1. This exam contains three writing assignments relating to two federal statutes pertaining to energy conservation. With the exception of New York City’s inclusionary zoning law discussed in Part III, the laws, events, and proceedings described in this summary are all real. The background provided with each question is intended to be a helpful guide and primer, but it is not intended to be a closed universe of sources that precludes you from consulting the actual statutes, rules, additional comments, judicial precedents, or any other material that you deem to be relevant and helpful for completing the three assignments.

2. This exam cites and quotes from actual legislative and administrative materials. I have included citations and hyperlinks in the exam itself to help you access the documents readily, but, as an extra aid, I have also posted the materials on the "NYU Courses" website for the course, under "Resources" and "Final Exam Materials." Please feel free to use this source of documents if you have trouble with the hyperlinks or otherwise cannot access a document.

3. **Word Limit:** Your responses to all three assignments combined should be no longer than **4,000 words**. You may divide your words among the three assignments in any manner that you please, just so long as you do not exceed the total word limit. Please do not use footnotes: The THES word count system does not detect them. You should consider each part’s share of the total grade as a rough guide for allocating your efforts and words.

4. Do not put your name on any page.

Good luck, and Happy Holidays!
Part I (40% of exam grade)

The National Energy Conservation Policy Act of 1978, Pub. L. No. 95-619, § 546, 92 Stat. 3206, 3278 (Nov. 9, 1978), codified at 42 U.S.C. §§8201 et seq. (hereinafter “ECPA”), provides that “[t]he head of a Federal agency may enter into contracts … solely for the purpose of achieving energy savings and benefits ancillary to that purpose.” 42 U.S.C.A. § 8287(a)(1). Such “energy savings performance contracts” (“ESPCs”) provide that, in return for a share of the savings in energy costs, a contractor will install various energy-savings devices and structures in the federal agency’s buildings (e.g., extra-efficient furnaces, thick insulation, solar panels, energy-efficient building design, etc.). The ECPA requires that the contractor guarantee to the agency that such measures will generate sufficient energy savings to cover the measures’ cost, including the contractor’s fee: Under the terms of the contract authorized by ECPA, the contractor can be paid only out of the net savings generated by the measures taken by the contractor. (For more information about ESPCs, see the Department of Energy’s website at http://energy.gov/eere/femp/energy-savings-performance-contracts. For a brief description of the sorts of improvements that private contractors provide pursuant to ESPCs, see Johnson Control’s website at http://www.johnsoncontrols.com/content/us/en/products/building_efficiency/building/federal_government/contracting/energy_savings_performance.html).

I. Your Assignment

You are a lawyer in the Office of General Counsel (“GC”) at the U.S. Department of Energy (“DOE”). The GC of DOE wants to know whether federal agencies may retain the energy savings produced by ESPCs in excess of the contractor’s fee, without turning all of this money over to the U.S. Government’s General Fund.

The GC has a policy intuition that the agency ought to be able to retain these energy savings. “If an agency makes the effort to save money,” he says, “then shouldn’t that agency get to keep the savings? How else will bureaucrats have sufficient incentive to undertake measures that save the taxpayers money and also help the environment?” Such policy reasoning, however, has little force if the law prohibits federal agencies from retaining and spending energy savings. The GC wants you, therefore, to write a memo setting forth the strongest case possible that ECPA permits federal agencies to retain and spend the largest possible amount of the savings derived from ESPCs – ideally 100% -- with the maximum amount of discretion. The GC plans to present your memo to the U.S. Attorney General and the Assistant Attorney General in charge of the Office of Legal Counsel to persuade them to endorse the memo as the official legal position of the United States. The GC also wants you to specify any actions that DOE could take to strengthen the argument that federal agencies should be entitled to retain extra energy savings above costs created by ESPCs.
In order to write your assigned memo, you will need to familiarize yourself with some statutory texts and administrative rulings described below.

II. General Background on Budgeting: The Miscellaneous Receipts Act and the Anti-Deficiency Act

As general background for understanding how agencies may and may not expend retained energy savings, it is helpful to have an overview of two federal budgetary statutes (the Miscellaneous Funds Act and Anti-Deficiency Act). The two statutes date from the nineteenth century (although they were revised and reenacted in 1982). As explained below, these statutes, considered by themselves, do not constitute an important limit on agencies’ retention and use of energy savings. Nevertheless, they provide the longstanding legal traditions against which the EPCA and later legislation was enacted and, therefore, could conceivably inform the interpretation of that legislation.

A. The Miscellaneous Receipts Act

The Miscellaneous Receipts Act, Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 948, codified at 31 U.S. Code § 3302 (“MRA”), provides that anyone “receiving money for the Government from any source shall deposit that money with the Treasury.” 31 U.S. § 3302(b). The MRA, versions of which date from the nineteenth century, was enacted to protect Congress’ “power of the purse” by ensuring that federal agencies did not bypass the appropriations authority of Congress by augmenting their budgets via other means – for instance, various user fees, contract and lease fees and revenues, monetary awards in court cases involving the agencies, civil penalties, etc. The MRA could conceivably pose obstacles to an agency’s spending freely the savings created through an ESPC. For instance, if a utility company were to provide a rebate to a federal agency for energy savings from measures adopted pursuant to a ESPC, then one might argue that, because the agency “receive[d]” such rebate “money,” the MRA might possibly oblige the agency to “deposit that money with the Treasury” rather than spend the money on its own programs.

The GC is not too worried about the MRA as an obstacle to agencies’ retaining and spending energy savings. First, it is well-established that private contractors’ refunds of money that the agency previously paid out to private contractors do not constitute “receiving money” under the MRA, since the refund merely reduces a prior government payment rather than provide a new source of revenue. The utility’s rebate check, therefore, would simply be treated as part of the congressional appropriation authorizing the prior expenditure. This view of utility rebates as exempt “refunds” was supported by an October 18, 1991 memo from Kathy Izell (an Attorney-Adviser within the DOE’s Office of the General Counsel). This internal DOE memorandum is still included on DOE’s Federal Energy Management Program (“FEMP”) website. See

B. The Anti-Deficiency Act


In theory, an agency’s spending of retained energy savings could violate the ADA – and subject federal officials who authorized such expenditures to criminal penalties! -- if the agency spent the money on ends for which there was no congressional appropriation. Under normal circumstances, however, the DOE has broad discretion to spend energy savings according to the terms of the original appropriation, because Congress’ appropriation categories are generally “lump-sum” appropriations – i.e., they tend to be fairly general. The DOE’s own 2014 appropriation, for instance, specified that the DOE would receive $1,912,104,111 for “the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for energy efficiency and renewable energy activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.” See Pub. L. No. 113-76, Title III (effective January 17th, 2014). So long as agencies’ expenditures of their retained energy savings stayed within such broadly defined “lump-sum” limits, the agencies would not violate the ADA by retaining and spending the savings.

III. Chronology of Amendments to ECPA and Related Legislation:

The ADA and MRA are not, however, the only relevant legislation. In particular, 42 U.S.C. §8256 contains language about such savings that is difficult to interpret. As described in
more detail below, five statutes specifically amended ECPA’s language pertaining to ESPCs and energy savings between 1985 and 2007. Moreover, a 1996 Appropriations Act specified rules for an “agency’s share of the measured energy savings” and the “amount of each utility rebate received by the agency for energy efficiency and water conservation measures.”

The GC is deeply concerned about these amendments to ECPA and the ’96 appropriation law, because they might arguably limit agencies’ power to spend energy savings. Indeed, if a federal official authorized an expenditure forbidden by the ’96 law, then they would be committing a crime under the ADA for which they could serve a two-year prisons sentence! Naturally, the GC wants to clear up the meaning of these laws as soon as possible, so agencies can know what to do with their energy savings.


Section 546 of the original ECPA (codified as 42 U.S.C. § 8256(a)) established energy performance targets for Federal buildings. Title V of the ECPA as originally enacted provided for a “federal energy initiative.” As originally enacted, section 546 provided for “energy targets” for federal buildings, stating that

“The Secretary [of Energy], in consultation with the Administrator of the General Services Administration, the Director of the National Bureau of Standards, and the Director of the Office of Management and Budget, shall establish and publish energy performance targets for Federal buildings, and shall take such actions as may be necessary or appropriate to promote to the maximum extent practicable achievement of such targets by Federal buildings. The performance targets established under the preceding sentence shall be compatible with energy conservation performance standards adopted or developed by the Secretary of Housing and Urban Development for buildings.”


B. Consolidated Omnibus Budget Reconciliation Act of 1985:

The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, 100 Stat. 142 (April 7th, 1986) provided budgetary authorization for (as the term “omnibus” implies) a broad range of unrelated topics. Title VII of this Omnibus Act contained measures for “energy and related programs.” Within Title VII, Subtitle C, § 7201(a) of the Omnibus Act amended the 1978 ECPA to provide for “Federal Energy Conservation Shared Savings.” This subtitle added
four new sections to the ECPA (§§801-804 in the original public law, codified as Title VIII of ECPA, 42 U.S.C. §§8287, 8287a, 8287b, and 8287c).

The centerpiece of this amendment to ECPA was §801’s authorization for federal agencies to enter into energy savings performance contracts (“ESPCs”), which authorization was provided by the new section 801 of ECPA as follows:

The head of a Federal agency may enter into contracts under this title solely for the purpose of achieving energy savings and benefits ancillary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.

Pub. L. 99-272, §7201(a), codified at 42 U.S.C. §8287(a)(1). (The original public law is available at [http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg82.pdf](http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg82.pdf)).

C. Federal Energy Improvement Act of 1988

In 1988, Congress sought to incentivize agencies to undertake ESPCs, amending 42 U.S.C. § 8256 to read:

Incentives for Agencies.

(a) IN GENERAL.— Each agency shall establish a program of incentives for conserving, and otherwise making more efficient use of, energy as a result of entering into contracts under title VIII of this Act [i.e., the sections added by the 1985 Omnibus Act, creating Title VIII of ECPA].  
(b) IMPLEMENTATION.— The head of each agency shall, no later than 120 days after the date of the enactment of the Federal Energy Management Improvement Act of 1988, implement procedures for entering into such contracts and for identifying, verifying, and utilizing, on a fiscal year basis, the cost savings resulting from such contracts.  
(c) USE OF SAVINGS.—The portion of the funds appropriated to an agency for energy expenses for a fiscal year that is equal to the amount of cost savings realized by such agency for such year from contracts entered into under title VIII [that is, ESPCs] shall remain available for obligation, without further appropriation, to undertake additional energy conservation measures.

The Energy Policy Act of 1992 (EPAct 1992), amended 42 U.S.C. § 8256(a) by striking "(a) IN GENERAL.—“and inserting in place of this heading, “(a) CONTRACTS.—(1)” followed by the old text of subsection (a) in the 1988 adding a new subsection (2), providing that

(2) The Secretary [of Energy] shall, not later than 18 months after October 24, 1992, and after consultation with the Director of the Office of Management and Budget, the Secretary of Defense, and the Administrator of General Services, develop appropriate procedures and methods for use by agencies to implement the incentives referred to in paragraph (1).

The EPAct of 1992 also deleted the old subsection (c) on the “Use of Savings” in the Federal Energy Improvement Act of 1988, replacing it with a new subsection (c) that provided the following:

(c) Utility incentive programs
(1) Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.
(2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.
(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.
(4) If an agency satisfies the criteria which generally apply to other customers of a utility incentive program, such agency may not be denied collection of rebates or other incentives.
(5)(A) An amount equal to fifty percent of the energy and water cost savings realized by an agency (other than the Department of Defense) with respect to funds appropriated for any fiscal year beginning after fiscal year 1992 (including financial benefits resulting from energy savings performance contracts under subchapter VII of this chapter and utility energy efficiency rebates) shall, subject
to appropriation, remain available for expenditure by such agency for additional energy efficiency measures which may include related employee incentive programs, particularly at those facilities at which energy savings were achieved.

(B) Agencies shall establish a fund and maintain strict financial accounting and controls for savings realized and expenditures made under this subsection. Records maintained pursuant to this subparagraph shall be made available for public inspection upon request.


E. The 1996 Appropriations Act

In November 1995, Congress enacted the Treasury, Postal Service, and General Government Appropriations Act, 1996, which contained the following provision:

(a) Beginning in fiscal year 1996 and thereafter, for each Federal agency, except the Department of Defense (which has separate authority), and except as provided in Public Law 102–393, title IV, section 13 (40 U.S.C. § 490g) with respect to the Fund established pursuant to 40 U.S.C. § 490(f), an amount equal to 50 percent of—

(1) the amount of each utility rebate received by the agency for energy efficiency and water conservation measures, which the agency has implemented; and

(2) the amount of the agency’s share of the measured energy savings resulting from energy-savings performance contracts,

may be retained and credited to accounts that fund energy and water conservation activities at the agency’s facilities, and shall remain available until expended for additional specific energy efficiency or water conservation projects or activities, including improvements and retrofits, facility surveys, additional or improved utility metering, and employee training and awareness programs, as authorized by section 152(f) of the Energy Policy Act (Public Law 102–486).

(b) The remaining 50 percent of each rebate, and the remaining 50 percent of the amount of the agency’s share of savings from energy-savings performance
contracts, shall be transferred to the General Fund of the Treasury at the end of the fiscal year in which received.


F. **Energy Policy Act of 2005**

The Energy Policy Act of 2005 (EPAct 2005) amended 42 U.S.C. § 8256 by adding a new subsection (e), which provided as follows:

(e) Retention of energy and water savings

An agency may retain any funds appropriated to that agency for energy expenditures, water expenditures, or wastewater treatment expenditures, at buildings subject to the requirements of section 8253(a) and (b) of this title, that are not made because of energy savings or water savings. Except as otherwise provided by law, such funds may be used only for energy efficiency, water conservation, or unconventional and renewable energy resources projects. Such projects shall be subject to the requirements of section 3307 of title 40.


G. **Energy Independence and Security Act of 2007**


IV. **The Comptroller’s Interpretations of Relevant Statutes**

There are also some administrative interpretations of the legislation described above that might be relevant to the question of whether federal agencies can retain their energy savings. These interpretations have been produced by an official called “the Comptroller General,” described below.
A. The Comptroller General and the General Accountability Office


The Comptroller General is appointed to a 15-year term by the President from a slate of candidates proposed by the leaders of Congress. 31 U.S.C. §703(a) The Comptroller General can be removed before the expiration this 15-year term only by either impeachment or by “joint resolution of Congress, after notice and an opportunity for a hearing, only for— (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.” 31 U.S.C. §703(e)(1)(B).

The Comptroller General is statutorily charged with the duty of generally reporting to Congress on the expenditure of federal monies. In particular, the Comptroller must “(1) investigate all matters related to the receipt, disbursement, and use of public money; (2) estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations the Comptroller General considers desirable; (3) analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently; (4) make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures; and (5) give a committee of Congress having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests.” 31 U.S.C. §712. As a practical matter, this means that the Comptroller issues opinions at the request of members of Congress about the meaning and application of the various federal laws on procurement and appropriations. You can find the appropriations opinions at http://www.gao.gov/legal/index.html. They typically take the form of a letter to the member of Congress requesting the opinion.

B. February 1996 Comptroller General Decision

On February 13, 1996, the Comptroller General issued a decision (B-265734) addressing the retention of a rebate resulting from agency participation in an energy savings program. The Comptroller General cited section 625 of the Treasury, Postal Service, and General Government Appropriations Act, 1996 (Section 625), and concluded that agencies “would retain 50 percent of the rebate without any fiscal year limitations, and the remaining 50 percent would be deposited
into the Treasury.” Footnote 1 of the Comptroller General decision called into question the underlying rationale of DOE’s October 1991 memorandum, specifically noting that utility rebates “are not like the travel rebates and are not governed by the cases cited” in the DOE memorandum. This Comptroller General decision is not included on FEMP’s website, but it can be found online at [http://archive.gao.gov/legald426p2/156296.pdf](http://archive.gao.gov/legald426p2/156296.pdf).

B. June 2001 GAO Opinion

In June 2001, a GAO opinion concluded that Section 625 “has permanent effect.” GAO concluded that:

As explained below, section 8287, together with section 625, permits an agency contracting under authority of section 8287 to retain an amount equal to 50 percent of the agency’s measured energy savings realized from an ESPC (after paying the ESPC contractor), for credit to appropriations that fund energy and water conservation activities at the agency’s facilities. This amount is available for specified energy and water conservation projects until expended. The agency must transfer to the General Fund of the Treasury an amount equal to the remaining 50 percent of the agency’s savings.

Part II (30% of exam grade)

I. Energy conservation standards for commercial clothes washers (“CCWs”):


EPCA further provides that the Secretary may not prescribe an amended standard if interested persons have established by a preponderance of the evidence that the standard is “likely to result in the unavailability in the United States of any product type (or class)” with performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary’s finding. (42 U.S.C. §6295(o)(4) and §6316(a)).

Whenever a type of equipment, including CCWs, have two or more subcategories, then section 325(q)(1) of EPCA (codified at 42 U.S.C. §6295(q)(1)) requires that DOE must specify a different standard of energy efficiency than that which applies generally to such a type of equipment

“for any group of covered products which have the same function or intended use, if * * * covered products within such group...(B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard” than applies or will apply to the other products. 42 U.S.C. §6295(q)(1)(B).

In determining whether a “performance-related feature” justifies such a different standard for a group of equipment, DOE must consider “such factors as the utility to the consumer of such a feature” and other factors DOE deems appropriate. 42 U.S.C. §6295(q)(1). Any rule prescribing such a standard must include an explanation of the basis on which DOE established such higher or lower level. (See 42 U.S.C. §6295(q)(2))

II. DOE’s Rule-Making Process and Final Rule

On November 9, 2009, the DOE proposed a rule that would impose separate energy standards on top-loaders and front-loaders on the ground that the location of the washer door was a “performance-related feature” under §6295(q)(1). This NPRM is published at 74 Fed. Register 57747, is posted on the course website, and is also available from regulations.gov using the docket number “EERE-2006-STD-0127.” Industry, environmentalists, and energy utilities (among others) commented on this proposed rule. (In case you want to browse them, all 64 comments are available at
http://www.regulations.gov/#docketBrowser;rpp=25;po=0;dct=PS;D=EERE-2006-STD-0127 or by using the same docket number).

The DOE adopted a final rule on January 8th, 2010. This final rule, along with its basis and purpose, is posted on the course website and is published at 75 Fed. Register 1122. In its final rule, DOE adopted separate energy standards for top-loading and front-loading CCWs, based on the view that method of loading constituted a “feature” under the EPCA. The DOE based this conclusion on its view that front-loading CCWs’ longer cycle times were likely to affect significantly the utility that consumers derived from CCWs. According to the DOE, it is beneficial to consumers in commercial and multi-housing settings with multiple, sequential laundry loads approximately to match CCW cycle times to dryers’ cycle times required in order to minimize wait times. (Put more simply, people do not like spending their day hanging out in Laundromats). According to DOE, front-loaders’ longer cycle times of 75-115 minutes resulted from their reduced mechanical agitation resulting in a longer cleaning time as compared to top-loaders, making the difference between the two types a “performance-related feature” within the meaning of 42 U.S.C. §6295(q).

DOE summarized and responded to comments at pages 1130-1134 of its basis and purpose for its final rule. In its summary at pages 1130-1133, DOE focused on six comments submitted by the Association of Home Appliance Manufacturers (“AHAM”), Alliance Laundry Systems, Whirlpool Corporation, Earthjustice, a joint comment by California utility companies (the “California utilities”), and a joint comment by the Appliance Standards Awareness Project and several other non-profit groups (the ASAP comment). All six of these comments are posted on the course website. DOE responded to these comments at pages 1133-34.

III. Your Assignment

You are an attorney with Earthjustice, a non-profit environmental law firm. Earthjustice opposes a rule issued by the U.S. Department of Energy (“DOE”) regarding the energy efficiency standards for commercial clothes washers (“CCWs”). Earthjustice sought from DOE a single energy efficiency standard with which both front-loading and top-loading machines would have to comply. The commercial washing machine industry, however, complained that, because front-loading clothes washing machines are more energy efficient than top-loading machines, a single standard would tend to drive top-loaders off the market. Instead of a single energy efficiency standard, therefore, the washer industry wanted two separate standards – a higher one for front-loaders and a lower one for top-loaders. As described above, the DOE has adopted the washer industry’s point of view by publishing a final rule, subjecting top-loaders and front-loaders to different energy efficiency standards.

Your boss at Earthjustice has asked that you write an internal memo for Earthjustice outlining the strongest possible arguments for overturning DOE’s final rule in a challenge under section 706(2)(A) of the Administrative Procedure Act. Your memo should be based on the relevant statutory language, the major comments submitted in response to the DOE’s notice of proposed rule-making, and DOE’s response to these comments in its basis and purpose.
accompanying its final rule. Your argument can be based on either or both the insufficiency of the DOE’s response to comments or the invalidity of DOE’s interpretation of the relevant statutory provision (both handily summarized at page 1133-34 of the DOE’s basis and purpose for its final rule). While outlining the strongest case against the final rule, however, be sure to assess the strength of the arguments against the position that you defend.
Part III (30% of exam grade)

I. New York City’s Proposal for Energy-Efficient Inclusionary Housing

Bill de Blasio, Mayor of New York City, has proposed a housing plan to enlarge the supply of affordable housing in New York City. Part of the plan calls for “inclusionary zoning.” Inclusionary zoning allows a developer to build structures that are denser than would otherwise be allowed by the applicable zoning restrictions on the condition that the developer sets aside some percentage of the units in the new building (usually defined as 20% of the total units) for affordable housing (usually defined as housing affordable by persons making 50% of the median income in the relevant borough). To insure that the inclusionary units remain affordable, the developer must place a deed restriction on them requiring that they be leased only for an affordable rent to low- or moderate-income households. The cost of these below-market rents are covered by the additional market-rate units that the developer obtains as a result of the density bonus. (The typical bonus is measured in terms of “floor-area ratio” (“FAR”), with one FAR being equivalent to the floor area of the entire lot). To make the inclusionary program attractive to developers, the de Blasio Administration plans to create “inclusionary housing zones” in specified areas of the City where the demand for taller residential buildings is high. In such neighborhoods, owners of any structure will be permitted, but not required, to enlarge their existing buildings up to a new and higher density of 15 FAR (which could be high than fifteen stories if the stories were smaller than a single FAR). In return for such density bonuses, the owners agree to set aside 20% of the new units for affordable housing.

Environmentalists within New York City were concerned about how the increased construction encouraged by Mayor de Blasio’s plan would affect the urban environment. They press for a requirement that any new construction in an inclusionary housing zone must achieve a “silver” rating under the “Leadership in Energy and Environmental Design” (“LEED”) standards developed by the U.S. Green Building Council (“USGBC”). The “silver” LEED standard requires the builder to earn 50-59 out of a possible 100 points across six credit categories (Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Quality, Innovation in Design). Buildings earn such points based on a certified LEED accreditation professional’s assessment of the building’s features such as use of recycled construction materials, use of solar energy, green roofs, bicycle storage facilities and access to public transportation, water-efficient landscaping, storm-water management (to reduce polluted runoff), low carbon emissions from heating and air-conditioning equipment, energy-reducing insulation, and so forth. (More information about LEED rating systems is available at http://www.usgbc.org/leed, including a checklist of factors at http://www.usgbc.org/redirect.php?DocumentID=1096).

While the de Blasio Administration was supportive of requiring inclusionary developments to meet LEED “silver” standards, developers complained that complying with
both housing and LEED conditions would be costly. Builders also noted that, while it was theoretically possible to achieve a LEED rating of 50 points without using heating and air-conditioning equipment exceeding federal standards, it was often not cost-effective to do so, because builders would have to adopt costly alternatives (e.g., solar paneling, proximity to public transit) to make up for the loss of LEED points that higher-performing appliances could earn for “energy and atmosphere,” including up to ten points for “optimizing energy performance.” In response to these complaints, environmental supporters of the LEED standards noted that developers were not required to apply for density bonuses and that, if city residents had to suffer from greater density and accompanying loss of light and air, then they should get some compensation in return, in the form of developments with higher environmental quality.

II. Overview of Preemption under the EPCA


(c) General rule of preemption for energy conservation standards when Federal standard becomes effective for product

“….no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product [that is covered by a federal energy efficiency standard].”

Section 6297(a)(2)(A) defines “state regulation” to mean “a law, regulation, or other requirement of a State or its political subdivisions.”

Section 6297(c) itself contains several very narrow exceptions to preemption for specific laws of various states (e.g., an exception in §6297(c)(4) for New York’s and Georgia’s efficiency standards for lavatory faucet standards). In addition to these fairly narrow exemptions, §6297(e) more generally exempts from preemption all “state procurement standards” (§§6297(e), 6297(c)(1), 6297(b)(2)). Section 6297(f)(3) provides another general exemption from preemption for “a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product” that meet each of six jointly necessary criteria in §6297(f)(3)(A)-(G). (This “building code” exemption was added by the National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, §7, 101 Stat. 103, 117-22, available at http://www.gpo.gov/fdsys/pkg/STATUTE-101/pdf/STATUTE-101-Pg103.pdf).
Aside from these exemptions from preemption, §6297(d)(1) authorizes states to petition the Secretary of Energy for a waiver of preemption. The statute, however, narrowly defines eligibility for such waivers. The Secretary may grant such a waiver only if the state “has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests,” §6297(d)(1)(B), defined as . interests “substantially different in nature or magnitude than those prevailing in the United States generally” that are superior to “alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.” Section 6297(d)(1)(C). To insure that the Secretary does not grant a waiver for state law without adequate justification, the Secretary must “afford interested persons a reasonable opportunity to make written comments, including rebuttal comments” on a state’s petition for a waiver, §6297(d)(2), and to deny petitions where interested parties show that the proposed state law will “significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis.”

III. Your Assignment

You are an assistant corporation counsel within the Legal Counsel division of the New York City’s Law Department. The Legal Counsel division provides legal opinions to the City’s executive branch about proposed legislation and regulation. You have been asked by the chief of the division to provide an opinion about whether the LEED design standards for a proposed “inclusionary housing zone” ordinance, described above, are consistent with the EPCA’s preemption clause, summarized in Section II. Your memo should set forth the strongest argument against the preemption of these design standards while responding to the most powerful arguments in favor of preemption. The chief also wants you to explore whether the Department of Energy could eliminate the threat of EPCA preemption by issuing a rule or guidance document construing the statute not to preempt the proposed inclusionary zoning law.