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ENVIRONMENTAL LAW & POLICY ANNUAL REVIEW

ARTICLES AND COMMENTS

Analysis of Environmental Law Scholarship 2020-2021

Linda K. Breggin, Bruce Johnson, Jaehee Kim,
and Michael P. Vandenberg

Environmental Citizen Suits and the Inequities of Races to the Top

David Adelman and Jori Reilly-Diakun

Responses by Howard Learner and Bina R. Reddy

Turning Participation Into Power: A Water Justice Case Study

Jaime Alison Lee

Responses by LaTricea Adams and Chandra T. Taylor-Sawyer

Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy

Leo E. Strine, Jr., Kirby M. Smith, and Reilly S. Steel

Responses by Margaret E. Peloso & Chloe E. Schmergel and
Todd Phillips

Rethinking Grid Governance for the Climate Change Era

Shelley Welton

Responses by Tom Hassenboehler, Casey Roberts, and
Rebecca Tepper & Kelly Caiazza

HONORABLE MENTIONS

Holding Polluters Accountable in Times of Climate and Covid Risk: The Problems With "Emergency" Enforcement Waivers

Victor B. Flatt

Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands

Monte Mills and Martin Nie

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2021-2022

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CONTENTS

Comment

- Analysis of Environmental Law Scholarship 2020-2021***, by Linda K. Breggin,
Bruce Johnson, Jaehee Kim, and Michael P. Vandenberg 10599

Articles and Comments

- Environmental Citizen Suits and the Inequities of Races to the Top***,
by David Adelman and Jori Reilly-Diakun 10606
- Citizen Environmental Enforcement Lawsuits Are Alive—What It Takes to Go Forward***,
by Howard Learner 10616
- No Accounting for Accountability? A Comment on Environmental Citizen Suits and
the Inequities of Races to the Top***, by Bina R. Reddy 10619
- Turning Participation Into Power: A Water Justice Case Study***, by Jaime Alison Lee 10622
- Reflections on Dr. Lee's Turning Participation Into Power***, by LaTricea Adams 10628
- Dual Purpose Outreach to Enhance Public Participation in Environmental
Decisionmaking***, by Chandra T. Taylor-Sawyer 10629
- Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated,
Efficient, and Effective Caremark and EESG Strategy***, by Leo E. Strine, Jr., Kirby M. Smith, and
Reilly S. Steel 10631
- Board Oversight in ESG—Evolving Trends in the Era of Increasing Disclosure
Requirements***, by Margaret E. Peloso and Chloe E. Schmergel 10637
- Director Engagement: Necessary for ESG Success***, by Todd Phillips 10641
- Rethinking Grid Governance for the Climate Change Era***, by Shelley Welton 10644
- The Organized Wholesale Market Improvement Paradox***, by Tom Hassenboehler 10649
- Comment on Shelley Welton, Rethinking Grid Governance for the Climate Change Era***,
by Casey Roberts 10652
- Comment on Rethinking Grid Governance for the Climate Change Era***,
by Rebecca Tepper and Kelly Caiazzo 10655

Honorable Mentions

- Holding Polluters Accountable in Times of Climate and Covid Risk: The Problems With
"Emergency" Enforcement Waivers***, by Victor B. Flatt 10660
- Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal
Co-Management on Federal Public Lands***, by Monte Mills and Martin Nie 10661

In the News 10662

Recent Journal Literature 10670

Volume 52 Cumulative Index 10672

About ELR® . . .

ELR®—*The Environmental Law Reporter*® is an essential online research tool edited by attorneys that provides the most-often cited analysis of environmental, sustainability, natural resources, energy, toxic tort, and land use law and policy. *ELR* has three components:

- Our highly respected monthly journal, *ELR*®—*The Environmental Law Reporter*®, provides insightful features relevant to both legal practice and policy on today's most pressing environmental topics. The journal is available in print as well as online.

- *ELR UPDATE* provides expert summaries three times a month of the most important federal and state judicial and administrative developments as well as federal legislative and international news. Highlights from *ELR UPDATE* may also appear in our monthly journal, but all of the material can be found on our website.

- *ELR Online*, available at www.elr.info, is a one-stop environmental law and policy research site with access to 50 years of *ELR* articles and analysis; extensive links to statutes, regulations, and treaties; a comprehensive subject matter index to cases and articles; and many other tools.

Submissions . . .

ELR invites readers to submit articles and comments, which are shorter features, for publication. Manuscripts may be on any subject of environmental, sustainability, natural resources, energy, toxic tort, or land use law or policy. Citations should conform to *A Uniform System of Citation* (the "Bluebook") and should include *ELR* citations for materials that we have published. Manuscripts should be submitted by e-mail attachment to austin@eli.org. We prefer that the file be in Microsoft Word® format.

Opinions are those of the authors and not necessarily those of the Environmental Law Institute or of funding organizations.

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ENVIRONMENTAL LAW AND POLICY ANNUAL REVIEW

Dear Readers:

The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* (ELR) in partnership with Vanderbilt University Law School. For more than a decade, ELPAR has provided a forum for presentation and discussion of the best environmental law and policy-relevant ideas from the legal academic literature. Published as an annual special issue of ELR, ELPAR is designed to fill the same important niche by helping to bridge the gap between academic scholarship and environmental policymaking.

ELI and Vanderbilt formed ELPAR to accomplish three principal goals. The first is to provide a vehicle for moving ideas from the academy to the policymaking realm. Academicians in the environmental law and policy arena generate hundreds of articles each year, many of which are written in a dense, footnote-heavy style that is inaccessible to policymakers with time constraints. ELPAR selects the leading ideas from this large pool of articles and makes them digestible by reprinting them in a short, readable form accompanied by expert, balanced commentary.

The second goal is to improve the quality of legal scholarship. Professors have strong institutional incentives to write theoretical work that ignores policy implications. ELPAR seeks to shift these incentives by recognizing scholars who write articles that not only advance legal theory, but also reach policy-relevant conclusions. By doing so, ELPAR seeks to induce them to generate new policy ideas and to improve theoretical scholarship by asking them to account for the hard choices and constraints faced by policymakers. And the third and most important goal is to provide a first-rate educational experience to law students interested in environmental law and policy.

To select candidate articles for inclusion, the ELPAR Editorial Board and Staff conducted a key word search for “environment!” in an electronic database. The search was limited to articles published from August 1, 2020, through July 31, 2021, in the law reviews from the top 100 *U.S. News and World Report*-ranked law schools and the “environment, natural resources and land use law” journals ranked by the Washington & Lee University School of Law. Journals that are solely published online were searched separately. Student scholarship and non-substantive content were excluded.

The Vanderbilt students then screened articles for consistency with the ELPAR selection criteria. They included only those articles that met the threshold criteria of addressing an issue of environmental quality and offering a law or policy-relevant solution. Next, they considered the articles' feasibility, impact, creativity, and persuasiveness.

Through discussion and consultation, the students ultimately chose 20 articles for review by ELPAR's Advisory Committee members, who provided invaluable insights on article selection. Vanderbilt University Law School Prof. Michael Vandenberg, ELI Senior Attorney Linda Breggin, and *ELR* Editor-in-Chief Jay Austin also assisted in the final selection process. Four articles were selected, and two received honorable mentions. Commentary on the selected papers then was solicited from practicing experts in both the private and public sectors.

On March 25, 2022, ELI and Vanderbilt cosponsored a virtual conference where some of the authors of the articles and comments presented their ideas to an audience of business, government (federal, state, and local), think-tank, media, and nonprofit participants. The featured articles were “Environmental Citizen Suits and the Inequities of Races to the Top”; “*Caremark* and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective *Caremark* and EESG”; and “Rethinking Grid Governance for the Climate Change Era.” The conference was structured to encourage dialogue among presenters and attendees. In addition, on February 28, 2022, ELI and Vanderbilt cosponsored a virtual symposium featuring the article “Turning Participation Into Power: A Water Justice Case Study.” Recordings of the conference and symposium are available at <https://www.eli.org/environmental-law-and-policy-annual-review>.

The students worked with the authors to shorten the original articles and to highlight the policy issues presented, as well as to edit the comments received. These edited articles and comments are published here as ELPAR, which is also the August issue of *ELR*. Also included is an article on environmental legal scholarship, which is based on the data collected through the ELPAR review process. We are once again pleased to present the results of this year's efforts.

Linda K. Breggin, Senior Attorney, Environmental Law Institute;
Lecturer in Law, Vanderbilt University Law School

Jay E. Austin, Editor-in-Chief, *ELR*—*The Environmental Law Reporter*

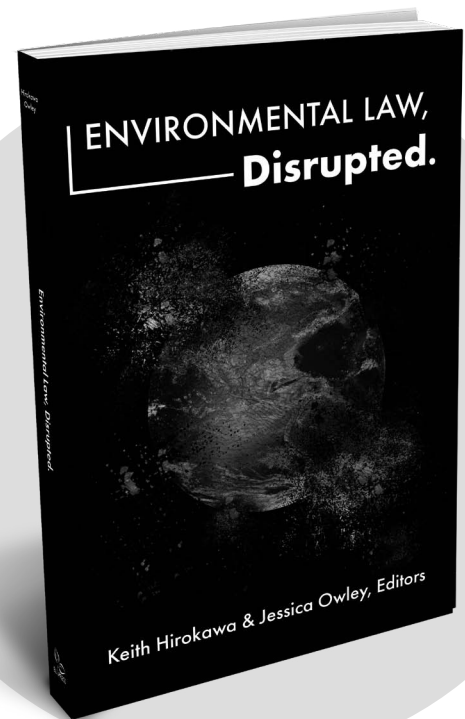
Michael P. Vandenberg, David Daniels Allen Distinguished Chair of
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ENVIRONMENTAL LAW, Disrupted.

by Keith Hirokawa & Jessica Owley, Editors

To date, U.S. law has largely served as an obstacle to an honest assessment of our preparedness to face the climate change challenge. Given that society has become comfortable amidst mild climatic conditions, and given a pervasive reluctance to change, extreme and abrupt climatic changes will hit hard. Our current legal structure maintains a dangerous status quo and it is time to unleash the potential of communities and the private sector to produce innovative solutions.

This book, the fourth in a series by the Environmental Law Collaborative, addresses disruption from a variety of influences and perspectives. Some essays consider the disruptive effects of environmental changes on human and ecological safety, security, and well-being, suggesting that the impacts of climate changes are not accounted for in the current legal system. Some identify key changes needed to respond to climatic challenges, social inequities, and dwindling grey and green resources. Others deconstruct social, political, and professional frameworks to understand how such influences might be used to disrupt the current regime, or even ones where expectations are being disrupted with the endorsement of law. Taken together, these essays provide an understanding of the cause, effect, and opportunity that environmental disruption presents in the climate change era.



"Environmental law began against a backdrop of burning rivers. Now the entire planet is on fire. The law has not kept up with the science of climate disruption and species extinction, to name but two of the existential threats facing humanity in the 21st century. Environmental law is long overdue for a complete makeover to address the root causes of ecosystem degradation, unsustainable consumption of natural resources, and systemic racism. Environmental Law, Disrupted. captures the thinking of the most innovative scholars in the legal academy. Read it as if your life depended on it because it does."

—Prof. Pat Parenteau, Vermont Law School



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C O M M E N T

ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2020-2021

by Linda K. Breggin, Bruce Johnson, Jaehee Kim, and Michael P. Vandenberg

Linda K. Breggin is a Senior Attorney with the Environmental Law Institute and Lecturer in Law, Vanderbilt University Law School. Bruce Johnson and Jaehee Kim are recent graduates of Vanderbilt University Law School. Michael P. Vandenberg is the David Daniels Allen Distinguished Chair of Law and Co-Director of the Energy, Environment, and Land Use Program, Vanderbilt University Law School.

The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI) *Environmental Law Reporter* in partnership with Vanderbilt University Law School. ELPAR provides a forum for the presentation and discussion of some of the most creative and feasible environmental law and policy proposals from the legal academic literature each year. The pool of articles that are considered includes all environmental law articles published during the previous academic year. The law journal articles that are re-published and discussed are selected by Vanderbilt University Law School students with input from their course instructors and an outside advisory committee of experts.

The purpose of this Comment is to highlight the results of the ELPAR article selection process and to report on the environmental legal scholarship for the 2020-2021 academic year, including the number of environmental law articles published in general law reviews versus environmental law journals, and the topics covered in the articles. We also present the top 20 articles that met ELPAR's criteria of persuasiveness, impact, feasibility, and creativity, from which four articles were selected to re-publish in shortened form, some of them with commentaries from leading practitioners and policymakers. Thus, the goal of this Comment is to provide an empirical snapshot of the environmental legal literature during the past academic year, as well as provide information on the top articles chosen by ELPAR.

I. Methodology

A detailed description of the methodology is posted on the Vanderbilt University Law School and ELI websites.¹ In brief, the initial search for articles that qualify

for ELPAR review is limited to articles published from August 1 of the prior year to July 31 of the current year, roughly corresponding to the academic year. The search is conducted in law reviews from the top 100 law schools, as ranked by *U.S. News and World Report* in its most recent report, counting only articles from the first 100 schools ranked for data purposes (i.e., if there is a tie and over 100 schools are considered top 100, those that fall in the first 100 alphabetically are counted). Additionally, journals listed in the "Environmental and Land Use Law" subject area of the most recent rankings compiled by Washington & Lee University School of Law are searched,² with certain modifications.

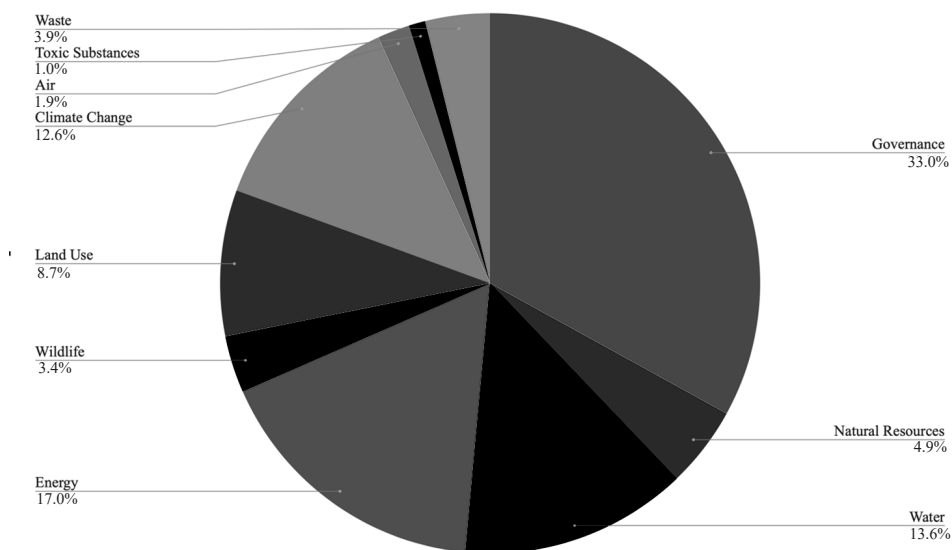
The ELPAR Editorial Board and Staff start with a keyword search for "environment!" in an electronic legal scholarship database.³ Articles without a connection to the natural environment (e.g., "work environment" or "political environment") are removed, as are book reviews, eulo-

academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php (last visited Mar. 25, 2022).

2. *W&L Law Journal Rankings: Ranking Methodology*, WASH. & LEE SCH. OF L., <https://managementtools4.wlu.edu/LawJournals/> (last visited Mar. 25, 2022).

3. ELPAR members conduct a search in the spring semester of articles published between August 1 and December 31 of the previous year. In the fall semester, members search each journal for articles published earlier that year, between the days of January 1 and July 31. The exact date of access for each journal varies according to when each individual ELPAR member performed the searches on their assigned journals, but the spring searches were performed in the 5th week of January 2021, and the fall searches were performed in the 5th week of August 2021. In order to collect articles from "embargoed" journals, which are only available on Westlaw after a delay, as well as articles from journals that are published after their official publication date, we set up a Westlaw Alert system to notify us when an article meeting our search criteria was uploaded to Westlaw after ELPAR members conducted their initial searches. A Westlaw Alert was set up for the spring search on February 1, 2021, and ran until August 31, 2021. An alert was set up for the fall search on September 1, 2021, and ran until September 16, 2021. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to our data analysis. Law reviews of schools added to the *U.S. News and World Report* Top 100 are searched for the entire year in the fall, and schools removed from the top 100 after the spring search are not considered for trends data.

1. *Environmental Law and Policy Annual Review Publications*, ENVTL. L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited Mar. 25, 2022); *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/>

Figure 1. 2020-2021 Articles Categorized by Primary Topic

gies, non-substantive symposia introductions, case studies, presentation transcripts and editors' notes. Student scholarship is excluded if the piece is published as a note or comment by a student who is a member of the staff of the publishing journal. We recognize that all ranking systems have shortcomings and that only examining top journals imposes limitations on the value of our results. Nevertheless, this approach provides a useful glimpse of leading scholarship in the field.

For purposes of tracking trends in environmental scholarship, the next step is to cull the list generated from the initial search to ensure that the list contains only those articles that qualify as "environmental law articles." Determining whether an article qualifies as an environmental law article is more of an art than a science, and our conclusions should be interpreted in that light. However, we have attempted to use a rigorous, transparent process. Specifically, an article is considered an "environmental law article" if environmental law and policy are a substantial focus of the article. The article need not focus exclusively on environmental law, but environmental topics should be given more than incidental treatment and should be integral to the main thrust of the article. Many articles in the initial pool, for example, address subjects that influence environmental law, including administrative law topics (e.g., executive power and standing), or tort law topics (e.g., punitive damages). Although these articles may be considered for inclusion in ELPAR and appear in our selection of top articles, they are not included for purposes of tracking environmental law scholarship since environmental law is not the main thrust of these articles.

Each article in the data set is categorized by environmental topic to allow for tracking of scholarship by topic area. The 10 topic categories are adopted from the *Environmental Law Reporter* subject matter index: air, climate

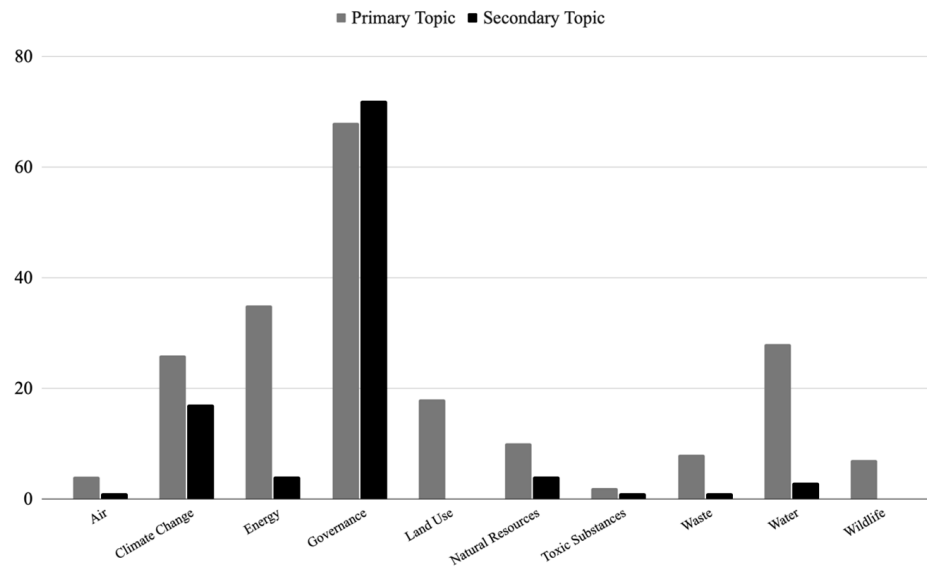
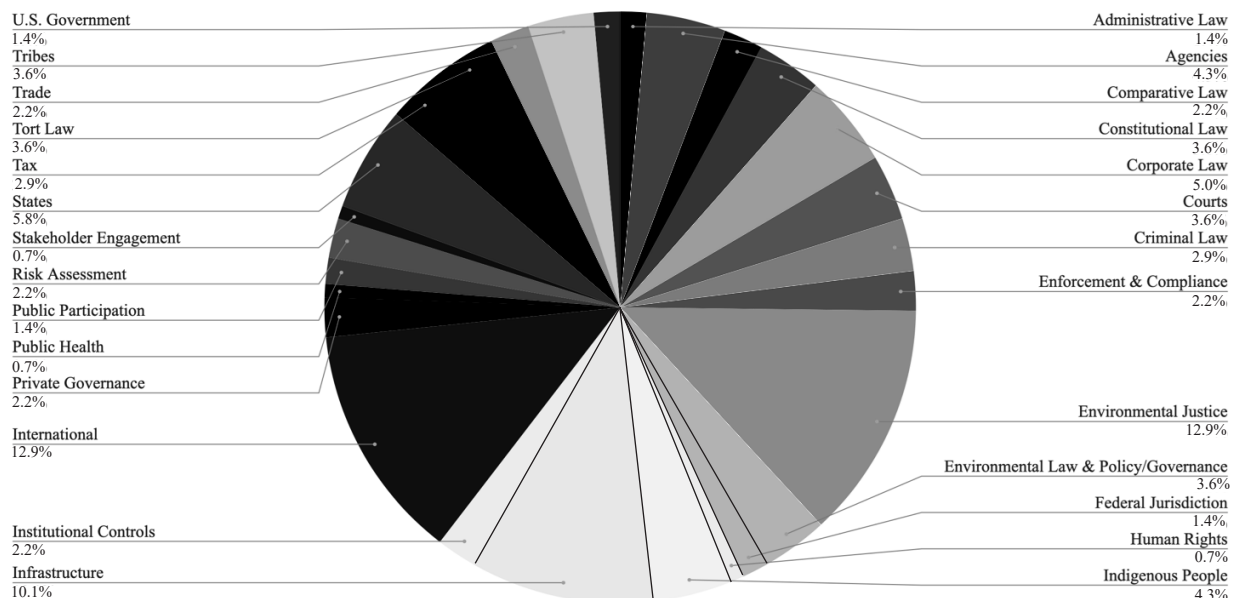
change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.⁴ ELPAR students assign each article a primary topic category and, if appropriate, a secondary category. This year, ELPAR students assigned each article a sub-category as well.⁵ Figure 3 shows the breakdown of governance articles, which was the largest category this year.

The ELPAR Editorial Board and Staff work in consultation with the course instructors, Prof. Michael P. Vandenberg and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on lists posted on the Vanderbilt University Law School website.⁶

4. *Subject Matter Index*, ELR, <https://www.elr.info/subject-matter-index/articles> (last visited Mar. 25, 2022).

5. *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic include: administrative law, Administrative Procedure Act, agencies, bankruptcy, civil procedure, comparative law, constitutional law, contracts, corporate law, courts, criminal law, enforcement and compliance, environmental justice, environmental law and policy, Equal Access to Justice Act, False Claims Act, Federal Advisory Committee Act, federal facilities, federal jurisdiction, Freedom of Information Act, human rights, indigenous people, infrastructure, institutional controls, insurance, international, public health, public participation, risk assessment, states, tax, tort law, trade, tribes, and U.S. government. For a list of all the subtopics in each topic, please see the following *ELR* link. *Subject Matter Index*, ELR, <https://www.elr.info/subject-matter-index/articles> [<https://perma.cc/9RWZ-2RXP>] (last visited Mar. 25, 2022).

6. *Environmental Law & Policy Annual Review Online Supplements*, VAND. L. SCH., <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/online-supplements.php> (last visited Mar. 25, 2022).

Figure 2. 2020-2021 Articles Categorized by Primary and Secondary Topic**Figure 3. 2020-2021 Governance Articles Categorized by Sub-Category**

II. Data Analysis on Environmental Legal Scholarship

For the 2020-2021 ELPAR review period (August 1, 2020, to July 31, 2021), we identified 206 environmental articles published in top law reviews and environmental law journals. 144 of these articles were published in journals that focus on environmental law, and 62 were published in general law reviews. The total of 206 articles is a small reduction from the 224 environmental articles published

in 2019-2020, and a substantial reduction from the 332 published in 2018-2019.

The primary topics of the 206 environmental articles published in 2020-2021 were as follows (see Figure 1): 68 governance articles (33.0%), 35 energy articles (17.0%), 28 water articles (13.6%), 26 climate change articles (12.6%), 18 land use articles (8.7%), 10 natural resource articles (4.9%), 8 waste articles (3.9%), 7 wildlife articles (3.4%), 4 air articles (1.9%), and 2 toxic substances articles (1.0%). 106 articles were also identified as including a secondary

topic, categorized as follows (see Figure 2): 72 governance articles, 17 climate change articles, 4 natural resources articles, 4 energy articles, 3 water articles, 3 wildlife articles, 1 air article, 1 toxic substances article, and 1 waste article. Accordingly, the most common topic category was governance, followed by energy.

III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2020-2021 academic year can be found in Table 1. Of the top 20 outlined below, 10 articles called for action by state and local governments as part of their proposal. Five articles called for action by the federal government, whether executive agencies, the legislative branch, or the judicial branch. Four articles called for updates to federal or international law, and one article advocated for private governance measures.

Primary topics identified in the top 20 articles were as follows: eight governance articles, seven energy articles, two land use articles, one water article, one climate change article, and one air article. Secondary topics were also identified for several articles: eight governance, four climate change, one water, one energy, and one land use.

This year's pool of top articles came from both general and environmental law journals. Eight of the top 20 articles were published in environmental law journals. Twelve of the top 20 articles were published in general law reviews. The lead authors of the top articles came from a range of law schools and academic backgrounds.

The chart that follows lists every article included in the top 20, with a brief description of each article's big idea. Links are provided to the full articles and most of the links contain the author's abstract.

Table 1: Article Overview Chart

Author(s)	Title	Citation and URL	Topic	The Big Idea
Adelman, David E., and Jori Reilly-Diakun	<i>Environmental Citizen Suits and the Inequities of Races to the Top</i>	92 U. COLO. L. REV. 377 https://lawreview.colorado.edu/printed/environmental-citizen-suits-and-the-inequities-of-races-to-the-top/	Governance (enforcement and compliance)	New empirical research demonstrates that citizen suits are filed in a small number of states with strong public support for environmental policies and robust state programs—not in states where policies and enforcement lag; several policies are proposed, both within and outside of the federal government, to mitigate the inequitable distribution of citizen suits and the resource limits that so often limit access to them.
Arnold, Craig A.	<i>Resilience Justice and Community-Based Green and Blue Infrastructure</i>	45 WM. & MARY ENV'T L. & POL'Y REV. 665 https://bit.ly/3GRo5CN	Governance (infrastructure/environmental justice)	To ensure more equitable and community-based green and blue infrastructure, co-governance systems of shared decisionmaking authority between government and low-income communities of color should be established and characterized by "resilience justice"—which focuses on community adaptive capacities and vulnerabilities to shocks and changes—and should be effectuated by a set of newly developed design and implementation principles that are based on over 300 studies of community resilience.
Camacho, Alejandro E., and Nicholas Marantz	<i>Beyond Preemption, Toward Metropolitan Governance</i>	39 STAN. ENV'T LJ. 125 https://www-cdn.law.stanford.edu/wp-content/uploads/2020/11/Metropolitan-Governance-As-Sent-to-Printer.pdf	Governance (states)/Climate Change/Water	Policymakers can promote more effective metropolitan governance on a range of intractable social problems by: (1) distinguishing the extent authority is centralized from the levels of overlap and coordination; and (2) leveraging targeted reallocations of authority to destabilize existing municipal incentives, simultaneously promoting regional goals while preserving many benefits of local democracy.

Christiansen, Matthew R., and Joshua Macey	<i>Long Live the Federal Power Act's Bright Line</i>	134 HARV. L. REV. 1360 https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-1360.pdf	Energy/ Governance (courts)	Although many have suggested that the Federal Power Act's (FPA's) bright-line division between federal and state jurisdiction is eroding, a trio of recent Supreme Court cases reaffirms that the bright-line construct remains alive and well, providing an organizing principle for resolving jurisdictional disputes under the FPA in a way that accommodates the ongoing transition to the electricity grid of the future.
Flatt, Victor B.	<i>Holding Polluters Accountable in Times of Climate and COVID Risk: The Problems With "Emergency" Enforcement Waivers</i>	12 SAN DIEGO J. CLIMATE & ENERGY L. 1 https://digital.sandiego.edu/jcel/vol12/iss1/2/	Governance (enforcement and compliance)	To combat the misuse of emergency enforcement waivers by the Environmental Protection Agency and state governments, which can result in substantial environmental harms, particularly to vulnerable communities, policymakers should: (1) restrict discretion and promulgate rules and/or guidance requiring regulated entities to prepare for disasters; and (2) initiate federal limitations on states' emergency suspension of federal laws.
Griffith, Janice C.	<i>Evolution of Metropolitan Planning Organizations (MPOs) Into Multi-Functional Regional Roles</i>	106 IOWA L. REV. 2241 https://ilr.law.uiowa.edu/print/volume-106-issue-5/evolution-of-metropolitan-planning-organizations-mpos-into-multi-functional-regional-roles/	Governance (states, infrastructure)/ Climate Change/ Land Use	Metropolitan planning organizations could play a vital role in addressing infrastructure and climate change challenges, provided they are: (1) authorized to engage in and implement multipurpose planning (rather than single-function transportation planning); (2) given an independent funding source; (3) granted some land use powers; and (4) reconstituted to reflect proportional representation and include metropolitan geographic area representatives on their boards.
Hutchins, Todd E.	<i>Crafting an International Legal Framework for Renewable Energy on the High Seas</i>	51 ENV'T L. 485 https://law.lclark.edu/live/files/32009-51-2-hutchinsfinalpdf	Governance (international)/ Energy	To realize the clean energy potential of ocean renewable energy (ORE) technologies such as floating wind turbines, wave energy devices, and biomass farms, the United Nations should adopt an internationally binding agreement to govern future ORE development by extending coastal state exclusive economic zones for OREs above the extended continental shelf and creating unitary global authority to manage resources about the deep seabed beyond national jurisdiction.
Jacobs, Sharon B.	<i>Agency Genesis and the Energy Transition</i>	121 COLUM. L. REV. 835 https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2441&context=articles	Energy/ Governance (administrative law, states)	Although creation of new agencies (or "agency genesis") is often embraced by policymakers and politicians, as it signals attention to perceived government failures and typically triggers administrative vitality, the most efficient way to address the transition to decarbonized energy may be to reform existing agencies rather than to create new administrative bodies.
Klass, Alexandra B., and Shantal Pai	<i>The Law of Energy Exports</i>	109 CALIF. L. REV. 733 https://www.californialawreview.org/print/the-law-of-energy-exports/	Energy/ Governance (courts, states)	An analysis of the newly-identified and evolving "law of energy exports" indicates that states and local governments can prevail in their efforts to reject proposed fossil fuel export facilities under existing dormant Commerce Clause doctrine, provided they: (1) do not favor in-state economic interests and; (2) do point to particular environmental and public health justifications.

Lee, Jaime A.	<i>Turning Participation Into Power: A Water Justice Case Study</i>	28 GEO. MASON L. REV. 1003 https://scholarworks.law.ubalt.edu/all_fac/1116/	Governance (environmental justice)/Water	A revamped model of participatory governance—the Constituent Empowerment Model—could yield more just water policy by affirmatively shifting power to the voices of marginalized constituents through operationalized (feasibly realized) participation, constituent primacy, and structural accountability, as indicated by a case study of Baltimore’s “Advocate” dispute resolution process.
Mills, Monte, and Martin Nie	<i>Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands</i>	44 PUB. LAND & RESOURCES L. REV. 49 https://scholarworks.umt.edu/cgi/viewcontent.i?article=1741&context=plrlr	Land Use/ Governance (tribes)	The U.S. can meaningfully connect public land law to the federal government’s long-standing trust-based and treaty-based responsibility to promote the sovereign and cultural interests of Native Nations through a “strategic playbook” that includes numerous executive authorities, such as protocols for tribal involvement in monument designations under the Antiquities Act, as well as potential congressional actions, such as place-based legislation, in order to enhance and engage in a new era of tribal co-management across the federal public land system.
Owen, Dave	<i>Law, Land Use, and Groundwater Recharge</i>	73 STAN. L. REV. 1163 https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/05/Owen-73-Stan.-L.-Rev.-1163.pdf	Land Use/ Water	While regulatory systems for groundwater appropriately focus on pumping water out of the ground, they also should address the many ways in which human land use decisions influence—positively and negatively—groundwater recharge processes.
Oyewunmi, Tade	<i>An Instrumental Perspective on Power-to-Gas, Hydrogen, and a Spotlight on New York’s Emerging Climate and Energy Policy</i>	38 PACE ENV’T L. REV. 221 https://digitalcommons.pace.edu/cgi/viewcontent.i?article=1848&context=pelr	Energy	Incentivizing power-to-gas systems and hydrogen-compatible networks within New York’s existing regulatory framework—by amending the definition of a Tier 1 renewable energy credit and by broadening requirements surrounding participation in wholesale capacity and ancillary service markets—would facilitate integration of clean energy into the grid and help New York solve the “energy trilemma” that includes curtailment and energy waste, stranded utility assets, low reliability, and high cost.
Pappas, Michael, and Victor Flatt	<i>Climate Changes Property: Disasters, Decommodification, and Retreat</i>	82 OHIO ST. L.J. 331 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544320	Natural Resources/ Governance (insurance)/ Climate Change	To address costly, repetitive losses from natural disasters, the concept of adjustment failure costs—costs that arise from difficulties in markets reaching efficiency—should inform federal disaster response policies and, accordingly, the federal government should modify the National Flood Insurance Program to address the moral hazard that perpetuates risky investments, reform the Hazard Mitigation Grant Program to reduce delays, and, along with localities, increase funding and eligibility for buyout programs, tie buyout compensation to pre-flooding property values, and block commodification of properties by, for example, removing parcels from the real estate market.
Peskoe, Ari	<i>Is the Utility Transmission Syndicate Forever?</i>	42 ENERGY L.J. 1 https://www.eba-net.org/assets/1/6/5_%5bPeskoe%5d%5b1-66%5d.pdf	Energy	The Federal Energy Regulatory Commission should revive its efforts to wrest control of the nation’s high-voltage electric transmission lines from investor-owned utilities, who are impeding development of large-scale transmission needed to facilitate the clean energy transition.

Righetti, Tara, Jesse Richardson, Kris Koski, and Sam Taylor	<i>The Carbon Storage Future of Public Lands</i>	38 PACE ENV'T L. REV. 181 https://bit.ly/3GMTAhg	Land Use/ Climate Change	Vast federal public lands can provide the carbon-storage space needed to meet Paris commitments if the government: (1) clarifies processes, rules, and regulations regarding federal pore space utilization; (2) creates categorical National Environmental Policy Act exclusions to reduce permitting requirements; (3) settles pore space ownership of split estates; and (4) incorporates geologic storage in resource planning.
Strine Jr., Leo E., Kirby Smith, and Reilly Steel	<i>Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG</i>	106 IOWA L. REV. 1885 https://ilr.law.uiowa.edu/assets/Uploads/E2_Strine-Smith-Steel.pdf	Governance (private governance)	Employee, environmental, social, and governance factors (EESG) should be considered an extension of a corporate board's compliance duties under Caremark, and by integrating compliance and EESG, including delegating compliance and EESG oversight to the same board committee and managers, corporations can capitalize on their existing structures and resources to meet the demand for improved corporate citizenship in a cost-effective manner that does not add undue burdens to employees or directors.
Welton, Shelley	<i>Rethinking Grid Governance for the Climate Change Era</i>	109 CALIF. L. REV. 209 https://www.californialawreview.org/print/rethinking-grid-governance/	Energy/ Climate Change	To prevent fossil fuel companies from obstructing the clean energy transition through Regional Transmission Organizations (RTOs), the Federal Energy Regulatory Commission or Congress should consider: (1) reducing RTOs' responsibilities; (2) increasing avenues for state and federal oversight; (3) monitoring corporate agglomeration; and (4) exploring public ownership or control over the grid.
Wiseman, Hannah J.	<i>Taxing Local Energy Externalities</i>	96 NOTRE DAME L. REV. 563 https://scholarship.law.nd.edu/ndlr/vol96/iss2/3/	Energy/ Governance (states)	A state-administered, adjustable tax on energy development redistributed largely to municipalities, in combination with incentives such as streamlined regulatory review for strong environmental performers, would fill a governance gap and address negative environmental externalities currently imposed on localities—particularly by energy industries with disproportionately harmful local effects.
Wyeth, George	<i>A Framework for Community-Based Action on Air Quality</i>	50 ELR 10808 https://drive.google.com/file/d/19tgtdy0w1IEy86gnMm6pr3s-87N0nsZd/view	Air/ Governance (environmental justice)	To address unusually high air pollution areas, or hotspots, typically in urban areas affected by multiple pollution sources, a new statutory framework should be adopted that identifies these areas and creates a process in which communities and agencies work jointly to develop emissions reduction plans that use all available tools and address many different sources, in a coordinated strategy that has strong community support.

ARTICLE

ENVIRONMENTAL CITIZEN SUITS AND THE INEQUITIES OF RACES TO THE TOP

by David Adelman & Jori Reilly-Diakun

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Citizen suits are filed disproportionately in a small number of states with robust environmental programs. This bias magnifies disparities across states both directly, by ensuring that standards and procedures are followed in favored states, and indirectly, by driving development with significant environmental impacts towards states in which citizen suits are rare and enforcement is less rigorous.

Among environmentalists and liberal commentators, citizen suits are lauded for their capacity to augment government enforcement and to compel ideologically antagonistic administrations to take legally required action.¹ Among skeptics, citizen suits threaten the constitutional authority of federal agencies to implement the law² and allow private organizations to take advantage of broad legislative mandates without any political accountability.³

*Editors' Note: This Article is adapted from David Adelman and Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377 (2021), and used with permission.*

1. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1 (1995); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 *WIDENER L. REV.* 1 (2003); William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 *VAND. L. REV.* 2129 (2004); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 *MICH. L. REV.* 589 (2005); Christian Langpap & Jay P. Shimshack, *Private Citizen Suits and Public Enforcement: Substitutes or Complements?*, 59 *J. ENV'T ECON. MGMT.* 235 (2010); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93 (2005); Will Reisinger, Trent A. Dougherty & Nolan Moser, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 *DUKE ENV'T L. & POL'Y F.* 1 (2010); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 *STAN. ENV'T L.J.* 81 (2002).
2. See Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 *VA. L. REV.* 1957 (1995).
3. See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 *TEMP. ENV'T L. & TECH. J.* 55 (1989); Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 *NW. U. L. REV.* 220 (1987); Stephen M. Johnson, *Sue and*

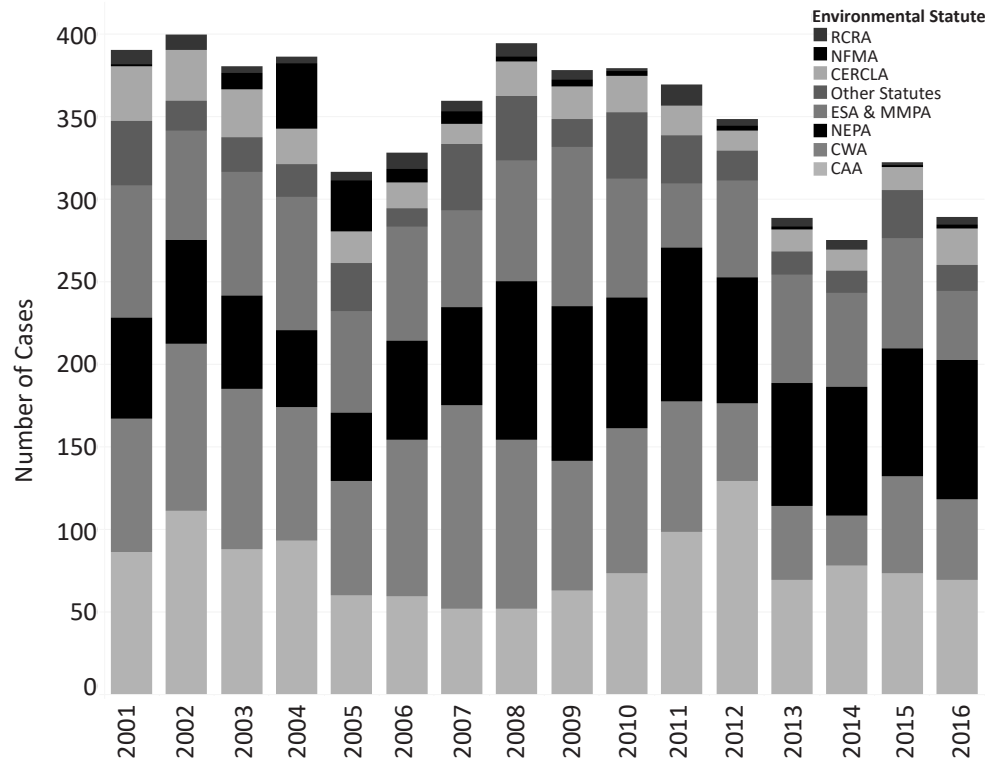
From this perspective, rather than acting as "private attorneys general," environmental groups exploit government power for their own ends, overriding the interests of local communities and private actors.⁴

We find little evidence for either perspective for the simple reason that few citizen suits are filed annually and a relatively small proportion of them involve "retail" litigation against individual private entities. Most citizen suits operate at the "wholesale" level through challenges to major policies or programs. They are filed against the federal or a state government for regulatory violations or, more commonly, for noncompliance with statutory mandates, including nondiscretionary duties,⁵ substantive criteria, and procedural requirements.⁶ Moreover, the concentration of citizen suits in states where public support is strong for environmental programs both negates critics' concerns about conflicts with local values and highlights the socioeconomic inequities of access to this form of legal recourse.

By taking a broader perspective of citizen suits filed over two presidential administrations, we examine the connections between the structures of statutory regimes and patterns of litigation. For example, we find that almost 90% of the citizen suits filed under the Clean Air Act (CAA) involve wholesale rulemaking challenges, whereas retail litigation accounts for a similar percentage of cases under the National Environmental Policy Act (NEPA). These differences reflect the substantive and procedural elements of each statute. Recognizing the practical limits of and struc-

Settle: Demonizing the Environmental Citizen Suit, 37 *SEATTLE U. L. REV.* 891 (2014); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 630-41 (2013).

4. See Engstrom, *supra* note 3, at 639-41.
5. Such suits can be filed under environmental statutes, such as the Endangered Species Act (ESA) §1540(g)(1)(B), 16 U.S.C. §1531 or the Clean Air Act (CAA) §7604(a)(2), 42 U.S.C. §7401 (2012), or the Administrative Procedure Act [hereinafter APA] §706(1), 5 U.S.C. §500 (2012).
6. These suits may also be filed under the APA, 5 U.S.C. §706(2) (authorizing courts to "hold unlawful and set aside agency action" found to be in violation of any of six standards of review), or a governing environmental statute, e.g., 33 U.S.C. §1369(b) (Clean Water Act (CWA)); 42 U.S.C. §6976 (Resource Conservation and Recovery Act (RCRA)); 42 U.S.C. §7607(b) (CAA).

Figure 1: Federal Environmental Cases by Year and Statute 2001-2016

tural constraints on citizen suits is therefore essential to identifying effective reforms.

I. Normative and Empirical Perspectives on Environmental Citizen Suits

Relatively few studies have been conducted on environmental citizen suits, and they are now almost all over a decade old.⁷ Most of this work has focused on cases against private or public entities alleged to be in violation of regulatory standards or protocols. Further, while studies of litigation exist under specific natural resource statutes, they often focus either on broad national statistics or litigation involving specific federal agencies, with little attention to variation across states or circuits and little consideration of differences in the nature of suits. We will show that the gaps in the empirical record explain, in part, the prevailing misperceptions about citizen suits and the divergent views about their efficacy and value.

Citizen suits may be filed against the federal government or against regulated, private third parties. Congress

believed, and proponents continue to assert, that citizen suits supplement or prod agency enforcement through “shaming [an agency] or by forcing it to intervene.”⁸ Critics have argued that citizen suits “disrupt government regulatory schemes and lead to wasteful or excessive enforcement.”⁹ Both positions are premised on empirical questions, as they turn on the balance between the benefits of supplementing government enforcement versus the potential shortcomings of overly zealous or counterproductive citizen-led suits.

The current study seeks to fill the empirical gaps in the literature by providing comprehensive estimates of the volume of litigation over time and how it varies geographically. This information is critical to informing public understanding about the influence that local politics has on the filing of citizen suits and the ways in which citizen suits complement (or frustrate) agency action and priority setting.

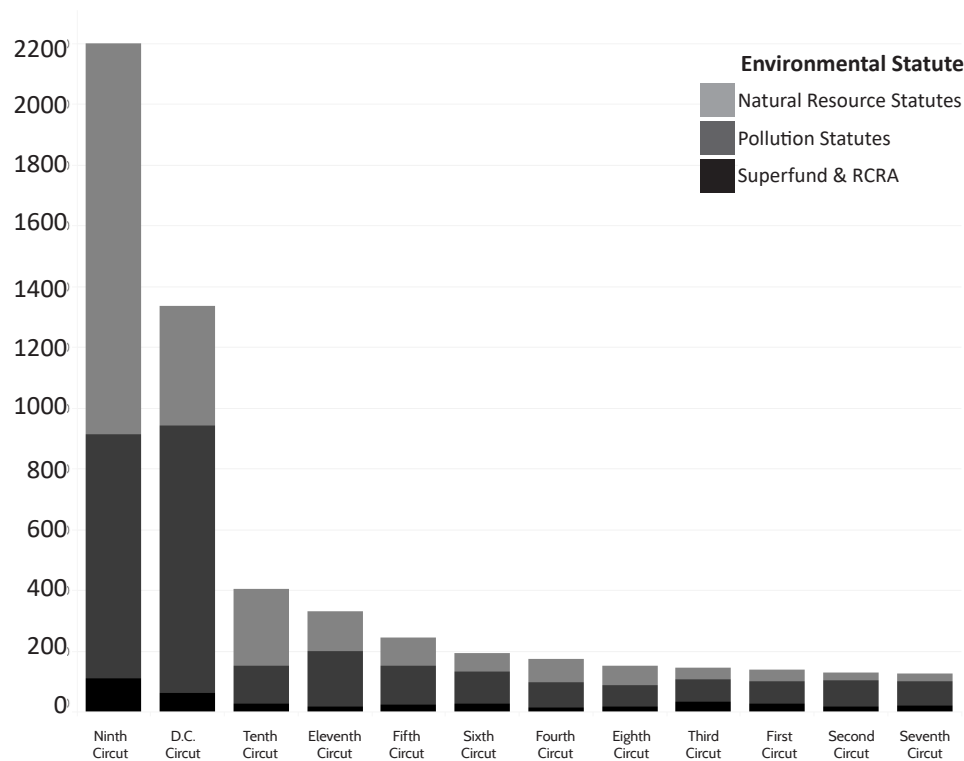
II. Litigation Trends Do Not Conform to Prevailing Views of Citizen Suits

Our principal findings are that (1) the number of citizen suits filed and concentration of cases in certain jurisdic-

7. ENV'T L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES V-7 (1984) [hereinafter ELI]; Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28 (Feb. 1992); May, *supra* note 1; Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENV'T L. 359, 371 (2004); Langpap & Shimshack, *supra* note 1.

8. Stephenson, *supra* note 1, at 110.

9. Stephenson, *supra* note 1, at 106; *id.* at 114; see also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 224 (1997).

Figure 2: Litigated Cases by Class of Environmental Statute and Circuit

tions foreclose conflicts between agency priority setting and the values of local communities; (2) the practical barriers to filing citizen suits and the difficulty of obtaining attorney's fee awards exacerbate rather than mitigate disparities across states in the implementation and enforcement of environmental laws; and (3) almost 85% of citizen suits are filed against the federal government, and a large share of these cases involve wholesale challenges to regulations, rather than retail litigation over discrete agency decisions.

The number of cases over the 16-year period of the study varied by roughly plus-or-minus 15% of the average 350 cases per year. The volume of litigation under each of the statutes has also remained relatively stable over time. The data also make clear that litigation is unevenly spread across federal environmental statutes, with more than 80% of federal environmental litigation filed under the Clean Water Act (CWA), CAA, Endangered Species Act (ESA), and NEPA, each of which accounted for roughly 20% of environmental litigation during this period.

A. *Most Environmental Litigation Is in the Ninth and D.C. Circuits*

The U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit together accounted for about 67% of the cases filed under the natural resource statutes, 60% of the pollution

statutes, and 43% of the cases filed under Superfund and Resource Conservation and Recovery Act. No other circuit exceeded 10% of the total number of cases filed over this period, and most were below 5%.

The most striking observation that emerges from the state-level data is the low volume of litigation. For natural resource statutes, just two states (California and Oregon) averaged over 10 suits per year, whereas the vast majority of states averaged in the low single digits. For the pollution statutes, only two states (California and Washington) averaged more than four cases per year and only 18 averaged more than one per year. The numbers are tiny in comparison to the number of federal actions, permits granted, and regulatory violations that occur each year.

Among the leading states, California and the District of Columbia are in a class of their own for all of the statutes (see Table 1). Oregon, Montana, and Idaho are also arguably exceptional for natural resource litigation, particularly in comparison to other similarly situated states (e.g., Wyoming and New Mexico). The variation among states with respect to the pollution statutes is striking for a different reason. Specifically, the lack of association between industrial development is notable for heavily industrialized states, such as Texas and Louisiana, as it demonstrates the disconnect between citizen suits and states with relatively lax environmental programs. Perhaps for similar reasons, the politics of the state do not appear to be a major factor when selecting a venue to file citizen suits.

Table 1: Environmental Cases Litigated in 15 Top States

Natural Resource (81%)*		Pollution (76%)		CERCLA & RCRA (67%)	
California	499	California	345	California	57
D.C.	364	D.C.	213	Washington	20
Oregon	178	Washington	148	New Jersey	19
Montana	134	Georgia	57	Ohio	15
Idaho	112	Florida	55	Pennsylvania	15
Arizona	102	New York	37	New York	14
Washington	100	Colorado	33	Texas	14
Florida	90	Oregon	33	Arizona	13
Colorado	83	Louisiana	30	Illinois	13
New Mexico	76	Pennsylvania	30	D.C.	12
Alaska	65	Wisconsin	29	New Mexico	12
Texas	46	Alabama	28	Rhode Island	11
Wyoming	45	Idaho	27	Florida	10
Nevada	44	Ohio	25	Massachusetts	10
Utah	37	West Virginia	24	Alaska	8

* The percentages for each category represent the percent of all cases in the class that were litigated in the top 10 states by volume of cases. The data reflected here represent all the cases in the DOJ database, including those for which there is no information on case outcome.

B. *Environmental Plaintiffs Sue the Federal Government Far More Often Than They Sue Private Third Parties*

Environmental litigation largely involves environmental organizations, companies, or individuals suing the federal government. Environmental organizations were the most common plaintiffs, participating in more than 40% of the cases, and their cases were evenly split across the natural resource and pollution statutes (see Table 2). Corporations were plaintiffs frequently, but most of their litigation was under the pollution statutes. State, local, and tribal governments (SLTs) were also important, but they filed far fewer cases and most were in a handful of states.

Figure 3 (next page) displays the litigation volumes by circuit and statute; it reveals the divergence in litigation patterns across the four classes of plaintiffs and statutes. The large number of cases under the pollution statutes filed by environmental nongovernmental organizations (NGOs) in the Ninth Circuit sets them apart from the other classes of plaintiffs, suggesting that they may be particularly sensitive to the forum. We observe broadly similar trends in the complementary Westlaw third-party-suit data; although, it shows an even higher concentration of cases filed by environmental NGOs in the Ninth Circuit and other liberal circuits.¹⁰ Together, these results conflict

Table 2: Environmental Cases by Statute and Party Class

Statute	Env. NGO		Company		Trade Gr.		Individual		SLT Gov't	
	Pl.	De.	Pl.	De.	Pl.	De.	Pl.	De.	Pl.	De.
CAA	546	2	242	56	235	4	103	12	141	15
CERCLA	13	0	81	63	2	1	33	18	54	28
CWA	728	6	74	374	89	6	180	102	100	118
ESA/MMPA	223	37	15	5	22	1	21	250	22	6
NEPA	691	10	34	8	44	6	144	17	117	17
NFMA	89	0	0	0	2	0	7	0	14	1
Other	69	4	38	2	30	0	24	11	36	3
RCRA	19	1	20	8	17	1	15	5	9	11
Total	2,378	60	504	516	441	19	527	415	493	199

with critics' claims that third-party suits routinely override agency priorities and local values.

In Figure 4 (next page), we focus on the relative rates (percentages) at which plaintiffs prevailed, as opposed to the absolute number of cases won. It shows that environmental NGOs consistently succeeded at higher rates than the other plaintiff groups. This suggests that environmental NGOs were more selective in the cases they filed and undermines critics' claims that lawsuits are often filed for purely strategic reasons. There is also no association between the success rates of environmental NGOs and the number of cases they filed.

We observe a difference of about 8%¹¹ in the success rates of environmental and other NGOs between the Ninth and D.C. Circuits and all other circuits, whereas consistent differences are not observed across circuits in the success rates of the other classes of plaintiffs.¹² This observation suggests that the higher preference for the Ninth Circuit among environmental NGOs is supported empirically, and that forum is a salient factor for determining where cases are filed.

Environmental plaintiffs' focus on litigating against the federal government, outside of limited contexts, further upsets the arguments made by both critics and advocates of citizen suits. The data show that environmental plaintiffs reinforce geographic disparities in environmental protection and that most litigation surrounds high-level policy decisions by the federal government.

10. Corporations also engage in forum-shopping, with 34% of their cases filed in the U.S. Court of Appeals for the Fifth Circuit and just 25% in the Ninth Circuit, with most of these cases representing challenges to state permitting decisions.

11. Environmental NGOs won 40% of their cases in the Ninth Circuit, 44% in the D.C. Circuit, and 32% in all other circuits; other NGOs won at similar rates as well.

12. For example, companies won 36% of their cases in the Ninth Circuit, 20% in the D.C. Circuit, and 30% in all other circuits.

Figure 3: Distribution of Environmental Litigation by Plaintiff Class

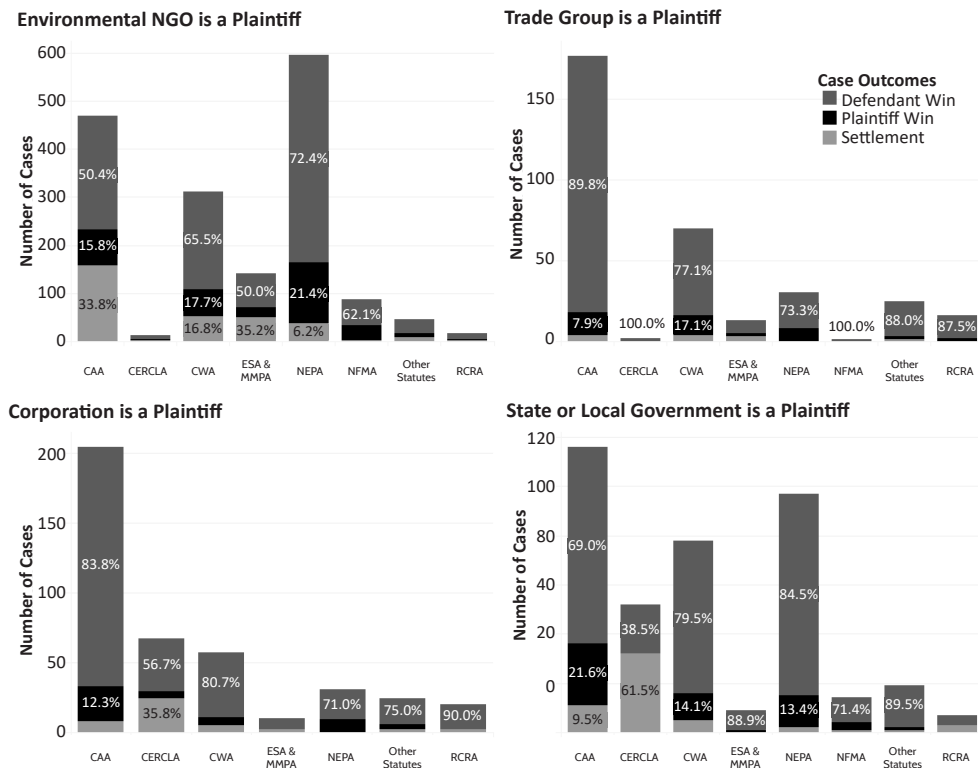


Figure 4: Case Outcomes by Statute and Class of Plaintiff

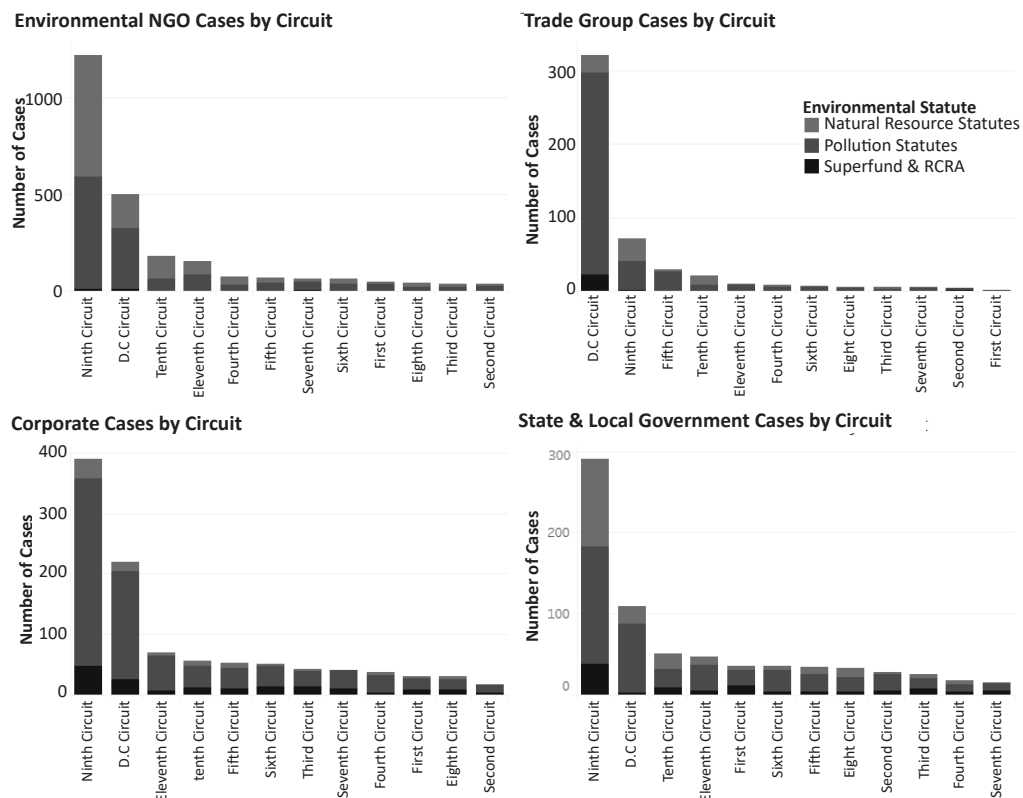


Figure 5: Average and Median Attorney Fee Awards by Year

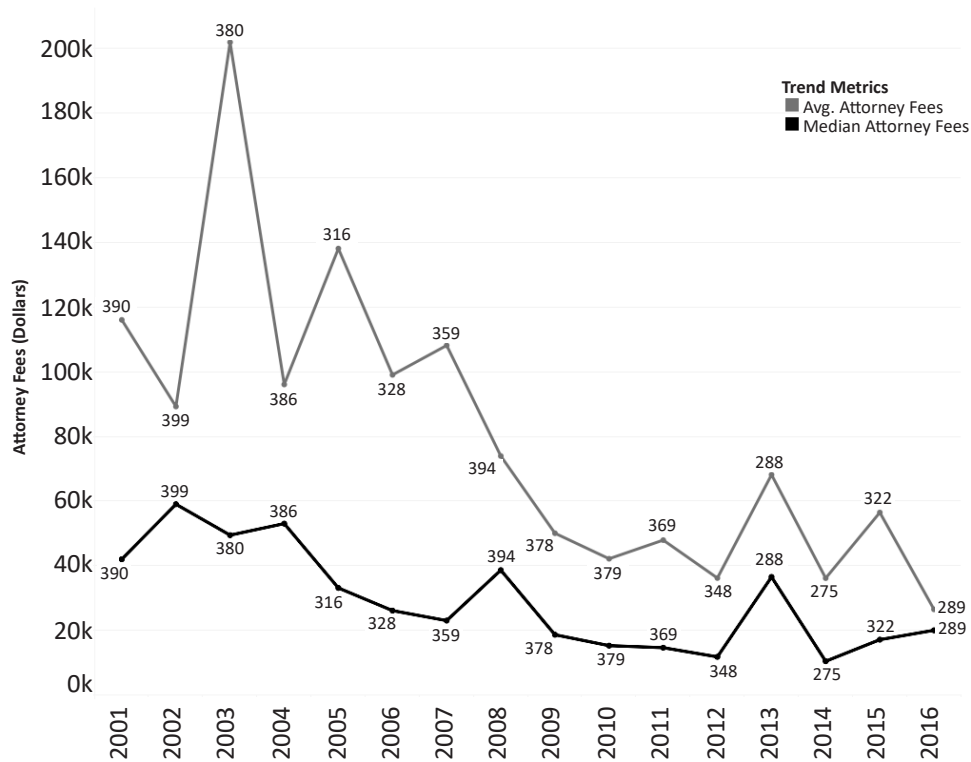
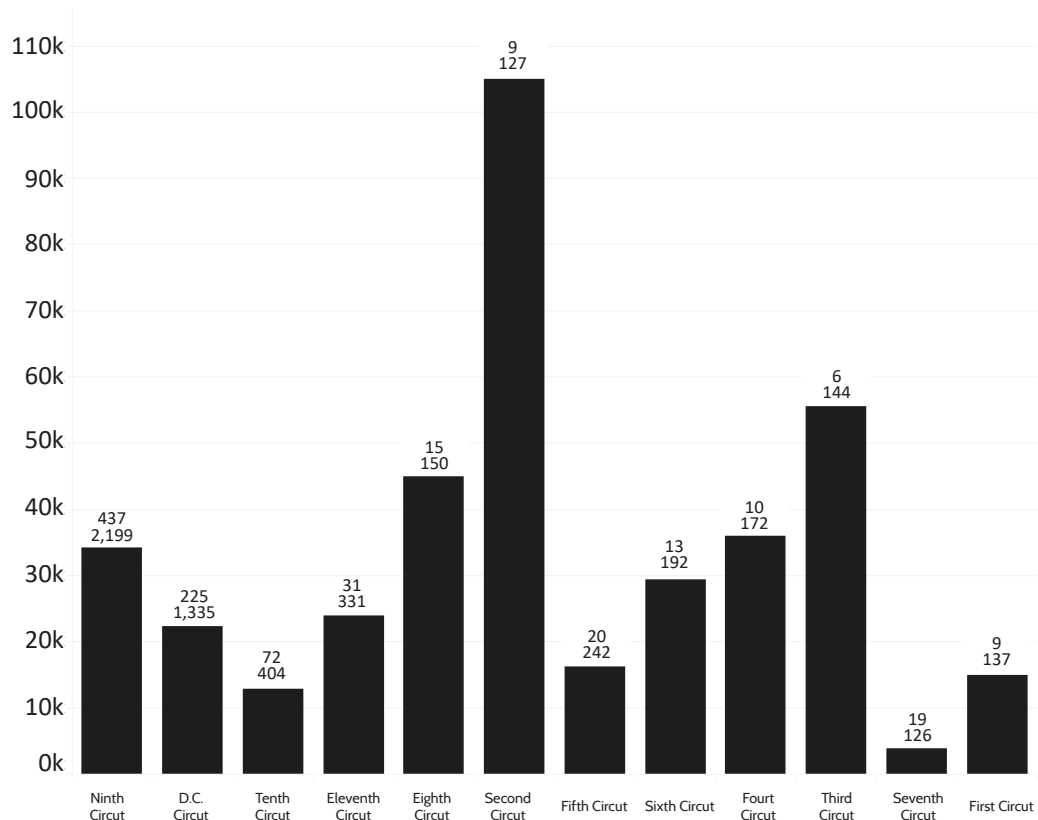


Figure 6: Median Attorney Fee Awards by Circuit



C. *The Low and Declining Rates at Which Attorney Fees Are Awarded*

Overall, the data suggest that environmental plaintiffs receive attorney fees in a small fraction of the cases, and that while the low rate of granting attorney's fees is relatively stable, the average and median amount of attorney fees awarded declined substantially over the period of the study.

Somewhat surprisingly, while there is some variability in the rate at which fees were awarded,¹³ it is overshadowed by the infrequency of fee awards overall (see Figure 6).

Overall, attorney fee awards are rare and declining everywhere. Thus, the low frequency at which attorney's fees are awarded likely exacerbates the economic barriers to filing citizen suits.¹⁴

D. *Support for Environmental Policies and Perceptions About Judicial Forums Are the Strongest Determinants of Where Citizen Suits Are Filed*

We conducted regressions on a broad range of explanatory variables, including the following state-level data: population, politics, amount of federal lands, number of environmental NGOs, attorney's fee awards, number of permits, government inspection and enforcement rates, and location of a state within the Ninth Circuit. Given the substantive differences in the natural resource and pollution statutes, particularly the importance of public lands in the former and permitting in the latter, we ran regressions on the two classes of cases separately.

The strongest predictors for natural resource cases were the number of environmental organizations in the state and whether the state was located in the Ninth Circuit. Natural resource cases are filed disproportionately in states where environmental organizations are located, as well as where the judicial forum, the Ninth Circuit, is perceived to be favorable for environmental litigants. Major environmental organizations were slightly more willing to file cases in politically conservative states and, at the same time, had a greater bias towards filing cases in the Ninth Circuit.

We view the number of environmental organizations in a state as a useful proxy for public support of environmental issues, which implies that natural resource suits are more likely to be filed in jurisdictions where public support is higher. This association suggests that environmental organizations tend to be parochial; they file litigation where they and their members are located.

Table 3: Regression on Number of Cases Per State for the Natural Resource Statutes

Independent Variables	Coefficient	Standard Er.	p-value	Beta
No. Environmental NGOs	0.5115	0.0362	0.000	0.8618
Ninth Circuit	46.770	17.299	0.012	0.2382
Percent Public Lands	0.8858	0.3181	0.010	0.2312
Mean Income	-0.0019	0.0006	0.002	-0.2459
Attorney Fees Expectation	0.0010	0.0004	0.013	0.1781
PPI 538	-0.5660	0.3627	0.131	-0.1231
Intercept	83.672	41.622	0.055	—

Source: ALAN C. ACOCK, *A GENTLE INTRODUCTION TO STATA* 302-04 (3d ed. 2012) (describing the meaning of each of the statistics in Table 3).

Table 4: Regression on Number of Cases Per State for the Pollution Statutes

Independent Variables	Coefficient	Standard Er.	p-value	Beta
No. Environmental NGOs	0.314976	0.045568	0.000	0.768016
Ninth Circuit	53.35449	13.86705	0.001	0.340381
CWA & CAA Permits	0.008302	0.004001	0.050	0.181519
CWA & CAA Enforcement	3.768331	23.15368	0.872	0.015077
PPI 538	-0.56866	0.346738	0.115	-0.16089
Attorney Fees Expect.	0.000939	0.000853	0.283	0.092798
Intercept	-48.3089	11.63913	0.000	—

The regressions for the pollution statutes included controls for the number of permits in each state and the rigor of government inspections and enforcement in each state.¹⁵ Neither the politics of a state nor the expectation value for attorney's fees was a significant predictor of the number of cases filed. These results indicate that litigation under the pollution statutes is also parochial and concentrated where environmental organizations are located; they also highlight once again the importance of judicial forum and specifically the Ninth Circuit.

13. The percentage of cases with fees awarded by circuit are as follows: Ninth Circuit (18.4%), U.S. Court of Appeals for the Tenth Circuit (15.5%), U.S. Court of Appeals for the Seventh Circuit (12.3%), D.C. Circuit (11.5%); the remainder of the circuits ranged between 4-9%.

14. Environmental litigation costs vary wildly depending on the complexity of the case, if experts are required, and many other factors. In 1984, ELI estimated that environmental litigation costs averaged \$40,000 per case—or put another way, between \$4,000 and \$200,000 per case. Those costs have no doubt risen significantly in the last 35 years.

15. After running regressions using several different measures of program implementation and enforcement, we find that the best metrics were the composite enforcement rates and number of permits under the CWA and CAA. None of the inspection data proved to be statistically significant.

The regression results contradict the narrative of both critics and proponents of citizen suits. Critics focus on the disruptive impact and unaccountability of citizen suits. Yet, both the volume and geographic distribution of citizen suits mitigate these concerns. Environmental litigation tends either to be parochial or to gravitate to states in which interest and support are highest. Our results are also inconsistent with the common narrative that citizen suits operate as a backstop to weak state enforcement of environmental laws. The skewed geographic distribution of citizen suits suggests that they may exacerbate disparities in enforcement and implementation more than they mitigate them.

III. Reassessing the Promise of Citizen Suits

The filing of citizen suits is, above all, limited by resources and thus reflects socioeconomic inequities that exist across states and federal circuits. The judicial forum and local environmental interest are the other principal drivers of where citizen suits are filed. These structural factors foreclose the worst fears of critics and place practical limits on the roles that citizen suits can play.

A. *The Practices and Resource Constraints That Limit the Impact of Citizen Suits*

1. Geographic Concentration and Low Numbers Limit Conflicts Between Citizen and Government Enforcement

The neglect of the practical limits on filing citizen suits is surprising given the extensive literature on the limits of government environmental enforcement. Yet, commentators have routinely presumed that citizen suits have the capacity either to offset the deficiencies of government programs or, through sheer volume, to override government priority setting and discretion. The resources of even the wealthiest organizations pale in comparison to those of the federal government and many states. These simple comparisons alone should have raised questions about whether government enforcement could be significantly augmented by citizen suits or overwhelmed given the resources available.

a. Citizen Suits Are More Likely to Exacerbate Rather Than Mitigate Disparities in the Enforcement and Implementation of Environmental Laws

Rather than conflicting with local values, citizen suits more often reflect them.

The local bias of organizations filing citizen suits also suggests that they may exacerbate interstate inequities in implementation and enforcement of environmental laws rather than mitigate them. This inference is reinforced by the low number of environmental justice suits—an estimated average of just six cases each year. If litigation, or

the threat of it, impacts development costs or uncertainty,¹⁶ the disparities could redirect development to states in which development costs and uncertainty are lower. It is the interstate differences in regulatory costs that exacerbate inequities. Thus, from the standpoint of equity, a race to the top can cause disparities that mirror those of a race to the bottom.

Similar disparities are observed under the natural resource statutes. The principal factors were whether a state is located within the Ninth Circuit and the number of environmental organizations in a state. Neither public support, as reflected in the number of environmental organizations, nor a favorable judicial forum is likely to be associated with weak implementation of federal natural resource laws.

2. Patterns of Wholesale and Retail Environmental Litigation

The patterns of citizen suits that we observe under the major environmental statutes exist along a continuum ranging from largely wholesale to largely retail litigation. The CAA is at the far extreme of wholesale litigation, with almost 90% of the cases involving petitions for review of EPA regulations. On the other extreme, litigation under NEPA is almost exclusively retail, with more than 90% of the cases involving discrete federal actions. Citizen suits under the CWA and ESA reside in the middle.

The differences we observe in the types and volume of litigation under the four major statutes suggest that there may be feedbacks between wholesale and retail litigation. In other words, the relative difficulty of retail litigation may elevate the importance of litigating over strict standards, as they represent both high-profile legal actions and may make it easier for government and public enforcement. We observe this pneumatic effect most directly in the contrast between litigation under the CAA and the CWA. With only limited options, environmental organizations may use the legal handles available to them—even if the scope and effect of the litigation are poorly calibrated to address their central concerns.

The central challenges are socioeconomic and judicial, and both limit the volume of litigation and concentrate it in certain jurisdictions. Statutory frameworks can mitigate these impediments by lowering the barriers to filing citizen suits, as reflected in the dramatic differences observed in the volume and types of litigation under the major environmental statutes. In particular, the availability of procedural claims and reporting requirements are associated with higher levels of litigation and appear to mitigate pervasive resource constraints. Nevertheless, the number of cases filed under even the most accessible statutes remains tiny in comparison to government enforcement actions. As a consequence, absent dramatic increases in financial resources or incentives, it is unlikely that wholesale litigation

16. See, e.g., Blair W. Will, *The Clean Water Act Citizen Suit Shakedown*, HMS L. GRP. NEWS (June 4, 2013), <https://www.hmslawgroup.com/clean-water-act-citizen-suit-shakedown> [https://perma.cc/TPE6-J72S].

tion on rulemaking could be significantly augmented or that retail litigation will evolve beyond the modest and geographically concentrated role it plays today.

B. *Reforming Our Vision for Citizen Suits and the Policies Needed to Realize It*

What is a realistic vision for citizen suits when the statutes with the most favorable frameworks fall woefully short of aspirations?

We have identified three types of legal and strategic reforms: (1) targeted legislative reforms lowering the barriers to filing citizen suits and creating incentives for filing them where they are most needed; (2) enhanced transparency about the filing of citizen suits and coordination among environmental organizations; and (3) education of judges about the types and importance of environmental citizen suits, including the volume of litigation, the tangible benefits, and the rates at which attorney's fee awards are granted.

1. Targeted Reforms to Facilitate and Support Citizen Suits

The most potent sources of opposition to citizen suits have been driven by perceptions that they are not in the interest of the general public, that they are filed principally for obstructionist objectives, or that they undermine government regulatory programs and priority setting. The challenge is to mitigate these concerns and misperceptions while still addressing the structural barriers to filing citizen suits that are of greatest importance—particularly distributional inequities.

Creating incentives for the filing of citizen suits based on low local enforcement rates, impacts of violations on human health or welfare, or disparate impacts on underserved communities would minimize opposition. The simplest way to augment incentives would be to create a strong presumption in favor of attorney's fee awards in cases that meet these types of criteria.¹⁷ Alternatively, organizations or individuals filing such cases could be given a portion of the fines levied against a defendant. Such reforms would offset recent trends in attorney's fee awards and leverage the limited resources available for filing citizen suits by focusing resources on critical lapses in enforcement and structural inequities reflected in the geographic distribution of citizen suits. More equitable distribution of foundation resources and other funding are the only other realistic options in the current political climate.

Identifying similar criteria for enhancing incentives to file citizen suits under the natural resource statutes is more challenging and likely to be more politically contentious. Because most of these cases involve challenges to federal

action, there is no analogue of relative enforcements. As a consequence, a reliable set of criteria for conditioning incentives does not appear to be available for natural resource cases.

2. Facilitating Coordination of and Transparency About Citizen Suits

Making information about the filing of citizen suits publicly available in a centralized database would enhance accountability, correct misperceptions about environmental litigation, and facilitate coordination between environmental organizations and other plaintiffs. Centralizing the collection and improving the quality of litigation data would also be of great value to researchers and policymakers.

New legislation could establish a program for compiling data on environmental citizen suits within the Council on Environmental Quality (CEQ), which already collects data and issues reports on litigation under NEPA. An expanded database for environmental citizen suits would require dedicated funding to ensure data quality and could be facilitated by reporting requirements for lead litigants. The new legislation could be readily integrated with citizen suit provisions under each of the federal environmental statutes or as a stand-alone provision for cases filed under the Administrative Procedure Act.

If legislation is not feasible, a similar, though less comprehensive database could be established by members of the environmental community and supported by interested funders.

A centralized and publicly accessible database for citizen suits, whether supported publicly or privately, would also put positive pressure on organizations to consider the distributive impacts of their decisions.

3. Educating Judges About the Patterns, Impacts, and Value of Citizen Suits

Outside the D.C. Circuit and several federal districts, most judges hear fewer than a handful of environmental citizen suits over the span of a decade. Informing them about the broader context of environmental litigation and the factors that motivate it would help to neutralize potential biases judges may have about environmental disputes and litigants.

Combating judicial bias is of greatest importance for rulings over which judges have especially broad discretion. We are thinking particularly of decisions on attorney fee awards, but this may also be true of constitutional standing determinations and rulings on compliance with administrative procedures. Similarly, in the context of suits involving private, third-party defendants, courts may view cases differently if they recognize just how rare they are.

Having a broader perspective on citizen suits and their social value, we hope, would provide a useful corrective to unfounded skepticism about environmental plaintiffs and the devolving trend in attorney fee awards across the country. It would also help to counteract environmental plain-

17. The difficulty of obtaining attorney fee awards is viewed as a significant barrier among representatives of environmental organizations. Interview with Nada Culver, Senior Counsel and Director, BLM Action Center, The Wilderness Soc'y, at 15 (Dec. 8, 2017).

tiffs' aversion to filing cases in circuits outside the Ninth Circuit and counteract the concentration of citizen suits in a small number of states.

IV. Conclusion

Citizen suits, by almost any measure, are underperforming. In most states, citizen suits are rarely filed, and they are concentrated in states where public support is high and environmental programs are relatively robust.

We find little to no evidence of the pathologies that critics commonly raise and little evidence that citizen suits systematically offset the shortcomings of government implementation or enforcement of environmental laws.

These realities place a premium on thoughtful prioritization and coordination of citizen suits, including consideration of distributional inequities. Our empirical work reveals deep inconsistencies and inequities in the filing of citizen suits that are overlooked by commentators across the political spectrum.

C O M M E N T

CITIZEN ENVIRONMENTAL ENFORCEMENT LAWSUITS ARE ALIVE—WHAT IT TAKES TO GO FORWARD

by Howard Learner

Howard Learner is President and Executive Director of the Environmental Law & Policy Center.

Thank you to the authors for a well put together and provocative article that will be helpful in the field. Their empirical analysis is valuable, and I can add some good news in at least two regions of the country—the Midwest and the Southeast, which are not always viewed as having especially vigorous state-level enforcement or strong environmental programs. In both of these regions, there are a significant number of big-deal, substantive citizen environmental lawsuits that are being filed, and plaintiffs are succeeding. They involve both actions against private parties and actions against governments. Some of these cases may be “retail level,” but many have high-leverage, systemic change value.

For example, in the Midwest, the Great Lakes is widely viewed as a global ecological gem providing a largesse of freshwater supply. There is strong bipartisan public and political support for protecting the Great Lakes in places like Toledo, northwest Indiana, Chicago, and throughout the region. Actually, these are more than “just” bipartisan issues; these are nonpartisan issues. Both Republicans and Democrats in the congressional delegation strongly support protecting the Great Lakes.

So, why are all these environmental citizen suits happening? In both regions, the Midwest and the Southeast, there are sophisticated public interest environmental legal advocacy groups that have the legal capacity, a strong enough financial base, and experienced attorneys who know how to bring these sorts of citizen suits. In the Midwest, it's the Environmental Law and Policy Center, and, also, our colleagues at the Midwest Environmental Advocates, Earthjustice, NRDC, Sierra Club, and other effective

groups. In the Southeast, it's the Southern Environmental Law Center, EDF, South Carolina Environmental Law Project, and a number of other groups. When there's a set of groups that have talented public interest attorneys with legal sophistication, and a reasonably strong financial base so they can take on citizen suits requiring years of litigation against powerful polluters with deep pockets to bank-roll big law firms and hired-gun experts, then you then have the capacity to undertake the types of cases that I will talk about now.

There is indeed a sort of self-regulating component to this. These cases require substantial investments of attorneys' time, experts, and money. Here, at the Environmental Law and Policy Center, we are looking at cases that raise the bar, and have leverage value. We cannot do everything, so one of the questions we always consider is whether this is a one-off case, or a case that will raise the bar for the future and have a ripple effect.

Another aspect of this is explained well by an attorney colleague who is the former managing partner of a major law firm: regulated industry clients want to know that if they do things right in reducing pollution, but their competitors are not doing things right—and that if the federal government in a certain administration is not going after that competitor—that there will be a group like the Environmental Law and Policy Center or Earthjustice who take legal action. Otherwise, their clients are at a competitive disadvantage, and they do not want to be in that situation.

In terms of leverage, no corporate general counsel and CEO of an industrial company wants to be seen on the front page of a newspaper labeled as a Great Lakes polluter. Nobody wants that. That provides some leverage. That is part of effective public interest advocacy when it comes to leveraging citizen suit litigation for environmental protection and progress.

Now, I will turn to some of the current litigation on our docket. Indiana is not well-known for strong environmental programs or enforcement despite some very good

Editors' Note: Howard Learner's Comment is based on an edited transcription of his remarks at the Environmental Law and Policy Annual Review conference. See 2021-2022 Environmental Law and Policy Annual Review Conference, available at <https://www.eli.org/environmental-law-policy-annual-review/2021-2022-ELPAR-conference>.

people working there. The Environmental Law and Policy Center and Hoosier Environmental Council brought a Clean Water Act citizen enforcement lawsuit in the U.S. District Court for the Northern District of Indiana because of excessive ammonia and cyanide discharges from Cleveland-Cliffs' Burns Harbor steel mill into the Little Calumet River and Lake Michigan. The company, then ArcelorMittal (before it was acquired by Cleveland-Cliffs), did not publicly say what happened when the discharges occurred. When 3,000 dead fish showed up in the east arm of the Little Calumet River about 72 hours later, people around Lake Michigan knew something was going on—and the company finally acknowledged the excessive ammonia and cyanide spills into the waterways.

The first aspect of bringing a citizen suit includes filing a 60-day notice letter—which is required under the Clean Water Act, Clean Air Act, and so forth—and spending some time negotiating with the state attorney general, the state environmental protection agency, and the federal agencies. If you do not negotiate with them during the 60-day notice period, you run the risk that, for example, on day 59, the federal or state government will over-file and bring their own enforcement action.

Now, that is not always bad; we want the federal and state governments to do a very good job of enforcement. We also want to make sure, however, that if they are going to take over enforcement, that they then do it well. Negotiating is a matter of making sure that if there is over-filing, there will be vigorous and effective enforcement. If, for whatever reason, the federal or state government is not going to do that, negotiating can help to ensure that they get out of the way so the citizen suit can be brought.

The federal or state government should carry out their enforcement action responsibilities and do them well. When they can't—for example, due to limited resources or political pressures—or they do not, then that is the complementary role of citizen suits under the Clean Water Act, Clean Air Act, and other environmental statutes. This is the public-private partnership intended by the U.S. Congress.

Without going chapter-by-chapter over this citizen environmental lawsuit in northwest Indiana under the Clean Water Act, in short, the plaintiff citizen groups brought the suit, it was on the front pages of the newspapers, and it turned out there were many permit violations.¹ Plaintiffs believed those violations were significant; the Defendants believed they were less significant. Two years into the litigation, the federal and state governments stepped up and decided to move forward.

There is now a consent decree filed with the U.S. District Court by the Plaintiff environmental-citizens groups, the Plaintiff federal and state governments, and the Defendants that includes injunctive relief by which Cleveland-Cliffs is required to: (1) upgrade its steel mill equipment and improve its operations, (2) pay \$3 million in civil pen-

alties, (3) transfer 127 acres of land to a land trust that will restore and subsequently convey the land to expand the adjacent Indiana Dunes National Park, and (4) undertake enhanced water quality monitoring and better public notification when pollution problems occur.² Moreover, Cleveland-Cliffs will pay almost \$1 million in attorney fees and costs to the Environmental Law and Policy Center because of the successful citizen suit action.

This is a big deal case. It has both retail value and high leverage value because when every other industrial facility owner along the Lake Michigan shoreline looks at this case, most don't want to be in Cleveland-Cliffs' position. So, this case has leverage value beyond the one huge Burns Harbor, Indiana, steel mill.

The Environmental Law and Policy Center is bringing cases in other Midwest states as well, and we have some significant recent victories:

- We have filed Clean Water Act lawsuits in the U.S. District Court for the Northern District of Ohio involving the federal government's and agricultural interests' failures to reduce nutrient runoff pollution (fertilizer and manure), which causes severe toxic algae blooms in western Lake Erie almost every summer—that's about as substantive of a case as you can get. Lake Erie is sadly the poster child for severe, recurring toxic algae outbreaks, and this litigation is designed to help clean up Lake Erie over time.
- We have entered into a revised consent decree on a Clean Air Act enforcement lawsuit against AEP involving some of its coal plants in Indiana and Ohio.
- We recently settled a Clean Air Act enforcement suit against BP, which involved its alleged violations of the consent decree governing its Whiting, Indiana, oil refinery in northwest Indiana; the settlement requires a fair number of "fix-its" going forward.
- In Wisconsin, Environmental Law and Policy Center public interest attorneys represent several national and local conservation groups in citizen actions to apply and enforce the laws designed to protect the Upper Mississippi River National Wildlife and Fish Refuge and properly implement the National Environmental Policy Act.
- In Illinois, the Environmental Law and Policy Center, NRDC, and Sierra Club recently prevailed in our Clean Air Act enforcement lawsuits against Vistra for violating opacity standards—due to excessive particulate pollution—at its old Edwards coal plant in Peoria.

1. Environmental Law & Policy Center et al. v. Cleveland-Cliffs Burns Harbor, LLC et al., Case No. 2:19-CV-473-PPS-JPK, U.S. District Court for the Northern District of Indiana (2019).

2. The Consent Decree providing consolidated remedies in the Plaintiff environmental groups' citizen enforcement lawsuit filed in 2019 and the new Complaint filed by the federal and state governments was recently approved by the U.S. District Court in *United States of America and State of Indiana v. Cleveland-Cliffs Burns Harbor, LLC and Cleveland-Cliffs Steel LLC*, Case No. 2:22-cv-00026-PPS-JEM (N.D. Ind., May 6, 2022).

- We have brought actions in Michigan as well, and recently prevailed before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in a case involving the U.S. Environmental Protection Agency's (EPA's) improper ozone nonattainment area designations.

These cases are all substantive, and they involve a mix of private parties and governmental defendants. Most of these cases are very publicly visible, which increases the whole-sale leverage value beyond the retail case alone. This leads to other defendants and corporate counsels having more concerns when they have similar air and water pollution problems at their plants.

The federal government has a vital and important role to play, but as we have all seen, sometimes EPA and the U.S. Department of Justice are vigorous in exercising their enforcement responsibilities, and sometimes, unfortunately, much less so. We want federal and state governments to be tough, fair, and effective enforcers, but when they are not, or when they cannot take on a particular matter, citizen suits are vitally important. Congress clearly intended this to be a public-private partnership in the Clean Air Act, Clean Water Act, and other federal environmental statutes.

There are some factors the authors should consider. *First*, regarding numbers, how do you value some of the bigger cases that have substantial leverage versus what are generally called "deadline cases" that are much more tactical in terms of moving a required governmental action forward? I do not know quite how to do that based on the data the authors have, but it is important to recognize the differences between the two.

Second, consider resources. Who has the capacity to bring effective, substantive citizen suits that involve private parties as well as government defendants? They tend to be in places where either the main offices of national environmental groups are located, such as in California or Washington, D.C., or in places like the Midwest or Southeast, where groups like the Environmental Law and Policy Center and the Southern Environmental Law Center have skilled experienced litigators, and their main offices. They also tend to be in places where there are good state-based groups like the Minnesota Center for Environmental Advocacy, local Sierra Club chapters, or others with litigation capacity.

Third, these groups must have a strong enough financial base and commitment to bring these citizen suits because attorney fees, alone, will not likely support all of this necessary work going forward. Attorney fees are an important part of the strategy, but actually receiving fees is episodic and somewhat unpredictable if and when they will ever be received. Sometimes, they are vigorously opposed in court, and sometimes not. Sometimes, judges look at attorney fees as being entirely justified, and sometimes judges have a lot of questions about them, including what rate is used, how many hours, and how long you've litigated.

Reforms that make attorney fees more predictable would be important to consider in the authors' analysis, because they provide some incentive for both public interest law organizations and private parties to bring citizen suits. Attorney fees should not be as difficult to obtain as they sometimes are. Furthermore, although prevailing plaintiffs are entitled to "fees on fees" when they need to litigate over attorney fees, there should be a way of resolving these issues with less fees on fees battles.

In short, citizen suits are vitally important for better environmental enforcement and, overall, better environmental performance by regulated industries. Almost all of us recognize that. Citizen suits are especially important when we have, for whatever combination of reasons, federal and state governmental administrations that are not following their legal responsibilities and public obligations when it comes to vigorous and fair enforcement. We need to make the system work better.

The system in some places, though, is perhaps a little more aggressive in terms of substantive, qualitative impacts than the authors' numbers of citizen suits indicate. I understand the limits of their analysis because the D.C. Circuit is where so many cases need to be filed as a matter of law so, of course, the number of cases there is going to be higher. The U.S. Court of Appeals for the Ninth Circuit is, in some ways, a special situation. The authors should consider setting the Ninth Circuit apart, and assessing the data for the differences among the other circuits. In the graph presented by the authors, the other circuits are relatively constant, but are some of those circuits seeing more cases than others, and what types of citizen lawsuits are they?

Thank you for your work on this timely and important topic.

C O M M E N T

NO ACCOUNTING FOR ACCOUNTABILITY? A COMMENT ON ENVIRONMENTAL CITIZEN SUITS AND THE INEQUITIES OF RACES TO THE TOP

by Bina R. Reddy

Bina R. Reddy is a Principal at Beveridge & Diamond PC.

Citizen suits elicit strong opinions but the discourse around their relative merits and deficits is often woefully lacking in supporting data. In *Environmental Citizen Suits and the Inequities of Races to the Top*, David E. Adelman and Jori Reilly-Diakun step into this void and provide a cogent empirical analysis of citizen suits aimed at assessing whether these statutory causes of action are meeting the intent of the U.S. Congress to serve as a layer of protection against lax federal or state enforcement of environmental laws.¹ The authors argue the data shows citizen suits are largely not meeting this goal, but nor are they fulfilling the concerns of citizen suit critics. More specifically, Adelman and Reilly-Diakun contend that the data does not bear out the concern that citizen suits allow private actors to augment government enforcement schemes and priorities in a manner that lacks accountability, including to local community members that are most directly affected by how environmental laws are enforced. To arrive at these conclusions, Adelman and Reilly-Diakun “crunched” the available data, i.e., categorized, sorted, and made certain assumptions about the data—as is necessary in any empirical study.

This Comment offers practitioner observations on how citizen suits may resist some of this sorting and categorization, and what the data says or doesn’t say about accountability to affected regulated and local communities. In particular, (1) the “wholesale” and “retail” litigation categories utilized by Adelman and Reilly-Diakun may obscure the broader impacts of retail citizen suit litigation on enforcement trends that have demonstrable bar-raising effects, and (2) the reliance on the number of environmental organizations in a state as a proxy for local preferences does not speak to whether there is alignment between the interests being vindicated by the actual citizen suit plain-

tiffs—often national environmental nongovernmental organizations (ENGOS)—and those of local residents.

I. Retail Litigation With Wholesale Impacts

Central to Adelman and Reilly-Diakun’s analysis is the distinction drawn between “wholesale” and “retail” citizen suit litigation.² Wholesale litigation is roughly defined as those citizen suits targeting state or federal agencies for violating non-discretionary duties, resulting in broadly applicable outcomes. Retail litigation on the other hand is characterized as suits targeting private facilities, generally for permit violations, and resulting in facility-specific outcomes.³ Adelman and Reilly-Diakun state that retail litigation has a “modest and geographically concentrated role,” and suggest that retail litigation does not meaningfully impact inequities in enforcement.⁴ However, this binary framing ignores the existence of retail suits that ask courts to interpret generic narrative requirements that are ubiquitous in permits, and which consequently result in broadly applicable outcomes. This is retail litigation that is, in effect, wholesale litigation. Citizens and ENGOS have long been aware of the way in which retail litigation can be used to create broad changes in enforcement. Citizen suit plaintiffs have limited resources and make use of “impact litigation” to maximize the effect of favorable outcomes. That is to say, citizens and ENGOS often make effective use of their funds by pursuing lawsuits that will have an impact beyond specific facilities. This approach has been used by

1. David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92(2) U. COLO. L. REV. 377, 379-80, 394-95 (2021).

2. *Id.* at 381.

3. *Id.* at 386, 407, 440-42.

4. *Id.* at 442.

ENGOS since the earliest days of citizen suit litigation⁵ and through today.⁶

An apt recent example of the way in which citizen suit retail litigation can create broad changes in enforcement was seen in *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp.*⁷ In this 2019 case, an ENGO prevailed in a Clean Water Act (CWA) citizen suit against plastics manufacturer Formosa Plastics Corporation.⁸ The allegations involved a narrative water quality standard in Texas-issued CWA permits that forbids discharges of floating solids “in other than trace amounts.”⁹ The plaintiffs introduced into evidence hundreds of bags of plastic waste collected from waters downstream of the facility.¹⁰ The district court determined that “trace” meant a “very small” or “barely discernable” quantity, and concluded the plaintiffs’ evidence demonstrated a violation of this threshold.¹¹ A consent decree was entered requiring injunctive relief and penalties costing approximately \$50 million.

The impacts of *Formosa Plastics*—a retail suit—are being felt far beyond the single facility at issue in the litigation. The Texas Commission on Environmental Quality has adopted a zero discharge interpretation of “trace amount” that is consistent with the consent decree and will amend permits for over 150 dischargers to impose this interpretation and related new best management practices. This will almost certainly force new technologies and capital improvements at numerous facilities.

Adelman and Reilly-Diakun’s characterization of retail litigation describes well those suits which seek to enforce a violation of a numerical standard at a specific facility, but *Formosa Plastics* and other suits like it do not sort neatly into the “wholesale” and “retail” buckets. These suits are also often at the leading edge of citizen suit law because they involve first impression questions of interpretation. Generic narrative standards in permits such as “trace,”¹²

“unnatural,”¹³ or “nuisance”¹⁴ create opportunities for citizens and ENGOS to advocate for stricter interpretations of these commonplace terms, and outside the processes that build in accountability between permitter and permittee when standards change (e.g., notice-and-comment procedures). When successful, these retail suits can have far-reaching impacts: on the defendant facility; on other regulated entities in the state seeking to avoid noncompliance with a newly defined standard; and, given the relatively small universe of citizen suit decisions and their high precedential value, potentially on the programs of other states that utilize similar permit language.

II. Limits on Assessing Accountability to Local Preferences Through Numerical Data

Adelman and Reilly-Diakun also considered whether the data shed light on the persistent criticism of citizen suits as lacking in accountability to local preferences. This is an enormously complex question—even the most basic citizen suits involve the intersection of numerous interests (e.g., plaintiff organization interests, specific legally recognized plaintiff interests giving rise to standing, local and state (and sometimes federal) interests, non-plaintiff “fenceline” community interests, etc.). Adelman and Reilly-Diakun conclude that this criticism is likely unfounded because the significant majority of citizen suits are filed in states where there are also higher numbers of ENGOS, reasoning that the number of environmental organizations in a state can serve as a proxy for public support of environmental programs.¹⁵ Adelman and Reilly-Diakun explain that the number of ENGOS in a state was chosen “because it is an indicator of regional political, social, and donor support for the organizations’ missions.”¹⁶ These assumptions may be correct, but arguably this metric is too attenuated to speak to the accountability of the actual plaintiffs filing citizen suits to local (non-plaintiff) preferences.

Adelman and Reilly-Diakun show that it is overwhelmingly ENGOS that are the plaintiffs in citizen suits.¹⁷ These groups are driven by defined programmatic objectives, grants, and other funding considerations, and are answerable to their members. It is also known that the membership and leadership of ENGOS (including those that command the largest litigation budgets), are overwhelm-

5. See, e.g., Thomas B. Stoel Jr., *Environmental Litigation From the Viewpoint of the Environmentalist*, 7 NAT. RESOURCES L., 547, 549 (1974) (“How do we actually decide which particular cases to become involved in? . . . [A] case should involve an important legal issue, with national or at least regional significance, and with precedential value. . . the case should, if successful, have the consequence of altering agency decisionmaking patterns . . .”); Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENV’T L. REV. 61, 63 (2014) (“In a radical shift from the classic administrative law model . . . the citizen suit provided nongovernmental organizations the opportunity to develop their own interpretations of the environmental norms and test these interpretations in enforcement actions in the courts as a matter of first impression.”).

6. NRDC, *Litigation at NRDC*, 4 (describing targeting cases “with a big impact”), <https://www.nrdc.org/sites/default/files/litigation-at-nrdc.pdf>.

7. No. 6:17-CV-0047, 2019 WL 2716544 (S.D. Tex. June 27, 2019). See also Karen M. Hansen & Bina R. Reddy, *Citizen Suits Lead the Way for Agencies on Plastics Enforcement*, BLOOMBERG L. (Oct. 16, 2020).

8. *Formosa Plastics*, *supra* note 7, at **8-9.

9. *Id.* at *3.

10. *Id.* at *4.

11. *Id.* at *3.

12. See generally *Formosa Plastics*, *supra* note 7.

13. Nat. Resources Defense Council v. Metro. Water Reclamation Dist. of Greater Chicago, 175 F. Supp. 3d 1041, 1058 (N.D. Ill. 2016) (interpreting meaning of “unnatural” in context of narrative water quality standard for phosphorus requiring that applicable waters be free from either “plant or algal growth . . . of other than natural origin” or “unnatural plant or algal growth.”).

14. Graff v. Haverhill N. Coke Co., No. 1:09-CV-670, 2015 WL 3755986, at *1 (S.D. Ohio June 16, 2015) (Clean Air Act citizen suit alleging violation of nuisance provision in Ohio state implementation plan).

15. Adelman & Reilly-Diakun, *supra* note 1, at 428.

16. *Id.* at 430, n.183.

17. *Id.* at 417-18.

ingly white, and are led primarily by men.¹⁸ ENGOs deserve credit for recognizing these issues and working in recent years to make progress on diversity, but nonetheless, in light of these facts, it is worth testing the assumption that the number of environmental groups in a state can serve as a proxy for local alignment with ENGO citizen suit litigants. Notably, in the retail context, the relief sought in a citizen suit (or settlement of a citizen suit) will often include injunctive measures that reflect the specific wishes of the plaintiffs. These wishes are sometimes, but

certainly not always, consistent with those of the local community.¹⁹ The number of environmental groups in a state is likely a useful proxy for statewide support for wholesale litigation. But it may be too crude a tool for the intensively local nature of retail litigation. Finally, as environmental justice concerns take on a larger role in citizen suits, additional data (e.g., the results of groundtruthing with local stakeholders on environmental priorities) may be needed to fully grapple with questions of accountability in citizen suit litigation.

18. See generally Erik Ortiz, *"The Numbers Don't Lie": The Green Movement Remains Overwhelmingly White, Report Finds*, NBC NEWS (Jan. 13, 2021); Dorceta E. Taylor, *The State of Diversity in Environmental Organizations*, GREEN 2.0 (July 2014).

19. See Rachel Jones, *The Environmental Movement Is Very White. These Leaders Want to Change That*, NAT'L GEOGRAPHIC (July 29, 2020) ("Many solutions to natural resource concerns are often experienced as environmental gentrification for communities of color. . . . Take bike lanes, which are often carved through communities where parking space is scarce and public transportation is minimal."). Questions of accountability to local preferences are especially acute in the context of citizen suits against governmental entities because the costs of relief will be assessed against local residents via taxes. See, e.g., *Newark Education Workers Caucus et al. v. City of Newark et al.*, No. 2:18-cv-11025 (D.N.J. 2018) (citizen suit brought by NRDC under the Safe Drinking Water Act against elected officials seeking preliminary injunctive relief costing \$80+ million, which if granted, would have been paid for by non-party local residents).

A R T I C L E

TURNING PARTICIPATION INTO POWER: A WATER JUSTICE CASE STUDY

by Jaime Alison Lee

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I. Introduction

This Article offers a revamped model of participatory governance—the Constituent Empowerment Model (CE Model)—which affirmatively shifts power to the voices of marginalized constituents so that they can influence governmental policy. The CE Model focuses on three concepts necessary to produce this shift in power to those who are traditionally unheard: operationalized (feasibly realized) participation; constituent primacy; and structural accountability. To illustrate how a CE system might be constructed, this Article examines a model recently adopted in the city of Baltimore, Maryland, that is designed to shift the balance of power between the water utility and its customers. Baltimore offers a blueprint for how this new form of participatory governance could make local institutions more responsive to the needs of disempowered constituents.¹

II. Participatory Governance: Foundations and Vulnerabilities

A. A Brief Introduction to the Foundations of Participatory Governance and Its Vulnerabilities

Participatory governance encourages problem solving that is meaningfully influenced by broad constituent input

during each stage of the process, including problem identification, solution development and implementation, and long-term monitoring, refinement, and accountability.² Many laud the potential of participatory systems to include more diverse perspectives and thus improve government policy. However, participatory systems can also be appallingly ineffective.³ Participatory systems too frequently solicit constituent input, yet ultimately disregard it, resulting in procedures that are merely cosmetic and produce no meaningful reform or benefit.⁴

The core critique is that consensus-based “roundtable” discussions amount to little more than a negotiation, which favors those with preexisting power.⁵ This is problematic

2. Other scholars use different formulations and definitions. *E.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 405 (2004); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 79 (2011).
3. *See, e.g.*, Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons From Financial Regulation*, 2010 WIS. L. REV. 441, 477-80; 484-86; Michele E. Gilman, *Five Privacy Principles (From the GDPR) the United States Should Adopt to Advance Economic Justice*, 52 ARIZ. ST. L.J. 368, 437-39 (2020) (discussing “many barriers to effective public participation that must be addressed to ensure that participation is meaningful, rather than mere window dressing”); Jaime Alison Lee, “Can You Hear Me Now? Making Participatory Governance Work for the Poor,” 7 HARV. L. & POL’Y REV. 405, 413-17 (2013); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 327, 329, 347-48 (2009); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 406 (2016) (explaining that participatory structures may mean shutting out the “disempowered”); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 559-63 (2008); Shelley Welton, *Non-Transmission Alternatives*, 39 HARV. ENV’T L. REV. 457, 462 (2015) (“FERC’s heavy reliance on participatory reforms to promote non-transmission alternatives pays lip service to these alternatives without meaningfully changing planning processes.”).
4. *See* Lee, *supra* note 3, at 414-15; NeJaime, *supra* note 3, at 362.
5. *See, e.g.*, Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 58 (2018):

[There is] a real concern that participatory processes are too often driven by idealistic beliefs in the “transformative force of truth and justice”—the idea that powerful institutions will change when confronted with the truth of marginalized peoples’ stories, regardless of the group’s actual social power. . . . [T]his belief wrongly assumes that “problems in our society occur because the ideas and experiences of oppressed people are excluded from democratic debate and not because of a struggle between groups of people with competing interests.”

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1. *See, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 572 (2017):
Local agencies also often operate at the edge of a blurry line between governmental action and public participation. Community engagement in zoning regulation, school board decisions, police review commissions, and other examples of the blending of public and private underscore the breadth of citizen participation in local agency work that is uncommon at the federal level.

for constituents who lack traditional forms of power⁶ and whose marginalization from traditional problem-solving processes is the very harm that broadly inclusive participatory structures are meant to remedy.⁷

Cosmetic processes thus cause dual harm to marginalized constituents; they not only fail to meet the needs of those whom they are meant to serve, but they further alienate and subordinate them by falsely claiming to address those needs.⁸

Accordingly, the CE Model seeks to reduce the likelihood of cosmetic processes by shifting power to marginalized constituents and eliminating the reliance on consensus-based negotiations.

The following presents the CE Model as adopted in Baltimore with the goal of forcing reform at a local governmental agency that has long been unresponsive to constituent needs. Baltimore presents a test case that is both difficult and regrettably common, and thus constitutes an appropriate laboratory in which to “stress-test” participatory governance theory.

B. The Difficult Case Study: The Recalcitrant and Unresponsive Local Agency

In Baltimore, the public water supply is controlled by the Department of Public Works (DPW).⁹ DPW has the power to deny water service if a customer has not paid her bill,¹⁰ leading to inhumane conditions that threaten the health and safety of both individuals and the greater public.¹¹ Prior to 2019, unpaid water bills in Baltimore could

trigger another severe penalty: losing one’s house through the state-sponsored foreclosure system.¹²

Baltimore low-income water customers are especially vulnerable to these injustices. A typical Baltimore household’s annual bill for water service more than quadrupled between 2000 and 2017 and is expected to be over \$1,100 by 2022.¹³

On top of unaffordability, Baltimore residents also suffer from an astonishingly inept and unresponsive bureaucracy. Water customers routinely experience bills that skyrocket from one month to the next with no apparent explanation.¹⁴ Even worse, the appeals process is woefully inadequate and many complaining customers receive no response at all from DPW, and thus must simply pay the bill or risk losing water and possibly their home.

In Baltimore, as in many other jurisdictions,¹⁵ injustice in water access disproportionately harms already vulnerable communities, including tenants, low-income, Black, and elderly and disabled people.¹⁶

C. The Failure of Traditional Accountability Tools and the Need for an Alternative

The remedies usually available to constituents when government policies cause harm have long been ineffective in Baltimore.¹⁷

Despite multifaceted and persistent efforts to motivate change, the electorate’s rage and voting power have proven largely impotent.¹⁸ Accountability mechanisms tradition-

(footnote omitted); Simonson, *supra* note 3, at 405-06 (the focus on consensus and deliberation over pluralism means shutting out the disempowered).

6. See, e.g., Wendy A. Bach, *Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures From the Ground Up*, 74 BROOKLYN L. REV. 275, 277-78 (2009) [hereinafter Bach, *Welfare Reform*] (“[T]he history of subordination and disproportionate power that characterizes social welfare history raises serious questions about the ability of poor communities to participate effectively . . .”).

7. See *id.*; see also Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 83 (1997).

8. See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 698 (2020):

The dialectical relationship between structural inequalities and political power compounds this difficulty: multiple layers of democratic and structural exclusion reinforce each other, reproducing unequal, racialized systems of justice and of governance. . . . The antidemocratic nature of our legal systems reinforces structural inequality; the result is that increasing community participation does not, on its own, truly tackle these deeply embedded structural problems.

see also Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 236 (arguing that “the democratic promise of new governance is hollow”); Freeman, *supra* note 7, at 83; Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 510 (describing cosmetic processes as a “charade” and “cruel”); Lee, *supra* note 3, at 406, 415.

9. BALT., MD., CITY CHARTER art. VII, §§27-46 (2020).

10. BALT., MD., CITY CODE art. 24, §4-3 (2020); see BALT., MD., CITY CHARTER art. VII, §45.

11. Joan Jacobson, *Keeping the Water On: Strategies for Addressing High Increases in Water and Sewer Rates for Baltimore’s Most Vulnerable Customers*, ABELL REP. (Nov. 2016) at 8-12; cf. Elizabeth Mack & Andy Henion, *Affordable*

Water in US Reaching a Crisis, MICH. STATE UNIV. (Jan. 17, 2017) [<https://perma.cc/U2W9-4NZL>].

12. JOAN JACOBSON, *THE STEEP PRICE OF PAYING TO STAY: BALTIMORE’S TAX SALE, THE RISKS TO VULNERABLE HOMEOWNERS, AND STRATEGIES TO IMPROVE THE PROCESS* 3 (2014).

13. ROGER COLTON, FISHER, SHEEHAN & COLTON, *BALTIMORE’S CONUNDRUM: CHARGING FOR WATER/WASTEWATER SERVICES THAT COMMUNITY RESIDENTS CANNOT AFFORD TO PAY* 4 (2017).

14. See OFF. OF INSPECTOR GEN., BALT. CITY, NO. 20-00400-I, *CONFIDENTIAL REPORT OF INVESTIGATION I* (2020) (explaining that “there are thousands of digital water meters in the City and the County that are not fully functional”).

15. See, e.g., FOOD & WATER WATCH, *AMERICA’S SECRET WATER CRISIS: NATIONAL SHUTOFF SURVEY REVEALS WATER AFFORDABILITY EMERGENCY AFFECTING MILLIONS* 7-8 (2018); COTY MONTAG, NAACP LEGAL DEF. & EDUC. FUND, INC., *WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA’S CITIES* 13-15 (2019).

16. See MONTAG, *supra* note 15, at 31, 71; Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO. J. POVERTY L. & POL’Y 355, 357-58 (2016); see also Tom I. Romero II, *The Color of Water: Observations of A Brown Buffalo on Water Law and Policy in Ten Stanzas*, 15 U. DENV. WATER L. REV. 329, 333 (2012).

17. See, e.g., ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

18. See Yvonne Wenger, *Advocates Decry Baltimore’s Delay in Implementing New Measures to Make Water More Affordable*, BALT. SUN (July 13, 2020) [hereinafter Wenger, *Advocates Decry Baltimore’s Delay*] [<https://perma.cc/QNE2-FSH8>]; Yvonne Wenger, *Baltimore Longtime Public Works Director Chow to Retire Feb. 1*, BALT. SUN (Oct. 17, 2019) [hereinafter Wenger, *Baltimore Longtime Public Works*] [<https://perma.cc/4WK7-T3YF>]; Rianna Eckel, *Will Mayor Scott Finally Fix Baltimore’s Busted Water Billing System?*, BALT. BREW (Jan. 13, 2021, 10:50 AM) [<https://perma.cc/M6ZV-9JEC>]; cf. *Archives of Maryland, Historical List, Baltimore Mayors, 1797*, MD. STATE ARCHIVES [<https://perma.cc/W336-HQTU>]; Water Accountability and Equity Act, BALT. CITY COUNCIL [hereinafter *Baltimore Water & Equity Act History*] [<https://perma.cc/U2QR-69MU>].

ally used in the face of such governmental intransigence might include lawsuits and administrative law remedies,¹⁹ which require abundant resources.²⁰ Administrative law tools intended to enhance government's responsiveness to its constituents have similarly afforded no relief.

Accordingly, new solutions are needed. Participatory structures may provide another path to accountability, but to succeed, they must reduce their vulnerability to merely cosmetic outcomes.

III. Turning Participation Into Power: The CE Model

Since the primary vulnerability of traditional participatory processes lies in the failure to address existing power imbalances, the revamped model must address this problem by affirmatively shifting power to constituent voice.

A prerequisite to implementing the CE Model is that the more powerful party must be required to address the needs of the less powerful. Power must be then shifted to marginalized constituents through specific techniques. The CE Model illustrates how these two things may be accomplished.

A. The Prerequisite: A Strong Executor Who Shifts Power to Marginalized Constituents

To thwart cosmetic outcomes, the more powerful must be incentivized to attend to the needs of the less powerful. In Baltimore, given DPW's long-standing refusal to address customer needs, strong structural incentives needed to be created for DPW to change course.

1. Destabilization as Incentive

One circumstance that can theoretically incentivize stakeholders to work more collaboratively is a "destabilizing event," usually a high-profile event that persuades both sides that there is a problem resolvable only through both sides' participation.²¹ Highly emotional City Council hearings, constant press coverage of embarrassing problems, and the sheer volume of consumer complaints might have incentivized the utility to change its approach. In Baltimore, however, none of these events sufficiently "destabilized" the status quo or moved the utility toward reform.²²

2. Structural Incentive

Where destabilization does not incentivize a recalcitrant party to act, coercion by a third party might.²³ One exam-

ple is a judge who orders opposing litigants to enter into settlement negotiations.²⁴ The judge serves as an "executor" of the participatory process by imposing a mutual goal on the parties and forcing them into discussions with each other with the goal of finding common ground.

In the context of DPW, the role of executor fell to the Baltimore City Council, which is empowered through its legislative powers to impose new requirements on the water utility. After years of encouragement by coalition members, in late 2019, the City Council unanimously voted to pass legislation subjecting the utility to the CE Model framework described in this Article, forcing DPW into a participatory governance process with its constituents.²⁵ In imposing the CE Model, the City Council changed the balance of power between the parties.

The Baltimore law has two major components. The first addresses the affordability of water by capping water bills, for those earning under 200% of the poverty level, at 3% of the customer's income, which meets the United Nations (U.N.) standard for water affordability.²⁶ The second, which serves as the focus of this Article's case study, uses a participatory governance framework that redistributes certain power to water customers.

B. The Constituent Empowerment Model: A Case Study

The CE Model adopted in Baltimore establishes an infrastructure for two critical functions: resolving individual customer disputes and reforming customer-facing policies. Both functions engage customers directly in the problem-solving process.

1. Individual Dispute Resolution as Participatory Problem Solving

The CE Model as adopted in Baltimore offers various paths for resolving disputes.

First, a customer may choose to work with the utility's dispute resolution process, likely speaking to customer service representatives.²⁷ Second, a customer may work with the newly created Office of Water Customer Advocacy and Appeals (Advocate).²⁸ Third, the customer may participate in a traditional due process administrative hearing.²⁹ Fourth, the customer can appeal in court.³⁰

19. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016-18 (2004).

20. *See id.* at 1050-59.

21. *See id.* at 424; *see also* Sabel & Simon, *supra* note 19, at 1056, 1062, 1076-78.

22. *See supra* Section I.B.

23. *See Lee, supra* note 3, at 424, 426-28. *See generally* JACOBSON, *supra* note 12.

24. *See Sabel & Simon, supra* note 19, at 1051, 1055-56.

25. *See supra* Section I.B.

26. *Five Reasons Baltimore Needs an Income-Based Water Affordability Program*, FOOD & WATER WATCH (Aug. 2017) [hereinafter *Five Reasons*] [<https://perma.cc/GLC8-J93H>]; *See* BALT., MD., CITY CODE art. 24, §§2-6, 2-17 to -22 (2020). According to the United Nations, affordability means three percent of income. *Five Reasons, supra*.

27. Customer service contact is traditionally the first step in DPW's dispute process. *See* Press Release, Balt. City Dep't of Pub. Works, Water Billing Reviews (July 25, 2019) [<https://perma.cc/N56C-EWH9>].

28. *See* BALT., MD., CITY CODE art. 24, §§2-17, 2-19 to -20 (2020).

29. *See id.* §2-21.

30. *See id.* §2-21(i).

The innovative and participatory component of this multitiered system is the Advocate's dispute resolution process, which is separate and distinct from traditional due process hearings.³¹ The Advocate process is more informal and involves both investigatory and problem-solving roles: the Advocate seeks to identify the causes of the dispute; to identify solutions for the customer that are workable for their particular circumstances; and to prevent the problem from reappearing in the future.³² This process is participatory in nature, as the Advocate uses customer input to find practical, long-term solutions to disputes.³³

2. Systemic Reform and Long-Term Accountability

The Advocate is also responsible for developing systemwide proposals to improve how the water utility treats its customers.³⁴ These proposals must be based on what the Advocate has learned from its experiences addressing customers' complaints; it must document and study what it learns from individual disputes, collect and study data reported systemwide, and justify its reform proposals based on the needs and concerns of constituents.³⁵

Once the Advocate drafts its proposals for reform, the proposals are scrutinized during semiannual public hearings.³⁶ The ongoing schedule of public hearings provides continual monitoring, scrutiny, and adjustment of revised rules and policies to ensure that these reforms are truly responsive to constituent needs.

Taken together, these elements of the Baltimore CE Model—the individual dispute resolution procedures and the process for system reform—are designed to emphasize the three essential requirements of constituent empowerment: operationalized participation (which makes participation feasible), constituent primacy (which gives weight to constituent input), and structural accountability (which provides ongoing oversight of the system itself). All three are necessary³⁷ to shift power to constituent voice and to prevent cosmeticism.

C. Concept One: Operationalized Participation

One of the greatest vulnerabilities of participatory systems is the risk of insufficient participation.³⁸ Traditional means of gathering input can be costly and burdensome, especially for disempowered constituents. These burdens must be lessened to make input feasible and meaningful.

Two strategies that may help to operationalize constituent input are the use of double-duty activities and proxies.

1. Double-Duty Participation

Double-duty participation means collecting input through a mechanism by which all parties are already engaged. In the case of Baltimore's water utility, the administrative due process and dispute resolution procedures serve as this mechanism.

Constituents will opt in because they stand to gain tangible benefits in the form of a resolution to their concerns.³⁹ Even constituents who distrust the agency are more compelled to engage in a dispute resolution process than in unstructured input-gathering processes, like voluntary townhalls, surveys, focus groups, and roundtable discussions, which can offer no clear benefit.⁴⁰

For agencies already providing due process hearings, incorporating a participatory input-gathering function into these procedures will likely incur negligible additional costs.⁴¹

Another example of double-duty participation is to put data from existing activities to good use. For example, Baltimore's Advocate must collect data on the nature of complaints made by customers; whether and how complaints are being resolved; how social services agencies are called upon by low-income water customers; who is enrolled in discount plans and who is not; and other matters.⁴²

2. Participation Through a Proxy

Another way to operationalize constituent input is to use proxies.⁴³ The proxy in Baltimore is the Advocate, which gathers, aggregates, analyzes, filters, reports on, and applies a broad mass of constituent input.⁴⁴ In centralizing these functions, the proxy lightens the burden of participation for each individual constituent and increases efficiency.

The use of double-duty input methods and the use of proxies is designed to generate broad and meaningful stakeholder participation through relatively efficient, low-cost means.

D. Concept Two: Constituent Primacy

Once constituent input is collected, actually incorporating that input into policy reforms requires further structural designs. The CE Model affirmatively shifts power to

31. *Id.* §§2-17, 2-19 to -22.

32. *Id.* §2-17(b)-(c).

33. *Id.* §2-20.

34. *See id.* §2-17(b)(2)(ii).

35. *Id.* §2-17(c)(3), (d).

36. *Id.* §2-17(c)(3), 2-23(e)(3).

37. While these elements are necessary for the system to succeed and their presence greatly increases the likelihood of such success, they certainly do not assure success. This is one reason that the CE Model is designed to work in conjunction with other methods. *See infra* Section II.E.2.

38. *See* Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 136-37, 137 n.228 (2016).

39. CODE art. 24, §§2-17, 2-19 to -22 (2020).

40. *See Requesting a Water Bill Adjustment*, BALT. CITY DEPT OF PUB. WORKS [<https://perma.cc/TNE3-6ZHX>]; *see also* Yvonne Wenger, *Clarke Wants Hearings Restored for Water Bill Disputes*, BALT. SUN (July 14, 2017) [<https://perma.cc/H7V8-26XE>] (providing additional context for water bill hearings in Baltimore). *Compare* Yvonne Wenger, *Advocates Decry Loss of Appeal Hearings in Baltimore Water Billing Disputes*, BALT. SUN (Feb. 23, 2017) [<https://perma.cc/K3NM-SJM2>] (explaining how the hearing process was limited a few years ago), *with* Amira Hairston, *Baltimore City Water Bill Hearing Scheduled for Wednesday Afternoon*, WMAR BALT. (Mar. 4, 2020 5:22 PM) [<https://perma.cc/R9Z9-T23A>] (showing that individuals may obtain hearings now).

41. *See* CODE art. 24 §§2-17(b)-(c), 2-21.

42. *Id.* §2-17(c)-(d).

43. Lee, *supra* note 3, at 429.

44. *See* CODE art. 24, §§2-17 to -23.

constituent voices through a concept referred to as Constituent Primacy.

Constituent Primacy is implemented through four different strategies in Baltimore: (1) the empowerment of the constituents' proxy, (2) framework goals that prioritize and give weight to constituent interests, (3) transparency, and (4) protecting the proxy from institutional influence.

1. The Empowered Proxy

The Baltimore Advocate is a uniquely powerful proxy. It has the power to investigate broadly, to determine the outcome of disputes, to propose systemwide agency reforms, and to speak for and act on behalf of constituents.⁴⁵ It is thus imbued with investigatory and reporting powers similar to those of an inspector general, with adjudicative powers similar to those of due process hearing administrators, and with proposed rulemaking powers similar to those of a regulatory agency.⁴⁶

2. Framework Goals That Mandate Constituent Primacy

While a proxy needs sufficient power to make meaningful change, the proxy's discretion must also be cabined to ensure that the proxy faithfully promotes the interests of its constituents.

One mechanism for cabining the proxy's discretion is the articulation of "framework goals."⁴⁷ Framework goals set forth the overall purpose of a participatory process and direct participants toward solving the problems at hand.⁴⁸ Framework goals, combined with standards for assessing progress toward those goals, are thus useful tools for cabin-ing discretion.

In Baltimore, the legislated mandate of the Advocate is to "promote fairness to customers"⁴⁹; "serv[e] as a customer advocate"⁵⁰; "resolv[e] customer concerns"⁵¹; provide "problem-solving services"⁵²; and "create solutions promoting customer fairness."⁵³ These goals are deliberately designed to be open-ended and flexible,⁵⁴ while also clearly directing the Advocate to serve customer interests.

The Advocate must also give "great weight" to "data derived directly from customer experiences . . . in designing reform proposals that promote customer fairness."⁵⁵

These requirements elevate the importance of constituent input and reduce the risk that the participatory process will be merely cosmetic.⁵⁶

3. Transparency of Constituent Service

Constituent Primacy is further enforced through transparency. For example, in Baltimore, only if the public knows what the Advocate is doing will the public know whether the Advocate is, in fact, faithfully promoting their interests. Accordingly, the Advocate must publicly testify both orally and in writing twice a year before the Committee on Oversight and the public.⁵⁷ It must report on its work, the data it has collected, and how its reform proposals promote customer fairness.⁵⁸ The Advocate must also report on whether its prior reforms are working and how that success is being measured. The meetings must be open to the public, who must be allowed to testify.⁵⁹ Transparency at each step should increase proxy accountability and thus protect against a cosmetic process.⁶⁰

4. Protecting the Proxy From Institutional Influence

The fourth way that the CE Model shifts power to constituents is by requiring that a proxy be shielded from undue influence exercised by others.

Ideally, a proxy like the Advocate would serve as an independent watchdog and be situated wholly outside of the formal boundaries of the agency's sphere of influence. Formal structural independence for the Baltimore Advocate was fiercely resisted by the utility, however, and failed as a legislative matter.⁶¹

While complete structural independence and transparent hiring was not possible in Baltimore, other meaningful protective mechanisms succeeded. These provisions are akin to those commonly used to protect other types of executive branch officials serving in similar "watchdog" roles within their own agency, such as inspectors general and administrative law judges.⁶² Protections include legislatively mandated job qualifications for the chief Advocate,⁶³ protections against adverse employment actions against the Advocate and against agency review or approval of the Advocate's work, as well as limits on communications

45. *Id.* §§2-17(b)-(c), 2-20(d) (2020).

46. *Id.* §§2-17 to -23.

47. Sabel & Simon, *supra* note 2, at 79.

48. *Id.*

49. CODE art. 24, §§2-17(b)(1), 2-23(e)(3)(i)(B) (2020).

50. *Id.* §2-17(c)(1).

51. *Id.* §§2-17(c)(3)(ii)(A), (C), 2-23(e)(3)(i)(B).

52. *Id.* §2-20(a)(1).

53. *Id.* §2-17(d)(3)(ii).

54. Care must be taken to craft framework goals that transfer power to constituents' voices while enabling constituents themselves to define the substantive content of those goals. See Ford, *supra* note 3, at 480 n.148; see also Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239 [hereinafter Bach, *Governance*] ("[T]he absence of substantive participation by poor communities in goal-setting and program design fundamentally undermines the experimentalist enterprise.")

55. CODE art. 24, §2-17(d)(4).

56. See Lee, *supra* note 3, at 431 (assigning a measure of weight to constituent input is a means of achieving the baseline conditions).

57. *Id.* §2-23(e)(3).

58. *Id.* §2-17(d)(4).

59. *Id.* §2-23(e)(3)(ii).

60. See Bach, *Governance*, *supra* note 54, at 294-95; Patience A. Crowder, "Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making, 74 TENN. L. REV. 623, 656-58 (2007); see also Chester L. Mirsky & David Porter, *Am-bushing the Public: The Socio-Political and Legal Consequences of SEQRA Decision-Making*, 6 ALB. L. ENV'T OUTLOOK J. 1, 27 (2002).

61. See Balt. Md., Ordinance 20-336 (Jan. 27, 2020).

62. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1120, 1126 n.151, 1154 n.306 (2018).

63. See BALT., MD., CITY CODE art. 24, §2-18(c) (2020).

between the Advocate and other agency employees to avoid the appearance of conflicts of interest.⁶⁴

These four Constituent Primary strategies of the CE Model shift power to disempowered constituents by giving their proxy enough power to make change, while also seeking to ensure that that power is used for their benefit.

E. Concept Three: Structural Accountability

Accountability—consequences for poor behavior—must also be built into the participatory system in order to prevent cosmetic outcomes.

Charles Sabel and William Simon discuss the need for “penalty defaults” that may be triggered if a participatory process does not result in meaningful change.⁶⁵ A penalty default is so undesirable that the recalcitrant actor would prefer to make the changes sought rather than suffer the penalty. A classic example of a penalty default that can motivate institutional change is the threat of litigation.

Especially in the case of a recalcitrant actor, some combination of strong penalty defaults must be imposed for the participatory process to result in affirmative change.

1. Penalty Defaults

Two penalty defaults strongly encourage the Baltimore water utility to adopt the systemwide reforms that will be proposed by the Advocate.

One penalty default is that, should DPW refuse to voluntarily adopt the Advocate’s reforms, the City Council may use its legislative powers to turn those proposals into law.⁶⁶

The second type of penalty default in Baltimore is semi-annual public hearings before an oversight committee⁶⁷ at which customer satisfaction and reforms are discussed and commented on.⁶⁸ The threat of negative attention at these hearings from the public, the media, the City Council, and the mayor serves as a penalty default that should incentivize the utility to reform itself and become more responsive to customer needs.⁶⁹

2. The Relationship of the CE Model to Other Conceptions of Constituent Power

While the CE Model focuses on power generated through procedural participation, structural accountability can also arise from other kinds of constituent power, namely, adversarial protest, which is an equally crucial means of inducing reform. Importantly, people who engage in the CE Model are *also* fully able to engage in contestatory, adversarial relationships against those in power. The CE Model not only allows for this, but creates opportunity for it by

requiring a regular public hearing, which can be a highly effective forum for united, vocal, and adversarial protest.

This ability to exercise both participatory and adversarial power simultaneously is an important change from traditional participatory systems, where the process is collaborative and consensus-seeking and participants thus cannot advocate for themselves too strongly without risking losing their “seat at the table.”⁷⁰ The CE Model avoids this trade off and is designed to work in tandem with other forms of power-building techniques, not as an alternative to them. This is a crucial design feature since multiple forms of power can likely be combined, to great effect, throughout the long, slow process of reforming a recalcitrant institution.

IV. Conclusion

It is hoped that the CE Model can serve as a blueprint for increasing public participation in a variety of contexts. Traditional environmental law, for example, might incorporate CE Model strategies into participatory systems already employed in the field.⁷¹ Marginalized voices also need greater representation with respect to other public infrastructure systems⁷² and public services institutions, such as school systems, police departments, social services agencies, transit departments, and public health departments. Mayors and legislatures might map the basic structure used in Baltimore onto their own executive branch agencies, especially since many of the core elements—due process hearings, constituent proxies, transparency, an oversight body, and public hearings—are already familiar within the governmental context.

It may also be possible that, where reform is desperately needed but a bolder transfer of power to constituents may not be politically possible, the CE Model’s moderate power-sharing arrangement may be a more feasible, effective strategy. Moreover, where reforms are likely to be incremental and difficult, the CE Model may be particularly valuable in that it supports sustainable, long-term engagement and monitoring.

Overall, the CE Model is meant to offer a flexible infrastructure that can be modified and experimented with in other circumstances in which greater representation of marginalized voices is needed.

64. See *id.* §2-18(e).

65. Sabel & Simon, *supra* note 19, at 1067; see also Lee, *supra* note 3, at 428, 439; Sabel & Simon, *supra* note 2, at 81.

66. See BALT., MD., CITY CHARTER art. III, §11 (2020).

67. See BALT., MD., CITY CODE art. 24, §§2-17, 2-21 to -23 (2020); see also Jacobson, *supra* note 11, at 23.

68. See §§2-17(3), 2-23(e)(3).

69. See *id.* §§2-17(d), 2-21 to -23.

70. See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 303 (Austin Sarat & Stuart A. Scheingold eds., 2006); Freeman, *supra* note 7, at 84-85; see also Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 57 n.36 (2018).

71. E.g., Lobel, *supra* note 2, at 423 (“Environmental law has been at the forefront of new governance experiments.”); Anne E. Simon, *Valuing Public Participation*, 25 ECOLOGY L.Q. 757, 757 (1999).

72. See K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2447-48 (2018).

C O M M E N T

REFLECTIONS ON DR. LEE'S *TURNING PARTICIPATION INTO POWER*

by LaTricea Adams

LaTricea Adams is Co-Founder and CEO of Black Millennials 4 Flint.

T*urning Participation Into Power: A Water Justice Case Study*¹ presents a rich, conceptual framework with the Constituent Empowerment Model (CE Model) that mirrors the foundational work of Dr. Robert Bullard's Environmental Justice Framework² in its very community-centered perspective. The article also integrates the Jemez Principles³ as a practical approach to community oversight and accountability. Using Baltimore as a case study added much value to the topic, as the state of Maryland is known for more progressive legislation regarding environment; however, Prof. Jaime Lee spares no criticism of the need for more constituent-centered and community-led accountability and oversight of the implementation and ongoing life cycle of policy in practice.

Professor Lee calls out the recurrence of “performative inclusion” where decisionmakers attempt to appease the community by creating an *invisible table* or in the words of Dr. Lee, “cosmetic processes” where community voice is heard only for the purposes of show and not for substantive contributions to problem solving. Dr. Lee successfully dismantles the unspoken mantra “process over people” and flips it on its head where the people, the community, iden-

tify the problem, create the process, and utilize their democratic power to inform the actions of government agencies and policymakers alike. The CE Model also demonstrates the power of intersectional environmentalism,⁴ as it amplifies the need for equity in accessing power by addressing upfront the challenges often faced by communities experiencing economic distress and communities of color that are often met with racial bias and discrimination. Essentially, the CE Model completely refutes any and all forms of classism and racial bigotry as a prerequisite to engaging in the community-led process. The individuals who are most disproportionately impacted are respected as the true experts as they always should be.

Turning Participation Into Power: A Water Justice Case Study should be deemed as a civic engagement tool that is versatile beyond an environmental context, as its success can be replicated to best serve other topics of public policy at the local, state, and even federal levels. As the current federal administration is laser-focused on environmental justice, including the Justice40 initiative⁵ for example, this article is very timely.

1. Jaime Alison Lee, *Turning Participation Into Power: A Water Justice Case Study*, 28 GEO. MASON L. REV. 1003 (2022).
2. Robert D. Bullard, (2008) *Environmental Justice in the 21st Century*, 49 PHYLON 151 (2001), https://uwosh.edu/sirt/wp-content/uploads/sites/86/2017/08/Bullard_Environmental-Justice-in-the-21st-Century.pdf.
3. S.W. Network for Env't. and Econ. Just., *Jemez Principles for Democratic Organizing* (1996) Jemez, New Mexico, <https://www.ejnet.org/ej/jemez.pdf>.

4. LEAH THOMAS, *THE INTERSECTIONAL ENVIRONMENTALIST: HOW TO DISMANTLE SYSTEMS OF OPPRESSION TO PROTECT PEOPLE + PLANET* (2022).
5. U.S. White House. (2021) *The Path to Achieving Justice40*, <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/>.

C O M M E N T

DUAL-PURPOSE OUTREACH TO ENHANCE PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING

by Chandra T. Taylor-Sawyer

Chandra T. Taylor-Sawyer is Senior Attorney and Environmental Justice Initiative Leader at the Southern Environmental Law Center

In my work at the Southern Environmental Law Center (SELC), I often face the question of how to do everything possible during the policymaking process to involve the people who are most harmed by environmental contamination. I have practiced in this area since 2006, and I have learned it helps to take a step back and make sure we are thinking about the problem we want to fix. In this case, we are talking about environmental injustice and the disproportionate burden of environmental harm on people of color and people who do not have a lot of money. The environmental contamination in these communities is the symptom of the problem, and the bigger problem is the legacy of economic and political disempowerment of communities of color that have persisted for generations.¹ SELC has dedicated a lot of time to addressing the problem and its symptoms in partnership with community groups that are experiencing environmental harm.² We bring with us the entire tool kit of laws, regulations, and policies that could possibly prevent or lessen these burdens.

There are ways in which citizen-driven and government-driven efforts toward greater public participation

can help work on the symptoms. For example, SELC worked with a partner group and community against a pipeline, in an effort to protect the community's aquifer, as well as the use and enjoyment of their historic and predominantly African-American neighborhoods.³ This 49-mile crude oil pipeline, called the Byhalia Pipeline, could have contaminated drinking water for one million Memphis/Shelby County residents.⁴ The citizen-driven public participation at the local government level against this project was led by a very dedicated base of activists who became environmental advocates because they cared about their community and were opposed to this project⁵—vigorous citizen-driven public participation can be expected more when there is a specific project with known threats affecting a particular place.

However, we also need to look at the bigger picture—the problem of economic and political disempowerment rooted in a long history of segregation of communities of color⁶ and how government-driven efforts for enhanced public participation can be better implemented. To do this, we have looked to the guidance and executive orders that outline how the federal government is addressing these issues. For example, Executive Order No. 12898⁷ is focused on the fair treatment and meaningful involvement of communities of color and low-wealth communities. The meaningful involvement part is so hard to achieve—or it seems

Editors' Note: Chandra Taylor-Sawyer's Comment is based on an edited transcription of her remarks at the Environmental Law and Policy Annual Review conference. See 2021-2022 Environmental Law and Policy Annual Review Conference, available at <https://www.eli.org/environmental-law-policy-annual-review/2021-2022-ELPAR-conference>.

1. See, e.g., Henry M. Lane et al., *Historical Redlining is Associated With Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENV'T. SCI. & TECH. LETTERS 345, 345 (2022), <https://pubs.acs.org/doi/pdf/10.1021/acs.estlett.1c01012>; Daniel Cusick, *Past Racist "Redlining" Practices Increased Climate Burden on Minority Neighborhoods*, E&E NEWS (Jan. 21, 2020), <https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/>; VT. L. SCHOOL ENV'T JUSTICE CLINIC ET AL., *FEDERAL DERELICTION OF DUTY: ENVIRONMENTAL RACISM UNDER COVID-19* (2021), <https://www.vermontlaw.edu/sites/default/files/2021-08/Federal-Dereliction-of-Duty-Full-Report.pdf>.
2. *Environmental Justice: Troubling the Water*, S. ENV'T L. CTR., <https://www.southernenvironment.org/topic/environmental-justice-troubling-the-water/> (last visited May 25, 2022).

3. *Victory for Southwest Memphis: Byhalia Pipeline Is Done*, S. ENV'T L. CTR. (July 2, 2021), <https://www.southernenvironment.org/news/victory-for-southwest-memphis-byhalia-pipeline-is-done/>.
4. *Hydrogeologic Report Warns of Pipeline Threats to Memphis Drinking Water Source*, S. ENV'T L. CTR. (Feb. 24, 2021) (citing Douglas Cosler, *Evaluation of the Risk of Contamination of the Memphis Sand Aquifer by the Proposed Byhalia Connection Pipeline* (Feb. 1, 2021)), <https://www.southernenvironment.org/news/hydrogeologic-report-warns-of-pipeline-threats-to-memphis-drinking-water-source/>.
5. See STOP THE PIPELINE, <https://www.memphisgap.org/home> (last visited May 25, 2022); PROTECT OUR AQUIFER, <https://www.protectouraquifer.org/> (last visited May 25, 2022).
6. See Shannon Roesler, *Racial Segregation and Environmental Justice*, 51 ELR 10773, 10773 (Sept. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929124.
7. Exec. Order No. 12898, 3 C.F.R. §859 (1995).

difficult when we look at broader policies to address political disempowerment and economic disempowerment.

Prof. Jaime Lee's idea of constituent empowerment is one that I'm very excited to learn has been implemented in Baltimore, and I am excited to think about how it would be implemented across varying public participation processes. By way of example, in North Carolina, where I live and work, our government has a new environmental justice and climate and transportation executive order that was issued in January 2022,⁸ implementation of which has included the use of a private consulting firm to request in-depth feedback from the public. We also have a task force that focuses on the state's response to COVID-19 and how it has had disproportionate harm on low-wealth communities and communities of color.⁹ That Task Force employs some combinations of more traditional methods of public hearings, updating the process via phone and virtual platform convenings.

As an advocate, part of my role is to emphasize the importance of getting public comments and community feedback in the administrative record. I am always looking out for opportunities to provide input to citizen advisory groups that are asking questions about how to fix this

problem—but not everyone is aware of the opportunities to provide feedback.

When governmental entities go out and talk to communities, or provide social services or benefits, the opportunity exists to ask more questions. General questions could be asked about how communities would like to prioritize funding to assist on environmental issues or types of additional environmental amenities. A dual-duty approach is compelling. Asking governmental entities to start thinking about how they can get more feedback from communities of color and low-wealth communities—communities that data show are known to have an additional burden from years¹⁰—holds a lot of promise. This approach helps our governmental entities, in addition to permit applicants, by asking more questions of the people who would be most impacted by a particular activity. And, asking for that information earlier would save permit applicants money and time as well.

These are two ways in which Professor Lee's model can help solve the actual problem and enable us to spend less time on the symptoms of the problem down the road. It would assist in getting more information earlier in the decisionmaking process.

8. North Carolina's Transformation to a Clean, Equitable Economy, Exec. Order No. 246, 36 N.C. Reg. 1287 (Feb. 1, 2022), <https://files.nc.gov/oah/documents/files/Volume-36-Issue-15-February-1-2022.pdf?VersionId=wUeoomVhFzLfZOLkPFD.lIdfLITgxxTMv>.

9. Addressing the Disproportionate Impact of COVID-19 on Communities of Color, Exec. Order No. 143, 35 N.C. Reg. 10, 13 (July 1, 2020), <https://files.nc.gov/oah/documents/files/Volume-35-Issue-01-July-1-2020.pdf?VersionId=URkLBb1ngPC6TyOGyRTot1vzjdM2BZvJ> (creating the Andrea Harris Social, Economic, Environmental, and Health Equity Task Force).

10. See, e.g., Marccus D. Hendricks & Shannon Van Zandr, *Unequal Protection Revisited: Planning for Environmental Justice, Hazard Vulnerability, and Critical Infrastructure in Communities of Color*, 14 ENV'T JUST. 87 (2021); Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>; Roesler, *supra* note 6, at 1076-77.

ARTICLE

CAREMARK AND ESG, PERFECT TOGETHER: A PRACTICAL APPROACH TO IMPLEMENTING AN INTEGRATED, EFFICIENT, AND EFFECTIVE CAREMARK AND EESG STRATEGY

by Leo E. Strine, Jr., Kirby M. Smith, and Reilly S. Steel

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I. Introduction

With concerns about climate change, growing economic insecurity and inequality, and the resiliency of critical supply chains has come renewed concern about whether business entities conduct themselves in a manner that is consistent with society's best interests. This concern manifests in a demand that corporations respect the best interests of society and all corporate stakeholders, not solely stockholders.¹ The buzz abbreviation for this is "environmental, social, and governance" (ESG), or as one of us has called it, "EESG."²

Many corporate fiduciaries believe that companies are most likely to create sustainable profits if they act fairly

toward their employees, customers, creditors, the environment, and the communities the company's operations affect.³ However, boards and management teams struggle to situate EESG within existing reporting and committee frameworks and figure out how to meet the demand for greater accountability to society while not falling short in other areas.

Here, we propose a way of thinking about EESG that promotes ethical, fair, and sustainable behavior without heaping additional work on already-stretched employees and directors. To develop the framework for this proposal, we relate the concept of EESG to the preexisting compliance duty of corporations. This long-standing duty, associated with the Delaware Court of Chancery's landmark decision in *In re Caremark International Inc. Derivative Litigation*⁴ but rooted in the much older requirement that corporations conduct only lawful business by lawful means,⁵ overlaps with and should be integrated into companies' decisions to hold themselves to even higher levels of responsibility.

This Article proceeds in three parts. Part II observes that corporate law's first principle is that a corporation must

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Authors' Note: The authors are grateful to Xavier Briggs, Jeff Gordon, Amelia Miazad, Elizabeth Pollman, and Eric Talley for their insightful comments.

1. See *infra* Part III.
2. The extra "E" is for employees—a crucial but oftentimes missing component in the ESG discussion. See Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism* 6 (Roosevelt Inst., Working Paper No. 202008, 2020), https://rooseveltinstitute.org/wp-content/uploads/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [<https://perma.cc/69BL-P6MD>].

3. See, e.g., John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1409 (2019); Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.BlackRock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/NT9H-PKKZ>] ("To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.").
4. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).
5. Leo E. Strine Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L. REV. 629, 649-51 (2010).

conduct lawful business by lawful means. From this, the Article explains that if a company strives to be an above-average corporate citizen, then it will also be much more likely to simultaneously meet its minimum legal and regulatory duties. In this way, EESG and ordinary compliance should be seen as interconnected and be accomplished in an integrated one-step process. Part III then sketches a high-level framework that allows directors and managers to situate EESG initiatives within their existing compliance and regulatory program. Finally, Part IV advises corporate leaders to update and integrate existing regulatory reporting and compliance processes and EESG standards, share results with stakeholders, and simultaneously fulfill their duty to monitor the corporate enterprise.

II. The Origins of Today's Intense Focus on EESG

For generations, the prevailing view among many business leaders, institutional investors, and law and economics academics was that corporate law should primarily serve the interests of companies' stockholders, an ideology known as "shareholder primacy."⁶

However, as a response to societal concerns regarding shareholder primacy, many business leaders, institutional investors, and policymakers have gravitated toward the view that corporations should serve the interests of all their stakeholders, not just those who own the company's stock.

Additionally, the economic and human crisis caused by COVID-19 will only boost calls for greater corporate regard for stakeholders like workers, ordinary-course suppliers, and the communities in which companies operate.

The demand for increased attention to stakeholders is clear. But too often lost in this conversation is the first principle of corporate law: corporations may only conduct lawful business by lawful means.⁷

Precisely because of this statutory mandate, corporate fiduciaries are imbued with substantial discretion to manage their corporations in an "other-regarding" manner.⁸ Like a human citizen, corporations can consciously choose to avoid ambiguous grey areas of conduct that risk violating the law.⁹

This first principle also helps illustrate our central point: a corporation's plan to fulfill its legal compliance obliga-

tions should not be viewed as separate and distinct from the corporation's plan to operate in a sustainable, ethical manner with fair regard for all the corporation's stakeholders.

In the landmark *Caremark* decision, Chancellor William Allen articulated the fiduciary duty that corporate directors owed to honor this first principle of statutory corporate law¹⁰:

[C]orporate boards may [not] satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.¹¹

Caremark and other developments stimulated focus on corporations adopting sound procedures to ensure lawful business conduct. Although liability under *Caremark* is hard to prove,¹² scholars have viewed the case as having enormous value in encouraging more intensive diligence in compliance,¹³ amplified by substantial government penalties on corporations that run afoul of the law with weak compliance programs. And recent *Caremark* decisions denying the defendants' motions to dismiss have resulted in renewed attention to directors' oversight obligations.¹⁴

In response to major accounting scandals and a market-shaking financial crisis within a decade, federal law also substantially enhanced the requirements for corporations to address financial risk and seat independent board members as the exclusive members of committees relevant to compliance.¹⁵

This period coincided with predominance of institutional investors over human stockholders, which facilitated collective action to change corporate management and strategy. Many investor initiatives have focused on making companies more, rather than less, responsive to immediate market pressures and paid little to no attention to issues like risk management.¹⁶ And some investors have pushed

6. Shareholder primacy dictates that corporations should, within the limits of law and ethics, focus on the best interests of their stockholders. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32; William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 268-70 (1992).

7. DEL. CODE ANN. tit. 8, §101(b) (2020) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes. . . ."); MODEL BUS. CORP. ACT §3.01(a) (AM. BAR ASS'N 2016) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

8. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738, 761 (2005).

9. See Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 710-11 (2019).

10. In re *Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

11. *Id.* at 970.

12. See, e.g., Guttman v. Huang, 823 A.2d 492, 505-06 (Del. Ch. 2003).

13. Donald C. Langevoort, Commentary, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 728 (2018); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 967 (2009).

14. See *Marchand v. Barnhill*, 212 A.3d 805, 807-09 (Del. 2019); In re *Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *10 (Del. Ch. Oct. 1, 2019); *Hughes v. Xiaoming Hu*, No. 2019-0112, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020).

15. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §301, 116 Stat. 745, 775-76 (codified as 15 U.S.C. §78j-1 (2018)).

16. See KOSMAS PAPADOPOULOS ET AL., U.S. BOARD STUDY: BOARD ACCOUNTABILITY PRACTICES REVIEW 5 (2018), <https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf> [https://perma.cc/E374-BC8V] (documenting the changes in governance at S&P Composite 1500 companies from 2009 to 2017).

companies to deliver immediate returns or risk being ousted from office or otherwise publicly embarrassed.¹⁷

This new dynamic has led naturally to an intense corporate focus on pleasing stockholders, even if doing so harms other key stakeholders such as creditors and, most importantly, employees. During this period, the traditional gainsharing from increased corporate profitability and productivity between employees and stockholders has markedly tilted toward stockholders and top corporate management.¹⁸ This tilt has contributed to greater inequality and growing economic insecurity and dissatisfaction.¹⁹ Likewise, some observers have expressed concern that the avid pursuit of stock market gains has led corporations to be insensitive (or worse) to the long-term consequences of their conduct for the planet's health and the health and welfare of their consumers.²⁰

One consequence of inequality and economic insecurity has been an increasing sense that corporations need to do more than the legal minimum and that the so-called stockholder wealth maximization principle is legally erroneous and socially harmful. Even mainstream institutional investors recognize that most investors whose money the institutions manage are human beings who invest for long-term objectives like retirement.²¹

The increased salience of so-called ESG, today's word for yesterday's corporate social responsibility, is one manifestation of this. Recognizing developments that highlight employees as well as environmental and social concerns, we will use the term "EESG" to incorporate the interests of employees into the ESG framework instead of just "burying them in the S."²²

In reaction to this EESG movement, corporations have taken action to adopt policies and practices reflecting their commitment to sustainable governance and ethical treat-

ment of stakeholders.²³ However, managers and directors are struggling with how to implement a commitment to good EESG practices, along with all their preexisting legal obligations and business requirements. If EESG just becomes another add-on to a list of already difficult-to-accomplish checklist items, the proponents of greater corporate social responsibility, i.e., EESG, will fail to achieve their worthy purpose. We next turn to the task of avoiding this wasteful and harmful outcome.

III. Toward an Integrated, Efficient, and Effective Approach to Corporate Compliance and EESG

We are optimistic about EESG for two reasons. First, the demand that corporations treat stakeholders and society with respect is a fundamentally critical function of social institutions.²⁴ Second, because EESG is intrinsic to good corporate management, there is good news: there is an effective method for corporations to embrace quality EESG standards that does not simply pile EESG responsibilities on top of existing duties of managers and the board. This method involves the recognition that the company's compliance and EESG plans should be identical, and that the work of implementing that singular plan should be allocated across company management and across the board's committee structure itself. That is, if a corporation already maintains a thorough and thoughtful compliance policy, the corporation has a strong start toward a solid EESG policy.

To grasp why, focus on the traditional "E" in ESG: the environment. Without minimizing the importance of carbon emissions, let's not lose sight of the fact that there are other sorts of dangerous emissions (e.g., particulate matter), there are other sorts of harmful excess (think plastic), and there will be evolving standards as new innovations result in unanticipated consequences. Since before *Caremark*, environmental concerns have been a core focus of corporate compliance programs.²⁵ The growing focus on climate change and other negative effects of intensive economic activity on the environment has manifested itself in litigation under *Caremark*.²⁶ Corporate compliance programs that effectively addressed these environmental risks have thus better-positioned their companies to confront

17. See Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and Gartenberg at Twenty-Five*, 61 VAND. L. REV. 497, 534 n.228 (2008).

18. We are not arguing in this Article that this reduction in gainsharing can be causally attributed to the interaction of greater company responsiveness to stockholders and a simultaneous weakening of worker leverage.

19. See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer, trans., 2014) (documenting growing inequality throughout the United States and other OECD countries). Growing inequality has resulted, in part, in increased economic instability. See generally Austin Nichols & Philipp Rehm, *Income Risk in 30 Countries*, 60 REV. INCOME & WEALTH S98 (2014) (documenting the rise of economic insecurity in America). research.org/global/2017/06/05/2-public-divided-on-prospects-for-the-next-generation [https://perma.cc/7XE4-TJR7].

20. See, e.g., Henry M. Paulson Jr., *Short-Termism and the Threat From Climate Change*, MCKINSEY & CO. (Apr. 1, 2015), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/short-termism-and-the-threat-from-climate-change> [https://perma.cc/J8A4-GJF3]; see Jamie Dimon & Warren E. Buffett, *Short-Termism Is Harming the Economy*, WALL ST. J.: OPINION (June 6, 2018, 10:00 PM), <https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801> [https://perma.cc/Z2SM-QP64].

21. BLACKROCK, *BLACKROCK INVESTMENT STEWARDSHIP: 2018 ANNUAL REPORT 1* (2018), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2018.pdf> [https://perma.cc/G4YJ-R3KZ].

22. Some commentators and market participants have lumped employees into the "social" prong of ESG. See, e.g., *What Is the "S" in ESG?*, S&P GLOB. (Feb. 24, 2020), <https://www.spglobal.com/en/research-insights/articles/what-is-the-s-in-esg> [https://perma.cc/64SE-LTXF].

23. See, e.g., Brad Smith, *Microsoft Will Be Carbon Negative by 2030*, MICROSOFT: OFF. MICROSOFT BLOG (Jan. 16, 2020), <https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030> [https://perma.cc/PD7X-632V] (announcing that Microsoft will decrease its carbon emission to below zero by 2030).

24. See generally COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* (2018) (laying out a stakeholder vision of business, with a focus on the corporate commitment to both customers and communities).

25. See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 140-61 (2013).

26. See *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 50 (Del. 2017); *Inter-Mktg. Grp. USA, Inc. ex rel. Plains All Am. Pipeline, L.P. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at **10-15 (Del. Ch. Jan. 31, 2020).

emerging demands to meet the “environmental” prong of EESG for action going beyond the legal minimum.

The environmental example is not isolated. For instance, to the extent that EESG embraces a responsibility toward company customers, it overlaps with compliance. Many *Caremark* cases and regulatory actions have focused on corporations that allegedly exposed consumers to undue harm, financial or otherwise.²⁷ Similarly, the responsibility to provide employees with safe working conditions,²⁸ an environment that is tolerant toward diverse beliefs and backgrounds,²⁹ and fair wages and benefits,³⁰ overlaps with important compliance duties. As with other EESG factors, the employee factor has also been a focus of *Caremark* cases and actions by regulators.³¹

Finally, to the extent that good EESG could be thought to involve yet another E, ethics and the overall commitment to conducting business with high integrity and an other-regarding spirit, EESG also overlaps with compliance. And as with the previous EESG factors, perceived ethical lapses have often prompted *Caremark* suits.³²

The overlap between compliance and EESG is understandable and unremarkable when considered from this perspective. Perhaps the most important foundational question corporate directors and managers need to be able to answer to be an effective fiduciary is: “How does the company make money?”³³

This simple question is powerful because it forces directors to examine closely what the company does that results in the ultimate profitable sale of a product or service. What will naturally flow from asking this core question is an understanding that the legal regimes likely to be most salient for the company are identical to the EESG issues that have the most salience. Why? Because society learns from experience, and the law is likely to have the most relevance to the company in those areas where the company has the most impact on the lives of its stakeholders, be they the company’s workers, its consumers, or the communities in which its operations have a material impact. So too will the pressures on particular companies to implement more ambitious EESG standards and practices likely coincide with the areas of company operations that have the most impact on particular stakeholders and society.

Therefore, by analyzing in a rigorous way how a company makes money, and the impact that has on others, directors will be well-positioned to best shape an effective compliance system and an effective EESG plan. If directors seek to go beyond the legal minimum and treat all the corporation’s stakeholders and communities of impact in an ethical and considerate manner, the corporation minimizes the risk of breaking the law. By trying to engage in EESG best practices, the corporation will have a margin of error that keeps it largely out of the legal grey and create a reputation that will serve the company well with its stakeholders and regulators when there is a situational lapse.

Unfortunately, for too many companies, their existing board compliance structures are not well thought-out. This may result in an imbalanced approach to legal compliance and risk management that hazards failing to identify and address key areas where the company could negatively affect stakeholders and society—and run afoul of the law.

IV. A Practical Way to Think About Organizing and Implementing an Integrative Compliance/EESG Strategy

For a public company seeking to reorganize its compliance and EESG functions, the most rational starting point involves building on the thought process discussed. The company’s board, management, and advisors should identify how the company makes money and the affected stakeholders.

As to material business lines, top management must address the relevant regulatory regimes that constrain the company’s conduct, consider the reasons why that is so, and identify the stakeholders whose interests the law protects. Relatedly, managers and boards should undertake the same inquiry in addressing reputable EESG criteria and their application. The results of these inquiries should then be integrated. The concerns addressed by law and EESG standards will tend to track.

This is an important point in the ongoing discussion about EESG reporting. Regulatory systems already require disclosure that is essential to a quality EESG monitoring and reporting system. And in the instances in which governments do not formally mandate reporting but still set metes and bounds for appropriate conduct, trade and industry groups often coalesce around best practices for monitoring and reporting.

However, the proliferation of different approaches to EESG reporting cannot be ignored.³⁴ It is inefficient, encourages greenwashing³⁵ and gamesmanship, and threatens to engage companies more in the rhetoric of EESG

27. See, e.g., *Marchand v. Barnhill*, 212 A.3d 805, 807 (Del. 2019).

28. See generally Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (ensuring safe working conditions).

29. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting discrimination on the basis of race, color, religion, sex, or national origin).

30. See generally Fair Labor Standards Act of 1938, 29 U.S.C. §§201-262 (2018) (establishing fair labor standards).

31. See *In re Am. Apparel, Inc. 2014 Derivative S’holder Litig.*, No. CV-14-05230, 2015 WL 12724070, at **2-4, 16-17 (C.D. Cal. Apr. 28, 2015); *In re FedEx Corp. S’holder Derivative Litig.*, No. 08-2284, 2009 WL 10700362, at *11 (W.D. Tenn. July 30, 2009).

32. See, e.g., *In re McKesson Corp. Derivative Litig.*, No. 17-cv-01850, 2018 WL 2197548, at **1, 7-12 (N.D. Cal. May 14, 2018) (*Caremark* claim based on alleged maximization of “short-term profits over safety with respect to sales and distribution of prescription opioids and fail[ure] . . . to [properly] implement a Controlled Substance Monitoring Program”).

33. Leo E. Strine Jr., *Warning—Potential Danger Ahead!*, DIRS. & BDS., Third Quarter 2004, at 25, 29.

34. See Jill Fisch, *The Uncertain Stewardship Potential of Index Funds*, in GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press, forthcoming), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3141&context=faculty_scholarship [<https://perma.cc/T8TS-269HJ>].

35. Richard Dahl, *Green Washing: Do You Know What You’re Buying?*, 118 ENV’T HEALTH PERSPS. A246, A247 (2010).

than the logistics.³⁶ Until this proliferation is alleviated, however, the only rational way to proceed is for the company to exercise judgment and to carefully select the most relevant and credible EESG standard. Management should also be prepared to explain the selection to its stakeholders.

The critical next step is determining what expertise is needed to implement the company's compliance and EESG plan, the allocation of responsibility among the company's management team, and the organization of the board to oversee management's implementation of the adopted plan.

Diversity is rightly a salient topic in the conversation about corporate citizenship. To be clear, we are not referring to the idea that having a board and management team with diverse socioeconomic, racial, ethnic, national, and gender backgrounds might enhance the company's ability to look at key issues from multiple perspectives. That very well may be the case.³⁷

But for present purposes, we are referring to the more mundane idea that the world is complex and diverse expertise is essential. In corporations whose products involve complex science and safety considerations, it is vital to have employees with the skill set and experience to enable the company not only to develop and market new products, but to do so in a manner that is safe and compliant with regulatory regimes.

The problem, however, is that the same kind of sensible deployment of expertise has not characterized how American corporations have addressed EESG. It remains the case that, for a large percentage of American public companies, the audit committee is the corporate committee singularly charged with approving and monitoring the corporation's compliance.³⁸ This is problematic for two reasons: (1) audit committees' core responsibilities in accounting and financial compliance, prudence, and integrity have grown even more challenging, complex, and time-consuming; and (2) corporations rarely face risk and compliance issues only in the financial arena, and often have issues in areas where specialized expertise of a non-financial nature is essential to effective management.

The interactive effect is easy to explain. With increased complexity in accounting and finance has come requirements that audit committees be comprised solely of directors who consider themselves financially expert.³⁹ Directors whose background is not in finance, but who

have other relevant talents, may be excluded from qualifying for those committees.

The core duties of an audit committee mean that the CFO, the head of internal audit, and other top finance officers will not just want, but need, a lot of time with the audit committee. There is an obvious danger that the audit committee will not have enough time to responsibly consider and address non-financial risks.

And the reality is that it is exceedingly unlikely that the skill set necessary to address the company's other non-financial risks and compliance issues is identical to that sought in audit committee members. More likely, corporations would want directors with substantial industry expertise in other relevant subjects.

The time crunch imposed by core financial and accounting duties means that the access that non-financial officers will get to the audit committee will be carefully rationed. It is natural to expect that the CFO and auditors will have an agenda of items to accomplish at each audit committee meeting. Other officers will have to fight for time.

The resulting allocation of talent and time is suboptimal. By putting a critical function in a committee that cannot perform it effectively, the board risks missing issues, limits communication between the directors and a more diverse set of company officers, and is likely to be spreading its work across its members in a highly inequitable way.

It is also unlikely that the corporation organizes its management-level approach to risk and compliance by giving its accountants responsibility for compliance with non-financial regulatory requirements, such as environmental rules. Much more likely, the corporation has developed methods to balance the competing values in specialization and generalization and has developed some industry-specific structures to address non-financial risk.

For these reasons, it seems much more effective and efficient to make sure that committee-level responsibility for risk management and compliance is thoughtfully allocated among the board's committees, rather than solely vested in the audit committee. With such a thoughtful allocation should come an alignment of officer-to-board-level reporting relationships.

Specifically, this allocation facilitates management-to-director communication on a regular basis on all the industry-relevant areas of compliance. Such a structure also maximizes the ability of a company to comprise a board with directors having the full range of talents the company's business needs, because directors can be seated and given roles that make sense for them.

This topic is an urgent one to date, as there has been a noticeable trend toward entrusting the nominating and corporate governance committee with responsibility for approving and overseeing the implementation of the company's EESG policies.⁴⁰ Rather than integrate EESG into the corporation's compliance oversight process,

36. See Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1826-27 (2008); Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1268-69 (2009). See SUSTAINABILITY ACCT. STANDARDS BD., *THE STATE OF DISCLOSURE 21* (2017), https://www.sasb.org/wp-content/uploads/2019/08/StateofDisclosure-Report-web11271.pdf?__hstc=105637852.135a89045bd6ea85f68591478e99eb09.1553809423920.1570492048390.1570494269935.17&__hssc=105637852.1.1570494269935 [https://perma.cc/4TPC-SAAF].

37. See, e.g., David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003).

38. See NAT'L ASS'N OF CORP. DIRS., 2019-2020 NACD PUBLIC COMPANY GOVERNANCE SURVEY 18 (2020), <https://corpgov.law.harvard.edu/wp-content/uploads/2020/01/2019-2020-Public-Company-Survey.pdf> [https://perma.cc/7QFF-4B36].

39. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §407, 116 Stat. 745, 790 (codified as 15 U.S.C. §7265 (2018)); see also NYSE LISTED COMPANY

MANUAL §303A.07(a) cmt. (2021); NASDAQ STOCK MARKET RULEBOOK §5605(c)(2)(A) (2021).

40. Nat'l Ass'n of Corp. Dirs., *supra* note 38, at 27.

most companies seem to be keeping primary responsibility for compliance in the audit committee, while putting EESG in another committee or on the whole board, splitting up what ought to be one integrated approach to inextricably linked goals. This is wasteful, risks missing key issues, and will be less effective in creating an ethical corporate culture.

To organize the EESG function of the corporation, the board should allocate responsibility to committees in a sensible way. This allocation of responsibility should track the skills needed to do the task well and mirror the way it is allocated at the management level.

The board's committee structure should be informed by the process outlined above, and when the fundamental compliance and EESG concerns are lined up, committees should be formed correspondingly based on board member expertise and functional purpose. For most companies,⁴¹ this will necessitate creating at least one committee that has risk management, compliance, and EESG functions.

Generally, it is important not to proliferate committees. Rather, in addition to considering whether to establish an EESG committee, what also needs to be revisited is the function of some of the mandated committees, such as the compensation committee. Compensation committees have focused obsessively on the compensation of top management. They have not been focused on the company's over-

all human capital strategy, or whether it would create more value to focus more on good pay for the many rather than the few at the top. But, there is an increased demand for corporations to give greater consideration to these areas.⁴²

Skeptics might contend that it is essential that the entire board be involved in compliance, risk management, and EESG. Yes, we agree, but there is an advantage to specialization. Specialization allows boards to use their management's diverse talents and limited time effectively to make sure that they identify all key issues. The result is a board that is better able to develop and implement an overall approach that is most effective.

V. Conclusion

With careful thought, corporate leaders can position their companies to better identify and address known and emerging risks; adopt goals for responsible corporate behavior toward workers, other stakeholders, and society; and establish standards and policies designed to promote and measure the attainment of both EESG goals and legal compliance. This will not be easy, but it is an exercise that is long overdue for most companies and will have long-lasting value if it becomes a regular process of serious thought about how the company makes money and how it affects the world in doing so.

41. See, e.g., Ashland Glob. Holdings Inc., Proxy Statement (Schedule 14A) 33 (Dec. 9, 2019).

42. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 5 (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/P4HG-BNMJ>].

C O M M E N T

BOARD OVERSIGHT IN ESG—EVOLVING TRENDS IN THE ERA OF INCREASING DISCLOSURE REQUIREMENTS

by Margaret E. Peloso and Chloe E. Schmergel

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In *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark ESG Strategy*, Leo Strine and co-authors frame a board's duty of oversight for environmental, social, and governance (ESG) issues in light of the common-law duties articulated under *Caremark*.¹ The landmark *Caremark* decision articulated that corporations and their directors have a duty to implement and monitor compliance programs to ensure that the company honors its legal obligations.² However, a number of recent proposed rules from the U.S. Securities and Exchange Commission (SEC) signal that ESG in the United States has reached an inflection point—moving from discretionary actions to regulatory ones. This Comment uses the SEC's recent proposal, The Enhancement and Standardization of Climate Related Disclosures for Investors (the SEC Climate Proposal),³ to examine how the shift to regulatory ESG may impact the board's oversight of ESG issues, potentially rendering Strine et al.'s *Caremark* framework obsolete.

I. What Is ESG and Why Does It Matter for Corporate Boards?

ESG is a widely used acronym that stands for the phrase “environmental, social, and governance.” Over the last few years, the term has been broadly used to refer to a range of factors that have traditionally been considered noneconomic risks, but are increasingly recognized to present potentially material risks to public companies.

Increasingly, large investors and proxy advisory services have promoted heightened ESG-related oversight by corporate boards. In recent years, major institutional investors and both proxy advisory services (ISS and Glass Lewis) announced policies articulating their prioritization of certain ESG matters.⁴ Such policies often lead investors to vote in favor of shareholder proposals or against key directors where the proxy advisor or institutional investor feels that a company and its board have not been sufficiently attentive to ESG matters. For example, in articulating its belief that “robust disclosure is essential for investors to effectively gauge the impact of companies’ business practices and strategic planning related to [environmental and social] risks and opportunities,” BlackRock asks companies to, among other things, demonstrate their approach to human capital management and disclose their business plans related to the transition to global net zero.⁵ According to BlackRock’s proxy voting guidelines, if shareholders propose climate plans aligned with BlackRock’s expectations, it may then vote in favor of such proposals.⁶

Companies have faced growing pressure from their shareholders regarding ESG matters in the form of shareholder proposals, as well. Shareholder proposals regarding ESG issues have become much more prevalent in recent years, with 530 environmental and social-related proposals being filed at U.S. companies in 2021, a record amount,

1. Leo E. Strine, Jr. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark ESG Strategy*, 106 IOWA L. REV. 1885 (2021).
2. *In re Caremark*, 698 A.2d 959, 970 (Del. Ch. Sept. 25, 1996).
3. Release No. 33-11042, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) [hereinafter Proposal].

4. See generally BlackRock, *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities* (Dec. 2021), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>; Cyrus Taraporevala, President & CEO of State Street Global Advisors, *CEO's Letter on Our 2022 Voting Agenda* (Jan. 2022), <https://www.ssga.com/us/en/intermediary/ic/insights/ceo-letter-2022-proxy-voting-agenda>; Vanguard Funds, *Global Investment Stewardship Principles* (Jan. 2022), <https://global.vanguard.com/documents/global-investment-stewardship-principles.pdf>; Glass Lewis, *2022 Policy Guidelines* (Jan. 2022), <https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf>.
5. BlackRock, *supra* note 3, at 16-18.
6. *Id.*

and 530 being filed by just March 2022.⁷ Voting support has also increased for these proposals, with social and environmental proposals receiving average support of 31.4% and 39 proposals receiving majority support in 2021, up from 21 majority-supported proposals in 2020.⁸

Corporate boards are increasingly⁹ choosing to focus on ESG for three reasons: (1) to capture ESG-focused investors and to appease the aforementioned shareholder demands; (2) to implement risk management/avoidance of adverse ESG events (i.e., to protect shareholder value); and (3) to pursue ESG-related opportunities (i.e., to create value). However, as ESG has grown in popularity, it has also arguably grown past usefulness as a concept due to the ever-expanding category of risks swept under the ESG umbrella¹⁰ and inconsistent methods of measuring and evaluating ESG performance.¹¹

Though the literature on ESG and value creation is somewhat limited, it tends to show that the ESG-value creation link only exists when companies pursue specific elements of ESG that are aligned to their core strategy.¹² However, the ability to generate empirical evidence clearly linking ESG writ-large to corporate value creation is limited because of inconsistencies and lack of precision in how ESG data are measured and reported. For example, in a report to the SEC Asset Management Advisory Committee by its ESG Subcommittee in May 2020, the Subcommittee stated that there was no consistent framework to determine how managers integrate ESG into their investment processes, and as a consequence, they could not compare corporate performance as it relates to ESG.¹³

Capital flows into sustainable funds have grown from 30 billion U.S. dollars in 2016 to 360 billion U.S. dollars in 2020, rising every year.¹⁴ Much of this ESG investing is guided, at least in part, by reliance on external ESG rating systems, including the MSCI, Sustainalytics, and Bloomberg ESG. However, differences between these rating systems and the vast array of measures that can be used in constructing an ESG score lead to significant differences in their scoring of individual companies. Research investigating the divergence of ESG ratings based on data from six prominent ESG rating agencies found that the correlation between ESG ratings ranged from 38% to 71%, with an average of 54%.¹⁵ Credit agency ratings, on the other hand, were correlated at 99%.¹⁶

Corporate boards have largely attempted to address their ESG-related concerns and the vast array of shareholders' ESG demands in broad strokes. However, it is clear that if companies wish to create value in taking up the ESG mantle, the approach to ESG must be more nuanced and strategically focused on company-specific risks.

II. The Pivot to Regulatory ESG and Its Impact on Board Oversight

As ESG issues have risen on the investor agenda in the last few years, corporate boards have addressed them using a variety of practices. As noted by Strine et al., some corporate boards have entrusted ESG duties to their nominating and corporate governance committees, some to their audit committees, and others have delegated the issues to the whole board, "bifurcating, trifurcating, or otherwise splitting up" these duties.¹⁷ Indeed, a recent survey of global corporate leaders found that 43% of companies house primary oversight of ESG with the full board, 30% with their nominating and corporate governance committees, and 15% with ESG or sustainability committees.¹⁸ By and large, ESG governance to date has been shaped by specific investor pressures in certain industries, and is far from uniform. However, 2022 marks a potentially pivotal year for ESG governance in the United States, as a suite of proposals from the SEC requires such granular detail on an issuer's specific management and governance of climate change that issuers may feel compelled to develop robust governance and oversight of such matters regardless of whether climate risks are significant to generating value or managing risks for a particular company.

For example, the SEC's Climate Proposal, proposed in March 2022, contains a set of specific disclosure requirements related to a board's oversight of climate change risks.

7. ISS, 2022 PROXY SEASON REVIEW: UNITED STATES—ENVIRONMENTAL & SOCIAL ISSUES 4 (2022).

8. *Id.*

9. A survey of 590 corporate directors conducted in 2022 on how boards are addressing ESG found that only 4% of respondents rarely or never discuss ESG in the boardroom, which is up from 20% pre-pandemic. DILIGENT INSTITUTE & SPENCER STUART, SUSTAINABILITY IN THE SPOTLIGHT: BOARD ESG OVERSIGHT AND STRATEGY 12 (2022).

10. ESG has been construed to include a wide and diverse array of topics including, but not limited to, climate change, diversity, privacy, workplace relationships, cybersecurity, supply chain concerns, and human rights. See Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821 (2021); see also Stavros Gadinis & Amelia Miazad, *Corporate Law & Social Risk*, 73 VAND. L. REV. 1401, 1414-15 (2020).

11. See Rose, *supra* note 9, at 1825 (stating that ESG performance ratings are inconsistent and difficult to decipher because the variety of ESG issues are factored into a rating, how performance on those issues is measured, and the weight each issue is given are subjective, usually non-transparent determinations that vary across ratings providers.) See also James Mackintosh, *Is Tesla or Exxon More Sustainable? It Depends Whom You Ask*, WALL ST. J., Sept. 17, 2018, at <https://www.wsj.com/articles/is-tesla-or-exxon-more-sustainable-it-depends-whom-you-ask-1537199931> (arguing that ESG scores are "no more than a series of judgments by the scoring companies about what matters").

12. See Michael E. Porter et al., *Where ESG Fails*, INSTITUTIONAL INVESTOR, Oct. 16, 2019, at <https://www.institutionalinvestor.com/article/b1hm5ghqtxj9s7/Where-ESG-Fails> (stating that there has never been conclusive evidence that socially responsible screens or company positions on lists such as the Dow Jones Sustainability Index deliver value, but arguing that there is compelling evidence that superiority in identifying and harnessing selected social and environmental issues relevant to the business can, over time, have a substantial economic impact on companies and even entire industries).

13. ESG Subcommittee Update: Report to the SEC Asset Management Advisory Committee (May 27, 2020), https://www.sec.gov/files/ESGSubcommitteeUpdate_0.pdf (powerpoint slide 10).

14. *The Tectonic Shift to Sustainable Investing*, BLACKROCK, <https://www.blackrock.com/institutions/en-us/insights/investment-actions/sustainable-investing-shift> (last visited July 7, 2022).

15. Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings*, REV. FIN. 8 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533.

16. *Id.* at 7.

17. Strine et al., *supra* note 1, at 1918.

18. DILIGENT INSTITUTE & SPENCER STUART, SUSTAINABILITY IN THE SPOTLIGHT: BOARD ESG OVERSIGHT AND STRATEGY 4-5 (2022).

Proposed Item 1501(a) of the climate disclosure rule would require all U.S.-listed public companies to disclose:

- The identity of any board members or committees responsible for the oversight of climate-related risks;
- Whether any member of the board has expertise in climate-related risks, including a description of that expertise;
- How the board is informed about and discusses climate risks, including the frequency of those conversations;
- Whether and how the board considers climate-related risks as part of business strategy, risk management, and financial oversight; and
- Whether and how the board sets climate-related targets and how it oversees progress toward those targets.¹⁹

There are a number of features of the SEC's proposed Item 1501 that merit further discussion. First, the proposed rule requires disclosures rather than particular substantive approaches—for example, it does not explicitly require that every board have a climate change expert or committee specifically charged with climate oversight. Nevertheless, numerous commenters have requested clarification that the SEC is not intending to dictate *how* board governance of climate risks is structured.²⁰ Even if such clarification were to be provided in any final rule, as a practical matter, many companies will likely feel the need to develop new board roles and competencies mapping onto these disclosure topics in order to avoid disclosing that they have no such expertise, discussions, targets, etc. regarding climate-related risks. Particularly when viewed in combination with the requirement to describe any climate-related expertise on the board, these disclosure requirements could be read as a suggestion that boards should have a climate expert. Second, the SEC's Climate Proposal does not specify what kind of climate expertise a board should seek to acquire. Instead, the proposed rule simply notes that companies must disclose “such detail as necessary to fully describe the nature of the expertise.”²¹ Still, even an implication that all boards should have climate expertise is a significant departure from the Commission's existing rules simply requiring information about the business experience of a company's board members and their qualifications for serving on the board.²²

19. Proposed 17 C.F.R. §229.1501(a).

20. See Microsoft Corporation, Comment Letter on the Proposed Rule (June 16, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131614-301990.pdf> (recommending that the SEC revise proposed Item 1501 to encourage issuers to tailor processes and disclosure to their circumstances with a focus on materiality).

21. Proposed 17 C.F.R. §229.1501(a)(1)(ii).

22. 17 C.F.R. §229.401(e)(1).

Third, proposed Item 1501 seeks granular disclosures of *how* the board is overseeing climate risks, including in the areas of strategy, risk management, and target-setting. In discussing the proposed requirement that issuers disclose whether and how the board of directors considers climate-related risks as part of its business strategy, risk management, and financial oversight, the Commission champions that such information would enable investors to understand how the board considers climate-related risks when reviewing and guiding business strategy and major plans of action, when setting and monitoring implementation of risk management policies and performance objectives, when reviewing and approving annual budgets, and when overseeing major expenditures, acquisitions, and divestitures.²³ The Commission argues that this disclosure requirement could help investors assess the degree to which a board's consideration of climate-related risks has been integrated into a registrant's strategic business and financial planning and its overall level of preparation to maintain its shareholder value.²⁴ As many commenters have noted, the level of disclosure into the board's oversight and decisionmaking sought here is far more detailed than the disclosures companies are required to make regarding fundamental economic issues that relate to the overall financial performance of the company.²⁵

While an approach such as that set forth in proposed Item 1501 has the potential to lead to a set of standard practices for climate change governance, it also has the potential to put a thumb on the scales toward board focus on climate change without consideration of whether it is the most significant ESG issue that would align with generating value or managing risks for a particular company. The SEC's proposed rule regarding disclosure of cybersecurity, Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (the Cybersecurity Proposal),²⁶ would similarly require companies to make granular disclosure regarding the board's oversight of cybersecurity risk, including the processes by which the board is informed about cybersecurity risk and the frequency of such discussions, whether and how the board considers cybersecurity risks as part of its business strategy, risk management, and financial oversight, and whether any

23. Proposal, *supra* note 2, at 95.

24. *Id.*

25. See Business Roundtable, Comment Letter on the Proposed Rule (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132191-302705.pdf> (arguing that the extent of disclosure required under proposed Item 1501 far exceeds required governance disclosures about any other topics and is disproportionate to a board's overall responsibilities); Bank Policy Institute, Comment Letter on the Proposed Rule (June 16, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131389-301543.pdf> (“The proposal's [governance] requirements are more prescriptive than the requirements for audit committee financial experts, defined in Regulation S-K.”); see also State Street Global Advisors, Comment Letter on the Proposed Rule (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131965-302424.pdf> (“The Commission should only require high-level, qualitative disclosure of the process by which climate-related financial risks are incorporated into governance arrangements and risk management”).

26. Release No. 33-11038, Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 87 Fed. Reg. 16590 (Mar. 9, 2022).

members of the board have expertise in cybersecurity.²⁷ Again, such a level of detailed disclosure could pressure boards to rethink their composition and priorities when doing so may not be in the best interests of the company and creating shareholder value.

Turning to the question of *how* boards should implement climate oversight in light of the SEC Climate Proposal, it is important to note the breadth of quantitative and qualitative disclosures that are called for under the Proposal. The SEC Climate Proposal would amend Regulation S-K to require every public company to disclose its own greenhouse gas emissions and adopt a series of qualitative disclosures on climate change strategy and risk management modeled after the Task Force on Climate Related Financial Disclosures. It would also amend Regulation S-X to require the incorporation of climate risks into a company's financial reporting. This means that simply to provide oversight of the disclosures that would be required under the SEC Climate Proposal (let alone the actual climate risks that a company may face), a board will have to develop some capacity for oversight of greenhouse gas emissions calculations, the identification and management of climate risks, and the integration of measures to address or respond to climate impacts into the company's financials. Even the proposed disclosure requirements that hew more closely to some of the traditional oversight of specific board committees may require that boards develop new areas of expertise. For example, audit committees are charged with reviewing a company's annual financial reporting and typically include among their members former corporate auditors or Chief Financial Officers. These board members are selected for their important qualifications in financial accounting that are necessary to carrying out the board's oversight function. However, they may not have experience with issues such as the accounting for and auditing of greenhouse gas emissions inventories. When assessing the breadth of the SEC's Climate Proposal, it appears that boards may need to assess how the individual disclosure requirements would overlap with responsibilities of board committees or the board as a

whole to determine how to best situate these responsibilities within their board structures. In so doing, boards will need to respond to any requirements in the SEC's final rule, with the regulatory requirements for disclosure being a primary factor in driving future organization of oversight efforts.

However, this does not mean that the board itself must have expertise regarding climate risks, or be granularly involved in the relevant measurements or management of those risks, to meet its oversight duties under *Caremark*. It is well established under Delaware law that directors are not required "to possess detailed information about all aspects of the operation of the enterprise," as "[s]uch a requirement would simpl[y] be inconsistent with the scale and scope of an efficient organization size in this technological age."²⁸ Rather, the board is entitled to rely on the work and technical expertise of officers and others within the organization—so long as the board (i) implements a reporting system to monitor the key risks facing the company, and (ii) ensures that the company responds to problems that are flagged by that reporting system. But regardless of what *Caremark* independently requires, to the extent that a company discloses pursuant to proposed Item 1501(a) that the board is involved in climate-related issues, it is important under *Caremark* (and the federal securities law) that the board in fact diligently fulfills the roles it has undertaken.

Strine et al. argue that an efficient and effective method for corporations to embrace quality ESG standards that does not simply pile ESG responsibilities on top of existing duties of managers and the board would be to build ESG responsibility into thorough and thoughtful compliance policies that corporations already maintain via satisfying their *Caremark* duties. The rigid and detailed requirements of the SEC's proposed ESG-related rules, however, seem to mandate the sacrifice of efficiency and strategy in favor of satisfying prescriptive disclosure requirements. While Strine et al. make a compelling argument for corporations to embrace ESG while still building shareholder value, the rise of regulatory ESG begs the question of whether this approach is still feasible.

27. Proposed 17 C.F.R. §229.106(c)(1); §229.407(j).

28. *In re Caremark*, 698 A.2d 959, 971 (Del. Ch. Sept. 25, 1996).

COMMENT

DIRECTOR ENGAGEMENT: NECESSARY FOR ESG SUCCESS

by Todd Phillips

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Leo Strine, Kirby Smith, and Reilly Steel make an important contribution to the corporate governance literature. In their article, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*,¹ they make the compelling case that *Caremark*'s obligation that directors "be reasonably informed concerning" the activities of their corporations—and be subject to legal liability if they are not—provides a foundation upon which directors can and should inform themselves as to whether their companies are acting in ESG-forward or otherwise ethical manners.²

While Strine, Smith, and Steel include discussions of *Caremark* liability and associated legal gloss, the practical "takeaway" from their article is that directors must be engaged with their companies' ESG (or, as the authors write, EESG)³ efforts, addressing those matters that pose moral risk to their firms as well as those that only pose legal ones. And importantly, director engagement on ESG should not just be something that corporate boards implement, but that shareholders should be demanding.

I. Informed Corporate Directors

Both primary theories of corporate governance today—whether to be operated in the interest of stakeholders or shareholders—require directors to be informed as to their corporations' activities. Under "stakeholder capitalism," a company should operate in manners that benefit all it affects. For example, a 2019 letter from the Business Roundtable and signed by the CEOs of some of America's largest corporations made "a fundamental commitment to all of our stakeholders," including customers, employees,

suppliers, communities, and shareholders.⁴ However, the perhaps most significant criticism of stakeholder capitalism is that it "means reducing CEOs' responsibility to shareholders, not increasing their responsibility to workers or society or anyone else."⁵ Accordingly, for stakeholder capitalism to be effective, chief executives must not be given carte blanche and directors must provide appropriate oversight that ESG commitments are being fulfilled.

The other theory of corporate governance is "shareholder primacy," meaning that a company should operate solely to benefit its investors. Although this has traditionally meant a focus on profits (Milton Friedman famously wrote, "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits")⁶ this is not necessarily the case as shareholders increasingly care about investing in corporations that are stewards for ESG values. Today, investments in ESG funds total roughly \$8 trillion worldwide with inflows only growing⁷ and the largest shareholder of public companies, BlackRock's Larry Fink, annually writes to corporate executives encouraging them to "act as a powerful catalyst for change."⁸ Clearly, whether because they believe companies that have ESG focuses will be more profitable than those who do not,⁹ or because they generally want their companies to act more ethically without regard for profit,¹⁰

Editors' Note: All opinions are the author's own and not of any affiliate or employer.

1. Leo Strine et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885 (2021).
2. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).
3. EESG stands for "employee, environmental, social, and governance." Strine et al., *supra* note 1, at 1885.

4. Business Roundtable, *Statement on the Purpose of a Corporation* (last updated July 2021), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf> (emphasis removed).
5. Matt Levine, *Money Stuff: When Can Bond Investors Lie to Banks?*, BLOOMBERG (Apr. 13, 2020), <https://www.bloomberg.com/news/newsletters/2020-04-13/money-stuff-when-can-bond-investors-lie-to-banks> (emphasis removed).
6. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970).
7. Evie Liu, *ESG Investing Could Quadruple by 2030*, BARRON'S (Dec. 3, 2021), <https://www.barrons.com/articles/esg-investing-outlook-2030-51638493803>.
8. Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK (2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.
9. See Jon Hale, *Sustainable Equity Funds Outperform Traditional Peers in 2020*, MORNINGSTAR (Jan. 8, 2021), <https://www.morningstar.com/articles/1017056/sustainable-equity-funds-outperform-traditional-peers-in-2020>.
10. See Lauren Migaki & Andee Tagle, *Understanding the Promises and Limits of Ethical Investing*, NPR (Jan. 22, 2022), <https://www.npr.org/2022/01/11/1072207126/ethical-investing-with-esg-funds>.

shareholders are taking ESG investing seriously. As shareholders' representatives, directors should ensure their companies are taking ESG seriously as well.

Directors owe a fiduciary duty to their corporations,¹¹ and a failure to provide oversight of their firms' activities can have catastrophic consequences.¹²

And whether because it is right by stakeholders (as Strine, Smith, and Steel argue) or right by shareholders, directors—especially independent directors—must provide oversight of their firms' ESG efforts.

II. Effective Board Oversight of ESG

Once a board has determined it has a role to play in supervising and directing its firm's ESG activities, the next question is how to effectively make that oversight a reality. Although most companies and all publicly traded companies maintain board audit committees,¹³ and although “most companies seem to be keeping primary responsibility for compliance in the audit committee,” Strine, Smith, and Steel recognize that “audit committees' core responsibilities [are, currently, largely] in accounting and financial compliance, prudence, and integrity” and that audit committees are “already the most burdened board committee.”¹⁴ Left unsaid is also that placing ESG oversight in the audit committee seemingly absolves directors who do not serve on that committee from ESG responsibilities.

Strine, Smith, and Steel articulate a better way. “[R]ather than solely vest[ing] in the audit committee” responsibility for oversight of a company's entire risk, compliance, and associated ESG efforts, that function should be “thoughtfully allocated among the board's committees” with that allocation “track[ing] the skills needed to do the task well and mirror the way the task is allocated at the management level.”¹⁵ The audit committee should likely focus on matters of accounting while other committees take on risk, compliance, and ESG oversight.

Strine, Smith, and Steel are quick to note that there should not just be a risk committee, a compliance committee, and an ESG committee. Those committees should be focused on business lines. Directors must “identify how the company makes money” and use that as a basis to set up board committees.¹⁶ Strine, Smith, and Steel note that important committees could include an environment or a food safety committee, with responsibility for the “risk management, compliance, and EESG functions addressing” that business line, in addition to traditional

nominating and governance committees and compensation committees.¹⁷

With that responsibility allocated, directors then need to get to the business of overseeing their company's ESG efforts. Strine, Smith, and Steel recommend that directors “consider the company's material sources of business and their impact.”¹⁸ Each board committee “must carefully address the relevant regulatory regimes that constrain the company's conduct, consider the reasons why that is so, and identify the stakeholders whose interests the law seeks to protect.”¹⁹ They should also take into consideration third-party criteria, protocols, or frameworks,²⁰ as well as their company's own ESG policies and values. In light of proliferating ESG standards, Strine, Smith, and Steel explain that it is ultimately up to a “company's management and board to exercise judgment and to carefully select the EESG standards it believes are the most relevant, informative, and credible.”²¹

Next, board committees must determine how they are going to measure their firms' performance in meeting its ESG goals and how they will obtain that data. As the adage goes, you get what you measure, and directors must use their business judgment—with reliance on third-party standards and frameworks if applicable—to determine what their goals are and how to adequately measure whether those goals are being met. Fortunately, as Strine, Smith, and Steel note, “[a] substantial amount of the relevant data required for robust EESG reporting [and evaluation] is already required to be collected by government regulation or as part of the company's legal compliance monitoring program.”²²

Finally, directors and boards as a whole must “determin[e] what expertise is needed to implement the company's compliance and EESG plan,” including at the management and board levels.²³ Strine, Smith, and Steel note that legal requirements have effectively ensured that audit committees are “comprised solely of directors who consider themselves financially expert,”²⁴ and there is no reason that the members of other committees should not similarly have expertise, such as in “environmental, food safety, data security, drug efficacy, plant and production safety measures, [and] privacy protections,” among oth-

11. Principles of Corp. Governance §4.01(c) (Am. Law Inst. 2008).

12. See, e.g., Ron Leuty, “Ultimately, Elizabeth Made the Decisions”: A Look Inside Theranos' Ineffective Board, S.F. BUS. TIMES (Aug. 7, 2018), <https://www.biz-journals.com/sanfrancisco/news/2018/08/07/theranos-elizabeth-holmes-board-kovacevich-shultz.html> (describing how the board of Theranos Inc. considered themselves “to be a collection of advisers, not one with traditional fiduciary duties” who did not understand the company's technology, and how that contributed to the company's downfall).

13. See Strine et al., *supra* note 1, at 1897-98.

14. *Id.* at 1915-16, 18.

15. *Id.* at 1917-18.

16. *Id.* at 1909.

17. *Id.* at 1918.

18. *Id.* at 1910.

19. *Id.*

20. See, e.g., THE GREENHOUSE GAS PROTOCOL, <https://ghgprotocol.org/>; PRINCIPLES FOR RESPONSIBLE INVESTMENT, <https://www.unpri.org/>.

21. Strine et al., *supra* note 1, at 1913.

22. *Id.* at 1910. Part of this is a result of *Caremark*. Because directors have the ultimate responsibility for stewarding their corporations, *Caremark* held that directors must “assur[e] themselves that information and reporting systems exist in the organization that are reasonably designed to provide to . . . the board itself timely, accurate information sufficient . . . to reach informed judgments concerning both the corporation's compliance with law and its business performance.” In re *Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996). Resultingly, many firms maintain data reporting requirements to ensure that directors fulfill this responsibility.

23. *Id.* at 1913.

24. *Id.* at 1915. See also *id.* at n.87 (noting that the Sarbanes-Oxley Act of 2002 and the NYSE and NASDAQ listing rules generally require audit committees to be financially literate and at least one member to be an accountant).

ers.²⁵ Only with directors (and managers) with varied expertise will companies be able to adequately assess and effect change in their ESG efforts.

III. Conclusion

ESG has traditionally been the province of divisions dedicated to diversity, sustainability, ESG generally, or even investor relations, making companies' ESG efforts somewhat of "a 'check the box' exercise or an inconsequential appendage to core business concerns."²⁶ Although no

effort to implement ethical decisionmaking should be discounted, all employees, managers, directors, and shareholders must be involved in ensuring ESG is fully considered and realized. Strine, Smith, and Steel make a compelling argument not only for why corporate directors especially must be engaged and why *Caremark* provides the foundation for board oversight of ESG, but also for how directors can oversee ESG effectively. Directors and shareholders must begin pushing to implement their recommendations in companies large and small.

25. *Id.* at 1916.

26. David A. Katz & Laura A. McIntosh, *Integrating ESG Into Corporate Culture: Not Elsewhere, but Everywhere*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 29, 2021), <https://corpgov.law.harvard.edu/2021/03/29/integrating-esg-into-corporate-culture-not-elsewhere-but-everywhere/>.

A R T I C L E

RETHINKING GRID GOVERNANCE FOR THE CLIMATE CHANGE ERA

by Shelley Welton

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I. Introduction

One central but under-scrutinized way that fossil fuel companies impede the clean energy transition is by essentially running the United States' electricity grid, writing its rules to favor their own private interests. In most of the country,¹ the electricity grid is managed by Regional Transmission Organizations (RTOs).² RTOs are private membership clubs in which incumbent industry members make the rules for electricity markets and the electricity grid through private mini-democracies—with voting privileges reserved for RTO members—under broad regulatory authority.³ RTOs are able to adopt positions against new clean energy technologies because their hybrid, quasi-governmental institutional structures allow incumbent industry members to dominate stakeholder processes. This Article contends that United States grid governance must be redesigned to accommodate a new era of regulatory priorities that include responding to climate change.

II. The Birth and Growth of RTOs

In 1999, to drive competition in the electricity industry and facilitate open access, the Federal Energy Regulatory Commission (FERC) pushed for all utilities to join

RTOs that would control the regional transmission grid, in place of utility-by-utility system management. However, the agency left the design details up to the industry.⁴ The Commission merely required that RTOs be (1) independent, (2) regional, and (3) responsible for the operation of the grid.⁵ In particular, FERC specified that RTOs must be given authority to design and administer their own regional tariffs, which would establish rules for regional transmission management.⁶

Although FERC hoped that all regions would form RTOs, FERC's various efforts to create a uniform model of grid governance were unsuccessful and ultimately abandoned. Accordingly, the United States is left with a hodge-podge system, where some portions of the country (notably, the Southeast and much of the West) maintain vertically integrated, regulated utility monopolies.⁷ Today, two-thirds of the country (by population) is under an RTO.⁸ In these regions, RTOs now have several important functions, including managing both the grid and regional electricity markets and planning for grid expansions. Several eastern RTOs have expanded their roles further by assuming control over "resource adequacy." In all of these areas, RTOs establish critical rules through a combination of membership voting and board oversight. FERC is supposed to ensure that all such rules create "just and reasonable" rates and practices.⁹

When FERC designed RTOs, it presumed that it would be able to adequately police their conduct; however, judicial and legislative developments have complicated FERC's scheme of private grid governance. In particular, a pair of

Editors' Note: This Article is adapted from Shelley Welton, Rethinking Grid Governance for the Climate Change Era, 109 CAL. L. REV. 209 (2021), and used with permission.

1. This Article does not discuss regions of the country that did not join RTOs—the Southeast and much of the West. A companion work-in-progress, *The States That Opted Out*, examines the status of electricity governance in those regions.
2. Also called "Independent System Operators" (ISOs) in some regions. In this Article, except where relevant for purposes of historical accuracy, I intend RTOs to include ISOs, as "[t]he difference between an ISO and RTO is largely semantic these days." DEVIN HARTMAN, R STREET POL'Y STUDY NO. 67: WHOLESALE ELECTRICITY MARKETS IN THE TECHNOLOGICAL AGE 3 n.5 (2016).
3. This description is overgeneralized. See the full article by Shelley Welton, Appendix A (Feb. 2021), at <https://www.californialawreview.org/print/rethinking-grid-governance>, for more on specific RTO structures. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209 (2021).

4. See FERC Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 810, 811, 813, 824 (issued Dec. 20, 1999) (codified at 18 C.F.R. pt. 35 (2019)) [hereinafter Order 2000].
5. *Id.* at 842. FERC clarified that, by "independent," it meant independent from "market participants." *Id.*
6. *Id.* at 858.
7. See generally William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810 (2016) (describing the three different models of state electricity regulation). Texas also has an RTO, which is not under federal jurisdiction. See *id.* at 855.
8. E4THE FUTURE, INC., REGIONAL ENERGY MARKETS: DO INCONSISTENT GOVERNANCE STRUCTURES IMPEDE U.S. MARKET SUCCESS? 3 (2016).
9. See 16 U.S.C. §824d(a) (2018).

circuit court opinions has circumscribed FERC's ability to manage the governance of these regional entities. In *CAISO v. FERC*, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that FERC has "no authority" to "order a public utility subject to its regulation to replace its governing board."¹⁰ And, in *NRG v. FERC*, the same circuit held that the Commission exceeded its legal authority by requiring the RTO to adopt more than "minor" modifications to its proposal to secure FERC approval.¹¹ The combined effect of *CAISO* and *NRG* is to provide FERC fewer tools to reform internal RTO governance at the same time that it must wholly accept or reject whatever proposals come out of RTO governance arrangements.

These doctrinal limitations on FERC's RTO oversight have been compounded by legislative developments that have stimulated utility mergers, which concentrate economic and political power in fewer companies.¹² There is a certain irony in the fact that deregulatory theories led FERC to turn increasingly to competition as the basis for ensuring "just and reasonable" rates, while also leading the U.S. Congress to lift prohibitions on consolidation that had ensured robust competition in the industry over the previous 80 years. This newly concentrated power complicates theories of RTO governance, which rely upon internal industry checks to legitimate RTO decisionmaking.

III. RTOs Confront the Climate Imperative

The electricity sector has been appropriately called the "linchpin of efforts to reduce greenhouse gas (GHG) emissions."¹³ Thus, it is only logical that both state and federal lawmakers and regulators have increasingly focused on decarbonizing the sector in the last several decades. Consequently, RTOs have faced an energy law landscape that has embraced a rapidly shifting set of priorities. But rather than embrace this challenge, RTO governance has too often resisted these changed priorities, especially when they threaten incumbent members of the energy sector.

As grid managers, RTOs play a key role in enabling sectoral transformation. This role is complicated, however, by the fact that neither FERC nor RTOs have an independent mandate to decarbonize.¹⁴ Moreover, the Federal Power

Act explicitly leaves decisions over the electric generation mix to the states.¹⁵ For this reason, those within RTOs often describe them as policytakers, not policymakers.¹⁶

However, reality belies these claims, as RTO rules necessarily dictate what resources can participate in regional markets and under what terms. In the last two decades, there has been a profusion of state climate policy: 29 states have required utilities to secure an increasing percentage of their electricity from renewable sources¹⁷; every state has put in place laws to encourage efficiency and conservation¹⁸; and many states have gone further to require rapid and thorough sectoral transformation.¹⁹ As a result of these policies, RTOs need to reform their markets and dispatch to accommodate the expected influx of renewable energy and support decreased reliance on natural gas in the electricity sector. The expansion of renewable energy will also require construction of *a lot* more transmission infrastructure to connect remote solar and wind resources to population centers.²⁰ In their role as regional transmission planning coordinators, RTOs' willingness to enable maximum transmission expansion will also help determine the viability of a renewables-heavy electricity sector. However, RTOs have not always been up to the challenge.

In particular, RTOs have been inveterate stallers when it comes to integrating new resources that would improve their markets but threaten incumbents' bottom lines. RTO heel-dragging causes years, if not decades, of delay in critical market improvements, costing billions of dollars and causing significant GHG emissions.²¹ RTOs' dil-

L. REV. 1783, 1786 (2016) (urging FERC to consider adopting a "carbon adder" to market pricing). For purposes of this Article, I accept FERC's movement in this direction as unlikely. See Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 5, 30-33 (2019) (explaining FERC's role as a fuel-neutral regulator that is not in charge of setting priorities for the generation mix, but can and should accommodate state climate priorities).

15. See 16 U.S.C. §824(b)(1) (2018).

16. See Benjamin A. Stafford & Elizabeth J. Wilson, *Winds of Change in Energy Systems: Policy Implementation, Technology Deployment, and Regional Transmission Organizations*, 21 ENERGY RSCH. & SOC. SCI. 222, 229 (2016) (quoting RTO staffer explaining: "We are a taker of policy not a maker of policy . . . We don't create policy. We attempt to interpret policy as handed to us."). See also Order on Tariff Filing, ISO New England, Inc., 162 FERC ¶¶ 61205, 61226 (2018) (FERC insisting that the agency remains resource-neutral); *Our Three Critical Roles*, ISO NEW ENGLAND, <https://www.iso-ne.com/about/what-we-do/three-roles> [<https://perma.cc/XB2A-UWVV>].

17. N.C. CLEAN ENERGY TECH. CTR., U.S. DEP'T OF ENERGY, RENEWABLE PORTFOLIO STANDARD POLICIES (2018), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2018/10/Renewable-Portfolio-Standards-2018.pdf> [<https://perma.cc/S4W7-U3YV>].

18. See *Database of State Incentives for Renewables & Efficiency*, N.C. CLEAN ENERGY TECH. CTR., <https://www.dsireusa.org> [<https://perma.cc/CM9G-CQ2S>].

19. See Jim Rossi, *Carbon Taxation by Regulation*, 102 MINN. L. REV. 277, 301-12 (2017). See also *Database of State Incentives for Renewables & Efficiency*, *supra* note 18.

20. See Jenkins et al., *supra* note 13, at 2506; Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ELR 10749, 10751 (Sept. 2017); Alexander E. MacDonald et al., *Future Cost-Competitive Electricity Systems and Their Impact on US CO₂ Emissions*, 6 NATURE CLIMATE CHANGE 526, 526 (2016).

21. See STEVE DAHLKE & MATT PROROK, GREAT PLAINS INST., CONSUMER SAVINGS, PRICE, AND EMISSIONS IMPACTS OF INCREASING DEMAND RESPONSE IN THE MIDCONTINENT ELECTRICITY MARKET 1 (2018) (finding savings potential from untapped demand response in MISO alone of up to \$18.5 million per year); SAM NEWELL ET AL., BRATTLE GRP., OPPORTUNITIES TO

10. Cal. Indep. Sys. Operator v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004).

11. NRG Power Mktg. v. FERC, 862 F.3d 108, 110, 114 (D.C. Cir. 2017).

12. See, e.g., Raymond S. Hartman, *The Efficiency Effects of Electric Utility Mergers: Lessons From Statistical Cost Analysis*, 17 ENERGY L.J. 425, 427-31 (1996) (discussing historical utility mergers that increased the size of generating units "to capture increasing returns to scale, thereby lowering average generation costs," and developing factors that may allow more modern utilities to capitalize upon economies of scale). But see Scott Hempling, *Inconsistent With the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L.J. 233, 234, 238 (2018) (pointing out that mergers can also create "diseconomies of scale due to non-integrated operations").

13. Jesse D. Jenkins et al., *Getting to Zero Carbon Emissions in the Electric Power Sector*, 2 JOULE 2498, 2498 (2018).

14. Most commentators accept that decarbonization is not within FERC's charge to maintain "just and reasonable" rates—although some argue that FERC could justifiably incorporate this goal. See, e.g., Christopher J. Bateman & James T.B. Tripp, *Toward Greener FERC Regulation of the Power Industry*, 38 HARV. ENV'T L. REV. 275, 278 (2014) (urging FERC to incorporate environmental considerations into market design); Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS

atory tactics have manifested in several technically dense controversies over demand response, energy storage, the integration of distributed energy resources (DER) into markets, and transmission policy. In each instance, FERC has had to force RTOs' hands with prescriptive policy measures that face resistance from incumbent industry members and often result in legal challenges. As FERC has explained, the reason that markets have discriminated against demand response, storage, and DER is that barriers "can emerge when the rules governing participation in those markets are designed for traditional resources and in effect limit the services that emerging technologies can provide."²² This is, however, the predictable result of a member-driven process for raising and vetting issues, where incumbents have both reason and power to block the entry of new competitor technologies.

At the same time, when it comes to renewable energy, certain RTOs have been aggressive and misguided. Natural gas generators in particular worry that the entry of substantial renewable resources into the market might lower market prices enough to drive fossil fuel companies out of business. Consequently, two RTOs have pushed for reforms that limit the ability of "state-supported resources" to participate in their markets.²³ Curiously, though, these RTOs define "state support" only to include certain state-driven policies that tend to promote clean energy.²⁴ The result of these reforms—still in place in one market, repu-

diated in the other—has been a slowing of the transition to clean energy.

IV. Privatization as the Problem: Diagnosing RTOs' Flaws

FERC hoped that RTOs would prove better stewards of the electricity system than atomized monopoly utilities. In many ways, this hope is borne out: researchers have documented many benefits that come with grid regionalization. However, the regional governance model approved by FERC has proven less than ideal in the face of the major energy transition demanded by climate change. Much of the recent research on RTOs suggests that their internal processes (outside California, which uses an administrative-agency-based model) excel at producing reforms that serve incumbents' business interests but struggle to effectuate reforms that enhance competition or shrink the demand for electricity.

And, states are largely powerless within RTO governance processes to do anything about the fact that RTOs are undermining their lawful state policies, especially in multi-state RTOs.

Consequently, FERC should abandon hope in RTOs' membership-club democracy as a sound method of grid management. Although reforms to RTOs' internal governance mechanisms might ease the challenges, the core of the problem is a lack of public control. This lack of control manifests in both an inversion of the proper hierarchy between RTOs' responsibilities and states' legitimate policy priorities, and an oversight deficit between RTOs and their primary government regulator, FERC.

V. Ways Forward: A Reform Agenda

Although the challenge of climate change is pushing state and federal legislators and regulators to adopt policies and priorities that privilege clean energy, the U.S. electricity grid is governed predominantly by behemoth, incumbent industry members with little interest in facilitating these changes. The goal for reformers should not be to abandon the regional format and unwind back to a time when states had predominant control. Both technology and policy prerogatives have usurped this possibility. Not only does today's interconnected grid make regional management economically and technically desirable, but the growing policy mandate to transition to clean energy demands even greater regional cooperation on climate. Therefore, to build the clean energy economy needed for the 21st century, RTO governance reforms are imperative to bring regional grid management in line with democratic demands. There are four pathways—some mutually reinforcing—to better grid governance: (1) pare back RTO authority; (2) increase regulatory oversight; (3) better police sectoral corporate power; and (4) consider a public option.

MORE EFFICIENTLY MEET SEASONAL CAPACITY NEEDS IN PJM 2 (2018) (estimating that better accommodating seasonal resources could save consumers hundreds of millions of dollars each year); JOHANNES P. PFEIFENBERGER ET AL., BRATTLE GRP., COST SAVINGS OFFERED BY COMPETITION IN ELECTRIC TRANSMISSION: EXPERIENCE TO DATE AND THE POTENTIAL FOR ADDITIONAL CUSTOMER VALUE 1-2 (2019) (estimating that more competitive transmission processes could create "customer value" of "approximately \$8 billion over the course of five years"); Iulia Gheorghiu, *PJM Capacity Market Plan to Increase Costs \$8.4B, Market Monitor Estimates*, UTIL. DIVE (Sept. 18, 2019), <https://www.utilitydive.com/news/PJM-capacity-market-ferc-costs-8billion-risks-state-subsidies-clean-energy-nuclear-mopr/563152> [<https://perma.cc/V26Z-PTQK>].

22. FERC Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 83 Fed. Reg. 9580, 9582 (Feb. 15, 2018) (codified at 18 C.F.R. pt. 35 (2019)) [hereinafter Order 841].

23. These regions will now subject state-supported resources to a "minimum offer price rule" that requires them to bid into capacity markets at levels less likely to clear and receive payment. See Order on Tariff Filing, ISO New England, Inc., 162 FERC ¶ 61205, para. 2-3 (Mar. 9, 2018); Order Establishing Just and Reasonable Rate, *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61239, para. 2 (Dec. 19, 2019). Because, however, state law requires these resources to be constructed to meet renewable procurement mandates, states will build them anyway—but they will not count toward the regions' installed capacity. For more detailed accounts, see Danny Cullenward & Shelley Welton, *The Quiet Undoing: How Regional Electricity Market Reforms Threaten State Clean Energy Goals*, 36 YALE J. REG. BULL. 106 (2018); Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PA. L. REV. 1181 (2020).

24. See *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶¶ 61239, 62998 (Comm'r Glick, dissenting) (accusing these reforms of specifically and arbitrarily targeting "state resource decisionmaking, and particularly state efforts to address the externalities of electricity generation"); *Calpine Corp. v. PJM Interconnection, order on reh'g and clarification*, 171 FERC ¶¶ 61034, 61235-36 (Apr. 16, 2020) (Comm'r Glick, dissenting) (cataloguing the "federal subsidies [that] have pervaded the energy sector for more than a century . . ." in support of fossil fuels, and which "remain pervasive in PJM").

A. Pare Them Back

FERC did not expect RTOs to have the range of functions and functional policymaking authority that they do today. The accretion of RTO authority over the types of resources built and brought to markets has been gradual and complex—but is not a necessary component of successful grid management, as demonstrated through several regions that maintain more state voice and control. Consequently, one potential reform is to return RTOs to a more basic set of functions.

Most notably, there is rising support for the idea of eliminating mandatory capacity markets from eastern RTOs.²⁵ FERC should be able to take this step unilaterally by declaring that the current mandatory capacity market constructs are “unjust and unreasonable” under Federal Power Act §206 and ordering regions to find another solution to resource adequacy that better accommodates states.²⁶ One model worth considering is that of California, where the California Public Utilities Commission and the California ISO (CAISO) share responsibility over resource adequacy according to their comparative advantages: CAISO is in charge of the technical elements of forecasting resource adequacy requirements, while the state commission oversees planning for how to meet these requirements.²⁷

Restructuring control over resource adequacy would go a long way toward remedying the mischief that pro-fossil companies have caused in several RTOs.²⁸ Nevertheless, this move alone will not solve all governance challenges. Already, there are controversies over how RTOs determine “price formation” in the markets under their control, as well as the rules surrounding requirements for new resources to connect to the grid. Ultimately, the issue comes down to *who writes these rules*. To ensure that pricing and rules in these markets remain just and reasonable under changing conditions, FERC may need to take a heavier hand in dictating what fair treatment looks like.²⁹

B. Increase Public Oversight and Control

A second set of reforms involves accepting RTOs’ aggrandized modern responsibilities and enhancing public oversight and control of these organizations commensurately.

RTO reform need not go as far as the California model—in which the ISO functions more like a state agency than a private club—to create a more robust role for states. The Midwest ISO, for example, has incorporated state regulatory authorities as the most powerful weighted voting bloc within its Membership Committee—thus building in a more direct state oversight role of its markets.³⁰ FERC might consider forcing other regions to reform their governance structures to provide a similarly strong role for state interests.³¹ A stronger reform would be to give regional state committees a veto-point over RTO decisionmaking at a level superior to regular membership.

There are, of course, risks to giving states too much control over RTOs, especially given the polarization among states regarding their attitudes toward clean energy.³² In regions where many states oppose clean energy, a stronger state oversight presence might not prove an antidote to challenges of incumbent favoritism within the RTO. But this risk is baked into energy law: As the Federal Power Act makes clear, “[t]he states, not the Commission, are the entities responsible for shaping the generation mix.”³³

If FERC remains wary of so fully involving states in regional market oversight, it could pursue more piecemeal changes: Recognizing the traditional state role over resource adequacy, FERC could give regional state committees the right to approve or reject by supermajority RTOs’ proposed changes in resource adequacy rules.³⁴ Or, perhaps FERC could give regional state committees the right to file a competing proposal when they disagree with an RTO’s §205 filing—the same right that is presently afforded to New England’s stakeholder governance group.³⁵

And although circuit courts have limited the matters FERC can regulate and the extent to which the agency can amend RTO proposals, FERC still has tools, however blunted they may be. The agency could, for example, become more muscular in its use of §206 findings that regional tariffs are “unjust and unreasonable.” Or it could use §206 findings as the basis of a larger proceeding devoted to reconsidering the RTO format.³⁶

25. David Roberts, *This Federal Agency Is Quietly, Profoundly Shaping Climate Policy*, Vox (May 22, 2019, 10:00 AM), <https://www.vox.com/energy-and-environment/2019/5/22/18631994/climate-change-renewable-energy-ferc> [https://web.archive.org/save/https://www.vox.com/energy-and-environment/2019/5/22/18631994/climate-change-renewable-energy-ferc] (quoting Commissioner Glick expressing “serious reservations about mandatory capacity markets”). See also Jennifer Chen & Gabrielle Murnan, *State Participation in Resource Adequacy Decisions in Multistate Regional Transmission Organizations*, DUKE U. NICHOLAS INST. ENV’T POL’Y SOLS. (2019) (advocating for greater state authority in resource adequacy).
26. See 16 U.S.C. §824e(e)(4)(a) (2018).
27. See CAL. PUB. UTIL. COMM’n, *Resource Adequacy*, <https://www.cpuc.ca.gov/ra> [https://perma.cc/8B9X-YH45].
28. See Jacob Mays et al., *Asymmetric Risks and Fuel Neutrality in Electricity Capacity Markets*, 4 NATURE ENERGY 948, 953 (2019) (finding that capacity markets are inherently biased against low-carbon resources, which tend to have high fixed costs and near-zero operating costs).
29. See MARK JAMES ET AL., R ST. POL’Y STUDY NO. 112: HOW THE RTO STAKEHOLDER PROCESS AFFECTS MARKET EFFICIENCY, Oct. 18, 2017 (suggesting that FERC should be less deferential to proposals coming from RTOs).

30. See Chen & Murnan, *supra* note 25, at 10 (describing MISO’s “relatively collaborative culture” between the ISO and the states); Welton, Appendix A, *supra* note 3 (showing that state authorities receive a 16% weighted vote in MISO).
31. See Order Rejecting Revisions, New England Power Pool Participants Comm., 166 FERC ¶¶ 61062, 61276 (Jan. 29, 2019).
32. See generally LEAH CARDAMORE STOKES, *SHORT CIRCUITING POLICY: INTEREST GROUPS AND THE BATTLE OVER CLEAN ENERGY AND CLIMATE POLICY IN THE AMERICAN STATES* (2020) (showing how fossil-fuel-allied interest groups dominate political and regulatory processes in Texas, Kansas, Arizona, and Ohio).
33. Order on Rehearing and Clarification, *Calpine Corp. v. PJM Interconnection*, 171 FERC ¶ 61035 (Comm’r Glick, dissenting, para. 5) (Apr. 16, 2020).
34. ³⁴Given that SPP already allows its regional state committee control over resource adequacy, this proposal seems legally plausible. See Chen & Murnan, *supra* note 25, at 15-16 (making this point). See also Order Accepting Revisions to Transmission Owners Agreement, Midwest Indep. Transmission Sys. Operator, Inc. & the Miso Transmission Owners, 143 FERC ¶¶ 61165, 62210 (May 23, 2013).
35. See Welton, Appendix A, *supra* note 3, for more on ISO-NE “jump ball” filings.
36. See William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739, 748 (2020) (arguing that FERC has unused authority to regulate price formation in RTOs).

More ambitiously, Congress could create a special category of review for RTO tariff filings within the Federal Power Act, providing FERC with the ability to amend portions of RTO filings and to reject plausible but inferior solutions. These changes would recalibrate FERC's authority over RTOs to align it with the authority of other federal agencies engaged in policymaking, which operate under the benefit of *Chevron* deference to preferred agency solutions.³⁷

C. Improve the Possibilities for Good Internal Governance

Reformers might also consider cabining the creeping dominance of heavyweight corporate entities in the electricity sector, by limiting the ability of large holding companies to dominate RTO governance through their opaque voting power across membership sectors. To tackle this challenge, FERC could increase scrutiny of corporate mergers and their impact on electricity governance by drawing upon its statutory charge to ensure that proposed mergers are "consistent with the public interest."³⁸ As utility expert Scott Hempling has suggested, perhaps "public interest" review should include not only a market power screen, but a more searching inquiry into whether each additional merger might harm the overall structural competition of the electricity sector.³⁹ Alternatively, FERC might place conditions on mergers that limit RTO stakeholder participation when the merger could create opportunities for self-interested voting.⁴⁰

For a more robust fix, Congress might revisit its 2005 decision to repeal the Public Utilities Holding Company Act (PUHCA), which eliminated New Deal-era limitations on the size and scope of utility holding companies. Although utilities suggest that PUHCA was a vestigial policy that limited their dynamism and economies of scale, others question whether consolidation has done the industry more harm than good.⁴¹

Alternatively, if Congress and the executive branch prove unwilling, the courts may present an increasingly plausible avenue for reigning in utility power. To date, electricity corporations have largely been immunized from antitrust challenges under the theory that FERC's review of utilities' filed

rates obviates the need for judicial antitrust scrutiny.⁴² However, in light of the significant changes in the industry, scholars have questioned whether courts should continue to allow the filed rate doctrine to stand as a bar to claims of industry collusion,⁴³ and the U.S. Supreme Court recently reaffirmed the applicability of state antitrust laws to FERC-regulated natural gas pipelines.⁴⁴ Although there is no rock-solid case under current precedent to assert that RTOs' self-interested rulemakings create either an antitrust or due process challenge, continued display of an incumbency bias could push courts toward accepting a theory crafted along these lines.

D. Explore a Public Option

There is, finally, a more radical option: Management of the grid could be made more thoroughly public. Several European countries have publicly owned grids.⁴⁵ Alternatively, California provides a model of political control without ownership, and has proven that more direct political control can align regulatory priorities and grid governance. How FERC might effectuate a transition to public ownership or control is a complex question. Perhaps a bold FERC, looking at the necessary pace and scale of decarbonization, might justify ordering significant RTO governance reform or transmission divestment to a public entity as a necessary precondition for "just and reasonable" rates in the era of climate change.⁴⁶ It is, however, unclear whether the federal courts would be willing to sanction such profound restructuring under long-standing statutory authority.⁴⁷ Nevertheless, the option at least merits discussion, so as to explore the full range of potential solutions rather than anchoring the reform conversation in the land of small tweaks to the privatized modern system.

VI. Conclusion

One way to understand RTOs is as sectoral symptoms of troubling trends toward privatization and agglomeration that pervade the modern U.S. economy and the institutions ostensibly designed to shape and control it. Electricity law, now hollowed by two decades of deregulatory experimentation, needs a reinvigorated focus on the *public* component of public utility law. Either the sector will embrace the existential challenge of climate change, or else it will take us all down with it.

37. See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1462 (2018) (finding agency win rates under *Chevron* steps one and two of 77.4% and 93.8%, respectively).

38. 16 U.S.C. §824b(a)(4) (2018). The agency's current practice is governed by a Merger Policy Statement, which FERC could amend. See FERC Order No. 592, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statement, 61 Fed. Reg. 68595-01, 68598 (Dec. 18, 1996) (codified at 18 C.F.R. pt. 2 (2019)) [hereinafter Order 592]. Indeed, FERC has recently contemplated amendments to this policy. See Notice of Inquiry, Modifications to Comm'n Requirements for Rev. of Transactions Under Section 203 of the Fed. Power Act and Mkt-Based Rate Applications Under Section 205 of the Fed. Power Act, FERC Docket No. RM16-21-000, 156 FERC ¶ 61214 (Sept. 22, 2016).

39. See Hempling, *supra* note 12, at 268-72. See also Order 592, *supra* note 38, at 68606 (listing "effects on competition" as one of three guiding criteria).

40. See 16 U.S.C. §824b(b) (2018) (granting FERC the authority to place "necessary or appropriate" conditions on mergers).

41. See Hempling, *supra* note 12, at 238, 279 (explaining how diversification poses risks in a landscape with regulated and unregulated markets).

42. See Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1593-94 (2003).

43. See *id.* at 1592, 1597; Sandeep Vaheesan, *Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity*, 46 U. MICH. J.L. REFORM 921, 921 (2013).

44. See *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

45. See Jean-Michel Glachant & Dominique Finon, *A Competitive Fringe in the Shadow of a State Owned Incumbent: The Case of France*, 26 ENERGY J. 181, 183-85 (2005); Hogné Leroy Sataoën et al., *Towards a Sustainable Grid Development Regime? A Comparison of British, Norwegian, and Swedish Grid Development*, 9 ENERGY RSCH. & SOC. SCI. 178, 181-82 (2015).

46. See 16 U.S.C. §824d (2018).

47. See *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (invalidating EPA's "Tailoring Rule" on grounds of statutory overreach); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 3 (2014).

C O M M E N T

THE ORGANIZED WHOLESALE MARKET IMPROVEMENT PARADOX

by Tom Hassenboehler

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Regional transmission organizations (RTOs), while imperfect, are the best method to facilitate the delivery of reliable, affordable, and clean electric power. However, after more than 20 years, and as the West and Southeast debate new market configurations, it is time to take a critical look and improve RTOs to ensure that they will continue to be a force in the U.S.'s electric system for the next 20 years. Despite oversight by the Federal Energy Regulatory Commission (FERC) and a growing judicial record of precedence in the courts, the U.S. Congress is the only place that can “fix” RTOs, and the political will must be developed to do so.

By way of background, I am a late appreciator of what markets have achieved over the last two decades. Despite having the privilege of participating in some of the biggest energy policy debates at the federal level over the last two decades, up until my second stint at the U.S. House of Representatives Energy and Commerce Committee, I could barely tell you what a regional transmission organization (RTO/ISO) is or does. This knowledge has been relegated to the FERC experts and electricity practitioners—and always viewed as overly cumbersome, complicated, and problematic. That was my perspective as a fairly informed policy professional—so imagine what members of Congress are like when you try to explain this complex architecture. However, this wasn't always the case. As many know, there was a robust history of congressional interest, oversight, and legislative development in the late 1990s and early 2000s. But then, for nearly 20 years at the federal legislative level, organized markets became relegated to the congressional sidelines. Why? Complexity. Underappreciation. Imperfection. Inconsistency throughout the country, all of which make it difficult to have a national narrative.

Due to lack of congressional involvement subsequent to facilitating the creation and debating the standardization of RTOs in the 1990s, RTOs have become necessarily and unnecessarily complex. Why? The electricity system is evolving in ways that were not considered during their origination, and they have become the default policy deci-

sionmakers for Congress. In 2015, however, Congress did take a look at wholesale markets and RTO governance through a legislative hearing series called “Powering America” that I helped to lead and organize. We held nearly 13 hearings that were completely bipartisan. The hearings and the development of the witness lists and topics were completely bipartisan. A two-part hearing that inspired my future work was called “Consumer Oriented Perspectives on Improving the Nation's Organized Markets.” The hearing was one of the first to showcase the rise of the 21st-century electricity customer—and its big-tent evolution—from consumer advocates, to large industrial and tech customers, to the active, climate-conscious consumer who wants to secure clean and increasingly localized electrons. These customers were simply not part of the equation two decades ago, when RTOs evolved into their current stance.

Despite time passing, the record from these hearings has not evaporated. While many new members of Congress are now on the Committee, several members and their staff remain. There is now burgeoning interest in building from these prior hearings and tackling some of these challenging but necessary topics again—in particular, organized market governance and expansion.

Organized markets (both their governance and new formation) have recently become a key topic in states and in new regions where they don't exist such as the West and Southeast, due to the rise of the active electricity customer. As the electricity industry evolves, so too does the electricity customer. No longer content with the traditional model, today's electricity customers seek a more active role in accelerating the energy transition. New electricity customers expect options that fit their needs and their mission. Wholesale markets are again becoming intertwined in the policy narrative, because customers (both large and small) are becoming more engaged and seeking options.

Prof. Shelley Welton's article¹ correctly points out flaws in the current approach and challenges the reader to think comprehensively about ways to improve upon the existing structures. This “rethink” comes at a critical and opportune time as new configurations of RTOs are being consid-

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1. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 257 (2021).

ered across the country and as existing RTOs face several existential crises. I offer three points to consider.

First, if reliability, affordability, and increasingly clean energy are the intended outcome of our evolving electricity system—organized markets have helped to get us on a path there—and more must be done. Remember, RTOs were founded with the desire to achieve greater efficiencies through scale, reserve-sharing, and joint dispatch of utility-owned generation. They were also formed, in part, to bring competition to the supply (generation) side of the business in response to expensive asset investments put to ratepayers under cost-of-service regulation, especially in the Northeast and Texas where utilities are unbundled.

The passage of time and the evolution of technology, as well as climate change and security needs, have caused this simple proposition to become much more complex. Many stakeholders are engaging in expanding the proven benefits of the basic functions of RTOs—including growing economies of scale and economic efficiency through joint dispatch to all regions of the country—in an effort to help replicate and accelerate the transition to the clean energy economy. At the same time, the continued refinement, improvement, and expansion of RTOs is being called into question because of lack of political will and policy guidance. This is a complex challenge that is playing out in different ways in various parts of the country, and as Professor Welton points out, can often run counter to the needs of the energy transition and particularly the needs of the electricity customer.

Second, the role of the customer is the new wildcard. Exacerbating these developments is the pace of technology change that has outstripped the pace of regulatory and institutional adaptation. Instead of abolishing RTOs or their fundamental principles, we should improve and build upon them. The customers of RTOs were never supposed to be customers in the traditional sense (large and small), but rather transmission owners. However, the rise of the active-not-passive customer via the forces of technology and the enhanced climate consciousness across customer classes has created a new paradigm—one in which all customers are increasingly concerned about how (and even where) their electrons are generated. Climate and national security concerns, including the ability to self-generate and access local power, will only continue to exacerbate this in the years ahead. These forces together create an extremely difficult confluence of challenges to harness and govern, even in the best functioning market systems. This further necessitates the need to build consensus and need for Congress to address the challenges and break the logjams. Professor Welton's points about complexity, adherence to governance principles, and needed attention to comprehensive solutions are overdue and needed in order to update a system that was never intended to function this way. Many of the themes from the article fit the paradox.

Third, in order to fundamentally improve RTOs, ultimately, Congress must enact legislation and provide the political will to FERC to fix the problem. Congress can use the power vested in it to regulate interstate commerce to initiate comprehensive reform that addresses grid gover-

nance challenges. This must be done with states as partners, however, it is important to take into account the regional sandboxes created by the status quo, due to the physics of the grid, but more often due to state versus state and regional conflicts. Accordingly, we must think more about how to maximize the grid, which was built in a different era, to run more like the highway system—with the free flow of electrons across state lines and that are increasingly being generated behind the meter and across traditional jurisdictional boundaries.

In addition, Congress needs to empower FERC and provide political will to improve RTOs, including supporting the items outlined in Professor Welton's article. As Professor Welton explains, "there is rising support for the idea of eliminating mandatory capacity markets from eastern RTOs."² She notes that "[already] there are controversies over how RTOs determine 'price formation' in energy markets and ancillary service markets" but, ultimately, the issue "comes down to *who writes these rules* within the RTO context."³ Professor Welton further observes: "To ensure that pricing in these basic markets remains just and reasonable under changing conditions, FERC may need to take a heavier hand. . . ."⁴ Specifically, she posits the following:

The ideal solution here would be for Congress to create a special category of review for RTO tariff filings within the Federal Power Act, providing FERC with the ability to amend portions of RTO filings and to reject solutions that it finds plausible but inferior. These changes would recalibrate FERC's authority over RTOs to align it with the authority of other federal agencies engaged in policy-making, which operate under the benefit of *Chevron* deference to preferred agency solutions.⁵

Furthermore, according to Professor Welton, FERC could "increase scrutiny of corporate mergers and their impact on electricity governance . . . by drawing upon . . . [its] statutory charge . . . to ensure that proposed mergers are 'consistent with the public interest.'"⁶ The Commission's "current practice is governed by a Merger Policy Statement,"⁷ which FERC could amend.

Congress can improve RTOs but, in order to do so, we must recognize that there will be compromises and, depending on your perspective, gains, and losses. Many argue Congress should be the last place any of this gets done, and I would usually agree. At this point, however, we are running out of options. We have black boxes that we were left to be filled, as Professor Welton says, because we punted these issues 20 years ago. Now, it is all coming back to roost.

2. *Id.* at 266.

3. *Id.* at 266-67.

4. *Id.* at 267.

5. *Id.* at 270.

6. *Id.* at 271 (citing 16 U.S.C. §791a, Chapter 12, Subchapter 1, Section 203(a)(4)).

7. *Id.* at 271 (citing 18 C.F.R. Part 2, (Order 592), available at https://www.ferc.gov/sites/default/files/2020-04/rm96-6_0.pdf).

I am not suggesting that Congress take on the role of RTOs, but it does need to create bipartisan political will for the sake of climate change, reliability, security, and resiliency. One way to do that is via an Advisory Committee. While Federal Advisory Committees often get criticized for pushing paperwork and holding meetings for meetings sake, in this case, we have enough entrenched interests on all sides that we need to establish an objective process that includes both incumbent and new voices,

in order to make the necessary recommendations to guide Congress and give political cover to FERC—including to both Republicans and Democrats and in all regions of the country. The hope is that in the coming years many more bills and efforts will be developed, as the challenges and plight of consumers operating in this complex system and different regions increasingly is documented and the political momentum for change grows.

C O M M E N T

COMMENT ON SHELLEY WELTON, RETHINKING GRID GOVERNANCE FOR THE CLIMATE CHANGE ERA

by Casey Roberts

Casey Roberts is a Senior Attorney at the Sierra Club's Environmental Law Program.

In *Rethinking Grid Governance for the Climate Change Era*, Shelley Welton has incisively described the underexplored institutional role of regional transmission organizations (RTOs) in facilitating decarbonization. As an attorney who advocates within the RTO stakeholder process, and before the Federal Energy Regulatory Commission (FERC) and the federal courts, I see firsthand how the RTO processes for identifying and addressing emerging issues can succeed or be derailed, and the limitations in FERC's ability to proactively set these processes and their outcomes straight. I agree with Welton that RTOs cannot be trusted to self-govern and that many factors militate against treating them with a lighter hand than a run-of-the-mill utility.¹ But I am more sanguine than Prof. Shelley Welton that FERC has sufficient ability to shape RTO processes and outcomes in a manner that protects consumers and advances decarbonization.

Second, while RTO voting structures unquestionably favor incumbents, the broader political environment in which RTOs operate can constrain their worst tendencies. I describe some of these dynamics and suggest ways that states, consumer advocates, and public interest organizations can shape outcomes while deeper reforms are pursued.

For all of their deficiencies, RTOs are a significant improvement over the prior holders of Federal Power Act Section 205 rights—individual utilities. Consumers have an inadequate say in RTO decisionmaking processes, but they have even less of a say in the decisions of a utility outside of an RTO. And while RTOs may drag their heels or erect roadblocks to innovative new technologies, it is undisputable that a non-RTO vertically integrated utility squelches nearly all competition from such technologies, unless the utility itself can develop them and add them to its rate-base. While RTOs are a significant improvement, they present considerable untapped potential.

I. FERC's Ability to Shape RTO Tariffs Is Substantial

Professor Welton notes that following the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit's decision in *NRG Power Marketing*, FERC's ability to modify an RTO's Section 205 filing has been significantly constrained, leaving FERC without the ability to impose a *more* just and reasonable alternative.² This limitation on FERC's authority also, of course, applies where a non-RTO utility submits changes to its rates under Section 205,³ and I think the evidence is mixed as to whether the RTO structure further diminishes FERC's authority.

It is true that FERC's approval of an RTO's Section 205 filing is sometimes heavily influenced by the fact that it was approved by a substantial portion of the RTO's membership. In this way, FERC could be understood to be applying a lighter hand to RTO filings because of the implicit vetting below. However, at other times, the existence of the stakeholder process complicates an RTO's effort to get its way at FERC. As Professor Welton observes, some controversial filings actually contravene stakeholder preferences,⁴ which leaves the RTO with the unenviable task of explaining why it has ignored these preferences. More broadly, the stakeholder process usually provides an opportunity for advocates to dissect and extract information from the RTO about its preferred course of action.⁵

2. *Id.* at 233-34 (citing *NRG Power Mktg. v. FERC*, 862 F.3d 108, 114 (D.C. Cir. 2017)).

3. It is worth considering that FERC may actually have broader authority over RTO rates than it does over bilateral contracts widely used outside of centralized RTO markets, given that application of the *Mobile-Sierra* doctrine to the latter limits FERC to setting aside rates only if they are clearly contrary to the public interest. *Tri-State Generation & Transmission Ass'n*, 170 FERC ¶ 61,221, at PP 44-46 (2020) (reiterating FERC precedent that the *Mobile-Sierra* standard applies only to individualized agreements negotiated at arms-length, not to generally applicable rates).

4. Welton, *supra* note 1, at 255.

5. *See, e.g.*, *ISO New England, Inc., Order Rejecting Proposed Tariff Revisions*, 173 FERC ¶ 61,106, at P 49 (2020) (finding an ISO-NE rate proposal unjust and unreasonable because the costs exceeded the benefits based on an impact assessment that ISO-NE had conducted at stakeholders' request).

1. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 257 (2021).

This can unearth evidence that undermines the RTO's case for its proposed tariff, which can later provide FERC with grounds to conclude that the RTO's proposal is not just and reasonable, or at least that the RTO has not met its burden of proof on that issue. Thus, even if public advocates lack sufficient voting power to prevent a Section 205 filing, the existing stakeholder processes help to build evidentiary records that can support Commission rejection of an RTO's Section 205 filing.

Moreover, while FERC's role under Section 205 is "passive and reactive," it is far from a rubber stamp.⁶ *NRG* imposes real limits, but FERC still has options for nuance, such as accepting only in part,⁷ or rejecting with guidance on what the RTO might re-file that would be acceptable.⁸ The Commission can also influence the contents of a tariff before it is filed through dialogue with RTOs on emerging issues and pre-filing meetings on particular topics. Of course, the Commission's authority under Section 205 is meaningless if it lacks a quorum or is deadlocked. Under Section 205(d), a utility's filing goes into effect by operation of law if the Commission is unable to rule on it within 60 days.⁹ Several recent filings with significant policy implication went into effect by operation of law,¹⁰ which confirms that institutional structures that result in RTO filings that better reflect state policies and consumer protection are critically important.

Finally, Professor Welton notes the challenges of invoking FPA Section 206, under which the Commission can direct RTOs to take specific actions.¹¹ To invoke this authority, the Commission must establish that the status quo is not just and reasonable. This is a real hurdle, but it is far from insurmountable so long as the Commission can build the needed record. As Professor Welton notes, the Commission has taken this action in cases where incumbents are constraining access by new entrants.¹² Admittedly, the Commission's sometimes-passive approach to Section 205 filings—conceding that wide range of proposals can be just and reasonable—could be viewed as affecting its ability to find that many tariffs are not just and reasonable.

But evidence of changed circumstances, and even evolving Commission views regarding economics, can justify a change in the Commission's determination regarding a tariff that it previously concluded was just and reasonable.¹³ It is true that the interests of an affordable energy transition may not always be advanced by the Commission's action under Section 206, but this is less an indicator of insufficient regulatory oversight of privatized RTOs, than another reminder that elections have consequences.

II. Increasing Consumer and State Influence to Accelerate an Affordable Clean Energy Transition

I share Professor Welton's conviction that RTO decision-making must better reflect the positions of new entrants, consumers, and states, if the RTO model is to facilitate an affordable clean energy transition. Notwithstanding the limitations recognized in the *CAISO* decision,¹⁴ the Commission has determined that membership rules have a direct effect on FERC-jurisdictional rates and therefore fall within its jurisdiction.¹⁵ FERC has also recognized that reforms other than changing the membership requirements or voting structure can directly affect rates and moreover, are just and reasonable. For example, in 2016, FERC approved a tariff change to provide funding for the Consumer Advocates of PJM States, because this expense would "benefit PJM's ratepayers by increasing its responsiveness to the needs of customers and other stakeholders and by making the stakeholder process more inclusive, transparent, and robust."¹⁶ In an earlier order, FERC approved funding for the PJM regional state committee—the Organization of PJM States, Inc.—on the basis that it would enable PJM to more efficiently engage with state regulators and would benefit market participants through coordinating consideration of transmission and markets issues with state and federal components.¹⁷ FERC has thus already recognized that additional resources for consumer and state advocates improve the quality of stakeholder deliberation—further expanding the resources available for engagement by these sorts of representative organizations could immediately benefit customers.¹⁸

While FERC has broad jurisdiction over governance practices, and there is ample precedent for approving reforms that improve responsiveness and accountability,¹⁹ there are important practical limitations on FERC's abil-

6. See, e.g., *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017).

7. See, e.g., *NYPSC v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1574 (D.C. Cir. 1993); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 183, 187 (D.C. Cir. 1986).

8. *PJM Interconnection, LLC*, 175 FERC ¶ 61,084, at P 17 (2021) (rejecting a Section 205 filing based on flaws in the proposed transition mechanism, but noting that the proposal was otherwise just and reasonable); *PJM Interconnection, LLC*, 176 FERC ¶ 61,056, at P 3 (2021) (accepting revised proposal filed without transition mechanism).

9. 16 U.S.C. §824(d).

10. See, e.g., *PJM Interconnection LLC.*, Docket ER21-2582, Notice of Filing Taking Effect by Operation of Law (Sept. 29, 2021) (PJM filing to eliminate application of minimum offer price rule to state policy resources); *Alabama Power Co., Dominion Energy South Carolina, Inc., Louisville Gas and Electric Co., Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Georgia Power Co., Kentucky Utilities Co., Mississippi Power Co.*, Notice of Filing Taking Effect by Operation of Law, Docket Nos. ER21-1111-002, ER21-1112-002, ER21-1114-002, ER21-1116-002, ER21-1117-002, ER21-1119-002, ER21-1120-002, and ER21-1121-002 (Oct. 13, 2021) (southern utilities filing to create energy exchange market).

11. Welton, *supra* note 1, at 261-62.

12. *Id.* at 244-45 (noting Orders 841 and 2222 pertaining to energy storage and aggregations of distributed energy resources, respectively).

13. See, e.g., *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

14. See Welton, *supra* note 1.

15. *New England Power Pool Participants Comm.*, 166 FERC ¶ 61,062, at P 48 (2019).

16. *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at P 2 (2016).

17. *PJM Interconnection LLC*, 113 FERC ¶ 61,292, at P 39 (2005).

18. Of course, state legislatures could and should increase funding for chronically under-resourced consumer advocates and state regulatory bodies.

19. See Christina E. Simeone, *Reforming FERC's RTO/ISO Stakeholder Governance Principles*, 34 *ELECTRICITY J.* 106954 (2021) (assessing proposing four new RTO governance principles to address observed deficiencies in RTO processes not covered by existing Order 719 criteria).

ity to radically overhaul governance within the existing framework of voluntary RTO membership. Creation of an RTO involves assignment of the transmission-owning utility's Section 205 filing rights to an independent entity on terms that the utility concludes are acceptable given the advantages of membership in a particular RTO. In *Atlantic City Electric Co. v. FERC*, the court rejected FERC's effort to change the terms of the deal these transmission owners had negotiated to form the PJM Interconnection by requiring the transmission owners to entirely cede their Section 205 rights to PJM.²⁰ Any FERC action mandating sharing of Section 205 rights with states, or significantly diminishing utilities' ability to affect the exercise of those rights by the RTO compared to the status quo, would face not only legal risk, but also potentially cause an exodus of utilities from the RTO. Unless RTO membership becomes mandatory or FERC sweetens the benefits of RTO participation, the risk of transmission owner defection constrains FERC's ability to significantly reform governance.

Formal voting power and exercise of Section 205 rights are only one part of the picture, however—the political environment in which RTOs operate moderates their pro-incumbent tendencies. For instance, while RTO membership is voluntary from FERC's perspective, states can compel utilities within their jurisdiction to become RTO members and arguably, prohibit or constrain it.²¹ In PJM, states further have the option of requiring their utilities to opt out of PJM's capacity market (though not the obligation to procure sufficient capacity). RTOs also show awareness that their social license to develop rules with wide-ranging effects on people's wallets and environment depends in significant part on public perception of these institutions as neutral arbiters that protect reliability of the bulk power

system and seek to balance competing interests. Without this perception, RTOs may face more opposition to their filings at FERC, be pelted with Section 206 complaints, or receive less deferential treatment of their Section 205 filings at FERC. Under Order 2000, RTO boards are required to be independent of the influence of any sector of market participants,²² and thus are sensitive to circumstances giving rise to questions about their independence.²³

As shown in the CAPS and OPSI orders, FERC shares an interest in RTO stakeholder processes functioning well and being perceived as fair, for a couple of reasons. First, truly inclusive and representative stakeholder processes lead to better-vetted and more durable tariff changes because differing perspectives can be discussed and reflected in the tariff design. Second, more inclusive stakeholder processes can result in Section 205 filings by RTOs that are less contentious or less likely to give rise to litigation against the Commission for approving them.

States themselves have put forward proposals for improved consideration of state and consumer views that stop well short of taking the reins at the RTO. The New England States Committee on Electricity recently published recommendations that focus heavily on requiring the ISO New England board to be transparent in how it has considered consumer costs and the positions of New England states when it makes decisions²⁴; presumably such transparency facilitates accountability to these interests, as well as providing additional evidence for proceedings at FERC. I offer these examples of more limited, intermediate steps to better state engagement at RTOs not to preclude the possibility of deeper governance reform, but instead to encourage near-term progress during a critical time for climate action and consumer protection.

20. *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002).

21. Some states already mandate that their utilities participate in regional transmission organization. See, e.g., OHIO REV. CODE ANN. §4928.12, <https://codes.ohio.gov/ohio-revised-code/section-4928.12> (requiring transmission owners to be members of RTOs); VA. CODE ANN. §56-579 (2022) (requiring utilities that own transmission to form or join a regional transmission entity).

22. See Order 2000, 89 FERC ¶ 61,285, at P 152 (1999) (describing requirement that RTOs have a decisionmaking structure independent of control by any market participant or class of participants).

23. See, e.g., Letter from PJM Board of Managers (Feb. 25, 2021), <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2021-0225-board-response-to-caps-letter-re-common-interest-agreements.ashx> (responding to criticism of confidentiality agreement with transmission owners).

24. NESCOE Resources, *Advancing the Vision* (June 29, 2021), https://nescoe.com/resource-center/advancing_the_vision/.

C O M M E N T

COMMENT ON RETHINKING GRID GOVERNANCE FOR THE CLIMATE CHANGE ERA

by Rebecca Tepper and Kelly Caiazzo

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In *Rethinking Grid Governance for the Climate Change Era*, Prof. Shelley Welton makes a compelling case for why “U.S. grid governance must be redesigned to accommodate a new era of regulatory priorities that include responding to climate change.”¹ As the operators of regional electricity markets and managers of the transmission grid, Regional Transmission Organizations (RTOs)² “must play a pivotal role”³ in achieving clean electricity goals.⁴ However, as Professor Welton details, RTO governance structures⁵ are in many ways designed to resist the types of changes necessary to enable a transition to a clean electric grid.⁶

Professor Welton offers four pathways to better grid governance, including increasing public oversight and control by enhancing state and federal oversight capabilities.⁷ Here, we focus on the role of states, and, in particular, the role that state consumer advocates can play in increasing RTO accountability, promoting cost-effective market and grid improvements, and advancing clean energy goals. We first discuss three developments that may serve as building blocks to potential reforms: the origin of state consumer

advocate offices, the formation of regional state committees, and the Federal Energy Regulatory Commission's (FERC's) effort to increase RTOs' accountability to consumers. Then, we review enduring barriers to participation in RTO stakeholder processes and offer recommendations.

I. State Consumer Advocates

Utility consumer advocates trace their origin to the 1970s when a confluence of factors, including the energy crisis of the early 1970s, caused sharp and more frequent utility retail rate increases.⁸ These increases heightened consumer interest in energy prices and prompted calls from consumer groups for increased utility regulation.⁹ State legislatures responded by creating consumer advocacy offices to represent the interests of consumers before state public utility commissions (PUCs) in an effort to level the playing field against well-represented and well-resourced utilities.¹⁰ Today, 44 states and the District of Columbia have consumer advocates.¹¹

While the structure of state consumer advocate offices varies,¹² three core attributes define legislatively created consumer advocates: (1) an explicit mandate to represent consumers, (2) structural separation from the state utility regulatory commission; and (3) standing in cases and the power to appeal decisions.¹³ Thus, consumer advocates

1. Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 214 (2021).

2. The term Regional Transmission Organization is used here to include Independent System Operators (ISOs).

3. Welton, *supra* note 1, at 240.

4. *See id.* at 239 (describing state clean electricity goals and decarbonization efforts). President Joe Biden has also set a goal for the United States to reach 100% carbon pollution-free electricity by 2035. White House Press Release, *Fact Sheet: Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

5. As Professor Welton describes, governance structures vary from RTO to RTO; in particular, the structure of the California ISO is distinct from the membership-driven RTOs/ISOs such as PJM. *See Welton, supra* note 1, at 226-30, Appendix A. Here, we focus on RTOs that fall under the PJM model described by Professor Welton, and, in particular, RTOs whose territory covers more than one state. *See id.* at 227-29.

6. *See generally id.* at 241-64.

7. *Id.* at 210, 267-70.

8. Elin Swanson Katz & Tim Schneider, *The Increasingly Complex Role of the Utility Consumer Advocate*, 41 ENERGY L.J. 1, 6 (2020) (citation omitted).

9. *Id.* (citations omitted).

10. *Id.* at 7 (citations omitted).

11. Jake Duncan & Julia Eagles, Institute for Market Transformation, *Public Utilities Commissions and Consumer Advocates: Protecting the Public Interest*, prepared for the National Council on Electricity Policy, administered by the National Association of Regulatory Utility Commissioners Center for Partnerships & Innovation, at 2 (Dec. 2021), https://www.imt.org/wp-content/uploads/2022/01/FINAL_NCEP_Consumer_Advocates_Mini_Guide.pdf.

12. *Id.* (“Consumer advocates fall into four general categories: independent state agencies, divisions of state attorneys general . . . nonprofit organizations, or arms of the legislature.”).

13. *Id.* at 3; Katz & Schneider, *supra* note 8, at 9.

play a particular role in utility oversight, distinct from utility regulators and other agencies that may serve the general public interest. Whereas PUCs fulfill the complex role of balancing ratepayer, utility, industry, and other interests, a state consumer advocate's primary mission is to represent the interests of consumers.¹⁴ These interests include maximizing the benefits of consumer-funded investments in clean energy generation and other decarbonization initiatives.¹⁵

In today's complex regulatory landscape, this often means acting on behalf of consumers in diverse state, regional, and federal forums. While state consumer advocate offices were primarily designed to operate in discrete, formal proceedings before PUCs,¹⁶ consumer advocates' work is increasingly expanding beyond litigated proceedings in their respective states to stakeholder and other processes that implicate regional and national issues.¹⁷ This includes participating in RTO stakeholder processes, which, as Professor Welton notes, have significant impacts on consumers and states' ability to implement their policy goals.¹⁸

Reflecting the varying stakeholder governance processes across RTOs, the ways in which consumer advocates participate in these processes differ from RTO to RTO. For example, the Consumer Advocates of the PJM States (CAPS) is a tariff-funded nonprofit organization formed to coordinate the participation of consumer advocates in the PJM stakeholder process.¹⁹ Additionally, individual consumer advocates in the PJM service territory can participate in the stakeholder process through the End-Use Customer sector and as part of the Public Interest and Environmental Organization user group.²⁰ In MISO (Midcontinent Independent System Operators), consumer advocates participate in the stakeholder process through the Public Consumer Advocates sector, which has an 8% weighted voting share on MISO's senior stakeholder committee.²¹ In ISO-

NE (ISO New England), consumer advocates can participate as members as part of the End-User sector.²²

II. Regional State Committees

As Professor Welton observes, when FERC established the framework for RTOs, it declined to grant states any formalized role in RTO governance,²³ instead adopting a "flexible approach that allows states to play appropriate roles in RTO matters."²⁴ Shortly thereafter, however, noting that there was not a formal process for state representatives to engage in dialogue with RTOs, FERC proposed to establish Regional State Advisory Committees.²⁵ As proposed, these committees would have been permitted to work with RTOs to "seek regional solutions to issues that may fall under federal, state, or shared jurisdiction," including resource adequacy standards and transmission planning and expansion.²⁶ While the FERC rule proposing Regional State Advisory Committees was not adopted,²⁷ groups of states nevertheless began forming their own versions of Regional State Committees (RSCs), starting with the Organization of MISO States (OMS) in 2003.²⁸ Additional groups of states followed suit in the subsequent years.²⁹

Today, state interests are coordinated through RSCs in each of the four multi-state RTOs.³⁰ In addition to OMS, these RSCs are: the SPP Regional State Committee (SPP RSC), the Organization of PJM States (OPSI), and the New England States Committee on Electricity (NESCOE).³¹ The Organization of MISO States, OPSI,

14. See Duncan & Eagles, *supra* note 11, at 1.

15. See Welton, *supra* note 1, at 239 (discussing state renewable energy policies and other policies to promote decarbonization).

16. Duncan & Eagles, *supra* note 11, at 1; Katz & Schneider, *supra* note 8, at 8 ("Utility consumer advocates were designed to effectively advocate in the types of proceedings used to establish utility rates in the late 1970s and early 1980s These typical commission proceedings at that time included rate cases, affiliate proceedings, and merger approvals.").

17. See Duncan & Eagles, *supra* note 11, at 5; Katz & Schneider, *supra* note 8, at 17-18.

18. See Welton, *supra* note 1, at 230-32, 238-40, 257-60; see also Duncan & Eagles, *supra* note 11, at 5-6; Katz & Schneider, *supra* note 8, at 17-18.

19. PJM Interconnection, L.L.C., Order Accepting Tariff Revisions, 154 FERC ¶ 61147, at para. 2 (Feb. 29, 2016) [hereinafter PJM Order].

20. Christopher A. Parent et al., Exeter Associates, Inc., *Governance Structure and Practices in the FERC-Jurisdictional ISOs/RTOs*, prepared for New England States Committee on Electricity, at 6-3 (Feb. 2021), <https://nescoc.com/resource-center/isorto-governance-feb2021/>. Each state consumer advocate may nominate one representative to serve as an ex officio member in the End-Use Customer sector. *Id.* at 6-5 (citation omitted). Ex officio members have voting rights at PJM's Members Committee and Markets and Reliability Committee. About PJM, Membership Enrollment, <https://www.pjm.com/about-pjm/member-services/membership-enrollment>.

21. Parent et al., *supra* note 20, at 4-3, 4-7; Welton, *supra* note 1, at 253, Appendix A.

22. Parent et al., *supra* note 20, at 3-4. With respect to the other multi-state RTO, SPP (Southwest Power Pool), consumer advocates can participate as alternative power/public interest members. *Id.* at 7-2. Notably, however, in 2019, FERC found that SPP's membership exit fee for non-transmission owners was unjust and unreasonable and created a barrier to membership, and it ordered SPP to eliminate the fee for non-transmission owners. See American Wind Energy Association and the Wind Coalition v. Southwest Power Pool, Inc., Order on Complaint, 167 FERC ¶ 61033, at ¶¶ 2, 49, 63 (Apr. 18, 2019). SPP is considering additional related changes. See Tom Kleckner, *SPP Briefs: Week of Feb. 14, 2022*, RTO INSIDER, <https://www.rtoinsider.com/articles/29609-spp-briefs-021422> (describing staff proposal that would lower the membership withdrawal deposit amount for groups such as public interest organizations and consumer advocates).

23. Welton, *supra* note 1, at 258.

24. FERC Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 810, 938 (Dec. 20, 1999) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 2000]; *id.* at 936, 938 (noting that "[a]lmost all commenters on this issue expressed support for a clear state role in governance," but finding that it was "not appropriate to try to set out a full set of states' roles" in the Order).

25. See Notice of Proposed Rulemaking, Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, 67 Fed. Reg. 55451, at ¶¶ 551-554 (Aug. 29, 2002) (codified at 18 C.F.R. pt. 35) [hereinafter NOPR Remedying Undue Discrimination] (also discussing a National Governors Association proposal to establish "Multi-State Entities"); see also William H. Smith Jr., *Formation and Nurture of a Regional State Committee*, 28 ENERGY L.J. 185, 189 (2007).

26. NOPR Remedying Undue Discrimination, *supra* note 25, at ¶ 554.

27. Smith, *supra* note 25, at 189 (citation omitted).

28. *Id.* at 196.

29. See *id.* at 202-03; Welton, *supra* note 1, at 228; Stephanie Lenhart & Dalten Fox, *Participatory Democracy in Dynamic Contexts: A Review of Regional Transmission Organization Governance in the United States*, 83 ENERGY RES. & SOC. SCI. 1, 10 (2022).

30. *Id.*

31. See Parent et al., *supra* note 20, at 3-2, 4-1, 6-1, 7-2.

and SPP RSC are comprised of representatives from utility regulatory authorities, often state PUC commissioners, within their footprint.³² NESCOE is governed by a board of managers appointed by the governors of the six New England states.³³

Reflecting the distinct governance structures of their corresponding RTOs and their individualized development processes, the authority and power of each RSC varies.³⁴ For example, the State Regulatory Authorities sector is the most powerful weighted voting bloc within MISO's senior stakeholder committee, holding 4 of 25 seats,³⁵ and OMS selects the representatives to fill these seats.³⁶ Additionally, OMS has a defined role in making resource adequacy determinations³⁷ and certain rights and responsibilities with respect to transmission planning and cost allocation.³⁸ Similarly, the SPP RSC has specific responsibilities to develop regional proposals regarding resource adequacy and transmission planning and cost allocation, including section 205³⁹ filing rights (through SPP) for these areas.⁴⁰ The Organization of PJM States can engage in the stakeholder process and raise issues and provide input, but it does not vote.⁴¹ Similarly, NESCOE participates in committee meetings and can make proposals or amendments in the stakeholder process, but it is not a member and does not vote.⁴²

III. FERC "Responsiveness" Requirements

While RSCs gave states an additional avenue to impact the stakeholder process, this did not fully address concerns that RTO governance design was insufficiently protective of the public interest.⁴³ In FERC Order No. 719, issued nine years after its Order on RTOs,⁴⁴ FERC took action to attempt to "enhanc[e] the responsiveness of RTOs and ISOs to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for

electricity services."⁴⁵ After considering stakeholder input, FERC ruled that RTOs "must provide an avenue for customers and other stakeholders to present their views on RTO and ISO decisionmaking, and to have those views considered."⁴⁶ Accordingly, FERC adopted four "responsiveness" criteria (inclusiveness, fairness in balancing diverse interests, representation of minority positions, and ongoing responsiveness)⁴⁷ intended to establish a means for customers and other stakeholder to have a form of direct access to RTO boards of directors, and thereby to increase the boards' responsiveness to these entities.⁴⁸ Notably, the "ongoing responsiveness" criterion instructs that "responsiveness to customers and other stakeholders should continually be evaluated for improvement."⁴⁹ However, as Professor Welton notes, RTOs' responses to Order No. 719's responsiveness directives were varied, and the Order's impacts since its issuance have been somewhat limited.⁵⁰

For example, in response to Order No. 719, ISO-NE established a Consumer Liaison Group (CLG) to "help end-users and consumer representatives understand stakeholder processes and key issues."⁵¹ The CLG is governed by a Coordinating Committee of 12 elected members from the six New England states.⁵² The CLG conducts open quarterly meetings that include updates from ISO-NE management and speakers on issues of importance to end-use consumers.⁵³ The CLG has provided an important venue to facilitate information-sharing from ISO-NE and to provide for greater understanding of ISO-NE's activities, decisionmaking processes, and potential impacts on consumers.⁵⁴ However, the CLG is primarily an educational entity; it is not an advocacy group that represents consumers' interests, and it is not a participating member in the stakeholder process. Thus, while providing a useful service to the public, the CLG alone cannot ensure that ISO-NE is sufficiently responsive to consumer concerns.

32. *Id.* at 4-2, 6-2, 7-2.

33. *Id.* at 3-3.

34. Lenhart & Fox, *supra* note 29, at 10; *see also id.* at 9, Table 5; Welton, *supra* note 1, at Appendix A.

35. Welton, *supra* note 1, at 268; Parent et al., *supra* note 20, at 4-7.

36. *Id.*

37. Welton, *supra* note 1, at 265-66, Appendix A; Lenhardt & Fox, *supra* note 29, at 10.

38. Parent et al., *supra* note 20, at 4-3-4-4.

39. Section 205 of the Federal Power Act.

40. Parent et al., *supra* note 20, at 7-2 (citation omitted); Welton, *supra* note 1, at 269, n.363 (citation omitted) (noting the RSC's control over resource adequacy). The SPP may also file its own proposals in addition to the SPP RSC's. Parent et al., *supra* note 20, at 7-4 (citation omitted).

41. Parent et al., *supra* note 20, at 6-3; *see also id.* at 6-2 (discussing specific OPSI and state roles regarding transmission planning, including PJM's State Agreement Approach for public policy transmission).

42. *Id.* at 3-4. NESCOE has a defined role in the ISO-NE tariff in connection with the transmission planning process for public policy-driven transmission, *id.*, and it has explored reforms to the existing process.

43. *See* Welton, *supra* note 1, at 226; *see also, e.g.,* Michael Brooks, *FERC Probed on RTO Governance, Market Issues*, RTO INSIDER (June 12, 2019), <https://www.rtoinsider.com/articles/22231-ferc-probed-on-rto-governance-market-issues> (quoting Rep. Bobby Rush, Chair of the House Energy and Commerce Committee's Subcommittee on Energy, "consumer voices are often overlooked, ignored or cut out of the RTO process entirely.");

44. *See* Order No. 2000, *supra* note 24.

45. FERC Order No. 719, Wholesale Competition in Regions With Organized Electricity Markets, 73 Fed. Reg. 64100, at ¶ 12 (Oct. 28, 2008) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 719].

46. *Id.* at ¶ 503.

47. *Id.* at ¶¶ 482, 504.

48. Welton, *supra* note 1, at 226 (citing Order No. 719).

49. Order No. 719, *supra* note 45, at ¶ 509.

50. *See* Welton, *supra* note 1, at 226; Brooks, *supra* note 43 (quoting Rep. Frank Pallone, Chair of the House Energy and Commerce Committee: "[T]here has not been a comprehensive review by FERC of each RTO's stakeholder process to ensure compliance with the requirements of Order 719."); *see also* Federal Energy Regulatory Commission Report on the Office of Public Participation, at 15 (June 24, 2021), <https://www.ferc.gov/media/ferc-report-office-public-participation> (describing public comments suggesting that the Office "help stakeholders and the public better understand, and participate in, the processes and proceedings of the Commission-regulated RTOs and ISOs").

51. ISO New England Inc. and New England Power Pool, Order Accepting Compliance Filing, 133 FERC ¶ 61070, at para. 13 (Oct. 21, 2010) [hereinafter ISO-NE & NEPOOL Order].

52. *See* Joint Report of the Consumer Liaison Group Coordinating Committee and ISO New England, 2021 Report of the Consumer Liaison Group, at 1-2 (Mar. 9, 2022), https://www.iso-ne.com/static-assets/documents/2022/03/2021_report_of_the_consumer_liaison_group_final.pdf.

53. *See id.* at 1, §3.

54. *See id.* at 1.

IV. Barriers to Participating in and Influencing RTO Stakeholder Processes

Several barriers impact states' and consumer advocates' ability to participate in RTO stakeholder processes in a manner that ensures the protection of state and consumer interests. First, at least in some cases and circumstances, states are limited by a lack of relative power⁵⁵ and formal authority to influence RTO action, which can impede their ability to achieve state policy goals. For example, Professor Welton discusses capacity market reforms in ISO-NE and PJM "that make it significantly harder for renewables to compete in their markets—thereby putting aggressive state renewable energy goals at risk."⁵⁶ While, as noted above, the RSCs in ISO-NE and PJM engage with their respective stakeholder processes, they do not vote and otherwise have limited authority.

Therefore, these RSCs and their member states often rely on informal measures to try to impact RTO decision-making. For example, in 2020, governors of five of the New England states released a statement arguing that the region's wholesale electricity markets and organizational structures must evolve toward a clean energy future.⁵⁷ The statement criticized the region's wholesale market design as "misaligned with [the] States' clean energy mandates" and argued that it "thereby fails to recognize the full value of [the] States' ratepayer-funded investments in clean energy resources."⁵⁸ NESCOE has also addressed similar issues in communications to ISO-NE.⁵⁹ Similarly, in a 2021 letter to the PJM Board, OPSI set forth core principles to guide discussion about the evolution of market design in PJM, including that "[s]tate procurements or competitive solicitations, policy choices, emissions levels, or clean energy requirements must be respected and accommodated, rather than over-ridden or made infeasible by PJM market rules."⁶⁰

While, as noted above, there have been developments in both regions with respect to market design reforms,⁶¹ this continuing process has been long and complex, and has been impacted by the fact that states have limited formal power within RTO governance structures.

A lack of relative power in the stakeholder process also impacts consumer advocates, which are often "lumped in with end-use customers."⁶² For example, in both ISO-NE and PJM, voting power is divided among industry sectors, and consumer advocates can participate in the stakeholder process as voting members in the end-user sector.⁶³ However, this grouping includes a diversity of interests within the sector.⁶⁴ In PJM, consumer advocates are grouped with industrial and commercial end-user stakeholders, which make up the majority of the sector.⁶⁵ In ISO-NE, the end-user sector includes consumer advocates, industrial and commercial users, local government users, and environmental organizations; and consumer advocates constitute approximately 11.5% of the voting membership within the sector.⁶⁶ While the interests of these stakeholders certainly align in some respects, certain consumer interests, including, in particular, retail consumer interests, risk being drowned out.⁶⁷

In addition to limitations with respect to a lack of formal authority and voting power, the technical complexity and time-intensity of RTO stakeholder processes present significant resource challenges for states and consumer advocates. "The RTOs and market participants play in a highly technical world of acronyms, complex engineering, and economics. Participation in the daily grind of RTO decision-making and FERC oversight requires not only technical understanding but a great deal of time."⁶⁸ In response to these demands, participants typically utilize some combination of dedicating staff to engage in the stakeholder process, hiring outside consultants to keep them informed, and strategically determining where and when to engage.⁶⁹ Participation can be prohibitively cost-

55. As Professor Welton details, in terms of voting power, industry interests most often dominate RTO stakeholder processes. See Welton, *supra* note 1, at 227, 253, 268, Appendix A.

56. *Id.* at 246. The situation with respect to capacity market reforms in both ISO-NE and PJM has continued to develop. See, e.g., Ethan Howland, *PJM's "Focused" MOPR Takes Effect, Boosting Renewables and Nuclear as FERC Commissioners Deadlock*, UTILITY DIVE (Sept. 20, 2021), <https://www.utilitydive.com/news/pjm-focused-mopr-takes-effect-ferc-capacity-market/607417/>; Ethan Howland, *FERC Approves ISO-NE Plan to End MOPR in 2025, While Accepting Some Renewables in Capacity Auctions*, UTILITY DIVE (published Apr. 4, 2022, updated May 31, 2022), <https://www.utilitydive.com/news/iso-ne-capacity-mopr-minimum-offer-clean-energy/621487/>.

57. See Statement of the Governors of Connecticut, Maine, Massachusetts, Rhode Island, and Vermont, *New England's Regional Wholesale Electricity Markets and Organizational Structures Must Evolve for 21st Century Clean Energy Future* (Oct. 14, 2020), <https://nescoe.com/resource-center/govstmt-reforms-oct2020/>.

58. *Id.* at 2. The statement also identified issues regarding transmission planning and governance.

59. See, e.g., Letter from NESCOE to ISO-NE Board of Directors, November 1, 2021 State Official/ISO-NE Board Meeting on ISO-NE Response to Advancing the Vision, (Oct. 29, 2021), https://nescoe.com/resource-center/memo_iso_adv_vision/.

60. Letter from the Organization of PJM States to the PJM Board of Managers (Jan. 8, 2021), <https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20210114-opsi-letter-re-the-future-resource-adequacy.ashx>; see also Jennifer Chen & Gabrielle Murnan, *State Participation in Resource Adequacy Decisions in Multistate Regional Transmission Organiza-*

tions, DUKE U. NICHOLAS INST. FOR ENV'T POL'Y SOLUTIONS, at 14 (Mar. 2019), <https://nicholasinstitute.duke.edu/publications/state-participation-resource-adequacy-decisions-multistate-regional-transmission> (discussing letters from OPSI to the PJM Board).

61. See, e.g., *supra* note 56.

62. Welton, *supra* note 1, at 227.

63. See *supra* Part I.

64. Lenhart & Fox, *supra* note 29, at 8.

65. See *id.* at 9, Figure 6.

66. *Id.*; NEPOOL, Current Members, https://nepool.com/participants/?_sectors=end-user&_voting_member=y&_per_page=-1.

67. See Michael H. Dworkin & Rachel Aslin Goldwater, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 584 (2007) (citation omitted): Even if representatives of the public interest (both governmental and non-governmental) have a designated seat at the table (for example, as members of the "end user" stakeholder group), if there are very few actual human beings representing the public interest in the room and participating in negotiations, they are less likely to be heard.

68. *Id.*; see also ISO-NE & NEPOOL Order, *supra* note 51, at ¶ 67 ("We recognize that existing RTO/ISO stakeholder and board processes present resource challenges for certain stakeholders, including many consumer advocates, and may present barriers to the full, open participation of stakeholders in RTO/ISO governance matters.").

69. See Katz & Schneider, *supra* note 8, at 17; Lenhart & Fox, *supra* note 29, at 8; Dworkin & Goldwater, *supra* note 67, at 584.

ly.⁷⁰ Additionally, it is worth noting that, while RSCs help states to address these resource challenges, other than in PJM,⁷¹ consumer advocates do not have the benefit of such formal resource-sharing and coordination.⁷²

V. Recommendations

Professor Welton and others have offered numerous suggestions aimed at ensuring that state and consumer interests are appropriately considered and addressed in RTO stakeholder processes. In line with Professor Welton's suggestion that RTO governance structures could be reformed to provide a strong role for state interests,⁷³ stakeholder processes could be reformed to give consumer advocates meaningful voting power apart from the voting power of other individual end-users. This could be accomplished through sector reform, vote-weighting reform, or potentially other methods. Currently in New England, the consumer advocates from four New England states are voting members in the stakeholder process.⁷⁴ Under current sector weighting, this means that state consumer advocates collectively hold approximately 2% of the overall voting power in the stakeholder process.⁷⁵ While changing this structure would not guarantee any particular substantive changes, it would help ensure that consumer advocates have a meaningful voice and that their concerns are considered.

Beyond giving consumer advocates more voting power within the stakeholder process, RTOs could also consider ensuring that consumer advocates have a voice directly on their boards by requiring that at least one member have

experience representing consumers. This requirement could be accompanied by a requirement to have a board standing committee specifically dedicated to responding to state and consumer issues, similar to the finance, planning, and human resources already utilized by RTOs.⁷⁶

In addition to giving consumer advocates more formal power, RTOs could take additional action to provide consumer advocates with resources to facilitate their participation in the stakeholder process. For example, the Massachusetts Attorney General's Office, along with other state consumer advocates in New England, has advocated for the creation of an independent, tariff-funded organization to assist in representing the interests of consumers in the ISO-NE stakeholder process,⁷⁷ similar to PJM's CAPS. As FERC found in approving related tariff revisions, "funding CAPS is a reasonable business expense of PJM which will benefit PJM's ratepayers by 'increasing its responsiveness to the needs of customers and other stakeholders,' and by making the stakeholder process more inclusive, transparent, and robust."⁷⁸ Establishing similar organizations in other regions could similarly provide such benefits.

V. Conclusion

To enable a clean energy transition, RTOs will need to take action to integrate new resources and technologies into energy markets and the transmission grid. While additional actions will no doubt be necessary, empowering states and consumer advocates within the RTO stakeholder process can provide traction to enable further reforms.

70. *Id.*

71. See *supra* Part I.

72. Moreover, while state utility regulators operate with limited resources, consumer advocates are typically even more constrained. Nationally, consumer advocates operate with roughly 10% of the staff and budget that PUCs have, according to data gathered by the Institute for Public Utilities and Rocky Mountain Institute. Duncan & Eagles, *supra* note 11, at 3.

73. Welton, *supra* note 1, at 268.

74. See NEPOOL, *supra* note 66.

75. Letter from the Consumer Advocates of New England (CANE) to Heather Hunt, Executive Director, NESCOE, at 5 (Mar. 26, 2021), <https://new-englandenergyvision.files.wordpress.com/2021/03/consumer-advocates-of-new-england-comments.pdf> [hereinafter Letter from CANE to NESCOE].

76. See National Association of State Utility Consumer Advocates, *Model Corporate Governance for Regional Transmission Organizations and Independent System Operators*, at 13 (2009), <https://nasuca.org/wp-content/uploads/2009/01/Model-RTO-.pdf>; NESCOE, New England Energy Vision Statement Report to the Governors, at 17 (June 2021), https://nescoe.com/resource-center/advancing_the_vision/ (recommending that ISO-NE establish a standing Board of Director Committee on State and Consumer Responsiveness).

77. Letter from CANE to NESCOE, *supra* note 75, at 3-6.

78. PJM Order, *supra* note 19, at ¶ 39 (quoting Order No. 719).

H O N O R A B L E M E N T I O N

HOLDING POLLUTERS ACCOUNTABLE IN TIMES OF CLIMATE AND COVID RISK: THE PROBLEMS WITH “EMERGENCY” ENFORCEMENT WAIVERS

by Victor B. Flatt

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In 2020, the oil and gas industry claimed that employee shortages induced by lockdowns and social distancing during the COVID-19 pandemic made it difficult to comply with the U.S. Environmental Protection Agency’s (EPA’s) anti-pollution rules. EPA, followed by state agencies, responded to industry pressure with relaxed enforcement. However, EPA’s enforcement waiver, entered ostensibly to protect workers from the novel coronavirus, likely increased negative public health impacts. Specifically, harmful air pollutants rose in heavily industrialized areas where the increase correlated with a spike in daily death rates from COVID-19. Congressional investigators link this to particularly severe impacts on minority communities.

This Article examines the legal basis of emergency exemptions, provides examples of how they have been abused during climate-related disasters and the COVID-19 pandemic, and proposes solutions to curtail the abuse of these exemptions while still accounting for genuine emergency conditions.

Federal and state laws, including environmental laws, provide for emergency exemptions from otherwise mandatory regulations. However, emergency exemptions often last well beyond the acute period of the qualifying emergency, exempting industries from containing and documenting the release of significant amounts of air and water pollutants. EPA should create solutions that would

minimize the negative effects of overextended, unnecessary emergency exemptions.

First, EPA should require facilities generating above a threshold amount of emissions to plan for an emergency or disaster as a condition of their permits under the Clean Air Act (CAA), Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA). This could be accomplished with new rulemaking or guidance, as modeled by the Emergency Planning and Community Right-to-Know Act (EPCRA).

Second, EPA should promulgate a rule specifying that, to the extent possible, all permitted entities must keep records of releases during disaster exemptions and continue to report these to their permitting agency (whether the state or federal). Except during the most acute phase of an emergency, when personnel may need to evacuate or power is not available, most companies are already keeping track of their releases.

Finally, waivers should automatically sunset after a certain period, subject to permitted parties’ demonstration of a continued inability to meet their obligations. EPA should revoke a state’s authority to administer emergency exemptions if it does not impose and monitor sunset provisions. Although EPA has little appetite or capacity for state program takeovers, the mere threat of a possible takeover may alter state actions.

Editors’ Note: This abstract is adapted from Victor B. Flatt, Holding Polluters Accountable in Times of Climate and COVID Risk: The Problems With “Emergency” Enforcement Waivers, 12 SAN DIEGO J. CLIMATE & ENERGY L. 1 (2021), and used with permission.

H O N O R A B L E M E N T I O N

BRIDGES TO A NEW ERA: A REPORT ON THE PAST, PRESENT, AND POTENTIAL FUTURE OF TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS

by Monte Mills & Martin Nie

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Federal public land management agencies regularly disassociate their land management activities from their interactions with Indian tribes. Moreover, federal public land law generally provides state governments and private interests broad powers and authorities not yet extended to Indian tribes. Public land management agencies must be compelled to work with tribes on a co-management basis. While the term “co-management” is subject to inconsistent interpretations, the core attributes of a co-management approach include: (1) recognition of tribes as sovereign governments; (2) incorporation of the federal government’s trust responsibilities to tribes; (3) legitimization structures for tribal involvement; (4) meaningful integration of tribes early and often in the decisionmaking process; (5) recognition and incorporation of tribal expertise; and (6) dispute resolution mechanisms.

A presidential administration could build a bridge to tribal co-management through multiple proactive measures. New executive orders can explain how existing authorities and processes enable tribal co-management.

The administration should also ensure that federal land planning regulations and agency-specific manuals, handbooks, and policies comport with the principles of tribal co-management. Further, tribal consultation requirements must be implemented as a federal objective on equal standing with the existing federal land management priorities: multiple-use, wilderness, refuge, and others. Finally, protocols for tribal involvement in monument designations under the Antiquities Act should be adopted.

New legislation can also enable tribal co-management on federal public lands. Place-based legislation could effectively codify forms of tribal co-management specific to a particular unit of federal land, and systemwide legislation could provide tribes an opportunity to submit their own proposed co-management plans for consideration by the Secretaries of the Interior and Agriculture. Bridging into a new era of tribal relations does not mean surrendering national interests in public lands; instead, a co-management regime portends a future of increased engagement and enhanced protection for those resources.

*Editors’ Note: This abstract is adapted from Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RESOURCES L. REV. 49 (2021), and used with permission.*

IN CASE YOU MISSED IT . . .

In the Courts

"In the Courts" contains full summaries of court cases reported in *ELR Update* during the month of June 2022. They are listed under the following categories: Climate Change, Energy, Governance, Natural Resources, Toxic Substances, Water, and Wildlife. The summaries are then arranged alphabetically by case name within each category. To access *ELR*'s entire collection of court cases and summaries, visit <https://www.elr.info/judicial>.

CLIMATE CHANGE

Louisiana v. Biden, No. 21A658, 52 ELR 20065 (U.S. May 26, 2022). In an emergency order, the U.S. Supreme Court denied several states' application to vacate the Fifth Circuit's stay of a district court ruling that had enjoined federal agencies from implementing interim estimates on the social cost of greenhouse gas emissions.

Rhode Island v. Shell Oil Products, Co., L.L.C., No. 19-1818, 52 ELR 20059 (1st Cir. May 23, 2022). The First Circuit again affirmed a district court order that remanded to state court Rhode Island's climate change lawsuit against oil companies. The district court concluded that none of the companies' grounds for removal—federal officer, federal question, Outer Continental Shelf Lands Act, admiralty, and bankruptcy—were warranted, and remanded back to state court. The appellate court had affirmed the district court's determination that there was no jurisdiction under the federal officer removal statute, and dismissed the rest of the companies' appeal for lack of jurisdiction. The U.S. Supreme Court vacated the appellate court's judgment, and remanded in light of its ruling in *BP P.L.C. v. Mayor & City Council of Baltimore*, which held that a federal appeals court is permitted to review a federal judge's entire remand order. The appellate court then considered all of the companies' bases for removal, but rejected all of them and affirmed the district court's remand order.

ENERGY

Belmont Municipal Light Department v. Federal Energy Regulatory Commission, No. 19-1224, 52 ELR 20069 (D.C. Cir. June 17, 2022). The D.C. Circuit granted in part and denied in part petitions to review FERC's order approving the Independent System Operator for New England's tariff revisions that compensated power plants for maintaining up to three days' worth of fuel on-site to generate electricity during winter months. Utility and environmental groups argued FERC's approval imposed unjust and unreasonable, discriminatory, and preferential rates, in violation of the Federal Power Act. The court found that the revisions effectively addressed a

pressing fuel security risk, did not unnecessarily duplicate other programs addressing fuel security in New England, and that the total costs were reasonable; but that FERC's approval of their inclusion of all eligible market participants—nuclear, coal, biomass, and hydroelectric—despite record evidence that they would not change their behavior in response to being compensated was arbitrary and capricious. It granted in part and denied in part the petitions and remanded to FERC for further proceedings.

Salisbury, North Carolina, City of v. Federal Energy Regulatory Commission, No. 20-1238, 52 ELR 20068 (D.C. Cir. June 10, 2022). The D.C. Circuit upheld FERC's approval of a dam operator's flood protection plan for a nearby water pump station in North Carolina. A city petitioned for review of FERC's approval of the plan, a state-imposed condition of its water quality certification under the CWA, which involved raising the pump station's equipment rather than building a new station. The court concluded that FERC adopted the best interpretation of the condition, that it reasonably concluded that the plan would enable the station to continue operating during floods, and that substantial evidence supported its approval. It denied the petitions for review.

GOVERNANCE

Commonwealth v. Exxon Mobil Corp., No. SJC-13211, 52 ELR 20061 (Mass. May 24, 2022). The Massachusetts Supreme Court affirmed a lower court's denial of an oil and gas company's motion to dismiss a civil enforcement action brought by the Massachusetts attorney general (AG) based on the company's communications with investors and consumers concerning the impact of climate change. The company moved to dismiss under the state's anti-SLAPP statute, arguing the suit was motivated by its "petitioning" activity. The AG argued that the anti-SLAPP statute did not apply to the AG but that even if it did, the suit was not brought in response to petitioning activities, but rather for unfair or deceptive practices. The lower court denied the company's motion, finding that at least some of the activity alleged was not "petitioning" within the meaning of the statute. The high court affirmed, but on the alternate ground that construing

the anti-SLAPP statute to apply to the AG would place significant roadblocks to enforcement of Massachusetts' laws.

Milton v. United States, No. 21-1131, 52 ELR 20066 (Fed. Cir. June 2, 2022). The Federal Circuit reversed a Court of Federal Claims ruling that the U.S. government was not liable for the flooding of homes near two Houston dams managed by the U.S. Army Corps of Engineers during Hurricane Harvey. Property owners downstream of the Addicks and Barker Dams argued that the government flooded their lands by opening the dams' gates to prevent additional flooding upstream, and thus caused a Fifth Amendment taking for which compensation was owed. The claims court found that neither Texas law nor federal law provided the owners with a cognizable property interest in perfect flood control in the face of Harvey, which was an "Act of God," and thus could not state takings claims against the United States. The appellate court found that Acts of God related, if at all, to whether a taking had occurred, not whether a party had a property interest, and that the owners had alleged cognizable property interests in flowage easements. It reversed and remanded for further proceedings.

Save the Scenic Santa Ritas v. United States Army Corps of Engineers, Nos. CV-19-00177-TUC-JAS and CV-19-00205-TUC-JAS, 52 ELR 20060 (D. Ariz. May 23, 2022). A district court granted a developer's motion to dismiss a challenge to the Army Corps of Engineers' decision to issue a CWA §404 permit for a proposed copper mine project in the Santa Rita Mountains. Environmental groups and Native American tribes argued that the Corps violated the CWA and NEPA when it issued the permit, and sought to have it vacated. The developer moved to dismiss for lack of subject matter jurisdiction, arguing plaintiffs' claims were moot because it had voluntarily surrendered the permit. The court found that because the developer had surrendered the permit, avowed not to use it, and did not request that it be reissued, there was no longer a live case or controversy surrounding the Corps' decision, and that the relief plaintiffs sought was no longer available. It dismissed the suit.

NATURAL RESOURCES

Bohon v. Federal Energy Regulatory Commission, No. 20-5203, 52 ELR 20071 (D.C. Cir. June 21, 2022). The D.C. Circuit affirmed a district court's dismissal of landowners' challenge to FERC's authority to grant pipeline certificates. The landowners asked the district court to declare that Congress' delegation of authority to FERC was unconstitutional and that all past certificates were void, and sought an injunction preventing the Commission from issuing any certificates in the future. The district court dismissed the suit, finding that the Natural Gas Act's (NGA's) exclusive review process precluded its jurisdiction. The appellate court affirmed, finding that the

NGA's special review scheme deprived district courts of jurisdiction to invalidate pipeline certificates.

Citizens for a Healthy Community v. United States Department of Interior, No. 21-cv-01268-MSK, 52 ELR 20058 (D. Colo. May 19, 2022). A district court granted in part and denied in part BLM's and the Forest Service's motion to remand a challenge to the agencies' approval of a master development plan concerning oil and gas development activities on Colorado's Western Slope. Environmental groups argued the agencies violated NEPA by failing to adequately consider the plan's effects on greenhouse gas emissions and climate change and failing to consider a range of reasonable alternatives. The agencies moved to remand without vacatur. The court found that because the agencies conceded that approval of the plan was not in accordance with NEPA's requirements, vacatur was the appropriate remedy. It vacated the approval and remanded for the agencies' reconsideration.

Environmental Defense Center v. Bureau of Ocean Energy Management, Nos. 19-55526, 19-55707, 19-55708, 19-55718, 19-55725, 19-55727, and 19-55728, 52 ELR 20067 (9th Cir. June 3, 2022). The Ninth Circuit affirmed in part and reversed in part a district court's grant of summary judgment in a challenge to the Bureau of Ocean Energy Management's and the Bureau of Safety and Environmental Enforcement's authorization of well stimulation treatments on offshore oil drilling platforms in the Pacific outer continental shelf. Environmental groups and the state of California argued the agencies violated NEPA because their EA did not constitute a "hard look" at environmental impacts of allowing the treatments, and because they did not prepare an EIS. The district court concluded the agencies reasonably decided to conduct an EA rather than an EIS and took a sufficiently hard look at environmental impacts. The appellate court found that the agencies relied on an incorrect assumption that treatments would be infrequent and did not give adequate consideration to a reasonable range of alternatives, and that they should have prepared an EIS. The groups separately argued the agencies violated the ESA by failing to consult with FWS and NMFS to ensure the treatments would not jeopardize endangered species or their habitats. The appellate court found the district court correctly held the agencies failed to consult in violation of the ESA. California separately argued the agencies violated the CZMA because they did not conduct a consistency review to determine whether offshore well stimulation was consistent with the state's coastal management plan. The appellate court agreed with the district court that the treatments qualified as "federal agency activity" and required a consistency review. It reversed the district court's grant of summary judgment upholding the EA, and affirmed summary judgment for plaintiffs on their ESA and CZMA claims.

Public Employees for Environmental Responsibility v. National Park Service, No. 19-3629 (RC), 52 ELR 20062 (D.D.C. May 24, 2022). A district court granted in part and denied in part summary judgment for environmental groups in a challenge to the National Park Service's (NPS') policy directive instructing park superintendents to allow e-bikes in

areas where traditional bikes were used, and subsequent rule amending NPS regulations to address e-bikes. The groups brought claims under the APA, NEPA, Federal Vacancies Reform Act (FVRA), and Federal Advisory Committee Act (FACA). The court found that the rule did not violate the APA because NPS addressed key concerns raised during the comment period; that while the directive violated the FVRA, the rule was “an independently reached new decision on the same substantive topic,” and thus not an improper ratification of the directive; and that the e-bike group was an advisory committee within the meaning of FACA, but the connection between the Act and the rule was too tenuous. It did, however, find the directive’s application of a categorical exclusion was inappropriate, and that the rule’s reliance on the fact that NEPA analysis had already been “required” by the directive was a “false justification for a continuing NEPA violation.” It granted summary judgment for the groups with respect to the NEPA claim, denied summary judgment as to the other claims, and remanded without vacatur to NPS.

TOXIC SUBSTANCES

Natural Resources Defense Council v. U.S. Environmental Protection Agency, Nos. 20-70787 and 20-70801, 52 ELR 20070 (9th Cir. June 17, 2022). The Ninth Circuit granted in part and denied in part a petition to review EPA’s determination that glyphosate did not pose “any unreasonable risk to man or the environment.” Nonprofit groups challenged the Agency’s determination, arguing that EPA did not adequately consider whether the weedkiller causes cancer and failed to follow ESA consultation procedures. The court found the Agency’s determination that glyphosate was not likely to be carcinogenic was not supported by substantial evidence, and that its failure to make an effects determination violated the ESA. It vacated the human health portion of the determination and remanded to EPA for further consideration.

WATER

Diamond Natural Resources Protection & Conservation Ass’n v. Diamond Valley Ranch, LLC, No. 81224, 52 ELR 20072 (Nev. June 16, 2022). The Nevada Supreme Court held, 4-3, that the state’s top water official had authority to approve a groundwater management plan (GMP) that deviated from the doctrine of prior appropriation for the over-appropriated Diamond Valley Hydrologic Basin. Senior rights holders in the basin sought to invalidate the GMP on the ground that it was legally erroneous. A lower court concluded that the plan violated the doctrine of prior appropriation for forcing senior appropriators to reduce their water use, the state’s beneficial use statute by allowing unused groundwater to be banked or transferred, and two permitting statutes by allowing appropriators to change the point or manner of diversion without filing an application with the official; it invalidated the official’s approval. The high court concluded that the state leg-

islature unambiguously gave the official discretion to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada’s statutory water scheme, and that his factual findings in support of his approval were supported by substantial evidence. It reversed the lower court’s order and reinstated the approval.

WILDLIFE

Alliance for the Wild Rockies v. Gassmann, No. CV 21-105-M-DLC-KLD, 52 ELR 20063 (D. Mont. May 25, 2022). A district court granted an environmental group’s motion to preliminarily enjoin the Forest Service and FWS from moving forward with a logging and road-building project in the Kootenai National Forest. The group argued the agencies violated the ESA by failing to conduct a lawful cumulative effects analysis in their consultation for the grizzly bear because they failed to analyze state and private activities, and that the Forest Service violated the ESA by skipping essential steps of requesting a species list from FWS to determine whether Canada lynx might be present in the project area and if so, conducting a biological assessment to determine potential effects of the project on the species. The court found the group was likely to succeed in proving that FWS’ decision to not obtain and disclose data concerning reasonably certain state and private activities and the Forest Service’s backwards approach concerning the Canada lynx violated the ESA. It enjoined the agencies from implementing the project pending a ruling on the merits.

Center for Biological Diversity v. Haaland, Nos. CV 20-181-M-DWM and CV 20-183-M-DWM, 52 ELR 20064 (D. Mont. May 26, 2022). A district court granted FWS’ motion for voluntary remand in a challenge to its 2020 decision to withdraw a 2013 proposed rule to list the wolverine as a threatened distinct population segment (DPS) in the contiguous United States under the ESA. Environmental groups argued the withdrawal was based on an unlawful DPS determination and an unlawful threat evaluation, and that FWS failed to use the best available science, used a definition of “foreseeable future” that was inconsistent with the ESA, and failed to evaluate whether the listing was warranted in a “significant portion of” the wolverine’s range. The Service moved for voluntary remand without vacatur, but the groups argued vacatur was warranted because FWS essentially admitted to “disregarding key scientific studies” and made errors that “violate[d] the fundamental requirement of the ESA.” The court found that FWS’ own reasons for remand implicated the substantive scientific and factual basis of the agency’s decision, and that the groups’ concerns were not procedural errors that could be remedied without further explanation. Moreover, the court found it troubling that the studies the Service contended now warrant further review existed at the time it made its withdrawal decision, but were not considered then. It granted FWS’ motion for voluntary remand, vacated the 2020 withdrawal, and remanded to the agency to submit a new final listing determination.

In the Federal Agencies

"In the Federal Agencies" contains summaries of notable agency activity during the month of June 2022. Citations are to the *Federal Register* (FR). Entries below are organized by Final Rules, Proposed Rules, and Notices. Within each section, entries are further subdivided by the subject matter area, with entries listed chronologically. To see *ELR*'s entire collection, visit <http://elr.info/daily-update/archives>.

FINAL RULES

WILDLIFE

FWS and NMFS rescinded the final rule titled "Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat" that was published in December 2020; the recession removes the regulatory definition of "habitat" established by the rule. 87 FR 37757 (6/24/22).

PROPOSED RULES

GOVERNANCE

The Securities and Exchange Commission proposed to amend rules and forms to require certain investment advisers and investment companies to provide additional information regarding their environmental, social, and governance investment practices under the Investment Advisers Act and the Investment Company Act. 87 FR 36654 (6/17/22).

WATER

EPA proposed a rule revising and replacing the Agency's 2020 regulatory requirements for water quality certification under CWA §401. 87 FR 35318 (6/9/22).

WILDLIFE

FWS proposed to revise regulations concerning experimental populations of endangered species and threatened species under the ESA by removing language that generally restricts the introduction of experimental populations to only the species' historical range to allow for the introduction of populations into habitats outside their historical range for conservation purposes. 87 FR 34625 (6/7/22).

NOTICES

CLIMATE CHANGE

The U.S. Patent and Trademark Office implemented the Climate Change Mitigation Pilot Program, which is designed to accelerate the examination of patent applications for innovations that reduce greenhouse gas emissions. 87 FR 33750 (6/3/22).

The Commodity Futures Trading Commission seeks comment to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets. 87 FR 34856 (6/8/22).

GOVERNANCE

The U.S. Army Corps of Engineers seeks public input to inform future decisionmaking related to Native American and Tribal Nation issues; potential rulemaking actions regarding the Corps' Regulatory Program's implementing regulations for the National Historic Preservation Act as well as Civil Works implementation of the Principles, Requirements, and Guidelines; and environmental justice. 87 FR 33756 (6/3/22).

WATER

EPA announced health advisories for four perfluoroalkyl substances (PFAS), including interim updated lifetime drinking water health advisories for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), and final health advisories for hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt (together referred to as "GenX chemicals") and perfluorobutane sulfonic acid and its related compound potassium perfluorobutane sulfonate (together referred to as "PFBS") under the SDWA. 87 FR 36848 (6/21/22).

In the Congress

"In the Congress" covers notable environment-related activities reported in the *Congressional Record* during the month of June 2022. Entries are arranged by bill number, with Senate bills listed first. To see all environment-related bills that are introduced, reported out of committee, passed by either house, or signed by the president, including environmental treaties ratified by the Senate, visit *ELR's* website at <https://elr.info/legislative/congressional-update>.

PUBLIC LAW

WATER

S. 66 (South Florida Clean Coastal Waters Act of 2021), introduced by Sen. Marco Rubio (R-Fla.) on January 27, 2021, was signed by President Biden on June 16, 2022. The Act required the Inter-Agency Task Force on Harmful Algal Blooms and Hypoxia to develop a plan for reducing, mitigating, and controlling harmful algal blooms and hypoxia in South Florida. Pub. L. No. 117-144, 168 Cong. Rec. D673 (daily ed. June 16, 2022).

CHAMBER ACTION

GOVERNANCE

S. 3510 (Disaster Resiliency Planning Act), introduced by Sen. Gary Peters (D-Mich.) on January 13, 2022, was passed by the Senate. The bill would require the Director of the Office of Management and Budget to issue guidance with respect to natural disaster resilience. 168 Cong. Rec. S3096 (daily ed. June 22, 2022).

H.R. 2020 (Post-Disaster Assistance Online Accountability Act), introduced by Resident Commissioner Jenniffer González-Colón (R-P.R.-At Large) on March 18, 2021, was passed by the House. The bill would provide for an online repository for certain reporting requirements for recipients of federal disaster assistance. 168 Cong. Rec. H5456 (daily ed. June 13, 2022).

H.R. 7211 (Small State and Rural Rescue Act), introduced by Rep. John Katko (R-N.Y.) on March 24, 2022, was passed by the House. The bill would amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and review a final FEMA rule. 168 Cong. Rec. H5531 (daily ed. June 14, 2022).

WATER

H.R. 7776 (Water Resources Development Act of 2022), introduced by Rep. Peter DeFazio (D-Or.) on May 16, 2022, was passed by the House. The bill would provide for improve-

ments to the rivers and harbors of the United States, and provide for the conservation and development of water and related resources. 168 Cong. Rec. H5402 (daily ed. June 8, 2022).

BILLS INTRODUCED

ENERGY

H.R. 7947 (Weatherization Enhancement and Readiness Act of 2022) was introduced by Rep. Paul Tonko (D-N.Y.) on June 3, 2022. The bill would amend the Energy Conservation and Production Act to direct the Secretary of Energy to establish a weatherization readiness program. It was referred to the Committee on Energy and Commerce. 168 Cong. Rec. H5233 (daily ed. June 3, 2022).

GOVERNANCE

S. 4355 (Clean Competition Act) was introduced by Sen. Sheldon Whitehouse (D-R.I.) on June 7, 2022. The bill would amend the Internal Revenue Code to create a carbon border adjustment based on carbon intensity. It was referred to the Committee on Finance. 168 Cong. Rec. S2814 (daily ed. June 7, 2022).

NATURAL RESOURCES

H.R. 7937 (RENEW Our Abandoned Mine Lands Act) was introduced by Rep. Conor Lamb (D-Pa.) on June 3, 2022. The bill would direct the Secretary of the Interior, acting through OSM, to establish a program to facilitate coal mine reclamation and award grants to certain states and Indian tribes to carry out coal mine reclamation. It was referred to the Committee on Natural Resources. 168 Cong. Rec. H5232 (daily ed. June 3, 2022).

TOXIC SUBSTANCES

S. 4492 (Federal PFAS Research Evaluation Act) was introduced by Sen. Gary Peters (D-Mich.) on June 23, 2022. The bill would provide for the National Academies of Sciences, Engineering, and Medicine to study and report on a federal research agenda to advance the understanding of perfluoroalkyl and polyfluoroalkyl substances. It was referred to the Committee on Commerce, Science, and Transportation. 168 Cong. Rec. S3160 (daily ed. June 23, 2022).

In the State Agencies

"In the State Agencies" contains summaries of notable state regulatory developments reported during the month of June 2022. The entries are arranged by state, and within each section, entries are further subdivided by subject matter. To access ELR's entire collection of state regulatory developments, visit <https://elr.info/administrative/state-updates>.

ALASKA

NATURAL RESOURCES

The Department of Natural Resources adopted changes to surface coal mining and reclamation regulations. The changes update provisions concerning ownership and control and valid existing rights associated with coal mining operations. See <http://notice.alaska.gov/207032> (June 7, 2022).

The Oil and Gas Conservation Commission proposed amendments to regulations concerning site clearance, completion dates for sundry work, test requirements for injection wells, confidentiality of certain applications, and requirements for an emergency well control contingency plan. See <http://notice.alaska.gov/207132> (June 17, 2022).

DISTRICT OF COLUMBIA

ENERGY

The Department of Energy and Environment adopted a rule establishing a maximum carbon dioxide intensity threshold of 180 lbs/mm BTU for fuel burned within the District, either for electricity or heating, with a compliance deadline of March 31, 2023. See 69 D.C. Reg. 6044 (May 27, 2022).

WASTE

The Department of Energy and Environment proposed to add a new chapter that would provide for a comprehensive voluntary cleanup program to encourage remediation and redevelopment of brownfields. See 69 D.C. Reg. 6066 (May 27, 2022).

IOWA

GOVERNANCE

The Environmental Protection Commission adopted amendments to regulations concerning floodplain permitting for bridges. The amendments subject replacement bridges to the same standards as new bridges for backwater. See XLIV Iowa Admin. Bull. 2856 (June 15, 2022).

WATER

The Environmental Protection Commission proposed to renew, with changes, five NPDES general permits. See XLIV Iowa Admin. Bull. 2816 (June 15, 2022).

MAINE

TOXIC SUBSTANCES

The Board of Pesticides Control proposed amendments to pesticide restrictions. The amendments would restrict registration of neonicotinoids and prohibit their use in outdoor residential landscapes for the purposes of managing pests in turf and ornamental vegetation, and prohibit the use of chlorpyrifos, except for licensed applicators who obtain a use permit from the Board to apply chlorpyrifos products purchased prior to December 31, 2022. See <https://www.maine.gov/sos/cec/rules/notices/2022/052522.html> (May 25, 2022).

NEW JERSEY

CLIMATE CHANGE

The Department of Environmental Protection adopted new rules and amendments that establish a greenhouse gas monitoring and reporting program in accordance with the Global Warming Response Act. The rulemaking requires facilities that emit 100 tons or more per year of methane to report their methane emissions as part of the Emission Statement program; requires facilities that use 50 pounds or more of high global-warming potential refrigerants in refrigeration systems to register and report their equipment and use of refrigerants; and requires natural gas public utilities with local distribution lines in the state to report information regarding their lines, advanced leak detection, and blowdown events. See <https://www.state.nj.us/oal/rules/accessp/> (June 6, 2022).

GOVERNANCE

The Department of Environmental Protection proposed new rules to implement the provisions of New Jersey's Environmental Justice Law and establish requirements for applicants seeking permits for certain pollution-generating facilities located, or proposed to be located, in overburdened communities. Comments

are due September 4, 2022. *See* <https://www.state.nj.us/oal/rules/accessp/> (June 6, 2022).

NEW MEXICO

CLIMATE CHANGE

The Environment Department adopted the California vehicle emission standards and requirements. *See* XXXIII N.M. Reg. 856 (June 7, 2022).

NEW YORK

TOXIC SUBSTANCES

The Department of Environmental Conservation proposed to adopt N.Y. COMP. CODES R. & REGS. tit. 6, §325.42. The new rule would prohibit the use of glyphosate by state agencies, state departments, and public benefit corporations on state property. Comments are due August 22, 2022. *See* XLIV N.Y. Reg. 8 (June 8, 2022).

OREGON

ENERGY

The Energy Facility Siting Council proposed to adopt new standards for wildfire prevention and risk mitigation at energy facility sites. *See* <https://secure.sos.state.or.us/oard/displayBulletins.action> (May 27, 2022).

The Energy Facility Siting Council proposed amendments to standards for addressing the impacts of energy facility siting on protected areas, scenic resources, and recreational opportunities. *See* <https://secure.sos.state.or.us/oard/displayBulletins.action> (May 27, 2022).

RHODE ISLAND

NATURAL RESOURCES

The Department of Environmental Management proposed amendments to oil pollution control regulations. The amendments would update and clarify definitions and regulatory parameters, and update contents to accurately reflect other state regulatory policies. *See* <https://rules.sos.ri.gov/Promulgations/part/250-140-25-2> (June 20, 2022).

UTAH

WATER

The Division of Environmental Response and Remediation proposed amendments to UST regulations to include above-ground petroleum storage tanks. *See* 2022-11 Utah Bull. 27 (June 1, 2022).

VERMONT

WATER

The Agency of Natural Resources proposed amendments to Vermont's water quality standards. The amendments would clarify applicability of the standards, reflect updates to policy related to streamflow and stream processes, and update water quality criteria for consistency with federal standards. *See* <https://secure.vermont.gov/SOS/rules/> (May 25, 2022).

WASHINGTON

CLIMATE CHANGE

The Department of Ecology proposed to adopt a new chapter to establish and implement the programmatic framework in the Climate Commitment Act, including a greenhouse gas emissions cap and allowance trading market. *See* <https://lawfileext.leg.wa.gov/law/wsr/2022/11/22-11-067.htm> (May 16, 2022).

WILDLIFE

The Department of Fish and Wildlife proposed to classify the Cascade red fox as threatened and to reclassify the white pelican from threatened to sensitive. *See* <https://lawfileext.leg.wa.gov/law/wsr/2022/11/22-11-092.htm> (May 18, 2022).

WISCONSIN

TOXIC SUBSTANCES

The Department of Natural Resources adopted a rule that regulates firefighting foam containing certain contaminants. *See* <https://docs.legis.wisconsin.gov/code/register/2022> (June 13, 2022).

WASTE

The Department of Natural Resources adopted a rule that incorporates federal requirements for coal combustion residual (CCR) landfills in order for Wisconsin to seek approval from EPA for a state CCR permit program. *See* <https://docs.legis.wisconsin.gov/code/register/2022> (June 13, 2022).

In the World

"In the World" features notable developments reported in the international section of *ELR Update* during the month of June 2022. Current and archived materials, and links to primary news sources, can be found on *ELR's* website at <https://elr.info/international/international-update>.

LAND USE

JUDGE ORDERS MEDIATION IN DEFORESTATION SUIT AGAINST FRENCH RETAILER

On June 9, a judge in Paris ordered mediation in a legal dispute between France's Casino Group and Indigenous groups over deforestation in the Amazon rainforest. Representatives of Brazil's Indigenous community and environmental groups filed suit last year against the supermarket chain, arguing it was selling beef from cattle raised in the rainforest in violation of human rights and environmental rules (AP). The parties have until September 15 to reach an agreement, or the case will proceed to trial.

The dispute marks the first time a French supermarket chain has been sued in court over deforestation and the loss of land and livelihood under a 2017 law that requires large companies to prevent serious human rights and environmental violations in their businesses and supply chains (AP, Reuters). Under the law, violators must pay reparations for any damage caused by their inaction.

Cattle ranching is responsible for much of the Amazon's deforestation, which reached record levels this year (AP). According to data released in May by Brazil's national space research institute INPE, deforestation exceeded 1,000 square kilometers in April, the highest total since 2006 (Mongabay).

NATURAL RESOURCES

U.K. APPROVES SHELL'S NEW GAS FIELD IN NORTH SEA

On June 1, the U.K. government announced its final approval of a plan proposed by Shell to develop a new gas field in the North Sea. The Jackdaw field, located east of Aberdeen, has the potential to produce 6.5% of Britain's gas output. Production is expected to begin at the field in the second half of 2025 (BBC).

Shell's initial proposal for the field was rejected by Britain's Offshore Petroleum Regulator for Environment and Decommissioning last October on environmental grounds. The company released an amended plan in March, which modified the way it would produce natural gas at the hub to which the Jackdaw field

will be connected. Instead of removing all naturally occurring carbon dioxide from the gas offshore, a portion of it would be exported to an onshore terminal for treatment (Reuters).

U.K. Business Minister Kwasi Kwarteng welcomed the approval, as the government intended to boost domestic energy production in light of Russia's invasion of Ukraine. Climate experts, on the other hand, said the approval "flew in the face of clear evidence from scientists that countries had urgently to cut greenhouse gas emissions to avoid the worst effects of the climate crisis" (Guardian). Greenpeace UK accused the government of "desperate and destructive" action, and mentioned potential legal action.

WASTE

CANADA BANS SOME SINGLE-USE PLASTICS

On June 20, the Canadian government published final regulations banning the manufacture and import of certain single-use plastics by the end of 2022 (Reuters). The ban prohibited six types of single-use plastics: checkout bags, cutlery, straws, stir sticks, ring carriers, and foodservice ware made from or containing plastics that are hard to recycle (Government of Canada). The regulations also banned the sale and export of these items by the end of 2023 and 2025, respectively.

Prime Minister Justin Trudeau first announced plans in 2019 to phase out the production and use of hard-to-recycle plastics by 2021, but those plans were delayed by the COVID-19 pandemic. The government has since listed plastics as toxic under the Canadian Environmental Protection Act, enabling their prohibition (AP).

Notably, the regulations did not include a ban on plastic packaging from consumer goods, which is currently the leading source of plastic waste worldwide, and they still allowed retailers to sell single-use plastic flexible straws if they are packed alongside beverage containers and the packaging is done off-site (Guardian).

According to research published by Environment and Climate Change Canada, 3.3 million tons of plastic was thrown out in 2019, and less than one-tenth of it was recycled (AP). The government estimates that the ban would eliminate more than 1.3 million tons of hard-to-recycle plastic waste and more than 22,000 tons of plastic pollution over the next decade (Government of Canada).

RECENT JOURNAL LITERATURE

“Recent Journal Literature” lists recently published law review and other legal periodical articles. Within subject-matter categories, entries are listed alphabetically by author or title. Articles are listed first, followed by comments, notes, symposia, surveys, and bibliographies.

AIR

Lee, Austin et al., *The Way Forward: A Legal and Commercial Primer on Carbon Capture, Utilization, and Sequestration*, 16 TEX. J. OIL GAS & ENERGY 43 (2021).

CLIMATE

- Babcock, Hope M., *The Current Role of the Environment in Reinforcing Acts of Domestic Terrorism: How Fear of a Climate Change Apocalypse May Strengthen Right-Wing Hate Groups*, 38 VA. ENV'T L.J. 207 (2020).
- Blue, Rachel, *Turning the Tide: Atoll Nations During the Era of Climate Change Emergency*, 48 DENV. J. INT'L L. & POL'Y 65 (2020).
- Bradford, Susann M., *Vertical Consistency in the Climate Change Context*, 12 GOLDEN GATE U. ENV'T L.J. 107 (2020).
- Kielar, Evan, *A Framework for the Future of Climate Refugees*, 34 GEO. IMMIGR. L.J. 819 (2020).
- Voeller, Amanda, “Eco” Your Own Way: An Argument for State-Specific Climate Change Legislation, 32 FORDHAM ENV'T L. REV. 259 (2021).

ENERGY

- Benjamin, Lisa, *Renewable Energy and Trade: Meeting the Paris Agreement's Goals Through a Two-Step Jurisprudential Advance*, 22 MINN. J.L. SCI. & TECH. 1 (2020).
- Diamond, Kimberly E., *COVID-19 Impacts: How a Global Pandemic Amid the Sunsets of the PTC and ITC Made the U.S. Wind and Solar Industries More Resilient*, 32 FORDHAM ENV'T L. REV. 149 (2021).
- Hassenboehler, Tom, *The Organized Wholesale Market Improvement Paradox*, 52 ELR 10649 (Aug. 2022).
- Husk, Sarah A., *Scattered to the Winds?: Strengthening the National Historic Preservation Act's Tribal Consultation Mandate to Protect Native American Sacred Sites in the Renewable Energy Development Era*, 34 TUL. ENV'T L.J. 273 (2021).
- Lemire, Alyssa Lauren, *Raising the Meter in Rhode Island: A Better Approach to Rhode Island's Net Metering Laws*, 25 ROGER WILLIAMS U. L. REV. 470 (2020).
- Mahoney, William E., *Making Sense of the Texas Oilfield Anti-Indemnity Act (TOAIA): It's About Recovery*, 16 TEX. J. OIL GAS & ENERGY L. 95 (2021).
- Roberts, Casey, *Comment on Shelley Welton, Rethinking Grid Governance for the Climate Change Era*, 52 ELR 10652 (Aug. 2022).

Tepper, Rebecca & Kelly Caiazzo, *Comment on Rethinking Grid Governance for the Climate Change Era*, 52 ELR 10655 (Aug. 2022).

Welton, Shelley, *Rethinking Grid Governance for the Climate Change Era*, 52 ELR 10644 (Aug. 2022).

Wetsel, Roderick E. & Laura M. Bowen, *The Sun Ariseth: A Guide to Drafting Solar Leases*, 16 TEX. J. OIL GAS & ENERGY L. 77 (2021).

Survey, *Recent Developments in Texas and United States Energy Law*, 16 TEX. J. OIL GAS & ENERGY L. 117 (2021).

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- Adelman, David & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 52 ELR 10606 (Aug. 2022).
- Altabef, William B., *The Legal Man in the Moon: Exploring Environmental Personhood for Celestial Bodies*, 21 CHI. J. INT'L L. 476 (2021).
- Breggin, Linda K. et al., *Analysis of Environmental Law Scholarship 2020-2021*, 52 ELR 10599 (Aug. 2022).
- Breland, William, *The Equal Protection Cure: Attacking Alabama's Rural Sanitation Crisis (and Its Resultant Tropical Diseases Outbreak) as an Inequitable Distribution of Municipal Provisions*, 34 TUL. ENV'T L.J. 247 (2021).
- Cantor, David James, *Environment, Mobility, and International Law: A New Approach in the Americas*, 21 CHI. J. INT'L L. 263 (2021).
- Hill, Alexandra et al., *Recent Developments in Environmental Law*, 34 TUL. ENV'T L.J. 399 (2021).
- Ho, Virginia Harper, *Disclosure Overload? Lessons for Risk Disclosure and ESG Reporting Reform From the Regulation S-K Concept Release*, 65 VILL. L. REV. 67 (2020).
- Judkins, Amy, *Taking It to the Bank: Creating a New Constitutional Standard and Using Blue Carbon Banking to Compensate the Miccosukee Tribe for the Federal “Taking” of Their Tribal Lands*, 12 FLA. A & M U. L. REV. 293 (2017).
- Learner, Howard, *Citizen Environmental Enforcement Lawsuits Are Alive—What It Takes to Go Forward*, 52 ELR 10616 (Aug. 2022).
- Peloso, Margaret E. & Chloe E. Schmergel, *Board Oversight in ESG—Evolving Trends in the Era of Increasing Disclosure Requirements*, 52 ELR 10637 (Aug. 2022).
- Phillips, Todd, *Director Engagement: Necessary for ESG Success*, 52 ELR 10641 (Aug. 2022).
- Powell, Catherine, *Blue States, Red States: The United States?*, 35 MD. J. INT'L L. 134 (2020).
- Reddy, Bina R., *No Accounting for Accountability? A Comment on Environmental Citizen Suits and the Inequities of Races to the Top*, 52 ELR 10619 (Aug. 2022).
- Rose, Amanda M., *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821 (2021).

Ryan, Ramon J., *The Fault in Our Stars: Challenging the FCC's Treatment of Commercial Satellites as Categorically Excluded From Review Under the National Environmental Policy Act*, 22 VAND. J. ENT. & TECH. L. 923 (2020).

Stanley, Diana, *Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation*, 30 B.U. PUB. INT. L.J. 89 (2021).

Strine, Leo E. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 52 ELR 10631 (Aug. 2022).

Trenta, Cristina, *Taxation in Support of Equality: The Swedish RUT Deduction and the Circular Economy*, 24 FLA. TAX REV. 349 (2020).

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Bragdon, Susan H., *Global Legal Constraints: How the International System Fails Small-Scale Farmers and Agricultural Biodiversity, Harming Human and Planetary Health, and What to Do About It*, 36 AM. U. INT'L L. REV. 1 (2020).

Cantwell Fraase, Bonnie, *The Un-Zoned City and Unplanned Disaster: A Case Study of Hurricane Harvey's Impact on Houston, Texas*, 38 VA. ENV'T L.J. 232 (2020).

Fletcher, Alden A., *Forced Betting the Farm: How Historic Preservation Law Fails Poor and Nonwhite Communities*, 109 GEO. L.J. 1543 (2021).

Harris, Timothy M., *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 LOY. L.A. L. REV. 455 (2021).

Hernandez-Lopez, Ernesto, *GMO Corn, Mexico, and Coloniality*, 22 VAND. J. ENT. & TECH. L. 725 (2020).

Kanner, Gideon & Michael M. Berger, *The Nasty, Brutish, and Short Life of Agins v. City of Tiburon*, 50 URB. LAW. 1 (2019).

Mandelker, Daniel R., *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L.J. 69 (2020).

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Wilson, Richard A. & Sharon E. Duggan, *Why It Is Time for a "Calfire Divorce": The Case for Establishing an Independent Forest and Resource Management Agency to Secure Healthy Forests in California*, 12 GOLDEN GATE U. ENV'T L.J. 1 (2020).

WASTE

Dalia, Kevin, *Green Garbage: A State Comparison of Marijuana Packaging and Waste Management*, 12 GOLDEN GATE U. ENV'T L.J. 175 (2020).

WATER

Adams, LaTricea, *Reflections on Dr. Lee's Turning Participation Into Power*, 52 ELR 10628 (Aug. 2022).

Bowman, Warigia M., *Dustbowl Waters: Doctrinal and Legislative Solutions to Save the Ogallala Aquifer Before Both Time and Water Run Out*, 91 U. COLO. L. REV. 1081 (2020).

Chachura, Michael, *Old Pipes in Brick City: Equal Protections and the Newark Water Crisis*, 22 RUTGERS RACE & L. REV. 123 (2020).

Collins, Gabriel, *The Emerging Battle Over Produced Water Ownership in Texas: A Legal and Practical Roadmap for Courts, Groundwater Owners, and Energy Producers*, 16 TEX. J. OIL GAS & ENERGY L. 1 (2021).

Johnson, Stephen M., *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 ST. LOUIS U. L.J. 373 (2020).

Lee, Clifford T., *Federalism and Water: The California Experience*, 12 GOLDEN GATE U. ENV'T L.J. 23 (2020).

Lee, Jaime Alison, *Turning Participation Into Power: A Water Justice Case Study*, 52 ELR 10622 (Aug. 2022).

Martin, Josh, *A Transnational Law of the Sea*, 21 CHI. J. INT'L L. 419 (2021).

Ozmy, Joshua & Melissa L. Jarrell, *Illegal Discharge: Exploring the History of the Criminal Enforcement of the U.S. Clean Water Act*, 32 FORDHAM ENV'T L. REV. 195 (2021).

Ryan, Erin, *A Short History of the Public Trust Doctrine and Its Intersection With Private Water Law*, 38 VA. ENV'T L.J. 135 (2020).

Schroer, Hannah, *When Going Green Means Going Into the Red: Pennsylvania's Struggle Funding Stormwater Regulations Creates Water Woes for MS4s*, 65 VILL. L. REV. 223 (2020).

Taylor-Sawyer, Chandra T., *Dual Purpose Outreach to Enhance Public Participation in Environmental Decision-making*, 52 ELR 10629 (Aug. 2022).

Symposium, *SGMA and Interconnected Groundwater-Surface Water*, 12 GOLDEN GATE U. ENV'T L.J. 81 (2020).

WILDLIFE

Price, Shannon, *Red Tide: A Blooming Concern for Florida Manatees*, 32 FORDHAM ENV'T L. REV. 233 (2021).

VOLUME 52 CUMULATIVE INDEX

Below are all Articles, Comments, and Dialogues published in *ELR—The Environmental Law Reporter* in 2022. To access the entire *ELR* archive online, visit <https://elr.info/articles>.

AIR

- Comment—*Building Better Building Performance Standards*, Danielle Spiegel-Feld & Katrina M. Wyman (Apr.) 10268
- Comment—*Toward Tradable Building Performance Standards*, Danielle Spiegel-Feld & Katrina M. Wyman (May) 10356

CLIMATE CHANGE

- Article—*Adapting to a 4° C World*, Environmental Law Collaborative (Mar.) 10211
- Article—*The Climate Crisis and Agriculture*, Peter H. Lehner & Nathan A. Rosenberg (Feb.) 10096
- Article—*A New Causal Pathway for Recovery in Climate Change Litigation?*, Thomas Burman (Jan.) 10038
- Article—*Using Issue Certification Against a Defendant Class to Establish Causation in Climate Change Litigation*, James Rehwaldt (Apr.) 10292
- Comment—*Climate Creep*, Cinnamon P. Carlarne (May) 10374
- Comment—*The Green Police: Criminal Enforcement in the Era of Climate Change*, Joshua Ozymy & Melissa Jarrell Ozymy (July) 10526
- Comment—*Thwarting Climate Change, Brick by Brick*, Bill Caplan (Mar.) 10182
- Dialogue—*Coastal Impacts of Climate Change*, Tayebbeh TajalliBakhsh et al. (Mar.) 10169
- Dialogue—*West Virginia v. Environmental Protection Agency: The Agency's Climate Authority*, Michael Gerrard et al. (June) 10429

ENERGY

- Article—*How Environmental Litigation Has Turned Pipelines Into Pipe Dreams*, Madison Hinkle & Jesse Richardson (July) 10558
- Article—*Rethinking Grid Governance for the Climate Change Era*, Shelley Welton (Aug.) 10644
- Comment—*Comment on Rethinking Grid Governance for the Climate Change Era*, Rebecca Tepper & Kelly Caiazzo (Aug.) 10655
- Comment—*Comment on Shelley Welton: Rethinking Grid Governance for the Climate Change Era*, Casey Roberts (Aug.) 10652
- Comment—*EV Incentive Policies Should Target Reducing Gasoline Use*, Matthew Metz & Janelle London (Feb.) 10089
- Comment—*The Organized Wholesale Market Improvement Paradox*, Tom Hassenboehler (Aug.) 10649

- Comment—*Regulatory Uncertainty and New Source Performance Standards on Methane*, Sebastián Luengo Troncoso (June) 10453
- Dialogue—*Renewal Energy and Biodiversity Conservation*, Patrick Donnelly et al. (Feb.) 10079

GOVERNANCE

- Article—*Addressing Cumulative Impacts: Lessons From Environmental Justice Screening Tool Development and Resistance*, Arianna Zrzavy et al. (Feb.) 10111
- Article—*Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, Leo E. Strine Jr. et al. (Aug.) 10631
- Article—*Environmental Citizen Suits and the Inequities of Races to the Top*, David Adelman & Jori Reilly-Diakun (Aug.) 10606
- Article—*State Citizen Suits, Standing, and the Underutilization of State Environmental Law*, Palden Flynn & Michael Barsa (June) 10473
- Article—*Trade Agreements and Environment in Latin America*, Dino Delgado Gutiérrez (Apr.) 10311
- Comment—*Analysis of Environmental Law Scholarship 2020-2021*, Linda K. Breggin et al. (Aug.) 10599
- Comment—*Annual Review of Chinese Environmental Law Developments: 2021*, Haijing Wang & Mingqing You (June) 10468
- Comment—*Board Oversight in ESG—Evolving Trends in the Era of Increasing Disclosure Requirements*, Margaret E. Peloso & Chloe E. Schmergel (Aug.) 10637
- Comment—*Citizen Environmental Enforcement Lawsuits Are Alive—What It Takes to Go Forward*, Howard Learner (Aug.) 10616
- Comment—*Community Input on State Environmental Justice Screening Tools*, Laura Grier et al. (June) 10441
- Comment—*Director Engagement: Necessary for ESG Success*, Todd Phillips (Aug.) 10641
- Comment—*No Accounting for Accountability? A Comment on Environmental Citizen Suits and the Inequities of Races to the Top*, Bina R. Reddy (Aug.) 10619
- Dialogue—*The Constitutional Right to Save the Environment*, Sen. Franklin L. Kury et al. (Jan.) 10007
- Dialogue—*Greenflation: Are Commodity Prices Actually Rising?*, Michael Curley et al. (May) 10345

Dialogue— <i>Year One Review of the Biden Administration</i> , Jonathan Brightbill et al. (Apr.)	10257
--	-------

NATURAL RESOURCES

Article— <i>The New Law of Geology: Rights, Responsibilities, and Geosystem Services</i> , Keith H. Hirokawa (May)	10380
Comment— <i>30 by 30, Areas of Critical Environmental Concern, and Tribal Cultural Lands</i> , Michael C. Blumm & Gregory A. Allen (May)	10366
Comment— <i>Federal Grazing Lands as “Conservation Lands” in the 30 by 30 Program</i> , Michael C. Blumm et al. (Apr.)	10279
Dialogue— <i>Amending the NEPA Regulations</i> , Jim McElfish et al. (July)	10515

TOXIC SUBSTANCES

Article— <i>EPA’s Opportunity to Reverse the Fertilizer Industry’s Environmental Injustices</i> , Jaclyn Lopez (Feb.)	10125
---	-------

WASTE

Article— <i>Recycling Is Rubbish: Reinvent, Realign, and Restructure U.S. Material Management</i> , James D. Brien (July)	10539
Article— <i>The U.S. Plastics Problem: The Road to Circularity</i> , Ruth Jebe (Jan.)	10018

WATER

Article— <i>Turning Participation Into Power: A Water Justice Case Study</i> , Jaime Alison Lee (Aug.)	10622
Comment— <i>Dual Purpose Outreach to Enhance Public Participation in Environmental Decisionmaking</i> , Chandra T. Taylor-Sawyer (Aug.)	10629
Comment— <i>Reflections of Dr. Lee’s Turning Participation Into Power: A Water Justice Case Study</i> , LaTricea Adams (Aug.)	10628

WILDLIFE

Article— <i>Arctic Anadromy and Congested Regime Governance</i> , Christopher R. Rossi (Mar.)	10193
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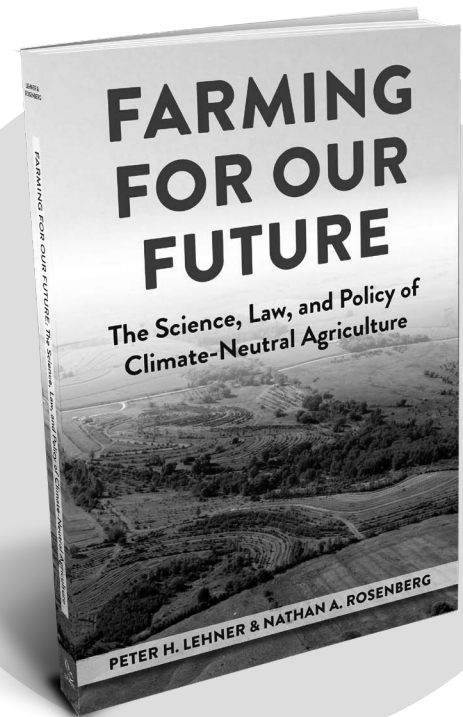
FARMING FOR OUR FUTURE

The Science, Law, and Policy of Climate-Neutral Agriculture

by Peter H. Lehner & Nathan A. Rosenberg

Farming for Our Future examines the policies and legal reforms necessary to accelerate the adoption of practices that can make agriculture in the United States climate-neutral or better. These proven practices will also make our food system more resilient to the impacts of climate change.

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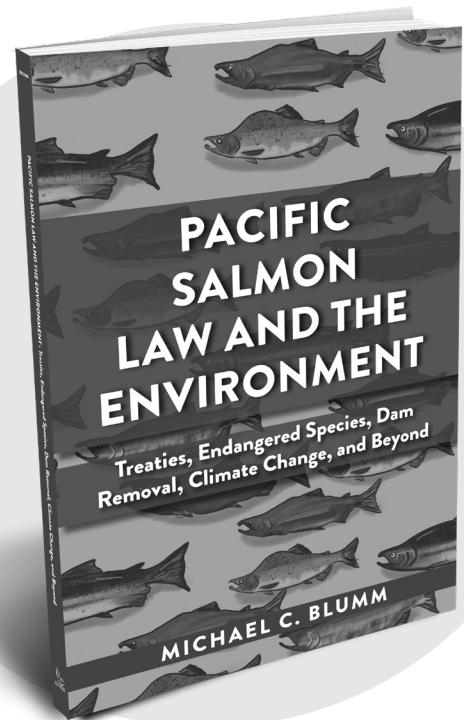
PACIFIC SALMON LAW AND THE ENVIRONMENT

Treaties, Endangered Species, Dam Removal, Climate Change, and Beyond

by Michael C. Blumm

The law and policy of salmon protection and restoration are complex, and matters surrounding salmon implicate topics as varied as Indian treaty fishing rights, dam management and removal, international treaties, predator control, and climate change.

Pacific Salmon Law and the Environment chronicles the diverse issues concerning salmon allocation, management, and restoration in the 21st century, providing the historical understanding necessary for an accurate perspective of the present-day problems salmon face. The book is a must-read for ecologists, biologists, attorneys, educators, activists, students, and others concerned about the fate of salmon in the Pacific Northwest in the climate-challenged 21st century.



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The cause is long-time destruction of salmon habitat beginning with hydroelectric dams and high-yield logging, joined today by relentless climate change. Blumm’s book vividly shows the importance of law in this field and the urgency of further law reform.”

—Charles Wilkinson, Distinguished University Professor,
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“Blumm’s book is a comprehensive, insightful, and timely analysis of how the law has affected the Pacific Northwest’s most iconic natural resource.”

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