

4-2016

## Trends in Green Leasing: From the Early Days to Today

Richard J. Sobelsohn

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Property Law and Real Estate Commons](#)

---



# Trends in Green Leasing

## From the Early Days to Today

By Richard J. Sobelsohn

### Historical Perspective

In 2007 the author negotiated his first green lease. It was for a major financial institution that wanted to have its premises located in a Leadership in Energy and Environmental Design (LEED) certified building in McKinney, Texas. The interesting thing about that lease was that it only included one line relating to the building's "sustainability." In those days, having a "green" reference in a lease was uncommon, even if that property was certified by USGBC, GBI, Energy Star, ASHRAE, or others (United States Green Building Council's Leadership in Energy and Environmental Design rating

---

**Richard J. Sobelsohn** is a product manager for LexisNexis's Lexis Practice Advisor® in New York, New York, and the chair of the Real Property Economics, Technology and Practice Methods Committee.

system, Green Building Initiative's Green Globes rating system, Energy Star rating system, American Society of Heating, Refrigerating, and Air-Conditioning Engineers certification, and others such as the Living Building Challenge, all of which assess a property for some or all of its sustainability factors). Today is a different matter.

### Positive Press

Not long after the author worked on that lease, "green-applicable" provisions started to crop up in many iterations of leases for class A buildings for which the property owner had already, or was in the process of obtaining, certification. For example, in May 2011, New York City Mayor Michael Bloomberg announced that the law firm WilmerHale (Wilmer Cutler Pickering Hale and Dorr LLP) had signed a lease with Silverstein Properties for

space in 7 World Trade Center, which he referred to as a "pioneering green lease agreement." (The mayor referred to the green lease when thanking those involved in its drafting. See WilmerHale, *Mayor Bloomberg Announces First Ever Lease for Commercial Office Space That Contains Groundbreaking Language That Incentivizes Energy Efficiency* (Apr. 5, 2011), [www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=100379](http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=100379).)

This "pioneering model" was dubbed the "Energy-Aligned Lease" and was only green in the provisions relating to landlord's capital expenditures designed to reduce energy expenses. (For a full description of an energy-aligned lease, see Nat'l Res. Def. Council, *Energy Efficiency (or Energy Aligned) Leases* (last visited Dec. 24, 2015), [www.nrdc.org/greenbusiness/cmi/energy-efficiency-leases](http://www.nrdc.org/greenbusiness/cmi/energy-efficiency-leases).)

iStockphoto

asp.) Yet the concept was novel. Up to that point in leasing transactions, most landlords had little to no incentive to make capital expenditures in their properties unless there was a necessity (such as a system nearing the end of its useful life). After all, the typical commercial lease provides for the tenants to pay their proportionate share of the building's operating expenses and real estate taxes, usually as "Additional Rent," and if market practice is to pass on the majority of those costs to the tenants, why would a landlord spend a dime on improvements unless it had to? (For a full description of an energy-aligned clause, see N.Y. City Mayor's Office of Sustainability, *Energy Aligned Clause* (last visited Dec. 24, 2015), [www.nyc.gov/html/gbee/html/initiatives/clause.shtml](http://www.nyc.gov/html/gbee/html/initiatives/clause.shtml).)

The Energy-Aligned Lease was a way for landlords to make those capital expenditures in systems that saved energy and water and upgrade their property simultaneously. Under this model, the landlord and tenant share the costs and benefits of energy retrofits by agreeing on a predicted amount of annual savings from the retrofits and having the tenant pay a percentage of the projected annual savings over the term of the lease. Thus, the tenant pays its proportionate share of operating expenses, including green capital expenditures, in additional rent and in turn benefits from lower building operating expenses. The result is a "split-incentive," by which Larry Silverstein ensured that 7 World Trade Center could have state-of-the-art water- and energy-efficient systems and the attendant economic benefits to both tenants and the landlord. After this energy-aligned agreement was publicized, other landlords started to adopt sustainability concepts into their own leases as well.

### Where the Green Lease Provisions Are Located

The incorporation of green lease provisions is not uniform among all landlords in all of their leases. In some cases, it may relate only to energy-efficient capital expenditures. In other instances, when a landlord wholly embraces sustainability, it could be

included in the following provisions:

- permitted use,
- operating expenses,
- janitorial services,
- energy services,
- alterations and improvements,
- surrender of premises,
- maintenance and repairs,
- assignment and sublet,
- insurance,
- default,
- access,
- rules and regulations exhibit,
- landlord sustainability exhibit,
- work letter exhibit, and
- parking agreement exhibit.

As evident in the above list, for a lease to be truly green, it could have sustainability provisions throughout the document. For example, in the permitted use clause, if a tenant's use does not comply with the landlord's sustainability practices or violates the property's certification or other third-party sustainability program, it could be a material default under the lease and possible cause for termination. Similarly, in the operating expenses provision, a landlord could include the costs for obtaining certification, maintaining certification, recycling, energy and water reduction measures, water-efficient landscaping, data collection and reporting, and any potential taxes relating to carbon pollution. But, even though tenants may be paying for these sustainability efforts, an inconsistency exists as to which party receives the "green-related credit." In some cases, tenants have no entitlement to any tax credit or incentive relating to the property, and in others the tenant is entitled to them.

Similarly, a landlord may require that tenants acknowledge that the property they occupy is certified by LEED/Green Globes/Energy Star/ASHRAE and obligate the tenant to comply with any certifying body's requirements. In another trend, landlords are requiring that tenant

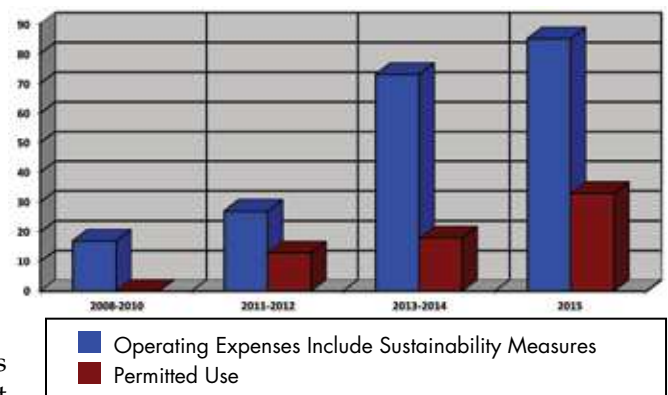
improvements be equal or superior to the certifying body's requirements for the quality and type of materials used in construction. For a tenant that desires a green lease, some leases permit the tenants themselves to pursue certification for the entire property—or just their premises—and include an affirmative covenant from the landlord to cooperate with the tenant in that endeavor. For the landlord's certification or re-certification efforts, most leases require tenants' cooperation as well.

### The Research

In a study by this author of more than 60 leases and subleases executed between 2008 and 2015, certain green leasing trends became evident. These trends relate to the number of clauses that incorporate sustainability, assignment to landlord or tenant of the obligation to comply with green building requirements, and allocation of the cost of sustainability efforts. Notably, among these three trends, allocation of the cost to obtain and maintain a property's certification was addressed most often. Also noteworthy, the number of leases containing sustainability-related provisions doubled from the 2011–12 period to the 2013–14 period, and tripled from the 2011–12 period to the 2015 period.

Operating expenses that included the landlord's sustainability practices saw the largest increase and permitted use the second largest increase.

During the period from 2005 to 2011, only 17% of the leases filed by public companies reporting to the U.S. Securities and Exchange Commission provided for tenants to assume some share of the landlord's sustainability



measures in their proportionate share of operating expenses. Similarly, only 17% of those leases even had a landlord sustainability exhibit. It appears, however, that 2011 was the turning point in green leasing, with a jump in the number of green provisions.

- As the chart on page 41 indicates, operating expense clauses showed the greatest increase in sustainability references between 2011 and 2015. Although only 27% of the leases executed between 2011 and 2012 had operating expense provisions containing sustainability costs, by 2015 88% of them included all expenses relating to green building measures and certification. Similarly, in the leases executed between 2011 and 2012, only 13% referred to sustainability-related restrictions in the permitted use clause, yet by 2015 that number increased to 33%.
- The tenant alterations/improvements provisions had a different trend and were fairly consistent. Only 13% of these provisions required green compliance with landlord sustainability practices and the building's certification

between 2011 and 2012, 18% between 2013 and 2014, and 17% in 2015. One reason for these low percentages could be because more general sustainability-related provisions cover all tenant acts instead of those specific to alterations and maintenance, as explained in the next bullet point.

- Provisions including sustainability-related issues began to become mainstream starting in 2013. Between 2013 and 2014, 18% of the leases restricted a tenant's permitted use to ones that complied with landlord's sustainability practices; 73% of the leases included green costs in the tenant's share of operating expenses; and 18% restricted tenant alterations to ones that were sustainability compliant or in conformance with the building's certification.
- Beginning in 2015, an even greater number of provisions addressed sustainability. Before 2015, less than 10% of the following provisions in leases referenced sustainability. But by 2015, 23% provided for services to comply with sustainability standards set forth by the landlord and some even provided for landlord's procurement of renewable energy for the property's use; 12% had sustainability references in the assignment and sublet provision; 30% of the leases included green references in the rules and regulations provision; and 20% had a landlord's sustainability exhibit.

The following includes some sustainability language that is now found in some of the green lease provisions discussed above.

#### Permitted Use

Some examples found in permitted use provisions include:

- "Tenant may not use or occupy premises for a purpose or in any manner that will cause the Building or any part thereof not to conform with Landlord's


Sustainability Practices or Certification."

- "Tenant agrees that Landlord shall have the right, but not the obligation, to maintain the Building's certification under LEED-EBOM including, without limitation, having the Building recertified under LEED-EBOM."
- "Tenant acknowledges that Landlord's Sustainability Practices address whole-building operations and maintenance issues including chemical use; indoor air quality; energy efficiency; water efficiency; recycling programs; exterior maintenance programs; and systems upgrades to meet green building energy, water, indoor air quality, and lighting performance standards."

#### Operating Expenses

Operating expense provisions can include not only certification-related expenses but also other costs associated with sustainability measures. Examples found in operating expense provisions include:

- "Landlord is permitted to purchase green or renewable energy and pass along such costs to Tenant."
- "Any environmental incentives or carbon credits attributable to the premises or the Property accrue to the Landlord and are not reflected on the Property's operating expenses."
- "Any environmental incentives or carbon credits attributable to the Premises or the Property accrue to the Tenant."
- "If Tenant has not contributed to capital expenditures for which Landlord has received environmental incentives or carbon credits, Tenant shall not benefit in a reduction of operating costs until all capital expenditures have been fully reimbursed to Landlord."
- "Operating Costs shall include the costs incurred for compliance and participation in conservation, recycling, sustainability, energy efficiency and waste reduction."



**Operating expense provisions can include not only certification-related expenses but also other costs associated with sustainability measures.**

- “Operating Expenses shall include all costs of maintaining, managing, reporting, commissioning, and re-commissioning the Building or any part thereof that was designed and/or built to be sustainable and conform with LEED, and all costs of applying, reporting, and commissioning the Building or any part thereof to seek certification or re-certification under LEED.”

### Compliance with Laws

A compliance with laws provision offers landlords a way to require a tenant’s compliance with sustainability practices even if that tenant’s lease was executed before the date that the building became green. For example, if during the lease term a new law required that the building become certified or meet certification standards, then the landlord could rely on this provision to require its tenants to meet whatever sustainability standards the landlord would need for certification. The problem arises, however, when local law does not require the property to obtain certification, because the landlord would have little leverage to require its tenants to comply with what it needs to get or stay green.

An example of a green-related compliance with laws provision is:

- “Tenant shall not do anything or suffer anything to be done in or about the Premises or the Project that will in any way conflict with any applicable laws and any renewable rating system level of certification designated for the Premises by Landlord, or as otherwise mandated under applicable laws, energy and other ‘green’ requirements, including any LEED or other building with respect to renewable energy or energy efficiency.”

### Services

The reasonableness of the delivery of the landlord’s services is now being compared to other similarly situated green building landlords in the vicinity of the property. For example, if the customary practice of other similarly



**A compliance with laws provision offers landlords a way to require a tenant’s compliance with sustainability practices even if that tenant’s lease was executed before the date that the building became green.**

situated green building landlords is to not provide a particular service, refusing to deliver such a service can be considered reasonable. The language seen in this regard is as follows:

- “If the service Tenant desires is not provided by landlords of other similarly situated LEED buildings in the vicinity of the Building, it shall be reasonable for Landlord to refuse to deliver such Tenant desired service.”

Lease references to renewable energy also are becoming mainstream, and some leases are now including the following:

- “On-site systems may include, without limitation, photovoltaic, wind energy systems, solar thermal, biofuel-based, and geothermal energy systems. Off-site renewable energy sources may include, without limitation, solar, wind, and other sources defined by the Center for Resource Solutions Green-e Energy program’s products certifications requirements or similar green power certification system.”

Further, in the landlord services section, the component relating to green cleaning could include routine cleaning during the day, the use of Green Seal products, and green equipment. Furthermore, the energy supplied to tenants could include landlord-chosen energy supplied by renewable resources, which could be provided by the local utility company or even the landlord itself (under circumstances in which the landlord has solar, wind, geothermal, hydro, or other renewable energy devices). In most cases, the landlord will perform data collection services relating to energy consumption, and the tenant is now typically agreeing to deliver any data relating to its premises.

### Assignment and Sublet

The landlord’s consent rights to an assignment or sublet is often a cause for much negotiation in a lease transaction. In some cases, the landlord wishes to retain absolute discretion over such proposed transfer and may have the right to even be unreasonable in its decision not to give consent. In other cases, the landlord has no such power, and the tenant has the unfettered right to assign or sublet. When the landlord has an obligation to entertain the tenant’s proposed assignment or sublet, in most cases the landlord is subject to a “reasonable” standard in making its decision. In green building leases, a qualified “reasonable” standard may be included, and the following can be seen addressing this last category.

- “It shall be a reasonable basis for Landlord to withhold its consent if Tenant tenders for Landlord’s approval an assignment of this Lease or a sublease of the Premises or any part of the Premises to a proposed assignee/subtenant whose proposed use or operation in the Premises may or will cause the Building or any part thereof not to conform with the environmental and green building clauses in this Lease.”

### Alterations/Improvements

When examining the alterations/

improvements provision in a sustainable building lease, the tenant may have to jump through more hoops than just obtaining the typical landlord consent for such alterations. In many cases the contractor (and architect) will have to be certified by one of the rating agencies, the tenant must use low volatile organic compound materials and paints, and, if any demolition occurs, reuse, recycle, or salvage much of what is being demolished. Similarly, because the alteration is taking place in a green building, HVAC air vents need to be protected and any other aspects of the construction job need to meet all of the landlord's sustainability requirements. In addition, if the tenant's requested approval for alterations does not comport with the above, the green lease could state that failure to meet these requirements would be a reasonable basis for the landlord to reject the request.

Samples of alterations/improvements provisions follow:

- "Tenant's alterations shall comply with Landlord's environmental policies and not jeopardize or otherwise affect Landlord's Green Standards for the Building."
- "No such installation and no removal thereof shall be permitted that violates or will cause any portion of the Premises or the Building to violate any of the Sustainability Standards or otherwise negatively impact the Building Certification."
- "Tenant's approval of alterations, improvements or additions to the Premises or Property may be conditioned upon compliance with the Sustainability Standards and potential Building Certification impacts."
- "All alteration and construction activities affecting more than one room and utilizing more than one trade shall be conducted under an Indoor Air Quality (IAQ) Best Management Practices: Management for Facility Alterations and Additions established and implemented in accordance with the requirements of LEED for Existing Buildings."



**As with any demolition that takes place within a tenant's premises located in a green building, the tenant will have to make sure that all materials demolished are salvaged, recycled, or reused to the extent they can be.**

- "Landlord's approval may be withheld and the withholding of such approval shall be deemed reasonable if Tenant's proposed alteration or assignee/sublessee is not compatible with any existing or planned future certification of the Project under the LEED rating system (or other certification standard)."

**Access**

Even access provisions are getting green hues. The latest language includes the following:

- "Landlord may enter the Premises for the purpose of performing any work necessary to obtain or maintain Building certification and/or maintain the Sustainability Standards."

**Parking**

Although this provision is not contained in every lease, in those where it is common, the following language is typical:

- "Landlord may establish preferred parking spaces reserved for car/van pool vehicles or for low-emitting and fuel-efficient vehicles. Tenant and its employees are prohibited from parking in any preferred parking spaces unless the vehicle being parked satisfies the requirements for use of same."

**Insurance**

Although relating to operating expenses, in 2015, leases started to include the following language:

- "The cost of insurance endorsements to repair, replace and re-commission the Building for recertification pursuant to LEED will be included in operating expenses."

**Surrender**

At the expiration or earlier termination of the lease term, a green lease will usually require the tenant to restore the premises to its condition at the commencement of the term, and, as with any demolition that takes place within a tenant's premises located in a green building, the tenant will have to make sure that all materials demolished are salvaged, recycled, or reused to the extent they can be and to report the data relating to these efforts to the landlord.

An example of the language relating to this is:

- "Tenant shall report to Landlord, in a format determined by Landlord, all methods used by Tenant to salvage, reuse, or recycle Tenant's property and non-structural and structural installations and provide all final energy, water, waste, maintenance or other records required under the Lease's sustainability practices for benchmarking."

**Default/Remedies**

The default and remedies section of a green lease looks similar to any other default and remedies section, but a sustainable building lease typically includes the following items in the definition of a default: violations

of landlord's sustainability practices, violations of the green-specific requirements in the work letter, any act that jeopardizes the property's certifications, and violations of any lender sustainability requirements.

In addition to all other defaults that would trigger an event of default, the following could be included:

- "Any act or omission to act that violates any of Landlord's Sustainability Practices and violates any Lender sustainability requirements pursuant to the mortgage or deed of trust."

### Rules and Regulations

In green leases, the rules and regulations provision now can include the following:

- "Tenant shall use window blinds, comply with LEED reporting and disclosure requirements, and not waste electricity or water."
- "Tenant shall participate in any program for metering or otherwise measuring the use of utilities and services."
- "Tenant shall not waste electricity, water, or air conditioning and agrees to cooperate fully with Landlord to ensure the most effective operation of the Building's heating and air conditioning system, including, without limitation, the use of window blinds to block solar heat load, and shall refrain from attempting to adjust any controls. Tenant shall comply with and participate in any program for metering or otherwise measuring the use of utilities and services, including, without limitation, programs requiring the disclosure or reporting of the use of any utilities or services. Tenant shall also cooperate and comply with, participate in, and assist in the implementation of (and take no action that is inconsistent with, or which would result in Landlord, the Building, or the Project failing to comply with the requirements of) any conservation, sustainability, recycling, energy efficiency, or

waste reduction programs, environmental protection efforts, or other programs that are in place or implemented from time to time at the Building or the Project, including, without limitation, any required reporting, disclosure, rating or compliance system or program (including, but not limited to, any LEED rating or compliance system, including those currently coordinated through the U.S. Green Building Council)."

### Renewal

In many green leases, the renewal provision may include determination of fair market rent by focusing on comparable properties using the following language:

- "with energy efficiencies and environmental elements, including LEED certification."

### Recycling and Waste Management

Although recycling and waste management provisions are not evident in many leases, when they are, the following language is a good example of what they now contain:

- "Tenant covenants and agrees, at its sole cost and expense: to comply with all present and future Laws regarding the collection, sorting, separation, and recycling of garbage, trash, and rubbish and to comply with Landlord's recycling policy as part of Landlord's sustainability practices where it may be more stringent than applicable Law. Tenant shall pay all costs, expenses, fines, penalties, or damages that may be imposed on Landlord or Tenant by reason of Tenant's failure to comply with the above."

### General Affirmative Covenants

Affirmative covenants on both the landlord's or the tenant's part have also trended green. A tenant in a green building now, on a regular basis, agrees to cooperate with the landlord in obtaining or maintaining certification.

In addition, it is not uncommon to find language such as:

- "Tenant is required to provide Landlord the following, at the frequency required by Landlord, to maintain LEED certification for the existing Building: (i) durable goods purchases will be logged in categories of electronic-powered equipment and furniture, and the ratio (in each category, by cost) of those purchases meeting identified sustainability criteria will be tracked. Tenant is encouraged to install ENERGY STAR-labeled dishwashers and to eliminate disposable utensils, cups and plates. ENERGY STAR-labeled computer equipment and other electric-powered equipment are also encouraged. Examples include computer equipment, kitchen appliances, copiers, AV and teleconferencing equipment and trade equipment. (ii) Furniture: Tenant shall make sustainable purchases for furniture (including cubicles and workstations) meeting the criteria of containing at least . . . ."



**A tenant in a green building now, on a regular basis, agrees to cooperate with the landlord in obtaining or maintaining certification.**

- “Landlord will cooperate with Tenant’s efforts to achieve LEED Commercial Interiors certification and other sustainable goals such as San Francisco Green Business.”

Other tenant affirmative covenants now include not only compliance disclosure data and reporting, but also, if a tenant is performing its own cleaning, that:

- “Within six months of the Commencement Date, all maintenance contracts shall specify Green Seal standards.”

Some affirmative covenants are limited, however, to mere “cooperation” with the landlord in its sustainability goals, such as the following:

- “Each party shall, at the other party’s request and expense, reasonably cooperate (including, without limitation, providing any necessary documents, instruments and/or information under the control of such party and executing and delivering any documents reasonably requested) to enable the requesting party to attempt to obtain LEED certification with respect to the requesting party’s activities at the Premises, the Building, and the Park.”

In other leases, cooperation is just the beginning and the following is now required:

- “Tenant consents to the use of water-saving appliances, such as waterless urinals, and other equipment as may be otherwise consistent with Landlord’s sustainability practices or the LEED-EBOM certification of the Building. Where use of potable water is not necessary, Tenant acknowledges and consents to the Landlord’s collection, treatment and reuse of condensate water, rainwater, and graywater for use as flushing water in washrooms and in other applications within and around the Building.”
- “Tenant agrees to cooperate fully



## Although landlords require a lot from their tenants, when the landlord goes green, it is typically carving out its own sustainability obligations.

with Landlord to ensure the most effective sustainable operation of the Building; to use window blinds to block solar heat loads; to comply with programs requiring disclosure or reporting of the use of energy; to deliver to landlord building and site plans and approvals to incorporate LEED certification; to install occupancy sensors in all offices, conference rooms, mechanical and janitorial rooms . . . .”

### General Negative Covenants

Landlord and tenant negative covenants are turning green as well. Sample language is as follows:

- “Tenant covenants not to use or permit any person to use the premises or any part thereof for any use or purpose contrary to the Rules and Regulations or in violation of any underlying documents or Landlord’s initiatives to seek or maintain Building certification under LEED.”
- “In no event shall any Tenant Changes result in the reduction

of any environmental rating for the Building or Project that may now or hereafter be made such as pursuant to LEED, Green Globes or Energy Star rating.”

- “Tenant may not waste electricity or water and must use blinds and comply with reporting, disclosure requirements and other LEED requirements for the Building.”
- “Tenant shall refrain from attempting to adjust any [HVAC] controls that could affect the landlord’s sustainability practices.”

Although landlords require a lot from their tenants, when the landlord goes green, it is typically carving out its own sustainability obligations. For example:

- “Landlord is not obligated to implement sustainability practices for the Project or to seek certification under, or make modifications in order to obtain, a certification from LEED or any other comparable certification.”

### Definitions

Defined terms in a lease are expanding as well. “Carbon tax” is now a defined term, as are “environmental and sustainability objectives.” In a recent lease, the definition of “hazardous substances” included “volatile organic compounds.”

### Conclusion

So where will these trends go from here? With many municipalities requiring some sort of sustainable construction compliance, green leasing trends will continue to embrace more and more provisions in the lease form. Similarly, in order to stay green, landlords will have to use the lease to require compliance with their own sustainability practices. As the author tells his law school students and the many attendees of his Green Leasing and Sustainable Building Law CLEs, within the next five to seven years, we will no longer use the term “green lease” because every lease will be green. ■





## Environmental Law Update

**Environmental Law Update** provides information on developments in environmental law as they apply to property, trust, and estate matters. The editors of *Probate & Property* welcome information and suggestions from readers.

### Conservation Tax Incentives Become Permanent

As part of the omnibus \$1.1 trillion spending bill passed by the U.S. House and Senate in December 2015, the tax incentive for conservation easement donations was made permanent. President Obama signed the bill into law on December 18, 2015. The incentive will be applied retroactively, starting on January 1, 2015.

The bill also reauthorized the Land and Water Conservation Fund for three years and increased its funding from \$306 million per year to \$450 million.

Since 2006, landowners have had the opportunity to take enhanced tax deductions for donating land or granting conservation easements. Since the original law passed, more than 2 million acres of farm and forest land and other open space have been preserved nationwide. Land Trust Alliance, [www.landtrustalliance.org/land-trust-alliance-cheers-passage-landmark-conservation-legislation](http://www.landtrustalliance.org/land-trust-alliance-cheers-passage-landmark-conservation-legislation).

The enhanced tax deduction law had expired in 2013 and was renewed on an annual basis for the past two years. Renewals took place at the end of each year, however, and applied retroactively, adding uncertainty about whether the deductions would be allowed for a particular year. Because Congress approved only one-year extensions, the law's future had remained uncertain until now.

### Solar Energy and Wind Tax Credits Extended

The omnibus bill also extends the 30% investment tax credit (ITC) for solar energy and the 2.3-cent-per-kilowatt-hour production tax credit (PTC) for wind power. Other power technologies—including geothermal, marine

energy, and small hydropower—received one-year extensions to their 30% ITC.

The PTC for wind energy will remain at full strength through 2016, followed by incremental reductions in value for 2017, 2018, and 2019 before expiring in January 2020.

The ITC for solar energy will continue at 30% levels for both commercial and residential systems through 2018, then taper off in yearly increments to 10% in 2022.

### Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017

On December 14, 2015, the EPA issued a final rule establishing annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to all motor vehicle gasoline and diesel produced or imported in the years 2014, 2015, and 2016. The 2014 and 2015 levels reflect the actual amounts of domestic biofuels used in those years, and the 2016 and 2017 standards represent projected growth over historic levels. See [www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2014-2015-and-2016-and-biomass-based](http://www.epa.gov/renewable-fuel-standard-program/final-renewable-fuel-standards-2014-2015-and-2016-and-biomass-based).

Final renewable fuel volumes established by EPA are shown in the table:

	2014	2015	2016	2017
Cellulosic biofuel (million gallons)	33	123	230	n/a
Biomass-based diesel (billion gallons)	1.63	1.73	1.90	2.00
Advanced biofuel (billion gallons)	2.67	2.88	3.61	n/a
Renewable fuel (billion gallons)	16.28	16.93	18.11	n/a

### Issues to Watch in 2016

#### Waters of the United States

Clean Water Act jurisdictional issues will continue to wind their way through federal courts (and back to the Supreme Court?) as agencies continue to wrestle with the EPA rule “clarifying” the definition of “waters of the United States.”

#### Clean Power Plan

Multiple state and utility challenges have been filed to EPA's Clean Power

**Environmental Law Update Editor:** Scott E. Hitch, Nelson Mullins Riley & Scarborough, LLP, Atlantic Station, 201 17th Street, N.W., Suite 1700, Atlanta, GA 30363, [scott.hitch@nelsonmullins.com](mailto:scott.hitch@nelsonmullins.com).

Plan for reducing carbon emissions from electric utilities.

### **Chevron Deference and the Issue of Cost in Environmental Regulation**

There could be significant fallout from the Supreme Court's *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015), decision from summer 2015. Does the decision signal the beginning of deference to EPA

rulemaking under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)? And how and when will courts force consideration of the cost of compliance in agency rulemakings?

**COP21 Climate Framework Agreement and a Push to a Carbon-Less Economy**  
Will the Paris agreement of 195

countries at the 21st Conference of the Parties (COP21) to cut greenhouse gas emissions on a global scale open new markets for renewable power and clean technologies? Will emerging economies meet their targets? How will climate finance principles work in practice? ■

Be Sure  
You're Taking  
Advantage  
of All RPTE  
Member  
Benefits. . .



### **Group or Committee Participation – Get Involved!**

Join one or more RPTE Groups and Committees covering the most important areas of Trust and Estate and Real Property practice.

- Participate in free member conference calls about current issues and timely case law that affect your clients and your practice.
- Work on legislative issues for a particular law specialty on a national and/or state level.
- Get published! Group and Committee work provides much of the basis for the Section's high quality educational programs and content for the Section's publications.

### **Continuing Legal Education**

Easily fulfill your mandatory CLE requirements by attending RPTE CLE programs face-to-face at conferences or by participating in low cost CLE programs by telephone at your desk.

### **Up-to-date Practice Information**

Tap into a wealth of industry information, along with practical tips and tools for your practice with RPTE Publications:

- **RPTE eReport** – A bi-monthly electronic publication featuring Section events and activities, news articles and resources for experienced lawyers, new lawyers and law students.
- **Probate & Property** – The Section's bi-monthly flagship magazine providing lawyers with practical information on real property and trust and estate planning.
- **Real Property, Trust and Estate Law Journal** – A quarterly journal providing in-depth articles of interest to real property and trust and estate law lawyers.
- **Real Estate Quarterly Reports** – A summary and commentary on prominent real estate law cases.

See our web site at  
[www.abanet.org/rpte](http://www.abanet.org/rpte)  
for more Section  
information and  
practice resources.