

## Oversight and Accountability of Water Privatization Contracts: A Proposed Legislative Policy.

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# OVERSIGHT AND ACCOUNTABILITY OF WATER PRIVATIZATION CONTRACTS: A PROPOSED LEGISLATIVE POLICY

By Mary Strayhorne\*

Safe drinking water is essential to human survival and is the center of an international debate over the privatization of public access to this vital, but increasingly scarce, natural resource.<sup>1</sup> This problem has even arisen in the United States, where potable water remains widely available but has become increasingly scarce in many cities.<sup>2</sup> A key issue entrenched within this debate is whether local governments should allow private companies to control, maintain, and service municipal water infrastructure and service systems.<sup>3</sup> Sustainability scholars and conservationists are concerned that current privatization allows private companies to generate profits at the expense of municipal water source communities.<sup>4</sup> Despite these concerns, many municipalities are entering privatization contracts with private water companies to reduce the financial burden to upgrade, maintain, and operate water infrastructure and shift the cost-induced rate increases away from political responsibility.<sup>5</sup> This feature article proposes a federal or state legislative policy that would promote local community stewardship by conditioning certain appropriations on municipal grants of privatization contracts. The primary goals of this stewardship would address accountability and oversight concerns over private control of municipal water and sanitation.<sup>6</sup> This article proposes a policy for granting privatization contracts to private water companies, requiring a municipality to show the private company (1) is a domestically owned, operated, and incorporated company, (2) with a business purpose that involves a direct benefit to the target local community's market, and (3) employs a certain percentage of municipal residents as a prerequisite to granting privatization contracts.<sup>7</sup>

Water privatization gained momentum in the United States during the 1980s and into the 1990s, with an increased need to update or replace municipal water infrastructure, reduce water consumption rates, and comply with federal drinking water quality standards.<sup>8</sup> As of 2007, approximately 600 U.S. cities within forty-three states had entered into municipal water privatization contracts.<sup>9</sup> Faced with limited revenue, many of these municipalities saw privatization as the only practical solution for providing water to the community but often failed to preserve "ecological integrity and sustainability" of the community that provided the water source.<sup>10</sup> For example, the City of Atlanta, Georgia entered into a twenty-year contract with United Water, a U.S. subsidiary of Suez Environment, a French-owned water company that provides water services to approximately 115 million people in 130 countries.<sup>11</sup> After only four years, the city terminated the contract due to Suez' inability to address systemic

failures in water system infrastructure repair and maintenance that caused severe service interruptions, water waste, and threats to public health.<sup>12</sup>

In the Atlanta-Suez water contract debacle, privatization failed to adequately serve a beneficial function, and it cost the city valuable natural and financial resources that exacerbated an already developing water shortage.<sup>13</sup> The problems Atlanta faced following the privatization of its municipal water system, combined with its increasing sprawl, left the city with a higher demand for water from its primary supply at Lake Lanier.<sup>14</sup> This increased demand has further strained a water supply source feeding areas in Florida and Alabama.<sup>15</sup>

From a stewardship standpoint, the private water companies servicing many U.S. cities and municipalities are often far-removed from the communities they serve, making them less accountable to these communities.<sup>16</sup> Some argue that this distance leads to a lack of community and environmental stewardship and has bolstered bottled water sales by undermining the public confidence in public water service.<sup>17</sup> Other challenges presented by water privatization manifest in poor long-term management planning and a primary focus on cost reduction. These management priorities both lead to subpar construction and maintenance of water infrastructures and potential negative environmental impacts.<sup>18</sup> Private companies providing water services to locations beyond their bases of operation have no significant incentive to build or maintain public water systems for long-term community financial or environmental benefits beyond the expiration or termination of their operating contracts.<sup>19</sup> Indeed, the evolution of environmental law in the United States demonstrates that environmental considerations tend to take a back seat to fiscal objectives in private enterprise strategies.<sup>20</sup> With this in mind, the accountability of private water service providers and state legislatures is necessary to ensure the protection of local water resource availability, quality, and cost.

A proposed legislative policy that conditions federal or state funding on municipal promotion of private water company stewardship would address many problems faced by underfunded municipalities. By conditioning state funding on promoting public service stewardship, states would be incentivized to implement the policy. A typical state policy would require the private public service provider to be a domestically owned, operated, and incorporated company within the state itself, allowing

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local government to keep the private entity under close scrutiny and empower states to revoke the company's contract should the company act against its stated purpose. The only exception may be allowing foreign benefits corporations to pledge to provide a public benefit to the state in which it wishes to incorporate.<sup>21</sup> Many states have enacted statutes allowing foreign and domestic entities to incorporate as benefits corporations, provided their articles and bylaws state a purpose that involves a benefit to society or the environment, or both.<sup>22</sup> To modify current policy, the enabling statute that empowers municipalities to enter into privatization contracts would stipulate that the stated purpose of the corporation would include a declaration to directly provide an identifiable and enforceable benefit to the incorporating state.<sup>23</sup>

Finally, under this policy, any privatized contract for water infrastructure, service upgrades or maintenance, funded in whole or in part by municipal or public funds, should be subject to resident hiring requirements.<sup>24</sup> Case law and current trends have tested the constitutionality and authority of state governments to require private companies working on public contracts funded with public funds to fulfill certain requirements, such

as the employment of an established percentage of municipal residents.<sup>25</sup> These employment requirements would serve a quality assurance and oversight function by putting responsible, accountable stakeholders in control of the daily operations provided for in the privatization contract.<sup>26</sup>

In light of looming resource shortages, past mismanagement, and systemic water service failures due to a lack of effective oversight, the time has come to promote accountability on the state level for those entities seeking to gain private control of natural resources.<sup>27</sup> This accountability must allow states and municipalities to maintain some level of control over these resources and promote the stewardship of local communities by private public service entities. This proposed policy would allow local control of resources but create an accountability mechanism making state legislatures accountable to Congress, and the people and private water companies accountable to state legislatures. Furthermore, this accountability policy will further protect municipal water resource availability and the integrity of water management and maintenance infrastructures for future generations.



## Endnotes: Oversight and Accountability of Water Privatization Contracts: A Proposed Legislative Policy

<sup>1</sup> Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization* 18, 31 BERKELEY J. INT'L L. 89 (2013) (discussing the United Nations General Assembly attention to the global crisis involving safe drinking water and noting a review of the 2010 minutes of the U.N. General Assembly vote involving human rights and safe drinking water "suggests that the politics around privatization may have influenced the positions of the abstaining countries." Although the article notes the U.N. debate is centered on human rights, there has already been debate from an economic and social rights perspective. The author notes three themes that highlight the "tensions between human rights and the private sector involvement in the water and sanitation sectors" to include "financial stability, efficiency, and dispute resolution."); see also, Julie C. Padowski, Dissertation, *The Complexity of Urban Water Resources Management: Water Availability and Vulnerability for Large Cities in the United States* 67, UNIV. OF FLA. (2011) ("As such urban areas have invested heavily in developing technology to secure the resources needed to meet and maintain these steadily increasing levels of production, although often to the detriment of the environment. . . . Despite constantly growing needs, over the years urban areas have continued to successfully exploit resources, despite their seemingly unsustainable rate of consumption. . . . In the [United States] however, the growing uncertainty surrounding future urban water availability has, for many water providers, become a primary issue of concern. . . ."); Julie Padowski & James Jawitz, UNIV. OF FLA., *Water Availability and the Vulnerability of Large United States' Cities*, GLOBAL WATER FORUM (Apr. 16, 2013), <http://www.globalwaterforum.org/2013/04/16/water-availability-and-the-vulnerability-of-large-united-states-cities/> ("Water availability measurements . . . based solely on renewable water supplies indicated that nearly half of the sampled urban population (47%) faced moderate (27%) or severe (20%) risk of water scarcity. Of those considered "at-risk," 14 urban areas were identified as having availability levels below the national average of 600 liters per capita per day (lpcd). These results suggest that these cities

suffer perpetual water shortages not from variability in supply, but rather from a perennial, systematic, lack of water.").

<sup>2</sup> Padowski & Jawitz, *supra* note 1.

<sup>3</sup> Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WILLIAM & MARY ENVTL. L. & POL'Y REV. 785 (2009); see also, Murthy, *supra* note 1, at 123.

<sup>4</sup> See Arnold, *supra* note 3 (noting water privatization profit potential encourages: (1) commodification of water counteracting conservation and leading to urban sprawl, (2) rate hikes to offset the cost to update water systems threatening the poorer populations access to water, and (3) private use for profit (i.e., water bottling operations)).

<sup>5</sup> Murthy, *supra* note 1, at 18-19, 26 (citing Jennifer Davis, *Private-Sector Participation in the Water and Sanitation Sector*, 30 ANN. REV. ENV'T & RESOURCES 145, 154 (2005) (noting also "[t]he more a state delegates its responsibilities to fulfill to a non-state actor, the greater its duty to protect. Accordingly, governments must confront the question of financial sustainability and affordability. While higher tariffs may be needed to improve water and sanitation infrastructure, long-term financing and some form of subsidy for the poor likely will be required to ensure that no one is denied access to basic services due to an inability to pay."); Andrew Nickson & Claudia Vargas, *The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21 BULL. LATIN AM. RES. 99-120 (2002) (arguing that political motives for privatization in communities with limited resources allows politicians to pass responsibility for raising water rates to a private water company to save political face).

<sup>6</sup> Murthy, *supra* note 1, at 26 (citing MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (1995)) (arguing that more oversight and regulation are required by political governing bodies).

<sup>7</sup> Arnold, *supra* note 3; *see also*, ROBIN A. JOHNSON ET AL., LONG-TERM CONTRACTING FOR WATER AND WASTEWATER SERVICES 9, 11 (2002) (“Long-term contracts can produce other important benefits for the community. Hiring the existing workforce promotes continuity and helps avoid nasty, divisive labor battles. Cities can also enhance local economic development through long-term contracts. . . . It has often been seen that private sector companies become good ‘corporate citizens’ and get involved in worthwhile community activities, charities, etc. This adds additional value to long-term partnership arrangements as companies ‘invest’ in the communities they serve. . . . Management contracts also enable municipalities to overcome potential employee opposition to privatization. Surveys on privatization consistently show that employee opposition is the leading obstacle to privatization of public services. A management contract can lessen opposition by allowing employees to remain on the public payroll. As employees become more comfortable with private management, they may be more willing to work for the contractor in a full [operations and management] agreement.”); *White v. Mass. Council of Constr. Empls.*, 460 U.S. 204 (1983) (holding it constitutional for cities, acting as market participants, to condition wholly or partially city-funded public projects to be performed by city residents); *see also*, *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984) (citing *Toomer v. Witsell*, 334 U.S. 385 (1948) (“[The Privileges and Immunities Clause] does not preclude discrimination against citizens of other States where there is a ‘substantial reason’ for the difference in treatment. ‘[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them;’” and further noting that States should be given “considerable leeway in analyzing local evils and in prescribing appropriate cures . . . [t]his caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls”); *see e.g.*, Benefit Corp Information Center, *State by State Legislative Status*, <http://benefitcorp.net/state-by-state-legislative-status> (last accessed Dec. 1, 2013) (listing the status of each state in passing a benefits corporation statute); BENEFIT CORP, 2013 STATE BY STATE SUMMARY CHART (2013), available at [http://benefitcorp.net/storage/documents/2013\\_State\\_by\\_State\\_Summary\\_Chart.pdf](http://benefitcorp.net/storage/documents/2013_State_by_State_Summary_Chart.pdf) (providing a summary of both model statutory and state by state statutory language).

<sup>8</sup> Arnold, *supra* note 3, at 791-794 (citing Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. §§ 300f- 300j-26 (2006)), amended significantly by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (2002)); Shiney Varghese, *Privatizing U.S. Water*, Inst. for Agric. & Trade Policy 4 (2007), available at [http://www.iatp.org/files/451\\_2\\_99838.pdf](http://www.iatp.org/files/451_2_99838.pdf); *see also*, JOHNSON ET AL., *supra* note 7, at 4 (“The 1997 changes were not the first time the tax law guidelines governing partnerships were changed. Before a 1986 tax law change, the privatization landscape included both short-term contract-operations arrangements and long-term (20-year) private-ownership arrangements. Under the latter, private-sector partnerships allowed for facilities to be upgraded or expanded, and new facilities to be designed, built, financed, operated, and owned by private partners. The 1986 tax law changes removed tax benefits for private ownership and the market became almost entirely short-term contract-operations arrangements. These arrangements were quite successful. Many companies in the business enjoyed a greater than 90[%] renewal rate in lieu of recprocement.”).

<sup>9</sup> Varghese, *supra* note 8, at 2-3; *see also* Murthy, *supra* note 1, at 126; Arnold, *supra* note 3, at 791.

<sup>10</sup> Arnold, *supra* note 3, at 828 (“Private control and commodification of water threaten the *integrity* and *sustainability* of waters, water systems, and watersheds in interconnected human and natural systems” by failing “to achieve *ecological integrity* and *sustainability*, because water is treated as disaggregated into discrete units of private control and consumption, instead of being considered part of interdependent human and natural communities.” (emphasis in original)); *see also* ERIC FREYFOGLE, WHY CONSERVATION IS FAILING AND HOW IT CAN REGAIN GROUND (2006); ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA’S FRESH WATERS (2002); SANDRA POSTEL AND BRIAN RICHTER, RIVERS FOR LIFE: MANAGING WATER FOR PEOPLE AND NATURE (2003); Jonathan Adler, *Water Marketing as an Adaptive Response to the Threat of Climate Change*, 31 HAMLINE L. REV. 729 (2008).

<sup>11</sup> Arnold, *supra* note 3, at 794, 799; Murthy, *supra* note 1, at 125-126, n. 178 (citing George R. G. Clarke, Katrina Kosec & Scott Wallsten, *Has Private Participation in Water and Sewerage Improved Coverage? Empirical Evidence from Latin America*, 21 J. INT’L DEV. 327, 335 (2009) and Douglas Jehl, *As Cities Move to Privatize Water, Atlanta Steps Back*, N.Y. Times, Feb. 10, 2003, <http://www.nytimes.com/2003/02/10/us/as-cities-move-to-privatize-water-atlanta-steps-back.html>).

<sup>12</sup> Arnold, *supra* note 3, at 799-800 (“Atlanta entered into the contract in 1999 due to the inefficiencies and inadequacies of its public sector water operations, as well as high infrastructure-related costs. The parties, however, rushed through the bidding and approval process, failed to gather sufficient information, and did not negotiate carefully. Moreover, United [Water] ran the Atlanta system poorly, resulting in extensive complaints and widespread public and municipal regret over the privatization decision. It underbid the highly competitive contract to operate, maintain, and upgrade Atlanta’s aging water infrastructure but blamed the city for allegedly failing to fully disclose the condition of its infrastructure. As United Water cut jobs and training to reduce expenses, it developed backlogs of thousands of work orders and delivered poor quality of water, often with inadequate pressure. As a result, water ran orange to brown for many customers, tinting clothes laundered in it and hair washed in it, and United Water had to issue numerous ‘boil water’ orders because low pressure or insufficient water treatment made the water unsafe to drink, even though some customers said that they did not receive notices until one to two days after the water became unsafe. In one example, United did not address a broken main gushing water into the street and washing away pavement during a severe drought for ten days, even though a customer notified United repeatedly. In addition, inefficiencies led to waste, such as failure to bill customers properly, which resulted in millions of dollars of lost revenues to the City of Atlanta. After city officials and United Water management agreed to terminate the contract after only four years, the city resumed operation of its water system under a new structure, making infrastructure upgrades, hiring new staff, and introducing new customer service processes.” (citations omitted)).

<sup>13</sup> Peter Orszag, *Atlanta’s Water War Is First in a Gathering Flood*, BLOOMBERG (Mar. 20, 2012), <http://www.bloomberg.com/news/2012-03-20/atlanta-s-water-war-is-first-in-a-gathering-flood.html>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Varghese, *supra* note 8, at 6.

<sup>17</sup> Varghese, *supra* note 8, at 6 (“More directly affecting the public drinking water supply is the increased use of bottled water. Despite community opposition, corporations such as Nestle, Coke and Pepsi have been successful in convincing the public that their bottled water is healthier than municipal water. According to a number of studies, bottled water usage is becoming pervasive, which in essence is participating in a new form of privatization of the drinking water supply. In the U.S., despite very high tap water quality standards (unlike bottled water, which is not regulated by EPA [U.S. Environmental Protection Agency]), more and more Americans feel the need to opt out of the public water system, and depend on bottled water. This loss of faith is less a result of under-performance of the water utility than of highly successful marketing strategies. This loss of faith sometimes seems shared even by the EPA itself. On December 12, 2006, EPA organized a listening session on ‘Exploring Bottled Water as an Alternative Compliance Option for Chronic Contaminants Regulated under the Safe Drinking Water Act in Limited Situations for Non-Transient, Non-Community Water Systems.’ In the listening session itself, citizens’ groups argued that this initiative poses a new threat to public water systems.”).

<sup>18</sup> Arnold, *supra* note 3, at 803-804; *see also* JOHNSON ET AL., *supra* note 7, at 3 (“The landscape for contract operations was radically transformed in 1997. Long-term contracts for public utility operations were made possible when the Internal Revenue Service [(‘IRS’)] issued Revenue Procedure 97-13 which allows operators to enter into contracts of up to 20 years in length. Prior to 1997, contracts for water and wastewater services not only were limited by the IRS to five years, but also needed a termination clause that allowed contract cancellation after only three years. In other words, a contractor could only be assured of a three-year involvement in a project. With such a narrow time frame, operators were limited in their ability to invest in infrastructure improvement. With the need for capital improvements that the water infrastructure requires, opportunities for building a mutually beneficial partnership over an extended term have become an attractive solution under the rule changes. The new federal rules also open the door to new possibilities of expanded efficiency and cost reductions.”).

<sup>19</sup> Arnold, *supra* note 3, at 799-800; *see also* Orszag, *supra* note 13.

<sup>20</sup> JOHNSON ET AL., *supra* note 7.

<sup>21</sup> The theory is that if a company wanted to incorporate anywhere in the United States or abroad, it could, but to provide public services, state policy would require the company to be a benefits corporation. The benefits corporation would be required to have a stated purpose to provide a public benefit to that state and reinvest a certain portion of the profits back into the corporation to allow it to carry on its purpose. The goal of this policy is a type of shared accountability: the corporation to the state and the state to state citizens. *See*

generally, John Sanbrailo, *Public-Private Partnerships: A Win-Win Solution*, Huffington Post (Sep. 25, 2013), [http://www.huffingtonpost.com/john-sanbrailo/public-private-partnership\\_4\\_b\\_3990605.html](http://www.huffingtonpost.com/john-sanbrailo/public-private-partnership_4_b_3990605.html). If the company fails to provide a benefit to the state, the state will revoke its charter. The organizational documents and bylaws would state a business purpose that is state-specific. If the company acts outside of its stated state-specific purpose, it loses its charter in that state and the contract to provide the public service. To incentivize companies to form for state-specific public service provider purposes, states would have to allow these corporations to generate a profit, a substantial portion of which would be reinvested in the corporation to the benefit of the community it serves. The profit would be key to generating revenue for continued maintenance. To avoid profit generation and immediate dissolution to redistribute profits, state policy should also consider a provision in the law regarding the remaining revenues distribution should private-public service providers dissolve. Any profits generated should be protected much like the cy pres doctrine

protects charitable gifts. See generally Benefits Corporation Information Center, <http://benefitcorp.net/> (last accessed Dec. 28, 2013).

<sup>22</sup> See BENEFIT CORP, 2013 STATE BY STATE SUMMARY CHART, *supra* note 7 (providing a summary of both model statutory and state by state statutory language that either follows or modifies the model statutory language).

<sup>23</sup> For a discussion and examples, see Arnold, *supra* note 3, at 792-793.

<sup>24</sup> Arnold, *supra* note 3, at 792-793; Varghese, *supra* note 8, at 2.

<sup>25</sup> Arnold, *supra* note 3, at 792-793; see *supra* note 7 and accompanying text.

<sup>26</sup> See generally, JOHNSON ET AL., *supra* note 7, at 9; Arnold, *supra* note 3, at 792-793.

<sup>27</sup> Murthy, *supra* note 1; see also Varghese, *supra* note 8, at 3 (referring to national and multinational water companies: "Tracking these national and multinational corporations is also a challenge because they are continually making changes to their structure such as adding and dropping cities and subsidiaries, trading divisions of their operations, and changing the name of their corporation completely. They also frequently alter contracts.").

## Endnotes: HOW ENVIRONMENTAL REVIEW CAN GENERATE CAR-INDUCED POLLUTION: A CASE STUDY

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<sup>35</sup> See Chertok & Miller, *supra* note 24, at 927.

<sup>36</sup> Chertok & Miller, *supra* note 24, at 927.

<sup>37</sup> Chertok & Miller, *supra* note 24, at 927-28.

<sup>38</sup> See Gregory D. Eriksen, Note, *Breaking Wind: Facilitating Wind Energy Development in New York State*, 60 SYRACUSE L. REV. 189, 196 (2009) (stating that challenges to decisions of SEQRA lead agencies usually take form of a petition under Article 78 of the New York Civil Practice Law and Rules); N.Y. C.P.L.R. art. 78 (McKinney 2006). New York courts usually uphold agencies' SEQRA decisions unless they are "arbitrary and capricious" or otherwise legally erroneous. *H.H. Warner, LLC v. Rochester Genesee Reg'l Transp. Auth.*, 87 A.D. 3d 1388, 1390, 930 N.Y.S.2d 131, 132 (App. Div. 2011).

<sup>39</sup> See Chertok & Miller, *supra* note 24, at 926 (DEC drafted relevant regulations).

<sup>40</sup> See N.Y. COMP. CODES R. & REGS. 6, § 617.4.

<sup>41</sup> The lead agency can rebut this presumption if its environmental assessment identifies "potential adverse environmental impacts, take[s] a 'hard look' at them, and '[makes] a reasoned elaboration of the basis for its determination' that there would be no adverse impacts." *Chinese Staff & Workers Ass'n v. Burden*, 932 N.Y.S.2d 1, 2 (App. Div. 2011) [hereinafter *Chinese Staff II*].

<sup>42</sup> See Sterk, *supra* note 6, at 2044-45.

<sup>43</sup> N.Y. COMP. CODES R. & REGS. 6, § 617.5(c).

<sup>44</sup> *Id.* at § 617.5(c)(1) (maintenance of existing facility), (2) (replacement or repair of structure or facility), (9) (construction of single-family, two-family or three-family residence), (10) (construction of accessory residential structures), (12) (granting of individual setback and lot line variances), (13) (other variances for single-family, two-family and three-family residences). *Cf.* Sterk, *supra* note 6, at 2044 (Type II actions include "replacement of existing facilities on the same site, granting of setback and lot size variances, construction of minor accessory structures . . . and mapping of existing roads."); Patricia Salkin, *The Historical Development of SEQRA*, 65 ALB. L. REV. 323, 340-44 (2001) (listing numerous other exclusions).

<sup>45</sup> N.Y. COMP. CODES R. & REGS. 6, § 617.2(ak) (defining "unlisted" actions).

<sup>46</sup> *Id.* at § 617.7 (agency must determine significance of environmental impact as to both Type I and unlisted actions).

<sup>47</sup> See Chertok & Miller, *supra* note 24, at 926.

<sup>48</sup> SEQRA's broad definition of "environment" is not the only difference between SEQRA and NEPA; however, it is the difference most relevant to this article. Two other differences are important but less relevant to the issues discussed below. First, SEQRA is a substantive statute (requiring agencies to actually avoid adverse environmental impacts to the maximum extent possible), while NEPA is merely a procedural statute, requiring agencies to disclose rather than avoiding environmental impacts. See Chertok & Miller, *supra* note 24, at 927-28 (SEQRA requires lead agency to certify that its action "avoids or minimizes adverse environmental impacts to the maximum extent practicable" through mitigation measures); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1195 n.291 (2012) (noting that because NEPA is "procedural", it "requires only that action agencies disclose environmental impacts, not that they alter their plans in light of what they learn"); *Robertson v. Methow Valley Citizens Council*, 490 U.S.

332, 351 (1989) (NEPA "prohibits uninformed—rather than unwise—agency action"). Second, SEQRA requires an EIS whenever agency action "may" significantly affect the environment. N.Y. ENVTL. CONSERV § 8-0109(2) (McKinney 2013). By contrast, NEPA requires an EIS only for actions that "will" create such an impact. See *Robertson*, 490 U.S. at 356, n.17.

<sup>49</sup> 42 USC § 4332(2)(C).

<sup>50</sup> *Chinese Staff I*, 502 N.E.2d at 503.

<sup>51</sup> N.Y. ENVTL. CONSERV § 8-0105(6).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ("long-term effects" must be considered under SEQRA).

<sup>54</sup> See *supra* notes 34-35 and accompanying text.

<sup>55</sup> *Jackson*, N.E.2d at 434.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 436.

<sup>58</sup> *Id.* at 435.

<sup>59</sup> See *infra* note 96.

<sup>60</sup> See George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1033 (2001) (describing "infill" as "re-use of developed urban parcels"); Hubble Smith, *Finding the Will to Infill*, LAS VEGAS BUS. PRESS, Jan. 16, 2012, at 6 (Infill development, "broadly defined [is] new construction on vacant parcels with utility and infrastructure already in place and surrounded by existing homes and businesses.").

<sup>61</sup> Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT'L & COMP. L. 589, 596 (2009).

<sup>62</sup> See Bill Lurz, *Don't Give Up on Developing Land*, HOUSING GIANTS (Nov. 24, 2008) at 7, [http://www.nxtbook.com/nxtbooks/reed/hg\\_20081124/index.php?startid=5#6](http://www.nxtbook.com/nxtbooks/reed/hg_20081124/index.php?startid=5#6) ("[M]any of the best infill sites will require . . . rezoning."); *Your Right to Know*, ATLANTA J. & CONSTITUTION, March 3, 2005, at 1 ("Usually . . . developments require rezoning.").

<sup>63</sup> See Chertok & Miller, *supra* note 24 and accompanying text.

<sup>64</sup> See *infra* Part III A.

<sup>65</sup> See *infra* Part III B.

<sup>66</sup> N.Y. ENVTL. CONSERV. §8-0105(6).

<sup>67</sup> *Id.*

<sup>68</sup> *Chinese Staff I*, 502 N.E.2d at 176.

<sup>69</sup> *Id.* at 177.

<sup>70</sup> *Id.* at 178 (More precisely, the city issued a "conditional negative declaration," which means that the project would "not have any significant effect on the environment if certain modifications were adopted by the developer.").

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 179.

<sup>73</sup> *Id.* at 180.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 181.

<sup>76</sup> *Id.*

<sup>77</sup> See Diane K. Levy, Jennifer Comey & Sandra Padilla, *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J.