

CONSTRUCTION LITIGATION

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ARTICLES

Implications of the International Green Construction Code

By William E. Kelley Jr. – September 10, 2012

Since the initial launch of the Leadership in Energy and Environmental Design (LEED) green building rating system, the green-building movement has seen significant and unprecedented growth in both the public and private sectors. In addition, green building has undergone a continuous evolution, including the development of multiple green-building rating systems, the introduction of legislation incentivizing or mandating sustainability requirements or energy-efficiency measures to be incorporated into projects, the creation of green training and certification programs for individual project participants, the development of new insurance products relating to green and sustainable building, and the emergence of new contract forms addressing the allocation of responsibility for green-building certification. Now, the green-building movement is preparing for its next major paradigm shift: green building codes.

Where Do Green Building Codes Fit In?

The world of building codes, green-building rating systems, and technical standards already seems to be a little crowded, so where do green building codes fit into this arena? Green project participants are already familiar with standards such as ASHRAE-90.1 and codes such as the International Energy Conservation Code, both of which relate to energy performance and efficiency. These individual standards and codes have not traditionally addressed the whole project, though, leaving jurisdictions without uniformly accepted standards or model codes to holistically address the sustainability features to be incorporated into the design, construction, maintenance, and operation processes. Until recently, states and local governments wishing to implement whole-project green legislation have largely had to rely on third-party certification programs such as LEED, Green Globes, and Energy Star as part of their legislative programs.

There are potential problems with legislative initiatives that require some level of certification under green building ratings systems, such as LEED. For starters, green building rating systems were not necessarily intended to become the minimum standard for all projects. LEED and other green building rating systems were intended to be “beyond code”—not necessarily the code itself. Green building codes help fill the gap between those projects that simply meet code without specific attention to sustainability concepts and those projects that go beyond code and achieve certification under green building rating systems. These green building codes do not replace green building rating systems, but rather they help raise the bar for projects that would not otherwise seek certification under green building rating systems.

The first mandatory state-wide green building code was California’s CALGreen Code, which went into effect on January 1, 2011. However, green building codes with a more national scope have not been far behind. In March 2010, the International Code Council (ICC) unveiled the first draft of its International Green Construction Code (IgCC) for public review and comment. The IgCC was developed by the ICC in partnership with the American Institute of Architects (AIA), the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE), the

U.S. Green Building Council (USGBC), and the Illuminating Engineers Society (IES). After two years of collaboration, public comment, and hearings on the draft code, the ICC released the final version of its 2012 IgCC in March 2012.

What Is the IgCC?

At its core, the IgCC can be described in three ways. First, it is a model code, meaning that it provides a road map for states and local governments interested in implementing a green construction code. However, as a model code, it is not mandatory or enforceable until a jurisdiction elects to actually adopt it in that particular location.

Second, it is an adaptable code insofar as jurisdictions have the option of adopting some or all of the code, or even adopting the whole code and then applying jurisdiction-specific amendments. This gives jurisdictions flexibility to shape the IgCC to meet their specific needs.

Third, it is an overlay code. The IgCC cannot serve as a stand-alone green building code. Instead, it specifically relies on the existence of other codes and standards. For example, the IgCC provisions relating to energy conservation, efficiency and atmospheric quality make specific reference to the International Energy Conservation Code (IECC). Because of the interrelation between the IgCC and other codes and standards, adopting jurisdictions will have to undergo a comprehensive review process to determine how existing codes will be affected by the IgCC, as well as determine whether any amendments or changes to those existing codes will be necessary to fully implement the IgCC.

The IgCC addresses multiple aspects of the green building process in relation to the overall construction project, including the administrative process, plan review and approval, inspections, and enforcement procedures. For example, the IgCC includes guidance for the local jurisdiction's role in review and approval of the plans and specifications for the green project, permitting requirements, and inspections that are necessary prior to the issuance of a certificate of occupancy. This obviously requires the code officials to possess a certain level of experience and familiarity with green building processes, but the model code allows for these code officials to be assisted by outside consultants or technical experts where it is deemed necessary to help facilitate administration of the code.

The substantive sections of the IgCC are similar in organization to other whole-project standards and green building rating systems such as LEED, as the code is divided into the following general categories: Site Development and Land Use; Material Resource Conservation and Efficiency; Energy Conservation, Efficiency and CO₂e Emission Reduction; Water Resource Conservation, Quality and Efficiency; Indoor Environmental Quality and Comfort; and Commissioning, Operation, and Maintenance. Further, the IgCC is not limited to new construction, and it includes provisions relating to renovations and retrofits for existing buildings.

There are four basic types of provisions in the IgCC: jurisdictional requirements, alternate compliance-path options, project electives, and all other mandatory provisions comprising the core of the code.

Jurisdictional Requirements

The IgCC allows adopting jurisdictions to select whether certain requirements within the IgCC will be adopted on a jurisdiction-by-jurisdiction basis. For example, adopting jurisdictions may elect whether individual jurisdictional requirements will apply or not apply in that particular jurisdiction. If selected by the adopting jurisdiction, these jurisdictional requirements become mandatory for all covered projects; however, if not selected by the jurisdiction, projects do not have to meet these requirements.

While some jurisdictional requirements consist solely of “Yes” or “No” selections by the adopting jurisdictions, other requirements, such as diversion of construction waste from landfills, require the jurisdiction to choose what level of compliance will be required—as opposed to choosing whether the requirement applies at all. The jurisdiction requirements are contained in Table 302.1 of the IgCC, an excerpt of which is shown here:

**TABLE 302.1
 REQUIREMENTS DETERMINED BY THE JURISDICTION**

Section	Section Title or Description and Directives	Jurisdictional Requirements	
CHAPTER 1. SCOPE			
101.3 Exception 1.1	Detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories in height above grade plane with a separate means of egress, their accessory structures, and the site or lot upon which these buildings are located, shall comply with ICC 700.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
101.3 Exception 1.2	Group R-3 residential buildings, their accessory structures, and the site or lot upon which these buildings are located, shall comply with ICC 700.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
101.3 Exception 1.3	Group R-2 and R-4 residential buildings four stories or less in height above grade plane, their accessory structures, and the site or lot upon which these buildings are located, shall comply with ICC 700.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
CHAPTER 4. SITE DEVELOPMENT AND LAND USE			
402.2.1	Flood hazard area preservation, general	<input type="checkbox"/> Yes	<input type="checkbox"/> No
402.2.2	Flood hazard area preservation, specific	<input type="checkbox"/> Yes	<input type="checkbox"/> No
402.3	Surface water protection	<input type="checkbox"/> Yes	<input type="checkbox"/> No
402.5	Conservation area	<input type="checkbox"/> Yes	<input type="checkbox"/> No
402.7	Agricultural land	<input type="checkbox"/> Yes	<input type="checkbox"/> No
402.8	Greenfield sites	<input type="checkbox"/> Yes	<input type="checkbox"/> No
407.4.1	High-occupancy vehicle parking	<input type="checkbox"/> Yes	<input type="checkbox"/> No
407.4.2	Low-emission, hybrid and electric vehicle parking	<input type="checkbox"/> Yes	<input type="checkbox"/> No
409.1	Light pollution control	<input type="checkbox"/> Yes	<input type="checkbox"/> No
CHAPTER 5. MATERIAL RESOURCE CONSERVATION AND EFFICIENCY			
503.1	Minimum percentage of waste material diverted from landfills	<input type="checkbox"/> 50% <input type="checkbox"/> 65% <input type="checkbox"/> 75%	

Alternate Compliance-Path Options

While the IgCC is predominantly focused on nonresidential construction, jurisdictions can elect to implement requirements for residential projects as well. In this regard, Table 302.1 (shown above in Section 101.3, Exceptions 1.1, 1.2, and 1.3) allows jurisdictions to require that residential projects comply with ICC 700, the National Green Building Standard. Thus, where selected by the adopting jurisdiction, residential projects can achieve compliance with the IgCC through compliance with ICC 700 as an alternate code-compliance path. In addition to ICC 700, the IgCC also includes alternate code-compliance paths through the use of ASHRAE 189.1, Standard for the Design of High-Performance Green Buildings; a whole-building life-cycle assessment; and alternate paths for energy conservation, including performance-based and

prescriptive-based compliance paths. Where a project elects to pursue one of these alternate compliance paths, then compliance with some (in the case of the whole-building life-cycle assessment and alternate paths for energy conservation) or all (in the case of ASHRAE 189.1) of the IgCC provisions is not strictly required.

Project Electives

The IgCC also allows jurisdictions to determine whether projects will be required to pursue certain electives that go beyond the baseline provisions by selecting from an approved list of project electives. If selected by an adopting jurisdiction, projects must incorporate a specific number of electives into the project in addition to the jurisdictional requirements and baseline code requirements. Once a project selects a project elective, then that elective becomes mandatory for that project. The project electives are contained in Appendix A to the IgCC, and an excerpt from Table A104 of the project electives is shown here:

TABLE A104
SITE PROJECT ELECTIVES

SECTION	DESCRIPTION	MINIMUM NUMBER OF ELECTIVES REQUIRED AND ELECTIVES SELECTED
A102.2	The jurisdiction shall indicate a number between and including 0 and up to and including 6 to establish the minimum total number of project electives that must be satisfied.	—
A104.1.1	Flood hazard area preservation	<input type="checkbox"/> Yes <input type="checkbox"/> No
A101.1.2	Flood hazard area minimization	<input type="checkbox"/> Yes <input type="checkbox"/> No
A101.1.3	Flood hazard area, existing building	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.2	Wildlife corridor	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.3	Infill site	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.4	Brownfield site	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.5	Site restoration	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.6	Mixed use development	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.7	Changing and shower facilities	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.8	Long-term bicycle parking and storage	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.9	Heat island	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.9.1	Site hardscape project elective 1	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.9.2	Site hardscape project elective 2	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.9.3	Site hardscape project elective 3	<input type="checkbox"/> Yes <input type="checkbox"/> No
A104.9.4	Roof covering project elective	<input type="checkbox"/> Yes <input type="checkbox"/> No

Mandatory Provisions of the IgCC

Code provisions that do not fall under the categories of jurisdictional requirements, project electives, or alternate compliance path options are mandatory for all covered projects—unless otherwise modified or amended by the adopting jurisdiction. For example, under the requirements for Site Development and Land Use, jurisdictions can determine whether the provisions relating to nondisturbance of greenfield sites will be required for all projects. However, provisions relating to storm-water management, landscape irrigation, and heat-island mitigation all fall under the mandatory requirements for all projects. Other code provisions falling under this mandatory category include pre- and post-occupancy commissioning of buildings, including a requirement that states that a post-occupancy commissioning report must be provided to the building owner within 30 months after the issuance of a certificate of occupancy.

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Legal Aspects of Green Building Codes

The shift from voluntary green building rating systems to mandatory green building codes raises many interesting legal questions. For example, if green building codes become the baseline standard for design and construction in a jurisdiction, does that, in turn, have the effect of raising the standard of care for construction and design professionals? That question was posed in the AIA D503-2011 Guide to Sustainable Projects (§ 2.2) as follows:

[A]s more jurisdictions institute green building standards by code, the Architect's standard of care may include requirements established by newly adopted code or practice. In other words, 'standard of care' is an evolving concept; as design professionals begin incorporating sustainable design practices as Basic Services (either voluntarily or through jurisdictional requirements), the Architect's standard of care may be construed to include those sustainable design practices as the accepted baseline standard of performance for the Architect.

The issue of standard of care has many potential implications in construction litigation, including establishment of the applicable standard of care through expert testimony and potential insurance-coverage issues, where it is deemed that the design professional has voluntarily agreed to heighten its standard of care for the project. Construction lawyers should give this issue considerable attention in both contract drafting and litigation.

Green building codes also raise legal questions as to which parties are responsible for ensuring green code compliance. As noted in the AIA D503-2011 Guide to Sustainable Projects, § 3.2.1 of the AIA B101-2007 Owner-Architect Agreement "requires that the Architect review laws, codes, and regulations applicable to the Architect's services as part of its Basic Services" and § 3.4.2 "requires that the Architect incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project." Such language would seem to suggest that the architect is the party ultimately responsible for identifying relevant green building code provisions and incorporating those requirements into the construction documents.

However, what about jurisdictions that require the selection of "Project Electives" as part of IgCC compliance? Once an elective is selected, it then becomes mandatory. Thus, there are elements of collaboration and discretion that have to be exercised in selecting the electives. Construction lawyers should review their clients' contract forms to determine whether those contract forms adequately address the selection process and identification of the parties to be involved. Special attention should also be given to determining whether standard contract provisions about code compliance adequately address the selection process for project electives and the potential liability stemming from those selections. The inclusion of alternate compliance paths to the IgCC also complicates matters somewhat. Does your client's standard form contract address what parties will be responsible for recommending whether the project should pursue an alternate compliance path, such as ASHRAE 189.1? If not already addressed in the contract, attention should be given to this type of issue as well.

Finally, legal questions may arise in relation to the enforcement of the IgCC. The body of the IgCC does not contain any enforcement procedures or requirements. Instead, the IgCC has two “suggestions” on enforcement, one contained in the optional ordinance contained in Appendix C and the other found in Appendix D (Enforcement Procedures). In the case of the Enforcement Procedures in Appendix D, the enforcement provisions mirror other model codes in terms of setting up requirements for notice and opportunities to cure, as well as resulting civil infraction and misdemeanor penalties for failure to comply with the code. The optional ordinance in Appendix C, on the other hand, suggests language that would require the posting of a green performance bond and payment by the surety to the jurisdiction in the event of uncured or incurable code violations. For code violations that are curable, these enforcement procedures may not raise many legal red flags. However, attention should be given to the possibility of incurable code violations, such as the failure to comply with the diversion of construction waste from landfills during the course of the project.

Fortunately, construction lawyers are not completely without guidance on these issues. In addition to publishing its D503-2011 Guide to Sustainable Projects as a reference tool, the AIA also recently released new contract forms to specifically define a process for sustainable project goals, including the goal-setting process, the incorporation of goals and a sustainability plan into the construction documents, and the allocation of responsibility for the individual components necessary for the achievement of sustainable project goals. These new contract forms include the A101-2007 SP, A201-2007 SP, A401-2007 SP, B101-2007 SP, C401-2007 SP, and B214-2012. All of these forms—with the exception of the B214-2012—are essentially modified versions of the already familiar 2007 contract forms, with additions relating specifically to sustainable project goals. Other green building contract forms exist from ConsensusDOCS and DBIA, and these forms should also be considered where appropriate.

The IgCC represents another paradigm shift in the world of green building, and prudent construction lawyers should prepare themselves now to adequately protect their clients in contract drafting, claims management, and litigation.

Keywords: litigation, construction litigation, green building, International Green Construction Code, building codes

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Green Building: Limitations Clock Starts at First Sign of Trouble

By Jeanne Schubert Barnum and Levi Jones – September 10, 2012

In 1999, the Chesapeake Bay Foundation wanted its new headquarters, the Philip Merrill Environmental Center, to be built in Annapolis, Maryland, from environmentally friendly materials—and it was. Unfortunately, a mistake or lack of understanding regarding one of the components in the construction led to serious problems with the final building and generated a lawsuit that was not resolved until 2012. *Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.*, No. 8:11-cv-00047-AW, 2012 U.S. Dist. LEXIS 39886 (D. Md. Mar. 23, 2012). While the context of the issues raised is fresh, the events that led to legal action, the claims, and the nature of the suit itself will be familiar to any attorney practicing construction law. Building “green” adds just one more layer of challenges to the many others that must be addressed when a building is under construction, and, at least in this case, it created no new cause of action. Instead it taught an always-valuable lesson that forgetting the basics can cause you to lose a case.

The Chesapeake Bay Foundation had a goal that its new waterfront location would be the nation’s first Leadership in Energy and Environmental Design (LEED) platinum building. The designer the foundation hired, SmithGroup, Inc., planned to meet that goal by utilizing a number of innovative materials and techniques. One of the materials it used on the project was Parallam, a structural material made of wood waste materials. Parallam is made from 2-foot to 8-foot wood veneer strands from second-growth trees that are bonded together under pressure using a high-strength glue. Parallam is considered a green product because it is made from wood scraps that would otherwise go to waste and because it uses timber from fast-growth trees, helping to relieve pressure on old-growth forests. Weyerhaeuser NR Company supplied the Parallam in this case, and it was used extensively for the structure’s outer shell and the exposed beams that extended beyond the roof of the building. Because of this design, some of the Parallam material was exposed to the elements, and Weyerhaeuser was also contracted to treat the Parallam members with a wood preservative, PolyClear 2000. Construction on the building began in late 1999 and was completed in December 2000. The headquarters, when completed, was an impressive addition to the Bay’s shoreline.

SmithGroup [displayed the foundation’s headquarters on its website](#) (last accessed June 11, 2012) and boasted:

In designing a new headquarters for the largest nonprofit regional environmental organization in the U.S., SmithGroup created an icon for sustainability. Winner of many awards for its innovative and sustainable design concepts, this foundation office building has been hailed by environmentalists and business leaders alike.

Shortly after opening, however, it was discovered that water leaked into the new building when it rained. Clark Construction, the general contractor on the project, hired a forensic engineer to find the source of the leaks. The engineer’s report pointed to the weather-exposed Parallam as the

problem. Noting that the Parallam members included inherent irregularities that gave them an attractive appearance, it also made them difficult to seal. The expert found some members that had not been correctly pressure-treated and others that lacked the preservative coating. If not properly addressed, an “accelerated rate of deterioration of the exposed wood elements at the building façade” was a potential result. Investigation into the water leaks continued, and, in May 2002, Clark retained a woodworking consultant. This expert found actual damage to the Parallam—splitting and movement of the trusses—that he ascribed to treatment and coating system failure that did not protect the Parallam adequately.

The foundation had been working with SmithGroup and Clark to determine the scope of the problem and how to resolve it. After receiving the expert reports in 2001 and 2002, the group notified Weyerhaeuser regarding the problems they had discovered. This was Weyerhaeuser’s first notice that there was a problem involving the Parallam. Weyerhaeuser sent its own experts to inspect and participated in remedial efforts until 2004, but it did nothing further. Its experts failed to find evidence of rotting, and Weyerhaeuser assured the foundation, Clark, and SmithGroup that the Parallam had been properly treated and that their concerns were unfounded.

The remedial efforts addressed the obvious problems but not those under the surface. During an annual inspection of the building in 2009, the foundation discovered, allegedly for the first time, that the Parallam beams were rotting and required emergency repair. After some debate as to who was responsible for the repairs, Clark and SmithGroup agreed to pay for the repair of the building together and joined the foundation in pursuing Weyerhaeuser to recover the repair costs. Not until after the repairs were completed did the foundation, SmithGroup, and Clark file suit against Weyerhaeuser, alleging breach of contract, common-law indemnity, contribution, negligent misrepresentation, and negligence. SmithGroup and Clark blamed Weyerhaeuser for inadequately treating the Parallam, for selecting an inappropriate preservative, and for misrepresenting the appropriateness of the preservative it selected. The plaintiffs sought damages for the cost of investigation, the cost of the remedial measures and the lost revenues for the loss of use while the building was being repaired. Weyerhaeuser, for its part, blamed the plaintiffs for negligently constructing and maintaining the building, for selecting or approving an inappropriate preservative for the Parallam, and for failing to take into account the seaside location (and harsher weather conditions) when designing the building. Weyerhaeuser also filed a third-party complaint against Permapost, the company with which it subcontracted to provide the preservative treatment for the Parallam. It’s not clear who actually selected the wood preservative that was used, but all the wood scientists involved agreed that it was not an appropriate choice for protecting wood exposed to the elements.

Although the case might have presented an interesting set of green-building litigation questions relating to how a court would apportion blame when innovative, green building materials fail, the court never reached the merits because it resolved the case on statute-of-limitations grounds. The statute of limitations in Maryland for breach of contract and the other alleged claims is three years. The district court applied Maryland’s discovery rule for statute-of-limitations cases. That rule holds that “the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.” *Poffenberger v. Risser*, 431 A.2d 677, 680 (Md. 1981). Applying the

rule, the court concluded that the foundation had both “actual and inquiry notice” of its claim because it first discovered the defects in the Parallam shortly after the building was completed, when it noticed the water leaks and received the report from the first expert inspection in 2001. While the 2001 report spoke about the potential for future problems, the 2002 report described the existing damage found as the result of improper or inadequate treatment of the Parallam members. Those facts led “ineluctably to the inference that Plaintiffs had actual awareness of the probable cause and general nature of the damage” and the “confluence of undisputed facts” compelled the conclusion that the “Plaintiffs had notice that Weyerhaeuser’s manufacturing and/or treatment process was a potential cause of the observed damage to the Parallams.” That discovery, according to the court, should have put the plaintiffs on notice that they were facing substantial problems, including the risk that the material would rot. The fact that they did not discover actual rot until 2009 was immaterial; the court said that was “just the ultimate manifestation of this constellation of injuries” that had been discovered earlier. The cause of action accrued in 2001, and the statute of limitations period expired in 2004, seven years before the plaintiffs filed suit against Weyerhaeuser.

The plaintiffs argued that Weyerhaeuser’s allegedly false assurances regarding the adequacy of the Parallam’s waterproofing tolled the statute of limitations. The court disagreed, holding that at the time the plaintiffs received any alleged assurances from Weyerhaeuser, they already had information from the inspection reports telling them that any such assurances were false.

The court appears to have taken the view that the plaintiffs should have known that there was a potential for massive problems as soon as they saw the first signs of water leakage around the Parallam members. It held, “Any ordinary person knows that, all else equal, wet wood rots.” The court also concluded that there were no public-interest factors weighing in favor of tolling the statute of limitations in this case. “Instead, it is a relatively insular dispute between sophisticated commercial entities.”

As *Chesapeake Bay Foundation* demonstrates, green-construction litigators may apply typical grounds for relief—breach of contract, breach of warranty, negligent design, and negligent construction—to new situations created as a result of a failure of green design, materials, techniques, and compliance. The same traditional defenses, such as the statute of limitations, are just as effective for fighting green-construction claims as they are for any other type of construction claim.

This means that litigators asserting or defending green-construction litigation claims are free to look to construction cases outside the green construction context for examples of best practices and pitfalls to avoid. For instance, *Chesapeake Bay Foundation* is not dissimilar from a high-profile lawsuit filed in 2007 by the Massachusetts Institute of Technology against Frank Gehry after its 720,000-square-foot academic complex began suffering serious problems shortly after its completion in 2004. See John A. Hawkinson, [MIT settles with Gehry over Stata Ctr. defects](#), The Tech: Online Edition (Mar. 19, 2010).

MIT’s lawsuit listed design and construction failures such as cracking masonry, poor drainage, mold growth on the brick exterior, persistent leaks throughout the building’s interior, and sliding

ice and snow. These problems were largely blamed on the envelope-pushing design of Gehry, the architect for the building. Gehry placed blame for the problems on the builder, Skanska, and Skanska in turn sued its contractor, NER Construction Management. Like *Chesapeake Bay Foundation*, all the players in this round robin of blame tried to place responsibility elsewhere for the problems that arose when they tried to translate the cutting edge design into reality. But unlike the Chesapeake Bay Foundation case, the plaintiffs were not barred from pursuing their claims by the statute of limitations. The parties settled the claims with a confidential agreement in 2010.

In a project as complex as the Chesapeake Bay Foundation building or the Gehry-designed MIT building, it is imperative to pin down in the design and construction contracts exactly who will be responsible for what if the building has problems, particularly when using cutting-edge design or green materials. Regular inspections and prompt collaborative action are crucial to discover and resolve problems. The plaintiffs in *Chesapeake Bay Foundation* conducted annual inspections of their facility, and according to the complaint they filed, that is how they first learned of extensive rot that went beyond the water leaks they had found earlier. That still did not save the Foundation's claim because two expert reports had already warned of the potential for future damage and the actual problems already discovered. With a project that is heavy on innovation, parties should be especially vigilant for any defects, and they should assume the worst and act quickly to ensure that they preserve their right to bring a cause of action when those defects arise. In other words, even a LEED certified building can have leaks in a rainstorm. If it does, you should assume that the leak may be just the tip of the iceberg and that there may be hidden problems waiting to be discovered.

Jurisdictions throughout the country are adopting stricter standards for green construction. For example, Maryland, home to the Chesapeake Bay Foundation, became the first state to adopt the more environmentally stringent International Green Construction Code, discussed in "[Implications of the International Green Construction Code](#)," enabling local governments across the state to adopt the Code. As more jurisdictions follow suit, builders and designers will be trying new designs and new materials to meet the stricter standards. Some of these innovations will inevitably lead to defects, and some of those defects will inevitably lead to litigation. As with any traditional construction litigation, when contracting parties first notice such defects, they must investigate thoroughly and act promptly to preserve their legal claims.

Keywords: litigation, construction litigation, green building materials, statute of limitations, Leadership in Energy and Environmental Design

Jeanne Schubert Barnum and Levi Jones are with Schnader Harrison Segal & Lewis.

Building Commissioning and the Role of the CxA

By Richard W. Gaeckle – September 10, 2012

What was once a growing trend—green building and sustainable design—has now become mainstream in building design and construction. Green building is typically associated with environmental responsibility. However, an often-overlooked objective of green building is the bottom-line motivation of the owner to realize energy savings through increased efficiency in building systems. Thus, the hallmark of any green building project is the ability to verify the performance expectations of the owner through a verification process of the building energy systems commonly known as commissioning.

The basic intent of building commissioning is to verify that the building energy systems are installed and that they perform in accordance with the Owners Project Requirements (OPR), the Basis of Design (BOD), and the project construction documents. Commissioning is not a function of design, nor is it an aspect of construction. Rather, commissioning is focused on the planning, recording, testing, and reporting functions relating to the building energy systems. In essence, the commissioning process is a systemic verification that the building systems perform in accordance with the design intent and that such systems meet the owner's operational needs.

In the last two decades, building commissioning has continuously developed and evolved. In the 1990s, American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Guideline 1 for the commissioning of heating, ventilation, and air-conditioning (HVAC) systems was the standard commissioning guideline for the green building industry. ASHRAE identified the overall purpose and intent of building commissioning, the process for identifying project performance goals, and the procedures necessary for proper verification. However, the ASHRAE guidelines focused more on commissioning as an overall process rather than the individual roles and responsibilities of specific project team members.

Influenced significantly by the energy standards of ASHRAE, the U.S. Green Building Council (USGBC) developed the Leadership in Energy and Environmental Design (LEED) sustainability assessment guidelines in the late 1990s and redeveloped them in 2000. Throughout the last decade, the LEED sustainability guidelines have gained prominence in the industry and are recognized as the predominant standard for green building design and construction. Included within the sustainability guidelines is a detailed itemization of the tasks required for proper building commissioning. Additionally, the LEED commissioning guidelines identify the specific roles and responsibilities of the project team members with respect to building commissioning.

Most recently, in the spring of 2012, the International Code Council finalized its long-awaited International Green Construction Code (IgCC). The IgCC is intended to serve as a model green construction code for adoption by various jurisdictions. Included as part of the IgCC are provisions requiring the commissioning of various building systems. While similar to the LEED commissioning guidelines, a notable aspect of the IgCC is the requirement stating that a final

commissioning report must be submitted to and accepted by the code official prior to the issuance of a certificate of occupancy.

While each commissioning standard contains its own unique features, the characteristics common to all standards for a comprehensive building commissioning process generally include documenting the design intent and operation protocols for all building systems, verifying in-place system performance through well-documented testing and measurement, evaluating performance in comparison to the documented design intent, preparing comprehensive operation and maintenance manuals coupled with the appropriate training of building operations staff, and monitoring system performance on an ongoing basis.

Another key characteristic of any building commissioning process is the designation of an objective individual to serve the role of the Commissioning Authority (CxA). Of course, the level of responsibility undertaken by the CxA will ultimately be dictated by the scope of the commissioning agreement. Nevertheless, the basic obligations of the CxA will generally include reviewing the OPR and the BOD, incorporating commissioning requirements into the construction documents, developing and implementing the commissioning plan, verifying the installation and the performance of the commissioned systems, and completing the final commissioning report.

In addition to these basic functions, the CxA may be required to undertake enhanced commissioning services. These additional obligations require greater involvement by the CxA in the design and construction phases. This includes performing design review at various project stages, reviewing contractor submittals, and involvement in the post-occupancy review of building operation systems. Finally, while other project team members may develop required systems manuals and undertake training of operation and maintenance personnel, as part of the commissioning process, the CxA may also be called on to perform or assist in these tasks.

It is important to note that the CxA traditionally does not design, nor does the commissioning agent construct, the system. Rather, the commissioning agent is part of the system check or test run of the system, ascertaining whether the system is operating as intended. In some instances, where enhanced commissioning is required by the project scope, a more involved role of the CxA may be required that may include design review, construction documents review, submittal review, and preparation of systems operation and maintenance manuals. The legal practitioner must be aware of the scope of the commissioning process, the limitations of such a process, and the specific obligations the CxA is required to perform.

Given its prominence in the green building industry, the LEED sustainability guidelines arguably set the standard for the commissioning of building energy systems in the industry. While certainly not intended to be a code, from an industry standpoint, the LEED guidelines identify the respective roles and responsibilities of those involved in the commissioning process—specifically the obligations expected of the CxA. In its current version, LEED characterizes the commissioning process to be employed on a green building project as either fundamental or enhanced. This can be analogized as basic services versus additional services required by the CxA. Where fundamental commissioning is required, the CxA has very basic and limited

obligations. As its name suggests, enhanced commissioning requires the CxA to undertake a greater responsibility and involvement in the commissioning process. The legal responsibility and potential liability of the CxA will ultimately depend on whether the owner elects to employ a fundamental or an enhanced commissioning process.

As noted above, the basic or fundamental commissioning services provided by the CxA require that the CxA reviews the OPR and the BOD developed by the design team. It is important to note that this service requires involvement by not only the CxA, but also by the owner and the design team collaboratively. The OPR is essentially a narrative of the design intent for the commissioned systems. This requires a description of the primary purpose, program, and use of the project, as well as the goals relating to the owner's program needs. This would include operational costs as well as energy efficiency goals, which may be linked to local energy codes or other standards such as ASHRAE or LEED. In addition, the OPR should include the performance expectations of the commissioned systems, including specific efficiency targets. Finally, the OPR should include operation and maintenance requirements and the level of training and orientation that the owner's personnel will require.

The BOD describes the design of the systems to be commissioned and includes specifically the performance criteria required for those systems that are to be commissioned. As part of its fundamental commissioning obligations, the CxA is required to review both the OPR and the BOD to ensure that the latter reflects the intent of the former.

In addition, the CxA is responsible for developing and incorporating the commissioning requirements into the contract documents. The commissioning requirements are generally delineated within the general conditions or contract specifications and typically assign responsibility for the commissioning requirements to the prime contractor.

The CxA is also responsible for the development and implementation of a commissioning plan. This plan is developed in the beginning stages of the commissioning process at design development. The commissioning plan includes those systems that are to be commissioned, as well as the goals, objectives, and performance criteria identified by the OPR and the BOD. The commissioning plan develops the protocol for testing the functional performance of the commissioned systems, as well as the procedures for verifying system performance, reporting deficiencies, and ultimate acceptance of the building systems by the owner.

In further keeping with the underlying purpose of the commissioning process, the CxA is required to verify the installation and performance of the commissioned systems. This requires that the CxA performs installation inspections, performance testing, and an evaluation of those testing results compared with the OPR and BOD.

Depending on the procedures delineated in the commissioning plan, the installation inspections may be performed by either the CxA or the contractor. This pre-function inspection is intended to identify installation issues and determine whether individual components have been installed properly so that any defects are discovered prior to the system's performance testing. The performance testing occurs when the system is ready for operational use—in other words, after

all the components have been properly installed, the controls have been properly programmed, and the system has been balanced. The performance testing simulates the actual operating conditions of the system so that the CxA can evaluate the system's performance compared with the OPR and the BOD. It is based on this evaluation that any discrepancies or deficiencies should be discovered and reported to the owner so that a resolution can be developed collaboratively among the project team members.

The final aspect of the fundamental commissioning process is the preparation of the final commissioning report by the CxA. This report summarizes the results of the evaluation of the performance testing and indicates whether the commissioned system meets the requirements of the OPR, the BOD, and the construction documents. The final commissioning report includes an executive summary of the commissioning process, any observations and conclusions by the CxA, any outstanding commissioning items, a history of any system deficiencies, and the system performance test results obtained during the commissioning process.

Enhanced commissioning requires that the CxA takes on additional responsibilities that may include design review, review of contractor submittals, and post-occupancy commissioning. Prior to the issuance of the construction documents, the CxA is required to perform at least one review of the design documents to ensure the clarity, the completeness, and the adequacy of the OPR. The purpose of this design review is to ascertain whether the design documents can achieve the OPR and the BOD. Additionally, enhanced commissioning requires that the CxA reviews contractor submittals for conformance with the OPR and BOD. This review, however, does not replace the scope or responsibility of the design team to review and approve contractor submittals. Finally, within 10 months of turnover, the CxA is required to coordinate and perform a post-occupancy review of the commissioned systems to identify any problems in the system's operation and performance.

The introduction of the commissioning into to the realm of building construction carries with it not only the addition of a new project team member, namely the CxA, but also obligations and responsibilities for all project team members not otherwise present in the traditional construction project. Recall that the underlying purpose of the commissioning process and, thus, the role of the CxA, is to provide a systemic verification that the building energy systems have been constructed in accordance with the design intent. However, building commissioning, as is the case with all green building projects, is a collaborative process requiring involvement by the owner, the designer, and the contractor, as well as the CxA.

While the CxA may assist in the preparation of the OPR, it is the ultimate responsibility of the owner to detail its project performance goals. Additionally, while the CxA may be involved in the review of the design and contractor submittals of the commissioned systems, the CxA is not the actual designer of the systems. Rather, the ultimate responsibility for the design of the commission systems rests with the professional in responsible charge. Similarly, while the CxA inspects, tests, and evaluates the system as installed, the CxA is not the installer of the system. Rather, the ultimate responsibility to install the system in accordance with the design and performance requirements rests with the contractor. Indeed, commissioning is, in its simplest

form, a quality-control systems check. It allows the owner to enjoy the assurances that the system, as installed, will operate and perform as designed. It is the function of the CxA to facilitate this process.

Whether due to a misunderstanding of the underlying purpose of the commissioning process or perhaps more commonly an inartfully worded commissioning agreement, a common misconception is that the CxA is somehow the guarantor of the performance of the building system. Thus, an aggrieved owner may view the CxA as the project member with ultimate responsibility for any failures in the ability to achieve the owner's intended performance goals, despite whether such failure is ultimately due to a design error or a construction defect. In reality, however, any potential liability and exposure to the CxA should be limited to the failure to identify and report any deficiencies, not for the failure to prevent such deficiencies.

Assume, for example, that following the construction and the acceptance of a high-performance energy system, the owner claims that it is not realizing the performance that was intended. The failure is attributed to a construction defect that was not identified by the CxA during the commissioning process. In such an instance, any liability to the CxA would not be the cost to remedy the construction defect because, had the CxA caught the error during the commissioning process, the defect would have required remediation anyway. Stated another way, any cost to remediate the defect would have been incurred by the project prior to the acceptance of the system but for the CxA's failure to catch the error. Thus, any potential liability and exposure to the CxA should be limited to the failure to identify and report the deficiency to the owner and not the cost to correct the deficiency. It follows then that any potential exposure would likely reflect the difference in the cost of correcting such deficiency at the time it should have been discovered versus the cost to correct the deficiency when it was actually discovered. In most cases, this will reflect a premium cost for performing the work at a later date, which is often a fraction of the total cost to actually repair the defect.

In addition, however, and perhaps more directly attributed to the role of the CxA, is the potential for exposure to damages arising from lost or unrealized energy savings. Recall that one of the principal goals in undertaking a green building project and installing high-performance energy systems is the realization by the owner of increased energy efficiency and reduced energy costs. Arguably then, the CxA may have a greater exposure in failing to properly verify the system where such failure results in unrealized energy savings.

Assume the same scenario as above: A construction defect prevents the energy system from performing as intended; this construction defect was not identified and reported during the commissioning process and was not discovered by the owner until some time after the project's completion. An argument can be made by the owner that, had the CxA identified the construction defect prior to completion and during the commissioning process, the defect could have been remedied at that time, allowing the owner to realize the intended energy savings. However, because the defect was not identified during the commissioning process, the owner has been deprived of the benefit of such savings from the time the final commissioning report was

issued until the defect was actually discovered. In such a scenario, a persuasive argument could be made that the CxA is responsible for those unrealized energy savings.

Of course, while this may be a sound *theory* of liability against the CxA, in reality, the ability to prove such damages is a far more difficult task. This is not a situation in which an owner can simply compare an old utility bill to a current utility bill. In fact, the damages experienced by the owner are not necessarily the difference between the energy costs incurred prior to the commencement of the project and those incurred following completion. Rather, the actual damage to the owner would be the lost energy efficiency, which is simply quantified as a dollar figure representing the energy cost.

For instance, additions to an existing structure would in all likelihood increase the energy costs to operate the facility as a whole. The driving purpose in undertaking the green building project, however, is to operate the energy systems more efficiently. In such a situation, the actual energy costs may increase by 20 percent due to the increased size of the facility, infrastructure, equipment, and so on. However, overall, the building energy systems may operate 40 percent more efficiently than before the addition. It is this second figure, the measurement of energy efficiency, that is the critical factor. However, without a baseline energy study or building audit prior to undertaking the green building project, it may certainly be difficult, if not impossible, to prove any lost energy efficiency following the completion of the project. Without the ability to ascertain any lost efficiency, the owner will be unable to quantify any unrealized energy cost savings.

Such a theory of liability against the CxA should not be an afterthought once the failure to properly commission the energy systems has been discovered. If the true intention of the owner is to realize energy savings through increased efficiency, the owner would be wise to establish an energy baseline prior to undertaking the green building project. Keeping with this notion that green building is as much about the bottom line as it is about environmental responsibility, the owner should want to know that it is getting what it paid for.

Keywords: litigation, construction litigation, green building, Commissioning Authority, Leadership in Energy and Environmental Design

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EPA Compliance Orders Subject to Immediate Judicial Review

By Logan A. Hollobaugh – September 10, 2012

On March 21, 2012, the U.S. Supreme Court issued a unanimous ruling in *Sackett v. U.S. Environmental Protection Agency*, 566 U.S. ____ (2012). The Court held that the Clean Water Act (CWA) is subject to the Administrative Procedure Act (APA), 5 U.S.C. §§ 706, appeals process for rulings by federal agencies, including compliance orders issued by the U.S. Environmental Protection Agency (EPA).

The case arose from a compliance order issued to an Idaho couple who had initiated site work on their property, on which they planned to build a house. The EPA determined that the couple's property, which was adjacent to a lake, was subject to the CWA and issued the order requiring the land owners to restore the property to its original condition. After being denied a hearing by the EPA, the landowners filed suit and eventually appealed the case to the Supreme Court.

As noted, the Supreme Court held that EPA compliance orders may be challenged in civil actions brought under the APA. The Court's holding was based on its findings that an EPA compliance order is a final agency action for purposes of the APA and that landowners have no other adequate remedy available to them absent this APA-based right of review. Accordingly, the Court reversed the Ninth Circuit's ruling that the court lacked subject-matter jurisdiction to review landowner challenges to EPA compliance orders.

It is immediately clear that this decision will have an impact on property owners, as well as the construction and environmental lawyers who counsel them.

Factual Background

The plaintiffs, Michael and Chantell Sackett, purchased a 2/3-acre parcel of land near Priest Lake in Bonner County, Idaho. The Sacketts planned to build a house on the property and began clearing the lot for construction. Part of the preconstruction involved adding fill and rock in preparation for the foundation of the residence. Shortly after the Sacketts began clearing the land, they received a compliance order from the EPA. The compliance order stated that the Sacketts had illegally placed the fill materials into jurisdictional wetlands on their property and that the property contained navigable waters, making it subject to the CWA.

The CWA prohibits, among other things, "the discharge of any pollutant by any person," without a permit into "navigable waters," which the CWA defines as "the waters of the United States." 33 U.S.C. § 1311; § 1344; and § 1362(7). Although the CWA does not define the waters of the United States, if the EPA determines that any person is in violation of this restriction, the CWA directs the EPA either to issue a compliance order or to initiate a civil enforcement action. § 1319(a)(3).

The compliance order also directed the Sacketts to restore the property to its original condition pursuant to an EPA-provided work plan and required the Sacketts to grant EPA personnel access to the property. Failure to follow the directives of the compliance order would expose the Sacketts to substantial fines. Specifically, when the EPA prevails in a civil action, the CWA provides for “a civil penalty not to exceed [\$37,500] per day for each violation.” § 1319(d). Moreover, according to the government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to \$75,000 per day—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order. More than 1,300 days passed between the time the EPA issued the Sacketts the compliance order and the time the Supreme Court granted certiorari. This length of time would have resulted in staggering fines of more than \$49 million (using \$37,500 per day) or \$98 million (using the \$75,000 per day suggested by the government).

The Sacketts did not believe their property was subject to the CWA requirements and requested a hearing from the EPA. The EPA denied the hearing request. The Sacketts thereafter filed an action in the U.S. District Court for the District of Idaho, seeking declaratory and injunctive relief. The Sacketts contended that the EPA’s compliance order was arbitrary and capricious under the APA and that the failure to provide them a right of review of this compliance order deprived them of due process of law in violation of the Fifth Amendment. 5 U.S.C. § 706(2)(A). The Sacketts’ suit was filed under Chapter 7 of the APA, which provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U. S. C. § 704.

The district court dismissed the Sacketts’ claims for lack of subject-matter jurisdiction. The Sacketts appealed to the U.S. Court of Appeals for the Ninth Circuit, arguing that the APA allows pre-enforcement review of CWA compliance orders and that due process requires the EPA to conduct a pre-enforcement review. The Ninth Circuit affirmed the district court’s dismissal. 622 F.3d 1139 (2010). The Ninth Circuit concluded that the CWA “precluded pre-enforcement judicial review of compliance orders,” joining four other U.S. circuit courts of appeal. The Ninth Circuit also determined that the pre-enforcement bar did not violate due process because judicial review of the compliance order was available after the EPA brought an enforcement action, and nothing barred the Sacketts from seeking a permit from the Army Corps of Engineers to build on their property, the denial of which would have been reviewable in a district court. The U.S. Supreme Court thereafter granted certiorari to consider whether the EPA compliance order was a final order, whether the Sacketts could seek judicial review of the compliance order under the APA, and, if not, whether the Sacketts’ inability to seek pre-enforcement judicial review of the compliance order violated their rights under the Due Process Clause of the U.S. Constitution.

The Supreme Court’s Decision

The Supreme Court, in a unanimous opinion delivered by Justice Scalia, first determined that the compliance order was a final agency action. The Court stated that the compliance order has all of the hallmarks of APA finality; the EPA specifically “determined” the “rights and obligations” of the Sacketts. The Sacketts had obligations under the order to restore the property and to provide access to the EPA. Further, the Court found that legal consequences flowed from the order,

including the possibility of double penalties (\$75,000 per day) and the fact that the Sacketts' ability to obtain a permit from the Corps would be severely limited. The Court further noted that the issuance of the compliance order marked the consummation of the agency's decision-making process.

Next, the Court considered whether the Sacketts had "no other adequate remedy in court" as required by the APA. Enforcement of the CWA typically results in civil action brought by the EPA as allowed by the CWA or when voluntary compliance is not obtained after the issuance of a compliance order. However, the Sacketts could not initiate the judicial process under the CWA, as only the EPA is granted such rights. This placed individuals like the Sacketts in a nearly impossible position. They must either wait for the EPA to enforce the compliance order and risk the potential fines of \$75,000 per day or comply with the order.

After discussing the Sacketts' predicament, the Court held that nothing in the CWA expressly precludes judicial review under the APA. As such, the Court rejected the government's arguments as to the CWA's statutory scheme and found that the compliance order was a final act. Further, the Court rejected the government's case law as not analogous and concluded that the compliance order issued to the Sacketts in this case was final agency action for which there was no adequate remedy other than APA review. Thus, the Ninth Circuit's ruling was reversed, and the case was remanded for further proceedings.

The Supreme Court did not reach the broader question of whether a bar on pre-enforcement review violates due process. By not reaching the due-process arguments, the court left open the issue of whether a statutory bar on pre-enforcement review, such as the language found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is unlawful.

Justices Ginsburg and Alito both provided concurring opinions. Justice Ginsburg wrote separately to stress that, although the Court's decision allowed the Sacketts to immediately litigate the question of the "EPA's authority to regulate their land under the Clean Water Act," it did not address the question of whether the Sacketts could challenge the terms and conditions of the EPA's compliance order.

Justice Alito's opinion is especially interesting because it attacks both the government's position and the EPA's possible treatment of land owners as "unthinkable." Justice Alito goes further by chastising Congress for failing to provide reasonably clear rules in the CWA. Justice Alito concludes that "allowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing but only clarification of the reach of the CWA can rectify the underlying problem."

Impact of the *Sackett* Opinion

The *Sackett* decision has a discernable impact for property owners as well as the environmental and construction lawyers counseling them. EPA compliance orders on construction projects are now subject to immediate challenge, giving clients and attorneys new options when faced with possible fines.

However, the *Sackett* opinion leaves several questions unanswered. First, the Court did not address whether its analysis can be extended to other statutes. Some will argue that *Sackett* provides that judicial review is available to challenge EPA orders issued under other statutes. For example, orders issued under the Resources and Conservation Recovery Act (RCRA) or the Clean Air Act (CAA) are likely subject to the same pre-enforcement judicial review. 42 U.S.C. § 6901 *et seq.* (1976) and 42 U.S.C. § 7401 *et seq.* (1970). Neither the RCRA nor the CAA contains an express pre-enforcement bar, similar to the CWA.

A second question left open, pursuant to Justice Ginsburg’s concurring opinion, is whether a property owner may seek pre-enforcement judicial review of the terms and conditions of a compliance order. This issue was not addressed in the unanimous opinion; however, Justice Ginsburg’s concurrence specifically notes that the Court ruled only that property owners may judicially challenge the EPA’s regulatory authority over their property under the CWA at the pre-enforcement stage. Her opinion suggests only a short-lived victory for the landowners, who may not be able to challenge the terms and conditions of the compliance order on their own initiative.

Third, the Court did not address whether the penalties accrue or are stayed while a recipient seeks pre-enforcement judicial review but eventually loses or whether double penalties are authorized by the CWA as suggested by the government. Clearly, the penalties would have increased to exorbitant sums if allowed to accrue during the judicial review period. The Sacketts could have faced millions in fines if the penalties were not tolled. If penalties are not tolled, individuals have little incentive to challenge EPA compliance orders in the face of sizable penalties (\$37,500–\$75,000 per day) and the length of time it can take to present the issues before a court. Such a chilling result is not consistent with the spirit of the Court’s ruling.

How the EPA will respond to the *Sackett* decision remains to be seen. Most commentators suspect that the threat of judicial review of compliance orders will stymie the EPA’s use of this enforcement tool consistent with the government’s argument. Certainly, the EPA has further incentive to ensure that there is no substantial basis to question the validity of compliance orders now that court challenges are possible. Prior to *Sackett*, the EPA had used compliance orders as an effective way to obtain voluntary compliance. After *Sackett*, the EPA may be less likely to issue an order under questionable circumstances.

Can We Expect Guidance on Identifying Waters Protected by the CWA?

In short, yes. The EPA and the Corps are currently moving forward to finalize rulemaking on a definition of “waters of the United States” (the subject of Alito’s concurring opinion). The final guidance document, which the EPA and Corps view as their authority to regulate all waters and wetlands, will significantly change and expand the water features subject to federal jurisdiction and the permit requirements under the CWA.

Keywords: litigation, construction litigation, Clean Water Act, Environmental Protection Agency, Administrative Procedure Act, Supreme Court

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