more about giving opportunities and how you can help Oregon's next generation of environmental lawyers, please visit

law.uoregon.edu/explore/invest-in-ENR

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