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### Protecting the Environment in an Era of Federal Retreat: The View from New York City

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# PROTECTING THE ENVIRONMENT IN AN ERA OF FEDERAL RETREAT: THE VIEW FROM NEW YORK CITY

Rebecca Bratspies\*

“There will be environmental regulation. It may not be federal regulation, but I promise you that there will be environmental regulation.”†

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## INTRODUCTION

Since its earliest days during the Nixon administration, environmental law has been built on federalism—on the notion that our nation’s shared air, water, and ecosystems were best and most effectively protected by standards set on a national scale and enforced on more local levels. Yet that long-standing pattern has been turned on its head. The United States currently faces not just retreat, but outright hostility to environmental regulation at the federal level. It is hard to remember that as recently as 2015, the Frank

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\* Professor, CUNY School of Law, Director Center for Urban Environmental Reform. This article benefited greatly from feedback at the Fall 2017 *FIU Law Review* Symposium titled Environmental Federalism in the Trump Era. I owe a debt of gratitude to my CUNY colleagues Sarah Lamdan and Doug Cox for their research support, to Erin Ryan, Jessica Owley, Kalyani Robbins, and Andrea McArdle for their invaluable critique, and to the students in my Administrative Law class whose questions encouraged me to write on this topic.

† Personal communication with City Councilmember Costa Constantidies, Chair of the New York City Council’s Environmental Protection Committee.

Lautenberg Chemical Safety for the 21st Century Act passed unanimously in the Senate. The days of any bipartisanship over environmental issues are over, at least for the foreseeable future. Climate deniers,<sup>1</sup> coal lobbyists,<sup>2</sup> and oil executives<sup>3</sup> head key federal agencies. Since taking office in January 2016, the Trump Administration has withdrawn from the Paris Accord,<sup>4</sup> vocally promoted the use of coal and other fossil fuels,<sup>5</sup> sought to eliminate the Clean Power Plan,<sup>6</sup> initiated a process to revoke the Waters of the United States Rule,<sup>7</sup> disbanded the EPA's Environmental Justice Office,<sup>8</sup> decimated

<sup>1</sup> Trump's EPA is run by Scott Pruitt, who is on record stating that carbon dioxide does not cause global warming. Tom DeChristopher, *EPA Chief Scott Pruitt Says Carbon Dioxide is Not a Primary Contributor to Global Warming*, CNBC (Mar. 9, 2017), <https://www.cnn.com/2017/03/09/epa-chief-scott-pruitt.html>. Sadly, Pruitt is far from the only member of the Trump Administration with extreme views on climate change. For a full roster of the climate views of cabinet members, see *Climate Change Denial in the Trump Cabinet: Where Do His Nominees Stand?*, GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/environment/2016/dec/15/trump-cabinet-climate-change-deniers>.

<sup>2</sup> Trump nominated longtime Murray Coal lobbyist Andrew Wheeler to be EPA Deputy Administrator. Lisa Friedman, *Trump Nominates a Coal Lobbyist to Be No. 2 at EPA*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/climate/trump-epa-andrew-wheeler.html>.

<sup>3</sup> Secretary of State Rex Tillerson was CEO of ExxonMobil until December 2016. In that role, he has been accused of misleading shareholders about the costs of climate change. Memorandum of Law in Opposition to Motion to Quash at 6–7, *People v. ExxonMobil Corp.*, No. 451962/2016 (N.Y. Sup. Ct. June 2, 2017).

<sup>4</sup> Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

<sup>5</sup> Alistair Doyle, *Trump's Coal Plan Sends US Energy 'Back to the Past'*, REUTERS (June 16, 2017), <http://www.reuters.com/article/us-climatechange-vatican-idUSKBN197216>; Eric Lipton & Barry Meier, *Under Trump, Coal Mining Gets a New Life on US Lands*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html>. During the 2016 campaign, Trump repeatedly touted his willingness to promote coal mining, and in one of his first speeches after the election promised to “cancel job-killing restrictions on the production of American energy, including shale energy and clean coal, creating many millions of high-paying jobs.” Chris Mooney & Steven Mufson, *Trump Wants to Lift Restrictions on 'Clean Coal.' Whatever That Is.*, WASH. POST (Nov. 22, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/11/22/trump-wants-to-lift-restrictions-on-clean-coal-whatever-that-is>.

<sup>6</sup> To begin the process of eliminating the Clean Power Plan, Trump issued Executive Order titled, “Promoting Energy Independence and Economic Growth.” Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). For a discussion, see Lisa Friedman, *Trump Wants to Repeal Obama's Climate Plan. The Next Fight: Its Replacement*, N.Y. TIMES (Sept. 28, 2017).

<sup>7</sup> Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017), with the Orwellian title “Restoring the Rule of Law, Federalism, and Economic Growth By Reviewing the Waters of the United States Rule.” In response, the EPA and the Army Corps of Engineers moved to rescind the Obama-era rule. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (proposed July 27, 2017).

<sup>8</sup> *EPA's Chief Environmental Justice Officer Steps Down*, NPR (Mar. 13, 2017, 5:16 AM), <https://www.npr.org/2017/03/13/519954289/epas-chief-environmental-justice-official-steps-down>.

the Science Advisory Board,<sup>9</sup> attempted to eliminate national parks and monuments,<sup>10</sup> approved controversial oil pipelines,<sup>11</sup> and that is just a few of the administration's most visible anti-environmental activities. As an example of the perversity inherent in these decisions, Trump issued an executive order revoking Obama-era flood risk management standards<sup>12</sup> just weeks before devastating hurricanes wreaked flooding havoc in Texas, Florida, the Virgin Islands, and Puerto Rico.<sup>13</sup>

Overseeing all these environmental rollbacks has been E. Scott Pruitt, Trump's choice to head the EPA. Pruitt's major qualification for the job was that he sued the EPA fourteen times while serving as Attorney General of Oklahoma.<sup>14</sup> Pruitt's vision of the agency's mission (which incidentally is "to protect human health and the environment")<sup>15</sup> is that "regulators exist to give certainty to those they regulate."<sup>16</sup> Emblematic of Pruitt's approach is the Superfund Task Force Report,<sup>17</sup> a sweeping revamp of how the Comprehensive Environmental Response Compensation and Liability Act<sup>18</sup>

<sup>9</sup> *Trump's EPA Dismisses Half the Scientists on Its Advisory Board*, L.A. TIMES (May 13, 2017, 1:03 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-s-epa-dismisses-half-of-the-1494273804-htmlstory.html>.

<sup>10</sup> Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). No President has ever before tried to revoke a National Monument designation, and Attorney General Opinions dating back to the 1930s have concluded that the Antiquities Act does not give the president that power. See ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATIONS OF NATIONAL MONUMENTS 3 (2016).

<sup>11</sup> Presidential Memorandum on Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8661 (Jan. 24, 2017), *reprinted as amended in* 82 Fed. Reg. 11,129 (Feb. 17, 2017); Presidential Memorandum on Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 (Jan. 24, 2017).

<sup>12</sup> See Exec. Order No. 13,807, 82 Fed. Reg. 40,469 § 6 (Aug. 15, 2017). This Executive Order revoked President Obama's Executive Order No. 13,690 of January 30, 2015, titled "Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input."

<sup>13</sup> At this writing, months after Hurricane Maria wreaked havoc in Puerto Rico, the majority of the island's population still languishes without potable water, reliable electricity, or access to basic governmental services.

<sup>14</sup> *Pruitt v. EPA: 14 Challenges of EPA Rules by the Oklahoma Attorney General*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/interactive/2017/01/14/us/politics/document-pruitt-v-epa-a-compilation-of-oklahoma-14.html>. For a full description of Pruitt's disastrous environmental record, see Jeff Goodell, *Scott Pruitt's Crimes Against Nature*, ROLLING STONE (July 27, 2017), <https://www.rollingstone.com/politics/politics-features/scott-pruitts-crimes-against-nature-195720/>.

<sup>15</sup> *About EPA*, EPA, <https://www.epa.gov/aboutepa> (last visited Oct. 31, 2017).

<sup>16</sup> *EPA Chief Scott Pruitt Says Regulators 'Exist to Give Certainty' in First Speech to Agency*, CNBC (Feb. 21, 2017), <https://www.cnn.com/2017/02/21/watch-scott-pruitt-deliver-a-speech-to-epa-staff-live.html>.

<sup>17</sup> U.S. ENVTL. PROT. AGENCY, EPA SUPERFUND TASK FORCE RECOMMENDATIONS (2017), [https://www.epa.gov/sites/production/files/2017-07/documents/superfund\\_task\\_force\\_report.pdf](https://www.epa.gov/sites/production/files/2017-07/documents/superfund_task_force_report.pdf) [hereinafter EPA SUPERFUND TASK FORCE].

<sup>18</sup> 42 U.S.C. §§ 9601 *et seq.* (2018).

(“CERCLA” or “Superfund”) deals with the pressing problem of contaminated industrial sites. Written in just two months, with no formal public input, or opportunity to comment, the Report does however, explicitly acknowledge that the agency considered “unsolicited but welcome, letters and white papers from industry, trade groups and individual businesses,”<sup>19</sup> but references no input whatsoever from any affected communities, or from environmental groups. Purportedly motivated by a “passion to clean up the country’s worst pollution,” this Report identifies five goals for Superfund enforcement, and makes forty-two recommendations for achieving those goals. The thrust of the document is to reorient Superfund cleanup priorities away from health and environmental outcomes, and toward redevelopment of contaminated sites. The Goals and Recommendations laid out in this Report for implementing Superfund make no reference to “health,” nor do they mention “ecosystems,” “nature,” “children,” or “vulnerable populations.” The Report mentions “environmental justice” exactly once.<sup>20</sup> By contrast, “redevelopment” is mentioned thirty-nine times, “reuse” is mentioned sixty-eight times, and the Agency devotes four pages and ten Recommendations to specifying how to better protect those investing in contaminated properties.<sup>21</sup>

The Administration’s nominee to head the EPA’s air program is an industry lawyer who was rejected for that same position during the Bush administration as a “doctrinal hit man”<sup>22</sup> whose “flagrant disregard for the Clean Air Act [was] alarming.”<sup>23</sup> In November 2017, the EPA boasted that it went “in the heart of coal country” to hold a public hearing about the agency’s proposal to eliminate the Clean Power Plan.<sup>24</sup> Much like the carefully

<sup>19</sup> EPA SUPERFUND TASK FORCE, *supra* note 17.

<sup>20</sup> On the second-to-last page of the Report, in Recommendation 40, environmental justice groups are included in a laundry list of those with whom the agency should hold meetings. *Id.* at 25.

<sup>21</sup> *Id.* at 15–19.

<sup>22</sup> *Dubious Choices*, N.Y. TIMES (Apr. 24, 2006), <https://www.nytimes.com/2006/04/24/opinion/dubious-choices.html>.

<sup>23</sup> JIM JEFFORDS, SENATE COMM. ON ENV’T AND PUB. WORKS, STATEMENT ON WEHRUM NOMINATION (2006), <https://www.epw.senate.gov/public/index.cfm/2006/4/post-ea292535-0f1f-42f9-be7a-661b2b84f501>.

<sup>24</sup> See EPA Proposed Repeal of Carbon Pollution Emissions Standards for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017). The agency was perhaps surprised there when the Chamber of Commerce, and many industry players urged it to reject proposals from climate skeptics to refrain entirely from regulating greenhouse gas emissions. Evan Halper, *Industries That Cheered Trump’s Climate Regulation Rollbacks Now Worry They’ll Go Too Far*, L.A. TIMES (Dec. 1, 2017, 9:41 AM), <http://www.latimes.com/95337101-132.html>. The agency was also confronted by testimony from residents, including former coal miners suffering from respiratory ailments, asserting they needed “EPA’s immediate help, not their abandonment” and urging the agency to put health concerns above the desires of the coal industry. Brady Dennis, *In the Heart of Coal Country, EPA Gets an Earful About the Clean Power Plan*, WASH. POST (Nov. 28, 2017),

scripted March 2017 signing ceremony for the Executive Order on that topic,<sup>25</sup> this hearing was intended to be political theatre justifying sweeping regulatory rollbacks. The agency also issued a notice of proposed rulemaking to exempt refurbished trucks (so-called “glider kits”) from more stringent emissions regulations,<sup>26</sup> and refused to ban chlorpyrifos, a pesticide that the EPA’s own scientists had concluded posed an undue risk of harm to young children.<sup>27</sup>

There is no escape from the conclusion that the Trump Administration intends to abandon the federal government’s decades-long project of environmental protection. The question is, what will happen to environmental law now?

Part of the answer lies in the choices that cities make about how to manage their environmental footprints,<sup>28</sup> even in the absence of federal leadership. As Former EPA Administrator Gina McCarthy put it, “Cities are where the action is. They’re still in.”<sup>29</sup> What Richard Briffault called “localism,” the power of cities to drive local policy, is a value deeply embedded in the American legal and political culture.<sup>30</sup> Cities therefore offer potential as a locus for environmental law, innovation, and enforcement untethered to federal pullbacks.

The United States is rapidly urbanizing<sup>31</sup>—with urban populations growing by 12.1% over the last decade.<sup>32</sup> According to the United States Census Bureau, 80.7% of Americans live in urban areas, loosely defined.<sup>33</sup>

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<https://www.washingtonpost.com/news/energy-environment/wp/2017/11/28/in-the-heart-of-coal-country-epa-gets-an-earful-about-clean-power-plans-fate/>.

<sup>25</sup> Maria Gallucci, *In Ultimate Insult, Trump Rolls Back EPA’s Climate Policies from Within the EPA*, MASHABLE (Mar. 27, 2017), <https://mashable.com/2017/03/28/trump-climate-change-rollback-order-from-epa/>.

<sup>26</sup> Repeal of Emission Requirement for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442 (proposed Nov. 16, 2017).

<sup>27</sup> Chlorpyrifos; Order Denying PANNA and NRDC’s Petition to Revoke Tolerances, 82 Fed. Reg. 16,581 (Apr. 5, 2017).

<sup>28</sup> The nation’s 10 largest cities are home to over 25 million people. DARRYL T. COHEN ET AL., U.S. CENSUS BUREAU, *POPULATION TRENDS IN INCORPORATED PLACES: 2000–2013* 6 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1142.pdf>.

<sup>29</sup> Gina McCarthy, Address at Columbia Law School’s Third David Sive Memorial Lecture on Environmental Law (Sept. 28, 2017).

<sup>30</sup> Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

<sup>31</sup> See generally, COHEN ET AL., *supra* note 28, at 7. The United States Census Bureau defines an urban area to include a city and its adjacent, densely settled suburbs. Thus, the boundaries of an urban area may differ from political boundaries.

<sup>32</sup> *Growth in Urban Populations Outpaces Rest of Nation*, U.S. CENSUS BUREAU (Mar. 26, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-50.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html).

<sup>33</sup> *Id.*

Across the globe, cities and metropolitan areas have an outsized economic impact,<sup>34</sup> and nowhere is that more true than in the United States. In 2010, nearly 85% of the United States' GDP was generated by the nation's largest cities.<sup>35</sup> McKinsey predicted that by 2025, the 259 largest United States cities will collectively drive more than 10% of global GDP growth.<sup>36</sup>

If cities are powerful economic engines, New York City stands alone as by far the most economically powerful city in the world.<sup>37</sup> New York City is the nation's largest city, with more than 8.4 million residents. The New York City metro area, which includes Newark, is the single most populous urban area, with more than 18.3 million inhabitants.<sup>38</sup> Thus, the choices that New York City makes have the potential to shape the environmental behaviors of roughly 17% of the United States population. Moreover, New York City, like many coastal cities, has reason to care about climate change. Hurricane Sandy underscored the risks the New York metropolitan area faces from rising seas and extreme weather.<sup>39</sup>

This combination of a large population at high vulnerability puts New York City on the front lines of climate change. Fortunately, New York City's political leaders are well-aware of the vulnerability, and eager to position the city to play a leadership role in driving national and global action to combat climate change. Thus it is no surprise that in the days and months after the 2016 election, New York City took a markedly divergent path from the federal government. Where the federal government has backed away from environmental protection, New York City stepped forward. In 2017, New York City's Mayor and City Council enacted a slew of new environmental laws and policies. On issues like climate change, environmental justice, air pollution, food waste, water quality, and public transportation, New York City has attempted to move the ball forward. This paper will describe some of those efforts, focusing on climate change and environmental justice.

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<sup>34</sup> See generally, Richard Florida, *What is the World's Most Economically Powerful City?*, ATLANTIC (May 8, 2012), <https://www.theatlantic.com/business/archive/2012/05/what-is-the-worlds-most-economically-powerful-city/256841/> (the top 10 cities alone are responsible for roughly a fifth of global economic production).

<sup>35</sup> JAMES MANYIKA ET AL., URBAN AMERICA: US CITIES IN THE GLOBAL ECONOMY 2 (2012).

<sup>36</sup> *Id.* at 1.

<sup>37</sup> New York ranks first or second on multiple comprehensive rankings of global cities, including the Martin Prosperity Institute's Global Economic Power Index, the Economist's Global City Competitiveness Index, AT Kearney's Global Cities Index, the Global Finance Center's Index, and McKinsey's Global City GDP 2025 Index. Florida, *supra* note 34.

<sup>38</sup> *QuickFacts: New York*, U.S. CENSUS BUREAU (Jul. 1, 2017), <https://www.census.gov/quickfacts/NY>.

<sup>39</sup> More recent experiences in Houston, Miami, and San Juan only underscore the urgency that coastal cities across the globe feel with regard to combatting the effects of climate change.

## I. CLIMATE CHANGE

We have known for nearly-two decades that “[i]t is not a question of whether the Earth’s climate will change, but rather when, where, and by how much.”<sup>40</sup> Scientists have conclusively documented the anthropogenic origins of climate change.<sup>41</sup> Indeed, the Intergovernmental Panel on Climate Change (“IPCC”) characterized the scientific evidence as “unequivocal.”<sup>42</sup> Human impacts on the global environment have become so omnipresent that the term Anthropocene is no longer an esoteric debate among scientists.<sup>43</sup> Yet the speed and scale of the changes has exceeded prediction. Sixteen of the seventeen warmest years on record have occurred since 2000.<sup>44</sup> The last time the world experienced a month with below average temperatures was February 1985.<sup>45</sup> Glaciers are retreating at a rate “without precedent.”<sup>46</sup> The Antarctic ice shelves are disintegrating.<sup>47</sup> In coastal zones, “sunny day flooding” is on the rise,<sup>48</sup> and many coastal cities will face inundation in the

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40 Robert T. Watson, Chairman, Intergovernmental Panel on Climate Change, Report to the Fifth Conference of the Parties of the United Nations Framework Convention on Climate Change (Nov. 2, 1999), <https://www.ipcc.ch/graphics/speeches/robert-watson-november-1999.pdf>.

41 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 7 (2014), [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf).

42 *Id.* at 2.

43 See Paul J. Crutzen, *Geology of Mankind*, 415 NATURE 23 (2002); Jan Zalasiewicz et al., *The New World of the Anthropocene*, 44 ENVTL. SCI. & TECH. 2228 (2010).

44 Justin Gillis, *Earth Sets a Temperature Record for the Third Straight Year*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/science/earth-highest-temperature-record.html>; NASA, *NOAA Analysis Reveals Record Shattering Global Warm Temperatures in 2015*, NASA (Jan. 20, 2016), <https://www.giss.nasa.gov/research/news/20160120/>.

45 GLOBAL Land-Ocean Temperature Index in 0.01 Degrees Celsius, NASA, [https://data.giss.nasa.gov/gistemp/tabledata\\_v3/GLB.Ts+dSST.txt](https://data.giss.nasa.gov/gistemp/tabledata_v3/GLB.Ts+dSST.txt). Anyone under the age of 32 (as of this writing) has never lived through a single month with below average global temperatures.

46 GLOBAL GLACIER CHANGE BULLETIN 2012–2013, WORLD GLACIER MONITORING SERVICE 8 (2015); Margaret K. Hobson, *Alaska’s Glaciers Are Retreating*, SCI. AM. (Sept. 30, 2016), <https://www.scientificamerican.com/article/alaska-s-glaciers-are-retreating/>.

47 Justin Gillis, *Miles of Ice Collapsing Into the Sea*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/18/climate/antarctica-ice-melt-climate-change.html>; Jugal K. Patel & Justin Gillis, *An Iceberg the Size of Delaware Just Broke Off a Major Antarctic Ice Shelf*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/interactive/2017/06/09/climate/antarctica-rift-update.html>. For decades, scientists have been warning of the catastrophic sea level rise associated with climate-change induced Antarctic melting. See John H. Mercer, *West Antarctic Ice Sheets and CO2 Greenhouse Effect: A Threat of Disaster*, 271 NATURE 321 (1978).

48 Justin Gillis, *Flooding of Coast, Caused by Global Warming, Has Already Begun*, N.Y. TIMES (Sept. 4, 2016), <https://www.nytimes.com/2016/09/04/science/flooding-of-coast-caused-by-global-warming-has-already-begun.html>. Sunny day flooding refers to tidal flooding due to rising sea levels. See Jonathan Corum, *A Sharp Increase in ‘Sunny Day’ Flooding*, N.Y. TIMES (Sept. 3, 2016),



coming decades.<sup>49</sup> Climate change is driving global biodiversity to the precipice of mass extinctions.<sup>50</sup>

Global atmospheric carbon levels have increased 24% since measurements began at Mauna Loa in the late 1950s.<sup>51</sup> In September 2016, the Scripps Institute announced that global atmospheric carbon dioxide levels crossed the 400 ppm line permanently (or at least for “the indefinite future.”).<sup>52</sup> While there is nothing magical about 400 ppm, it had taken on symbolic importance as a boundary for keeping climate change within tolerable bounds. Thus, crossing that 400 ppm line offered a “stark reminder that the world is still not on track to limit CO<sub>2</sub> emissions and therefore climate impacts.”<sup>53</sup>

We are already seeing glimmers of what this will mean for our lives. Wildfires in the Pacific Northwest scorched 7 million acres during the summer of 2017.<sup>54</sup> Heatwaves in Arizona prompted residents to flood social media with photos of eggs, cookies, and meat cooking in the sun.<sup>55</sup> Planes

<https://www.nytimes.com/interactive/2016/09/04/science/global-warming-increases-nuisance-flooding.html>.

<sup>49</sup> ERIKA SPANGER-SIEGFRIED ET AL., WHEN RISING SEAS HIT HOME, UNION OF CONCERNED SCIENTISTS 16–20 (2017).

<sup>50</sup> Chris D. Thomas, *Extinction Risk from Climate Change*, 427 NATURE 145 (2004) (predicting that under mid-range climate-warming scenarios 15%–37% of species will be committed to extinction by 2050).

<sup>51</sup> *Trends in Atmospheric Carbon Dioxide: Full Mauna Loa CO<sub>2</sub> Record*, NOAA, <https://www.esrl.noaa.gov/gmd/ccgg/trends/full.html>; *For First Time, Earth’s Single-Day CO<sub>2</sub> Tops 400 ppm*, NASA (May 9, 2013), <https://climate.nasa.gov/news/916/for-first-time-earths-single-day-co2-tops-400-ppm/>.

<sup>52</sup> Brian Kahn, *Earth’s CO<sub>2</sub> Passes the 400PPM Threshold—Maybe Permanently*, SCI. AM. (Sept. 27, 2016), <https://www.scientificamerican.com/article/earth-s-co2-passes-the-400-ppm-threshold-maybe-permanently/> (explaining that for the first time, September carbon dioxide levels remained above 400 parts per million); Robb Monroe, *Notes on Reaching the Annual Low Point*, SCRIPPS INST. OF OCEANOGRAPHY (Sept. 23, 2016), <https://scripps.ucsd.edu/programs/keelingcurve/2016/09/23/note-on-reaching-the-annual-low-point/>. Four hundred ppm is a symbolic milestone, representing decades of locked in warming, no matter what happens to reduce carbon emissions in the present or future. Michael Slezak, *World’s Carbon Dioxide Concentration Teetering on the Point of No Return*, GUARDIAN (May 16, 2016), <https://www.theguardian.com/environment/2016/may/11/worlds-carbon-dioxide-concentration-teetering-on-the-point-of-no-return>.

<sup>53</sup> *NASA Scientists React to 400 ppm Carbon Milestone*, NASA (May 21, 2013), <https://climate.nasa.gov/400ppmquotes/> (quoting NASA scientist Dr. Annmarie Elderling on the first occasion that atmospheric carbon crossed the 400ppm threshold).

<sup>54</sup> For an explanation of the relationship between wildfires and climate change see *Is Global Warming Fueling Increased Wildfire Risks?*, UNION OF CONCERNED SCIENTISTS, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/impacts/global-warming-and-wildfire.html](http://www.ucsusa.org/global_warming/science_and_impacts/impacts/global-warming-and-wildfire.html) (last visited June 17, 2018).

<sup>55</sup> Chaffin Mitchell, *It’s So Hot in Arizona that Street Signs and Mailboxes are Melting*, ACCUWEATHER (June 26, 2017), <https://www.accuweather.com/en/weather-news/its-so-hot-in-arizona-that-street-signs-and-mailboxes-are-melting/70002032>.

were grounded because it was “too hot to fly.”<sup>56</sup> The 2017 hurricane season was particularly dramatic, with Houston experiencing unprecedented flooding, and Puerto Rico and many Caribbean Islands suffering massive destruction. As the evidence that the climate is changing piles up, climate denials are becoming increasingly implausible. People are starting to take notice. Indeed, a recent poll showed that a majority of Americans believe that climate change contributed to the severity of the 2017 hurricane season.<sup>57</sup>

Nevertheless, the federal government is turning its back on efforts to stop climate change. The Trump Administration has instead promoted increased use of coal and other fossil fuels,<sup>58</sup> has taken steps to dismantle the Clean Power Plan,<sup>59</sup> and proposed entirely eliminating the Energy Star program.<sup>60</sup> On June 1, 2017, Trump announced his intention to withdraw the

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<sup>56</sup> Matt Falcus, *Chaos in Arizona: What Happens When It's Too Hot to Fly?*, MULTIBRIEFS (June 27, 2017), <http://exclusive.multibriefs.com/content/chaos-in-arizona-what-happens-when-its-too-hot-to-fly/transportation-technology-automotive>; Amy B. Wang, *It's So Hot in Phoenix that Airplanes Can't Fly*, WASH. POST (June 21, 2017), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2017/06/20/its-so-hot-in-phoenix-that-airplanes-cant-fly/> (reporting that many regional jets can only operate out of Phoenix when the temperatures is 118° F and below). See generally, Zach Wichter, *Too Hot to Fly? Climate Change May Take a Toll on Air Travel*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/business/flying-climate-change.html> (explaining how excessive heat affects air travel). Climate change could affect a significant percentage of flights by mid-century. Ethan D. Coffel et al., *The Impacts of Rising Temperatures on Aircraft Takeoff Performance*, 144 CLIMACTIC CHANGE 381 (July 13, 2017).

<sup>57</sup> *Washington Post-ABC News Poll September 18-21, 2017*, WASH. POST (Oct. 20, 2017), [https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2017/09/28/National-Politics/Polling/release\\_494.xml](https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2017/09/28/National-Politics/Polling/release_494.xml).

<sup>58</sup> Alister Doyle, *Trump's Coal Plan Sends US Energy 'Back to the Past'*, REUTERS (June 16, 2017), <http://www.reuters.com/article/us-climatechange-vatican-idUSKBN197216>; Eric Lipton & Barry Meier, *Under Trump, Coal Mining Gets a New Life on US Lands*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html>. During the 2016 campaign, Trump repeatedly touted his willingness to promote coal mining, and in one of his first speeches after the election promised to “cancel job-killing restrictions on the production of American energy, including shale energy and clean coal, creating many millions of high-paying jobs.” Mooney & Mufson, *supra* note 6.

<sup>59</sup> See Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). For an explanation of why this matters, see Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html>. At a recent rally in Huntsville, Alabama, Trump bragged, “Did you see what I did to [the Clean Power Plan]? Boom, gone.” Eric Bradner, *Trump Touts 'Big Luther's' loyalty, Electability at Alabama Rally*, CNN (Sept. 22, 2017), <http://www.cnn.com/2017/09/22/politics/trump-alabama-trip-senate-race/index.html>.

<sup>60</sup> Mary H.J. Farrell, *Proposed Federal Budget Eliminates Energy Star*, CONSUMER REPORTS (May 23, 2017), <https://www.consumerreports.org/appliances/proposed-federal-budget-eliminates-energy-star/>.

United States from the Paris Agreement.<sup>61</sup> The announcement did not go over well in New York City.

### A. *New York City Responds to Trump on Climate Change*

New York City's Mayor, Bill de Blasio, responded by tweeting that New York City would be "taking matters into our own hands."<sup>62</sup> The very next day, Mayor de Blasio signed Executive Order 26, the Climate Action Executive Order, which described the decision to pull out of the Paris Accords as "put[ting] millions of Americans at risk."<sup>63</sup> As a result, de Blasio declared that "cities like New York City must step up to stop climate change."<sup>64</sup> To that end, de Blasio's Executive Order adopted the Paris Agreement goal of keeping anthropogenic climate change under 1.5 degrees Celsius,<sup>65</sup> and directed City Agencies to create a citywide plan to advance that goal.<sup>66</sup> At the same time, New York City's former mayor, Michael Bloomberg,<sup>67</sup> helped lead the "We're Still In" coalition—a nationwide drive to collect carbon reduction pledges from cities, counties, states, and private actors aimed at achieving the United States' Paris Agreement commitment regardless of the stance of the federal government.<sup>68</sup> This coalition had a significant presence at the November 2017 23rd Conference of Parties for the UN Climate Convention, seeking to counteract the official US delegation which characterized increased fossil fuel use as "a global reality."<sup>69</sup>

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<sup>61</sup> Andrew Restuccia & Matthew Nussbaum, *Trump Announces US Withdrawal from Paris Climate Deal*, POLITICO (June 1, 2017), <https://www.politico.eu/article/trump-announces-us-withdrawal-from-paris-climate-deal/>. On August 4, 2017, the Trump Administration delivered a notice to that effect to the United Nations. Since the terms of the Paris Agreement bar any withdrawal before 2020, this notice was largely symbolic. Andrew Restuccia, *Trump Administration Delivers Notice US Intends to Withdraw From Paris Climate Deal*, POLITICO (Aug. 4, 2017), <https://www.politico.com/story/2017/08/04/trump-notice-withdraw-from-paris-climate-deal-241331>.

<sup>62</sup> NYC Mayor's Office (@NYCMayorsOffice), TWITTER (June 2, 2017, 4:36 PM), <https://twitter.com/NYCMayorsOffice/status/870786281214795777/video/1>.

<sup>63</sup> Exec. Order No. 26, *Climate Action Executive Order*, N.Y.C. OFF. MAYOR (June 2, 2017), [http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2017/eo\\_26.pdf](http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2017/eo_26.pdf).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1, § 1.

<sup>66</sup> *Id.* at 2, § 2.

<sup>67</sup> For a discussion of the urban network that emerged from the C40, see, for example, Andrea McArdle, *Lessons for New York: Comparative Urban Governance and the Challenge of Climate Change*, 42 FORDHAM URB. L.J. 91 (2014).

<sup>68</sup> Hiroku Tabuchi & Lisa Friedman, *U.S. Cities, States and Businesses Pledge to Measure Emissions*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/climate/cities-states-businesses-emissions-climate-pact.html>.

<sup>69</sup> Stephen Leahy, *Half of US Spending Power Behind Paris Agreement*, NAT'L GEOGRAPHIC (Nov. 15, 2017), <https://news.nationalgeographic.com/2017/11/were-still-in-paris-climate-agreement->

New York City was not the only city frustrated by the President's choice to abandon the Paris Agreement—the same day that Mayor de Blasio issued his executive order, the United States Conference of Mayors held a press conference to voice their strong opposition to the decision and to reiterate their support for the Paris Agreement.<sup>70</sup> America's Pledge, an umbrella organization led by California Governor Jerry Brown, and former New York City Mayor Michael R. Bloomberg, rapidly gathered carbon reduction commitments from 239 cities and counties, as well as nine states, and thousands of businesses, investors, and educational institutions.<sup>71</sup>

Mayor de Blasio's Executive Order 26 built on New York City's strong track record of working to reduce greenhouse gas emissions in the face of federal intransigence. In 2007, while the Bush Administration was conducting a disinformation campaign about climate change,<sup>72</sup> New York City responded by striking out on its own. That year, the City Council unanimously enacted the *New York City Climate Protection Act*.<sup>73</sup> This Act required the City to investigate and publicize data about the City's contribution to climate change,<sup>74</sup> and to take concrete actions to reduce the City's greenhouse gas emissions 30% by 2030.<sup>75</sup> To that end, then-Mayor, Michael Bloomberg, unveiled *PLaNYC 2030: A Greener, Greater New York*.<sup>76</sup> *PLaNYC* explicitly recognized the linkages between climate resilience and overall social resilience, setting environmental justice goals as well as economic and environmental goals. As part of *PLaNYC*, the Mayor created the New York City Panel on Climate Change ("NPCC"), as a technical

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coalition-bonn-cop23/. This ongoing dialogue raises fascinating questions about the relationship between international law and sub-state actors that are beyond the scope of this article.

<sup>70</sup> See *Mayors To Voice Strong Opposition To Withdrawal From Paris Climate Accord*, U.S. CONF. MAYORS (June 2, 2017), <https://www.usmayors.org/2017/06/02/mayors-to-voice-strong-opposition-to-withdrawal-from-paris-climate-accord/>.

<sup>71</sup> See WE ARE STILL IN, <http://wearestillin.com/> (last visited Oct. 31, 2017). My institution, the City University of New York (CUNY) is one of the signatories. For more information, see AMERICA'S PLEDGE, <https://www.americaspledgeonclimate.com/> (last visited Oct. 31, 2017).

<sup>72</sup> Suzanne Goldenberg, *The Worst of Times: Bush's Environmental Legacy Examined*, GUARDIAN (Jan. 16, 2009), <https://www.theguardian.com/politics/2009/jan/16/greenpolitics-georgebush>.

<sup>73</sup> N.Y.C. Local Law No. 55 (2007) amended the New York City Administrative Code in Relation to Greenhouse Gases. The next year, N.Y.C. Local Law No. 22 repealed and replaced Local Law 55. However, Local Law 22 recodified the substantive provisions of Local Law 55.

<sup>74</sup> New York City Admin. Code § 24-803(c) required the City to conduct an inventory of greenhouse gas emissions and to share that publicly on City websites.

<sup>75</sup> New York City Admin. Code § 24-802(b) required that the City reduce citywide emissions by 30% below 2006 levels by 2017.

<sup>76</sup> N.Y.C., PLANYC: A GREENER, GREATER NEW YORK (2011), [http://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc\\_2011\\_planyc\\_full\\_report.pdf](http://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc_2011_planyc_full_report.pdf) [hereinafter PLANYC].

advisory group to advise the City on climate risks and resilience,<sup>77</sup> as well as the New York City Climate Change Adaptation Task Force.<sup>78</sup> The City Council subsequently enacted Local Law 42<sup>79</sup> to institutionalize both the Panel and the Task Force as permanent advisory bodies. By 2011, New York City had already reduced its emissions by 13%, even as the City's population grew.<sup>80</sup> In recognition of the sweeping ambition of this initiative, the C40 Cities Climate Leadership Group elected then-Mayor Michael Bloomberg to be its chair.<sup>81</sup> That put New York City in charge of the C40 Cities Initiative, which connects mayors around the world to “enable stronger collective climate action.”<sup>82</sup>

In 2013, New York City adopted a revised version of *PlaNYC* subtitled: *New York City's Pathways to Deep Carbon Reductions*.<sup>83</sup> The next year, New York City doubled down on its commitment to emissions reduction, raising the City's greenhouse gas emissions reduction target from a 30% reduction by 2030 to an 80% reduction by 2050 (known as “80 x 50”).<sup>84</sup> Under the new, more ambitious law, the old 30% target went from being the end goal to simply a progress marker along the path to even more significant reductions.<sup>85</sup> In embracing this goal, New York City acknowledged that limiting global temperature increase to no more than 1.5 degrees Celsius, the goal of the Paris Agreement, means that developed countries would have to

<sup>77</sup> *New York City Panel on Climate Change*, NYC.GOV (Feb. 2015), <http://www1.nyc.gov/site/orr/challenges/nyc-panel-on-climate-change.page>. This panel, which consisted of climate change and climate impact scientists, as well as legal, insurance and risk management experts, was first convened in 2008 to produce a set of climate projections specific to New York City. In 2012, City Council enacted Local Law 42 to establish the Panel as an ongoing body tasked with advising the Office of Long-Term Planning and Sustainability. In 2013, after Hurricane Sandy, the Panel produced the 2013 Climate Risk Information Report and in 2015 issued *Building the Knowledge for Climate Resiliency*. See *Building the Knowledge for Climate Resiliency*, N.Y. ACAD. SCIS. (Jan. 2015), <http://onlinelibrary.wiley.com/doi/10.1111/nyas.2015.1336.issue-1/issuetoc>.

<sup>78</sup> The Task Force is made up of City and State agencies, authorities, and private companies that operate, maintain, or control critical infrastructure in New York City. For details, see NYC Climate Adaptation Task Force, *ORR Flood Insurance Presentation*, N.Y.C. MAYOR'S OFF. RECOVERY AND RESILIENCY (May 10, 2016), <http://edepot.wur.nl/381111>.

<sup>79</sup> N.Y.C. Local Law No. 42. (2012).

<sup>80</sup> PLANYC, *supra* note 76, at 3, 5.

<sup>81</sup> *Mayor Bloomberg and Toronto Mayor David Miller Announce That Mayor Bloomberg Has Been Elected Chair of the C40 Climate Leadership Group*, NYC.GOV (Sept. 21, 2010), <http://www1.nyc.gov/office-of-the-mayor/news/401-10/mayor-bloomberg-toronto-mayor-david-miller-that-mayor-bloomberg-has-been-elected-chair#/1>.

<sup>82</sup> *Networks*, C40 CITIES, <http://www.c40.org/networks> (last visited June 17, 2018).

<sup>83</sup> N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING AND SUSTAINABILITY, *NEW YORK CITY'S PATHWAY TO DEEP CARBON REDUCTIONS* (2013), [http://s-media.nyc.gov/agencies/planyc2030/pdf/nyc\\_pathways.pdf](http://s-media.nyc.gov/agencies/planyc2030/pdf/nyc_pathways.pdf).

<sup>84</sup> N.Y.C. Local Law No. 66 (2014).

<sup>85</sup> *Id.* at § 24-803.

reduce greenhouse gas emissions by that amount. Six months later, New York City released its blueprint for reaching its 80 x 50 goal in a document called *One New York: The Plan for a Strong and Just City* (“*OneNYC*”).<sup>86</sup> In late 2016, New York City released its *Roadmap to 80 x 50*, which upped the City’s interim greenhouse gas emissions reductions goal to 40% by 2030.<sup>87</sup> As part of the *OneNYC* plan, Mayor de Blasio announced the *One City Built to Last Initiative*, which involved a massive investment in retrofitting public buildings for energy efficiency.<sup>88</sup>

Since Trump took office, New York City has pressed forward with its aggressive plans to reduce its carbon emissions and to adapt to climate change. Indeed, just days after the inauguration, New York City launched the NYC Carbon Challenge for Commercial Owners and Tenants.<sup>89</sup> This new initiative brought twenty-two of the City’s major commercial landowners into the ongoing NYC Carbon Challenge.<sup>90</sup> The Carbon Challenge, which began in 2008 as an initiative for government and institutional facilities to cut their carbon emissions by 30% or more, has already resulted 340,000 tCO<sub>2</sub>e in avoided emissions, the equivalent of taking 70,000 cars off the road.<sup>91</sup> With the addition of the commercial landowners, the Carbon Challenge initiative is expected to reduce emissions by 515,000 tCO<sub>2</sub>e—the equivalent of taking more than 210,000 cars off the roads.<sup>92</sup>

### B. *New York City: Reducing the Climate Footprint of Buildings*

In New York City, emissions from buildings, mostly attributable to heating oil and lighting, make up the lion’s share of greenhouse gas

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<sup>86</sup> *OneNYC* provided what the City called its “blueprint for inclusive climate action that works for all New Yorkers across four key visions of Growth, Equity, Sustainability, and Resiliency.” *80 x 50*, NYC.GOV, <https://www1.nyc.gov/site/sustainability/codes/80x50.page>. It described, *inter alia*, new investments in renewable energy, electric vehicles, and solid waste management designed to climate objectives while also providing important co-benefits in the form of improved air quality across the city.

<sup>87</sup> N.Y.C. MAYOR’S OFFICE OF SUSTAINABILITY, NEW YORK CITY’S ROADMAP TO 80 X 50 (2016), [https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/New%20York%20City’s%20Roadmap%20to%2080%20x%2050\\_Final.pdf](https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/New%20York%20City’s%20Roadmap%20to%2080%20x%2050_Final.pdf).

<sup>88</sup> *One City Built to Last: Letter from the Mayor*, NYC.GOV, <http://www.nyc.gov/html/builttolast/pages/home/home.shtml> (last visited June 17, 2018).

<sup>89</sup> *Mayor De Blasio Announces Major Expansion of NYC Carbon Challenge as 22 Commercial Owners and Tenants Commit to Dramatically Reduce Greenhouse Gas Emissions in Next 10 Years*, NYC.GOV (Jan. 26, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/044-17/mayor-de-blasio-major-expansion-nyc-carbon-challenge-22-commercial-owners-and>.

<sup>90</sup> *Id.* For details about the Carbon Challenge, see *The New York City Carbon Challenge*, NYC.GOV, <http://www.nyc.gov/html/gbee/html/challenge/nyc-carbon-challenge.shtml>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

emissions. New York City had already taken steps to reduce these impacts. It has enacted a series of local laws targeting pollution from heating oil.<sup>93</sup> Large and mid-sized buildings are required to create energy audits<sup>94</sup> and to benchmark their energy usage.<sup>95</sup> To encourage conservation, City Council simultaneously enacted a local law requiring sub-metering of all tenant spaces over 10,000 square feet,<sup>96</sup> and all non-residential spaces over 5,000 square feet,<sup>97</sup> meaning that each tenant knows of and pays for its own energy usage.

Because air conditioning accounts for 15%-20% of all electricity use in New York City commercial buildings,<sup>98</sup> it has also been a target. The City began with perhaps the lowest of all low-hanging fruit, by requiring that chain stores keep their doors closed when air conditioning is running.<sup>99</sup> Even though this law, Local Law 38, was a “no brainer,”<sup>100</sup> it was intended to prod a big behavioral change. Many retail stores deliberately propped their doors open on hot days, using a blast of cool, air-conditioned, air to lure passers-by into the shop’s interior. By outlawing this practice, Local Law 38 hoped to achieve twin goals: to significantly reducing carbon dioxide emissions,<sup>101</sup>

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<sup>93</sup> See *NYC Clean Heat*, NYC.GOV, <https://www.nycleanheat.org/spot-the-soot> (last visited Oct. 31, 2017).

<sup>94</sup> To amend the New York city charter and the administrative code of the city of New York, in relation to requiring energy audits and retro-commissioning of base building systems of certain buildings and retro-fitting of certain city-owned buildings. N.Y.C. Local Law No. 89 (2009). In 2016, City Council passed Local Law 133 to amend the administrative code of the city of New York “in relation to expanding the list of buildings required to be benchmarked for energy and water efficiency.” N.Y.C. Local Law No. 133 (2016).

<sup>95</sup> N.Y.C. Local Law No. 84 (2009) imposed these requirements on buildings with greater than 50,000 square feet of floor area.

<sup>96</sup> N.Y.C. Local Law No. 88 (2009), titled “To amend the administrative code of the city of New York, in relation to upgrading lighting systems and the installation of sub-meters in certain buildings.” As its title indicates, Local Law 88 also required significant energy efficiencies with regard to upgrading building lighting systems. *Id.* In 2016, City Council enacted Local Law 134, expanding this lighting requirement to buildings with 25,000 square feet of floor area. N.Y.C. Local Law No. 134 (2016).

<sup>97</sup> Local Law No. 132 and Local Law No. 136 similarly expanded the sub-metering requirement. N.Y.C. Local Law No. 132 (2016); N.Y.C. Local Law No. 136 (2016).

<sup>98</sup> N.Y.C. MAYOR’S OFFICE OF SUSTAINABILITY, ONE CITY BUILT TO LAST TECHNICAL WORKING GROUP TRANSFORMING NEW YORK CITY BUILDINGS FOR A LOW CARBON FUTURE 4 (2016), [https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/TWGreport\\_04212016.pdf](https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/TWGreport_04212016.pdf).

<sup>99</sup> N.Y.C. Local Law No. 38 (2008).

<sup>100</sup> Eric A. Goldstein, *Cold Comfort: Some NYC Businesses Still Blast A.C. onto Sidewalks*, NRDC (Aug. 21, 2009), <https://www.nrdc.org/experts/eric-goldstein/cold-comfort-some-nyc-businesses-still-blast-ac-sidewalks> (quoting Councilmember Brewer as stating, “there’s no use cooling the sidewalk.”).

<sup>101</sup> For each business that complies with the law by closing its front door during the summer months, Con Edison estimates a reduction of 2.5 tons reduction of CO<sub>2</sub> emissions, and a \$1000 saving on electric bills. Benjamin Falvo, *Open Doors Cost More*, GREENLIGHT ENERGY (July 14, 2016), <https://gogreenlightenergy.com/open-doors-cost-more/>.

and by reducing energy demand to also reducing the risk of summer brown outs.<sup>102</sup> In the first few years, there was little in the way of publicity or enforcement of the law, and informal surveys showed that compliance was spotty.<sup>103</sup> Beginning in July of 2016, however, City Council acted to change that situation by amending the law to encompass all retail stores, and by raising noncompliance fines to give the law more teeth.<sup>104</sup> At the same time, New York City's Department of Consumer Affairs also worked to develop a "compliance pull" through a social media campaign with the tagline "*Shut the Front Door!*"<sup>105</sup>

In 2010, New York City enacted Local Law 43,<sup>106</sup> which phased out use of the two most polluting heating oils by 2030 in buildings.<sup>107</sup> As the first step in implementing this law, in 2015 it became unlawful to burn No. 6 heating oil in buildings in the City.<sup>108</sup> The City's Department of Environmental Protection followed up with regulations that ban No. 4 oil by 2030.<sup>109</sup> This change was expected to reduce particulate emissions from buildings by at least 63%, and to save hundreds of lives each year.<sup>110</sup> In 2015, the City enacted Local Law 38, which required permitted entities like electric

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<sup>102</sup> This law was, in part, a response to a crippling blackout in the summer of 2006 that left thousands of Queens residents without power for a week or longer.

<sup>103</sup> Goldstein, *supra* note 100.

<sup>104</sup> N.Y.C. Local Law No. 92 (2015). This amendment, signed by the Mayor on October 7, 2015, imposed penalties ranging from \$250 to \$1000 for each offense. *Id.* According to the Mayor's Office of Sustainability, the law's expanded mandate brings an additional 10,000 businesses under the policy. Jennifer Peltz, *NYC Cracks Down on 'Air Conditioning the Sidewalk'*, BROOKLYN DAILY EAGLE (July 8, 2016), <http://www.brooklyneagle.com/articles/2016/7/8/nyc-cracks-down-air-conditioning-sidewalk>. Full compliance would decrease CO<sub>2</sub> emissions by over 22,000 tons per year, the equivalent of removing 3,600 cars from the road. *Id.*

<sup>105</sup> *Department of Consumer Affairs Encourages Businesses to "Shut the Front Door!" when the Air Conditioning is On*, NYC.GOV (July 22, 2015), <http://www1.nyc.gov/site/dca/media/pr072215.page>.

<sup>106</sup> N.Y.C. Local Law No. 43 (2010).

<sup>107</sup> *Heating Oil*, NYC.GOV, [http://www.nyc.gov/html/dep/html/air/buildings\\_heating\\_oil.shtml](http://www.nyc.gov/html/dep/html/air/buildings_heating_oil.shtml) (last visited Oct. 31, 2017).

<sup>108</sup> N.Y.C. COUNCIL, INTRO 1465-A: POWER PLANT FUEL OILS, ATTACHMENT A: PROJECT DESCRIPTION 1-3 (2017), <https://council.nyc.gov/costa-constantinides/wp-content/uploads/sites/23/2017/12/Full-EAS-Package.pdf>. The Department of Environmental Protection reports a 99.8% compliance rate with this regulation. See Susan DesRoches, Mayor's Office of Recovery and Resiliency, Testimony of the Mayor's Office of Sustainability Before the New York City Council Committee on Environmental Protection (Nov. 28, 2016), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2845241&GUID=AA736062-3C62-4BDE-A009-FB12768CA76E&Options=&Search> (click hyperlink "Hearing Testimony" to download).

<sup>109</sup> N.Y.C. DEP'T OF ENVTL. PROT., PROMULGATION OF AMENDMENTS TO CHAPTER 2 OF TITLE 15 OF THE RULES OF THE CITY OF NEW YORK GOVERNING THE EMISSIONS FROM THE USE OF NO. 4 AND NO. 6 FUEL OIL IN HEAT AND HOT WATER BOILERS AND BURNERS (2011), [www.nyc.gov/html/dep/pdf/air/heating\\_oil\\_rule.pdf](http://www.nyc.gov/html/dep/pdf/air/heating_oil_rule.pdf).

<sup>110</sup> See *Heating Oil*, *supra* note 107.



utilities to phase out No. 6 oil by 2020 and No. 4 oil by 2030.<sup>111</sup> Under these laws, by 2030, No. 6 or No. 4 oil will be banned in the City.<sup>112</sup>

In January 2018, Mayor DeBlasio signed a local law speeding up part of that phase out.<sup>113</sup> Under the new law, use of No. 4 oil in power plants will now be phased out by 2025 at the latest.<sup>114</sup> According to its sponsors, this new law will reduce carbon emissions by an additional 125,000 tons, while also avoiding thousands of tons of co-pollutant emissions, specifically particulates, sulfur oxides, and nitrogen oxides.<sup>115</sup>

In tandem with this ban, the City is working with buildings to retrofit old boilers to use No. 2 heating oil instead of much dirtier No. 6 or No. 4 oils.<sup>116</sup> This switch to cleaner burning fuels will not only reduce greenhouse gas emissions but will also generate significant health co-benefits by reducing particulate and sulfur emissions. Pending legislation would go even further, establishing limits for fossil fuel use in certain buildings, and requiring annual fuel audits, while promoting the retrofit to clean energy technologies.<sup>117</sup> If adopted, this bill would require that by 2021 the City promulgate rules setting overall energy use targets for buildings, and penalties for noncompliance.<sup>118</sup> The bill would create a series of phased-in compliance deadlines spanning 2030-2035,<sup>119</sup> reporting requirements that incorporate incentives to retrofit existing buildings away from fossil fuels to green systems,<sup>120</sup> and penalties for noncompliance.<sup>121</sup> By 2050, the law would impose limits on the amount of fossil fuel energy a building may consume.<sup>122</sup>

The suite of existing and proposed building regulations will transform New York City's carbon footprint. The associated co-benefits of reduced pollution will be particularly important for the City's overburdened

<sup>111</sup> N.Y.C. Local Law No. 38 (2015).

<sup>112</sup> Michael Tobias, *How NYC is Phasing Out Heavy Heating Oils*, NEWYORK ENGINEERS (Nov. 4, 2017), <http://www.ny-engineers.com/blog/how-nyc-is-phasing-out-heavy-heating-oils>.

<sup>113</sup> N.Y.C. Local Law No. 31 (2018).

<sup>114</sup> *Id.*

<sup>115</sup> *Council to Vote on Cleaner Power Generation Bill*, QUEENS GAZETTE (Dec. 20, 2017), [http://www.qgazette.com/news/2017-12-20/Features/Council\\_To\\_Vote\\_On\\_Cleaner\\_Power\\_Generation\\_Bill.html](http://www.qgazette.com/news/2017-12-20/Features/Council_To_Vote_On_Cleaner_Power_Generation_Bill.html). No. 2 oil contains only 15 ppm sulfur compared to 3,000 ppm in No. 6 and No. 4 oils. *Heating Oil*, *supra* note 107.

<sup>116</sup> NYC RETROFIT ACCELERATOR, <https://retrofitaccelerator.cityofnewyork.us/> (last visited Oct. 31, 2017).

<sup>117</sup> N.Y.C. Local Law No. 1745 (2017).

<sup>118</sup> *Id.* at Proposed Section 24-806(b)(2).

<sup>119</sup> *Id.* at Proposed Section 24-806(b)(3).

<sup>120</sup> *Id.* at Proposed Section 24-806(a).

<sup>121</sup> *Id.* at Proposed Section 24-806(f).

<sup>122</sup> *Id.* at Proposed Section 24-806(b)(4).

environmental justice communities. New York continues to rigorously pursue these goals, even as the Trump Administration tries to gut the Clean Power Plan and promote dirty fuel from coal and tar sands.

### C. *New York Promoting Alternative Energy*

This administration has routinely expressed support for expanding the use of coal, while taking steps to hamper the growth of solar and wind energy. Indeed, *Forbes Magazine* described the President and Congress as “waging a war on solar.”<sup>123</sup> For example the GOP tax bill that passed the House would have drastically reduced tax credits for solar and wind energy, while leaving subsidies for oil and coal untouched.<sup>124</sup> The final tax bill left those credits largely untouched,<sup>125</sup> but that has not slowed the assault. On January 22, 2018, Trump invoked a rarely-used provision of domestic trade law,<sup>126</sup> to impose “huge” (30%) tariffs on solar panel imports.<sup>127</sup> Because these tariffs make solar less competitive, they are projected to slow solar installation by around 11%,<sup>128</sup> and to cost roughly 23,000 jobs in the first year.<sup>129</sup>

New York City, by contrast, has stepped up its investment in renewable energy by creating an Office of Alternative Energy within the Department of Buildings.<sup>130</sup> The Office is tasked with gathering and disseminating information, as well as ensuring that the City has policies to encourage alternative energy.<sup>131</sup> New York City also adopted two laws promoting voluntary adoption of solar energy—one facilitating bulk solar energy

<sup>123</sup> Joshua Rhodes, *With Tax Bill, GOP Wages War on Solar*, FORBES (Dec. 14, 2017), <https://www.forbes.com/sites/joshuarhodes/2017/12/14/the-war-on-wind-and-solar/#45ba13b36a32>; see also Emily Atkin, *The Republican Tax Plan is an Assault on Renewable Energy*, NEW REPUBLIC (Nov. 10, 2017), <https://newrepublic.com/article/145759/republican-tax-plan-assault-renewable-energy>.

<sup>124</sup> Rhodes, *supra* note 123.

<sup>125</sup> Brad Plummer, *Tax Bill Largely Preserves Incentives for Wind and Solar*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/16/climate/tax-bill-wind-solar.html>.

<sup>126</sup> *Understanding Safeguard Investigations*, U.S. INT’L TRADE COMM’N, [https://www.usitc.gov/press\\_room/us\\_safeguard.htm](https://www.usitc.gov/press_room/us_safeguard.htm) (last visited Oct. 31, 2017).

<sup>127</sup> U.S. TRADE REP., FACT SHEET: SECTION 201 CASES: IMPORTED LARGE RESIDENTIAL WASHING MACHINES AND IMPORTED SOLAR PANELS AND MODULES (2017), <https://ustr.gov/sites/default/files/files/Press/fs/201%20FactSheet.pdf>.

<sup>128</sup> Julia Pyper, *New Tariffs to Curb US Solar Installations by 11% Through 2022*, GREENTECH MEDIA (Jan. 23, 2018), <https://www.greentechmedia.com/articles/read/tariffs-to-curb-solar-installations-by-11-through-2022>.

<sup>129</sup> Ana Swanson & Brad Plumer, *Trump’s Solar Tariffs are Clouding the Industry’s Future*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/us/politics/trump-solar-tariffs.html>.

<sup>130</sup> N.Y.C. Local Law No. 223 (2017).

<sup>131</sup> *Id.*

purchases by city employees,<sup>132</sup> and one facilitating bulk purchases in business improvement districts.<sup>133</sup> Toward the end of the 2017 legislative session, the New York City Council began considering a bill to require that the Department of Environmental Protection create a wind resource assessment—a wind map that would document the wind energy generation potential of various city neighborhoods.<sup>134</sup> On January 31, 2018, The Chair of that Committee, Costa Constantinides, reintroduced the bill this legislative session.<sup>135</sup>

#### *D. New York City: Reducing Carbon Emissions from Transportation*

New Yorkers have a smaller carbon footprint than do most Americans.<sup>136</sup> One main reason is the City's ubiquitous public transportation.<sup>137</sup> Roughly 23% of New Yorkers own cars,<sup>138</sup> as opposed to 90% nationally.<sup>139</sup> Moreover, New Yorkers take an average of 8.6 million subway rides each day,<sup>140</sup> and another 400,000 take buses.<sup>141</sup> Overall, four out of five rush hour commuters use public transportation to the central business districts,<sup>142</sup> and more than 55% of the City's residents take public transportation regularly to and from work,<sup>143</sup> while another 11% either walk

<sup>132</sup> N.Y.C. Local Law No. 230 (2017).

<sup>133</sup> N.Y.C. Local Law No. 232 (2017).

<sup>134</sup> N.Y.C. Local Law Int. No. 1726 (2017).

<sup>135</sup> N.Y.C. Local Law Int. No. 48-A (2018); *see also* Costa Constantinidis, State of the District Speech (Jan. 30, 2018) (on file with author).

<sup>136</sup> GLOB. FOOTPRINT NETWORK, STATE OF THE STATES: A NEW PERSPECTIVE ON THE WEALTH OF OUR NATION 9 (2015), [http://www.footprintnetwork.org/content/images/article\\_uploads/USAFootprintReport\\_final\\_lores.pdf](http://www.footprintnetwork.org/content/images/article_uploads/USAFootprintReport_final_lores.pdf).

<sup>137</sup> *Id.* Housing density and small house size also play key roles.

<sup>138</sup> CEOS FOR CITIES, NEW YORK CITY'S GREEN DIVIDEND 1-4 (2010), [http://www.nyc.gov/html/dot/downloads/pdf/nyc\\_greendividend\\_april2010.pdf](http://www.nyc.gov/html/dot/downloads/pdf/nyc_greendividend_april2010.pdf).

<sup>139</sup> Dave Gershgorin, *After Decades of Decline, No-Car Households Are Becoming More Common in the US*, QUARTZ (Dec. 28, 2016), <https://qz.com/873704/no-car-households-are-becoming-more-common-in-the-us-after-decades-of-decline/>.

<sup>140</sup> AM. PUB. TRANSIT ASS'N, TRANSIT RIDERSHIP REPORT: FIRST QUARTER 2017 (2017), <http://www.apta.com/resources/statistics/Documents/Ridership/2017-q1-ridership-APTA.pdf> (this figure marks an increase from 7.7 million trips per day in 2016) [hereinafter TRANSIT RIDERSHIP REPORT: FIRST QUARTER 2017]; *see also* *Public Transportation for New York Region*, MTA NETWORK, <http://web.mta.info/mta/network.htm> (last visited Jan. 9, 2018).

<sup>141</sup> TRANSIT RIDERSHIP REPORT: FIRST QUARTER 2017, *supra* note 140.

<sup>142</sup> *Id.*

<sup>143</sup> *The New York Commute*, NYCEDC (June 27, 2012), <https://www.nycedc.com/blog-entry/new-york-commute>. These numbers are outdated. Given recent increases in ridership, it is likely that this number is higher. Moreover, if Staten Island, which is ill-served by public transportation, is excluded,

or bike.<sup>144</sup> An earlier attempt to convert the City's entire taxi fleet to hybrids was defeated in court.<sup>145</sup> Nevertheless, roughly half of the taxi fleet is hybrid.<sup>146</sup>

Since Trump took office, he has expressed hostility to fuel efficiency standards, calling them "industry-killing regulation"<sup>147</sup> and announcing that "the assault on the American auto industry is over."<sup>148</sup> His EPA is considering rolling back new car fuel efficiency standards that would require carmakers to deliver a fleet with an average of 54.5 mpg by 2025,<sup>149</sup> and exempting a class of heavy diesel trucks from stringent emissions standards.<sup>150</sup> He also proposed slashing funding for Amtrak, and eliminating federal support for building transit lines.<sup>151</sup>

New York City, by contrast, has stepped up its investment in public transportation. In Spring of 2017, the City opened six new ferry routes across the East River connecting underserved parts of Queens and Brooklyn to Manhattan, and to each other.<sup>152</sup> The ferries were an immediate hit, with

the percentage using public transportation increases to around 60%. However, it is certainly possible that the rise of services like Uber and Lyft may be altering these numbers.

<sup>144</sup> *Id.*

<sup>145</sup> See Michael M. Grynbaum, *Supreme Court Halts Mayor's Push for Hybrid Taxis*, N.Y. TIMES (Feb. 28, 2011), <https://cityroom.blogs.nytimes.com/2011/02/28/supreme-court-halts-mayors-push-for-hybrid-taxis/> (the city's plan, which imposed financial penalties on taxi owners who did not use hybrid cars, was struck down as a *de facto* emissions standard).

<sup>146</sup> Dana Rubenstein, *Combusted: The Death of Hybrid Taxis in New York City*, POLITICO (Oct. 12, 2012), <https://www.politico.com/states/new-york/city-hall/story/2012/10/combusted-the-death-of-hybrid-taxis-in-new-york-000000>.

<sup>147</sup> Jill Colvin, *Trump Announces Challenge to Obama-Era Fuel Efficiency Standards*, ASSOCIATED PRESS (Mar. 16, 2017), <https://apnews.com/22cc9ab8288a40b9ba773a42fd678de5/trump-take-fuel-standards-hold-nashville-rally>.

<sup>148</sup> *Id.*

<sup>149</sup> Sonari Glinton, *Trump Administration Takes Key Step to Rolling Back Auto Fuel Standards*, NPR (Aug. 14, 2017), <http://www.npr.org/2017/08/14/543474251/trump-administration-takes-key-step-to-rolling-back-auto-fuel-standards>.

<sup>150</sup> Repeal of Emission Requirement for Glider Vehicles, Glider Trucks, and Glider Kits, 82 Fed. Reg. 53,442 (proposed Nov. 16, 2017).

<sup>151</sup> Katherine Shaver & Lori Aratani, *Trump Budget Slashes Federal Aid for Rail, Long-Distance Amtrak Routes*, WASH. POST (May 23, 2017), [https://www.washingtonpost.com/local/trafficandcommuting/trump-budget-slashes-federal-aid-for-rail-long-distance-amtrak-routes/2017/05/23/55df2bc4-3fdf-11e7-adba-394ee67a7582\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/trump-budget-slashes-federal-aid-for-rail-long-distance-amtrak-routes/2017/05/23/55df2bc4-3fdf-11e7-adba-394ee67a7582_story.html).

<sup>152</sup> NYC FERRY, <https://www.ferry.nyc/> (last visited Jan. 9, 2018); see also Patrick McGeehan, *NYC Ferry is Expanding Again, But Not Without Growing Pains*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/nyregion/nyc-ferry-astoria-kayakers.html>.

ridership topping one million by June<sup>153</sup> and two million by September.<sup>154</sup> Indeed, by November, the new ferries had served 700,000 more riders than originally anticipated.<sup>155</sup> In response to this unexpected popularity of the ferries, the City has ordered larger boats to handle more riders, and is considering implementing more ferry routes, including express routes.<sup>156</sup> To make the ferries even more sustainable, New York City Council unanimously adopted legislation to study the use of alternative fuels to power the city ferries.<sup>157</sup>

The City is also considering building the Brooklyn Queens Connector (known as the BQX),<sup>158</sup> a new trolley system along the East River. The BQX proposal, which would connect growing population centers in Queens and Brooklyn, is heavily backed by developers, raising environmental justice and gentrification fears among long-time residents.<sup>159</sup>

In the fall of 2017, New York City also doubled the size of its bike share program. Known as Citibike, the program is a public-private partnership between the Department of Transportation and privately owned Motivate. The bike share program added 142 new locations throughout Queens, Brooklyn, and Manhattan.<sup>160</sup> This bike-share program is touted as the “first new major form of public transportation in New York City in more than 100 years.”<sup>161</sup> The largest bike-share program in the United States, Citibike allows New Yorkers “to take advantage of this fast, affordable, convenient and sustainable transportation option.”<sup>162</sup> To further promote bicycle commuting, New York City has been installing and upgrading bike lanes around the City. The City Council recently required that buildings provide

<sup>153</sup> *Id.* (the city heavily subsidizes the ferries so that they cost riders the same as the subway and buses (whose fares are set by the state through the MTA)).

<sup>154</sup> Vincent Barone, *NYC Ferry Orders Three 350-Passenger Boats for Service in 2018*, AMNEWYORK (Sept. 27, 2017), <http://www.amny.com/transit/city-orders-larger-boats-for-nyc-ferry-1.14288922>.

<sup>155</sup> Patrick McGeehan, *New York's Ferry Fleet is Off to a Fast Start*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/nyregion/new-york-ferry.html>.

<sup>156</sup> *Id.*

<sup>157</sup> Ariel Hernandez, *Council Passes Bill to Use Renewable Fuel in Ferries*, QUEENS TRIBUNE (Dec 29, 2017), <http://queenstribune.com/council-passes-bill-use-renewable-fuel-ferries/>.

<sup>158</sup> BROOKLYN-QUEENS CONNECTOR, [www.bqx.nyc](http://www.bqx.nyc) (last visited Jan. 9, 2018).

<sup>159</sup> Amy Plitt, *Gentrification Fears Loom in New Anti-Brooklyn Queens Streetcar Documentary*, CURBED N.Y. (Aug. 4, 2017), <https://ny.curbed.com/2017/8/4/16094652/brooklyn-queens-connector-documentary-gentrification>.

<sup>160</sup> *2017 Expansion*, CITIBIKE, <https://www.citibikenyc.com/expansion>.

<sup>161</sup> *Citibike Begins Fall 2017 Expansion into New Neighborhoods*, N.Y.C. DEP'T OF TRANSP. (Sept. 5, 2017), <http://www.nyc.gov/html/dot/html/pr2017/pr17-065.shtml>.

<sup>162</sup> *Id.*

tenants with bicycle access by creating and implementing bicycle access plans.<sup>163</sup>

## II. ENVIRONMENTAL JUSTICE

The federal government has a complex history with environmental justice. Promoting environmental justice has been official federal policy since 1994, when President William J. Clinton signed the Executive Order 12898 on Environmental Justice. This Executive Order recognized the “disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations.”<sup>164</sup> Two decades later, President Obama issued a presidential proclamation reaffirming the right of every American “to breathe freely, drink clean water, and live on uncontaminated land.”<sup>165</sup> This proclamation acknowledged the progress of the prior two decades, but also grimly reminded us that “much work remains” particularly in an era of climate change.<sup>166</sup> In his short time in office, Trump has signaled a lack of commitment to environmental justice. Indeed, many of his proposed actions, ranging from gutting funding for the EPA and the National Oceanic and Atmospheric Administration, to rejecting the Paris Agreement and attacking the Clean Power Plan, indicate that his administration will not make environmental justice a priority. Congress has echoed this hostility, taking up a bill that would prohibit the use of funds to “design, build, maintain, utilize, or provide access to a Federal database of geospatial information on community racial disparities.”<sup>167</sup>

On March 9, 2017, environmental justice champion Mustafa Ali resigned from his leadership position at the United States EPA to protest Trump Administration cuts to environmental justice programs.<sup>168</sup> Ali had a storied history at the EPA, dating back to the early 1990s. He began his service in the newly-formed office of Environmental Equity during the waning days of the George H.W. Bush administration, and until his resignation, led the EPA’s Office of Environmental Justice.<sup>169</sup> During the

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<sup>163</sup> N.Y.C. Local Law No. 107 (2016).

<sup>164</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

<sup>165</sup> Proclamation No. 9082, 3 C.F.R. § 9082 (2014).

<sup>166</sup> *Id.*

<sup>167</sup> See H.R. 482, 115th Cong. (2017).

<sup>168</sup> Phil McKenna, *Chief Environmental Justice Official at EPA Resigns, With Plea to Pruitt to Protect Vulnerable Communities*, INSIDE CLIMATE NEWS (Mar. 9, 2017), <https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt>.

<sup>169</sup> *Id.*

Obama Administration, Ali served as a special advisor to the EPA Administrator and Assistant Associate Administrator to the Office of Enforcement.<sup>170</sup> In that capacity, Ali had chaired the Inter-Agency Task Force on Environmental Justice.<sup>171</sup> All told, Ali had spent twenty-four years at the EPA, working to promote environmental justice under both Democratic and Republican Administrations.<sup>172</sup>

In his resignation letter, Ali implored EPA Administrator Scott Pruitt to keep a commitment to environmental justice.<sup>173</sup> Sadly, Mustafa Ali's resignation was a harbinger of things to come. Trump's proposed federal budget dramatically reduced funding for the EPA and completely eliminated funding for the Office of Environmental Justice.<sup>174</sup> Environmental Justice is no longer a stand-alone office within the EPA, but has instead been merged into the Office of Compliance and Enforcement Assurance within the Office of Policy.<sup>175</sup>

Even as the federal government was stepping away from a commitment to environmental justice, New York City took a major step forward. In April 2017, New York City passed two new Local Laws on Environmental Justice. As he signed the bills, Mayor de Blasio characterized them as “recogniz[ing] the historic injustices that have disproportionately fallen on low-income residents and communities of color—with the burden of pollution and the effects of climate change—and offer[ing] a different path forward.”<sup>176</sup> Environmental justice advocates were quick to emphasize that “as Trump moves backwards” New York City is moving forward on environmental justice.<sup>177</sup> The City agreed. Daniel Zarrilli, New York City's Chief Resilience

<sup>170</sup> *Mustafa Santiago Ali*, HIP HOP CAUCUS, <http://hiphopcaucus.org/our-story/team/mustafaali/> (last visited Oct. 31, 2017).

<sup>171</sup> *Id.*

<sup>172</sup> Jay Willis, *Mustafa Ali, Former Environmental Justice Leader on Why He Quit the EPA*, GQ (Mar. 17, 2017), <https://www.gq.com/story/mustafa-ali-epa-interview>.

<sup>173</sup> Letter from Mustafa Santiago Ali, Assistant Assoc. Adm'r. Env'tl. Justice, Env'tl. Protection Agency, to Scott Pruitt, Adm'r., Env'tl. Protection Agency (Mar. 8, 2017), <https://assets.documentcloud.org/documents/3514958/Final-Resignation-Letter-for-Administrator.pdf>.

<sup>174</sup> *Trump Wants to Kill the EPA's Environmental Justice Program*, NRDC (June 1, 2017), <https://www.nrdc.org/trump-watch/trump-wants-kill-epas-environmental-justice-program>.

<sup>175</sup> John Siciliano, *EPA Restructuring Environmental Justice, Permitting Offices*, WASH. EXAMINER (Sept. 7, 2017, 7:21 PM), <http://www.washingtonexaminer.com/epa-restructuring-environmental-justice-permitting-offices/article/2633774>.

<sup>176</sup> Press Release, Mayor de Blasio Signs Legislation to Better Promote Environmental Justice Through the Work of City Agencies (Apr. 25, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/262-17/mayor-de-blasio-signs-legislation-better-promote-environmental-justice-the-work-city>.

<sup>177</sup> Brooke Havlik, *While Trump Moves Backwards, NYC Passes Bills to Protect Environmental Justice Communities*, WEACTION (Apr. 5, 2017), <https://www.weaction.org/2017/04/ejbills/>.

Officer, characterized these laws as a direct response to the lack of federal leadership on the issue.<sup>178</sup> Costa Constantinides, chair of City Council's Environmental Protection Committee, echoed the sentiment that these laws are part of New York City's response to federal disengagement with environmental law in general, and environmental justice in particular.<sup>179</sup>

The first Environmental Justice Law, Local Law 60, requires the City to delimit boundaries of environmental justice communities around New York City, and to issue recommendations for legislation, policy, and budget initiatives that could address environmental justice concerns within those communities.<sup>180</sup> To facilitate community empowerment, this Local Law also directs the creation of an Environmental Justice Portal on the City's website. This portal will contain relevant maps, data, studies and other information.<sup>181</sup>

The second Environmental Justice Law, Local Law 64, requires city agencies to develop plans to incorporate environmental justice into their decision-making processes.<sup>182</sup> The Act also requires the Mayor to establish an Interagency Working Group on environmental justice and tasks the Working Group with developing a comprehensive environmental justice plan.<sup>183</sup> The goal of this Law is to incorporate environmental justice concerns into all City decision-making and to identify opportunities for promoting environmental justice.<sup>184</sup>

Together, these two new laws should put New York City on a path to finally address its long-standing and thorny issues of environmental injustice.<sup>185</sup> These laws build on New York City's recognition that

<sup>178</sup> *Id.*

<sup>179</sup> Shachar Sharon, *City Council Passes Most Comprehensive Environmental Justice Legislation in Nation*, N.Y.C. COUNCIL (Apr. 5, 2017), <https://council.nyc.gov/costa-constantinides/2017/04/05/230/>.

<sup>180</sup> N.Y.C. Local Law No. 60 (2017). For a description of the history behind this bill, see COMM. ON ENVTL. PROT., N.Y.C. COUNCIL, REPORT OF THE INFRASTRUCTURE DIVISION 2–6 (2016), <https://static1.squarespace.com/static/57f9842a37c5814489122d1a/t/58f8465503596ee41cde4308/1492666018932/NewYorkEJCommitteeReport2016.pdf>, for a description of the history behind this bill.

<sup>181</sup> This bill was sponsored by Councilmember Costa Constantinides, whose Queens district includes Astoria—a neighborhood home to power plants and near La Guardia airport. Constantinides serves as the Chair of City Council's Environmental Committee.

<sup>182</sup> This bill was sponsored by Councilmember Inez Barron, whose Brooklyn district includes parts of Broad Channel Brownsville, Canarsie, East Flatbush, East New York, Howard Beach and Jamaica Bay. Barron serves as the Chair of City Council's Committee on Higher Education. The bill had originally been introduced by her husband and predecessor in City Council, Charles Barron in 2004. *New York City Environmental Justice Act*, AFRICAN AM. ENVTL. ASS'N, <http://africanamericanenvironmentalistassociation.org/nyc-ej-act/> (lasted visited Jan. 5, 2018).

<sup>183</sup> N.Y.C. Local Law No. 64 (2017). Councilmember Inez Barron championed this legislative proposal for years before finally seeing it enacted.

<sup>184</sup> *Id.*

<sup>185</sup> New York City has long struggled with environmental disparities that unduly burden communities of color. For example, noxious uses like power plants, waste facilities, and noxious facilities



environmental justice and environmental protection are “inexorably linked.”<sup>186</sup> In addition, the City Council continues to move forward with other environmental justice bills. For example, a bill introduced in 2017 would require that 100,000 trees be planted in environmental justice communities within five years.<sup>187</sup> This measure, which has the full support of environmental justice advocates,<sup>188</sup> would go a long way toward reducing the heat island effect<sup>189</sup> in those communities over the medium and long-term.<sup>190</sup> In the meantime, the Mayor’s office is moving forward with a parallel plan called Cool Neighborhoods,<sup>191</sup> which also involves tree plantings, as well as a cool roofs initiative.<sup>192</sup> In announcing this program, Mayor de Blasio acknowledged that the urban heat islands in NYC pose a “threat that falls disproportionately on communities of color and the elderly.”<sup>193</sup> In addition, planting trees improves local air quality,<sup>194</sup> beautifies neighborhoods, and provides a host of intangible benefits associated with wellness.<sup>195</sup> Perhaps

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that involve heavy truck traffic tend to be clustered around low-income communities and communities of color. PRIYA MULGAONKAR & JESSICA QUIASON, TRANSFORM DON’T TRASH NYC COALITION, CLEARING THE AIR: HOW REFORMING THE COMMERCIAL WASTE SECTOR CAN ADDRESS AIR QUALITY ISSUES IN ENVIRONMENTAL JUSTICE COMMUNITIES 3 (2016), [http://transformdonttrashnyc.org/wp-content/uploads/2016/09/Final-draft-v3\\_TDT-Air-Qual-Report\\_Clearing-the-Air-1.pdf](http://transformdonttrashnyc.org/wp-content/uploads/2016/09/Final-draft-v3_TDT-Air-Qual-Report_Clearing-the-Air-1.pdf); Juliana Maantay, *Zoning, Equity, and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1037 (2001).

<sup>186</sup> N.Y.C. OFFICE OF SUSTAINABILITY, ONE NEW YORK: THE PLAN FOR A STRONG AND JUST CITY 164 (2015), <http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf>.

<sup>187</sup> See N.Y.C. Local Law Int. No. 1535 (2017) (“A Local Law to Amend the Administrative Code of the City of New York in Relation to Requiring the Department of Parks and Recreation to Plant 100,000 Trees in Environmental Justice Communities Within Five Years”).

<sup>188</sup> See, e.g., N.Y.C. ENVTL. JUST. ALL., NYC CLIMATE JUSTICE AGENDA 6 (2017), <https://core.ac.uk/download/pdf/83111900.pdf>.

<sup>189</sup> Urban heat islands are urban areas, which experience higher temperatures than their surrounding rural areas due to changes in the landscape due to fewer trees, and more dark pavement and rooftops. See Shaunacy Ferro, *This is What an Urban Heat Island Looks Like*, POPULAR SCI. (Sept. 2, 2013), <https://www.popsci.com/science/article/2013-08/what-urban-heat-island-looks>.

<sup>190</sup> Bill M. Jesdale et al., *The Racial/Ethnic Distribution of Heat Risk-Related Land Cover in Relation to Residential Segregation*, 121 ENVTL. HEALTH PERSPECTIVES 811 (2013).

<sup>191</sup> Press Release, Mayor Announces Program to Help Curb Effects of Extreme Summer Heat (June 14, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/411-17/mayor-program-help-curb-effects-extreme-summer-heat>.

<sup>192</sup> *Id.* The cool roof initiative provides white, reflective roof coatings to building owners at reduced or no cost in a bid to increase the City’s albedo. This reduces the need for cooling. *NYC CoolRoofs*, N.Y.C. BUS., <https://www1.nyc.gov/nycbusiness/article/nyc-coolroofs> (last visited Jan. 5, 2018).

<sup>193</sup> *Id.*

<sup>194</sup> DAVID J. NOWACK, USDA FOREST SERV., THE EFFECT OF URBAN TREES ON AIR QUALITY 1 (2002), [https://www.nrs.fs.fed.us/units/urban/local-resources/downloads/Tree\\_Air\\_Qual.pdf](https://www.nrs.fs.fed.us/units/urban/local-resources/downloads/Tree_Air_Qual.pdf).

<sup>195</sup> CHRIS HASTIE, WARWICK DIST. COUNCIL, THE BENEFIT OF URBAN TREES (July 2003), <http://www.naturewithin.info/UF/TreeBenefitsUK.pdf>.

most importantly from an environmental justice perspective, children living on tree lined streets are less likely to develop asthma.<sup>196</sup>

Asthma is a significant environmental justice issue,<sup>197</sup> with African American and Latino children experiencing much higher rates of asthma than white children.<sup>198</sup> In New York City, “[a]sthma rates have tripled in the past three decades” and are now “the leading cause of emergency room visits, hospitalizations and school absenteeism.”<sup>199</sup> Children living in minority neighborhoods are at a much higher risk.<sup>200</sup> Outdoor air quality varies widely, with environmental justice communities more likely to have poor air quality.<sup>201</sup> The new Environmental Justice Local Laws will help document these disparities, and will focus the attention of City officials on methods to resolve these disparities. However, indoor air quality can also contribute to asthma. City Council’s Committee on Housing and Buildings recently held hearings on a bill that would increase a building owner’s responsibilities with regard to indoor asthma allergen hazards.<sup>202</sup> This bill has the strong backing of environmental justice advocates.<sup>203</sup> If enacted, this bill will make a

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<sup>196</sup> Gina S. Lovasi et al., *Children Living in Areas with More Street Trees Have Lower Prevalence of Asthma*, 62 J. EPIDEMIOLOGY & COMMUNITY HEALTH 569 (2008).

<sup>197</sup> See, e.g., Athena Motavvef, *7 Reasons Why Asthma is an Environmental Justice Crisis*, WEACT (May 7, 2017), <https://www.weact.org/2017/05/7-reasons-asthma-environmental-justice-crisis/>.

<sup>198</sup> N.Y. DEP’T OF HEALTH, NEW YORK STATE ASTHMA SURVEILLANCE SUMMARY REPORT 16–17 (2013), [https://www.health.ny.gov/statistics/ny\\_asthma/pdf/2013\\_asthma\\_surveillance\\_summary\\_report.pdf](https://www.health.ny.gov/statistics/ny_asthma/pdf/2013_asthma_surveillance_summary_report.pdf) (stating that this pattern holds true across the United States as well); see Lara J. Akinbami et al., *Status of Childhood Asthma in the United States, 1980–2007*, 123 PEDIATRICS SUPPL. 3:S131-45 (2009); Lara Akinbami, *Asthma Prevalence, Health Care Use and Mortality: United States 2003-05*, CDC (Apr. 6, 2010), <https://www.cdc.gov/nchs/data/hestat/asthma03-05/asthma03-05.htm>.

<sup>199</sup> MT. SINAI CHILDREN’S ENVTL. HEALTH CTR., NEW YORK STATE’S CHILDREN AND THE ENVIRONMENT: A REPORT FROM THE CHILDREN’S ENVIRONMENTAL HEALTH CENTER 10 (Dec. 2013), [https://www.mountsinai.org/static\\_files/MSMC/Files/Patient%20Care/Children/Childrens%20Environment%20Health%20Center/NYS-Children-Environment.pdf](https://www.mountsinai.org/static_files/MSMC/Files/Patient%20Care/Children/Childrens%20Environment%20Health%20Center/NYS-Children-Environment.pdf).

<sup>200</sup> *Asthma Emergency Room Visits*, CITIZENS COMM. FOR CHILDREN OF N.Y., <http://data.cccnewyork.org/data/bar/6/asthma-emergency-department-visits#6/197/1,15,28,2,47,62/9/20> (last visited Jan. 5, 2018); *Overall Risk Ranking*, CITIZENS COMM. FOR CHILDREN OF N.Y., <http://data.cccnewyork.org/riskranking#?domain=1245&year=20&communities=8%7C17> (last visited Jan. 5, 2018).

<sup>201</sup> *Neighborhood Air Quality*, N.Y.C. HEALTH, [http://a816-dohbsep.nyc.gov/IndicatorPublic/PublicTracking.aspx?theme\\_code=1,4&subtopic\\_id=91](http://a816-dohbsep.nyc.gov/IndicatorPublic/PublicTracking.aspx?theme_code=1,4&subtopic_id=91) (last visited Jan. 5, 2018).

<sup>202</sup> See N.Y.C. Local Law No. 55 (2018) (“A Local Law to Amend the Administrative Code of the City of New York, in Relation to Indoor Asthma Allergen Hazards in Residential Dwellings and Pest Management, and to Repeal Section 27-2018 of the Administrative Code of the City of New York, Relating to Rodent and Insect Eradication and Extermination”).

<sup>203</sup> Marcia G. Yerman, *Peggy Shepard of WEACT on Air Pollution, Asthma and Environmental Justice*, HUFFINGTON POST (May 16, 2017), [http://www.huffingtonpost.com/entry/peggy-shepard-of-weact-on-air-pollution-asthma\\_us\\_591b3acde4b086d2d0d8d317](http://www.huffingtonpost.com/entry/peggy-shepard-of-weact-on-air-pollution-asthma_us_591b3acde4b086d2d0d8d317).

significant difference in childhood asthma for the City's most vulnerable residents.

### III. LIMITATIONS TO RELYING ON CITIES TO DRIVE ENVIRONMENTAL POLICY

Although New York City continues to forge new environmental protection ground, and cities in general can be important environmental leaders, there are some real drawbacks to relying on cities rather than a robust federal program of environmental protection. First, cities are not inherently sovereign entities, and exercise only delegated power.<sup>204</sup> Municipal governments across the country exercise governing power under one of two theories: either under "home rule" or the "Dillon rule." Home rule gives municipalities the governing authority to make a wide range of legislative decisions that have not been addressed by the state. By contrast, the Dillon rule emphasizes state supremacy over local governments.<sup>205</sup> Under this approach to local government, municipalities have only those powers expressly granted by the state legislature, along with powers that either are necessarily implied from those express powers, or are essential and indispensable to exercising those express powers. Thus, municipalities that operate under the Dillon rule can only legislate with the permission of the state legislature. This rule dramatically limits the ability of municipalities to make choices intended to protect the environment. For example, the Virginia Supreme Court recently used the Dillon Rule to thwart a Virginia municipality's decision to limit development on barrier islands within its jurisdiction in order to protect the Chesapeake Bay.<sup>206</sup> At the height of the Tea Party furor, Alabama passed a law prohibiting municipalities from adopting "any policy recommendation originating in, or traceable to, 'Agenda 21,' adopted by the United Nations in 1992 at its Conference on

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<sup>204</sup> For a discussion of some of the ways this plays out across the country, see Andrea McArdle, *Local Green Initiatives: What Local Governance Can Contribute to Environmental Defenses Against the Onslaught of Climate Change*, 28 *FORDHAM ENVTL. L. REV.* 102, 116–20 (2017).

<sup>205</sup> The Dillon Rule, which was first articulated by Iowa Supreme Court Justice John Dillon in *City of Clinton v. Cedar Rapids & Missouri River R.R.*, 24 Iowa 455, 475 (1868) (declaring that "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature."). The United States Supreme Court endorsed this view in 1906 when it concluded that the state of Pennsylvania could consolidate the cities of Pittsburgh and Allegheny over the objections of a majority of Allegheny residents. *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907) (finding that because "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

<sup>206</sup> *Marble Technologies v. City of Hampton*, 690 S.E. 2d 84, 87–90 (2010).

Environment and Development, or any other international law or ancillary plan of action that contravenes the state and federal constitutions.”<sup>207</sup>

Home rule provides more scope to municipalities than does the Dillon Rule, but still falls far short of the range of powers available to states or the federal government.<sup>208</sup> Indeed, the scope of local authority is often highly variable, “reflecting an ever-shifting mix of state delegation and oversight, the vagaries of judicial interpretation, fluctuations in the local capacity to initiate measures, the strains of inter-local conflict and the changing economic, social, and technological dimensions of the problems local governments are called upon to address.”<sup>209</sup>

New York City operates under home rule rather than the Dillon Rule.<sup>210</sup> Nevertheless, the City’s ability to adopt environmental measures has been limited by the New York State legislature. For example, New York City has been trying to adopt a congestion pricing plan for years. A congestion pricing plan would impose tolls on bridges and certain roads in order to reduce pollution and traffic in overburdened parts of the City, and to generate funds for mass transit improvements. Under Mayor Bloomberg, *PlaNYC* included a congestion pricing proposal as a centerpiece of transit and pollution planning. New York City residents backed congestion pricing by an overwhelming majority (67% to 27%).<sup>211</sup> A majority of City Council members also supported congestion pricing.<sup>212</sup> However, under home rule, the City did not have authority to adopt this plan.<sup>213</sup> Instead, the plan required an act of the state legislature, which refused to even put the issue to a vote.<sup>214</sup> Recently, New York’s Governor, Andrew Cuomo, breathed new life into

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207 ALA. CODE § 35-1-6(b) (2018) (effective Aug. 1, 2012).

208 See, e.g., Jacob Alderdice, *Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL’Y REV. 489, 463–65 (2013) (detailing how home rule limits governments’ powers to create innovative policies); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2556, 2563–64 (2006).

209 Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18 (1990).

210 N.Y. CONST. art. IX, § 2.

211 Sewall Chan, *Poll: Voters Back Congestion Pricing, If Funds Go To Transit*, N.Y. TIMES (Mar. 24, 2008), <https://cityroom.blogs.nytimes.com/2008/03/24/poll-public-backs-traffic-fees-if-the-money-goes-to-mass-transit/>.

212 Sewall Chan, *Council Votes 30-20 For Traffic Fees*, N.Y. TIMES (Mar. 31, 2008), <https://cityroom.blogs.nytimes.com/2008/03/31/council-panel-approves-congestion-pricing-measure/>.

213 Erin Durkin & Dan Rivoli, *City Councilmembers Tout East River Bridge Tolls as a Way of Funding MTA*, DAILY NEWS (Oct. 29, 2015), <http://www.nydailynews.com/new-york/city-council-members-tout-plan-impose-east-river-bridge-article-1.2416432>.

214 Nicholas Confessore, *Congestion Pricing Plan Dies in Albany*, N.Y. TIMES (Apr. 7, 2008), <https://cityroom.blogs.nytimes.com/2008/04/07/congestion-pricing-plan-is-dead-assembly-speaker-says/>.

congestion pricing, calling it “an idea whose time has come.”<sup>215</sup> Governor Cuomo created a Fix NYC Advisory Panel tasked with making recommendations about both traffic congestion in Manhattan, and about funding public transportation.<sup>216</sup> On January 19, 2018, the Advisory Panel released its report.<sup>217</sup> The plan renewed many of the Bloomberg Era recommendations, and proposed using the congestion fees to fund mass transit improvements. Now it is up to the New York legislature to take up the question. Yet, the final decision still rests with the state, rather than the City.

The fate of New York City’s attempt to limit use of single-use plastic bags offers another example of the limitations of relying on cities with limited sovereignty to solve environmental problems. Every year, 10 billion bags enter New York City’s waste stream.<sup>218</sup> The Department of Sanitation estimates that collecting and disposing of these plastic bags costs New York City \$12.5 million per year.<sup>219</sup> To combat this problem, New York City sought to join more than 150 municipalities around the country with ordinances to either ban single-use plastic bags or to impose a surcharge on their use.<sup>220</sup> New York City enacted Local Law 63, imposing a five cent charge on single-use plastic bags.<sup>221</sup> Environmental groups lined up behind

<sup>215</sup> Marc Santoro, *Cuomo Calls Manhattan Traffic Plan ‘An Idea Whose Time Has Come’*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/nyregion/cuomo-rethinks-opposition-to-tolls-to-ease-manhattan-traffic.html>. In doing so, Governor Cuomo embraced the grassroots planning done by Move NY. MOVE NY, <http://iheartmoveny.org/> (last visited Oct. 31, 2017). The Governor will reportedly make congestion pricing a centerpiece of his transportation plans in 2018. Winnie Hu, *New York’s Tilt Toward Congestion Pricing Was Years in the Making*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/nyregion/congestion-pricing-new-york.html>.

<sup>216</sup> *Governor Cuomo Announces “Fix NYC” Advisory Panel*, N.Y. STATE (Oct. 5, 2017), <https://www.governor.ny.gov/news/governor-cuomo-announces-fix-nyc-advisory-panel>. The 16 member panel includes business leaders, transit experts, and politicians from outside the City. Notably absent were any City officials, transit advocates, or community groups.

<sup>217</sup> N.Y.C., FIX NYC ADVISORY PANEL REPORT (2018), <http://www.hntb.com/HNTB/media/HNTBMediaLibrary/Home/Fix-NYC-Panel-Report.pdf>.

<sup>218</sup> *State Lawmakers Move to Postpone NYC Bag Fee*, NBC N.Y. (Feb. 6, 2017), <https://www.nbcnewyork.com/news/local/New-York-State-Legislature-Blocks-New-York-City-Plastic-Bag-Fee-412958963.html> (quoting Marcia Bystryn, President of the League of Conservation Voters).

<sup>219</sup> Testimony of Kathryn Garcia, Comm’r of N.Y.C. Dep’t of Sanitation, before the New York City Council Committee on Sanitation & Solid Waste Management 1–4 (Nov. 19, 2014), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687953&GUID=492A60EA-D352-462A-915A-BB2C34A58D61&Options=ID%7cText%7c&Search> [hereinafter Garcia Testimony] (click hyperlink “Hearing Testimony 11/19/14” to download).

<sup>220</sup> Karen Matthews, *NYC Lawmakers Approve 5-cent Charge for Disposable Bags*, NBC N.Y. (May 5, 2016), <https://www.nbcnewyork.com/news/local/Plastic-Bag-Fee-New-York-City-NYC-Recycling-Green-Paper-Council-378272421.html>.

<sup>221</sup> N.Y.C. Local Law No. 61 (2016) (“A Local Law to amend the administrative code of the city of New York in relation to reducing the use of carry-out bags. The law was amended by Local Law 81, which pushed back the compliance date into February 2017”); see also N.Y.C. Local Law No. 81 (2016)

the bill.<sup>222</sup> Washington D.C.’s Director of the Department of the Environment took the trouble to journey to New York City to testify about the success of the D.C. program, which is credited with a 60% decrease in disposable bag use, and a comparable decrease in litter associated with plastic bags.<sup>223</sup> The only opposition came from the producers and marketers of plastic bags.<sup>224</sup>

Yet, both houses of the New York state legislature passed bills preventing Local Law 63 from taking effect.<sup>225</sup> Governor Cuomo signed the bill killing the five cent fee in February of 2017, just days before Local Law 63 would have taken effect.<sup>226</sup> In its place, the Governor set up a state-wide Task Force to investigate the “issue” of plastic bags.<sup>227</sup> At least some news reports suggest that the Task Force is “likely” to recommend some sort of control measures for plastic bags.<sup>228</sup> However, to date there have been no recommendations from the Task Force, even as billions of plastic bags continue to enter the waste stream.

#### IV. CONCLUSION

These are trying times for any American committed to protecting the environment. Internationally and domestically, the federal government has all but abandoned its leadership role on these issues. The President and his

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(“A Local Law to Amend the Administrative Code of the City of New York in Relation to Reducing the Use of Carryout Bags”).

<sup>222</sup> Garcia Testimony, *supra* note 219.

<sup>223</sup> Testimony of Keith A. Anderson, Dir. of the D.C. Dep’t of the Env’t, before the New York City Council Committee on Sanitation & Solid Waste Management 11–15 (Nov. 19, 2014), [http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687953&GUID=492A60EA-D352-462A-915A-BB2C34A58D61&Options=ID%7cText%7c&Search=\[hereinafter Anderson Testimony\]](http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687953&GUID=492A60EA-D352-462A-915A-BB2C34A58D61&Options=ID%7cText%7c&Search=[hereinafter Anderson Testimony]) (click hyperlink “Hearing Testimony 11/19/14” to download).

<sup>224</sup> See Hearing before the New York City Council Committee on Sanitation & Solid Waste Management (Nov. 19, 2014), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687953&GUID=492A60EA-D352-462A-915A-BB2C34A58D61&Options=ID%7cText%7c&Search=> (click hyperlink “Hearing Testimony 11/19/14” to download).

<sup>225</sup> Similar measures imposing fees on plastic bags in Suffolk County and Long Beach were left in place by the state legislation. Sarah Maslin Nir, *State Senate Takes Aim at Plastic Bag Fee in New York City*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/nyregion/plastic-bags-new-york.html>.

<sup>226</sup> Jesse McKinley, *Cuomo Blocks NYC Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html>.

<sup>227</sup> *Governor Announces Launch of Statewide Plastic Bag Task Force*, N.Y. STATE (Mar. 12, 2017), <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-statewide-plastic-bag-task-force>.

<sup>228</sup> Kevin Tampone, *NY State Task Force Likely to Favor Controls on Plastic Shopping Bags*, SYRACUSE.COM (Oct. 12, 2017), [http://www.syracuse.com/state/index.ssf/2017/10/plastic\\_bag\\_ban\\_fee.html](http://www.syracuse.com/state/index.ssf/2017/10/plastic_bag_ban_fee.html).

appointees have expressed intense hostility to environmental regulation. Yet, federal retreat need not result in the death of environmentalism. Creative and committed public officials are using their authority to move New York City forward, even in the face of a federal retreat. The examples from New York City discussed in this brief essay offer “models that [can and] will be replicated around the nation.”<sup>229</sup> NYC is a leader in green governance. But, as a general matter, the more latitude that local communities have to tailor governance to local conditions, the more likely it is that we can ensure the level of flexibility necessary for responding to climate-induced risks.<sup>230</sup>

New York City is showing how we can move forward together, particularly in responding to climate change and working to confront environmental injustice. Cecil Corbin-Marks, of the environmental justice advocacy group WEACTION for Environmental Justice expressed it best when he said: “People are looking to New York City for leadership, and some of our elected officials are recognizing that and thinking of how else they can step up.”<sup>231</sup>

There is a lot that New York City, and other cities, can do to protect the environment in an era of federal neglect. However, City authority has limits, and those limits can sometimes get in the way of sound environmental policy. The saga of New York City’s attempt to regulate plastic bags highlights how the limits of municipal authority can create a problem. New York City found itself at the mercy of an unsympathetic state legislature, which exercised its power to undo what had been a well-supported, carefully-considered municipal decision. This limitation on authority is a real barrier to transformative change. It means that, even with the most-foresighted environmentally-minded leaders, New York City can only do so much. Municipal action alone cannot fill the gaping hole left when the federal government abandons its commitment to environmental protection.

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<sup>229</sup> Havlik, *supra* note 177.

<sup>230</sup> See generally McArdle, *supra* note 204 (making this case).

<sup>231</sup> Keith Rushing, *Resisting Trump’s Environmental Rollbacks Locally*, DAILY KOS (June 15, 2017), <https://www.dailykos.com/stories/2017/6/15/1672084/-RESISTING-TRUMP-S-ENVIRONMENTAL-ROLLBACKS-LOCALLY>.