The George Washington Journal of Energy and Environmental Law

ELR®

JEEL

Article

Notes

Volume 14 No. 1

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

The George Washington Journal of Energy and Environmental Law

BOARD OF EDITORS
Volume 14

Cole Fox
Editor-in-Chief

Emma Ross
Senior Articles Editor

Maggie Sullivan
Senior Managing Editor

Elise Levy
Senior Production Editor

Andrea Lorch
Senior Projects Editor

Chris Hanson
EBA Brief Liaison

Cole Niggeman
Senior Notes Editor

Brian Atkin
Elizaveta Bradford
Production Editors

Sarah Newman
Sonal Patel
Managing Editors

Kevin Kurzeja
Monishaa Suresh
Francesca DiJulio
Notes Editors

ASSOCIATES

Evan P. Allen
Cole Beck
Sue Choi
Christine Colalillo
Avinash Chokshi
Joshua Cunningham
Jessica Donegan
Joshua Feder
Marco Guzman
Nicole Karem
Rosemary Martin
Steven Martin
Ellis McKennie
Jin Qian
Brianna Rodriguez
Yan Sun
Garrett Gunner Swope
Scott F. Travers
Erica Weyer
Catherine Yang
Yueqi Yang
Andrew W. Young

MEMBERS

Julia Addison
Christine Allen
Madeleine Aroner
Danielle Baron
Faren Bartholomew
Dylan Basescu
Caden Burchianti
Rachel Cassandro
Erik Cervantes
Clare Choi
Aashini Choksi
Patrick Collishaw
Emily Conn
John Darby
Alexandra Della Volpe
Hannah Ellis
Allison Finn
Matthew Gino
Luke Hale
Jonathan Haskin
Katie Hennessy
Katherine Herman
Danielle Hunter
Rachel Johnson
Mi Rae Kim
David McCullough
Laura Mezzanotte
Esteban Munoz Calle
Kai Qi
Sonia Schmidt
Margo Schwartz
Emmalee Sproul
Samia Syed
Jim Thomma
Kafilat Umar
Cindy Vong
Xinyue Wang
Cindy Wang
Bryan Williams
Shengyuan Zhu

Dean Randall Abate, *Faculty Advisor*

The George Washington
Journal of Energy and Environmental Law

CONTENTS

VOLUME 14 NO. 1

ARTICLE

NOTES

Cover photo courtesy of The George Washington University Law School.
Copyright © 2023 Environmental Law Institute® and The George Washington University Law School. All rights reserved.
ELR®, Environmental Law Reporter®, and the Environmental Law Institute® are registered trademarks of the Environmental Law Institute.
The George Washington Journal of Energy and Environmental Law is published biannually.
General inquiries may be sent to *The George Washington Journal of Energy and Environmental Law*; 2028 G Street, NW, Suite LLC-023; Washington, DC 20052.
Third-class postage paid at Washington, D.C. POSTMASTER: Send address changes to:
The George Washington Journal of Energy and Environmental Law, 1730 M Street, NW, Suite 700, Washington, DC 20036.

ARTICLE

NAVIGATING THE REGULATORY ENVIRONMENT FOR RENEWABLE ENERGY IN INDIA AND RENEWABLE PURCHASE OBLIGATIONS

Chandrika Bothra*

ABSTRACT

As with other sources of electricity, state distribution companies remain the biggest purchasers of electricity generated from renewable energy sources. State distribution companies, on the other hand, are currently beset by large debts. Their operations are also heavily influenced by local political concerns, rather than operational and technical efficiencies. Thus, an effective transition to the renewable energy goals set by the Central Government in 2015 would require a holistic overhaul of the institutions in the electricity distribution sector itself. This would also require change from the law and policy front at various levels to create a conducive environment for an effective transition to renewable energy. In this essay, I examine the legislative framework surrounding the renewable energy sector in India. This involves consideration of recent legal reform in the area, including the National Tariff Policy, the Draft Renewable Energy Act, as well as the Electricity Act, 2003. I also analyze the practical ramifications and prevalent trends of the Renewable Purchase Obligation levied on state distribution companies. The wider issue over sectoral reform and its consequences for the renewable energy sector is examined.

I. Introduction

The landscape surrounding the use of clean energy and carbon emissions has been evolving swiftly in India.[1] Not only has the country reiterated its commitment toward the same on a global stage, but has also realigned the focus of domestic policy on clean energy objectives. In the 2015 national budget, the Central Government ("Government" or "Center") increased its 2022 renewable energy targets, along with budgetary allocations, to 175 gigawatts ("GW"),[2] a nearly fivefold increase.[3] The breakdown of the 175 GW is as follows: 5 GW of small hydropower capacity, 10 GW of biomass capacity, 60 GW of wind capacity, and 100 GW of solar capacity.[4]

As with other sources of electricity, state distribution companies remain the biggest purchasers of electricity generated from renewable energy sources.[5] Thus, a nationwide shift from conventional power sources to renewable energy sources would require extensive involvement of state distribution companies. Unfortunately, state distribution companies are currently beset by large debts.[6] They face a variety of challenges, including ones at the operational, managerial, regulatory, political, and technological

*The author is a lawyer working in Mumbai, India, and is a graduate of the West Bengal National University of Juridical Sciences, Kolkata, India. *The author thanks the editors at The George Washington Journal of Energy and Environmental Law for their editorial insight and feedback on earlier drafts of this article.* *The author may be reached at* chandrikabothra@gmail.com *for any comments.*

1. *See* Justin Worland, *Why No Country Matters More Than India at the Paris Climate Talks*, Time Mag. (Dec. 11, 2015, 3:06 PM), http://time.com/4144843/india-paris-climate-change/ [https://perma.cc/BZC2-SRNU].
2. A watt ("W") is a unit of measurement of power. One GW equals one billion watts.
3. *See* Megha Kaladharan, Renewable Energy in India: An Analysis of the Regulatory Environment and Evolving Policy Trends 2 (Aug. 29, 2016) (unpublished working paper) (on file with Ctr. for Pol'y Rsch.).
4. *Id.*
5. *See generally* Prasanth Regy et al., Turning Around the Power Distribution Sector: Learnings and Best Practices From Reforms 42 (NITI Aayog et al. eds., 2021), https://www.niti.gov.in/sites/default/files/2021-08/Electricity-Distribution-Report_030821.pdf [https://perma.cc/Z2XG-62LC].
6. PHD Chamber & Arthur D. Little, Restructuring Debts of Discoms' for Sustainable Power Growth 7 (2013), https://www.adlittle.com/sites/default/files/viewpoints/Indian_Power_Disco_s_and_Debt.pdf [https://perma.cc/T225-T6ND].

ends that contribute significantly to their debts.[7] Due to issues such as outdated power purchase agreements and poor investment in distribution infrastructure, cost optimization remains a challenge for state distribution companies. Underinvestment and line losses, as well as issues in billing, metering, and collection, are obstacles faced at the revenue realization end.[8] Losses faced by state distribution companies also soared during the COVID-19 pandemic with projected losses rising up to ₹ 75,000 crore in fiscal year ("FY") 2022.[9] The sharp reduction in demand from commercial and industrial customers during lockdowns imposed by the Government distressed distribution companies and increased their reliance on Government subsidies and liquidity infusion schemes.[10] This is further exacerbated by delays in collecting subsidy reimbursements from the Government.[11] These institutional shortcomings eventually contribute to the indebtedness of state distribution companies.[12]

Their operations are also heavily influenced by local political concerns rather than operational and technical efficiencies.[13] Thus, an effective transition to the renewable energy goals set by the Government in 2015 would require a holistic overhaul of the institutions in the electricity distribution sector itself. This would also require change from the law and policy front at various levels to create a conducive environment for an effective transition to renewable energy.

In this essay, I examine the legislative framework surrounding the renewable energy sector in India. This involves consideration of recent legal reform in the area, including the National Tariff Policy, the Draft Renewable Energy Act, and the Electricity Act, 2003 ("the Electricity Act"). I also analyze the practical ramifications and prevalent trends of the Renewable Purchase Obligation ("RPO") levied on state distribution companies. The wider issue over sectoral reform and its consequences for the renewable energy sector is also examined.

II. Constitutional Background

The Constitution of India allocates legislative as well as executive powers to the Center and the States and is largely quasi-federal in nature. Per the 7th Schedule of the Constitution, which provides matters to be regulated by either the Center or the State, and concurrently by both, electricity is enlisted as Entry 38 of List III.[14] While the regulation and overseeing of transactions between States falls within the Center's purview, States are bestowed the power to govern the sale, distribution, and supply of electricity within their respective borders.[15] Even though this distribution of powers seems rigid, the boundaries between the roles of the Center and the States are often blurred. For example, States are barred from taking any specific action due to concurrent jurisdiction of the Center and the States on matters concerning the consumption and purchase of electricity. This is further highlighted by the relationship between the Central Electricity Regulatory Commission ("CERC") and the State Electricity Regulatory Commissions ("SERCs") and their functioning.

In pursuance of the power granted to CERC by section 66, section 178(1) read with section 178(2)(y) of the Electricity Act to frame rules and regulations for the development of power market, CERC issued the CERC Regulations (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) ("REC Regulations") in 2010.[16] The REC Regulations aimed to foster the development of renewable energy by introducing mechanisms to ensure compliance with RPO through measures such as the Renewable Energy Certificates ("RECs").[17] While CERC was tasked with facilitation,[18] SERCs were thrusted with the power to set the RPOs and all relevant targets underneath.[19]

Although the Government has renewed its focus and commitment toward renewable energy in recent years,[20] the specific modalities are governed by the constitutional provisions which require the Center and the State to work in tandem. Since "Electricity" falls in the concurrent list of the Constitution of India,[21] it gives both the state government as well as the Government the power to regulate the area concurrently.

The power of CERC, however, is limited to administering and incentivizing states to achieve renewable energy targets.[22] It is imperative to note, however, that even though CERC's role directs it to promote competition, efficiency, and economy in activities of the electricity industry, it is not empowered to encroach on these powers or penalize the States for their lack of compliance.[23] This inhibits complete liberalization of the renewable energy sector in India and prevents effective realization of RPOs. Most states are unable to meet the RPOs in the Electricity Act.[24] Though outside the scope of this article, the issue is further complicated by the presence of political influences in the sector.

7. *Id.* at 1–5.
8. *Id.* at 3, 8.
9. *See* Sabyasachi Majumdar et al., Distribution Sector Reforms Imminent With Rising Discom Debt and Dues to Gencos 9 (ICRA ed., 2021), www.icraresearch.in/research/ViewResearchReport/3567 [https://perma.cc/S8B7-YUD5].
10. *Loans Worth ₹1.25 Lakh Crore Sanctioned Under Discoms Liquidity Package*, BQ Prime (Feb. 2, 2021, 8:27 PM), https://www.bqprime.com/business/loans-worth-rs-1-25-lakh-cr-sanctioned-under-discoms-liquidity-package-disbursement-at-rs-46k-cr [https://perma.cc/K5PT-YD3U].
11. PHD Chamber & Arthur D. Little, *supra* note 6, at 11.
12. *Id.* at 12.
13. *See* Kaladharan, *supra* note 3.
14. India Const. (1950) art. 287.
15. *Id.*
16. CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (No. L-1/12/2010-CERC) [hereinafter REC Regulations]; The Electricity Act, 2003, § 178 (India).
17. *See* REC Regulations, §§ 3(2)(ii), 4(1)–(2).
18. The Electricity Act, 2003, § 79 (India).
19. *Id.* § 86.
20. *See India Plans to Produce 175 GW of Renewable Energy by 2022*, U.N. Div. for Sustainable Dev. Goals, https://sdgs.un.org/partnerships/india-plans-produce-175-gw-renewable-energy-2022 [https://perma.cc/64BH-MUXA] (last visited Mar. 10, 2022).
21. India Const. (1950) art. 287.
22. The Electricity Act, 2003 § 79 (Act No. 36/2003) (India).
23. *See id.*
24. *See* Kaladharan, *supra* note 3, at 5.

It is imperative to note that there are certain provisions of the Constitution that support the use of renewable energy, even though the Constitution does not explicitly mention the term "renewable energy." In the case of *Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission*,[25] the Supreme Court dealt with compliance of the RPOs.[26] The Court held that promotion of clean energy is mandated by the Constitution and can be traced back to Article 21 on right to life,[27] which, when read with Article 51-A(g) and Article 48-A on protection and improvement of the environment,[28] would imply an obligation on the part of individuals and institutions to support, produce, and consume clean energy.[29]

III. Regulatory Framework

The Electricity Act's passage kickstarted a change in the electricity sector toward a globally competitive model that prioritized renewable energy.[30] Development and cogeneration of electricity from clean energy sources, as well as the establishment of RPO objectives, were expressly listed among the functions of SERCs in section 86(1)(e) of the Electricity Act.[31] SERCs have been tasked with the promotion of cogeneration and generation of electricity from renewable energy sources by providing suitable measures for connectivity with the grid and sale of electricity to persons. They are also to specify the total percentage of consumption of electricity in the area of a distribution licensee for the purpose of purchasing electricity from such sources.[32]

Additionally, section 61(h) of the Electricity Act enabled SERCs to specify the relevant terms and conditions required for the determination of tariffs.[33] The determination of tariffs should be undertaken in a manner guided by the "the promotion of co-generation and generation of electricity from renewable sources of energy."[34]

Commendably, the statute tried to demystify power distribution by enacting provisions to unbundle state electricity boards.[35] State electricity boards are not allowed to operate as integrated power utilities under the Electricity Act. It requires them to be separated into independent entities to handle functions of transmission, generation, distribution, and trading.[36] Unbundling was made mandatory as part of the power sector reforms because multiple electricity boards were operating as loss-making companies with significant outstanding dues.[37] The objective of unbundling these boards was to increase efficiency by simplifying distribution, transmission, generation, and trading activities while also increasing openness and accountability.[38]

This led to the statewide unbundling of power utilities and formation of institutions independently responsible for the maintenance of financial accounts, generation, transmission, and distribution of power, along with regulatory commissions that also operated independently at the state, appellate, and central level. This assisted in increasing transparency in the operations of distribution companies by focusing attention specifically to parts of the utility, including generation, transmission, or distribution. In Gujarat, this unbundling has been believed to be a crucial step toward improving performance of distribution companies.[39] Even though the Electricity Act was ambitious in reforming the sector and its practices, the institutions formed by the Act are in the form of public enterprises,[40] leading to the accumulation of large debts.[41] While the current state of affairs can be attributed to a plethora of causes, the primary reasons include inefficiency in billing consumption and transmission of electricity, the levy of commercially unfit tariffs, and the accumulation of actual losses as a result of theft and ineffective regulation.[42] The dismal financial health of the distribution companies negatively impacted their creditworthiness, thus preventing them from taking on more debt.[43] From the perspective of the renewable energy sector, this remains a key challenge to the role of the distribution companies within the sector, who still remain the largest purchasers of renewable energy. Thus, a shift from the current scenario to a more renewable energy-focused framework would involve restructuring debts and improving creditworthiness.

The Electricity (Amendment) Bill 2018 ("Amendment") adds definitions to the Electricity Act for the terms "renewable energy" and "renewable energy company" for the first

25. *See* Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission, (2015) Civ. Appeal No. 4417 of 2015 (India).
26. *Id.* at 2.
27. *See id.* at 5; India Const. (1950) art. 21.
28. *See Hindustan Zinc Limited*, Civ. Appeal No. 4417 of 2015 at 5; India Const. (1950), art. 51-A(g), art. 48-A.
29. *See Hindustan Zinc Limited*, Civ. Appeal No. 4417 of 2015 at 5.
30. *See* J. Charles Rajesh Kumar & Mohammed Abdul Majid, *Renewable Energy for Sustainable Development in India: Current Status, Future Prospects, Challenges, Employment, and Investment Opportunities*, Energy, Sustainability & Soc'y (2020), https://energsustainsoc.biomedcentral.com/articles/10.1186/s13705-019-0232-1 [https://perma.cc/6N7N-5V7X].
31. The Electricity Act, 2003, § 86 (Act No. 36/2003) (India).
32. *Id.*
33. *Id.* § 61.
34. *Id.*
35. *Id.* § 131.
36. *Id.*
37. *Id.*
38. *See* Vivien Foster & Anshul Rana, *Rethinking Power Sector Reform in the Developing World*, *in* Sustainable Infrastructure Series 1, 42 (World Bank Grp. ed., Dec. 2019), https://openknowledge.worldbank.org/bitstream/handle/10986/32335/9781464814426.pdf?sequence [https://perma.cc/S6EA-BSLH].
39. *See* Regy et al., *supra* note 5, at 2.
40. *See* Devendra Kodwani, *Institutional Endowments and Electricity Regulation in India: Comparative Analysis of Telecom and Electricity Regulation Policies*, ResearchGate, 8 (Jan. 2006), https://www.researchgate.net/publication/242616396_Institutional_Endowments_and_Electricity_Regulation_in_India [https://perma.cc/57BU-FNFT].
41. *See* Aparna Iyer, *Discom Debt to Impact States' Spending on Development: RBI*, Live Mint (Apr. 8, 2016, 3:47 AM), http://www.livemint.com/Industry/DgYTFNJUmvLvsaQtWtgdEP/Power-reforms-likely-to-pressure-states-budgets-RBI.html [https://perma.cc/9GRH-XRG8].
42. *See* Utpal Bhaskar, *Renewable Energy—India's Sunrise Sector*, Live Mint (Mar. 13, 2015, 12:56 AM), http://www.livemint.com/Politics/p17bEaMyU6xy6pMa2MisEO/Renewable-energyIndias-sunrise-sector.html [https://perma.cc/E892-UUPF].
43. *See Discom Debt at Rs 6 Trillion; Negative Outlook on Power Distribution: ICRA*, Econ. Times Bureau, https://economictimes.indiatimes.com/industry/energy/power/discom-debt-at-rs-6-trillion-negative-outlook-on-power-distribution-icra/articleshow/81431574.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst [https://perma.cc/SX5M-2G68] (Mar. 10, 2021, 05:38 PM).

time within the framework of electricity and energy law.[44] The Amendment requires coal (including lignite) thermal generating stations to set up a renewable energy station or procure energy from renewable energy sources.[45] It also imposes a penalty in the event of noncompliance with the RPO targets[46] and envisions the preparation of a National Renewable Energy Policy.[47]

The 2020 Draft Bill ("Draft Bill") establishes a framework for the Government of India to adopt a Renewable Energy Policy aimed at encouraging the generation of electricity from renewable sources.[48] While the Electricity Act allows SERCs to define renewable purchase requirements,[49] the Draft Bill proposes that SERCs specify RPOs, and hydropower purchase obligations as may be prescribed by the Government.[50] Furthermore, if the regulatory commissions at the state or central level fail to decide a tariff rate within two months of receiving an application, the Draft Bill allows for CERC or SERCs to be assumed to have adopted the tariff.[51] In terms of dispute resolution, the Draft Bill proposes to establish an electrical contract enforcement authority to hear cases involving the performance of duties arising from agreements regarding electricity transmission, sale, or purchase.[52]

In 2005, the National Electricity Policy ("Policy") was released.[53] It called for a gradual transition from conventional coal-powered thermal energy toward renewable energy.[54] It specified that state distribution companies should acquire renewable energy through competitive bidding in order to maximize economic efficiencies.[55] Furthermore, the Policy acknowledged the lag in reaching grid parity through renewable energy sources and provided the relevant commissions with the authority to set favorable prices for electricity generated from renewable energy sources.[56] The National Tariff Policy, 2006 ("NTP") was formulated to assist state regulators at the central and state levels in determining tariffs.[57] The NTP lists promotion of renewable energy as one of the policy's primary goals.[58]

Minimum renewable energy purchase standards have also been set by paragraph 4.2.2 of the National Action Plan on Climate Change of 2008 ("NAPCC").[59] One out of the eight national missions enlisted by the NAPCC provides that the minimum renewable energy purchase standard be increased annually up till 2020 by 1% starting from a base of 5% in FY 2009-2010 in order to meet the 15% renewable energy target by 2020.[60] Policies targeting particular renewable energy sources including wind energy, solar energy, biomass energy, and mini-hydro energy are in place at both the central and state levels.[61]

A. *Solar Energy*

There are a variety of policies to further the use of solar energy. These include, but are not limited to, the Jawaharlal Nehru National Solar Mission ("JNNSM") and Rooftop Solar Projects.[62]

The goal of JNNSM or the National Solar Mission is to encourage solar energy development for generation of electricity through grid-connected and off-grid generation with an objective of making India a global leader in the field.[63] In India, the major goal is to make solar energy competitive with conventional energy by 2022, with a target of 100 GW of solar photovoltaic.[64] As of February 28, 2022, India's solar power facilities have a total capacity of 50.77 GW.[65]

The Indian government set a goal of 20 GW of capacity for 2022, and that was met four years ahead of schedule.[66] In 2015, the goal was increased to 100 GW of solar capacity by 2022 (including 40 GW from rooftop solar), aided by a $100 billion investment.[67] JNNSM has been accredited with a part of the success as it has resulted in lower tariffs and project costs.[68] The JNNSM and associated state solar purchasing objectives are expected to stimulate the development of domestic manufacturing capabilities in solar technology and equipment.[69] The Mission has been categorized into phases with different production targets and policy objectives as highlighted below.[70] (See table on next page.)

The Solar Energy Corporation of India ("SECI") and the NTPC [National Thermal Power Corporation] Vidyut Vyapar Nigam Limited ("NVVN") assist in the imple-

44. Draft Amendments to The Electricity Act, 2003, § 2(57A)–(57B) (Sept. 2018).
45. *Id.* § 7(1); *see also* The Electricity Act, 2003, §§ 7, 73 (Act No. 36/2003) (India).
46. *Id.* § 57(1)(i).
47. *Id.* § 3(1).
48. The Electricity (Amendment) Bill, 2020, § 4, (Apr. 17, 2020) (India).
49. The Electricity Act, 2003, § 86(1) (Act No. 36/2003) (India).
50. The Electricity (Amendment) Bill, 2020 § 4.
51. *Id.* § 17.
52. *Id.* § 28.
53. National Electricity Policy, 2005 (India).
54. *See id.* § 5.12.1.
55. *See id.* § 5.12.2.
56. *See id.* § 5.12.1.
57. National Tariff Policy, 2006, § 2.3 (India).
58. *See id.* § 4.0(e).
59. Prime Minister's Council on Climate Change, National Action Plan on Climate Change § 4.2 (2008) (India).
60. *Id.*
61. *Id.* §§ 4.1–4.8.
62. *Solar Policies*, Ministry of New & Renewable Energy, https://mnre.gov.in/Solar/policy-and-guidelines/ (last visited Mar. 1, 2022).
63. *See* Jawaharlal Nehru National Solar Mission, *Building Solar India: Guidelines for Selection of New Grid Connected Solar Power Projects*, Ministry of New & Renewable Energy 2 (2009), http://www.indiaenvironmentportal.org.in/files/jnnsm-gridconnected-25072010.pdf [https://perma.cc/PZW8-C8ZR] [hereinafter Jawaharlal Nehru National Solar Mission].
64. *See id.*
65. *Physical Progress (Achievements)*, Ministry of New & Renewable Energy, https://mnre.gov.in/the-ministry/physical-progress (last visited Aug. 30, 2021).
66. *See India Achieved Solar Power Target 4 Years Ahead of Schedule: DST Advisor*, The Econ. Times (Sept. 11, 2019), https://economictimes.indiatimes.com/small-biz/productline/power-generation/india-achieved-solar-power-target-4-years-ahead-of-schedule-dst-advisor/articleshow/71078461.cms?from=mdr [https://perma.cc/E28C-QB4Q].
67. Cabinet, *Revision of Cumulative Targets Under National Solar Mission From 20,000 MW by 2021-22 to 1,00,000 MW*, Press Info. Bureau Gov't of India (June 17, 2015), https://pib.gov.in/newsite/PrintRelease.aspx?relid=122566 [https://perma.cc/M5RT-9YFP].
68. Jawaharlal Nehru National Solar Mission, *Towards Building Solar India*, Ministry of New & Renewable Energy 4 (Jan. 11, 2009).
69. *Id.* at 6.
70. *Id.* at 3–4.

Phase[a]	Duration	Target for grid-connected PV (including rooftop)	Target for off-grid solar PV applications
Phase I	2010-2013	1,000 MW	200 MW
Phase II*	2014-2017	4,000–10,000 MW	1,000 MW
Phase III	2017-2022	1,00,000 MW	2,000 MW
*Scheme for at least 25 solar parks (34 approved currently under Government) and the Ultra Mega Solar Power Projects to target 40 GW solar PV through 13th Plan (2017-2022).[b]			

a. Jawaharlal Nehru National Solar Mission, *Towards Building Solar India,* Ministry of New & Renewable Energy 3–4 (Jan. 11, 2009).
b. *Id.* at 10.

mentation of the National Solar Mission.[71] They facilitate the sale of power to state distribution companies or consumers in bulk quantities at a prescribed tariff.[72] This is done through entering into regular long-term power sale agreements.[73] The solar power sector in India has made significant headway since the launch of the Mission in 2010.[74]

The Ministry of New and Renewable Energy ("MNRE"), along with various state governments, has launched a number of initiatives to encourage grid-connected and off-grid solar rooftop installations.[75] Furthermore, as cost-effective and high-capacity battery storage technology evolves, solar power will no longer be classified as a limited or infirm power source that can only be utilized during the day.[76] Questions around a "utility death spiral," a situation in which families convert to solar and reduce their consumption of grid energy, have arisen as a result of the increase in rooftop solar installations over time.[77] As a result, the customer base necessary to pay distribution companies' fixed expenses decreases, resulting in an increase in the tariffs for other consumers.[78] As a result of the higher prices, more consumers are moving to solar to lower their costs, making solar more attractive and grid energy a less appealing alternative.[79]

B. Wind Energy

India now has about 37.8 GW of installed wind power capacity, making it the world's fourth biggest installed wind power capacity.[80] Karnataka, Andhra Pradesh, Madhya Pradesh, Gujarat, Rajasthan, Maharashtra, Tamil Nadu, and Telangana account for the majority of this potential.[81] MNRE has implemented a number of programs and incentives to encourage the growth of wind energy, including the Accelerated Depreciation and Generation Based Incentive, the National Offshore Wind Energy Policy, 2015 ("Wind Policy"), and the Scheme for setting up of 1,000 megawatts ("MW") Central Transmission Utility (CTU) connected Wind Power Projects, 2016.[82]

While the Wind Policy recognizes the potential of wind farms along India's 7,600 kilometers of coastline,[83] the Scheme for Setting up of 1,000 MW CTU Connected Wind Power Projects[84] strives to set up installations to produce 60 GW of energy by 2022.[85] The scheme lays down provisions to facilitate the delivery of power to distribution companies with "poor wind resources" through competitive bidding, and in turn assist them in achieving their non-solar RPOs,[86] with trading companies acting as intermediaries between bidders and distribution companies through Power Sale Agreements.[87]

71. *See id.* at 6.
72. *Id.* at 8–9.
73. *Id.* at 8.
74. Jawaharlal Nehru National Solar Mission, *supra* note 63, at 1.
75. *Solar Schemes*, Ministry of New & Renewable Energy, https://mnre.gov.in/solar/schemes [https://perma.cc/W3MK-8L57] (last visited Aug. 11, 2021).
76. *See* Andy Colthorpe, *India's First 24/7 Solar-Powered Town Enabled With Battery Storage and Smart Controls*, Energy Storage News (June 7, 2022), https://www.energy-storage.news/indias-first-24-7-solar-powered-town-enabled-with-battery-storage-and-smart-controls/ [https://perma.cc/BR4X-K2FK].
77. Rahul Tongia, *Challenges Ahead for Clean Energy*, Mint (Sept. 28, 2017, 11:48 PM), https://www.livemint.com/Industry/aOhc0bEziRHFuoR5ae03xO/Challenges-ahead-for-clean-energy.html [https://perma.cc/FBS6-VFR2] (last visited Mar. 7, 2022).
78. *Id.*
79. *Id.*
80. *Wind Energy*, Ministry of New & Renewable Energy, https://mnre.gov.in/wind/current-status/ [https://perma.cc/KM6D-BZXT] (last visited Aug. 14, 2021).
81. Ministry of New & Renewable Energy, *Government Launches Scheme for Setting Up 1000 MW CTU-Connected Wind Power Project*, Press Info. Bureau Gov't of India (June 15, 2016, 12:49 PM), https://pib.gov.in/newsite/PrintRelease.aspx?relid=146194.
82. *Id.*
83. *Offshore Wind*, Ministry of New & Renewable Energy, https://mnre.gov.in/wind/offshore-wind/ (last visited Aug. 5, 2022).
84. *Id.*
85. *Id.*
86. *See id.*
87. *Id.*

C. *Biomass*

Power generated through biomass-based sources has been gaining traction in India in recent years with the setting up of various plants with MW-scale capacity to process biomass residues such as de-oiled cakes, wood, husks, shells, etc.[88] In the country, around 800 biomass power and bagasse/non-bagasse cogeneration plants with a total capacity of 10,170 MW have been set up to supply electricity to the grid.[89] Maharashtra, Karnataka, Uttar Pradesh, Tamil Nadu, and Andhra Pradesh are among the states that have taken the lead in implementing bagasse cogeneration plants.[90] On the other hand, Chhattisgarh, Madhya Pradesh, Gujarat, Rajasthan, and Tamil Nadu are home to multiple biomass power projects.[91]

Developers are given central financial assistance to help them install biomass facilities.[92] They are also eligible for reduced customs and excise duties on equipment needed for the initial setup of biomass plants.[93] This central financial assistance acts as a fiscal incentive that aids in installing biomass facilities that can have high initial costs.[94] The Indian Renewable Energy Development Agency ("IREDA") also provides financing for biomass power and bagasse cogeneration plants.[95]

MNRE has also formulated a National Biofuels Policy, which enlists biofuels as liquid or gaseous fuels generated from biomass resources that are utilized in lieu of, or in addition to, petrol, diesel, or other fossil fuels.[96] Per this policy, oil marketing firms handle biofuel storage, distribution, and marketing.[97] The policy takes a comprehensive approach to the production and use of biofuels, with one of the components being electricity generation.[98] In this regard, it is worth noting that several SERCs have defined a distinct biomass RPO in their regulations.[99]

IV. Institutional Framework

The variety and dynamics of institutional players at the state and national levels make the instituting change in the sector difficult. For instance, while the Ministry of Power, Central Electricity Authority, and MNRE are responsible for formulating policy at the central level, various Departments of Energy do the same at the state level.[100] In addition to CERC and SERCs being the key regulators at the central and state level, differences also exist in generation, transmission, and distribution.[101]

There are various institutions at the Central level. MNRE is the nodal ministry for renewable energy at the Central level.[102] Its mission is to promote the development and deployment of renewable energy to meet the country's energy demands.[103] MNRE has established three specialized technical institutions: the National Institute of Solar Energy, the National Institute of Wind Energy, and the Sardar Swaran Singh National Institute of Bio-Energy.[104] These institutions conduct activities related to testing, skill development, research, resource assessment, certification, standardization, and awareness in the field of solar energy,[105] wind energy,[106] and bioenergy commercialization.[107] In addition, IREDA is a Non-Banking Financial Company operating under the aegis of MNRE.[108] It is tasked with offering loans and overseeing financial operations and initiatives in order to promote renewable energy.[109] Additionally, the Solar Energy Corporation of India is actively involved in adjacent aspects of solar energy, including owning solar power plants, generating and selling electricity, and other renewable energy-related businesses.[110] The National Electricity and Tariff Policies, along with other legislative reforms in the sector and amendments to the Electricity Act, are carried out by the Ministry of Power ("MoP").[111] Thus, while MNRE can be said

88. *Bio-Energy*, Ministry of New & Renewable Energy, https://mnre.gov.in/bio-energy/current-status [https://perma.cc/8XLW-UTU3] (last visited Aug. 14, 2021).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *See* Team ProductLine, *CFA and Fiscal Incentives Available for Biomass Power Generation and Bagasse Cogeneration Projects*, The Econ. Times (Nov. 8, 2019, 1:41 PM), https://economictimes.indiatimes.com/small-biz/productline/power-generation/cfa-and-fiscal-incentives-available-for-biomass-power-generation-and-bagasse-cogeneration-projects/articleshow/71967805.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst [https://perma.cc/KVR9-CEEQ].
94. *Id.*
95. *See Biomass Power and Cogeneration Programme*, Ministry of New & Renewable Energy, http://mnre.gov.in/schemes/grid-connected/biomass-powercogen/ (last visited Aug. 14, 2021).
96. *Bio-Energy*, *supra* note 88; National Policy on Biofuels, 2018, § 1.4 (India).
97. National Policy on Biofuels, 2018, § 5.11 (India).
98. *Id.* § 4.0.
99. *See State Renewable Energy Capacity Addition Roadmap, Action Plan 2022 and Vision 2030: Summary of Findings*, Niti Aayog, https://www.niti.gov.in/sites/default/files/energy/Executive-Summary.pdf [https://perma.cc/9CHV-PJ6E] (last visited Mar. 12, 2022).
100. Central Electricity Authority, https://cea.nic.in/?lang=en [https://perma.cc/6TU6-8CLZ] (last visited Aug. 14, 2021); *Energy Efficiency*, Ministry of Power, https://powermin.gov.in/en/content/energy-efficiency (last visited Mar. 10, 2022).
101. *See* The Electricity Act, 2003, §§ 79(1)(b)–(d), 86(1)(a), 86(1)(c), & 86(2)(iv) (India).
102. *Association of Renewable Energy Agencies of States (AREAS)*, Ministry of New & Renewable Energy, https://mnre.gov.in/areas (last visited Mar. 10, 2022).
103. *The Ministry*, Ministry of New & Renewable Energy, https://mnre.gov.in/the-ministry/what-does-the-ministry-do/ (last visited Mar. 10, 2022).
104. *Autonomous Institutes*, Ministry of New & Renewable Energy, MNRE.gov.in (last visited Aug. 1, 2022).
105. *See National Institute of Solar Energy (NISE), Gurugramm*, Ministry of New & Renewable Energy, https://www.indiascienceandtechnology.gov.in/organisations/ministry-and-departments/ministry-new-and-renewable-energy-mnre-govt-india/national-institute-solar-energy-nise-gurugram [https://perma.cc/WFM3-FFZX] (last visited Sept. 5, 2022).
106. *See About Us*, Nat'l Inst. of Wind Energy, https://niwe.res.in/about.php (last visited Sept. 5, 2022).
107. *See* Sardar Sawan Singh Nat'l Inst. of Bio-Energy, https://www.nibe.res.in [https://perma.cc/4D4Y-PTHL] (last visited Sept. 5, 2022).
108. *See Background*, Indian Renewable Energy Dev. Agency Ltd., https://www.ireda.in/background [https://perma.cc/SJ92-N9K2] (Sept. 4, 2022).
109. *See id.*
110. *See Objectives*, Solar Energy Corp. of India ltd., https://www.seci.co.in/about/objectives (last visited Aug. 2, 2022).
111. *See Policies and Publications*, Ministry of Power (Feb. 22, 2001), https://powermin.gov.in/en/content/tariff-policy.

to regulate renewable energy production and deployment at the national level,[112] it is influenced by MoP broadly for large-scale policy reforms.[113]

Nodal institutions and energy departments function under the effective supervision of state governments at the state level.[114] These institutions oversee central-level subsidy channeling, coordinate with other local-level agencies, and implement pilot projects, among other things.[115] They also create and monitor strategies for the promotion, development, and deployment of renewable energy in the state.[116]

State and central regulators, SERC and CERC, respectively, in addition to government ministries and agencies, play an important role in the growth of the renewable energy sector.[117] They monitor the development of energy markets, provide a regulatory framework for the sector, and monitor the application of different rules.[118]

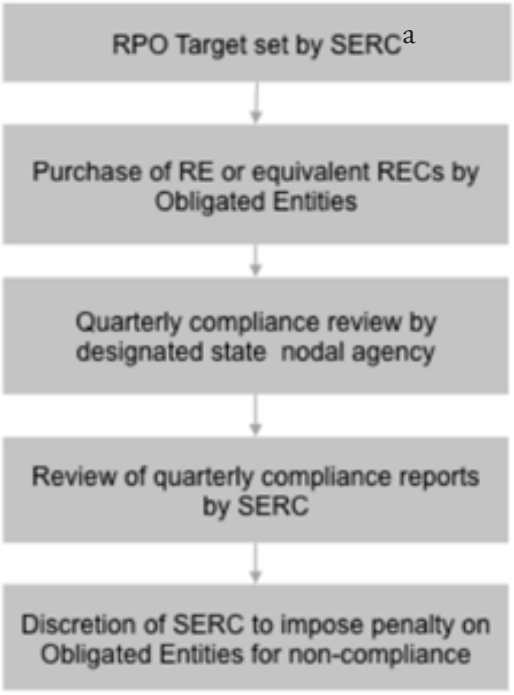
V. Renewable Purchase Obligation

A. *Compliance With RPOs: Myth or Reality?*

Per section 86(1)(e) of the Electricity Act, SERCs establish targets for distribution companies, open access consumers, and captive power plants, among other obligated entities, to acquire a percentage of their total power consumption from renewable energy sources.[119] The National Tariff Policy also requires SERCs to set a mandatory lower limit percentage of renewable energy purchases for their purchase, taking into account each state's renewable energy potential and its influence on retail tariffs.[120] In 2011, the NTP was revised to mandate SERCs to set aside a minimum proportion for solar energy purchases, which rose to 0.25% by the end of 2013 and to 3% by 2022 in the revised form.[121] Based on the provisions of the Electricity Act and relevant policies framed underneath, various SERCs have come up with their RPO targets.[122] However, in the past they have typically been lower than the prescribed limit set by NAPCC.[123]

A Renewable Energy Certificate ("REC") mechanism is a market-based instrument to promote renewable energy and facilitate compliance of RPOs.[124] An REC represents that one MW hour of electricity has been injected.[125] In making RECs tradeable, CERC recognizes the varying generation capacities of different states.[126] By purchasing RECs, states would be able to meet their RPO targets.[127] Thus, the purpose of RPOs and RECs is to increase the proportion of renewable energy used by a state.[128] By mandating "demand" in such an order, the market for renewable energy is regulated.[129]

From time to time, MNRE revises statewide renewable energy capacity targets to meet the goals set by the Center for 2022.[130] It also emphasizes the need for SERCs to update RPO trajectory in compliance with national objectives, with seventeen percent renewable energy in the cumulative energy mix and eight percent being derived from solar energy by 2022.[131] The Ministry has also advocated for the formation of state-level governing bodies to regulate RPO compliance by obligated entities.[132]



[a] Kaladharan, *supra* note 3, at 11.

Thus, even though the Government has carefully curated a market and incentive-based system for the renewable energy sector through RPO and REC mechanisms, the reality remains dismal, as states are often not able to

112. *The Ministry*, *supra* note 103.
113. *See Statutory Bodies (Organizations Under MoP)*, Ministry of Power, https://powermin.gov.in/en/statutory-bodies (last visited Mar. 10, 2022).
114. *See SDAs*, Bureau of Energy Efficiency, https://beeindia.gov.in/content/sdas-0 (last visited Mar. 10, 2022).
115. The Electricity Act, 2003, § 86(1)(a), (c), & (e).
116. *See id.* § 61.
117. *See id.* §§ 79, 86(1).
118. *See* Gevorg Sargsyan et al., The World Bank, Unleashing the Potential of Renewable Energy in India 25 (2011).
119. The Electricity Act, 2003, § 86.
120. Kaladharan, *supra* note 3, at 10.
121. Ministry of Power, F.No.23/17/2009-R&R 296 (Issued on Jan. 20, 2010) (India).
122. *See Renewable Purchase Obligation Manual*, Ministry of New & Renewable Energy 1, https://rpo.gov.in/ProjectFiles/Manual/RPO%20Manual_Obligated%20Entity.pdf (last visited Mar. 10, 2022).
123. Comptroller & Auditor Gen. of India, Report No. 34 of 2015—Performance Audit on Renewable Energy Sector in India 15 (2015) https://cag.gov.in/cag_old/content/report-no-34-2015-performance-audit-renewable-energy-sector-india-union-government-ministry.
124. *Frequently Asked Questions*, Renewable Energy Certificate Registry of India, https://www.recregistryindia.nic.in/index.php/publics/faqs [https://perma.cc/P75E-TBLB] (last visited Aug. 21, 2021).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *See generally id.*
130. *See Biomass Power and Cogeneration Programme*, *supra* note 95.
131. Ministry of New & Renewable Energy, Annual Report 2018-19 (2019), https://mnre.gov.in/img/documents/uploads/file_f-1608040317211.pdf.
132. Kaladharan, *supra* note 3, at 1–2.

meet their RPO targets.[133] Most states are unable to meet the targets set by their respective SERCs, let alone exceed the RPO targets.[134] Tamil Nadu, Arunachal Pradesh, Mizoram, Karnataka, Meghalaya, and Himachal Pradesh are some of the states that have been consistent in achieving their RPO targets.[135]

According to NITI Aayog's Report on renewable energy in India,[136] RPO targets are meant to be indicative of a floor limit but are treated as an upper ceiling instead.[137] This prevents their intended use—an incentive for a gradual transition to the purchase of renewable energy.[138] However, it must be noted that states are not entirely at fault for their failure to achieve RPO targets.[139] Factors such as higher prices of power purchase, grid integration, financial stability of distribution companies, and the nature of infirm power have also contributed largely to the current state of affairs.[140] The REC system is criticized for its transparency requirements regarding acquisition because it simultaneously requires distribution companies to pay for actual electricity to meet the requirements.[141] In the absence of requirements to initiate *suo-moto* proceedings to review compliance or review timelines for processes, the lack of effective oversight by SERCs has translated into haphazard implementation and lack of compliance with RPO targets.[142]

B. RPO Compliance and Judicial Attitudes

This section highlights the judicial trends in the enforcement of RPO obligations. Note that most disputes regarding the compliance of RPOs are heard either by the Appellate Tribunal for Electricity ("APTEL") or the Supreme Court.[143] Recent trends indicate an inclination toward a position where greater pressure is imposed over states and SERCs to achieve the target RPO.[144]

In the case of *Indian Wind Power Association v. Gujarat Electricity Commission and Others*,[145] APTEL provided that carry forward of RPO targets may be permitted by SERCs in certain pre-specified circumstances.[146] These include the prerequisite of a lack of availability of tradable RECs.[147] The factual matrix of the dispute revolved around the waiver granted by the Gujarat Electricity Regulatory Commission ("GERC") to the distribution companies for their shortfall.[148] The facts required the Tribunal to regulate on the following issues: (1) whether SERCs can waive the shortfall of distribution companies in circumstances where RECs are available; (2) whether SERC is enabled to revise the RPO targets for a given FY and under what circumstances; and (3) whether SERCs can permit adjustment of excess purchase of solar RPO by distribution companies against fulfillment of its non-solar RPO. The appellants contended that SERC had erred in holding that the purpose of the REC mechanism was to enable states with low renewable energy potential to fulfill their RPOs through purchase of RECs from other states.[149] SERCs' power to permit carry forward of RPOs extends only to cases of non-availability of power from renewable energy sources or non-availability of RECs.[150] The respondent, GUVNL, countered the contentions by citing the definition of "Renewable Energy Sources" and highlighting that the same is supposed to be interpreted in a restrictive manner and not include instruments such as REC.[151] Further, RPOs are obligations relating to purchase of physical renewable energy and do not include obligations in regard to REC.[152] They also argued that RPO targets are determined on the basis of an expectation of availability of renewable power, but this may differ from the actual availability of renewable power which is subject to vagaries of any kind.[153]

Dismissing the arguments of the distribution companies, APTEL highlighted that the REC system was put into place as an alternative to procurement of renewable energy in times of shortage.[154] However, in states where renewable energy is in surplus of the RPO targets, the mode of renewable power procurement must be done by distribution companies in accordance with sound principles of commerce.[155] APTEL further provided that if a SERC believes that the RPO targets are unrealistic based on trends from previous years, then it may revise the RPO targets.[156] However, the same should be done at the beginning of a FY or in case of force majeure events.[157] Revision is not warranted in circumstances where the distribution companies have not engaged in procurement of renewable energy or equivalent RECs.[158] Lastly, the tribunal emphasized that SERCs should refrain from permitting distribution companies to alter technology-specific RPOs for solar and non-solar sources.[159]

133. *See* Ministry of New & Renewable Energy, Report of the Comptroller and Auditor General of India on Renewable Energy Sector in India 15 (2015), https://cag.gov.in/uploads/download_audit_report/2015/Union_Civil_Performance_Renewable_Energy_Report_34_2015.pdf [https://perma.cc/ZDA3-ASU3].
134. *Id.*
135. *Id.*
136. *See* Niti Aayog, Report on India's Renewable Electricity Roadmap 2030: Toward Accelerated Renewable Electricity Deployment 29 (2015), https://policy.thinkbluedata.com/sites/default/files/Report-on-Indias-RE-Roadmap-2030-full-report-web2.pdf [https://perma.cc/WX2S-YMEL].
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Kaladharan, *supra* note 3, at 13.
144. *See id.*
145. *See* Indian Wind Power Ass'n v. Gujarat Elec. Regul. Comm'n, 2015 SCC Online APTEL 105 (India).
146. *Id.* ¶ 52.
147. *Id.*
148. *Id.* ¶¶ 3–4.
149. *Id.* ¶ 4.
150. *Id.* ¶ 4.
151. *Id.* ¶ 29.
152. *Id.*
153. *Id.* ¶ 5.
154. *Id.* ¶ 32.
155. *Id.*
156. *Id.* ¶ 48.
157. *Id.*
158. *Id.* ¶ 50.
159. *Id.* ¶ 68.

In the case of *Indian Wind Energy Association and Others v. APERC and Others*,[160] APTEL reiterated its previous decision in holding that distribution companies should file their plan for purchase of renewable energy as a part of their tariff petitions made to SERC.[161] The issue revolved around RPO compliance of obligated entities across states.[162] Based on the power bestowed upon APTEL through section 121 of the Electricity Act, APTEL provided important principles in this regard.[163] It laid down that the exercise of determining RPO targets must be undertaken before the commencement of multi-year tariff periods, RPO compliance should be supervised in regular intervals, and carry forward and review of RPOs may be done by SERCs only in cases where RECs are absent.[164] It emphasized that SERCs must not be shy in imposing penalties on distribution companies in cases of noncompliance, and while SERCs do have the power to relax and exempt compliance of RPOs, the same must be exercised only under extraordinary circumstances.[165]

In the case of *Hindustan Zinc v. Rajasthan Electricity Regulatory Commission (RERC)*,[166] the Supreme Court of India was posed with the question of whether the fulfillment of RPO targets by obligated entities included only the distribution companies or also applied to captive power generation companies and open access users.[167] The Court emphasized Article 21 read with Article 48A and Article 51A(g) to lay down the obligations of the states as well as citizens to protect the environment to hold in favor of SERC and imposition of RPOs.[168] The Court challenged the practices of high courts to issue relevant orders in cases of noncompliance with RPOs.[169] The Court further held that the surcharge imposed by SERCs in cases of shortfall of meeting RPO targets is not in the nature of a tax.[170] Under sections 142 and 147 of the Electricity Act, SERCs are empowered to impose such a surcharge as an alternative method of ensuring compliance with RPO targets and achieving renewable energy goals.[171]

Based on the series of decisions in this regard, it is evident that the authority to impose penalties on obligated entities, including distribution companies in the event of noncompliance with RPO regulations, rests with SERCs. The power to penalize stakeholders also rests with SERCs and is derived through the Electricity Act and relevant rules and regulations.[172] In the past, penalties for noncompliance with RPO obligations have been imposed by various SERCs, including the Uttarakhand Electricity Regulatory Commission ("UERC") and Maharashtra Electricity Regulatory Commission ("MERC").[173]

VI. National Tariff Policy 2016

The Tariff Policy, revised from time to time, was recently amended in 2016 with a heightened focus on renewable and clean energy.[174] One of the key changes in the amendment is the transition to competitively determined tariffs from the previous regime of preferential tariff determination.[175] For procurement of renewable energy, the policy prescribed competitive bidding instead of the preferential tariff route in order to regulate the tariffs.[176] Additionally, the policy sets an upper cap of 35% of installed capacity of power procurement by states.[177] This capacity can be procured through the process of tariffs determined by SERC and includes renewable energy and other generation mechanisms as well.[178] In the solar sector, this shift to a competitive tariff bidding system has translated into reduced costs of power and created a more favorable environment for the procurement of renewable power by distribution companies in order to fulfill RPOs.[179]

Concerns have also been raised with respect to the binding nature of certain prescriptions made by the policy.[180] It states that electricity regulatory commissions at the central and state levels "shall be guided" by the policy.[181] However, it contains neither obligations for states to enforce it nor penalties if they do not.[182] The Electricity Act also does not prescribe anything in this regard. It is unclear how various state and local governments will look at such obligations. The Tariff Policy does not prescribe provisions for states that have failed to meet the three percent solar energy RPO requirements provided in the previous version of the Tariff Policy.

VII. Renewable Energy Act, 2015

MNRE also developed the draft National Renewable Energy Act ("NREA"), recognizing that the Electricity Act did not adequately address the renewable energy needs of the country and that there needed to be a specific statute in this regard for growth of the renewable energy sector in India.[183] Resources assessment, testing facilities, monitor-

160. *See* Indian Wind Energy Ass'n v. Andhra Pradesh Elec. Regul. Comm'n, O.P. No. 1 of 2013 & IA No. 291 & IA No. 420 of 2013, O.P. No. 2 of 2013 & O.P. No. 4 of 2013, decided on Apr. 20, 2015 (APTEL).
161. *Id.* ¶ 28(ii).
162. *Id.* ¶ 3(a).
163. *Id.* ¶ 2.
164. *Id.* ¶ 28.
165. *Id.* ¶ 13.
166. *See* Hindustan Zinc v. Rajasthan Elec. Regul. Comm'n, (2015) 12 SCC 611(India).
167. *Id.* ¶ 4.
168. *See id.* ¶ 11.
169. *See id.* ¶ 44.
170. *Id.* ¶ 49.
171. *See id.* ¶ 43.
172. *See generally* The Electricity Act, 2003 (India).
173. Uttarakhand Energy Regulatory Commission, In the Matter of Non-Compliance by UPCL of RE Regulations, 2010 and RPO Regulations, 2010 and Commission's Order Dated September 11, 2013 (Issued on Jan. 22, 2014); Case No. 49 of 2013, Order (Suo-Motu), dated on July 22, 2013 (MERC).
174. National Tariff Policy, 2016, § 4.0(e) (India).
175. Kaladharan, *supra* note 3, at 18.
176. National Tariff Policy, 2016, § 5.3 (India).
177. *Id.* § 5.2.
178. *Id.*
179. Tamil Nadu Electricity Regul. Comm'n, Consultative Paper for Issue of Tariff Order for Solar Power and Related Issues 4 (2018), www.tnerc.gov.in/PressRelease/files/PR-120320211520Eng.pdf [https://perma.cc/G8LD-K98T].
180. Kaladharan, *supra* note 3, at 19.
181. National Tariff Policy, 2016, § 2.2 (India).
182. Kaladharan, *supra* note 3, at 19.
183. National Renewable Energy Act, 2015 (India).

ing and verification programs, and regulations to promote local production are all included as part of the supporting ecosystem mentioned in the NREA.[184]

From the standpoint of the distribution companies, the NREA is noteworthy because it prescribes the compulsory RPO objectives to be achieved within one year of its adoption and implements a system to monitor compliance of RPOs in a centralized manner.[185] Distribution companies have been obligated to develop five-year plans to fulfill their renewable energy goals.[186]

The NREA also specifies the sanctions that SERCs can levy for noncompliance with the RPO, which include fines of up to one crore rupees and/or imprisonment for up to three months for each continuous violation.[187] MNRE will also have the authority to intervene and offer financial assistance to distribution companies until grid parity is reached so that they eventually become indifferent in their choice between conventional and renewable energy supplies.[188] The Draft Act also calls for the formation of a National Renewable Energy Advisory Group ("NREAG"), which will comprise producers and users of renewable energy, distribution utilities, research institutes, and think-tanks, among other stakeholders.[189]

However, despite the existence of a legislative and regulatory framework that encourages public engagement, civil society participation in the regulatory process has been rather minimal.[190] Civil society organizations can assist Distribution Companies to better interact with other consumers and raise awareness about initiatives including theft prevention and metering. This can be accomplished through direct collaborations with the Distribution Companies.[191]

VIII. Conclusion

The Indian power market is undergoing an upheaval, with the Government aiming for a forty percent renewable energy mix by 2030.[192] Legislative, regulatory, and policy actions at the national and state levels support these lofty goals.[193] This is in congruence with global trends that favor green industrial policies as a means of achieving a clean and long-term development.[194] Instead of focusing on market control, the focus has changed to market involvement through the establishment of an enabling policy framework.[195] While there is consensus at the central level on how to drive renewable energy legislation, there is a palpable sense of complexity at the state level.[196]

It must be noted that distribution companies are critical to the success of any renewable energy strategy. The existing operating environment for distribution companies is far from ideal, and it is obscured by state-level politics.[197] The RPO targets must be implemented correctly if India's renewable energy objectives are to be met.[198] Unfortunately, prior years have demonstrated that guaranteeing RPO compliance is a difficult task, with several distribution companies unable or unwilling to fulfill their RPOs.[199]

While some SERCs have prosecuted distribution companies for noncompliance, other SERCs have been lax in imposing sanctions by providing carry forward and RPO waivers on a regular basis.[200] The decreasing trajectory of RPO compliance is expected to continue in the absence of clear action from SERCs and state governments toward RPO fulfillment.[201] This also reiterates the need of considering the long-term character of the reform process.

184. Kaladharan, *supra* note 3, at 19.
185. National Renewable Energy Act, 2015, § 40 (India).
186. *Id.*
187. *Id.* § 39(8)–(9).
188. *Id.* § 39(4)(i).
189. *Id.* § 4(2)(vi).
190. *See* Regy et al., *supra* note 5, at 27.
191. *See* Kaladharan, *supra* note 3, at 20–21.
192. *Id.* at 21.
193. Int'l Energy Agency, India 2020 Energy Policy Review 34 (2020), https://iea.blob.core.windows.net/assets/2571ae38-c895-430e-8b62-bc19019c6807/India_2020_Energy_Policy_Review.pdf [https://perma.cc/B4E5-Q4D8].
194. *See id.* at 41.
195. *See generally* The Electricity Act, 2003 (India); National Tariff Policy, 2016 (India).
196. National Renewable Energy Act, 2015 (India).
197. *See* Ajay Shankar & TCA Avni, Resolving the Crisis in Power Distribution in India 2–3 (Aug. 2021) (unpublished discussion paper) (on file with The Energy & Resources Institute) https://www.teriin.org/sites/default/files/2021-08/power-distribution-India-dp.pdf [https://perma.cc/AJR2-QC4H].
198. Kumar & Majid, *supra* note 30, at 16.
199. *Id.*
200. Rakesh Ranjan, *Rajasthan DISCOMS Allowed Time Until FY 2024 to Clear RPO Backlog of 11,454 MU*, MERCOM (Dec. 29, 2021), https://mercomindia.com/rajasthan-discoms-allowed-until-fy-2024-clear-rpo-backlog/ [https://perma.cc/MQ9U-CEWM].
201. *See Shortfall in Solar RPO Compliance a Challenge: ICRA*, The Econ. Times (June 22, 2016, 4:23 PM), https://economictimes.indiatimes.com/industry/energy/power/shortfall-in-solar-rpo-compliance-a-challenge-icra/articleshow/52867940.cms?from=mdr [https://perma.cc/HH58-DLA7].

FERC'S MOPR: POLITICS WITH A THIN VENEER OF ENERGY REGULATION

Cole Beck*

ABSTRACT

This Note argues that the Minimum Offer Price Rule ("MOPR") is an unnecessary and harmful economic policy that has become a political weapon, devolving from its original purpose as a necessary means to prevent price suppression in PJM's capacity market. Rather than relying on front-end market regulatory tools such as the MOPR in the PJM Interconnection, which has been widely criticized by scholars and commentators, the Federal Energy Regulatory Commission ("FERC") should instead rely on the enforcement authority granted to the Commission in the Federal Power Act and the Energy Policy Act of 2005 to prevent manipulation and deter fraud in the wholesale capacity market. By shifting to a civil enforcement model for regulating the PJM, FERC will insulate the regulatory regime from political pressures, promote transparency, and better protect consumers.

I. Introduction

In the summer of 2021, the Intergovernmental Panel on Climate Change ("IPCC") released a scathing report detailing the need for a drastic change in global climate policy, finding that with "virtual certainty," anthropogenic carbon emissions affect weather and climate extremes in every region across the globe.[1] In light of these developments, the current IPCC position is that the *only* practical way to reduce anthropogenic climate change is by limiting cumulative carbon dioxide and other greenhouse gas ("GHG") emissions to at least a net zero level.[2] In other words, if the United States is to significantly limit GHG emissions, it must change its sources of electricity generation.

Electricity production accounts for 25% of the GHG emissions, and approximately 62% of the United States' electricity is generated from burning fossil fuels, largely coal and natural gas.[3] Notably, coal accounted for 54% of carbon dioxide emissions, yet it produced only 20% of electricity in the United States in 2020.[4] Put bluntly, if a climate crisis is to be averted, the United States must wean itself off using fossil fuels to generate electricity.

Largely due to dissatisfaction with the federal government's response in adopting clean energy initiatives, states have taken it upon themselves to take the lead in green generation policy.[5] These policies are designed both to promote competition between renewable and fossil-fuel generation and to subsidize the development costs of new renewable and nuclear generation facilities.[6] For example, Illinois and New York have implemented Zero-Emissions Credits ("ZECs"): state subsidies tied to the development of zero-carbon generation resources.[7]

However, these state initiatives have received considerable pushback from not only the fossil-fuel industry, but also from the Federal Energy Regulatory Commission ("FERC" or the "Commission"), the independent federal agency charged with regulating interstate transmission and wholesale markets for electricity.[8] FERC regulates these

* Cole Beck is a 2023 J.D. candidate at The George Washington University Law School, where he serves as a member of the GW Journal of Energy and Environmental Law. He received his B.A. from North Carolina State University in Political Science. Cole thanks his energy law teachers, especially Profs. Regina Speed-Bost, Robert H. Soloman, and Andrew Satten for their inspiration and guidance in writing this Note. He also thanks his family and friends for supporting him throughout his law school journey, and finally the Journal editors and members for their thoughtful edits and comments.

1. Richard P. Allan et al., Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis, Summary for Policymakers 27 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [https://perma.cc/NV8F-624R].
2. *Id.* at 20.
3. *Sources of Greenhouse Gas Emissions*, U.S. Env't Prot. Agency, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#t1fn3 [https://perma.cc/6Y4D-85T5] (Aug. 5, 2022).
4. *Id.*
5. *See* Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41, 45 (2d Cir. 2018) (discussing New York's Zero Emissions Credit ("ZEC") program as the state's effort to subsidize nuclear power plants because of New York's preference for the zero-emission attributes of nuclear power).
6. *Id.*
7. *See id.* at 45; Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 522 (7th Cir. 2018).
8. 16 U.S.C. § 824(d) (2022) ("wholesale" is defined as any sale of electricity with the purpose of being resold to another buyer).

markets by way of proxy.[9] The Commission allows independent regional entities, known as either Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs") to control and regulate electricity sales between generators and public utilities.[10] RTOs/ISOs submit tariffs proposing how the wholesale markets will operate to FERC.[11] Once approved, the tariff controls,[12] and the RTO/ISO seeks to ensure that the market operates as planned by monitoring and facilitating the subsequent electricity exchanges.[13] In the past, FERC has used this tariff approval process to directly limit the effects of state generation policy in the wholesale capacity markets.[14]

Pursuant to section 205 of the Federal Power Act ("FPA"),[15] PJM Interconnection, LLC ("PJM"), the RTO responsible for regulating wholesale transmission in thirteen mid-Atlantic states and the District of Columbia,[16] filed revisions to its Open Access Transmission Tariff on July 30, 2021.[17] Specifically, the revisions changed PJM's "Expanded" Minimum Offer Price Rule ("MOPR"), which was widely criticized by many commentators—including FERC's Chairman, Richard Glick—and had negative effects on state-implemented renewable generation policies.[18] A generic MOPR is basically a rule in which resources cannot offer to sell their electricity generation in the wholesale market for less than a specified and regulated price.[19] However, the Expanded MOPR had negative effects on state policies because it prevented green resources that received public subsidies for zero-emission generation from factoring in that state support when selling their electricity in the wholesale capacity markets, forcing them to bid in at artificially high prices.[20] Maryland and New York fought back against this policy, and because of their outcry, PJM abandoned the Expanded MOPR policy for the more accommodating "Focused" MOPR for its capacity market,[21] removing the Expanded MOPR's blocking effects on state subsidies of renewable generation.[22]

Subsequently, in September 2021, FERC's Commissioners split 2-2 about whether these revisions to the PJM MOPR were "just and reasonable and not unduly discriminatory or preferential."[23] As a result of the split, each Commissioner was required, under the FPA, to "add to the record of the Commission a written statement explaining the views of the Commissioner with respect with the change."[24]

Chairman Glick and Commissioner Allison Clements issued a joint statement where they both agreed that the approval of the Focused MOPR was a long-overdue step on the road to returning PJM's MOPR to its original purpose of "eliminating the incentive that large net buyers of capacity may have to take uneconomic action to decrease capacity prices,"[25] while importantly abandoning years of the Commission's prior policy of curbing or "nullifying" the effects of state clean energy initiatives like ZECs and other renewable subsidies.[26] Glick and Clements further contend that approving the new PJM MOPR will ensure just and reasonable rates because PJM's capacity market under the Focused MOPR will "better reflect the forces actually shaping supply and demand and do so at a far lower cost to customers,"[27] while retaining state authority to promote preferred clean generation.[28]

In contrast, Commissioners Mark C. Christie and James Danly issued separate statements, in which they both rejected PJM's tariff application, finding that the Focused MOPR is not just and reasonable.[29] They, along with Pennsylvania and Ohio, contend that other states in the PJM, particularly Maryland and New Jersey, would "unjustly" be allowed to influence the wholesale market with their respective state policy preferences for renewable energy by offering state subsidies to zero-emissions generation sourc-

9. *RTOs and ISOs*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/power-sales-and-markets/rtos-and-isos [https://perma.cc/ T926-9KP4] (Mar. 18, 2021).
10. *Id.*
11. *See* 16 U.S.C. § 824d (2018); 18 C.F.R. pt. 35 (2022); *see also Energy Price Formation: Information on Market Rules and Operational Practices*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/industries-data/electric/electric-power-markets/energy-price-formation (June 17, 2020); Letter from Chenchao Lu, Senior Couns., PJM Interconnection, L.L.C., to Kimberly D. Bose, Sec'y, U.S. Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000, Revisions to Application of Minimum Offer Price Rule 1 (2021), https://www.pjm.com/directory/etariff/FercDockets/6239/20210730-er21-2582-000.pdf [https://perma.cc/WUS2-AWUX] ("Pursuant to section 205 of the Federal Power Act . . . and part 35 of . . . [FERC's] regulations, PJM . . . hereby submits for filing proposed revisions to PJM's Open Access Transmission Tariff.").
12. *Id.*
13. *Id.*
14. *See* U.S. Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000, Joint Statement of Chairman Glick and Commissioner Clements Regarding the PJM MOPR (2021), at 2, https://www.ferc.gov/news-events/news/joint-statement-chairman-glick-and-commissioner-clements-regarding-fair-rates-act [https://perma.cc/PB49-9M3U] [hereinafter Joint Statement of Glick and Clements].
15. 16 U.S.C. § 824(b) (2022).
16. *PJM*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/industries-data/electric/electric-power-markets/pjm [https://perma.cc/JH99-TWWD] (July 28, 2022).
17. Letter from PJM Interconnection, L.L.C., to Secretary Kimberly D. Bose, *supra* note 11, at 10.
18. *See* Joint Statement of Glick and Clements, *supra* note 14; Calpine Corp., 171 FERC ¶ 61,034 (2020) (Glick, Comm'r, dissenting); *see also* Deandra Fike, Note, *Regional Electricity Markets and the Struggle to Integrate State Clean Energy Subsidies*, 46 Colum. J. Env't L. 523 (2021); Philip N. Killeen, Comment, *FERC'S Tether Tantrum: Why Suppressing State Support for Renewable Energy Violates the Federal Power Act and Threatens U.S. Climate Leadership*, 70 Am. U. L. Rev. 271 (2020).
19. *See* Joint Statement of Glick and Clements, *supra* note 14, at 12.
20. *See generally* Joint Statement of Glick and Clements, *supra* note 14; Calpine Corp., 163 FERC ¶ 61,236, at ¶¶ 44–48 (2018) (Glick, Comm'r, dissenting); Fike, *supra* note 18.
21. U.S. Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000, Notice of Filing Taking Effect by Operation of Law (2021).
22. *See* Joint Statement of Glick and Clements, *supra* note 14, at 4.
23. *See* Joint Statement of Glick and Clements, *supra* note 14 (finding that the Focused MOPR proposal is just and reasonable and not discriminatory); Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000, Commissioner Danly's Fair Rates Act Statement on PJM Statement (2021) (finding that the Focused MOPR is not just and reasonable and preferential) [hereinafter Danly's Statement]; U.S. Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000, Commissioner Christie's Fair Rates Act Statement on PJM MOPR (2021) (concurring with Danly) [hereinafter Christie's Statement].
24. 16 U.S.C. § 824d(g) (2022).
25. *See* Joint Statement of Glick and Clements, *supra* note 14, at 1.
26. *See id.*
27. *See id.*
28. *See id.*
29. *See* Danly's Statement, *supra* note 23 at 1, 19 n.111; Christie's Statement, *supra* note 23, at 2–3.

es.[30] These state policies would impermissibly distort the wholesale capacity market.[31]

Notably, Commissioner Danly argues that the Commission *must* reject the Focused MOPR proposition specifically because it does not have provisions mitigating the effects that state subsidies for renewable generation may have on the capacity market.[32] In Danly's view, "no [FERC MOPR] Order could ever survive judicial review under the APA's arbitrary and capricious standard if it held that no action whatsoever were required to mitigate the known and significant price-suppressive effects of state subsidies"[33] because the order would not include all causes of buyer-side price suppression that would cause a rate to be unjust and unreasonable.[34]

However, all of this controversy over the MOPR may not be warranted. Though much has been written about the MOPR, and the Commission has fluctuated on the policies and justifications for it, perhaps doing away with the policy altogether is a preferable alternative to changing regimes every time PJM submits a tariff.[35] Moreover, when Commissioners are split on partisan lines to the point where revisions of the MOPR are being passed necessarily by operation of law, one must wonder whether there is a substantial creep of politics into electric grid administration. If so, there is a question of whether the public is harmed by the political de-insulation of a regulatory regime in which the principal focus is ensuring reliability and consumer protection.

In response to these concerns, this Note argues that the MOPR is an unnecessary and harmful policy that has become a political weapon rather than a means to prevent price suppression. Rather than relying on front-end market regulatory tools such as the Expanded or the Focused MOPR in the PJM Interconnection, FERC should instead rely on its enforcement authority granted in the FPA[36] and the Energy Policy Act of 2005 ("EPAct 2005")[37] to prevent market manipulation and deter fraud in the wholesale capacity market. FERC must shift its market-regulatory policy enforcement because its current regulatory scheme is: (1) unsustainable, both economically and environmentally; (2) contrary to FERC's mandates under the FPA and Order Nos. 888, 889, and 2000[38]; (3) contrary to democratic principles and political accountability by cloaking political agenda in economic regulation; and (4) inadequate for ensuring clarity and stability in the wholesale capacity market.

In making this argument, this Note proceeds as follows. Part II details the history of regulations in the electricity industry, RTO formation and characteristics, and the MOPR policy's development in the PJM. This part is necessary to understand how the industry, RTO/ISOs, and the MOPR have evolved dramatically since their inception. Part III discusses the legal regime surrounding FERC and the MOPR policy and demonstrates how both the states and the federal government are in legal equipoise, with the states lawfully issuing subsidies for renewable generation and FERC lawfully implementing the MOPR policy. Part IV discusses how the MOPR policy is unsustainable, has been warped into a political tool, and why it needs to be reconsidered, if not completely rejected, as a way of policing the PJM capacity market. Finally, Part V proposes an alternative to the MOPR policy: using civil enforcement authority to prevent manipulation and deter fraud in the wholesale capacity market instead of relying on the current MOPR or any subsequent variant.

II. Background

A. *History of RTO/ISOs*

1. Electricity Regulation's Early Beginnings

PJM is an RTO. RTOs and ISOs are terms often used interchangeably to describe regional market entities that are tasked with providing reliable, non-discriminatory, and fairly priced transmission services in competitive wholesale markets.[39] The only differences between them are that RTOs are approved under FERC Order No. 2000 standards, rather than older regulations that govern ISOs, and RTOs generally service a larger geographical area.[40] Both RTOs and ISOs are voluntary to join and aid FERC in discharging its mandate under FPA section 205.[41]

Before the advent of RTO/ISOs, governments and regulators in the industry operated with a presumption that electricity markets are naturally monopolistic and that regulation is the necessary response to market failures associated with large, unchecked, vertically integrated firms.[42] Local administrators feared that a single firm operating as the sole electricity provider for a significant number of customers would be able to charge a higher price than it would otherwise be able to in a naturally competitive market.[43] To prevent artificially high pricing, local regulation was implemented by way of traditional cost-of-service ratemak-

30. *See* Danly's Statement, *supra* note 23 at 18, 19 n.111; Christie's Statement, *supra* note 23, at 2–3.
31. *See* Danly's Statement, *supra* note 23 at 18, 19 n.111; Christie's Statement, *supra* note 23, at 2–3.
32. *See* Danly's Statement, *supra* note 23, at 9.
33. *See id.* at 10.
34. *See id.*
35. *See generally* Joint Statement of Glick and Clements, *supra* note 14; Calpine Corp., 171 FERC ¶ 61,034 (2020) (Glick, Comm'r, dissenting); Fike, *supra* note 18; Killeen, *supra* note 18; Joshua C. Macey & Robert Ward, *MOPR Madness*, 42 Energy L.J. 67 (2021).
36. 16 U.S.C. § 824e(a) (2022).
37. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 595 (amending § 316A of the Federal Power Act, 16 U.S.C. § 825o-1(b) (2000)).
38. The general mandate and purposes of FERC Order Nos. 888, 889, 2000, and the FPA is to promote competition and to benefit consumers by reducing the cost of power.
39. Regional Transmission Organizations, 89 FERC ¶ 61,285, at 3 (issued Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35).
40. *See* Joel B. Eisen et al., Energy, Economics, and the Environment 713 (5th ed. 2020).
41. Regional Transmission Organizations, 89 FERC ¶ 61,285, at 3–4 (issued Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35); *see also* Eisen et al., *supra* note 40, at 712–13.
42. *See* Eisen et al., *supra* note 40, at 13.
43. *See id.*

ing.[44] Municipalities typically granted a monopoly franchise to private utilities and permitted them to sell energy to local consumers, provided that the company's rates were confined to an administratively set price based on the utility's cost of providing electricity.[45]

Municipal ratemakers ensured that the prices that utilities charged to consumers were just and reasonable.[46] But as energy demand grew, so too did the need for more local franchises.[47] Eventually state governments stepped in, often by creating new state agencies or Public Utility Commissions ("PUCs") to regulate the distribution of energy from generators to consumers on a largely intrastate level.[48]

Administrative "cost-of-service ratemaking" has long been criticized for two main reasons.[49] First, as is true for many regulated markets, the ratemaking process itself is imperfect, and regulated firms may be able to manipulate rate outcomes.[50] For example, large energy suppliers may "artificially inflate their rate base and . . . overinvest in capital assets" by building unnecessary generation facilities, so they may earn a higher rate of return.[51] The downside is that consumers are the ones who must bear the cost of the excess power.[52] This is especially true in regions where large power corporations have enormous influence on political and regulatory processes.[53] Second, it is often argued that any governmentally regulated rate will ultimately be less efficient at approximating the true cost-of-service than would a well-functioning market.[54]

However, while a competitive market among private utilities may ultimately be preferable and better at pricing and allocating electricity resources, cost-of-service ratemaking is the default rate setting mechanism in the electricity industry.[55] Additionally, many utilities—typically ones in the transmission business—are subject to pricing based on their cost of the services they provide.[56]

2. The Federal Power Act and PURPA

Before the U.S. Congress passed the FPA in 1935, state PUCs had broad authority to set rates within their own borders.[57] But notably, there was no federal agency authorized to regulate transmission of electricity between the states.[58] This lapse in jurisdiction came to be known as the "Attleboro Gap," in which neither the states nor the federal government had authority to regulate interstate electricity exchanges because, per the Commerce Clause of the U.S. Constitution, state regulation stops at their geographic borders.[59] The intention of the FPA was to fill this regulatory void and its mechanism of choice was the creation of the Federal Power Commission ("FPC"), the precursor to FERC.[60] The FPC was charged with providing oversight of both interstate electricity transmission and wholesale sales of electric energy in interstate commerce.[61]

Notable sections of the FPA are sections 205 and 206. Section 205 requires FERC to ensure that: (1) "all rates and charges made, demanded or received by any public utility . . . shall be *just and reasonable*[,]" and (2) that "no public utility shall make or grant any undue preference or advantage . . . or maintain any unreasonable difference in rates either as between localities or as between class of service."[62] Moreover, section 206 gives FERC the power to remedy any unlawful discrimination or unjust and unreasonable rate.[63]

Since the FPA was enacted, technological advances have made it possible to generate electricity both in many different ways and in smaller plants, leading to a dramatic increase in the number of suppliers who have entered the market.[64] The influx of new generation opportunities over the past century has coincided with the development of three major power networks ("grids") in the continental United States: (1) the Eastern Interconnection; (2) the Western Interconnection; and (3) the Texas Interconnection, which covers most of intrastate Texas.[65]

Most states, besides Alaska, Texas, and Hawaii, are connected to the main grid formed between the Eastern and Western Interconnections.[66] Any electricity generated in states connected to the main grid "enters . . . immediately and becomes a part of the vast pool of energy that is constantly moving in interstate commerce."[67] This massive interconnection has made it possible for zero-emission generators in one state, such as nuclear power plants in New York, to transmit environmentally friendly power to municipalities in other states who may be historically dependent on coal or natural gas.[68] However, despite these advances in technology and interconnectivity, local public utilities retain control of the transmission lines that must be used by out-of-state generators to deliver electricity to their wholesale and retail customers.[69]

44. *See id.* at 14.
45. *Id.* at 13.
46. 16 U.S.C. § 824d(a) (2022).
47. Eisen et al., *supra* note 40, at 13.
48. *Id.*
49. *Id.*
50. *Id.* at 14.
51. *Id.* at 15.
52. *Id.*
53. Eisen et al., *supra* note 40, at 15.
54. *Id.*
55. *See Cost-of-Service Rate Filings*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/industries-data/natural-gas/overview/general-information/cost-service-rate-filings (Aug. 14, 2020) ("The basic methodology [FERC] use[s] to establish just and reasonable rates is cost-of-serve ratemaking. Under cost-of-service ratemaking, rates are designed based on a pipeline's cost of providing service including an opportunity for the pipeline to earn a reasonable return on its investment.").
56. *See* Eisen et al., *supra* note 40, at 14.
57. *See id.* at 13.
58. *See* New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1, 5–6 (2002); Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927), *abrogated by* Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983).
59. *Fed. Energy Regul. Comm'n*, 535 U.S. at 20 (2002); *Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. at 89–90.
60. 42 U.S.C. §§ 7151(b), 7171(a), 7172(a) (2022).
61. 16 U.S.C. § 824(b) (2022).
62. 16 U.S.C. § 824d(b) (2022) (emphasis added).
63. *See* 16 U.S.C. § 824e(a) (2022).
64. *Fed. Energy Regul. Comm'n*, 535 U.S. at 7.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 8.

Congress sought to modernize the regulation of the contemporary energy grid with the passage of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which promoted the development of new generating facilities,[70] and the Energy Policy Act of 1992 ("EPAct 1992"), which authorized FERC to order individual utilities, on a case-by-case basis, to "wheel" power across the interstate market or to provide transmission services to wholesale generators so they may provide power to distant states connected to the grid.[71] But after issuing dozens of individual orders in separate adjudicatory proceedings, FERC concluded that this method of facilitating intrastate wheeling was far too costly and time-consuming to be sustained and failed to provide an adequate remedy for correcting unlawful discrimination in the interstate power market.[72]

3. FERC Order Nos. 888, 889, and 2000

FERC responded to the inadequacy of the case-by-case orders by issuing two legislative rules in 1996, Order No. 888 and Order No. 889.[73] Grounding its authority in sections 205 and 206 of the FPA, FERC argued that Order No. 888 would curb anti-competitive behavior in the wholesale power market.[74] FERC also found that "electric utilities were discriminating in the 'bulk power markets' in violation of section 205 of the FPA" by providing generators either inferior access to their transmission lines or no access at all to third-party electricity wholesalers.[75]

To remedy this discrimination, Order No. 888 drastically reduced the barriers to competition in the energy market.[76] First, it mandated "functional unbundling of wholesale generation and transmission services."[77] Functional unbundling requires "each utility to state separate rates for its wholesale generation, transmission, and ancillary services."[78] Moreover, transmission of a utility's wholesales and purchases of electricity would now be regulated under a single tariff, and this tariff would apply equally to both the utility that owns the physical power lines and to outside market participants who seek to use that transmission network.[79]

Second, FERC imposed open-access requirements on unbundled interstate retail transmissions.[80] In other words, if a public utility offered unbundled retail access, or if a state required it, "the affected retail customer must obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission."[81] Further, Order No. 889 required public utilities to publicly provide their information regarding capacity, price, and any other material matters needed to use the open transmission lines in real time via the Open Access Same-Time Information System ("OASIS").[82] To comply with the Orders, FERC recommended state formation of RTOs/ISOs, and FERC explicitly encouraged their formation in Order No. 2000.[83]

Also in Order No. 2000, FERC enumerated the basic requirements for regional entities to be recognized as RTO/ISOs by the Commission and that future FERC regulations would accommodate and promote RTO/ISOs' operation and function in the wholesale markets.[84] And the Commission has repeatedly stated that the regional RTO system is the best alternative for facilitating wholesale competition given that there is no national electricity market.[85] Many states have adopted FERC's recommendation, creating RTO/ISOs to regulate their wholesale energy markets.[86] The PJM is one such RTO.[87]

B. Characteristics of RTOs/ISOs

FERC concluded that the ISO/RTO model could address both operational and reliability issues confronting the wholesale transmission market and eliminate price discrimination that occurs when a market is controlled by a single, vertically integrated utility.[88] FERC itself has said that competition in wholesale electricity markets is preferable to cost-of-service ratemaking in ensuring that consumers pay the lowest prices for reliable services.[89] To promote competition while ensuring market integrity, Order No. 2000 established the minimum characteristics that an

70. 16 U.S.C. § 2601.
71. 16 U.S.C. § 824j (2022); *see also Fed. Energy Regul. Comm'n*, 535 U.S. at 1, 9 (discussing EPAct's authorization of FERC to order public utilities to "wheel" power).
72. *See Fed. Energy Regul. Comm'n*, 535 U.S. at 9 (citing FERC Order No. 888, at 31).
73. *Id.* at 10.
74. *Id.* at 11.
75. *Id.*
76. *Id.*
77. *Id.* (citing 75 FERC 61,080 (1996)).
78. *Fed. Energy Regul. Comm'n*, 535 U.S. at 11.
79. *Id.*
80. *Id.*
81. *Id.* at 12 (citing Order No. 888, 75 FERC 61,080 (1996) (to be codified at 18 C.F.R. pt. 37)) (internal quotation marks omitted).
82. Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 75 FERC 61,078 (1996) (to be codified at 18 C.F.R. pt. 37). In *Fed. Energy Regul. Comm'n*, 535 U.S. at 1–3, the U.S. Supreme Court held that Order No. 888 was a proper use of FERC's authority under §§205 and 206 of the FPA.
83. Regional Transmission Organizations, 89 FERC ¶ 61,285, at ¶ 1 (1999) (to be codified at 18 C.F.R. pt. 35).
84. *See id.* at 152 (1999); Wholesale Competition in Regions With Organized Electric Markets, 125 FERC ¶ 61,071, at ¶ 5 (Oct. 17, 2008) (to be codified at 18 C.F.R. pt. 35).
85. Regional Transmission Organizations, 89 FERC ¶ 61,285, at ¶ 152 (1999) (to be codified at 18 C.F.R. pt. 35); *see* Wholesale Competition in Regions With Organized Electric Markets, 125 FERC ¶ 61,071, at ¶ 5 (Oct. 17, 2008) (to be codified at 18 C.F.R. pt. 35).
86. *See RTOs and ISOs*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/power-sales-and-markets/rtos-and-isos [https://perma.cc/ T926-9KP4] (Mar. 18, 2021).
87. *PJM*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/industries-data/electric/electric-power-markets/pjm [https://perma.cc/JH99-TW-WD] (July 28, 2022).
88. Regional Transmission Organizations, 89 FERC ¶ 61,285, at ¶ 152 (1999) (to be codified at 18 C.F.R. pt. 35).
89. *See Electric Competition*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/industries-data/electric/power-sales-and-markets/electric-competition [https://perma.cc/GXP4-CSX9] (Aug. 6, 2020):

> Competition [ ] has been the [Commission's] primary approach in recent years for wholesale generation service. Advances in technology, exhaustion of economies of scale in most electric generation, and new federal and state laws have changed the Commission's views of the right mix of these two approaches. The Commission's goal has always been to find the best possible mix of regulation and competition to protect consumers from the exercise of monopoly power.

RTO must satisfy in order to qualify as such.[90] In short, RTO/ISOs must be: (1) independent[91]; (2) operate over an appropriate scope[92]; (3) exercise authority over all transmission facilities under its control[93]; and (4) exclusively maintain short-term reliability of its regional grid.[94]

This last characteristic is the most important. The FPA mandates that FERC ensures a reliable grid[95] and that FERC uses RTO/ISOs as an extension of itself to satisfy this responsibility.[96] Short-term grid reliably covers "transmission reliability responsibilities short of grid capacity enhancement,"[97] which places the burden on RTOs to procure reliable energy transmission, either through bilateral contracting, or by their real-time, next day, and capacity markets.[98]

C. *A Main Function of RTOs: Administering Capacity, Energy, and Real-Time Electricity Markets*

Generally, RTOs must administer their tariffs,[99] facilitate smooth electric path flow, coordinate upgrades to their system, and participate in an OASIS pursuant to Order No. 899.[100] But perhaps the most critical function of RTOs is to facilitate competitive wholesale regional markets for electricity.[101] RTOs and ISOs use two different mechanisms for conducting wholesale transactions: (1) bilateral contracting, in which load serving entities ("LSEs") negotiate and sign contracts with generators to purchase a fixed amount of electricity at a certain rate over a definite time[102]; and (2) competitive wholesale auctions.[103]

There are three types of wholesale auctions, each with a different temporal window.[104] Real-time, or "same-day auctions" involve generators bidding for the immediate delivery of electricity, usually due to a sudden spike in demand caused by bad weather.[105] "Next-day" or "energy" auctions, satisfy anticipated short-term demand, typically within months or a year of the need.[106] Finally, "capacity markets," those which the MOPRs are intended to regulate, involve an auction to provide power at some point far off in the future, typically three years out.[107] Capacity markets are critical for inducing investment in capital-intensive generation such as wind, solar, or nuclear power plants.[108] These projects can cost exorbitant amounts of money and investors need assurances that the electricity generated from these new plants will be purchased in wholesale markets.[109]

PJM operates such a capacity market, and it functions as follows: first, PJM forecasts "electricity demand three years into the future and assigns a share of that demand to each participating."[110] Next, generators bid to sell their electricity to purchasers in the wholesale market three years in the future at the generator's proposed rate.[111] Theoretically, the price should reflect the initial cost-of-capital plus operating costs plus some return on investment for private investors if the generator is an investor-owned utility ("IOU").[112] Finally, PJM begins to accept bids, starting with the lowest proposed rate and working its way up the price ladder until it has purchased enough generation to adequately meet the need for the forecasted demand.[113] Importantly, all generators will receive the rate of the highest bid that PJM accepts no matter what rate the generator initially proposed in their own bid.[114] This final standard rate is called the "clearing price."[115]

To illustrate how this works, imagine that three generators participating in the PJM bid in the capacity market to sell electricity at $5 per kilowatt hour ("kWh"), $10 per kWh, and $20 per kWh, respectively. PJM accepts all three bids and only those three bids. The clearing price is then set at $20 per kWh. In this scenario, each generator will receive a rate of $20 per kWh, despite the first two generators bidding into the market at $5 and $10, respectively. In addition, because they did not meet the clearing price, any generator that initially bid into the PJM at a higher rate than $20 per kWh will have no chance of being accepted once PJM has satisfied its capacity needs.

90. Regional Transmission Organizations, 89 FERC ¶ 61,285, at ¶ 152 (1999) (to be codified at 18 C.F.R. pt. 35).
91. *Id.*
92. *Id.* at 246–47 (what defines an "appropriate scope" is determined on a case-by-case basis. Generally, an RTO cannot limit their scope insomuch as it prevents them from satisfying their necessary functions, nor can an RTO set its scope to interfere with the formation of a larger and more suitable balancing authority in order to act as a "toll collector" for wholesale transmission sales into that region).
93. *Id.* at 277.
94. *Id.* at 315–16.
95. 16 U.S.C. § 824o(d) (2005).
96. *See* Regional Transmission Organizations, 89 FERC ¶ 61,285, at ¶¶ 315–16 (1999) (to be codified at 18 C.F.R. pt. 35).
97. *Id.*
98. *Id.*
99. *Id.* ¶ 324.
100. *See* Order No. 888, 75 FERC ¶ 61,080.
101. Regional Transmission Organizations, 89 FERC ¶ 61,285; *see also* Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 155 (2016).
102. *Hughes*, 578 U.S. at 155.
103. *Id.*
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.*; *see also* Gavin Bade, *The Great Capacity Market Debate: Which Model Can Best Handle the Energy Transition?*, Utility Dive (Apr. 18, 2017), https://www.utilitydive.com/news/the-great-capacity-market-debate-which-model-can-best-handle-the-energy-tr/440657/ [https://perma.cc/3BSM-LUS2].
108. Adam James, *Explainer: How Capacity Markets Work*, Energy News Network (June 17, 2013), https://energynews.us/2013/06/17/explainer-how-capacity-markets-work/ [https://perma.cc/Q8AQ-2BGB].
109. *See id.*
110. *Hughes*, 578 U.S. at 155.
111. *Id.*
112. *See Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923), holding that cost-of-service
> [r]ates which are not sufficient to yield a reasonable return on [investment] . . . are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary. "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

(quoting *Smyth v. Ames*, 169 U.S. 466, 547 (1898)).
113. *Hughes*, 578 U.S. at 155–56.
114. *Id.*
115. *Id.*

D. What Is a "MOPR" and How Did It Come to Be Prominent in the PJM?

A MOPR is a regulatory policy that FERC has frequently used in capacity markets for a variety of reasons, some more controversial than others.[116] Essentially, it is a price floor that prevents resources from bidding into the market below a set value.[117] A simple example is a MOPR that applies to all generators set at $5. This would mean that all generators seeking to sell capacity would have to offer a bid greater than or equal to $5 to comply with PJM's tariff. The PJM capacity auction has had a MOPR in effect for almost two decades, and its most recent iteration passed by operation of law on September 29, 2021.[118]

1. The Original MOPR and Its Purpose

MOPRs were introduced in the early 2000s following FERC Order No. 2000 to protect the newly formed RTO capacity markets from potentially problematic buyer-side market power.[119] Buyer-side market power is the ability of a buyer to artificially depress the market price below what would otherwise be the naturally set price in a completely competitive market.[120] To artificially lower the market price, the buyer of supply withholds their demand.[121] In effect, this reduces the total price of the good or service—electricity capacity.[122]

This market posture is the complete inverse of a market in which the supplier has substantial market power, like in a monopoly, where a supplier can withhold their supply to artificially inflate market prices and increase profits.[123] In capacity markets, a significant number of utilities are both capacity buyers and sellers, often directly owning or contracting with resources for capacity in their market.[124] All capacity bidders that clear the market generally receive the same rate.[125] Therefore, it is possible for a utility who both buys and sells into the market, and who purchases more capacity than it sells (a "net-buyer"), to direct a resource that it owns—or has under contract—to submit an artificially low bid.[126] This, in turn, depresses the price that the buyer has to pay for capacity.[127] This is a lucrative venture because net-buyers can often earn higher returns through lowering their expenditure costs on buying capacity than they can by selling their limited capacity resources at higher rates.[128]

PJM has always had a MOPR in its capacity auctions.[129] In 2006, PJM established the Reliability Pricing Model ("RPM").[130] The Model implemented a centralized capacity auction in the PJM, called the Base Residual Auction ("BRA"), in which LSEs could purchase capacity.[131] The BRA included a MOPR that was designed to protect against buyer-side market power and was justified for that reason.[132] Originally, this MOPR only applied to natural gas resources because they were the most efficient resource type at the time, so net-buyers of natural gas had the most incentive to exercise improper market power.[133]

Green resources like nuclear and hydroelectric power were exempted from the original MOPR because they were more expensive and new generation facilities took a long time to complete and become operational, making these resources unlikely to be used by a net-buyer seeking to lower their capacity expenses.[134] This original MOPR stayed true to the justification forwarded by its designers and did not interfere with the types of generation preferred by state policy.[135] Rather, it looked to a resource type's ability to unduly manipulate the market.[136] The initial MOPR even included an exemption for any new projects built under state mandates because regulators recognized that these projects were designed to meet a state's reliability responsibilities and to ensure local power integrity.[137]

The initial MOPR regime stayed unchanged until 2011, when PJM proposed to modify their tariff rules to reflect the development of state programs in Maryland and New Jersey, which favored certain new sources of generation that would meet the respective states' policy goals.[138] Along with other modifications, PJM proposed to eliminate the state mandate exception for new generation proj-

116. *See* Joint Statement of Glick and Clements, *supra* note 14, at 1 n.1.
117. *Id.*
118. Notice of Filing Taking Effect by Operation of Law, *supra* note 21.
119. *See* Joint Statement of Glick and Clements, *supra* note 14, at 1 n.5 (citing PJM Interconnection, L.L.C., 117 FERC ¶ 61,331, at ¶¶ 103–04 (2006) (2006 RPM Settlement Order)) (finding that the PJM MOPR was "a reasonable method" of curbing the potential incentive of net buyers to depress market clearing prices by offering self-supply below a competitive market price); PJM Interconnection, L.L.C., 143 FERC ¶ 61,090, at ¶ 20 (2013) (2013 MOPR Order) (stating that "PJM's MOPR mechanism was implemented with the intention of preventing the exercise of buyer-side market power in the PJM capacity market").
120. *See* Memorandum from Paul M. Sotkiewicz on MOPR Proposal Presented at PJM Stage 4 Meeting June 30, 2021 (June 23, 2021) (serving as the executive summary for the 2021 shareholders of PJM Interconnection, LLC) [hereinafter Sotkiewicz Memorandum]; Joint Statement of Glick and Clements, *supra* note 14, at 1.
121. *See* Sotkiewicz Memorandum, *supra* note 120.
122. *See id.*; Joint Statement of Glick and Clements, *supra* note 14, at 1.
123. *See* Sotkiewicz Memorandum, *supra* note 120, at 2.
124. *See* Joint Statement of Glick and Clements, *supra* note 14, at 1 n.6 (describing these "net buyers" as "a seller with a net-short position, meaning it purchases more capacity from the capacity market than it sells into it. [Therefore,] [n]et-buyers have an incentive to depress the capacity price to benefit their purchases.").
125. *See id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Understanding FERC's 'Minimum Offer Price Rule' Order*, Advanced Energy Econ. (2020), https://info.aee.net/hubfs/Federal%20Policy%20(2018-2020)/PJM%20MOPR%20Explainer%2001_20.pdf [https://perma.cc/QC7Z-U6K3].
130. *See* Joint Statement of Glick and Clements, *supra* note 14, at 3; *see also* PJM Interconnection, L.L.C., 115 FERC ¶ 61,079, at ¶ 29 (2006); 2006 RPM Settlement Order, 117 FERC ¶ 61,331 at ¶ 1.
131. *See* Joint Statement of Glick and Clements, *supra* note 14, at 3.
132. *Id.* at 3–4.
133. *Id.* at 4; *see also* 2011 MOPR Order, 135 FERC ¶ 61,022 at ¶¶ 153, 155 (finding that new natural gas resources are the most likely resources to exercise buyer-side market power because natural gas generators have the shortest development time, are cheap, and are dispatchable).
134. Joint Statement of Glick and Clements, *supra* note 14, at 3–4.
135. *See id.* at 4.
136. *Id.*
137. 2006 RPM Settlement Order, 117 FERC ¶ 61,331 at ¶ 104; *see also* Joint Statement of Glick and Clements, *supra* note 14, at 4 (to qualify for the exemptions, states had to show that the new project was implemented to address a projected capacity shortfall).
138. Joint Statement of Glick and Clements, *supra* note 14, at 4.

ects.[139] Ironically, FERC accepted PJM's proposed tariff, eliminating the MOPR exception, yet the Commission still acknowledged and affirmed the states' right to favor certain generation resources that conformed to state policies and ensured generation and reliability needs.[140] Even as early as 2011, the tension between the MOPR regime and the states began rising.[141]

Just two years later in 2013, the MOPR changed yet again when FERC accepted PJM's proposal to exempt certain competitive entry and self-supply LSEs, subject to PJM's review, from the MOPR.[142] The exemptions were approved because FERC recognized there was no incentive for these market participants to exercise buyer-side market power, and found that the MOPR was unnecessarily burdensome in these cases.[143] The PJM review process would give self-supply LSEs the chance to show PJM that their actual costs going forward were lower than the MOPR price floor.[144] And if the LSEs were able to do so, they would be permitted to submit a bid lower than the MOPR price.[145] This regime struck a balance between state efforts to choose generation and maintaining a fair competitive capacity market. It also utilized the MOPR for its intended purpose: curbing buyer-side market power.[146]

2. From the Traditional MOPR to the "Expanded" MOPR

However, in 2018, the PJM MOPR began to be used in a different way: to specifically target and essentially nullify state-subsidy programs that provided funding to clean generation resources, such as nuclear energy and offshore wind.[147] Agreeing with Calpine Corporation, a major natural gas generator,[148] that state-supported clean energy subsidies impermissibly distorted the clearing price, FERC rejected PJM's tariff filing because it failed to "protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market [state] support."[149]

As Commissioners Glick and Clements note, the use of the MOPR as a mechanism for curbing and controlling buyer-side market power in capacity markets has been at best an afterthought, if not completely absent from the Commission's earlier justifications for previous MOPR tariffs.[150] With their new reasoning, FERC "expanded" the MOPR regime from being used principally to curb buyer-side market power to instead being used as a mechanism to control state subsidies by requiring bidders to exclude subsidies from their costs when bidding into the PJM and forcing these resources to bid in at artificial price floors.[151] In other words, clean energy generators under an Expanded MOPR tariff must bid into the capacity market as if they were receiving no subsidies at all, inflating their price.[152] Consequently, these rules make it much less likely that subsidized resources will clear the PJM auction, thereby frustrating state policies favoring cleaner generation facilities.[153]

Many critics argue that the Expanded MOPR discourages competition in the PJM capacity market.[154] Competitive markets, by definition, should offer the best price possible to consumers for a particular product or service. For RTO capacity markets like the PJM, a competitive market must allow resources to freely compete to submit bids that accurately reflect the lowest price the resource can charge to cover their net costs going forward and still make a reasonable return for investors.[155] This competitive environment encourages capacity resources to innovate and improve efficiencies to reduce future net costs so they may bid in lower to the capacity markets.[156] It also encourages capacity providers to move toward state-favored clean generation technologies that are subsidized, so they may utilize the state programs, lower net costs, and increase the likelihood they bid under the clearing price.[157] However, if the market is controlled by overarching regulation like the Expanded MOPR that requires resources to use administrative pricing, then the market is not competitive and it does not reflect the actual cost borne by these resources to provide capacity.[158] Recall that completely competitive markets are generally more efficient at reflecting the true prices of goods and services.[159]

Commissioners Glick and Clements contend that because the Expanded MOPR required state-subsidized resources to disregard their actual net costs of providing capacity for the planned horizon, and instead bid in at artificially inflated prices, the clearing price in the PJM was unnecessarily higher than it otherwise would have been.[160] Incumbent generators, mostly fossil fuels, were protected from policies meant to curb emissions in order to reach climate goals.[161] Further, because these clean resources would be prohibited from bidding into the PJM with state subsidies factored into their costs, they are forced to submit artificially higher rates that both do not reflect the reality of state support and that are also unlikely to clear the market.[162] And because the clearing price is raised by prohibiting state sponsorship from being factored into capac-

139. 2011 MOPR Order, 135 FERC ¶ 61,022 at ¶¶ 125–26.
140. *Id.* at 139–43.
141. *See* Joint Statement of Glick and Clements, *supra* note 14, at 3.
142. 2013 MOPR Order, 143 FERC ¶ 61,090 at ¶ 25 n.19.
143. *Id.* ¶ 25 n.20.
144. *Id.* ¶¶ 25–26, 107–08, 141; *see also* Joint Statement of Glick and Clements, *supra* note 14, at 4.
145. *Id.*
146. *Id.*; *see also* PJM Interconnection, L.L.C., 115 FERC ¶ 61,079, at ¶ 29 (2006); 2006 RPM Settlement Order, 117 FERC ¶ 61,331 at ¶ 1 (2006).
147. Joint Statement of Glick and Clements, *supra* note 14, at 2.
148. *See About Us*, Calpine, https://www.calpine.com/About-Us [https://perma.cc/X8DY-LGXX] (last visited Sept. 26, 2022).
149. Joint Statement of Glick and Clements, *supra* note 14, at 4.
150. *Id.* at 2.
151. Fike, *supra* note 18, at 548.
152. *Id.*; Joint Statement of Glick and Clements, *supra* note 14, at 2.
153. Fike, *supra* note 18, at 546–47.
154. Joint Statement of Glick and Clements, *supra* note 14, at 2.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See* Eisen et al., *supra* note 40, at 15.
160. Joint Statement of Glick and Clements, *supra* note 14, at 2.
161. *Id.*
162. Fike, *supra* note 18, at 546.

ity bids, consumers will have to pay more because of the inflated clearing price.[163]

3. Return to the Focused MOPR by Operation of Law

On September 29, 2021, the Expanded MOPR was killed by operation of law.[164] PJM now functions under their new "Focused" MOPR proposal, which removes the Expanded MOPR's blocking effects on state subsidies of renewable generation.[165] The Focused MOPR allows generators receiving credits from state programs to bid into the PJM with subsidies included in their actual going-forward cost.[166] In proposing this new regulatory regime, the PJM noted that since the Expanded MOPR was passed, state generation subsidy programs have only increased and show no sign of stopping.[167] Moreover, PJM conceded that the Expanded MOPR had the latent effect of preventing state-subsidized generation from clearing the PJM, causing the market to ignore that capacity.[168] This in turn sent inaccurate price signals that additional capacity was needed and levied the excess charge on consumers.[169]

The Focused MOPR remedies many of the problems that the Expanded MOPR presented. First, the Focused MOPR prevents inaccurate price signals by including the subsidized generation into the capacity mix, thereby not charging consumers for redundant capacity.[170] Second, the Focused MOPR returns the MOPR to its original purpose of deterring buyer-side market manipulation and anti-competitive conduct.[171] By facilitating state incentives in the wholesale market, the Focused MOPR induces more investment in clean energy generation, while also removing a significant barrier to entry for new participants entering the market.[172]

PJM's legal justification for the Focused MOPR also echoed two opinions of the U.S. Courts of Appeals for the Seventh and Second Circuits both upholding the validity of state subsidy programs for green generation, which is discussed below.[173] PJM contended that the indirect minor reductions in capacity prices from state generation policies is a lawful and natural consequence of the modern interconnected grid, and therefore saw no need for the MOPR to categorically exclude such resources.[174]

While the Focused MOPR is now in effect, future changes to the PJM's tariff are always possible.[175] And a return to the Expanded MOPR, or some other variant, is far from off the table.[176] On the other hand, state subsidies for clean generation resources are only increasing and the legal regime surrounding these subsidies paves a favorable path forward for states wishing to cut their carbon emissions with subsidy programs.[177]

III. The Legal Regime Surrounding the MOPR and State Subsidies

Before examining how the MOPR is legally justified, it is necessary to understand how the U.S. Supreme Court has interpreted the FPA. In three major decisions all in the past two decades, the Court has shaped the jurisdictional framework in which FERC, the states, and the MOPR policies operate, at many times at odds with each other.[178]

A. The Modern Grid and Legal Regime

As discussed above, in the latter half of the 20th century, the electricity sector began to shift from a space dominated by a few vertically integrated utilities to a competitive market where cost-of-service ratemaking was no longer always necessary to ensure consumer protection.[179] With the transition came RTO/ISOs,[180] and the practical challenges of the interconnected electricity grid make bright-line jurisdictional boundaries nearly impossible to draw.[181]

The first major case to establish the principles for interpreting the FPA in the modern competitive energy market was *New York v. FERC*, in which the state of New York challenged FERC Order No. 888 as impermissibly interpreting the FPA to grant FERC power to regulate unbundled retail transmission services within their state.[182]

163. *Id.* at 547; Joint Statement of Glick and Clements, *supra* note 14, at 2.
164. *See* 16 U.S.C. § 824d(g); Notice of Filing Taking Effect by Operation of Law, PJM Interconnection, L.L.C., Fed. Energy Regul. Comm'n Docket No. ER21-2582-000 (issued Sept. 29, 2021) (focused MOPR taking effect by operation of law).
165. *See* Joint Statement of Glick and Clements, *supra* note 14, at 4.
166. Notice of Filing Taking Effect by Operation of Law, PJM Interconnection, L.L.C., Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000 (issued Sept. 29, 2021) (focused MOPR taking effect by operation of law).
167. *See* Joint Statement of Glick and Clements, *supra* note 14, at 4 (citing an act to amend Title 26 of the Delaware Code Relating to Renewable Energy Standards, S. 33, 151st Gen. Assembly (Del. 2021); Clean Energy DC Omnibus Amendment Act of 2018, D.C. Act 22-583 (D.C. 2019); Maryland Clean Energy Jobs Act of 2019, S. 516, 2019 Sess. (Md. 2019)).
168. *See* Joint Statement of Glick and Clements, *supra* note 14, at 5.
169. *Id.*
170. *See id.* at 7.
171. *Id.*
172. *Id.*
173. *See* Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 522 (7th Cir. 2018); Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41, 45 (2d Cir. 2018); Letter to Secretary Bose, PJM Interconnection L.L.C., Docket No. ER21-2582-000 Revisions to Application of Minimum Offer Price Rule at 10 (2021).
174. Letter from Chenchao Lu, Senior Couns., PJM Interconnection, L.L.C., to Kimberly D. Bose, Sec'y, U.S. Fed. Energy Regul. Comm'n, Docket No. ER21-2582-000 Revisions to Application of Minimum Offer Price Rule at 10 (2021), https://www.pjm.com/directory/etariff/FercDockets/6239/20210730-er21-2582-000.pdf [https://perma.cc/WUS2-AWUX].
175. *See generally* Joint Statement of Glick and Clements, *supra* note 14, at 3–4.
176. *See generally id.*
177. *See generally Star*, 904 F.3d at 522; *Zibelman*, 906 F.3d at 45; Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260, 265 (2016); Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 154 (2016).
178. *See generally Hughes*, 578 U.S. 150; *Elec. Power Supply Ass'n*, 577 U.S. at 265; New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1, 20 (2002).
179. *See Hughes*, 578 U.S. at 154–55; *Fed. Energy Regul. Comm'n*, 535 U.S. at 23; David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 Cornell L. Rev. 765, 770 (2008).
180. *See Hughes*, 578 U.S. at 155.
181. *See Fed. Energy Regul. Comm'n*, 535 U.S. at 17 (recognizing modern advancements in energy technologies blended the federal and state jurisdictional boundaries to the point where a collaborative federalism analysis was needed); *see also Hughes*, 578 U.S. at 154–55; *Elec. Power Supply Ass'n.*, 577 U.S. at 265.
182. *Fed. Energy Regul. Comm'n*, 535 U.S. at 18–20.

The Supreme Court rejected New York's argument that the proper framework for reviewing Order No. 888 was a bright-line jurisdictional analysis, which would incorrectly conclude that intrastate retail transmission was the sole province of the states because the lines and towers were physically located within New York's geographical boundaries.[183] Instead, the Court found that intrastate retail transmission was comprehensively linked to interstate wholesale transmission and interstate commerce generally because power placed onto the grid generally flows between multiple states, regardless of whether it is for wholesale or retail purposes.[184] The Court also noted that the bright-line analysis was no longer appropriate because the grid is no longer "neatly divided into spheres of retail versus wholesale sales" as it was in 1935 when the FPA drew its *jurisdictional* lines.[185] In conclusion, the Court held that the FPA's statutory grant of authority over transmission of electric energy in interstate commerce included federal authority over intrastate services that were undoubtedly putting electricity into interstate commerce.[186]

The Supreme Court doubled down on its abandonment of bright-line analysis in *Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n* ("*EPSA*"), which involved a jurisdictional dispute over demand response resources.[187] The Electric Power Supply Association argued that demand response resources fall under state jurisdiction because demand response primarily affects retail rates, and under the FPA, the states have exclusive jurisdiction over such retail transactions.[188] The Court, however, once again rejected such a bright-line analysis.[189] Instead, the majority recognized the "inextricable link[ ]" between wholesale and retail transmission markets and found that wholesale transactions will inevitably affect the retail markets.[190]

The Court in *EPSA* had no problem with a marbled jurisdictional split between the states and FERC that reflects the reality of the modern grid.[191] However, recognizing the need for clarity, the Court adopted a three-step approach in which it would examine the intent and effects of any state or federal action that crossed jurisdictional boundaries.[192] First, the Court determines whether the proposed action "directly affect[s] wholesale rates."[193] Second, the Court looks to see if either the federal or state action is intended to regulate the retail or the wholesale market, ensuring that the action does not intrude on the domain of FERC or the states respectively.[194] Third, the Court determines if the proposed action is consistent with the "core purpose" of the FPA: to ensure reasonable prices for consumers and to enhance energy reliability.[195]

This new case-by-case-based approach was refined further in a subsequent decision in the same year, *Hughes v. Talen Energy Mktg., LLC*, where the Court for the first time applied the *EPSA* factors to a state action being challenged for impermissibly impeding on FERC's jurisdiction.[196] The facts of *Hughes* are worth mentioning. Maryland regulators felt concerned that their state was not receiving adequate growth and investment in the development of new generation resources.[197] To make matters worse, Maryland sits in a regionally congested part of the Eastern Interconnection, which makes it particularly difficult to transmit energy from out-of-state generation sources.[198] To address the potential reliability and supply issues of electricity, Maryland decided that the best option was to incentivize investors by guaranteeing that their generation facilities would earn a healthy return even if they did not meet the PJM's clearing price.[199] To accomplish this, Maryland entered into a "contract for differences" with CPV Maryland, LLC ("CPV"), an entity tasked with submitting a capacity bid into the PJM auction.[200] Maryland then required in-state LSEs to enter into pricing contracts with CPV with a rate set by CPV.[201] CPV would then enter into the PJM capacity auction with whatever price was needed to ensure that the bid fell below the clearing price, thus ensuring its acceptance.[202] If CPV's bid cleared the market and fell below the price guaranteed in the state contract, Maryland would pay the difference between the contract price and the PJM clearing price.[203] The costs would then pass to Maryland consumers in higher retail rates.[204] If, however, the clearing price was greater than the contract price, CPV would pass the savings onto Maryland consumers in the form of lower retail rates.[205] And since CPV is guaranteed their contract rate, they have an extreme incentive to bid into the PJM at the lowest price possible to guarantee their capacity will be sold.[206]

Despite affirming the finding in *EPSA* that the interconnectivity of the modern grid made state and federal jurisdictional overlap inevitable, the Court found the Maryland program to be unlawful under both the cooperative federalism framework of the FPA and the test in *EPSA*.[207] The Court found the Maryland program had too much of a targeted effect on the wholesale market.[208] Such a direct state action as contracting to pay differences in capacity auctions was directly targeted at or *tethered to* the wholesale market because the contract for differences "operates within the auction . . . mandat[ing] that the LSEs and CPV exchange money based on the cost of CPV's capacity sales

183. *Id.* at 16.
184. *Id.* at 18–20.
185. *Id.* at 16.
186. *Id.* at 18–20.
187. 577 U.S. 260, 265 (2016).
188. *Id.* (quoting 16 U.S.C. § 824(b)).
189. *Id.*
190. *Id.*
191. *Id.* at 288.
192. *Id.*
193. *Id.* at 276, 279.
194. *Id.*
195. *Id.*
196. *See* Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 165 (2016).
197. *Id.* at 158.
198. *See id.*
199. *See id.* at 165.
200. *Id.* at 159.
201. *See id.* at 158.
202. *See id. at* 158–59.
203. *See id.* at 159.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 165–66.
208. *See id.* at 164.

to PJM."[209] Therefore, the Maryland program impermissibly intruded in FERC's jurisdiction to regulate the PJM capacity market and failed the *EPSA* test accordingly.[210]

However, the Court importantly and expressly qualified their holding, stating that "we reject Maryland's program *only* because it disregards an interstate wholesale rate required by FERC"—the approved clearing price—and declined to address the permissibility of other state policies aimed at encouraging clean generation such as "tax incentives, land grants, *direct subsidies*, construction of state owned-generation facilities, or re-regulation of the energy sector."[211] In short, so long as the state does not directly affect payments made to the capacity market, the program should pass muster under *Hughes*.[212]

While the Supreme Court has not yet applied the tethering test to a challenged state renewable subsidy, two circuits have done so, and both emphasized the narrowness of *Hughes*' holding.[213] The two, *Electric Power Supply Ass'n v. Star* and *Coalition for Competitive Electricity v. Zibelman*, both involved subsidies called ZECs, that certified and incentivized electricity generated in qualified intrastate nuclear plants that demonstrate they emit zero carbon.[214] Both programs were passed by their states' legislature to factor in the social cost of carbon emissions on the environment and sought to encourage more development and reliance on cleaner resources.[215] For example, in New York's ZEC program, the New York Public Service Commission ("PSC") first calculates the total environmental cost of carbon for the next two years.[216] Then, the PSC reduces that sum based on: (1) the number of new renewable energy generators in the state; and (2) a forecast of wholesale prices.[217] The ZEC price cannot vary from the environmental cost of carbon, and once the price is set by the PSC, it cannot fluctuate to match the wholesale clearing price.[218] Therefore, unlike the contract-for-differences program in Maryland, generators receiving ZEC credits are not protected from the risk of falling capacity prices.[219] This in turn avoids incentivizing generators to bid below their actual costs and prevents the clearing price from being artificially suppressed. Moreover, unlike Maryland's subsidies in *Hughes*, both the Illinois and New York ZECs did not require participation in the PJM capacity market.[220] And renewable generators receiving ZECs are free to sell their capacity through bilateral contracts to whomever they wish.[221]

While both circuits noted that the subsidy could indirectly affect capacity prices, they found that, under *Hughes* and *New York v. FERC*, indirect effect is permissible under the FPA's marbled jurisdictional framework.[222] For these reasons, both the Second and Seventh Circuits found that the Illinois and New York programs were not tethered to the wholesale market and therefore did not impermissibly impede on FERC's jurisdiction.[223]

B. *The MOPR in the Modern Legal Regime*

Both the MOPR and state subsidies for renewable energy are in equipoise in terms of their legality. FERC clearly could implement MOPRs in order to regulate the wholesale capacity markets under the FPA,[224] but likewise, states have jurisdiction over selecting generation resources.[225] The ZEC subsidies in *Star* and *Zibelman* have been upheld at the circuit level, and the reasoning tracks with the tethering test described in *Hughes*.[226] Therefore, while controversial as a matter of policy, it seems that the MOPR, as well as certain state subsidies, are on good legal footing.

IV. Why the MOPR Is Unsustainable and a Bad Policy Regime

A. *Why the MOPR Cannot and Should Not Prevent State Generation Subsidies*

While the Focused MOPR may be a step in the right direction, any future MOPR policy that is motivated by a desire to curb state programs subsidizing preferred resources is likely to be economically deficient for the same reasons that the Expanded MOPR were. Unless Congress amends the FPA, states will also continue to have exclusive jurisdiction over generation facilities.[227] Moreover, the Supreme Court has already affirmed states' right to subsidize preferred resources with programs that are not conditioned on the wholesale market.[228] Therefore, legal challenges that state subsidies tied to carbon overstep their jurisdictional boundaries seem unlikely to be successful.[229] Because of this, the MOPR probably cannot be used to prevent efforts by states to favor certain generation resources.[230]

209. *See id.* at 165.
210. *Id.* at 166 ("Maryland [should] encourage[e] production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'").
211. *See id.* at 166 (emphasis added).
212. *Id.* at 160.
213. *See* Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 522 (7th Cir. 2018); Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 45 (2d Cir. 2018).
214. *See Star*, 904 F.3d at 522; *Zibelman*, 906 F.3d at 45.
215. *See Star*, 904 F.3d at 522; *Zibelman*, 906 F.3d at 45.
216. *See Zibelman*, 906 F.3d at 47.
217. *Id.*
218. *Id.* at 51.
219. *Id.*
220. *See Star*, 904 F.3d at 523–24; *Zibelman*, 906 F.3d at 46.
221. *See Star*, 904 F.3d at 523; *Zibelman*, 906 F.3d at 46.
222. *See Star*, 904 F.3d at 524; *Zibelman*, 906 F.3d at 56–57.
223. *Star*, 904 F.3d at 523–24; *Zibelman*, 906 F.3d at 46, 54.
224. 16 U.S.C. § 824(d) (2022).
225. 16 U.S.C. § 824(b)(1) (2022).
226. *Compare* Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 163–66 (2016) (dicta), *with Star*, 904 F.3d at 523–24, *and Zibelman*, 906 F.3d at 41.
227. *See* 16 U.S.C. § 824(b)(1) (2022).
228. *Hughes*, 578 U.S. 150 at 166.
229. *See id.*
230. *See id.*

B. *Per the FPA, the MOPR Is Contrary to FERC's Role*

The text of the FPA and its subsequent interpretations by the Supreme Court make it clear that Congress intended the FPA to stand for a cooperative effort between the states and the federal government in the regulation of the entirety of the electricity sector.[231] Policies such as the Expanded MOPR, which seek to frustrate state efforts to shape their generation mix, not only undermine the Supreme Court's jurisprudence interpreting Congress's intent to have marbled jurisdiction, but also with the direct text of the FPA.[232] The FPA expressly states that "[FERC] shall establish . . . rate treatments for the transmission of electric energy . . . for the purpose of benefiting consumers by reducing the cost of delivered power."[233] But as the adoption of the Expanded MOPR demonstrated, these policies can be misused and actually increase costs.[234]

Further, the policy can muddy the relationship between FERC and the states.[235] For example, states like Illinois, Maryland, and New Jersey have threatened to stop participating in the capacity market altogether because of the Expanded MOPR's detrimental effects on state carbon goals.[236] If future uses of the MOPR cause states to leave the PJM market, competition between generation will undoubtedly decrease, leading to rising costs for consumers and perhaps even a need to return to cost-of-service ratemaking in non-competitive regions. This cannot be the intention of the FPA.

C. *The MOPR Injects Partisan Politics Into Otherwise Insulated Economic Regulation*

While the legal scholarship regarding MOPR policy has largely attempted to divorce politics from the analysis, it is difficult to ignore given the totality of the circumstances surrounding the changes in the PJM's MOPR. It is no secret that under the Donald Trump Administration, the United States adopted several policies that favored traditional non-renewable generation like oil, coal, and natural gas.[237] For example, the Trump Administration repealed and replaced President Barack Obama's Clean Power Plan—a policy that was enacted to reduce carbon dioxide emissions from the electricity grid by prohibiting the development of new coal plants without carbon capture and storage mechanisms.[238] In its place, the Trump Administration passed the Affordable Clean Energy Rule, which drastically reduced the regulation on power plant emissions.[239] EPA estimates that, when compared to no regulation at all, President Trump's proposal has only reduced total GHG emissions from power plants by 1%.[240]

FERC's novel justification for changing the MOPR's underlying policy rationale from curbing buyer-side market manipulation to "address[ing] the impact of State Subsidies [for new zero-carbon generation] on the market" coincides remarkably well with the change in presidential administrations.[241] Furthermore, the policy justifications for the new MOPR were in direct response to pleadings from fossil-fuel generators who were angry that the state subsidies allowed renewables to compete in the PJM capacity auction.[242] And most notably, FERC itself rejected PJM's original prototype for the expanded MOPR as "unreasonable" because it included an exception for renewables needed to reach a state's renewable portfolio goals.[243] In other words, the original PJM's MOPR proposal did not go far enough in frustrating the effectiveness of state renewable credits.[244] Having rejected all of PJMs proposals for dealing with state subsidies, FERC initiated its own section 206 proceeding to solicit proposal alternatives and landed on the Expanded MOPR that applied to all new or existing subsidized resources.[245] This is all to say that the Expanded MOPR and the switch from preventing buyer-side market abuse to curbing the effects of state renewable subsidies came at the behest of FERC itself—it was not the product of the PJM or necessitated by incidents of manipulation in the market.[246]

Another factor evidencing the politicization of the MOPR was President Trump's "firing" of Commissioner Chatterjee as chairman of FERC.[247] Chatterjee was appointed to the chair of FERC by President Trump on October 24, 2018, and presided over the Expanded MOPR proceedings through its final adoption.[248] Chatterjee is a Kentucky Republican with a strong affiliation

231. *See* 16 U.S.C. § 824a (2022); *Hughes*, 578 U.S. 150 at 166; Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260, 265 (2016).
232. *See* 16 U.S.C. § 824a (2022); *Hughes*, 578 U.S. 150 at 154; *Elec. Power Supply Ass'n*, 577 U.S. at 265–67.
233. 16 U.S.C. § 824(a) (2022).
234. *See* Joint Statement of Glick and Clements, *supra* note 14, at 2; Fike, *supra* note 18, at 546.
235. Joint Statement of Glick and Clements, *supra* note 14, at 7.
236. *See* Catherine Morehouse, *States Ask FERC to Eliminate MOPR, Grant More Flexibility in Pursuing Alternatives to PJM Capacity Market*, Util. Dive (Apr. 26, 2021), https://www.utilitydive.com/news/states-ask-ferc-to-eliminate-mopr-grant-more-flexibility-in-pursuing-alter/599039/ [https://perma.cc/4BTU-CEQ3].
237. *See* Samantha Gross, *What Is the Trump Administration's Track Record on the Environment*, Brookings (Aug. 4, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-trump-administrations-track-record-on-the-environment/ [https://perma.cc/2VQP-NWAF].
238. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).
239. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).
240. *Proposed ACE Rule—CO_2 Emissions Trends*, U.S. Env't Prot. Agency (2019), https://www.epa.gov/sites/default/files/2018-08/documents/ace_trends.pdf [https://perma.cc/2X83-DA9Y].
241. Calpine Corp., 171 FERC ¶ 61,035 at ¶ 45 (2019).
242. *Id.* at 3.
243. Calpine Corp., 163 FERC ¶ 61,236, at ¶¶ 44–48 (2018) (Glick, Comm'r, dissenting).
244. *Id.*
245. *Id.* at 3; 16 U.S.C. § 824e(a) (2022).
246. Calpine Corp.,169 FERC ¶ 61,239, at ¶ 3 (Dec. 19, 2019).
247. *See* Josh Seigel, *Neil Chatterjee Replaced as FERC Chairman After Promoting Carbon Pricing*, Wash. Examiner (Nov. 5, 2020, 9:24 PM), https://www.washingtonexaminer.com/policy/energy/neil-chatterjee-replaced-as-ferc-chairman [https://perma.cc/3ZEP-JWTF] [hereinafter Seigel, *Chatterjee Replaced*].
248. Calpine Corp., 169 FERC ¶ 61,239, at ¶ 3 (Dec. 19, 2019).

to Sen. Mitch McConnell (R-Ky.) and the coal industry.[249] President Trump likely appointed Chatterjee to the FERC Chair position to advance his pro-fossil fuel policies, and Chatterjee did just that in his cultivation and implementation of the Expanded MOPR.[250]

However, as Chatterjee continued his tenure in office, he changed his tune and began to take actions that supported state clean energy initiatives contrary to his earlier statements and policies.[251] For example, Chatterjee voted to approve FERC Order No. 2222, which allowed distributed energy resources, particularly rooftop solar, to participate in wholesale capacity markets and be fairly compensated for their electricity generation.[252]

Additionally, Chatterjee directly endorsed state exploration of subsidies tied to carbon reduction in a statement he made on October 15, 2020, stating: "my overarching takeaway from this robust conversation [with Commissioners Glick and Danly] was that if states continue to pursue carbon pricing [like New York's ZECs] RTOs and their stakeholders can and *should* explore the feasibility and benefits of market rules that incorporate the state-determined carbon price."[253] A few weeks after that statement, President Trump removed Chatterjee from his chair position.[254] Chatterjee expressed his belief that he may have been removed for his endorsement of the subsidies, telling reporters that he has been open in his endorsement of such policies and if his removal was motivated by "retribution for [his] independence, [he] was quite proud of that."[255]

Taken together, these incidents point to a troubling conclusion. The MOPR has become a political weapon and can no longer be comprehensively analyzed without looking into the politics surrounding its changes. By hiding behind a complex regulatory scheme of administrative pricing, FERC has been able to satisfy the political agenda of the party in office at the detriment of consumer protections and cutting carbon emissions.[256]

V. Proposed Solution: The Civil Enforcement Alternative

A. *FERC's Civil Enforcement Ability and Feasibility of Policing the PJM*

Before President Joe Biden appointed a fifth commissioner to FERC, Willie L. Phillips, the majority of the Commissioners agreed that "the [Expanded] PJM MOPR structure need[ed] to be replaced or significantly modified" because the Expanded MOPR is "simply unsustainable," as it results in increased costs to consumers and inaccurate price signals.[257] That being said, two of the Commissioners believe that the current Focused MOPR is "unjust and unreasonable" for failing to adequately insulate the wholesale market from the effects of state subsidies.[258] And interestingly, Commissioner Christie goes so far as to cite the PJM Independent Market Monitor's ("IMM's") claim that the Focused MOPR is even worse than no MOPR at all.[259] This raises the questions: What would the PJM look like without a MOPR policy? Would buyer-side market power run rampant? Unlikely.

In 2005, Congress enhanced FERC's authority to assess civil penalties for violations of the FPA for fraud, making untrue or misleading statements to the Commission, or engaging in any practice that would operate as deceit upon any entity in the electricity market.[260] The penalties for violations are significant, totaling over one million dollars ($1,000,000) per violation for each day that it continues.[261]

FERC's Office of Enforcement ("OE") "initiates and executes" investigations of possible violations of the statutes administered by the Commission, like the FPA, as well as FERC's rules, orders, and regulations.[262] Given the steep penalties that could be assessed against generators if found to be fraudulently suppressing the clearing price with exercise of buyer-side market power, firms and investors have a strong deterrent against such abuse.[263] Only if the possibility of being caught by FERC's OE was low, would firms potentially find the risk of civil penalties worth the economic benefits of exercising buyer-side power, and they would have a rational incentive to do so.

249. *See* Josh Seigel, *Trump Appointee Becomes Leading Climate Problem Solver*, Wash. Examiner (Oct. 29, 2020, 11:00 PM), https://www.washingtonexaminer.com/policy/energy/trump-appointee-becomes-leading-climate-problem-solver [https://perma.cc/NV8Y-JMGH] [hereinafter Seigel, *Trump Appointee Becomes Climate Solver*].

250. Calpine Corp., 169 FERC ¶ 61,239, at ¶ 3 (Dec. 19, 2019); *see also* Seigel, *Trump Appointee Becomes Climate Solver*, *supra* note 249.

251. Seigel, *Trump Appointee Becomes Climate Solver*, *supra* note 249.

252. Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators, 172 FERC ¶ 61,247 (2020) (to be codified at 18 C.F.R. pt. 35).

253. *See* Remarks of Chairman Neil Chatterjee on FERC Proposed Policy Statement on State-Determined Carbon Pricing in Wholesale Markets, U.S. Fed. Energy Regul. Comm'n at ¶ 6 (Oct. 15, 2020).

254. *See* Seigel, *Chatterjee Replaced*, *supra* note 247.

255. *Id.*

256. *See* Joint Statement of Glick and Clements, *supra* note 14, at 2.

257. *Id.* at 6 (citing Christie's Statement, *supra* note 23).

258. *See* Christie's Statement, *supra* note 23; Danly's Statement, *supra* note 23.

259. Christie's Statement, *supra* note 23, at 1 (citing IMM Aug. 20, 2021, Protest).

260. *See* Energy Policy Act of 2005, 1284 (amending § 316A of the Federal Power Act, 16 U.S.C. 825o-1(b) (2000)) (increasing the penalty from $10,000 to $1,000,000 per day per violation of the FPA); Prohibition of Energy Market Manipulation, 18 C.F.R. § 1c; *see also* Civil Monetary Penalty Inflation Adjustments, 82 Fed. Reg. pts. 8,137, 8,138 (Jan. 24, 2017) (adjusting penalties for inflation).

261. *Id.*; *see also Civil Penalties*, U.S. Fed. Energy Regul. Comm'n, https://www.ferc.gov/civil-penalties#:~:text=Congress%20established%20the%20maximum%20civil,each%20day%20that%20it%20continues [https://perma.cc/Z63C-P3R7] (Jan. 28, 2022).

262. *See Investigations*, U.S. Fed. Energy Regul. Comm'n (June 22, 2022), https://www.ferc.gov/investigations# [https://perma.cc/4XX6-MP5S] (describing the functions of the Office of Enforcement).

263. *See* 16 U.S.C. § 825o-1(b) (2000).

However, the risk of civil penalties is significant. The PJM already administers a monitoring process that would lend itself easily to civil penalty enforcement.[264] To implement the Focused MOPR, PJM has an initial certification process.[265] Before every capacity auction, capacity sellers are "required to certify that the seller *acknowledges* the prohibition of the Exercise of Buyer-Side Market Power and *does not intend to Exercise* Buyer-Side Market Power for a particular generation capacity resource."[266] PJM treats this acknowledgment as a sworn statement.[267] Either submitting a false affidavit or breaching the certificate is grounds for disciplinary action, which PJM is obligated to refer to FERC's OE.[268]

Further, either PJM itself or PJM's IMM can initiate an investigation into a market seller under a mere suspicion of a fraudulent or misleading certification or if either have a "reasonable basis to initiate an inquiry."[269] If the PJM or IMM believe a seller intends to offer an uneconomic resource in a location where the seller—or its affiliates—have a "net-short position," this is grounds for an investigation and referral to FERC's OE.[270]

During the inquiry, PJM and the IMM stated that they will test for the ability of the market participant to exercise buyer-side power by "determining the extent to which a shift in the supply curve equal to the size of the resource would have a 'material effect' on capacity market clearing prices."[271] If the seller materially shifts the supply curve, the PJM/IMM then tests to see if the seller could receive a net benefit to its generation portfolio from its uneconomic bid.[272] If so, the seller is deemed to have an "incentive" to exercise buyer-side power.[273] The seller can then explain themselves, but if said explanation is inadequate, referral to OE may be appropriate.[274]

Even in the absence of such a monitoring and enforcement system, attempting to exercise buyer-side market power is risky from a purely economic standpoint. Sellers attempting to suppress capacity prices must offer resources at significantly below their costs to clear the market.[275] However, as Commissioners Glick and Clements explain,

> [f]or new resources, this requires a long-term commitment because recouping the above market costs of that resource require low clearing prices over multiple years, but, in the long-run, capacity sellers also adjust their supply offers over time in response to low prices and thus capacity prices would increase over the years.[276]

In other words, market volatility and supply and demand principles make exercising buyer-side market power by offering artificially low resource prices very risky for the seller and improbable to succeed, as the success is conditioned on low-capacity prices continuing for a number of years.[277] Coupling the economic disincentives with the increased monitoring by the PJM/IMM, it seems highly unlikely that buyer-side market abuses would occur with any regularity. And if they did, abuses would likely be detected before the violating firm could recover the costs from their initial uneconomic capacity offers.

Finally, unlike the MOPR, which has both over- and underinclusive effects, the PJM/IMM investigatory process is fact-specific and tailored to preventing market manipulation while recognizing the possibility that resources receiving things like state subsidies may indirectly suppress capacity prices having no incentive to exercise buyer-side power whatsoever.[278] Moreover, PJM has specifically stated that state subsidies were permissible and can be used to justify why a seller would be able to suppress the capacity market, so long as the subsidy is not directly conditioned on participation in the market.[279]

B. *The GreenHat Energy Example*

An example of FERC using its civil enforcement authority came in response to alleged market manipulation by GreenHat Energy, LLC ("GreenHat").[280] In May 2021, FERC ordered GreenHat, a PJM market participant, to "explain why they should not pay a total of $229 million in civil penalties and disgorge nearly $13.1 million in unjust profits for alleged electric market manipulation."[281] FERC's OE alleged that GreenHat Energy violated both the FPA and the PJM tariff by engaging in a manipulative scheme in which GreenHat, among other things, sent false price signals into the PJM market, made deliberately false statements to PJM, and rigged the Financial Transmission Rights ("FTR") market.[282] After FERC issued its order to show cause, GreenHat did not provide sufficient evidence

264. *See* Joint Statement of Glick and Clements, *supra* note 14, at 12–15; Letter to Secretary Bose, PJM Interconnection L.L.C., Docket No. ER21-2582-000, Revisions to Application of Minimum Offer Price Rule at 34 (2021).
265. Joint Statement of Glick and Clements, *supra* note 14, at 12.
266. *Id.* (emphasis added).
267. *See id.*; *see also* Letter to Secretary Bose, PJM Interconnection L.L.C., Docket No. ER21-2582-000, Revisions to Application of Minimum Offer Price Rule at 29–31 (2021).
268. *See id.* at 27.
269. Joint Statement of Glick and Clements, *supra* note 14, at 12 (citing PJM Interconnection, L.L.C., Notice, L.L.C, Docket No. ER21-2582-000 (issued Sept. 29, 2021) (taking effect by operation of law).
270. Joint Statement of Glick and Clements, *supra* note 14, at 12.
271. *Id.*
272. *Id.* at 12–13.
273. *Id.*
274. *Id.* at 13.
275. *Id.* at 14.
276. Joint Statement of Glick and Clements, *supra* note 14, at 14.
277. *Id.* at 5.
278. Letter to Secretary Bose, PJM Interconnection L.L.C., Docket No. ER21-2582-000 Revisions to Application of Minimum Offer Price Rule at 30–31 (2021).
279. *Id.* Note how the PJM is implementing the holding in *Hughes* into its tariff proposals, demonstrating an understanding and reliance on its holding. 578 U.S. 150 (2016).
280. *FERC Orders GreenHat to Respond to Market Manipulation Allegations, Proposes Penalties*, FERC Docket No. IN18-9-000 (May 20, 2021) (note that this enforcement action was taken during the Expanded MOPR regime) [hereinafter FERC Orders GreenHat].
281. *Id.*
282. *Id.* The details of the FTR market are beyond the scope of this Note. Essentially, FTRs are contracts entitling the FTR holder to a stream of revenues—or charges—based on the day-ahead hourly congestion price difference across an energy path and are a way to bypass congestion charges. In other words, FTRs give market participants the ability to attain a better price certainty when delivering energy across the grid. *See* PJM Learning Center, *Financial Transmission Rights FAQs: What Are Financial Transmission Rights?*, PJM (2022), https://learn.pjm.com/three-priorities/buying-and-

to disprove the allegations, and FERC investigated.[283] Subsequently, on November 5, 2021, the Commission issued an Order assessing the $229 million fine.[284] The details of the enforcement action are still developing.[285]

FERC has declined to comment on the matter.[286] But this proceeding is an excellent example of FERC utilizing its civil enforcement authority against a company who allegedly engaged in market manipulation in the PJM Interconnection.[287] It also shows both the Commissions' willingness and ability to use this power to police market manipulators who are able to engage in fraud.[288] Notably, GreenHat was engaging in this fraud under the Expanded MOPR regime, indicating that the more stringent market policy did little to curb this firms behavior.[289]

C. *Benefits of Using Civil Enforcement Rather Than the MOPR*

There are significant benefits to relying on FERC's civil enforcement authority rather than relying on the Focused MOPR or MOPR-type variant. Rather than being couched behind complex and technical economic policy, a civil enforcement regime may prove to be much more transparent in terms of highlighting and punishing market manipulation.[290] In addition to the potential civil penalty of $1,000,000 per day per violation,[291] the reputational damage would also significantly deter firms from engaging in such practices, not to mention potential investor retaliation for IOUs. Furthermore, before initiating an enforcement proceeding, PJM/IMM provides the seller with notice stating the basis for the investigation and offering an opportunity for the seller to justify itself, just like it did with GreenHat.[292] This process establishes a record for the investigation, and if the enforcement action is carried out in its entirety, it will be no secret which firm attempted to manipulate the capacity market and how that firm did so, leaving no ambiguity as to what behavior is unlawful. Moreover, the regulatory policies in capacity markets would become less politically volatile and allow FERC to focus on ensuring reliability and protecting consumers per the Commission's mandate under the FPA.[293]

However, perhaps the most significant benefits of FERC utilizing its civil enforcement authority rather than a MOPR policy is the clarity and stability that such a policy would bring to the capacity markets. The constant oscillation in MOPR polices that occurs every few years would be replaced by an ever-present enforcement regime that would alleviate pressure on capacity providers to comply with changing MOPR regulations. And importantly, an enforcement regime returns FERCs regulatory focus to protecting RTO/ISO capacity markets from buyer-side market manipulation and does not punish states for subsidizing preferred methods of generation, soothing tensions between states and FERC and promoting the cooperative federalism that will become increasingly necessary in the 21st century grid.[294]

In short, abandoning the MOPR policy, or simply ignoring the policy and switching to an enforcement regime could bring clarity, stability, and transparency to the regulation of market manipulation in the PJM capacity market. Moreover, having no MOPR will not impede states' rights to pursue green generation and cannot be used as a political weapon.

VI. Conclusion

This Note agrees with Commissioner Christie's sentiment that a "no MOPR" alternative may be preferable to even the current Focused MOPR regime.[295] A regulatory model in which the PJM and FERC must decide on replacement MOPR policies every few years—largely coalescing with changes in partisan control—that properly accommodates both new and long-term state policies, protects capacity markets from buyer-side market manipulation, and promotes competition is unworkable.[296] The Chatterjee incident and the several repeated fluctuations in MOPR variants and rationales demonstrate that the policy has devolved from its original purpose of curbing buyer-side market manipulation and can easily become a political tool used to favor whatever generation resources are politically beneficial to the party in charge.[297] This model evades

selling-energy/ftr-faqs/what-are-ftrs.aspx#faq-box-text0 [https://perma.cc/W6ZD-J695] (last visited Apr. 12, 2022).

283. *See* Order Assessing Civil Penalties, 177 FERC ¶ 61,073.

284. *See id.*

285. *See* Fed. Energy Regul. Comm'n v. GreenHat Energy, L.L.C., Case No. 2:22-cv-00044 (E.D. Pa. 2022) (filed Jan. 6, 2022).

286. *See* Sebastien Malo, *FERC Sues GreenHat Energy to Enforce $242 Million Fraud Penalty*, Reuters (Jan. 7, 2022, 5:26 PM), https://www.reuters.com/legal/transactional/ferc-sues-greenhat-energy-enforce-242-million-fraud-penalty-2022-01-07/ [https://perma.cc/2K5R-TX5H].

287. *Id.*

288. *See* FERC Orders GreenHat, *supra* note 280, with Chairman Glick stating:

> [e]nforcement staff's investigation and report raise very serious allegations about market manipulation that cost consumers in the PJM market nearly $180 million . . . [t]his Commission takes very seriously our responsibility to ensure that FERC jurisdictional markets operate competitively and free from fraudulent schemes that harm other market participants and impose excessive, unjust costs on consumers.

289. S*ee* June 2018 Order, 163 FERC ¶ 61,236; June 2018 Rehearing Order, 171 FERC ¶ 61,034; December 2019 Order, 169 FERC ¶ 61,239; December 2019 Rehearing Order I, 171 FERC ¶ 61,035; December 2019 Rehearing Order II, 173 FERC ¶ 61,061 (orders adopting the Expanded MOPR, made during the time that GreenHat was allegedly engaging in market manipulation in the PJM Interconnection).

290. *See Malo*, *supra* note 286 (illustrating that FERC's enforcement action highlights GreenHat as a market manipulator; undoubtedly, GreenHat suffered reputational damage from this proceeding).

291. 16 U.S.C. § 825o-1(b) (2000).

292. Joint Statement of Glick and Clements, *supra* note 14, at 17 (citing PJM, Intra-PJM Tariffs, OATT, Attach. DD, § 5.14(h-2)(B)(i) (32.0.0)).

293. 16 U.S.C. § 824(d) (2022).

294. *See Smart Grid Week: How the Transition to 21st Century Grid Impacts You*, U.S. Dep't of Energy (June 5, 2013), https://www.energy.gov/articles/smart-grid-week-how-transition-21st-century-grid-impacts-you [https://perma.cc/BPT7-L2C7].

295. *See* Christie's Statement, *supra* note 23, at 1 (citing IMM Aug. 20, 2021, Protest).

296. *Id.*

297. *See* Seigel, *Chatterjee Replaced*, *supra* note 247; Joint Statement of Glick and Clements, *supra* note 14, at 17 (discussing the history of different MOPR policies and rationales in the PJM interconnection).

political accountability by allowing partisan regulators to cloak their energy agendas in complex economic regulation that is both publicly opaque and inadequate for ensuring clarity and stability in the wholesale capacity markets. Moreover, the MOPR policy is contrary to the purposes of FERC Order No. 888, 889, 2000, and the FPA generally, as it fails to promote competition in the capacity markets and to benefit consumers by reducing the cost of power.[298] Finally, we have seen the MOPR policy be used to target efforts from states attempting to promote zero-emission generation for their energy future. There is no law preventing FERC from reinstating the Expanded MOPR regime and negatively impacting those states' efforts again. If such a regime returns, even on an intermittent basis, it could have devastating effects on the efforts to combat climate change by curbing GHG emissions.[299]

That being said, FERC already has the tools necessary to ensure the integrity of RTO/ISO capacity markets and protect consumers under the FPA and EPAct 2005.[300] As evident by the GreenHat example, the MOPR is not necessary to root out and punish firms engaging in the unlawful behavior that the MOPR purported to curb.[301] And enforcement actions are not only much more publicly salient than the MOPR, but also provide the industry with a clear and strong statement that such manipulative behavior will not be tolerated. For these reasons, FERC should abandon the MOPR policy and instead rely on its civil enforcement authority to prevent buyer-side market manipulation in the PJM capacity market.

298. *See generally* 16 U.S.C. § 824e(e) (2022); New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1, 10 (2002) (discussing Order No. 888 and 889's purpose in curbing anti-competitive behavior in the capacity markets); Wholesale Competition in Regions With Organized Electric Markets, 125 FERC ¶ 61,071, at ¶ 5, Docket Nos. RM07-19-000 and AD07-7-000 (Oct. 17, 2008).

299. *See generally* Intergovernmental Panel on Climate Change, *supra* note 1; *Sources of Greenhouse Gas Emissions*, U.S. Env't Prot. Agency (Aug. 5, 2022), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#t1fn3 [https://perma.cc/E3FK-VEBG].

300. 16 U.S.C. § 824e(a) (2022); Energy Policy Act of 2005 (amending § 316A of the Federal Power Act, 16 U.S.C. § 825o-1(b) (2000)).

301. *See Malo*, *supra* note 286.

ESG METRICS: SAFEGUARD AGAINST GREENWASHING OR SAFE HARBOR FOR GREENWASHING?

Sue Choi*

ABSTRACT

Corporations have responded to the burgeoning trend of sustainable investing and investor demand for environmental, social, and governance ("ESG") disclosures, largely in voluntary measures. A lack of regulation around ESG disclosures has allowed for greenwashing practices in corporations' ESG statements. Attempts to prevent greenwashing in ESG reporting are emerging internationally, with particular force in the European Union ("EU"). Any regulatory framework surrounding ESG standards and reporting is novel and subject to uncertainties, while the demand for more robust regulation increases. This Note explores the unique challenges in creating a scheme that works effectively to increase transparency, consistency, and reliability, while providing the flexibility and comparability necessary in the global economy. This Note proposes that the United States follow the EU's lead in implementing a mandatory disclosure framework to prevent greenwashing, with a focus on dedicating a uniform standard-setting body akin to the Financial Accounting Standards Board for financial accounting standards.

I. Introduction

In 2010, a United Nations ("U.N.")-ordered study found that the combined environmental damage caused by the 3,000 largest public corporations in the world totaled 2.2 trillion U.S. dollars.[1] According to another U.N.-ordered study, if the world's wealthiest corporations were held financially accountable for the cost of their environmental harm, their profits would decrease by one-third.[2] Today, corporations produce, manage, and fund just about every aspect of society worldwide[3]—and by extension, their operations have significant implications for the environment. More recent studies have found that 100 energy companies were responsible for "71% of all industrial emissions since human-driven climate change was officially recognized"[4] and that publicly traded companies are responsible for 40% of emissions.[5]

In light of the global environmental consciousness, a growing number of individual investors and institutional investors alike consider a corporation's environmental impact and commitments in making their investment decisions.[6] This practice is referred to as "socially responsible investing" ("SRI") or "sustainable investing."[7] Corporations have responded to investor demand for sustainable investing, largely in the form of making public commitments to

* B.A. 2014, University of California Santa Barbara; J.D. Candidate 2023, The George Washington University Law School. The author would like to thank Prof. Adriana Vélez-León and her Notes Editor Joseph Kennelly for their guidance and support throughout the writing process, and Prof. Lawrence Cunningham for extending his time and expertise on the subject matter. She would also like to thank the entire JEEL staff for their detailed editing, hard work, and professionalism.

1. *See* Juliette Jowit, *World's Top Firms Cause $2.2tn of Environmental Damage, Report Estimates*, The Guardian (Feb. 18, 2010, 1:19 PM), https://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage [https://perma.cc/M76Y-YCF8].
2. *Id.*
3. *See* Guillermo C. Jimenez & Elizabeth Pulos, Good Corporation, Bad Corporation: Corporate Social Responsibility in the Global Economy 1 (2016), http://solr.bccampus.ca:8001/bcc/file/70fa0825-d41b-4519-975b-71bc2ea1f704/1/Good-Corp-Bad-Corp.pdf [https://perma.cc/6JGP-EMDN].
4. Joshua Axelrod, *Corporate Honesty and Climate Change: Time to Own Up and Act*, Nat. Res. Def. Council Expert Blog (Feb. 26, 2019), https://www.nrdc.org/experts/josh-axelrod/corporate-honesty-and-climate-change-time-own-and-act [https://perma.cc/XT33-6DKQ].
5. *See Listed Companies Account for 40% of Climate-Warming Emissions, Reveals New Research by Generation Investment Management*, Generation Inv. Mgmt. LLP (Oct. 11, 2021), https://www.generationim.com/our-thinking/news/listed-companies-account-for-40-of-climate-warming-emissions/ [https://perma.cc/48Y4-LKNJ].
6. *See* David Uzsoki, Int'l Inst. for Sustainable Dev. & MAVA Foundation, Sustainable Investing: Shaping the Future of Finance 1–3 (2020), https://www.iisd.org/system/files/publications/sustainable-investing.pdf [https://perma.cc/D37X-TP9N].
7. *Sustainable Investing*, Investopedia, https://www.investopedia.com/sustainable-investing-4427774 [https://perma.cc/49UZ-P36E] (last visited Jan. 30, 2022) ("Sustainable investing directs investment capital to companies that seek to combat climate change, environmental destruction, while promoting corporate responsibility.").

socially responsible goals[8] and by providing Environmental Social Governance ("ESG")[9] information. Unlike a corporation's financial information that is relatively measurable and substantiated, matters relating to a corporation's commitments and impact on the environment pose challenges concerning accuracy, consistency, and comparability across industries.[10] Furthermore, whereas corporate financial disclosure is regulated in the United States and in other countries with clear imposed requirements and standards, such non-financial disclosures[11] are relatively new and lack a developed regulatory framework worldwide.[12]

The lack of regulation surrounding non-financial disclosures combined with the heightened pressure on corporations to provide information that would attract and maintain investors, improve their business reputation, and generate positive publicity has created an environment ripe for greenwashing.[13] Part II will provide a deeper explanation of the term greenwashing, but greenwashing generally refers to the act of misleading or deceiving the receiver of information regarding the greenwasher's environmental practices and impact.[14] Greenwashing occurring within ESG reporting ("ESG-washing") is especially problematic considering the very purpose of ESG information disclosure for investors: to encourage corporate social responsibility ("CSR") and disincentivize irresponsible corporate practices.

This Note explores the existing and transforming regulatory framework surrounding greenwashing issues in ESG disclosures. In Part II, this Note will explain the concepts of greenwashing, SRI, ESG, and ESG-washing. Part III will provide an overview of the existing U.S. regulatory framework along with recent developments, followed by an analysis of the European Union's ("EU's") leading role in setting a mandatory framework and compare the approach to the U.S.' largely voluntary and private-ordering regulatory framework. While the regulatory history and development differ in significant respects, Part IV draws lessons from the recent and current challenges the EU faces in creating a unified regulatory scheme that operates consistently and effectively across its Member States.

This Note then suggests the United States follow the EU's lead in establishing a mandatory regulatory scheme, and that the Securities and Exchange Commission ("SEC") is the appropriate administrative body to implement mandatory regulations. The U.S. Congress delegated to SEC the authority and responsibility to protect investors and regulate the securities market, including the authority to mandate corporate reporting.[15] However, learning from the EU's obstacles in achieving harmonization, SEC should dedicate an independent standard-setting body to adapt standards specifically to U.S. laws, modeled after SEC's regulatory framework for corporate financial reporting. Specifically, SEC should authorize a U.S.-based standard setter, modeled after the Financial Accounting Standards Board ("FASB")[16] in the financial reporting context, to set the rules for ESG statements. The standard setter should also build on the existing international standards to foster compatibility and comparability in a global economy.

II. Greenwashing in ESG Reporting

A. *The Concept of Greenwashing*

The scope of the term "greenwashing" encompasses considerably more today than its original meaning did over thirty years ago. The oldest usage of the term is predominantly credited to environmentalist Jay Westerveld in 1986 to refer to a hotel's misleading environmental claims for their services.[17] Although Westerveld's coinage of the term was specific to the hotel industry, today greenwashing generally refers to any organization's false or misleading claims and representations that deceive the targeted audience about the environmental soundness of the organization's products or services.[18] Despite the conceptual and definitional development of the term, greenwashing remains without a legal definition in U.S. law even when policymakers intend to target greenwashing specifically.[19] However, as frontrunners in developing greenwashing laws, EU regulators have not shied away from using the term and providing a working definition. The European Commission ("EC") formally defined greenwashing in the 2020 New Consumer Agenda

8. The concept known as "Corporate Social Responsibility" will be explained in Part II.
9. ESG will be explained in Part II.
10. *See* Virginia E. Harper Ho, *Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform*, 10(2) J. Acct. Econ. & L. 1, 6 (2019) [hereinafter Harper Ho, *Non-Financial Reporting & Corp. Gov.*].
11. "Non-financial disclosures" or "non-financial reporting" refers to the information a corporation provides to investors, regulators, and the public that encompasses the non-financial aspects of corporate performance, often defined as "Environmental, Social, and Corporate Governance (ESG) information, referring to the three central components in measuring the sustainability and societal impact of a company." *Reporting of Non-Financial Information*, Deloitte 2 (Jan. 2021), https://www2.deloitte.com/content/dam/Deloitte/be/Documents/audit/DT-BE-reporting-of-non-financial-info.pdf [https://perma.cc/W3EV-Z8DL]. This Note will use "non-financial disclosures," "sustainability reporting," and "ESG reporting" interchangeably.
12. Robert G. Eccles & Judith C. Stroehle, *Exploring Social Origins in the Construction of ESG Measures* 1 (U. Oxford Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212685.
13. *See generally* Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. Davis Bus. L.J. 281 (2013) (exploring the relationship between corporate social responsibility and greenwashing, with an examination of the legal structure that allows greenwashing to occur).
14. See discussion *infra* Part II.A.
15. See discussion *supra* Part III.A.1.a; Securities Exchange Act of 1934, 15 U.S.C. §§ 77g, 78m.
16. *See infra* note 212 and accompanying text.
17. Cherry, *supra* note 13, at 284 (explaining Westerveld's usage of the term in reference to a hotel sign encouraging guests to use fewer towels for environmental purposes when the true purpose was for the hotel's reduced laundry costs).
18. *See id.* at 282 (defining corporate greenwashing as a corporation "increas[ing] its sales or boost[ing] its brand image through environmental rhetoric or advertising, but in reality, does not make good on these environmental claims"); Erica Orange, *From Eco-Friendly to Eco-Intelligent*, 44 The Futurist 29, 30 (2010) ("The term is now used to refer to all industries that adopt outwardly green acts with an underlying purpose of increasing profits.").
19. *See* Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.4 (2012) (avoiding usage of "greenwashing" and instead using phrasing such as "unqualified general environmental benefit claims" and "deceptive claims").

as "information that is not true or presented in a confusing or misleading way to give the inaccurate impression that a product or enterprise is more environmentally sound,"[20] and again in a press release just three months later as "the practice by which companies claim they are doing more for the environment than they actually are."[21]

As environmental issues increasingly take the forefront in policy considerations and public demands, greenwashing not only persists, but continues to take on new forms.[22] A study in 2007 recording 1,753 environmental claims on 1,018 products carried in category-leading big-box stores identified "Six Sins of Greenwashing" ranging from the most prevalent "Sin of the Hidden-Trade Off" (environmental claims that are true, but ignores other important environmental attributes) to the "Sin of No Proof" (unsubstantiated environmental claims).[23] The term greenwashing initially referred to corporations' false or misleading claims aimed at consumers usually in the form of product advertisements, thus greenwashing originally fell squarely within the jurisdiction of the Federal Trade Commission ("FTC").[24] However, corporate greenwashing practices have expanded and evolved in response to trends in investor interest in sustainable investments.[25] Thus, greenwashing practices not only implicate consumer protection laws, but also implicate securities fraud laws and fall within SEC's jurisdiction.

B. SRI and ESG Measures

SRI[26] is an investment philosophy and strategy that considers social and environmental impact alongside financial return.[27] SRI coincides with the explosion of the CSR movement in the 1990s that can be generally defined as a self-regulating business model that focuses not only on a corporation's financial performance, but also on its performance in environmental and social considerations.[28] The CSR momentum was largely in response to criticisms of corporate behavior and concurrently developed into a corporate marketing strategy.[29] While CSR encompasses the overall non-financial impacts of corporate operations, SRI is a subset of CSR primarily addressed to investors.[30]

SRI can be a tool for investors to effectuate CSR practices; investors can influence companies to adopt CSR by placing importance on environmental and social considerations in their investment decisions.[31] Growing CSR and SRI in recent years necessitated a means to measure a corporation's social impact beyond its claims of socially responsible commitments.[32] Reflecting the growing demand for measurable and verifiable evaluations, ESG criteria emerged as a quantifiable set of standards to measure a company's operations regarding its environmental impact, its business relationships throughout its supply chain, and its governance practices.[33] Much like CSR, companies adopting ESG metrics capitalized on its prospect as a marketing technique.[34] Consequently, the growth of CSR, SRI, and ESG pressures corporations across industries to appear, even if they are not, green.[35]

C. "ESG-Washing"

The compelling incentives for corporations to present themselves as socially responsible has led to diverging results: (1) informative measures to suit investor decisionmaking[36] and (2) selective and misleading measures that proliferate yet another avenue for corporate greenwashing—"ESG-

20. *Communication From the Commission to the European Parliament and the Council: New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery*, COM (2020) 696 final (Nov. 13, 2020).
21. European Commission Press Release IP/21/269, Screening of Websites for "Greenwashing": Half of Green Claims Lack Evidence (Jan. 28, 2021).
22. *See* TerraChoice, The Sins of Greenwashing: Home and Family Edition (2010), http://faculty.wwu.edu/dunnc3/rprnts.TheSinsofGreenwashing2010.pdf [https://perma.cc/68RB-Z52M] (updating the "Sins of Greenwashing").
23. *See* TerraChoice, The "Six Sins of Greenwashing™": A Study of Environmental Claims in North American Consumer Markets 3–5 (2007), https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf [https://perma.cc/3TB9-ES3T] (other "Sins" are the "Sin of Vagueness," the "Sin of Irrelevance," the "Sin of Fibbing," and the "Sin of Lesser of Two Evils"); *see* TerraChoice, The Sins of Greenwashing: Home and Family Edition (2010), http://faculty.wwu.edu/dunnc3/rprnts.TheSinsofGreenwashing2010.pdf [https://perma.cc/68RB-Z52M] (adding the seventh "Sin of Worshiping False Labels" to include a product that "gives the impression of third-party endorsement where no such endorsement actually exists").
24. *See* Federal Trade Commission Act, 15 U.S.C. §§ 45, 53, 54 (amended 2006) (providing the FTC authority to prevent "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce" and to seek injunctions, restraining orders, and penalties for engaging in the dissemination of false advertisements unlawful under the Act).
25. *See infra* Part II.B.
26. SRI is used interchangeably with several phrases, including "impact investing," "ESG investing," "sustainable investing," "green investing," and "ethical investing." For consistency, this Note will use the term "SRI."
27. *What You Need to Know About Impact Investing*, Glob. Impact Investing Network, https://thegiin.org/impact-investing/need-to-know/ [https://perma.cc/Z9AQ-YSX8] (last visited Mar. 6, 2022); *see* Federico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation: Stock Exchanges as Regulators of ESG Factors Disclosure*, 19 Wash. U. Glob. Stud. L. Rev. 167, 182 (2020).
28. *See* Fornasari, *supra* note 27, at 177.
29. *See id.* at 178.
30. *See id.* at 182.
31. *See id.*
32. *See generally* Fabrizio Tocchini & Grazia Cafagna, *The ABCs of ESG Reporting: What Are ESG and Sustainability Reports, Why Are They Important, and What Do CFOs Need to Know*, Wolters Kluwer (Mar. 9, 2022), https://www.wolterskluwer.com/en/expert-insights/the-abcs-of-esg-reporting [https://perma.cc/T7GB-V8RJ] (discussing ESG reporting as a way for companies to demonstrate to investors their qualitative and quantitative ESG activities).
33. *See* The Investopedia Team, *Environmental, Social, and Governance (ESG) Principles and Criteria*, Investopedia, https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp [https://perma.cc/3U8C-MG67] (May 28, 2022).
34. *See* Maria Lozovik, *Tackling Greenwashing Requires a Long-Term Approach to ESG*, Fin. Times Adviser (Aug. 3, 2022), https://www.ftadviser.com/investments/2022/08/03/tackling-greenwashing-requires-a-long-term-approach-to-esg/ [https://perma.cc/L99N-UNDR] (discussing the growing phenomenon of funds rebranding as ESG-forward to match investor interests, without employing a truly ESG-focused strategy).
35. *See* Cherry, *supra* note 13, at 287, 301.
36. G&A reported an all-time high in ESG reporting trends by the largest U.S. public companies in 2020. *See* Louis D. Coppola, *92% of S&P 500® Companies and 70% of Russell 1000® Companies Published Sustainability Reports in 2020, G&A Institute Research Shows*, Governance & Accountability Inst., Inc. (Nov. 16, 2021, 9:00 AM), https://www.globenewswire.com/news-release/2021/11/16/2335435/0/en/92-of-S-P-500-Companies-and-70-of-Russell-1000-Companies-Published-Sustainability-Reports-in-2020-G-A-Institute-Research-Shows.html [https://perma.cc/UKC4-JH3B].

washing."[37] A 2020 ESG survey including 1,250 management and senior-level executives of large corporations in the United States, the United Kingdom ("U.K."), France, and Germany found that "81% of companies have a formal ESG program, but only 50% of companies believe their company performs effectively against environment metrics."[38] Corporate employees themselves recognize that despite rising ESG initiatives and spending, companies fall short of meeting their own stated ESG metrics.[39] Furthermore, the study highlighted that the respondents "ranked environment as the most important ESG element impacting their company's brand reputation."[40] The finding suggests a stronger corporate incentive to highlight and maximize the "E" element in their ESG initiatives, which results in a greater risk for ESG-washing regarding environmental claims.[41]

The incentive for portraying high ESG measures is especially problematic without a strong legal and regulatory regime.[42] In fact, MSCI, the largest ESG rating provider,[43] does not even measure a company's environmental and social impacts, but rather the inverse: the risks ESG considerations pose on the company.[44] Such an approach results in paradoxical and misleading ratings. For example, MSCI gave McDonald's a ratings upgrade despite the company's 7% increase in greenhouse gas emissions—which totaled more than Portugal or Hungary's emissions in a single year—because it considered whether climate change potentially affects the company's bottom line, and thus did not even consider the company's greenhouse gas emissions.[45]

MSCI is only one ESG rating provider, and companies communicate their ESG information in a variety of formal and informal mediums in the absence of an established regulatory framework, further contributing to problems in variance, consistency, and comparability.[46] However, regulating ESG disclosure poses challenges that are burdensome for corporations, investors, and regulators.[47] The resulting opportunity for ESG-greenwashing threatens the legitimacy of all ESG measures as investors and consumers lose faith in the entire concept.[48] In order to avoid delegitimizing the foundation of CSR and ensure meaningful ESG measures, ESG standards and disclosures require a strong regulatory framework.

III. The Existing Regulatory Framework—the United States, the EU, and Third-Party Standard-Setting Bodies

A. The United States: The Private Ordering and Voluntary Framework

To date, the U.S. regulatory framework of ESG disclosure relies heavily on voluntary disclosure and private ordering.[49] Key reasons for the current U.S. framework include dominant social norms and pre-existing legal rules surrounding corporate practice.[50] The U.S. approach today is a public-private hybrid system that combines third-party reporting standards, voluntary disclosure, and shareholder activism with federal securities laws that regulate corporate annual reports and proxy statements.[51] Industry represen-

37. *See* Stefanie Spear, *New Study Quantifies Lack of "Truth in Labeling" in ESG Mutual Funds and ETFs*, As You Sow (Jan. 11, 2022), https://www.asyousow.org/press-releases/2022/1/11/lack-of-truth-in-labeling-esg-mutual-funds-etfs [https://perma.cc/8NF8-FBDP] (study of mutual funds and ETFs identifying themselves as "ESG" found that 60 out of 94 ESG funds failed to adhere to ESG investing principles).
38. NAVEX, *Global Survey Finds Business Increasing ESG Commitments, Spending*, JD Supra (Feb. 23, 2021), https://www.jdsupra.com/legalnews/global-survey-finds-businesses-1478807/ [https://perma.cc/3CLR-SM4V]; *see* Coppola, *supra* note 36, at 2.
39. NAVEX, *supra* note 38.
40. *Id.*
41. *See* Irma Russell & Roger Martella, *Corporate Social Responsibility and Multinational Corporations: Emergency Vehicle for Doing Public Good*, 35 Nat. Res. & Env't 4 (2020) (suggesting that ESG is more associated with environment and climate change impacts).
42. *See* Javier El-Hage, *Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading Ratings?*, 26 Fordham J. Corp. & Fin. L. 359, 363–75 (2021).
43. ESG rating agencies are private organizations that evaluate public information to grade companies and produce ESG ratings or scores. SEC does not regulate ESG ratings nor the ESG disclosures that the ratings are based upon, resulting in high variances of ESG scores between rating providers. *See* Kurt Wolfe, *Who Regulates the ESG Ratings Industry?*, Bloomberg L. (Feb. 22, 2022, 4:00 AM), https://news.bloomberglaw.com/esg/who-regulates-the-esg-ratings-industry [https://perma.cc/EU4B-4UBM]; Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!*, Rsch. Affiliates (Jan. 2020), https://www.researchaffiliates.com/publications/articles/what-a-difference-an-esg-ratings-provider-makes [https://perma.cc/9RBC-PU92].
44. MSCI explicitly states that the purpose of its ESG ratings system is "to measure a company's resilience to financially material [ESG] risks . . . *not* a general measure of corporate 'goodness.'" *What MSCI's ESG Ratings Are and Are Not*, MSCI, https://www.msci.com/our-solutions/esg-investing/esg-ratings/what-esg-ratings-are-and-are-not [https://perma.cc/CW3G-USFS] (last visited Mar. 6, 2022) (emphasis added).
45. Cam Sipson et al., *The ESG Mirage*, Bloomberg (Dec. 10, 2021), https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/ [https://perma.cc/58T2-BFP8].
46. *See* Harper Ho, *Non-Financial Reporting & Corp. Gov.*, *supra* note 10, at 6.
47. *See id.*; *see generally* El-Hage, *supra* note 42 (discussing the problems in defining ESG, how inconsistent definitions lead to problematic ESG ratings, and the problems caused by a framework of voluntary disclosures and inconsistent methodologies); Andrew W. Winden, *Jumpstarting Sustainability Disclosure*, 76 Bus. Law. 1215, 1223 (2021) (discussing the common concerns of proponents and opponents of mandatory ESG metric disclosure, including costs of acquiring, processing, and verifying the accessibility, comparability, and reliability of such disclosures).
48. *See* Cherry, *supra* note 13, at 301–02 (arguing that if greenwashing is widespread in CSR claims, not only would individual consumers and investors lose faith in all CSR claims, but the foundation of CSR itself would be delegitimized).
49. *See* Harper Ho, *Non-Financial Reporting & Corp. Gov.*, *supra* note 10, at 3. "Private ordering" refers to the sharing of regulatory authority with private actors. Steven L. Schwarcz, *Private Ordering*, 97 Nw. Univ. L. Rev. 319 (2002). For an extensive analysis of the various forms of private ordering and its public legitimacy, *see generally id.*
50. *See* Harper Ho, *Non-Financial Reporting & Corp. Gov.*, *supra* note 10, at 9–18 (discussing shareholder primacy, broad skepticism toward government intervention, and the existing legal limitations in U.S. securities laws as reasons for the United States' relatively outlier approach).
51. *See* Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. Pa. J. Int'l L. 249, 290–91 (2019) [hereinafter Harper Ho, *ESG Disclosure Comparative*]. Existing federal securities laws mandate that public companies file periodic reports ("SEC Filings"), which contain primarily financial information, and only require companies to disclose non-financial information that has a material risk on the company's finances and operations. *Id.* SEC also mandates that companies file a proxy statement prior to a shareholder meeting, disclosing information on which the company solicits shareholder voting. *Id.* Otherwise, companies voluntarily disclose non-financial, ESG-related information according to various third-party reporting standards and in response to shareholder demands. *Id.*

tatives and regulators remain divided as to whether current ESG-related disclosure requirements are adequate.[52] However, U.S. lawmakers and SEC have signaled a shift in ESG information regulation through pending federal legislation and newly proposed agency rulemaking.[53]

1. The Current Framework

a. SEC

The Securities Exchange Act of 1934 ("SEA")[54] created SEC and delegated the independent[55] federal agency "broad authority over all aspects of the securities industry."[56] The fundamental role of SEC is to protect investors, regulate the securities market, and facilitate capital formation.[57] Regarding SEC's role with respect to ESG issues, free-market conservative groups argue that, as financial regulators, SEC should stay out of climate and environmental policy.[58] Whereas climate advocates and SRI proponents urge SEC to regulate non-financial information, reasoning that such regulation is necessary for SEC to fulfill its responsibility to protect investors and the public interest.[59] These two opposing views account for SEC's restrained regulation of non-financial reporting.

The SEA expressly empowers SEC to mandate corporate reporting for information "necessary or appropriate in the public interest or for the protection of investors."[60] Regulation S-X outlines reporting requirements for financial information[61] and Regulation S-K provides reporting requirements for non-financial information.[62] In response to heightened climate change concerns, SEC issued the Guidance Regarding Disclosure Related to Climate Change in 2010, which provided that corporations were required to disclose sustainability-related information only when such information is likely to have a "material effect" on the corporation's financial condition or operating performance.[63] In securities litigation, the U.S. Supreme Court has long established materiality to be an objective standard: information is material if a reasonable investor would consider the information important in decision-making.[64] Consequently, the guidance gave the discretion to corporations to determine whether such information was "material" to require disclosure,[65] allowing corporations to pick and choose which sustainability information to disclose on the front-end.

Criticism from investors and interest groups regarding the quality and truthfulness of mandated disclosures led SEC to issue the Regulation S-K Concept Release in 2016, asking for comments about whether the agency should mandate sustainability disclosures.[66] Out of over 10,100 responses, 10,070 expressed support for mandatory sustainability disclosure.[67] Additionally, the U.S. Government Accountability Office ("GAO") found that SEC faces constraints in overseeing ESG-related disclosures due to corporate discretion in the information they provide and its lack of subpoena power of such information.[68] SEC issued a final rule in 2020 amending Regulation S-K to eliminate and streamline certain financial information disclosure requirements, but fell short in addressing ESG issues.[69] The amendments maintained a "principles-based, registrant-specific" approach that gives much discretion to corporate management in disclosure decisions, as opposed to a "prescriptive" approach that would prescribe additional specific

52. *See* U.S. Gov't Accountability Off., GAO-18-188, Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements 2 (2018), https://www.gao.gov/assets/gao-18-188.pdf [https://perma.cc/XW8U-DGWZ].
53. See discussion *infra* Parts III.A.1.a., III.A.2.
54. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78qq.
55. Independent agencies of the United States, while part of the executive branch, have regulatory or rulemaking authority and are insulated to some degree from presidential control. *See Independent Agencies*, Justia, https://www.justia.com/administrative-law/independent-agencies/ [https://perma.cc/PDG9-WUWS] (May 2022); Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (holding that Congress could constitutionally limit the president's removal power of the FTC, an agency Congress intended to perform quasi-legislative and quasi-judicial powers, "free from executive control").
56. *The Laws That Govern the Securities Industry*, Investor.gov, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry [https://perma.cc/D62D-ZUS2] (last visited Apr. 12, 2022). *See* Union Pac. R.R. Co. v. Chicago & N.W. Ry. Co., 226 F. Supp. 400, 406 (N.D. Ill. 1964) ("The SEC is vested with primary responsibility for enforcing the Act and protecting the public interest."); Quinn & Co. v. Sec. & Exch. Comm'n, 452 F.2d 943, 947 (10th Cir. 1971) (reiterating the Court's recognition that SEC has "primary responsibility for protection of investors in securities" and SEC's "broad discretion" in enforcing the Securities Act).
57. Elvis Picardo, *Understanding the SEC*, Investopedia (Aug. 25, 2021), https://www.investopedia.com/articles/investing/112914/understanding-sec.asp [https://perma.cc/3NCJ-QRXP].
58. *See* Avery Ellfeldt, *Resigned to SEC Climate Moves, Conservatives Plan Defenses*, ClimateWire (July 7, 2021, 6:44 AM), https://subscriber-politicopro-com.gwlaw.idm.oclc.org/article/eenews/2021/07/07/resigned-to-sec-climate-moves-conservatives-plan-defenses-179698 [https://perma.cc/79CC-BJWY].
59. *See id.*
60. Securities Exchange Act of 1934, 15 U.S.C. §§ 77g, 78m.
61. Regulation S-X covers quantitative disclosures and sets out the form and content requirements for registering companies' annual reports and financial statements. 17 C.F.R. pt. 210 (2022).
62. Regulation S-K covers qualitative disclosures and sets out detailed disclosure requirements for the description of material aspects of a companies' operations. 17 C.F.R. pt. 229 (2022).
63. Securities and Exchange Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).
64. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (adding that "there must be a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available"); Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) (reaffirming the standard set in *TSC Industries, Inc.*, 426 U.S. 438).
65. *See* Becky L. Jacobs & Brad Finney, *Defining Sustainable Business—Beyond Greenwashing*, 37 Va. Env't L.J. 89, 125 (2019).
66. Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10,064, 81 Fed. Reg. 23916 (proposed Apr. 22, 2016). Regulation had not undergone revisions in over thirty years.
67. Winden, *supra* note 47, at 1217.
68. U.S. Gov't Accountability Off., GAO-18-188, Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements 16–17 (2018).
69. The only update to ESG disclosure requirements was to Item 101, requiring disclosure of material information regarding human capital resources. SEC Final Rule Release No. 33-10825, Modernization of Regulation S-K Items 101, 103, and 105. *See* Paul A. Davies et al., *SEC Amendments to Regulation S-K Are Silent on ESG Disclosures*, Latham & Watkins LLP (Aug. 31, 2020), https://www.globalelr.com/2020/08/sec-amendments-to-regulation-s-k-are-silent-on-esg-disclosures/ [https://perma.cc/TB69-87N6].

disclosures.[70] SEC reasoned that following its long-standing commitment to a principles-based approach would provide registrants more flexibility to tailor disclosures as appropriate, reduce the disclosure of immaterial information, and encourage registrants to disclose their business strategy, while still requiring disclosure of material information to investors.[71] Instead of mitigating the uncertainty in determining materiality required for disclosure, the amendments cemented discretion at the hands of registrants by clarifying and expanding its principles-based approach.[72] The amendments failed to even address ESG disclosures and drew sharp criticism from the dissenting Commissioners Allison Herren Lee and Caroline Crenshaw.[73]

The change in administration in 2021 marked a notable shift in environmental policy and signaled SEC's more robust response to investor demand for ESG information.[74] For example, on March 4, 2021, SEC announced the creation of a Climate and ESG Task Force ("ESG Task Force")—an enforcement task force that will "develop initiatives to proactively identify ESG-related misconduct."[75] Later that month, SEC's, then-Acting Chair, Commissioner Allison Herren Lee, welcomed public input on climate change disclosures, asking specifically about whether and how existing disclosure requirements should be modified and for comments to potential new disclosure requirements.[76] After receiving 5,876 responses calling for various levels and methodologies of ESG-related disclosure rules,[77] SEC proposed the new rule titled, "The Enhancement and Standardization of Climate-Related Disclosures for Investors" ("Proposed Rule on Climate-Related Disclosures").[78] Upon significant interest from a wide range of investors, market participants, and other stakeholders, the Commission extended the comment period[79] and is expected to finalize and issue the rule before the end of 2022.[80] Still, opponents maintain their skepticism regarding SEC's efforts to address ESG issues, arguing that existing disclosure requirements are adequate and already address climate-related disclosures when appropriate.[81]

b. ESG Litigation: Section 10(b) Securities Fraud Claims

Despite arguments that existing regulations adequately protect investors and provide for sufficient access to material information,[82] ESG-washing probes by investors and interest groups have led to a rise in lawsuits in the United States challenging corporations' ESG statements.[83] Investors can seek remedy for false or misleading ESG information under the anti-fraud rules provided by Section 10(b) of the SEA and SEC's implementing Rule 10b-5.[84] To date, litigants in such cases have struggled to overcome the unique barriers in surviving ESG-related securities fraud claims in court, only recently seeing success in courts.[85]

As an initial matter, plaintiffs challenging a corporation's ESG disclosures must demonstrate the materiality of an alleged misrepresentation or omission to survive a motion to dismiss, and companies frequently rely on the puffery

70. SEC Final Rule Release No. 33-10825, Modernization of Regulation S-K Items 101, 103, and 105.
71. *See id.*
72. *See id.*
73. *See* Commissioner Allison Herren Lee & Caroline A. Crenshaw, *Joint Statement on Amendments to Regulation S-K: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Information*, U.S. Sec. & Exch. Comm'n (Nov. 19, 2020) (on file with SEC).
74. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Division of Examinations Announces 2021 Examination Priorities (Mar. 3, 2021), https://www.sec.gov/news/press-release/2021-39 [https://perma.cc/D97X-BUTW] (announcing 2021 examination priorities, including greater focus on climate-related risks).
75. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/SD7E-2DLH] ("The initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules.") [hereinafter SEC Announces Task Force on Climate and ESG].
76. Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, U.S. Sec. & Exch. Comm'n (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/HNQ4-V7XA].
77. *Comments on Climate Change Disclosures*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/comments/climate-disclosure/cll12.htm [https://perma.cc/LJ76-JU36] (last visited Apr. 12, 2022).
78. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, and 249).
79. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 29059 (proposed May 12, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, and 249). The extended comment period closed on June 17, 2022, and the Commission received 10,592 comments. *Comments for the Enhancement and Standardization of Climate-Related Disclosure for Investors*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/comments/s7-10-22/s71022.htm [https://perma.cc/JNJ7-QJTU] (last visited Aug. 25, 2022).
80. *See Proposed SEC Climate Disclosure Rule*, Bloomberg L. (Aug. 12, 2022), https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/ [https://perma.cc/VG68-DEYB].
81. SEC's Republican Commissioners Hester M. Peirce and Elad L. Roisman expressed resistance against the new Task Force and SEC's direction toward stricter ESG information requirements. *See* Hester M. Peirce & Elad L. Roisman, *Enhancing Focus on the SEC's Enhanced Climate Change Efforts*, U.S. Sec. & Exch. Comm'n (Mar. 4, 2021), https://www.sec.gov/news/public-statement/roisman-peirce-sec-focus-climate-change [https://perma.cc/6YQN-XAUQ].
82. *See id.*
83. David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 ELR 10849, 10850–52 (Oct. 2020).
84. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b) (2022). Under Section 10(b) and Rule 10b-5, a company has a duty to ensure the accuracy and completeness of an affirmative statement, and courts have long recognized an implied private right of action where litigants can show material misstatement or omission in connection with the purchase or sale of any security. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014). The anti-fraud rules apply beyond formal SEC filings and official disclosures to less formal statements, such as press releases, investor calls, and websites. *See* Cherry, *supra* note 13, at 290.
85. *See* In re Vale S.A. Sec. Litig., No. 1:15-CV-9539-GHW, 2017 WL 1102666, at *24 (S.D.N.Y. Mar. 23, 2017) (finding company's public statements represented "present or historical facts" that could be the basis for Section 10(b) claims); In re Banco Bradesco S.A. Sec. Litig., 277 F. Supp. 3d 600, 660 (S.D.N.Y. 2017) (denying motion to dismiss Section 10(b) claims based on aspirational statements in company's code of conduct because the statements were "made in an effort to reassure the investing public about the Company's integrity, specifically with respect to bribery, during a time of concern," and thus material in context).

defense[86] to move for dismissal as a matter of law.[87] U.S. courts distinguish between inactionable puffery and material misrepresentation that raise a viable cause of action, but the fact-specific inquiry has led to inconsistent results in the context of ESG statements.[88] In determining whether a representation is mere puffery, courts consider the specificity of the statements,[89] the temporality of the statements,[90] and the context in which the statements are made rather than the type or form of document in which the statement appears.[91] Defendants have largely succeeded in using the puffery defense, leaving investors who relied on misleading or inaccurate statements without legal recourse.[92] Even so, as ESG statements become more common practice, plaintiffs are increasingly willing to challenge statements that run contradictory to corporate actions, and courts are willing to hear them.[93]

Unlike affirmative misrepresentations,[94] an omission is actionable as fraud to establish a Section 10(b) claim only when the corporation has a duty to disclose the omitted facts.[95] In the ESG context, plaintiffs are especially unlikely to sustain a challenge to an omission because regulations to date do not mandate ESG disclosures unless the corporation predetermines the information to be "material" to require disclosure.[96] The courts continue to grapple with establishing consistent findings due to the highly factual nature of the materiality element, as well as applying the remaining elements of a securities fraud claim,[97] where the court faces unique problems concerning investors increasingly paying attention to ESG information.[98]

2. Pending Legislation

a. Corporate Governance Improvement and Investor Protection Act

After a failed attempt in its first introduction in 2019, the Corporate Governance Improvement and Investor Protection Act ("H.R. 1187") was reintroduced on February 18, 2021, and passed in the U.S. House of Representatives on June 16, 2021.[99] Currently referred in the U.S. Senate Committee on Banking, Housing, and Urban Affairs, H.R. 1187 would amend the SEA by requiring securities issuers to annually disclose certain ESG metrics and their connection to the long-term business strategy of the issuer.[100] Congress proposed H.R. 1187 in response to investor criticism of the inadequacy of voluntary ESG disclosures and after finding that "ESG matters are material to investors."[101] Furthermore, H.R. 1187 would establish the Sustainable Finance Advisory Committee, a permanent advisory committee that will make policy recommendations to SEC "to facilitate the flow of capital towards

86. Puffery generally refers to exaggerated, vague, or loosely optimistic statements that are deemed immaterial or unworthy of reliance that no reasonable person would consider factual, and thus may be used as a defense to a fraud claim. *See* Zack v. Allied Waste Indus., No. CIV04-1640PHXMHM, 2005 WL 3501414, at *28–32 (D. Ariz. Dec. 15, 2005) (finding statements such as "[t]he objective is to take our best practices and do a better job" and "benefit us later in . . . years to come" too vague for a reasonable investor to be expected to rely on, and thus inactionable puffery).
87. *See Halliburton Co.*, 573 U.S. at 267 (providing the elements a plaintiff must prove to recover damages for violations of Section 10(b) and Rule 10b-5); City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183–84 (2d Cir. 2014) (finding bank's statements in initial offering materials about compliance, reputation, and integrity were inactionable puffery).
88. *Compare* In re BHP Billiton Ltd. Sec. Litig., 276 F. Supp. 3d 65, 80 (S.D.N.Y. 2017) (finding statements that would be too general and/or aspirational in isolation, made "over and over and over" suggested the company knew of its significance to reasonable investors), *with* In re Vale S.A. Sec. Litig., 2017 WL 1102666, at *21–22 (finding statements inactionable puffery when too general and aspirational to cause a reasonable investor to rely upon, especially when the company uses explicitly aspirational qualifiers such as "'aims to,' 'wants to,' and 'should,'" and "lack[s] objective criteria on which to judge their accuracy").
89. *Compare* In re YUM! Brands, Inc. Sec. Litig., 73 F. Supp. 3d 846, 863 (W.D. Ky. 2014) (finding statements immaterial when they are "vague, subjective assertions" that are "too squishy" that a reasonable investor would not consider them important in investment decisionmaking), *with* In re Massey Energy Co. Sec. Litig., 883 F. Supp. 2d. 597, 617–18 (S.D. W. Va. 2012) (finding the company's statements that it was "the industry leader" in safety and that safety was "the first priority every day" material misrepresentation because they are capable of being proven false), *and* Water & Sanitation Health, Inc. v. Chiquita Brands Int'l, Inc., No. C14-10 RAJ, 2014 WL 2154381, at *6 (W.D. Wash. May 22, 2014) (finding the company's environmental statements specific enough because they represented safe environmental practices in *all* relevant facilities).
90. The 1995 Private Securities Litigation Reform Act (PSLRA) distinguishes forward-looking statements from statements of past and present, explicitly granting a safe harbor for forward-looking statements. 15 U.S.C. § 78u-5. *See* Krim v. BancTexas Grp., Inc., 989 F.2d 1435, 1446 (5th Cir. 1993) (finding "projections of future performance not worded as guarantees" generally inactionable); In re Ligand Pharms., Inc. Sec. Litig., No. 04CV1620DMS(LSP), 2005 WL 2461151, at *17 (S.D. Cal. Sept. 27, 2005) (qualifying a present-tense statement as forward-looking "if the truth or falsity of the statement cannot be discerned until some point in time after the statement is made").
91. U.S. courts have liberalized the types of corporate communications a reasonable investor may rely on as potentially material statements to include press releases, news articles, websites, and other informal statements. *See* Semerenko v. Cendant Corp., 223 F.3d 165, 176 (3d Cir. 2000) (adopting the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Ninth Circuit reasoning that statements may qualify as material when "misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor rely, and that they were material when disseminated.").
92. *See* Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 Berkeley Bus. L.J. 391, 403 (2020).
93. *See* Hackett et al., *supra* note 83, at 10855.
94. When a corporation makes a disclosure, Section 10(b) and Rule 10b-5 impose a duty on the corporation to ensure the statement is accurate and complete, regardless of whether the disclosure was voluntary or required. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b) (2022).
95. Under Section 10(b) and Rule 10b-5, a duty to disclose may arise expressly pursuant to an independent statute or regulation, when there is corporate insider trading on confidential information, or a corporate statement that would otherwise be inaccurate, incomplete, or misleading. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b) (2022).
96. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).
97. To make a viable Section 10(b) securities fraud claim, a plaintiff must prove "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 460–61 (2013) (quoting Matrixx Initiative, Inc. v. Siracusano, 563 U.S. 27, 37–38 (2011)).
98. *See* Saad & Strauss, *supra* note 92.
99. Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (as passed by the U.S. House of Representatives, June 17, 2021).
100. *Id.* § 103(k)(1).
101. *Id.* § 102.

sustainable investments, in particular environmentally sustainable investments."[102] Even if members on the Senate Banking Committee have voiced opposition to the bill's passage,[103] SEC's latest proposed rule on climate-related disclosures for investors indicates the agency's authority and willingness to act unilaterally to shape ESG regulation in the United States.[104]

b. CLEAN Future Act

Though not specifically targeting ESG matters in securities laws, the CLEAN Future Act[105] would potentially give SEC more authority, or at least stronger impetus, to provide stricter ESG regulation. Currently introduced to the House and referred to the Subcommittee on Environment and Climate Change, the bill sets out national greenhouse gas reduction goals and mandates all federal agencies to develop a plan to achieve those goals.[106] Notably, the legislation proposes to amend the SEA by adding mandatory climate change-related disclosures to be included in SEC filings.[107] Both the CLEAN Future Act and H.R. 1187 would require SEC to promulgate implementing rules and regulations to specify the required information, the forms of acceptable disclosure, as well as the standard(s) to follow.[108] Thus, regardless of the likelihood of passage and the length of time until the legislation would be effective, SEC should act to create a mandatory framework for ESG disclosures.

B. The EU: Adopting a Mandatory Disclosure Framework

Leading the way in environmental policy, the EU maintains its recognition as a "global ecological leader."[109] Consistent with this role, the EU are the frontrunners in adopting a mandatory disclosure framework for ESG information. Unlike U.S. regulators who primarily focus on a company-focused approach, EU regulators are targeting investment managers in their efforts to regulate ESG disclosures.[110] The Sustainable Finance Disclosure Regulation ("SFDR"), effective as of March 2021, is the most relevant EU development and its implementation remains ongoing.[111]

Subsection 1 provides a review of SFDR's predecessor, the Non-Financial Reporting Directive ("NFRD"), followed by case studies of its transposition by Member States of the EU ("Member States") to anticipate possible issues and solutions in the EU's latest developments. Subsection 2 discusses the latest EU regulations, which include the EU Action Plan for Financing Sustainable Growth of 2018, SFDR, the EU Taxonomy Regulation, and the Corporate Sustainability Reporting Directive.

1. The NFRD of 2014

In 2014, the EU introduced the NFRD, mandating Member States to enact laws that will require large corporations to disclose non-financial information as part of their annual public reporting obligations.[112] The EU stated in the Directive that the amendments were made to increase transparency and uniformity across Member States of the social and environmental information provided by corporations across industries.[113] Notably, the NFRD introduced the "double materiality" concept[114]—companies must report both on how sustainability issues affect their performance as well as the company's own impact on people and the environment.[115]

Though a significant development, by still allowing both mandatory and voluntary reporting, the NFRD likely weakened its effectiveness.[116] Specifically, the NFRD requires a "non-financial statement,"[117] but it did not prescribe a standard or manner in which to produce such a statement.[118] As a result, examination of Member States with varying degrees of pre-NFRD non-financial reporting requirements showed that transposition of the NFRD into their national laws increased the quantity of reporting in some Member States but failed to improve the quality of reporting.[119]

---

102. *Id.* § 104(k).
103. *See* Letter from Republicans of the U.S. S. Comm. on Banking Hous. & Urb. Affs. to Gary Gensler, Chair & Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n (June 13, 2021), https://www.banking.senate.gov/imo/media/doc/banking_committee_republicans_letter_to_sec_on_climate_disclosures.pdf [https://perma.cc/K4GV-MP4F].
104. *See* Jennifer C. Guest, *Client Alert: Will ESG Disclosures Be Mandated by Law? A Legislative Analysis*, King & Spalding (Sept. 22, 2021), https://www.kslaw.com/news-and-insights/will-esg-disclosures-be-mandated-by-law-a-legislative-analysis [https://perma.cc/Y3QA-7393] (discussing the uncertainty of whether SEC has the agency authority to require ESG data without explicit congressional authorization).
105. Climate Leadership and Environmental Action for our Nation's Future Act, H.R. 1512, 117th Cong. (2021).
106. *Id.* §§ 101, 102.
107. *Id.* § 852.
108. *Id.* § 852; Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. § 103(b)(1) (as passed by the House, June 17, 2021).
109. *See* Jacques Le Cacheux & Eloi Laurent, Report on the State of the European Union: Is Europe Sustainable? 125 (1st ed. 2015) (exploring how the EU gained its prominent global position and the global significance of EU's environmental policy).
110. *See* Tim Quinson, *SEC Takes a Different Route Than Europe on Climate Disclosures*, Bloomberg Green (Sept. 15, 2021, 6:00 AM), https://www.bloomberg.com/news/articles/2021-09-15/the-sec-is-taking-a-different-route-than-europe-on-climate-disclosures [https://perma.cc/D6BH-LNPU].
111. See discussion *infra* Part III.B.2.
112. *See* Directive 2014/95/EU, of the European Parliament and of the Council of 22 Oct. 2014, Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1 [hereinafter EU NFRD].
113. *See id.*
114. European Commission Press Release QANDA/21/1806, Questions and Answers: Corporate Sustainability Reporting Directive proposal (Apr. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1806 [https://perma.cc/525H-SJRD] [hereinafter QANDA/21/1806].
115. EU NFRD, *supra* note 112.
116. Constance Z. Wagner, *Evolving Norms of Corporate Social Responsibility: Lessons Learned From the European Union Directive on Non-Financial Reporting*, 19 Transactions: Tenn. J. Bus. L. 619, 624 (2018).
117. EU NFRD, *supra* note 112.
118. Deirdre Ahern, *Turning Up the Heat? EU Sustainability Goals and the Role of Reporting Under the Non-Financial Reporting Directive*, 13 Eur. Co. & Fin. L. Rev. 599, 601–02 (2016).
119. Wagner, *supra* note 116, at 624.

a. France and Denmark

France, notable for being one of the pioneers of mandating non-financial reporting,[120] had pre-NFRD national laws that required covered companies to disclose certain categories of corporate activity—including environmental impact, labor standards, and community involvement.[121] Despite its long-standing development in non-financial disclosure regulation, the lack of government sanctions, unclear reporting standards, and the "comply or explain" approach[122] contributed to weakening the effectiveness of France's pre-NFRD framework.[123] Denmark, another Member State with a relatively developed pre-NFRD disclosure framework, was the first to transpose the NFRD into national law.[124] Much like France, Denmark's laws defined the ESG-related information to be included in annual reports, but lacked consistency in reporting and contained similar comply-or-explain requirements.[125]

After the introduction of NFRD in 2014, both France and Denmark implemented national laws that went beyond the minimum disclosure requirements.[126] This may suggest that for States with an already developed regulatory framework for non-financial reporting, transitioning to a mandatory disclosure regime would be welcomed by the government. Moreover, corporations in those States will be better equipped to make adjustments to an already established practice. However, both France and Denmark's implementing legislation fell short in prescribing a uniform reporting standard despite exceeding NFRD requirements.[127] The lack of a uniform reporting standard is one of the most difficult challenges that corporations, investors, and regulators alike continue to struggle with across jurisdictions in the global context.

b. The U.K. and Italy

Though no longer a Member State after Brexit in 2020, the U.K. serves as an important case study due to its relatively well-developed hybrid public-private system, which was largely dependent on voluntary disclosure measures at the time of NFRD.[128] A notable development in the U.K. that remains undeveloped in the United States is the direct role of the Financial Reporting Council ("FRC") in overseeing and establishing standards for ESG reporting.[129] In comparison to France and Denmark, the U.K.'s implementation of NFRD took an almost exclusively copy-out approach[130] without imposing any additional requirements.[131] The U.K. largely remained silent on specifying what companies should disclose and stopped short of requiring an audit on the content.[132] Italy, by comparison, lacked development in non-financial reporting regulation and made considerable reforms to its existing regulations to meet NFRD's minimum disclosure requirements.[133] In doing so, Italy *over*-implemented some aspects of NFRD, resulting in new divergences among the Member States, including requirements that companies disclose changes in reporting standards and policies.[134]

Overall, NFRD implementation fell short in achieving its purpose of creating more consistency and comparability between Member States, and instead created new divergences in transposition. Key differences in specifying the content of required disclosures, location of disclosures, and auditing requirements led to clear inconsistencies in transposition.[135] Even similarities in transposition weakened NFRD's effectiveness.[136] For example, all Member States failed to define the materiality concept, and all countries conferred discretion to companies to choose the reporting framework to use—maintaining the difficulty of material comparability.[137] Though the Commission later in 2019 published non-binding guidelines on non-financial reporting under NFRD,[138] the subsequent shift to a mandatory disclosure framework demonstrates the inadequacy of such voluntary guidelines.

2. EU Action Plan for Financing Sustainable Growth

In 2018, the Commission announced the EU Action Plan for Financing Sustainable Growth (the "Action Plan" or

120. *See* Jacobs & Finney, *supra* note 65, at 124 (noting that France legislated on mandatory reporting as early as the 1970s, requiring disclosure of employment-related performance information).
121. Wagner, *supra* note 116, at 671–72.
122. The "comply or explain" approach refers to a company's option to not disclose required information if the company can explain a rationale for why the information is not relevant to its operations. EU NFRD, *supra* note 112. This approach is consistent with the NFRD, however the latest EU Directive (SFDR) has abandoned the "explain" component and mandates full compliance. *Compare* EU NFRD, *supra* note 112, *with* EU SFDR, *infra* note 141.
123. Wagner, *supra* note 116, at 673.
124. *See id.* at 676.
125. *See id.* at 677–82.
126. *See id.* at 676, 684.
127. *See id.* at 686.
128. *See* Selena Aureli et al., *The Role of Existing Regulation and Discretion in Harmonizing Non-Financial Disclosure*, 16 Acct. in Eur. 290, 295 (2019) (describing the U.K.'s pre-NFRD non-financial reporting practices as largely left to voluntary measures taken by companies, coexisting with the Companies Act 2006, which mandates non-financial information disclosure in the strategic report); Companies Act 2006, c. 46 (U.K.), https://www.legislation.gov.uk/ukpga/2006/46/contents [https://perma.cc/VS3C-EWRV].
129. The FRC is an independent regulator in the U.K. and Ireland, responsible for regulating auditors, accountants, and actuaries, and setting the U.K.'s Corporate Governance and Stewardship Codes. *About the FRC*, Fin. Reporting Council, https://www.frc.org.uk/about-the-frc [https://perma.cc/BHE4-Y4TT] (last visited Mar. 5, 2022).
130. A "copy-out" approach refers to the implementation practice of adopting the same wording as that of an EU Directive. *EU Legislative Process—Overview*, Lexis PSL, https://www.lexisnexis.com/uk/lexispsl/publiclaw/document/413479/5CYS-BVS1-DYY6-F02M-00000-00/EU_legislative_process_overview [https://perma.cc/2ZM2-FUPQ] (last visited Aug. 24, 2022).
131. Aureli et al., *supra* note 128, at 306. The U.K.'s implementation approach is partly attributable to its pre-existing requirements and partly attributable to an effort to maintain the status quo. *Id.*
132. *Id.*
133. *Id.* at 291.
134. *Id.* at 301.
135. *Id.* at 305.
136. *Id.* at 304.
137. *Id.*
138. Communication From the Commission, Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information), 2017 O.J. (C 215/01).

the "Plan").[139] The Plan set out a comprehensive strategy to further connect finance with sustainability and proposed ten key actions—several of which were immediately implemented in the Commission's legislative package—while other laws would follow.[140] Two key developments in preventing greenwashing in financial product information followed as part of the Action Plan: the SFDR effective March 10, 2021,[141] and the EU Taxonomy Regulation ("EU Taxonomy") effective January 1, 2022.[142] The SFDR, as part of action 9 of the Action Plan to strengthen sustainability disclosure, requires manufacturers of financial products[143] and financial advisors in the EU to disclose information on various ESG considerations to end-investors publicly.[144] SFDR imposes obligations on financial market participants and financial advisors to publicly disclose whether they consider ESG-related factors in their investment decisions, and if so, how their considerations are reflected at the financial product level.[145] Also aiming to prevent greenwashing in financial product marketing, the new EU Taxonomy established a common classification system that provided definitions for which economic activities are considered environmentally sustainable.[146]

While leading the way in setting a mandatory disclosure framework, the ongoing development of the Action Plan and its respective regulations is not without challenges. The complexity of the SFDR required two levels of mandatory disclosure: Level 1 disclosure requirements[147] were effective in March 2021, while Level 2 requirements[148] were set to become effective in January 2022.[149] However, the deadline for Level 2 was delayed twice and is expected on January 1, 2023, due to the "length and technical detail" of the directive.[150] The delay means that Level 2's specific methodologies and presentation of SFDR disclosure requirements will not go into effect until the later date. The EU Taxonomy, though successfully effective on the projected date, remains contentious over Member State disagreements on which investments are environmentally sustainable.[151] For now, how the EU and its Member States will respond to these challenges remains an open question.

Among its ongoing developments, the EU adopted the Corporate Sustainability Reporting Directive ("CSRD") proposal on April 21, 2021, which will replace NFRD in 2023.[152] The amending directive aims to extend NFRD's scope and reporting requirements in an effort to tackle quality reporting, consistency, and comparability among Member States.[153] CSRD clarifies the principle of double materiality by "removing any ambiguity" about the mandatory disclosure requirement for all information necessary to understand how sustainability matters affect companies and the company's impact on sustainability matters.[154] CSRD will also make mandatory third-party assurance to ensure reliability of reporting (i.e., mandatory auditor reports) and refines the materiality concept to clarify required disclosure information.[155]

C. *Third-Party Standard-Setting Bodies*

Amidst the emergence of ESG-related laws and regulations adopted by governments, third-party independent organizations have played a particularly influential role in setting ESG standards at the international level. Seeking to meet investors' informational demands, numerous and diverse third-party organizations have developed their own ESG-related reporting frameworks.[156] But however sound and

139. *Communication From the Commission, Action Plan: Financing Sustainable Growth*, COM (2018) 97 final (Mar. 8, 2018).
140. The ten key actions are as follows: (1) Establishing an EU classification system for sustainability activities; (2) creating standards and labels for green financial products; (3) fostering investment in sustainable products; (4) incorporating sustainability when providing investment advice; (5) developing sustainability benchmarks; (6) better integrating sustainability in ratings and research; (7) clarifying institutional investors and asset managers' duties; (8) incorporating sustainability in prudential requirements; (9) strengthening sustainability disclosure and accounting rulemaking; and (10) fostering sustainable corporate governance and attenuating short-termism in capital markets. *Id.*
141. Commission Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 Nov. 2019, on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1 [hereinafter EU SFDR].
142. Commission Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020, on the Establishment of a Framework to Facilitate Sustainable Investment, and amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 1, 13 [hereinafter EU Taxonomy].
143. *Communication From the Commission, Action Plan: Financing Sustainable Growth*, COM (2018) 97 final (Mar. 8, 2018). Financial market participants include asset managers, institutional investors, insurance companies, pension funds, and all entities that offer financial products and manage clients' money. *Sustainability-Related Disclosure in the Financial Services Sector*, European Comm'n, https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en [https://perma.cc/Z7FH-DZMQ] (last visited Aug. 24, 2022) [hereinafter *Sustainability-Related Disclosure*].
144. EU SFDR, *supra* note 141.
145. *Id.*
146. EU Taxonomy, *supra* note 142, at 11.
147. Level 1 disclosures are "entity level disclosures which require information about financial market participants' policies on the identification and prioritization of principal adverse sustainability impacts." *SFDR—A Snapshot*, KPMG's Creative Servs. (Mar. 10, 2021), https://assets.kpmg/content/dam/kpmg/ie/pdf/2021/03/ie-sustainable-finance-disclosure-reg-sfdr.pdf [https://perma.cc/7JB2-XNDC].
148. Level 2 disclosures will include the Level 1 principal adverse sustainability impacts statement, supplemented by regulatory technical standards ("RTS") that would impose more onerous requirements on in-scope firms. *Sustainability-Related Disclosure*, *supra* note 143.
149. EU SFDR, *supra* note 141, at 2.
150. Letter from John Berrigan, the Eur. Comm'n Dir. Gen., to Irene Tinagli, Chair of the Comm. on Econ. & Monetary Aff. & Andrej Šircelj, President of the ECOFIN Council (Nov. 25, 2021) (on file with the EC) [hereinafter Level 2 Second Delay Letter].
151. *See* Antony Ashkenaz, *EU Must Be Joking! Germany in Furious Tirade as Macron's "Greenwashing" Plans Approved*, Express (Jan. 03, 2022, 12:16 PM), https://www.express.co.uk/news/science/1543971/germany-france-greenwashing-macron-scholz-eu-green-taxonomy-climate-change-environment [https://perma.cc/S9XZ-4EBX] (Germany expressed strong criticism over the EC's proposal to consider natural gas and nuclear power as "green" in the EU taxonomy). The remaining division of the Member States on whether such activities should be classified as green reflects the differing and conflicting stances that correlate with the States' reliance on differing energy sources. *Id.*
152. Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No. 537/2014, as Regards Corporate Sustainability Reporting, at 12–13 COM (2021) 189 final (Apr. 21, 2021).
153. *Id.* at 19.
154. *Id.*
155. *See* Lisa Kreusch, *The Corporate Sustainability Reporting Directive (CSRD)*, planA (June 2, 2022), https://plana.earth/academy/csrd-corporate-sustainability-reporting-directive/ [https://perma.cc/83DU-BDM3].
156. *See* Novisto ESG Innovation Team, *List of Key ESG Reporting Frameworks, Standards and Ratings*, Novisto (Apr. 21, 2022), https://novisto.com/list-esg-reporting-framework-standard/ [https://perma.cc/P398-EJQG].

instructive such standards may be, the diversity and freedom of choice that corporations have in which standards to follow results in persistent challenges for comparable and consistent information. The following are three of the most prominent and established standard-setting organizations.

The U.S.-based Sustainability Accounting Standards Board ("SASB"), founded in 2011 under the Value Reporting Foundation,[157] sets industry-specific standards across seventy-seven industries.[158] SASB's ESG reporting standards "guide the disclosure of financially material sustainability information by companies to their investors,"[159] and are particularly appealing to the U.S. business community because they were designed to be compatible with existing SEC regulations.[160]

In 2015, the Financial Stability Board,[161] an international body composed of all G20 major economies and the United States, established the Task Force on Climate-Related Financial Disclosures ("TCFD") to "improve and increase reporting of climate-related financial information."[162] The TCFD develops voluntary guidelines and processes for companies to report the financial implications associated with the climate-related issues they face.[163] In addition to the TCFD standards' prominence and wide acceptance in the United States, these standards, like the SASB standards, were designed to readily align with SEC standards.[164]

The Global Reporting Initiative ("GRI"), another independent standards organization, was created in 1997 following the Exxon oil spill[165] to "create the first accountability mechanism to ensure companies adhere to responsible environmental conduct principles."[166] With over two decades in operation, the GRI is the first to set global standards ("GRI Standards" or "Universal Standards") for sustainability reporting,[167] now incorporating reporting on human rights and environmental impact.[168] Whereas the SASB and TCFD standards were specifically created in accordance with existing national regulations, GRI Standards is a comprehensive reporting framework designed to allow any corporation to follow.[169] GRI Standards are adopted worldwide,[170] and the EU is considering incorporating the Universal Standards for its mandatory nonfinancial reporting framework.[171]

IV. Proposal for the United States

Legal developments are rapidly taking form across jurisdictions in response to the current regulatory needs surrounding ESG disclosures.[172] With the EU as the first to tackle ESG-washing at a systemwide level, the United States has the advantage of looking to Europe's ongoing developments.[173] The following section proposes that the United States should abandon its voluntary, private-ordering framework and adopt a mandatory disclosure framework for ESG information. Due to the inherent delays and uncertainties of legislative action, SEC should take advantage of its current momentum in ESG disclosure efforts for more immediate solutions. In doing so, SEC should establish a single independent standard-setting body, akin to FASB in the financial reporting context, specifically tailored for the U.S. business community. Finally, the United States should make reforms at the legislative level to ensure long-lasting effects.

A. *Call for a Mandatory Disclosure Framework*

The United States should adopt a mandatory disclosure framework for ESG-related information in the securities trading and investment context to combat greenwashing in ESG claims and metrics. A mandatory disclosure framework for securities disclosures is necessary to ensure reliable and consistent information for investors, in addition to encouraging genuine efforts to improve corporate performance in ESG matters. SEC, the agency charged with enforcing the nation's securities laws, is the appropriate agency to implement a mandatory framework for the securities industry.[174] To shift to a mandatory disclosure

157. The Value Reporting Foundation is a global nonprofit organization that offers resources designed "to help businesses and investors develop a shared understanding of enterprise value." Value Reporting Found., https://www.valuereportingfoundation.org [https://perma.cc/BGH6-QGNN] (last visited Jan. 30, 2022).

158. *About Us*: *SASB Standards Connect Business and Investors on the Financial Impacts of Sustainability*, SASB Standards, https://www.sasb.org/about/ [https://perma.cc/8H8Y-QTQZ] (last visited Mar. 6, 2022).

159. *Id.*

160. Jacobs & Finney, *supra* note 65, at 128.

161. *About the FSB*, Fin. Stability Bd., https://www.fsb.org/about/ [https://perma.cc/CHD6-KX65] (Nov. 16, 2020) ("The Financial Stability Board (FSB) is an international body that monitors and makes recommendations about the global financial system.").

162. *Climate Change Presents Financial Risk to the Global Economy*, Task Force on Climate-Related Fin. Disclosures, https://www.fsb-tcfd.org [https://perma.cc/N2TR-MBM5] (last visited Jan. 30, 2022).

163. Robyn Bishop, *Investing in the Future: Why the SEC Should Require a Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Lewis & Clark Env't L. Rev. 491, 504–05 (2018).

164. *Id.* at 506.

165. *Exxon Valdez Oil Spill*, history.com (Mar. 23, 2021), https://www.history.com/topics/1980s/exxon-valdez-oil-spill [https://perma.cc/PN7F-ZQQZ] (providing a historical account of the Exxon oil spill).

166. *Our Mission and History*, Glob. Reporting Initiative, https://www.globalreporting.org/about-gri/mission-history/ [https://perma.cc/D73B-B8GN] (last visited Aug. 6, 2022).

167. *Id.*

168. *The Global Standards for Sustainability Reporting*, Glob. Reporting Initiative, https://www.globalreporting.org/standards/ [https://perma.cc/HP46-SLVD] (last visited Aug. 6, 2022).

169. *Id.*

170. In 2019, the GRI reported that the organization's reporting standards had a 93% usage rate by the world's largest 250 corporations reporting on their sustainability performance. Jacobs & Finney, *supra* note 65, at 127.

171. *ESG Reporting Frameworks & Standards—Continue to Multiply*, Governance & Accountability Inst., Inc. (Oct. 14, 2021), https://www.ga-institute.com/nc/news/newsletter/press-release/article/esg-reporting-frameworks-standards-continue-to-multiply.html [https://perma.cc/9UQ4-6MAR].

172. *See* Christine Dawson, *ESG Regulations Around the World*, ESGClarity (Mar. 14, 2022), https://esgclarity.com/esg-regulations-around-the-world/ [https://perma.cc/5NLU-A8NK].

173. *See id.*

174. According to Profs. Cynthia Williams and Jill E. Fisch, expanding mandatory ESG disclosure requirements is "consistent with the SEC's authority to promote market efficiency, and within its broad mandate 'to promulgate

framework, SEC should further amend Regulation S-K to address the ESG issues that the 2020 Final Rule failed to cover.[175]

SEC should take the following actions to adopt a mandatory disclosure framework: provide a clearer definition of materiality, adopt the EU's "double materiality principle," and dedicate a single, independent standard-setting body to prescribe ESG information disclosure standards rather than allowing corporations to choose which standards, if at all, to follow. Subsection 1 explains why SEC should expand mandatory ESG-information disclosure requirements. Subsection 2 discusses why and how SEC should refine the "materiality" issue for mandatory disclosures and proposes SEC adopt the double materiality principle to expand mandatory disclosure requirements. Finally, Section IV.B. explains the importance of dedicating a single and independent standard setter and suggests selecting a pre-existing U.S.-based organization.

B. SEC Should Expand Mandatory ESG Disclosure Requirements

As discussed in Part III, SEC is charged with broad authority over the securities industry to protect investors, facilitate capital formation, and protect the public interest.[176] Opponents of stricter SEC regulation of ESG disclosures argue that current requirements already cover ESG-related information that is material to a company's financial operations such that the reasonable investor would deem important.[177] This view is based on the presumption that the threshold for materiality in existing federal securities law is adequate in protecting investor and public interest in the context of ESG and SRI. The unceasing influx of Section 10(b) claims across the nation demonstrates the contentious nature and uncertain future of when ESG information is deemed material to require disclosure.[178] Meanwhile, studies have long shown that a company's ESG practices have a positive correlation with its financial performance.[179] Beyond financial performance, the prevalence of SRI among investors raises new questions about the materiality factor when investors take into account ESG in their investment decisions, whether financially impactful or not.

Thus, for SEC to properly protect today's investors, the agency should amend existing regulations and provide for new mechanisms to adapt to the ever-changing needs of the business community. The 2020 Final Rule amending Regulation S-K maintained its "principles-based" approach and effectively left discretion to corporations to determine whether information is material.[180] The current Proposed Rule on Climate-Related Disclosures requires information about a corporation's climate-related risks that are "reasonably likely to have a material impact on its business, results of operations, or financial condition," including disclosure of its greenhouse emissions.[181]

The proposed rule details extensively, over 500 pages, specific climate-related disclosure requirements, including information on the oversight and governance of climate-related risks by the company's board and management, the likely material impact of climate-related risks on its business and financial performance, its processes for identifying and assessing climate-related risks, and the corporation's climate-related targets or goals.[182] However, the proposed rule preserves the current definition of materiality by keeping it "consistent with Supreme Court precedent" and "similar to what is required when preparing the MD&A section."[183] By maintaining the current materiality definition, the proposed rule would likely allow for greenwashing to persist.

1. Adoption of a Mandatory Disclosure Framework: Refine the Definition of "Material" and Adopt the EU's Double Materiality Principle

The current ESG disclosure system, and likely the proposed rule, allows ESG-washing practices to continue largely unchecked by only requiring ESG disclosure when it is "material" to financial performance as currently defined.[184] As discussed above, such a standard gives the corporation discretion to predetermine whether such information is material to require disclosure.[185] Even when investors seek remedy for misrepresentations, courts have been left to struggle with defining materiality in the ESG context without clearer legislative or administrative interpretations.[186] Accordingly, clarification of mandatory ESG disclosure requirements by refining the definition of "material" is necessary to clearly establish corporate obligations and improve the reliability of disclosures for investors. To dispel any ambiguity in what information is "material" to require disclosure, SEC should look to pending legislation H.R. 1187, which defines materiality as such: "ESG metrics . . . are de facto material for the purposes of disclosures under the Securities Exchange Act."[187]

rules for registrant disclosure as necessary or appropriate in the public interest or for the protection of investors.'" El-Hage, *supra* note 42, at 385.

175. See discussion *supra* notes 70–73.
176. *Supra* Part III.A.1.a. notes 56–59.
177. Ellfeldt, *supra* note 58.
178. *See* Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys., 141 S. Ct. 1951, 1963 (2021) (holding that the generic nature of an alleged misrepresentation is often important evidence of price impact that courts in securities-fraud class actions should consider at class certification, vacating and remanding for further consideration of the generic nature of the company's alleged misstatements).
179. *See* Tensie Whelan et al., *ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence From 1,000 Plus Studies Between 2015-2020*, NYU Stern Ctr. for Sustainable Bus. (2021) (finding positive correlations between ESG performance and operational efficiencies, stock performance, and lower cost of capital).
180. Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, (Oct. 8, 2020) (to be codified at 17 C.F.R. §§ 229, 239, and 240).
181. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, and 249).
182. *Id.* at 21345.
183. *Id.* at 21351.
184. *Id.* See also discussion *supra* Part III.A.1.
185. See discussion *supra* Part III.A.1.
186. See discussion *supra* Part III.A.1.b.
187. Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (as passed by the House, June 17, 2021).

A second component SEC should consider in developing a mandatory ESG disclosure framework is the "double materiality" concept adopted by the EU.[188] The double materiality principle requires disclosure of both sustainability risk affecting the corporation as well as the corporation's impact on sustainability matters.[189] Only requiring disclosure of ESG-related information that affects or is likely to affect the corporation results in a huge gap in the information that investors require access to in their investment decisions, especially for the ESG-conscious investors. Adoption of the double materiality concept will face heavy backlash and is highly likely to face litigation challenging SEC's jurisdiction to require disclosure of information without a direct connection to a company's financial value.[190] Even SEC, however, recognizes the growing investor demand for climate-related disclosure in seeking to consider such information as part of their investment decision-making process.[191]

Opponents also argue that expanding reporting requirements would result in overreporting and inundating investors with immaterial information.[192] To combat this risk, the standard setter should provide industry-specific standards and qualifiers, rather than an across-the-board approach. The focus should be on increasing the quality of reporting rather than the quantity by specifying appropriate industry-relevant information. Such industry-specific and quality-focused standards would indeed be an arduous task requiring substantial resources, as demonstrated by the EU's delays in implementing its SFDR Level 2 requirements.[193] However, existing standard-setting organizations already use their resources and expertise in developing their standards to develop industry-specific standards.[194]

Another potential problem with providing mandatory ESG disclosure requirements in place of the corporate-discretionary material framework is the possibility of a deterrent effect. Opponents argue that expanding the scope of disclosures will deter companies from disclosing more than the information strictly required to avoid liability for statements later challenged.[195] To mitigate the deterrence effect and allow for flexibility, several Member States adopted the "comply-or-explain" approach, leaving corporations with the discretion to not follow an otherwise required reporting policy if it can provide a "clear and reasoned explanation."[196] However, the comply-or-explain approach in the NFRD context impaired its effectiveness in achieving consistency and comparability among the Member States.[197] The SFDR effectively has abandoned the "explain" component and mandates full compliance, and U.S. regulators should do the same to avoid facing the same issues.

However, unlike the EU's approach, which targets certain financial market actors,[198] the United States should maintain its focus on disclosure requirements at the corporate actor level. The EU Action Plan's focus on financial market actors has already uncovered complications.[199] The EU SFDR applies to financial market participants and financial advisors with an average of 500 or more employees.[200] By focusing on the intermediary between companies and end-investors, the SFDR approach aims to create a stronger role for covered financial entities as mechanisms to combat ESG-washing.[201] However, creating such an expansive regulatory framework with no pre-existing framework in place has inevitably led to challenges, such as uncertainties as to which entities qualify and the delayed rolling out of concrete regulatory standards for reporting companies to follow.[202] To combat similar challenges, the United States is likely to fare better by leveraging the existing securities regulatory framework under the federal securities laws and SEC.

2. Enforcement: SEC's ESG Task Force

An advantage of current securities laws and SEC in ESG reporting regulation is the newly created ESG Task Force.[203] Following adoption of mandatory ESG disclosure requirements, SEC already has a designated department within its Division of Enforcement with a purpose to identify and investigate ESG-washing practices.[204] Working in tandem with the courts, the Task Force will be equipped to protect investors from ESG-related misinformation if it is tasked with implementing the proposed framework. Enforcement on a national scale, especially considering interstate commerce and multinational corporations, will require large-scale resources.[205] Accordingly, SEC and the ESG Task Force should establish working agreements with

188. *See* QANDA/21/1806, *supra* note 115.
189. EU NFRD, *supra* note 114, at 5.
190. SEC Commissioner Hester M. Peirce released a statement explaining the reasons why she opposes the proposal: existing rules already cover material climate risks, the proposed rule dispenses and distorts materiality, the proposal will not lead to comparable, consistent, and reliable disclosures, and SEC lacks authority to propose the rule. Comm'r Hester M. Peirce, *We Are Not the Securities and Environmental Commission—At Least Not Yet*, U.S. Sec. & Exch. Comm'n (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/9JNV-QGGW] [hereinafter *Commissioner Hester's Statement on the New Rule Proposal*].
191. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, and 249).
192. *See Commissioner Hester's Statement on the New Rule Proposal*, *supra* note 190, at 3.
193. *See* Level 2 Second Delay Letter, *supra* note 150.
194. *See Standards Overview*, SASB Standards, https://www.sasb.org/industry-specific/ [https://perma.cc/XU69-AEAZ] (last visited Apr. 12, 2022).
195. *See id.*
196. *See* Wagner, *supra* note 116, at 648.
197. *See id.* at 673.
198. EU SFDR, *supra* note 141, at 3.
199. *See* BIQH SFDR Team, *Sustainable Finance Disclosure Regulation [SFDR]: Common Market Data Challenges*, BIQH (Aug. 25, 2021), https://www.biqh.com/blog/sustainable-finance-disclosure-regulation-sfdr-market-data-challenges/ [https://perma.cc/VS9D-E3A9].
200. EU SFDR, *supra* note 141, at 9.
201. *Id.* at 2–6.
202. *See SFDR Compliance to Remain a Struggle for Many Companies*, A-Team Insight (Oct. 20, 2021), https://a-teaminsight.com/blog/sfdr-compliance-to-remain-a-struggle-for-many-companies/ [https://perma.cc/3UVW-AGEQ].
203. SEC Announces Task Force on Climate and ESG, *supra* note 75.
204. *See id.*
205. *See* U.S. Sec. & Exch. Comm'n, Fiscal Year 2023 Congressional Budget Justification Annual Performance Plan; Fiscal Year 2021 Annual Performance Report 24–25 (2022) (requesting additional positions across several divisions and offices for climate-related reporting enforcement and regulation).

state securities agencies[206] to ensure national coherence and avoid overlap.

3. Call for a Single Independent Standard-Setting Body

SEC should establish an independent standard-setting body charged with establishing ESG reporting standards for corporations to follow. The EU's developments since pre-NFRD serves as an example model the United States can learn from regarding likely challenges and differing considerations. One of the primary shortcomings of NFRD was its lack of a uniform standard for Member States to adopt into their national laws.[207] Instead, by allowing for discretion on the matter, NFRD not only failed to increase consistency and comparability among Member States, but failed to improve the quality of reporting as well.[208] To avoid the same self-defeating fate, SEC should define clearly and specifically what ESG information must be disclosed and designate a single standard-setting body for U.S. companies, as is further discussed in the next section.

Though SEC is the appropriate enforcement agency to promulgate the relevant rules and oversee violations, it must dedicate a single, independent organization to set the standards. This is necessary not only because setting the standards is beyond the scope of SEC's authority, expertise, and resources,[209] but it also ensures consistent and trustworthy industry standards that are insulated from political influence and private interests. In dedicating an independent standard setter, the agency should reformulate its existing financial reporting framework and adapt it into an ESG reporting framework. SEC designated FASB[210] in 1973 in response to calls akin to current demands for ESG requirements in light of bursting financial accounting scandals.[211] Despite criticisms from its formation, particularly when the nation has faced financial crises, FASB has endured its place in the financial reporting framework.[212] Thus, modeling after the financial reporting framework is a viable answer.

As an initial matter, SEC should designate only one organization, and the standard-setting organization should act independently from the government. A single organization is necessary to ensure uniformity and competition among existing standard setters.[213] Choosing a single organization will require resolving two issues: determining the organization that will serve as the single standard setter and determining the future of the remaining unselected but already operating standard setters. One clear choice SEC can make is between using a pre-existing U.S.-specific organization, using a pre-existing non-U.S.-specific organization, or creating a new organization. Proponents of the first choice predominantly nominate SASB because its standards were originally designed in accordance with existing SEC requirements.[214] Some SASB proponents also suggest that SASB standards would solve the problems regarding the definition of materiality in ESG information by tailoring the financial definition to apply more readily to ESG-related information.[215] However, if the United States adopts a mandatory framework in line with this Note's proposals, the materiality issue will be less of a problem.

On the other hand, a pre-existing non-U.S. organization such as the TCFD or GRI would have the advantage of uniformity and compatibility in the global economy at large. However, even considering the EU's consideration of incorporating the GRI Standards[216] and the TCFD's design in ready alignment with SEC standards,[217] a non-U.S. entity is less likely to guarantee future alignment with U.S. laws and business practices. Creating a new standard-setting organization is even less ideal due to the urgency of the circumstances and the implicated costs. Thus, SEC should designate a pre-existing, U.S.-based organization as the standard-setting body.

It is crucial that the standard setter be independent from both the government and any private institutions. Independence from government ensures that the standards are not influenced by political agendas and that the inevitable policy changes that ensue from changing administrations do not create instability in the framework.[218] Independence from private institutions combats conflicts of interest in standard setting.[219] Accordingly, the independent standard setter should be a neutral body based on expert membership and with heightened sensitivity to regulated industries to account for free-market principles and industry-specific concerns. In this way, the mandatory framework will

206. Each state has its own securities agency that enforces its respective state's own set of securities laws, commonly referred to as the "blue sky" laws. *State Securities Regulators*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/state-securities-regulators [https://perma.cc/JKN7-6CWS] (last visited Apr. 12, 2022).
207. See discussion *supra* Part III.B.1.
208. *See id.*
209. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78qq.
210. FASB is "the independent, private-sector, not-for-profit organization . . . that establishes financial accounting and reporting standards for [organizations] that follow the Generally Accepted Accounting Principles ("GAAP")." *About Us*, FIN. ACCT. STANDARDS BD., https://www.fasb.org/about [https://perma.cc/39TW-HB7L] (last visited Sept. 24, 2021).
211. *See* Stephen A. Zeff, *How the U.S. Accounting Profession Got Where It Is Today: Part I*, 17 ACCT. HORIZONS 189, 196–99 (2003) (discussing the challenges and crises that faced the accounting profession during the time).
212. *See* William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 48 B.C. L. REV. 5, 5–10 (2007).
213. *See* Fabrizio Tocchini & Grazia Cafagna, *The 5 Biggest Hurdles to Effective ESG Reporting*, WOLTERS KLUWER (July 20, 2022), https://www.wolterskluwer.com/en/expert-insights/the-5-biggest-hurdles-to-effective-esg-reporting [https://perma.cc/3MSG-WKKB].
214. *See* Jacobs & Finney, *supra* note 65, at 128.
215. *See* Ruth Jebe, *The Convergence of Financial ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 687 (2019).
216. *See* Dawson, *supra* note 172.
217. *See Exxon Valdez Oil Spill*, *supra* note 165.
218. *See* Rachel Dresen, *FASB Independence and Fair Value Accounting*, AIPCA, https://us.aicpa.org/advocacy/issues/fasbindependenceandfairvalueaccounting [https://perma.cc/2VTL-VZ5M] (last visited Aug. 24, 2022).
219. *See Board Members,* FIN. ACCT. STANDARDS BD., https://www.fasb.org/page/PageContent/%2Fabout-us%2Fboardmembers.html [https://perma.cc/KUV7-V9VH] (last visited Aug. 24, 2022) (FASB members are required to sever connections with the institutions they served before joining the Board to foster their independence).

remain sensitive to the public-private cooperative nature of standard setting in the business community.[220]

After SEC designates a single standard-setting body, the organization will require experts in ESG information and ESG malpractice to serve as full-time board members.[221] Further, the members should seek guidance from experts and constituents across all industries to ensure industry-appropriate and relevant information in reporting standards. The board should seek advice from both corporations as well as investors to ensure quality and fair standards in reporting.

C. *Long-Term Solutions*

Policymakers should continue to push through both H.R. 1187 and the CLEAN Future Act for long-lasting solutions by expressly delegating authority to SEC to require ESG-related disclosures in SEC filings.[222] Legislation effectuating mandatory disclosure of ESG information in securities reporting will guarantee the fundamental elements of the framework stay in place. If SEC acts unilaterally to expand ESG disclosure requirements, opponents are certain to challenge the agency's authority in court.[223] Legislation will combat both challenges to any agency rulemaking, as well as uncertainties of materiality of mandatory ESG information. Further, legislation would provide clearer guidance for courts struggling to determine the unique questions ESG and SRI raise in securities fraud lawsuits.

V. Conclusion

As policymakers across jurisdictions develop their respective regulatory frameworks surrounding ESG disclosures, they must balance the interests of the corporation and the free market with the interests of the investor and their right to accurate material information. The United States signals a shift from its largely voluntary ESG disclosure framework to more mandatory requirements to address the global concerns of ESG misrepresentations. The United States should look to the EU's past and recent developments in the area and follow its adoption of a mandatory ESG disclosure framework while there is national and international momentum. SEC, in particular, is the appropriate agency for effectuating some of the most immediate solutions to address ESG-washing practices. In doing so, SEC should designate a single independent standard-setting body to ensure uniform, quality reporting across all industries. For long-lasting solutions, legislation should be passed to establish a stable regulatory framework surrounding ESG reporting with the purpose of protecting the interests of investors, corporations, the financial market, and the public interest at large.

220. *Cf.* Bratton, *supra* note 212, at 6 (suggesting that standard setting can involve "public-private regulatory cooperation," and that government agencies adopt such privately generated standards to take advantage of inexpensive, private expertise).

221. The standard-setting body should adopt FASB's approach to require its board members to serve full time and to sever connections with the firms and institutions they served before joining the board to ensure their independence and avoid conflicts of interest. *See Board Members*, *supra* note 219.

222. *See supra* Part III.A.2.a–b.

223. Under the Administrative Procedure Act, an agency action can be challenged in court because it is in excess of statutory authority or an abuse of discretion. 5 U.S.C. § 706. *See Commissioner Hester's Statement on the New Rule Proposal*, *supra* note 192 (contending that SEC lacks authority to propose the SEC Proposed Rule on Climate-Related Disclosures).

CLICKING TOWARD EXTINCTION: HOW COVID-19 HAS ACCELERATED THE NEED TO REGULATE AND REDUCE THE PLASTIC E-COMMERCE WASTE DESTROYING OUR PLANET

Cole Fox*

ABSTRACT

Plastic packaging used by e-commerce companies for shipping is an unaddressed issue that contributes to serious environmental impacts both nationally and globally. Since the onset of the Covid-19 pandemic, e-commerce sales have boomed, increasing the environmental impacts of plastic packaging. As there is no current or proposed regulatory scheme at the state or federal level that sufficiently addresses the issue in the United States, this Note proposes stand-alone federal legislation to add a new subtitle to the Solid Waste Disposal Act that will expeditiously eliminate plastic e-commerce packaging and combat its environmental effects. This legislation is advantageous because it will provide needed uniformity, ensure corporate responsibility and transparency, and can be easily implemented into an existing enforcement mechanism. Such legislation will also promote efficiency, benefit consumers, and can pass congressional gridlock.

I. Introduction

People seem to love receiving packages in the mail.[1] The ease of ordering with one click, the speed of shipping, and the small rush of serotonin that accompanies a delivery notification all contribute to the online ordering experience.[2] While this experience is great, there remains a major caveat—the packaging. Items that are unlikely to be damaged in transit arrive wrapped in swaths of plastic.[3] Boxes twice the size of the product ordered are blatantly wasteful, yet are regularly used.[4] As online shopping during the Covid-19 pandemic has boomed, the already notable environmental effects of these practices and materials[5] continue to increase.[6] While the prevalence of e-commerce is understandable due to the increased risk of contracting Covid-19 in a store,[7] the trend away from brick-and-mortar retail is nothing new.[8] However, the recent acceleration of e-commerce has magnified the existing problems associated with the plastic waste produced by billions of packages traversing the United States each year.[9]

* Cole Fox is a third-year law student at The George Washington University Law School. He would like to thank Prof. Brandon Flick and his Notes Editor, Anna Ellison, for their guidance throughout the writing process. He would also like to thank his friends and family for their continuous love and support and the entire JEEL staff for their production work on this Note.

1. *See* Suzy Davidkhanian, *US Ecommerce Forecast 2021*, Insider Intelligence: eMarketer (July 8, 2021), https://www.emarketer.com/content/us-ecommerce-forecast-2021#page-report [https://perma.cc/7LX4-NKJC].
2. *See Buy Now Ordering*, Amazon, https://www.amazon.com/gp/help/customer/display.html?nodeId=201889620 [https://perma.cc/3UM5-BDR7] (last visited Nov. 21, 2021).
3. *See* Pamela L. Geller & Christopher Parmeter, *This Peeler Did Not Need to Be Wrapped in So Much Plastic*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/opinion/amazon-plastic-waste.html [https://perma.cc/P43J-83LG].
4. This assertion stems from my personal experience with many online purchases ordered from Amazon and other sellers along with information accrued from informal discussions with friends and family over the past several years.
5. *See* Oceana, Amazon's Plastic Problem Revealed 5 (2020), https://oceana.org/wp-content/uploads/sites/18/amazons_plastic_problem_report_12.17.2020_doi.pdf [https://perma.cc/DA2Y-QNMB].
6. *See* U.N. Conf. on Trade & Dev., *Global E-Commerce Jumps to $26.7 Trillion, Covid-19 Boosts Online Sales* (May 3, 2021), https://unctad.org/news/global-e-commerce-jumps-267-trillion-covid-19-boosts-online-sales [https://perma.cc/7GDG-5RR3].
7. *See Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html#print [https://perma.cc/H5ZE-4BBE] (Apr. 5, 2021).
8. *See* Davidkhanian, *supra* note 1.
9. *See* Michael Corkery & Sapna Maheshwari, *With 3 Billion Packages to Go, Online Shopping Faces Tough Holiday Test*, N.Y. Times (June 17, 2021), https://www.nytimes.com/2020/12/05/business/ecommerce-shipping-holiday-season.html [https://perma.cc/XAP8-4KP6]; *see also* Jason Dies, *Parcel*

Therefore, to address this issue, the U.S. Congress should amend the Solid Waste Disposal Act ("SWDA") and add a new subtitle that emphasizes expedited elimination of plastic waste, focuses on corporate responsibility and transparency, and targets e-commerce companies with over $1,000,000 in annual revenue.[10] The existing framework of the SWDA allows the U.S. Environmental Protection Agency ("EPA") to enforce—with help from the states—the SWDA's provisions and meet its objectives, which "are to promote the protection of health and environment and to conserve valuable material and energy resources."[11] Adding a new subtitle to the SWDA would allow utilization of the current enforcement mechanism to ensure regulated companies eliminate their plastic e-commerce packaging.[12] Additionally, although the proposed Break Free From Plastic Pollution Act of 2021 ("BFFPPA") provides guidance regarding coverage of e-commerce companies, stand-alone legislation is necessary because the BFFPPA does not adequately consider the rapid increase of online shopping due to the Covid-19 pandemic, which will continue to amplify the already sizable environmental impact of plastics associated with plastic shipping waste.[13]

Part II of this Note will discuss the impact of plastics and how Amazon, given its market share, is an archetypal example of e-commerce's contribution to plastic pollution.[14] Additionally, Part II will highlight how government action forced Amazon to change its packaging habits in India. Part III will explore legislation in the United States at the federal and state level, including federal agency action, that has been implemented to combat this crisis and will explain why current and proposed legislation is inadequate. Part IV will analyze the inadequacies of several international solutions, specifically mitigation measures introduced in France's 2020 Anti-Waste Law and other countries' recycling programs. Part V will introduce the stand-alone legislation and its enforcement mechanism, which solves the inadequacies of current solutions. Part VI will explain that the legislation is necessary because states cannot regulate the entire e-commerce industry, consumer advocacy is not as impactful as federal legislation, and federal resources are necessary for implementation. Part VI will also discuss several political benefits of the stand-alone legislation. Part VII will examine why corporate responsibility and transparency provisions should also be included in the legislation and how it will strengthen the bill and benefit consumers without overburdening companies subject to the regulations.

II. The Environmental Impact of Plastic E-Commerce Waste

The impact of plastic e-commerce waste on the environment is significant.[15] About 58% of global plastic waste either enters the environment or is sent to a landfill.[16] One of the main issues with plastic is that it does not break down easily in nature and can exist in the environment for decades.[17] Even when it does not reach the environment, "only 18% of plastics waste are recycled, and 24% are incinerated."[18] This, in turn, causes massive greenhouse gas emissions that further affect the environment, endangers human health, and compounds the climate crisis.[19] Furthermore, the cost and difficulty associated with cleaning up plastic, especially in the ocean, makes action that will significantly reduce the presence of plastic infeasible.[20]

Due to its lightweight nature, plastic packaging, among other plastics, often makes its way into the ocean,[21] which contributes to notable examples of plastic accumulation.[22] The Great Pacific Garbage Patch ("Patch"), for example, is comprised mostly of plastics, including plastics used in packaging.[23] The Patch, which spans from the West Coast of the United States to Japan, is incalculably large.[24] Plastics from land-based sources make up most of the Patch, and ocean currents often carry these plastics for thousands of miles.[25]

Moreover, shipping waste affects more than just the ocean. Marine life and humans also bear the brunt of this pollution.[26] For example, microplastics and other trash that collect near the ocean's surface block sunlight from reaching marine life, such as plankton and algae, which are critical to the food chain.[27] Entanglement, smothering, and ingestion also cause problems with marine life, and "nearly 700 marine species have been observed to interact directly with plastic[ ] marine debris."[28]

Similarly, chemicals that can cause environmental and health problems are released during the breakdown of plas-

Shipping Index 2021, Pitney Bowes, https://www.pitneybowes.com/content/dam/pitneybowes/us/en/shipping-index/parcel-shipping-index-ebook.pdf [https://perma.cc/V4WM-4LFJ] (last visited July 17, 2022).

10. *See* Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 6901–6992k.
11. *See id.* § 6902.
12. *See id.*
13. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021).
14. The goal of this Note is to discuss why all e-commerce companies with over $1,000,000 in annual revenue need to be regulated regarding their plastic packaging used for shipping. However, since Amazon's e-commerce market share is so large, significant portions of this Note reference Amazon, specifically regarding policy suggestions and implementation. Although Amazon is often named throughout this Note, and its policies, habits, and resources are referenced, these discussions are meant to provide an example of how the entire industry can and should be regulated. Statistics specifically attributed to Amazon's practices and plastic waste, however, are not meant to be representative of every e-commerce company and should be read in context.
15. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 32.
16. *See* Ali Chamas et al., *Degradation Rates of Plastics in the Environment*, 8 ACS Sustainable Chemistry & Eng'g 3494, 3495 (2020).
17. *See id.* at 3494.
18. *See id.*
19. *See* Lisa Anne Hamilton et al., Plastic & Climate: The Hidden Costs of a Plastic Planet 55–56 (Amanda Kistler & Carroll Muffett eds., 2019).
20. *See Great Pacific Garbage Patch*, Nat'l Geographic, https://www.nationalgeographic.org/encyclopedia/great-pacific-garbage-patch [https://perma.cc/DMA7-L6PR] (June 2, 2022).
21. *See* Murat Suner, *Ways That Plastic Gets Into the Ocean*, FairPlanet (Jan. 1, 2020), https://www.fairplanet.org/story/ways-that-plastic-gets-into-the-ocean [https://perma.cc/4GUQ-PNUL].
22. *See Great Pacific Garbage Patch*, *supra* note 20.
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. Chamas et al., *supra* note 16, at 3495.

tics and are consumed by marine animals, which can then be consumed by humans.[29] When these plastics invade the human body, they "have the potential to disrupt the endocrine system, which releases hormones into the bloodstream that help control growth and development during childhood, among many other important processes."[30] The potential for these plastics to harm bodily functions, which in turn could affect the genetics of future generations, is too serious to ignore. While there are other contributors to areas like the Patch,[31] e-commerce has and will continue to be a significant source of plastic pollution.[32]

A. *Amazon's Plastic Pollution*

Amazon is the perfect example of a large company that has the ability to make change but has consistently refused to do so on a noteworthy scale. Its plastic pollution and waste practices in other contexts show that, even though it has the ability to do so, it will not make change on the broad scale necessary to eliminate its plastic e-commerce waste without a federal legislative directive.

Amazon, due to its size, market share,[33] and commitment to the highest levels of efficiency when delivering packages to consumers,[34] is a particularly notable polluter.[35] While Amazon makes claims regarding its commitment to sustainability and reducing its environmental impact,[36] the reality is very different.[37] The company's packaging practices demonstrate this tension.[38] A report released by Oceana, a nonprofit ocean advocacy organization, estimates that Amazon created 465 million pounds of plastic packaging waste in 2019—enough "to circle the Earth over 500 times" in plastic air pillows.[39] That year, Amazon's packaging alone accounted for over 22 million pounds of plastic pollution in lakes, rivers, and oceans.[40] Of the more than fifteen types of plastic packaging Amazon utilizes, air pillows, bubble wrap, and plastic mailers account for the majority of its plastic packaging.[41] Additionally, the waste generated by Amazon's plastic packaging "is expected to grow at a much faster rate than sales."[42]

Amazon, however, claims to be a leader when it comes to sustainability.[43] A letter penned by Kara Hurst, Amazon's Vice President for Worldwide Sustainability, promotes Amazon's goals and accomplishments in areas like wage growth, diversity, and the company's transition to renewable energy.[44] The notable omission from the letter—plastic.[45] Among the discussion of initiatives and statistics showing progress on multiple environmentally related issues, Amazon's use of plastic packaging and its impact does not receive so much as a sentence.[46]

Despite Amazon's lack of candor regarding its plastic use, the company is making some effort to address its packaging. In 2020, Amazon announced a "Climate Pledge Fund."[47] The fund is "a $2 billion internal venture capital fund focused on supporting startups making products that Amazon can then use in its quest to meet its climate goals."[48] One of the companies Amazon invested in, CMC Machinery, "makes custom-size boxes specifically tailored to the dimensions of a product in a given order."[49] Amazon projects this technology "could reduce the cubic volume for each box by 24% on average," leading to reduction of "approximately one billion plastic air pillows by the end of 2022."[50] Unfortunately, Amazon does not put this seemingly impressive reduction into perspective. As Amazon produced over 465 million pounds of plastic packaging in 2019,[51] reducing plastic air pillow use by one billion units does little to reduce the company's plastic waste.[52] Thus, this effort by Amazon, while important, shows that Amazon has no interest in satisfactorily addressing its plastic packaging practices.

By contrast, in India, Amazon demonstrated how quickly it can reduce the impact of its plastic packaging in a major market when properly motivated to do so.[53] Market experts estimate that India's e-commerce sales,

29. *See Great Pacific Garbage Patch*, *supra* note 20.
30. *See* Geller & Parmeter, *supra* note 3.
31. *See Great Pacific Garbage Patch*, *supra* note 20.
32. *See* Davidkhanian, *supra* note 1.
33. *See* Blake Droesch, *Amazon Dominates US Ecommerce, Though Its Market Share Varies by Category*, Insider Intelligence: eMarketer (Apr. 27, 2021), https://www.emarketer.com/content/amazon-dominates-us-ecommerce-though-its-market-share-varies-by-category[https://perma.cc/2CWY-SMS3].
34. *See* Terry Nguyen, *Amazon's 1-Day Shipping Is Convenient—and Terrible for the Environment*, Vox (Oct. 16, 2019, 1:40 PM), https://www.vox.com/the-goods/2019/10/16/20917467/amazon-one-day-shipping-bad-for-environment [https://perma.cc/WFQ7-EN97].
35. *See id.*
36. *See Amazon Sustainability*, Amazon, https://sustainability.aboutamazon.com [https://perma.cc/J5LA-6PVA] (last visited Nov. 22, 2021).
37. *See, e.g.*, Isobel Asher Hamilton, *One Amazon Warehouse Reportedly Throws Out 130,000 Products a Week, Including Some That Are Brand New. An Expert Blames Its Giant Third-Party Retail Business*, Business Insider (July 3, 2021, 6:00 AM), https://www.businessinsider.com/amazon-throws-away-new-products-waste-third-party-sellers-profitable-2021-6 [https://perma.cc/9Y9H-FRTL].
38. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 32.
39. *See id.* at 4, 12.
40. *See id.*
41. *See id.*
42. *See id.* at 12.
43. *See* Kara Hurst, *Further and Faster, Together*, Amazon (2021), https://sustainability.aboutamazon.com/about/letter-from-leadership [https://perma.cc/KY4J-SDGU].
44. *See id.*
45. *See id.*
46. *See id.*
47. *See* Kristin Toussaint, *Custom Boxes and Fast Charging: The Next Companies Funded by Amazon's $2 Billion Climate Pledge Fund*, Fast Co. (Oct. 27, 2021), https://www.fastcompany.com/90690300/custom-boxes-and-fast-charging-the-next-companies-funded-by-amazons-2-billion-climate-pledge-fund [https://perma.cc/8FJH-XJWY].
48. *See id.*
49. *See id.*
50. Amazon Staff, *Amazon Backs New Companies Focused on Low-Carbon Technology*, Amazon (Oct. 27, 2021), https://www.aboutamazon.com/news/sustainability/amazon-backs-new-companies-focused-on-low-carbon-technology [https://perma.cc/P4KQ-RXNS].
51. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 4.
52. Plastic air pillows weigh next to nothing. For example, on Amazon's website, one seller notes that 100 air pillows weigh 2.4 ounces. *See* 330 Count 4x8 Airdefender Air Pillows 40 Gallon 5.33 Cubic Feet Void Fill Cushioning Shipping Packing Package, Amazon, https://www.amazon.com/airDEFENDER-Air-Pillows-Cushioning-Discount/dp/B01IO5RD9S [https://perma.cc/B2EZ-XR6A] (last visited Mar. 6, 2022). Thus, one billion units only equates to 1.5 million pounds of plastic—1/310th of the plastic packaging Amazon produced in 2019. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 4, 12.
53. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29.

which were $451.4 million in 2020, could at least double by 2025.[54] India's plastic ban, which would have addressed the issue posed by plastic waste stemming from the country's colossal increase in e-commerce sales, was scheduled to go into effect by 2022 but was delayed.[55] After the ban was delayed, a 16-year-old, Aditya Dubey, became the catalyst for Amazon's plastic waste reduction.[56] The Indian Central Pollution Control Board, in response to a petition, informed Amazon that "in line with India's Extended Producer Responsibility for plastic waste," Amazon needed to "establish a system for collecting back the plastic waste generated due to their products."[57] Amazon immediately jumped into action, replacing bubble wrap and plastic air pillows with paper cushions.[58] Amazon also expanded its "Packaging-Free Shipping" program, which resulted in 40% of all orders in India being shipped in original packaging.[59] The overall result was notable—Amazon eliminated nearly 100% of plastic shipping waste in under one year.[60] Although Amazon clearly had the ability to make this change on their own, it took government action to force them to do so.

Another example of Amazon's unwillingness to change its corporate practices on its own is its product destruction policies. In Britain, an undercover investigation revealed that Amazon was destroying around 130,000 unused items per week at a single warehouse.[61] While Amazon disputes this astounding level of waste, multiple sources, including former Amazon employees, corroborated the allegations.[62] After the story and accompanying video were released, Greta Thunberg, a well-known climate activist, targeted Amazon on Twitter.[63] Additionally, Prime Minister Boris Johnson "promised that he would look into the allegations."[64] This is not the first time Amazon has been exposed for destroying products, and while Amazon maintains that they are "working towards a goal of zero product disposal" through donations, resale, and recycling, it is unclear what steps they will take without action on the part of the British—and other—governments.[65] Despite immense resources and public condemnation, Amazon often refuses to change unless, like in India, it is forced to do so.

While Amazon does not represent the entire e-commerce market,[66] the methods it employed in India could surely be implemented by every e-commerce company with over $1,000,000 in annual revenue, which is the same as the threshold in the BFFPPA.[67] Also, issues with recycling in the United States have been exacerbated in recent years,[68] and building better recycling infrastructure, while crucial to the future of the recycling generally, is not the most efficient way to eliminate plastic shipping waste.[69]

III. Current Legislative Frameworks Are Ineffective

A. *Federal Legislation*

From Congress to agencies, multiple attempts at a solution to plastic pollution have been passed,[70] researched,[71] or proposed.[72] One piece of legislation that passed a divided Congress is the bipartisan Save Our Seas 2.0 Act ("SOS Act"), which was signed into law on December 18, 2020.[73] The SOS Act directs the Secretary of State to submit a report to Congress regarding the potential for international agreements to reduce land-based sources of marine debris.[74] The SOS Act also requires "a multifaceted study" on U.S. plastic pollution.[75] However, the provisions of the SOS Act are broad, and many of them involve one or two-year deadlines to complete studies on the impact of plastic waste across sectors without any accompanying action to reduce plastic pollution.[76]

Along those lines, the BFFPPA is a proposed bill in the 117th Congress that is much more comprehensive regarding the reduction of plastic waste across the United States economy.[77] The BFFPPA is based around an Extended Producer Responsibility ("EPR") model.[78] The idea behind EPR is to "identify a point along the supply chain that can manage externalities associated with production."[79] In doing so, the burden shifts back to the producer "to imple-

54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. *See* Jennifer Hassan, *Footage of Amazon Destroying Thousands of Unsold Items in Britain Prompts Calls for Official Investigation*, Wash. Post (June 23, 2021, 8:16 AM), https://www.washingtonpost.com/world/2021/06/23/amazon-uk-warehouses-destroy-items/ [https://perma.cc/XW6N-LBCA].
62. *See id.*
63. Greta Thunberg (@GretaThunberg), Twitter (June 23, 2021, 3:39 AM), https://twitter.com/gretathunberg/status/1407604088708206595.
64. *See* Hassan, *supra* note 61.
65. *Id.*
66. *See* Droesch, *supra* note 33.
67. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29; Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101(b)(1)(A) (2021).
68. *See* Cheryl Katz, *Piling Up: How China's Ban on Importing Waste Has Stalled Global Recycling*, YaleEnvironment360 (Mar. 7, 2019), https://e360.yale.edu/features/piling-up-how-chinas-ban-on-importing-waste-has-stalled-global-recycling [https://perma.cc/F6VX-9CHK].
69. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29 (Amazon's elimination of nearly 100% of plastic packaging in India in under one year demonstrates the ability of large e-commerce companies to change their packaging habits in a far more efficient manner than currently proposed legislation would require).
70. *See* Allyn L. Stern et al., *Bipartisan Save Our Seas 2.0 Act Signed Into Law*, X Nat'l L. Rev. (Dec. 23, 2020), https://www.natlawreview.com/article/bipartisan-save-our-seas-20-act-signed-law [https://perma.cc/564X-PUNW].
71. *See generally* U.S. Env't Prot. Agency, Pub. No. 160K20001, The United States Federal Strategy for Addressing the Global Issue of Marine Litter (2020).
72. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021).
73. *See* Save Our Seas 2.0 Act, Pub. L. No. 116-224, 33 U.S.C. ch. 55 (2020).
74. *See* Stern, *supra* note 70, at 3.
75. *See* Save Our Seas 2.0 Act, Pub. L. No. 116-224, 33 U.S.C. ch. 55 § 4265 (2020).
76. *See generally id.*
77. Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021).
78. *See id.* at 24–26.
79. *See* Anastasia M. Telesetsky, *Beyond Existing Legislative Efforts to Control Single-Use Plastics: A Proposal for Ending Fossil-Fuel Subsidies and Standardizing Single-Use Plastic Packaging*, 57 Cal. W.L. Rev. 43, 55 (Jan. 1, 2021).

ment upstream changes in design, which in turn would increase the durability and decrease the adverse impacts of the product."[80]

The BFFPPA establishes "packaging" as a "covered product"[81] under the Act and defines "packaging" as "any package or container, regardless of recyclability or compostability" and "any part of a package or container, regardless of recyclability or compostability . . . used for . . . goods that are sold, offered for sale, or distributed to consumers in the United States, *including for an internet transaction*."[82] Moreover, e-commerce companies such as Amazon would be a "responsible party" under the BFFPPA,[83] and any items used in packaging—such as plastic air pillows—that were not covered under the "packaging" definition would likely be covered under the "single-use product" definition.[84] The BFFPPA's EPR model also requires all responsible parties to "participate as a member of an Organization for which a Plan is approved by the Administrator" and "through that participation, satisfy the performance targets under section 12105(g)."[85] This means that each covered party has to create a plan to meet the goals laid out in the legislation.[86] While the coverage provisions are comprehensive, there are two major issues with the performance targets.

First, the performance targets require, "by weight of [the] covered product," that "by December 31, 2027" at least "65 percent of all covered products, except paper, [are] recycled."[87] This requirement increases to at least 80% by the end of 2032.[88] Five years to reach a 65% recycling rate for plastic shipping waste is a goal that Amazon has shown is not necessary—elimination of almost all plastic packaging is feasible in a far shorter time frame.[89] Although this longer time frame could be intended to benefit smaller companies, new legislation would contain exemptions similar to the BFFPPA, which exempts companies from the EPR portion of the bill that have "annual revenue of less than $1,000,0000" during "the preceding fiscal year," or if the company "is the responsible party for less than 1 ton of covered products or beverage containers in commerce each year."[90]

Second, the BFFPPA calls for the use of reusable packaging in 15% of covered products by December 31, 2030.[91] As with the recycling provision, Amazon has proven this length of time is not necessary to achieve the desired goal.[92] Although some of these provisions address e-commerce packaging and corporate responsibility, the reduction requirements and associated time frame for implementation of the EPR model described is woefully inadequate given the feasibility of immediate elimination of plastic packaging.[93]

B. Federal Agency Action

There are also other proposed solutions to environmental plastic pollution.[94] In 2020, EPA produced a report discussing federal strategies for reduction of marine litter, 80% of which is plastic waste.[95] Three of the main strategies proposed were building better systems for waste management, incentivizing recycling, and promoting research and development for technological solutions.[96] While these strategies may be viable for cleaning up waste that has already made its way to the environment, they do not address the issue at its source.[97]

One way the government is attempting to address the source of the pollution is through the U.S. Department of Energy's ("DOE's") Plastic Innovation Challenge.[98] This program has created and funded a multitude of research projects and other programs with the goal of reducing plastic waste in oceans and landfills.[99] But while these solutions may help reduce overall plastic waste, none of them address plastic shipping waste specifically.[100]

Furthermore, none of these proposed solutions or projects can create the widespread change necessary to prevent an already out-of-control problem from becoming much worse. This is because solutions outside of federal legislation do not affect every state and are not backed by the full resources and authority of the federal government. Also, while some agencies have large budgets and thousands of workers, they are unable to unilaterally enact regulations in an expedient manner because they are hamstrung by Administrative Procedure Act rulemaking requirements.[101] Therefore, congressional regulation to eliminate plastic shipping waste is the most viable and pragmatic solution.[102]

80. *Id.*
81. Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12001(5)(A)(i) (2021).
82. *See id.* § 12001(10)(A) (emphasis added).
83. *See id.* § 12001(16)(B)(ii).
84. *See id.* § 12001(19)(A).
85. *See id.* § 12101(a)(1)–(2).
86. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12105(a) (2021).
87. *See id.* § 12105(g)(2).
88. *See id.* § 12105(g)(2)(D).
89. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29.
90. Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101(b) (2021).
91. *See id.* § 12105(g)(2)(C).
92. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29 (Amazon's achievement of 40% original packaging in a short amount of time demonstrates the feasibility of an expanded program that deemphasizes repackaging). While further research is needed, shipping a product in its original box may significantly reduce the use of plastics and other shipping materials and could potentially even reduce shipping times.
93. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. §§ 12001, 12105, 12105(g) (2021).
94. *See* The United States Federal Strategy for Addressing the Global Issue of Marine Litter, *supra* note 71, at 9.
95. *See id.* at 7.
96. *See id.* at 9.
97. *See generally id.*
98. *See id.* at 11–12.
99. *See id.*
100. *See id.*
101. Under the Administrative Procedure Act, agencies must follow specific procedures to implement a rule through notice-and-comment rulemaking. *See* Maeve P. Carey, Cong. Rsch. Serv., IF10003, An Overview of Federal Regulations and the Rulemaking Process 1, 2 (Mar. 19, 2021). Due to this process, new agency rules can take nearly a decade to become final. *See, e.g.*, Richard Fairfax, *OSHA's Rulemaking Process: Why Does It Take So Long?*, ORC HSE, https://www.orchse-strategies.com/orc-hse-blog/oshas-rulemaking-process-why-does-it-take-so-long/#1540683364107-9fedaaa9-e977 [https://perma.cc/JK86-J8W9] (last visited Mar. 6, 2022).
102. Solutions outside the sole purview of executive agency power, like currently proposed legislation, cannot simply be improved because the legislation would still be unlikely to pass. Specifics regarding the benefits of stand-alone legislation are discussed later in this Note.

C. State Legislation

States have begun to recognize e-commerce waste as a significant issue, and several have passed laws to combat it.[103] In Maine and Oregon, state lawmakers took matters into their own hands, introducing bills also built around an EPR model.[104] This model focuses on the design of products such as electronics,[105] increasing the availability of recycling for plastics,[106] and even charging companies for recycling costs.[107] While these features are important, increasing recycling options and even charging companies to recycle still does not address the source of the pollution itself. Additionally, because no recycling solution is perfect,[108] elimination is the only way to prevent plastic packaging from reaching the environment.

Moreover, state EPR programs struggle to make an impact because they rely on uncontrollable factors like Chinese recycling policy. The biggest change in national and global recycling was precipitated by China's 2018 "National Sword" policy, which "banned the import of most plastics and other materials headed for that nation's recycling processors."[109] Even before China's ban, recycling statistics were abysmal—9% of global plastics were recycled between 1950 and 2015.[110] The ban only exacerbated the global recycling problem, with even more plastics heading to "landfills, incinerators, or likely littering the environment."[111] These recycling issues, among others, make state EPR programs[112] an ineffective way to deal with the deluge of plastic packaging waste.

Although other states are considering legislation similar to the bills enacted in Maine and Oregon,[113] waiting for more states to pass laws is inefficient because it provides no national standard or guidance to the large corporations that make up the vast majority of the e-commerce market.[114] Relying on state regulations also provides a perverse incentive for states who disagree with the aforementioned policies to relax their own regulations surrounding plastic waste and recycling, which could offset the gains made by states that enact EPR programs. Thus, given that corporations such as Amazon cannot be trusted to act on their own,[115] even the most effective state regulations will not cause a difference on a national scale.

IV. International Solutions Are Similarly Inadequate

International government efforts to eliminate plastic waste have primarily focused on solutions that uniformly regulate the specific country's entire economy. For example, in 2020 France passed an "Anti-Waste Law" to combat plastic waste and the climate crisis.[116] The goal of the law is "a system-wide transition to a circular economy."[117] To accomplish this, the law targets "production, distribution, and consumption" with the goal of encouraging all actors, public, private, and individual, to adopt conscientious waste practices.[118] One of the law's notable provisions is its "phase out" of single-use plastics by 2040 and its requirement that all plastics be recycled by 2025.[119] While this nationwide effort is the right approach, the timeline, similar to the timeline currently proposed in the BFFPPA,[120] is not ambitious enough.

Additionally, France's law is not a new concept in the international community, as almost all countries in the European Union along with Japan, South Korea, and multiple provinces in Canada have implemented successful EPR programs to help them combat plastic waste and promote recycling.[121] Ireland, for example, increased their recycling rate of plastic and paper products "from 19 percent in 2000 to 65 percent in 2017" after implementing an EPR program.[122] Furthermore, European Union countries with these programs have "a recycling rate between 60 and 80 percent." In stark contrast, the United States had a recycling rate of 32% in 2018.[123] While the BFFPPA's EPR model regarding recycling of plastic waste in the United States could help, expedited elimination of plastic waste at its source will significantly enhance the positive impact.[124]

These directives and approaches contained in various state, national, and international legislation are a step in the right direction. However, the broad provisions and consistently long timeframes will fail to prevent millions of pounds of plastic shipping waste from invading oceans,

103. *See* Winston Choi-Schagrin, *Maine Will Make Companies Pay for Recycling. Here's How It Works.*, N.Y. Times (Aug. 5, 2021), https://www.nytimes.com/2021/07/21/climate/maine-recycling-law-EPR.html [https://perma.cc/PNV3-8MNH]; Megan Quinn, *Oregon Governor Signs Country's Second EPR Law for Packaging*, Waste Dive (Aug. 9, 2021), https://www.wastedive.com/news/oregon-epr-packaging-truth-in-labeling-living-wage/602640/ [https://perma.cc/6AH3-9BHS].
104. *See* Choi-Schagrin, *supra* note 103; Quinn, *supra* note 103.
105. *See* Frances Stead Sellers, *Maine Becomes First State to Shift Costs of Recycling From Taxpayers to Companies*, Wash. Post (July 14, 2021, 7:00 AM), https://www.washingtonpost.com/climate-environment/maine-becomes-first-state-to-shift-costs-of-recycling-from-taxpayers-to-companies/2021/07/13/aa6fbe44-e416-11eb-8aa5-5662858b696e_story.html [https://perma.cc/A8ZS-86LC].
106. *See* Quinn, *supra* note 103.
107. *See* Choi-Schagrin, *supra* note 103; Sellers, *supra* note 105.
108. *See* Choi-Schagrin, *supra* note103.
109. *See* Katz, *supra* note 68.
110. *See* Roland Geyer et al., *Production, Use, and Fate of All Plastics Ever Made*, 3 Sci. Advances, July 19, 2017, at 1, 3.
111. *See* Katz, *supra* note 68.
112. *See* Choi-Schagrin, *supra* note 103; Quinn, *supra* note 103; *see also* Sellers, *supra* note 105.
113. *See* Choi-Schagrin, *supra* note 103.
114. *See* Davidkhanian, *supra* note 1.
115. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29.
116. *See* Ellen MacArthur Found., France's Anti-Waste and Circular Economy Law: Eliminating Waste and Promoting Social Inclusion 2 (2021), https://circulareconomy.europa.eu/platform/sites/default/files/case_studies_-_french_anti_waste_law_aug21.pdf.pdf [https://perma.cc/9YXQ-Y3NZ].
117. *See id.*
118. *See id.*
119. *See id.* at 3.
120. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021).
121. *See* Choi-Schagrin, *supra* note 103.
122. *See id.*
123. *Id.* For further discussion of the pandemic's effects on recycling, see Megan Calfas, *A Struggling Recycling Industry Faces New Crisis With Coronavirus*, L.A. Times (Dec. 5, 2020, 6:00 AM), https://www.latimes.com/environment/story/2020-12-05/coronavirus-recycling-crisis [https://perma.cc/E7WR-R42L].
124. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101 (2021).

killing plants and animals, and continuing to have potentially catastrophic effects on the human body and the developmental systems of children.[125] Similarly, agency action in the United States likely will not have any effect until after the studies are completed and further legislation is explored and implemented to act on the results. Fortunately, waiting is not necessary. Given the wealth of information already available regarding the impact of plastics on the environment[126] and the rising effect of plastics in e-commerce packaging,[127] immediately regulating corporate use of packaging in e-commerce can lead to rapid reduction in sources of plastic pollution.[128]

V. The Framework for Stand-Alone Legislation

Although the proposed BFFPPA provides guidance regarding coverage of e-commerce companies, stand-alone legislation amending the SWDA is necessary because the BFFPPA does not adequately consider the speed of transition to online shopping due to the Covid-19 pandemic, which will continue to amplify the already sizable environmental impact of plastics associated with plastic shipping waste. Consequently, an SWDA amendment to eliminate plastic waste should be introduced and built around the aforementioned provisions of the BFFPPA that target e-commerce. However, the bill should contain: (a) a twelve-month time frame for at least 90% elimination of plastic packaging; (b) a sixteen-month timeframe for elimination of 99% of plastic packaging; (c) corporate responsibility and transparency provisions to enhance public trust and engagement; and (d) should target companies with over $1,000,000 in annual revenue. This new bill should be implemented into the existing enforcement scheme under the SWDA, which would allow for immediate oversight of the regulated companies.

For implementation and enforcement, adding a new "Subtitle K" to the SWDA immediately places the regulations under an existing SWDA enforcement mechanism.[129] This enforcement mechanism provides several benefits. First, the SWDA is overseen and enforced by the Office of Solid Waste, which is part of EPA.[130] Amending the SWDA would place implementation and enforcement under the purview of EPA, and a new office could be established to oversee it.[131] Moreover, similar to the BFFPPA, states should be deputized, at the discretion of the EPA Administrator, to enforce civil penalties or injunctive relief.[132] Thus, EPA, with assistance from states, would be able to implement and enforce new legislation to eliminate plastic shipping waste across the United States.

Second, the SWDA is established legislation, and combining enforcement mechanisms that have been in place for decades with enforcement provisions of the BFFPPA would help ensure compliance.[133] The SWDA provides, in relevant part, "the Administrator [of EPA] may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both" and can also "commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction."[134]

Moreover, the BFFPPA establishes that "[i]t shall be unlawful for . . . a responsible party for a covered product . . . to sell, use, or distribute any covered product or beverage sold in a beverage container in commerce except in compliance with [the EPR requirements]."[135] Those found in violation are subject to a fine of up to $70,117 per day and could be subject to "a civil action to enjoin the sale, distribution, or importation into the United States of a covered product."[136] The combination of the relevant portions of the SWDA and BFFPPA would take tried and true enforcement practices that EPA knows well and allow it to deputize states, within certain guidelines, to help with enforcement and take some of the burden off of the federal government. This will create a comprehensive and effective enforcement scheme to incentivize a high level of compliance with the new bill.

VI. The Necessity of Stand-Alone Legislation

Stand-alone legislation is necessary for two reasons. First, current legislation in the United States at the state level, while helpful, cannot regulate the entire e-commerce industry. Even if every state were to pass laws regulating e-commerce packaging, the regulations would not be uniform and would likely cause confusion and frustration among companies and citizens alike. Similarly, currently enacted federal legislation does little more than commission studies and pay lip service to the plastic choking landfills, streams, and oceans. Even at the international level, recycling rates in countries that have resilient programs fall well below 100%,[137] and the timelines for total bans on single-use plastics, some of which are used in packaging, are measured in decades.[138] Also, the methods and dates within the BFFPPA and France's Anti-Waste Law for recy-

125. Geller & Parmeter, *supra* note 3.
126. *See* Chamas et al., *supra* note 16, at 3494–95.
127. *See* Davidkhanian, *supra* note 1.
128. *See* Stern et al., *supra* note 70, at 3.
129. The "Subtitle K" idea comes from the BFFPPA. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021).
130. *See* 42 U.S.C. § 6911 (2019).
131. *See Planning, Budget, and Results*, U.S. Env't Prot. Agency, https://www.epa.gov/planandbudget/budget [https://perma.cc/W7PX-LRBN] (June 23, 2022) (EPA can handle regulating and enforcing the entire e-commerce industry—the agency employs over 14,000 workers and has an annual budget of over nine billion dollars).
132. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101(c)(4) (2021).
133. *See* 42 U.S.C. § 6928; Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101(c) (2021).
134. 42 U.S.C. § 6928(a)(1).
135. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. § 12101(c)(1) (2021).
136. *See id.* § 12101(c)(2)–(3).
137. *See* Choi-Schagrin, *supra* note 103.
138. *See* Ellen MacArthur Foundation, *supra* note 116.

cling and phasing out certain types of packaging do not fully recognize the need for more immediate regulation surrounding plastic packaging, especially given the acceleration of online shopping due to the Covid-19 pandemic.[139]

Second, the resources, power, and influence of the federal government is necessary to coordinate and implement these regulations. The federal government has vast resources,[140] and its regulatory authority is unmatched.[141] For example, legislation proposing breaking up companies like Amazon shows that Congress is the one with the power to shape the structure, habits, and behavior of large corporations.[142] Moreover, the federal government is the only regulatory power that can provide uniform structure, implementation, and enforcement of a ban on plastic packaging.[143] The executive branch, for example, has purview over numerous agencies, one of which already regulates certain types of packaging.[144] The U.S. Food and Drug Administration ("FDA") has authority over food packaging regulations[145] and uses this authority to protect the public from a range of health threats, including the impacts of plastics such as Bisphenol A.[146] Furthermore, as the nation's largest employer, the federal government has the workforce necessary to conduct oversight and enforcement of implemented legislation.[147]

A. *Political Benefits of Stand-Alone Legislation*

Merely amending the BFFPPA and accelerating the timing provisions is not a feasible option. Environmental legislation is often proposed and prioritized by Democratic lawmakers,[148] but congressional gridlock and the current rules surrounding the U.S. Senate filibuster present two major roadblocks to passing a bill as large and comprehensive as the BFFPPA.[149] Currently, less than one-half of the Democrats in the Senate cosponsor the BFFPPA, while only around one-half cosponsor it in the U.S. House of Representatives.[150] While there may be more Democratic cosponsors for the bill if it had a better chance of passing the current Congress, that argument supports a stand-alone bill. If the BFFPPA cannot even garner support from a majority of Democratic lawmakers, an amended BFFPPA with enhanced timing provisions will do little to change the calculus.

There are three other political benefits to stand-alone legislation. First, stand-alone legislation can provide insight into whether a smaller bill in this arena would have the desired effect, which could facilitate future bills of this nature. Second, a new bill provides an opportunity to reframe the narrative surrounding the goals of the legislation. Third, public opinion on a bill can be important, and companies like Amazon place a high value on how consumers view their actions.[151]

Regarding public opinion, Rachel Johnson Greer, a former Amazon manager in the company's regulatory and product development division for almost ten years, said, "if [Amazon's] customers get upset, Amazon gets upset" when discussing how consumer opinion has the potential to help shape Amazon's actions.[152] According to Greer, if Amazon were to ask suppliers to eliminate plastic packaging, "most sellers would be perfectly fine not having plastic packaging."[153] Because Amazon is such a large player, its "ability to set the rules" means that sellers on Amazon, including Amazon itself, could almost certainly get rid of

139. *See* U.N. Conference on Trade and Development, *supra* note 6.

140. *See* Cong. Budget Off., The Federal Budget in 2019: An Infographic (Apr. 15, 2020), https://www.cbo.gov/publication/56324 [https://perma.cc/D7WB-FWPD] (the 2019 federal government's budget outlay was $4.4 trillion and is used here to give an idea of the federal government's financial resources prior to the onset of the Covid-19 pandemic in the United States).

141. *See* Cristiano Lima & Leah Nylen, *House Panel Approves Plan to Help Break Up Tech Giants*, Politico (June 24, 2021, 4:43 PM), https://www.politico.com/news/2021/06/24/house-tech-giants-breakup-bill-496091 [https://perma.cc/P5RK-FNG9].

142. *See id.* Although breaking up tech companies is controversial in Congress, the proposal advanced through the House Judiciary Committee with bipartisan support. *See id.* The proposed bill "would allow federal regulators to sue to break up companies that both operate a dominant platform and sell their own goods or services on it, if the arrangement poses an 'irreconcilable conflict of interest.'" *Id.* This demonstrates Congress' power to pass legislation providing the federal government with the necessary regulatory authority to challenge major corporations on a variety of issues, including plastic packaging. *Id.* Moreover, the Commerce Clause gives Congress power "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes . . . ." *See The Constitution of the United States: A Transcription*, Nat'l Archives, https://www.archives.gov/founding-docs/constitution-transcript#toc-section-3- [https://perma.cc/UR74-TRCC] (last visited Mar. 6, 2022) (U.S. Const. art. I, § 8). This power likely extends to e-commerce sales. *See, e.g.*, Am. Librs. Ass'n v. Pataki, 969 F. Supp. 160, 173 (S.D.N.Y. 1997) ("The inescapable conclusion is that the Internet represents an instrument of interstate commerce" and "the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations.").

143. *See* Lima & Nylen, *supra* note 141. The provision(s) in the five proposed bills listed at the bottom of the article show that the regulations in this context would be advanced uniformly across dominant tech companies, which could similarly be applied to e-commerce companies. *See id.*

144. *See generally Packaging & Food Contact Substances (FCS)*, U.S. Food & Drug Admin. (Sept. 1, 2021), https://www.fda.gov/food/food-ingredients-packaging/packaging-food-contact-substances-fcs [https://perma.cc/YYT4-ZMYA] (listing a variety of reports and guideline documents, some of which discuss plastic food packaging and their potential risks).

145. *See id.*

146. *See Questions & Answers on Bisphenol A (BPA) Use in Food Contact Applications*, U.S. Food & Drug Admin. (Feb. 21, 2018), https://www.fda.gov/food/food-additives-petitions/questions-answers-bisphenol-bpa-use-food-contact-applications [https://perma.cc/B4DZ-R3QV] (describing BPA as "a chemical component present in the polycarbonate plastic used in the manufacture of certain beverage containers").

147. *Federal Employers*, U.S. Dep't of Lab., https://www.dol.gov/agencies/odep/program-areas/employers/federal-employment [https://perma.cc/8P5Q-B7HT] (last visited Jan. 29, 2022).

148. Apart from Bernie Sanders, who is an Independent but caucuses with the Democrats, the fourteen U.S. Senate cosponsors for the BFFPPA are all Democrats. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021). Similarly, all 124 cosponsors for the identical companion bill in the U.S. House of Representatives are Democrats. *See* Break Free From Plastic Pollution Act of 2021, H.R. 2238, 117th Cong. (2021).

149. *See About Filibusters and Cloture*, U.S. Senate, https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm [https://perma.cc/SW3W-L9VK] (last visited Jan. 29, 2022).

150. *See* Break Free From Plastic Pollution Act of 2021, S. 984, 117th Cong. (2021); Break Free From Plastic Pollution Act of 2021, H.R. 2238, 117th Cong. (2021).

151. Emily Petsko, *Amazon "Would Have No Problem" Switching to Plastic Free Packaging, Says Former Amazon Executive Rachel Johnson Greer*, Oceana (Sept. 8, 2020), https://oceana.org/blog/amazon-would-have-no-problem-switching-plastic-free-packaging-says-former-amazon-executive/ [https://perma.cc/7RZP-KELY].

152. *Id.*

153. *Id.*

plastic packaging "within a year."[154] By contrast, at the beginning of 2021, a group of Democratic senators sent letters to "Amazon, Walmart, Apple, Home Depot, Target, Wayfair, Best Buy, and Costco asking them to reduce plastic waste."[155] These companies are all well-known players in the e-commerce industry, and Amazon has an interest in maintaining relationships on Capitol Hill.[156] These letters, however, went unanswered.[157]

While consumer pressure has potential to shape Amazon's actions, consumer advocacy alone is not as effective as federal legislation, which gets companies to act immediately and protect the environment. Amazon's actions in India are illuminating—they provide an extraordinary example of how efficiently large e-commerce companies can implement new packaging policies and eliminate plastic when regulated.[158] Baby steps will not solve the issue, and companies cannot be trusted to take the necessary steps on their own.[159] Public pressure can lead to press releases that promise to do better, but corporations like Amazon, one of the largest and most valuable companies in the world,[160] are unlikely to lose enough customers in a short enough period of time to be convinced to act with the haste needed for impactful change.

A further issue with simply amending a large bill like the BFFPPA lies in the resistance it would almost certainly face from a multitude of interest groups. Amazon's lobbying is notorious, and the company spent over $20 million in 2021 to "aggressively lobb[y] lawmakers to abandon bipartisan bills in the House and Senate that target Silicon Valley's controversial business practices."[161] One of these bills, the American Innovation and Choice Online Act, "would block dominant companies . . . from giving preference to their own products or discriminating against rivals on their platforms."[162] Moreover, other large companies with interest in maintaining their current practices may join a lobbying push to kill an amended BFFPPA. A smaller, targeted bill, however, which may still draw resistance from Amazon and other e-commerce companies, is unlikely to attract resistance from all of the companies that would be regulated under the BFFPPA's provisions. Consequently, a stand-alone bill that amends the SWDA may have an easier path through Congress and is a necessary step to regulate the entire e-commerce industry.[163]

VII. Corporate Responsibility and Transparency Solutions

A. *Corporate Responsibility*

Because consumers should not be solely responsible for reusing and recycling when e-commerce companies like Amazon are swimming in profits,[164] using legislation to eliminate plastic e-commerce waste will make corporations responsible for the waste they produce. According to EPA, "[m]ost Americans want to recycle, as they believe recycling provides an opportunity for them to be responsible caretakers of the Earth."[165] However, difficulties arise when it comes to recycling due to confusion over "what materials can be recycled, how materials can be recycled, and where to recycle different materials."[166] This, in turn, leads to people putting recyclables in the trash or thinking certain items meant for the trash can be recycled.[167] While EPA is working to address these issues through conversations and other actions involving stakeholders in the recycling industry, progress only moves so fast.[168]

Also, even when items are recycled, little of what is properly recycled ends up being reused,[169] and recycling infrastructure in the United States is dismal compared to other countries.[170] Putting responsibility on consumers to try and make up for the failings of the country's infrastructure, which is out of their direct control, is unproductive. Placing responsibility for the elimination of plastic packaging on the corporations engaging in e-commerce, however, would mean less packaging needs to be recycled by consumers. If there is no plastic packaging in the first place, it is impossible for consumers to be confused on how, where, or whether to recycle it. In addition, completely eliminating plastic packaging, such as plastic air pillows, would also save companies like Amazon money.[171] Thus, putting responsibility on corporations for their packaging is a win for themselves, consumers, and the environment.

154. *See id.*
155. Press Release, Dick Durbin Illinois, *Durbin, Senators to E-Commerce Companies: Reduce Plastic Use in Your Packaging to Protect Environment* (Jan. 25, 2021), https://www.durbin.senate.gov/newsroom/press-releases/durbin-senators-to-e-commerce-companies-reduce-plastic-use-in-your-packaging-to-protect-environment [https://perma.cc/KCQ2-ZVBN].
156. *See* Fatma Khaled, *Facebook and Amazon Are Now the Top Lobbying Spenders in the US*, Bus. Insider (Mar. 25, 2021, 1:23 PM), https://www.businessinsider.com/facebook-and-amazon-are-countrys-top-lobbying-spenders-report-2021-3 [https://perma.cc/HG64-SYXA].
157. I was unable to locate a publicly available response to the letters.
158. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29.
159. *See id.* The fact that plastic packaging in the e-commerce world remains a problem despite evidence that it can be eliminated in one of the world's largest economies provides the necessary proof to conclude that e-commerce companies will not act fast enough to combat the transition to an e-commerce economy without governmental regulation.
160. *See Forbes Profile "Amazon,"* Forbes, https://www.forbes.com/companies/amazon/?sh=750817ab6fb8 [https://perma.cc/7VA6-NHZF] (last visited Jan. 29, 2022).
161. *See* Karl Evers-Hillstrom, *Amazon, Meta Report Record Lobbying Spending in 2021*, The Hill (Jan. 21, 2022, 12:30 PM), https://thehill.com/business-a-lobbying/business-a-lobbying/590788-amazon-meta-report-record-2021-lobbying-spending [https://perma.cc/D9LK-PSJJ].
162. *See id.*
163. An "easier" path does not mean an easy path, and while there would almost certainly be other roadblocks that new legislation would face, a lobbying push as large as the BFFPPA could face if it were amended and had a viable chance of passage would be less likely with the new bill.
164. *See, e.g.*, Todd Bishop, *Amazon Profits Nearly Double to $14.3B, Boosted by Rivian Stake, as Company Hikes Prime Fees*, GeekWire (Feb. 3, 2022, 1:16 PM), https://www.geekwire.com/2022/amazon-profits-nearly-double-to-14-3b-boosted-by-rivian-stake-as-company-hikes-prime-membership-fee/ [https://perma.cc/5WXX-6QJ7].
165. *The U.S. Recycling System*, U.S. Env't Prot. Agency, https://www.epa.gov/recyclingstrategy/us-recycling-system#USRecyclingSystemOverview [https://perma.cc/ET4E-2R87] (Dec. 15, 2021).
166. *Id.*
167. *See id.*
168. *See id.*
169. *See* Katz, *supra* note 68.
170. *See* Choi-Schagrin, *supra* note 103.
171. *See* Petsko, *supra* note 151.

In addition, putting the onus on consumers to change the way massive corporations operate through activism and rhetoric will not create a meaningful difference. Companies like Amazon are so large that the effort and consumer coordination it would take to convince them to phase out practices like single-use plastic is unrealistic. For example, in 2021 a shareholder proposal would have required that "Amazon . . . disclose how much of its plastic packaging winds up in the environment" by the end of the year.[172] The shareholders also wanted "to see a report published by December [2021] that shows how much plastic waste the retail giant is responsible for and what it's doing to reduce plastic packaging."[173] While 35.5% of shareholders voted in favor of the proposal, it still failed—even Amazon's shareholders were unable to force the company to increase transparency regarding the environmental impacts of its plastic packaging.[174] This is another demonstration that legislation regulating e-commerce corporations is the only path to comprehensive change.

Corporations like Amazon also make immense profits off of consumers,[175] and the responsibility for plastic packaging waste should be placed accordingly. But while corporations should bear most of the responsibility for reducing packaging waste, consumers should still be responsible for their part in reduction of waste. As Amazon has shown, plastic packaging can be eliminated in an expeditious manner.[176] However, no solution is immediate, and with billions of packages shipped every year, there should be an accompanying push to encourage responsible consumerism and utilization of proper disposal methods while the regulations are implemented.[177]

B. Transparency Solutions

While not necessary to eliminate plastic waste, transparency is another key aspect of this solution because it provides consumers with the information necessary to make informed choices about their purchases and will provide insight into the progress and effects of the legislation. Therefore, the legislation should include a provision akin to a plastic-use index.[178] This is especially important because Amazon has shown that they will actively oppose efforts to increase transparency surrounding plastic waste.[179]

In addition to eliminating plastic packaging, new legislation should require Amazon, along with other companies, to implement accountability and transparency practices that will allow consumers to make active and educated choices regarding whether plastic is involved in completion of their orders.[180] According to a 2019 Amazon report, small businesses sold an average of "more than 4,000 items per minute in Amazon's stores."[181] While Amazon may "repackage any product delivered to a fulfillment center with inadequate or non-compliant packaging," third-party sellers still choose their own packaging, which inevitably involves plastic.[182]

One potential transparency solution for Amazon's shipments from third-party sellers is "a plastic-use index that allows consumers to know how much single-use plastics those businesses use in a package."[183] Although online ordering comes with the convenience of not having to visit a store, "consumer[ ] expectations are similar between both retail and e-commerce (rapid receipt of product, ease of recovery/disposal and product protection)."[184] A plastic-use index for third-party sellers, however, recognizes the difficulty smaller businesses may have eliminating plastic packaging as quickly as larger companies can while allowing consumers an option to choose which small businesses to purchase from based on their plastic use. According to a survey conducted by McKinsey & Co., a supermajority of all respondents and three-quarters of millennials consider the environment when making purchases.[185] Thus, a plastic-use index would provide a natural incentive for businesses to eliminate—or at least reduce—plastic packaging as quickly as possible. Additionally, with Amazon eliminating plastics under the requirements of the legislation, businesses would have a further incentive to eliminate plastic packaging so that they do not look like they are continuing to contribute to a problem that Amazon itself would no longer be a part of.

Regarding implementation, this provision could be completed over a one-year period, which would balance the competing interests of giving companies time to implement new practices in a comprehensive and user-friendly manner while recognizing the need for urgency and the propensity of companies to push back against change on

172. *See* Justine Calma, *Shareholders Push Amazon to Reveal Its Plastic Footprint*, The Verge (Apr. 23, 2021, 11:10 AM), https://www.theverge.com/2021/4/23/22399329/amazon-shareholders-plastic-packaging-waste-pollution [https://perma.cc/6YDU-TB3N].
173. *See id.*
174. *See* Anna Baxter, *35.5% of Amazon Shareholders Call on Company to Report on Plastic* Footprint, Oceana (June 1, 2021), https://oceana.org/press-releases/355-amazon-shareholders-call-company-report-plastic-footprint/ [https://perma.cc/T3QJ-KDSX].
175. *See* Shelley E. Kohan, *Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion*, Forbes (Feb. 2, 2021, 6:12 PM), https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=445b95f21334 [https://perma.cc/4JWT-X86Q].
176. *See* Amazon's Plastic Problem Revealed, *supra* note 5, at 29.
177. *See* Corkery & Maheshwari, *supra* note 9.
178. *See* Geller & Parmeter, *supra* note 3. The plastic-use index could be a simple table on a company's website that shows consumers how much single-use plastic is used in a specific package.
179. *See* Calma, *supra* note 172.
180. *See* Geller & Parmeter, *supra* note 3.
181. *See* Press Release, Amazon Publishes 2019 SMB Impact Report; Launches "Build Your Business With Amazon" Website to Help Businesses, Authors, and Developers Succeed With Support From Amazon, AboutAmazon (May 7, 2019, 3:01 AM), https://press.aboutamazon.com/news-releases/news-release-details/amazon-publishes-2019-smb-impact-report-launches-build-your [https://perma.cc/6KJH-VNXN].
182. *See Packaging and Prep Requirements*, Amazon Seller Central, https://sellercentral.amazon.com/gp/help/external/G200141500?language=en_US [https://perma.cc/VQ4K-MYLF] (last visited Jan. 30, 2022).
183. Geller & Parmeter, *supra* note 3.
184. Kyla Fisher et al., Optimizing Packaging for an E-Commerce World 4 (Jan. 2017), https://cdn.ymaws.com/www.ameripen.org/resource/resmgr/PDFs/White-Paper-Optimizing-Packa.pdf [https://perma.cc/2DKK-PTLN].
185. *See* Andrew Martins, *Most Consumers Want Sustainable Products and Packaging*, Bus. News Daily (June 29, 2022), https://www.businessnewsdaily.com/15087-consumers-want-sustainable-products.html#:~:text=According%20to%20a%20survey%20from,with%20their%20values%20and%20priorities [https://perma.cc/V2TK-3C5A].

any timeline but their own.[186] Requiring Amazon to use their financial and intellectual resources to implement better corporate practices is necessary due to the market shift to e-commerce,[187] and it does not impose an outsize burden on the company given that the resources they need to do so are already at their disposal.[188]

VIII. Conclusion

As the trend toward e-commerce accelerates and Covid-19 continues to push more people toward online shopping, the environmental impacts of plastic packaging felt across the United States and around the globe will only increase. Given the challenges associated with more comprehensive legislation to regulate plastics across the entire economy and the time frame that is required to do so, new federal legislation to amend the SWDA, target plastic packaging, and address this issue must be passed. This legislation would require massive companies like Amazon, who have a monopoly on e-commerce, to implement sustainable shipping practices regarding use of plastics and increase transparency and accountability moving forward.

186. *See, e.g.*, Calma, *supra* note 172. Regarding the feasibility of this requirement, Amazon "is one of the biggest employers of Ph.D. economists in the United States." *See* Geller & Parmeter, *supra* note 3.
187. *See* Davidkhanian, *supra* note 1.
188. *See* Geller & Parmeter, *supra* note 3.

WHEN THE EIGHTH AMENDMENT FAILS: THE SAFE DRINKING WATER ACT FOR PROTECTION AGAINST CONTAMINATED PRISON WATER

Rosemary Martin*

ABSTRACT

People who are incarcerated may be forced to drink contaminated water inside of prisons. Inmates have mostly relied upon the Eighth Amendment—which prohibits cruel and unusual punishment—to seek legal recourse for the contaminated water they are forced to drink. Because the Eighth Amendment has an elaborate actus rea requirement and mens rea requirement, it is not a reliable tool for people who are incarcerated. The Safe Drinking Water Act will offer inmates more protection because it is a strict liability statute that requires no showing of mens rea or the severity of the harms posed by certain kinds of contaminated water.

I. Introduction

Craig Converse was a new inmate at a Texas prison when he noticed his legs and hips starting to swell.[1] He sought help from the prison's nurse, who gave him medicine for inflammation and asked if he drank the prison's water.[2] Upon learning that Converse did, she urged him to stop and to buy bottled water at the commissary.[3] Fortunately for Converse, he had enough money to spend on the commissary and started to drink bottled water instead of the prison's tap water.[4] His swelling and muscle pain abated over the next thirty days.[5]

While still in prison, Converse found a report about the prison's water quality.[6] The report was a Consumer Confidence Report ("CCR"), which is a compilation of data about a particular community water system.[7] The U.S. Environmental Protection Agency ("EPA") mandates operators of community water systems disseminate CCRs to their customers annually.[8] The report showed the prison's water had double the level of arsenic permitted by EPA.[9] Converse filed multiple grievances in the prison, alleging the prison was in violation of the Safe Drinking Water Act ("SDWA"), which regulates contaminant levels in drinking water.[10] Both grievances were denied, but fortunately, Converse was released shortly after his discovery of the arsenic-contaminated water.[11]

Inmates who do not have imminent release dates may not have any other choice but to drink contaminated water. Inmates who do not have outside funds to buy water from the prison's commissary store are also without alternatives.[12] Even if inmates have viable options, they should not have to pursue any of them—prisons should provide clean water.

This Note will show that the Eighth Amendment's protection against cruel and unusual punishment does not adequately protect incarcerated people from contaminated water. A plaintiff shows a violation of the Eighth Amendment when he demonstrates (1) that the harm he

* *Rosemary Martin is a third-year law student at The George Washington University Law School. She received her Bachelor of Arts in Anthropology and Hispanic Literatures and Cultures from Wesleyan University. Rosemary would like to thank Matthew Henjum and Eleanor Maloney for their guidance on this Note. She also thanks the entire JEEL staff for their production work. Finally, Rosemary thanks her family for their endless support.*

1. Panagioti Tsolkas, *Is Texas Poisoning Prisoners With Contaminated Water?*, Prison Legal News (Sept. 2015), https://www.prisonlegalnews.org/news/2015/aug/31/texas-poisoning-prisoners-contaminated-water/ [https://perma.cc/X8M3-GXZY].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* See discussion *infra* Part III.A, for more information about EPA's reporting requirements for community water systems.
8. *See CCR Information for Consumers*, U.S. EPA, https://www.epa.gov/ccr/ccr-information-consumers [https://perma.cc/UH8W-C92E] (Sept. 27, 2022).
9. Tsolkas, *supra* note 1, at 12.
10. *Id.*
11. *See id.*
12. *Id.*; *see generally* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol'y Initiative (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/9B4J-JQWK].

suffered was sufficiently serious and (2) that the defendant was deliberately indifferent to his health or safety.[13] Both requirements are difficult to prove. To convince a court that harm from consumption of contaminated water is sufficiently serious, a plaintiff may need scientific data or expert testimony.[14] To show deliberate indifference, a plaintiff must present evidence that shows prison guards knew or should have known that water was contaminated and failed to act.[15] I will propose that incarcerated plaintiffs use the SDWA to obtain meaningful protection from contaminated water.

Plaintiffs may bring a citizen suit under the SDWA to obtain a preliminary injunction to abate the harm and can recover attorney fees and the costs of litigation.[16] As a strict liability statute, the SDWA does not require plaintiffs to show that prison officials knew of the risk posed by contaminated drinking water and disregarded it.[17] Plaintiffs have to demonstrate that the prison's drinking water was contaminated with an EPA-regulated contaminant and that the level of contaminant exceeded the maximum contaminant level allowed by EPA's regulations.[18]

Part I of this Note provides a brief overview of environmental justice in the United States and how it relates to the incarcerated population. Part II focuses on the Eighth Amendment's approach to water contamination inside prisons and highlights its shortcomings. Part III shows how the SDWA is a reliable and protective statute for people inside prisons seeking legal relief for contaminated water. Finally, Part IV returns to an unsuccessful Eighth Amendment prison water contamination case and demonstrates how the plaintiff could have used the SDWA to obtain relief.

A. *Environmental Justice and the Incarcerated Population*

> The health and safety of incarcerated people in the United States are one front of the environmental justice movement, which recognizes that the structural inequalities built into society, particularly those based on race and socioeconomic status, are statistically connected to a person's access to a clean and healthful environment. Environmental justice affirms that all people have the right to clean land, water, air, and food. It demands environmental policy free of discrimination and bias and is based on mutual respect and justice for all people.[19]

In recent years, environmental justice advocates have succeeded in attracting public attention to environmentally unsafe prisons.[20] In 2007, the publication *Prison Legal News* published a report about sewage and sanitation issues in prisons from seventeen states around the country.[21] Paul Wright started the publication while he was incarcerated and imagined it as a way incarcerated individuals and their families could advocate for policy change and reform in the criminal legal system.[22] Seven years later, Wright helped launch the Prison Ecology Project, whose mission is to track the overlap of mass incarceration and environmental injustice.[23] The organization has been a leading force of attracting public attention to environmental hazards in prisons and has used the terminology "prison ecology" to describe the area of its central concern.[24]

EPA seems to be paying more attention to environmental justice concerns regarding prisons.[25] In 2017, EPA added prisons to EJScreen,[26] an EPA environmental mapping tool that provides environmental and demographic data for geographical areas in the United States.[27] Following the addition of prisons, the tool now shows where prisons and detention centers are located relative to environmentally hazardous areas.[28]

Federal and state governments also appear to be paying more attention to the issue of contaminated water in prisons[29]: EPA's enforcement database reveals that federal and state agencies brought 1,149 actions and 78 formal actions against prisons, jails, and detention centers between 2012

13. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981), and Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).
14. *See, e.g.*, Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *7 (D. Colo. July 13, 2017).
15. *See Farmer*, 511 U.S. at 842:
    > Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.
16. 42 U.S.C. § 300j-8(a), (d).
17. *See, e.g.*, *id.* at § 300j-8(a)(1).
18. *See id.*; *see, e.g.*, 40 C.F.R. § 141.11(b); *see also National Primary Drinking Water Regulations*, U.S. EPA, https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations#one [https://perma.cc/6BHE-UVP2] (Jan. 26, 2022).
19. Kimberly M.S. Cartier, *An Unfought Geoscience Battle in U.S. Prisons*, Eos: Sci. News by AGU (Nov. 10, 2020), https://eos.org/features/an-unfought-geoscience-battle-in-u-s-prisons [https://perma.cc/A4T7-ADFJ].
20. *See, e.g.*, Candace Bernd et al., *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, Earth Island J., https://earthisland.org/journal/americas-toxic-prisons/ [https://perma.cc/NDM7-VU8S] (last visited Oct. 31, 2022); Adam Mahoney, *America's Biggest Jails Are Frontline Environmental Justice Communities*, Grist (Apr. 15, 2021), https://grist.org/equity/toxic-jails-environmental-justice-los-angeles-new-york-chicago/ [https://perma.cc/YQM8-L8GR].
21. *See* John E. Dannenberg, *Prison Drinking Water and Wastewater Pollution Threaten Environmental Safety Nationwide*, Prison Legal News (Nov. 2007), https://www.prisonlegalnews.org/news/2007/nov/15/prison-drinking-water-and-wastewater-pollution-threaten-environmental-safety-nationwide/ [https://perma.cc/6AHK-3UZN].
22. Paul Wright, *Milestone: Thirty Years of Prison Legal News and the Human Rights Defense Center*, Prison Legal News (Nov. 2020), https://www.prisonlegalnews.org/news/2020/nov/1/milestone-thirty-years-prison-legal-news-and-human-rights-defense-center/ [https://perma.cc/AF5E-QCCU].
23. *See Prison Ecology Project: About Us*, Nation Inside, https://nationinside.org/campaign/prison-ecology-project/about/ [https://perma.cc/7DTA-3TUX] (last visited Oct. 15, 2022).
24. *Id.*
25. Rachel Leber, *EPA Adds Environmental Justice Map Focused on Prisons*, Corr. News (Dec. 7, 2017), https://correctionalnews.com/2017/12/07/epa-adds-environmental-justice-map-focused-prisons/ [https://perma.cc/4M25-735N].
26. *Id.*
27. *What Is EJScreen?*, U.S. EPA, https://www.epa.gov/ejscreen/what-ejscreen [https://perma.cc/WX8F-UG4D] (Feb. 18, 2022).
28. Leber, *supra* note 25.
29. As discussed in Part III.A, states may assume enforcement authority of SDWA regulations upon approval from EPA. States' regulations can be no less stringent than those provided by EPA. 42 U.S.C. § 300g-2.

and 2017 for contaminated water.[30] The agencies used the SDWA to enforce minimum water standards in prisons and jails.[31] However, EPA's enforcement and compliance database covers only a fraction of the nation's 6,000 federal, state, and local prisons.[32] Of the 1,065 correctional facilities covered by EPA, 17% were in violation of environmental laws in 2018.[33] Despite recent enforcement actions brought against prisons, toxic prisons are sprinkled around the country and pose health risks to individuals inside of them.[34]

II. The Eighth Amendment Framework for Responding to Contaminated Water in Prisons

The Eighth Amendment is not a reliable tool for relief from contaminated prison water, but many individuals have used it in search of clean water.[35] The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[36] The Amendment purportedly protects incarcerated people from inhumane prisons.[37] However, "the Constitution does not mandate comfortable prisons."[38] Incarcerated plaintiffs alleging inhumane conditions in prison will succeed on an Eighth Amendment claim only when two conditions are met: (1) the deprivation he alleges must be sufficiently serious, and (2) the prison official's act, or failure to act, must result in the denial of "the minimal civilized measure of life's necessities."[39] The first prong—sufficiently serious—is the objective standard.[40] The second prong is the subjective standard because it requires the plaintiff to show that the defendant prison official was deliberately indifferent to the inmate's health or safety.[41]

A. *The Eighth Amendment's Two Prongs: Sufficiently Serious and Deliberate Indifference*

To succeed on an Eighth Amendment claim, the inmate must demonstrate that the alleged deprivation was sufficiently serious.[42] This inquiry is the objective portion of the Eighth Amendment test.[43] The objective evaluation of the Eighth Amendment claim is not just a scientific inquiry into the seriousness of the harm and the likelihood that the alleged deprivation is the actual source of harm.[44] Courts should also assess:

> [W]hether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.[45]

Thus, the objective prong is not just a question of whether there is sufficient evidence; courts must also ask what society would think of the harm at issue.[46]

The second prong of the Eighth Amendment inquiry is deliberate indifference.[47] The phrase "deliberate indifference" first appeared in the U.S. Supreme Court's Eighth Amendment case law in *Estelle v. Gamble*.[48] "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[49] A trier of fact may infer the prison official's actual knowledge of a substantial risk from circumstantial evidence.[50] The circumstantial evidence that would permit such an inference should show, for example, that the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past" and that the prison official had been exposed to that information.[51] Applying these rules to water contamination cases demonstrates why incarcerated plaintiffs have such a difficult time proving Eighth Amendment violations for contaminated water.

30. Bernd et al., *supra* note 20.
31. *Id.*
32. Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-Prison Environmental Movement*, 26 Critical Criminology 407, 412 (July 12, 2018), https://link.springer.com/content/pdf/10.1007/s10612-018-9399-6.pdf [https://perma.cc/A52R-7RW5]; Bernd et al., *supra* note 20. The database includes only those facilities that have historically been in violation of environmental laws; new violators are not reflected in the system. Bernd et al., *supra* note 20. In addition, EPA has said that the incomplete coverage may be due to incomplete data entry. Bernd et al., *supra* note 20.
33. Bradshaw, *supra* note 32, at 412.
34. *See id.*; Bernd et al., *supra* note 20; Raven Rakia, *A Sinking Jail: The Environmental Disaster That Is Rikers Island*, Grist (Mar. 15, 2016), https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/ [https://perma.cc/K95F-2HMG].
35. *See, e.g.*, Carroll v. DeTella, 255 F.3d 470, 472–73 (7th Cir. 2001); Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *1 (D. Colo. July 13, 2017); Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *1 (D. Colo. Aug. 3, 2015).
36. U.S. Const. amend. VIII.
37. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994); *see, e.g.*, Foster v. Runnels, 554 F.3d 807, 815 (9th Cir. 2009) (holding that the prison depriving an inmate of sixteen meals over twenty-three days violated the Eighth Amendment).
38. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
39. *Farmer*, 511 U.S. at 834 (quoting *Rhodes*, 452 U.S. at 347).
40. Wilson v. Seiter, 501 U.S. 294, 298 (1991).
41. *Id.* at 298–99.
42. *Id.* at 298.
43. *Id.*
44. Helling v. McKinney, 509 U.S. 25, 36 (1993).
45. *Id.*
46. *Id.*
47. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).
48. Estelle v. Gamble, 429 U.S. 97, 104 (1976). In that case, an incarcerated plaintiff claimed that the prison's doctors subjected him to cruel and unusual punishment for failing to effectively address his medical needs with adequate treatment. *Id.* at 97. The Court rejected the plaintiff's claims because he did not show that the doctors possessed a sufficiently culpable state of mind. *Id.* at 106. The Court found that prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when they act with deliberate indifference to risks to prisoner health or safety. *Id.* at 104–05.
49. *Farmer*, 511 U.S. at 847. In this case, Dee Farmer alleged that prison officials were aware of, and actively disregarded, the risk to her safety posed by her placement in general population at a prison known for its violence and inmate attacks, given her vulnerable status as a transgender woman. *Id.* at 829.
50. *Id.* at 842.
51. *Id.* at 842–43.

B. *Successes of Eighth Amendment Claims for Contaminated Prison Water*

The Eighth Amendment is not a reliable tool for incarcerated people seeking relief for contaminated prison water. It has been successful only in the limited circumstance where the plaintiff has clear evidence that a prison official had knowledge of serious water contamination.[52] Furthermore, successful plaintiffs usually had documentation issued by the city and sent to the prison which warned of excessive contaminant levels in the water.[53] These pieces of evidence helped plaintiffs prove perhaps the most difficult element of an Eighth Amendment claim based on water contamination: that the defendants had knowledge of the risk.[54]

1. A Success Story: *Walker* and City Warnings of Contaminated Water Inside Prison[55]

In *Walker*, the U.S. Court of Appeals for the Tenth Circuit found that a reasonable fact finder could infer that two wardens acted with deliberate indifference to the plaintiff's health because they received warnings from the city about contaminated drinking water but did not do anything to prevent him from drinking it.[56] Tyrone Walker alleged that Sterling Correctional received an administrative notice from the city of Sterling's Public Water System stating that the water was contaminated with uranium.[57] In response to the notice, one warden assured inmates that the water was safe to drink.[58] Another warden received the same state administrative notice, which advised Sterling's citizens to refrain from drinking the uranium-contaminated water, and did nothing to prevent inmate harm in response.[59] The Tenth Circuit found that Walker plausibly pled defendants' knowledge of the risk and failure to reasonably act to abate it.[60]

2. Another Success With Documented Evidence of Contamination: *Duncan v. Hickenlooper*[61]

In a second case arising out of Sterling Correctional Facility, the Tenth Circuit found that plaintiff pled both prongs of an Eighth Amendment violation when he claimed that prison wardens received documents that alerted them to harmful contaminated water in the prison and failed to do anything in response.[62] In his filings, James Duncan included several documents which aided the court's analysis: a 2008 notice from Sterling City which urged citizens to use alternative water sources because the city's water was contaminated with uranium, a portion of a 2013 memorandum issued by the Colorado Department of Corrections regarding a water contamination violation in Sterling City, another 2013 notice from the city alerting residents to water contamination, and a 2013 news article about the city's water contamination.[63] Duncan alleged that the defendants received the documents, read their contents describing the serious health risks of drinking uranium-contaminated water, and failed to protect inmates from further consumption of the water.[64]

Under the first prong—whether the harm alleged was substantially serious—the Tenth Circuit noted that the city's notices to the defendants detailed the serious health risks posed by the contaminated water.[65] The memoranda, when taken together, cautioned that long-term exposure to the contaminants here could cause health issues in the liver, kidneys, central nervous system, and could increase drinkers' risk of cancer.[66] These documents were an invaluable tool for the plaintiff because neither the court nor the defendants could reasonably question the seriousness of the harm alleged when the city itself recognized the serious health risks of drinking the contaminated water. Furthermore, Duncan also plausibly alleged that he was personally injured because of his consumption of Sterling water.[67] He claimed CT scans showed a cyst on his kidney which caused blood to discharge into his urine, a doctor found the nerve damage to his liver was a direct result of radiation exposure, and that a physician's assistant told him his thyroid gland was shutting down due to too much uranium in his system.[68] Together, the city's documents detailing the serious harm posed by consumption of contaminated water and Duncan's alleged personal injuries satisfied the objective component of the Eighth Amendment inquiry.[69]

On the subjective inquiry, the memoranda were determinative.[70] It was reasonable to assume that the wardens knew about the contamination because they received the memoranda and the court inferred that the wardens read them.[71] Furthermore, it was reasonable to infer that the wardens were aware of the attendant health risks of drinking the contaminated water because the memoranda themselves described those risks.[72] Finally, the allegations that the wardens failed to do anything to abate the risks stated a plausible claim of deliberate indifference.[73]

52. *E.g.*, Walker v. Hickenlooper, 627 F. App'x 710, 714–15 (10th Cir. 2015); Duncan v. Hickenlooper, 631 F. App'x 644, 646 (10th Cir. 2015); Cole v. Livingston, No. 4:14-CV-1698, 2016 WL 3406439, at *7–8 (S.D. Tex. June 21, 2016), *order vacated, appeal dismissed sub nom.* Yates v. Collier, 677 F. App'x 915 (5th Cir. 2017).
53. *See, e.g.*, *Walker*, 627 F. App'x at 714–15; *Duncan*, 631 F. App'x at 646.
54. *Walker*, 627 F. App'x at 714–15; *Duncan*, 631 F. App'x at 651.
55. *Walker*, 627 F. App'x at 710.
56. *Id.* at 714–15.
57. *Id.* at 714.
58. *Id.*
59. *Id.* at 714–15.
60. *Id.* The court remanded Walker's case for further proceedings on his conditions of confinement claims, but no subsequent litigation occurred. *Id.* at 720.
61. Duncan v. Hickenlooper, 631 F. App'x 644, 644 (10th Cir. 2015).
62. *Id.* at 649–51.
63. *Id.* at 646.
64. *Id.* at 650–51.
65. *Id.* at 649.
66. *Id.*
67. *Id.*
68. *Id.*
69. *See id.*
70. *Id.* at 650–51.
71. *Id.*
72. *Id.*
73. *Id.* at 651. The Court remanded Duncan's case for further proceedings, but none occurred. Duncan did, however, bring a separate Eighth Amendment water contamination claim two years later, which is discussed in Part II.C.1.

3. The Final Success: *Cole v. Livingston* and a Prison's Concession That Water Was Contaminated[74]

In *Cole v. Livingston*, the court granted the plaintiffs' emergency motion for preliminary injunction[75] in response to allegations that Wallace Pack Unit inmates were forced to live in extreme temperatures during the summer months and that the mitigation strategy offered by the Texas Department of Criminal Justice ("TDCJ")—to drink more water—was inadequate because the prison's water supply was contaminated with arsenic.[76] The Eighth Amendment issue in *Cole* was whether the prison's measure to mitigate extreme heat by advising inmates to drink more of the prison's contaminated drinking water presented a substantially serious risk of harm.[77] Because the prison officials conceded that they knew the water was contaminated, the subjective prong—deliberate indifference—was not in question.[78]

TDCJ did not dispute the danger posed by extreme heat, nor that the water contained between two times to four-and-a-half times the amount of arsenic permitted by EPA.[79] TDCJ asserted that it implemented mitigation measures to reduce the risk posed by the heat and that it was in the process of installing a new filtration system for the water.[80] The court was unconvinced.[81] It did not matter that consumption of arsenic water increased the inmates' risk of cancer only slightly.[82] *Any* increased risk, no matter how small, was unacceptable given the low cost of providing clean water to inmates.[83]

Furthermore, the *Cole* court found that the fact that many free Americans drink contaminated water every day did not undermine the assertion that the harm posed by consumption of contaminated water was sufficiently serious:

> It is undisputed that many free world residents of the United States still drink water with arsenic concentrations at or above the concentrations in the Pack Unit water system. But those individuals do so with EPA-mandated notice from the water system, and they do so voluntarily. A free individual who receives notice that his water system does not meet EPA regulations has several options: he can drink the water, knowing it will (slightly) increase his risk of cancer; he can find or buy a different water source to drink from; he can buy and use a personal water filter; he can even move, if he wishes, if the water system has not been fixed within a year or within ten years. For prisoners, those options obviously do not exist.[84]

Moreover, the fact that some communities in the United States still struggle to eradicate contaminants in their water supplies does not demonstrate widespread acceptance of that risk.[85] "Rather, it demonstrates the intolerability of imposing such risks upon people who live under the government's complete physical control."[86]

C. *When Incarcerated Plaintiffs Do Not Have Documentation: The Eighth Amendment's Failure to Protect Individuals From Contaminated Water*

In *Walker* and *Duncan*, the plaintiffs had documents which described their prisons' water contamination *and* evidence that the defendants had read those documents.[87] In *Cole*, the defendants conceded that they knew about the contaminated prison water.[88] Most plaintiffs do not have the powerful evidence that the *Walker*, *Duncan*, and *Cole* plaintiffs had.[89] Usually, plaintiffs' claims do not survive motions for summary judgment or motions to dismiss.[90] Both prongs of the Eighth Amendment inquiry present significant hurdles for incarcerated people who may not have access to attorneys, expert witnesses, or investigators.

1. *Duncan v. Milyard*: A Defendant Prison With an Expert Witness and an Incarcerated Plaintiff Without One[91]

Duncan v. Milyard was Duncan's second water contamination case.[92] The district court dismissed plaintiff's water contamination claim because he did not have expert wit-

Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *1 (D. Colo. July 13, 2017).

74. Cole v. Livingston, No. 4:14-CV-1698, 2016 WL 3406439, at *8 (S.D. Tex. June 21, 2016).
75. *Cole*, 2016 WL 3406439, at *6–7 (quoting Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011)). The requirements for a motion for preliminary injunction are: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Id.*
76. *Id.* at *2–3.
77. *Id.*
78. *Id.* at *7.
79. *Id.* at *2.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at *7.
84. *Id.* at *2.
85. *See* Brief for Plaintiffs-Appellees at 23, Cole v. Livingston, No. 4:14-CV-1698, 2016 WL 3406439 (S.D. Tex. June 21, 2016), *order vacated, appeal dismissed sub nom.* Yates v. Collier, 677 F. App'x 915, 918 (5th Cir. 2017).
86. *Id.*
87. Walker v. Hickenlooper, 627 F. App'x 710, 714–15 (10th Cir. 2015); Duncan v. Hickenlooper, 631 F. App'x 644, 646 (10th Cir. 2015).
88. *Cole*, 2016 WL 3406439, at *2.
89. *See, e.g.*, Carroll v. DeTella, 255 F.3d 470, 473 (7th Cir. 2001); Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *8 (D. Colo. July 13, 2017); Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *8 (D. Colo. Aug. 3, 2015).
90. *See, e.g.*, *Carroll*, 255 F.3d at 473; *Duncan*, 2017 WL 2986495, at *8; *Cary*, 2015 WL 5432793, at *8.
91. *Duncan*, 2017 WL 2986495, at *8.
92. Duncan's first case was discussed above in Part II.A.2. *See* Duncan v. Hickenlooper, 631 F. App'x 644, 649 (10th Cir. 2015). Duncan brought this initial water contamination case against Colorado's governor, John Hickenlooper, as well as several Colorado Department of Corrections employees. *Id.* at 647. The court dismissed the claims against all defendants except Warden Kevin Milyard and Warden James Falk. *Id.* at 651. In Duncan's newer case, he brought claims only against those wardens. *Duncan*, 2017 WL 2986495, at *2.

ness testimony or scientific arguments which demonstrated that the harm was sufficiently serious.[93] In *Duncan v. Milyard*, Duncan alleged that his thyroid issues, kidney injuries and pain, liver damage, and immune and nervous system ailments were all caused by his forced consumption of polluted food and drink inside prison.[94] The defendants' expert witness testified the plaintiff's health issues were not associated with excessive uranium exposure.[95] Plaintiff's failure to rebut the expert witness's conclusions or offer "scientific, technical, or other specialized knowledge" linking his uranium exposure to his ailments raised no issue of material fact according to the court.[96]

2. *Carroll v. DeTella*: No Eighth Amendment Protection for Contaminated Water Because Non-Incarcerated People Also Have to Drink It[97]

Some courts have suggested water contamination cannot pose a sufficiently serious harm to inmates because it is a common problem in society.[98] In *Carroll v. DeTella*, when assessing the seriousness of excessive radium levels in prison water where the plaintiff was incarcerated, the U.S. Court of Appeals for the Seventh Circuit noted that the harms caused by exposure to water contaminants are not experienced only by people in prison.[99] The fact that many Americans live in conditions that expose them to contaminants supposedly undercuts the seriousness of the risks of contaminated drinking water in prison.[100] The Seventh Circuit affirmed the district court's grant of the defendants' motion for summary judgment.[101]

Thus, the first prong presents several obstacles. Under this prong, courts will assess plaintiffs' showing of causation: that the health ailments they experience, or will experience,[102] are caused by water contamination.[103] At the summary judgment stage, courts will not accept mere conclusory statements about causation, and often require specialized knowledge from experts that links the health ailment to exposure to the specific contaminant.[104] Incarcerated plaintiffs, particularly those proceeding *pro se*, are unlikely to have access to experts as defendant prisons do.[105] In addition, some plaintiffs will have to show that water contamination is unique to prison.[106] In creating this new rule, the Seventh Circuit failed to recognize that the commonality or ubiquity of a harm does not make it any less cruel or unusual when experienced by someone in prison.[107] Furthermore, the state of being incarcerated changes the very nature of the harm itself: a free individual who discovers their water is contaminated may have the option to purchase a filtration system or even move, as noted by the *Cole* court.[108] When imprisoned, individuals have no other meaningful option but to drink the harmful liquid. The court thus equates harm that is common in society with harm that is not sufficiently serious, which lessens incarcerated plaintiffs' likelihood of success under the first prong in water contamination cases.

Once a court has found a plaintiff presented no issue of material fact that suggests the harm is sufficiently serious, it will grant the defendants' motion for summary judgment without reaching the second prong of the Eighth Amendment inquiry.[109] Sometimes though, like in *Carroll v. DeTella*, a court will assess plaintiff's showing that the defendants were deliberately indifferent to the alleged risk under the second prong.[110] The plaintiffs in *Carroll* initially complained about the water quality in a Stateville prison eight years before the initiation of the suit.[111] The warden assured the inmates that the water was safe to drink, but at the same time provided prison staff with bottled water because they too were concerned about the tap water's quality.[112] In responding to the plaintiffs' inference that the warden was aware of the substantial hazard posed by contaminated water based on the distribution of bottled water to prison employees, Judge Richard Posner wrote for the Seventh Circuit:

> The fact that the prison gave bottled water free of charge to its own staff does not show an awareness of a substantial hazard. If an employee has an irrational fear, that is nevertheless a brute fact that the employer has to take into account lest the employee quit or demand a higher wage to compensate him for bearing the supposed hazard. It is no proof that the employer shares the fear. Prison officials do not demonstrate that deliberate indifference to the inmates' welfare . . . when they refuse to take measures against hazards that they reasonably believe to be nonexistent or slight.[113]

93. *Duncan*, 2017 WL 2986495, at *7.
94. *Id.*
95. *See id.*
96. *Id.* at *7–8.
97. Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001).
98. *See* Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *6 (D. Colo. Aug. 3, 2015) (finding that, when plaintiff sought recourse for contaminated prison tap water, he did not complain of any harms that were unique to prison and not also faced by non-incarcerated citizens).
99. *See Carroll*, 255 F.3d 470 at 472.
100. *Id.*
101. *Id.* at 473.
102. Helling v. McKinney, 509 U.S. 25, 34 (1993) ("the Eighth Amendment protects against sufficiently imminent dangers . . . .").
103. *See, e.g.*, Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *7–8 (D. Colo. July 13, 2017).
104. *See id.*
105. *See, e.g.*, *id.*; *see also* David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 Hastings L.J. 281, 281 (1990).
106. *See, e.g.*, Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001); Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *6 (D. Colo. Aug. 3, 2015).
107. The Supreme Court also held that the ubiquity or commonality of an environmental harm does not diminish a plaintiff's standing when that harm impacts their use and enjoyment of natural resources, even if many people use those same natural resources and have suffered the same harm. *See* United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 686–87 (1973).
108. These options assume that free individuals have the resources which would make these options viable. Cole v. Livingston, No. 4:14-CV-1698, 2016 WL 3406439, at *2 (S.D. Tex. June 21, 2016), *order vacated, appeal dismissed sub nom.* Yates v. Collier, 677 F. App'x 915, 918 (5th Cir. 2017).
109. *See Duncan*, 2017 WL 2986495, at *8.
110. *Carroll*, 255 F.3d at 473.
111. *Id.* at 472.
112. *Id.*
113. *Id.* at 473.

In rejecting the plaintiffs' deliberate indifference argument, Judge Posner notes poisoning the water supply or purposefully inducing cancer in an incarcerated individual would be cruel and unusual punishment.[114] However, "failing to provide a maximally safe environment, one completely free from pollution or safety hazards, is not."[115] Under Judge Posner's formulation, a prison official would have to do some affirmative and intentional act which causes harm to be deliberately indifferent. But *Farmer v. Brennan* makes clear that a prison official need not act deliberately in the literal sense to be found deliberately indifferent; the standard encompasses *both* the prison official who purposefully leaks arsenic into the prison's water supply and the prison official who knows arsenic is present in the water supply but does nothing to stop inmates from drinking.[116]

Inmates relying on the Eighth Amendment to obtain legal relief for contaminated water are likely to run into obstacles. While they may survive motions to dismiss, plaintiffs may have trouble surpassing motions for summary judgment if they do not have access to expert witnesses, scientific data, prison and local government memoranda, or judges willing to construe *Farmer* to allow for an inferential leap when it comes to the Eighth Amendment deliberate indifference standard.[117] Plaintiffs will have to show causation and substantial harm from contaminated water.[118] Moreover, some judges may assert that the existence of communities that experience water contamination demonstrates that the harm posed by contaminated water inside of prison is not sufficiently serious.[119] There are several mechanisms with which courts will dismiss an Eighth Amendment claim in response to prison water contamination, making the Amendment an unreliable tool for legal relief.[120]

III. My Proposal: The SDWA

The SDWA does not require plaintiffs to prove consumption of contaminated water presents a serious risk to their health, and they do not have to prove that defendants knew and disregarded those risks.[121] Instead, plaintiffs must show a contaminant is present in their drinking water at levels that exceed EPA regulations' permitted quantity.[122] Once they have made that showing, liability attaches to defendants.[123] This is the power of the SDWA.

A. The SDWA: A Summary

The SDWA was first enacted in 1974 after studies of community water systems around the country revealed poor water quality and associated health risks.[124] The studies showed the water quality was a result of poor management and bad water facilities.[125] In response, the U.S. Congress developed the SDWA and its key component: the regulation of water contaminants.[126] The SDWA empowers EPA to promulgate regulations for water contaminants.[127] Only those contaminants that meet the following criteria may be regulated:

> (i) The contaminant may have an adverse effect on the health of persons;
>
> (ii) The contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and
>
> (iii) In the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.[128]

Once the Administrator determines a contaminant requires regulation, the SDWA requires EPA to set two different standards for the contaminant: a non-enforceable maximum contaminant level goal ("MCLG") and a maximum contaminant level ("MCL").[129] The MCLG is the level of contaminant in the water that poses no known or anticipated adverse health effects.[130] The MCL is the highest level of a contaminant that is allowed in drinking water; it is set as close to the MCLG as feasible using the best technology, treatment techniques, and other means available while accounting for cost considerations.[131] Each MCL exceedance is a violation of the SDWA and thus actionable.[132]

The SDWA covers three types of water systems: community water systems, non-transient non-community water systems, and transient non-community water systems.[133] A community water system serves the same residences year-

114. *Id.* at 472.
115. *Id.*
116. Farmer v. Brennan, 511 U.S. 825, 847 (1994).
117. Under *Farmer*, an incarcerated plaintiff must show that a prison official knew of a substantial risk of harm and disregarded that risk. *Id.* The *Farmer* court allowed a trier of fact to infer that an official had actual knowledge of a substantial risk from circumstantial evidence. *Id.* at 842–43.
118. *See, e.g.*, Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *7–8 (D. Colo. July 13, 2017).
119. *See, e.g.*, *Carroll*, 255 F.3d at 472.
120. *See supra* Part II.B.
121. *See generally* 42 U.S.C. § 300j-8.
122. *See id.*; 40 C.F.R. § 141.11(b); *see also National Primary Drinking Water Regulations*, *supra* note 18.
123. *See, e.g.*, 40 C.F.R. § 300j-8(a)(1).
124. Elena H. Humphreys & Mary Tiemann, Cong. Rsch. Serv., RL31243, Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements 2 (2021), https://crsreports.congress.gov/product/pdf/RL/RL31243 [https://perma.cc/J4Q9-6KVX].
125. *Id.*
126. *Id.* at 2–3.
127. 42 U.S.C. § 300g-1(b)(1)(A).
128. *Id.*
129. 42 U.S.C. § 300g-1(b)(4)(A)–(B).
130. 42 U.S.C. § 300g-1(b)(4)(A). For some contaminants, like arsenic and uranium, the MCLG is zero because there is no level at which those contaminants can safely exist in drinking water. *See National Primary Drinking Water Regulations*, *supra* note 18.
131. 42 U.S.C. § 300g-1(b)(4)(B), (D).
132. *See* 42 U.S.C. § 300j-8; 40 C.F.R. § 141.11(b); *see also National Primary Drinking Water Regulations*, *supra* note 18.
133. Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements, *supra* note 124, at 4–5.

round.[134] All federal regulations apply to community water systems.[135] Most prisons get their water from community water systems.[136] Non-transient non-community water systems serve facilities such as schools and factories, which have their own water systems and serve the same individuals for more than six months but less than one year.[137] Most federal regulations apply to non-transient non-community water systems.[138] Finally, transient non-community water systems provide their own water to transitory customers.[139] These systems can be found in campgrounds and gas stations.[140] The only regulations for transient non-community water systems are those which regulate contaminants that pose immediate health risks to humans.[141] In total, federal drinking water regulations apply to about 144,650 water systems.[142]

States can assume primary oversight and enforcement responsibility for public water systems with EPA approval.[143] To establish state primacy, the state must apply to EPA for primacy and EPA must determine that the state meets six conditions: it must adopt regulations at least as strict as the federal regulations, adopt and implement adequate enforcement procedures, create and maintain records required by EPA, permit variances or exemptions in a manner no less strict than what would be allowed under federal guidelines, adopt an emergency response protocol to ensure the provision of safe drinking water in emergency circumstances, and adopt authority for administrative penalties.[144] If a state with primacy does not properly enforce the SDWA, EPA can take enforcement action or withdrawal primacy.[145] All states, with the exception of Wyoming and the District of Columbia, assume primacy over drinking water regulations.[146]

Other key components of the SDWA include its monitoring and reporting provisions. States must require water supplies to conduct monitoring of drinking water and issue reports based on the monitoring results.[147] Requirements for the frequency of monitoring depends on the contaminant being monitored and the type of water system.[148] The monitoring requirements are not as rigid as the reporting requirements.[149] Primacy states must submit quarterly reports with data on new MCL violations[150] and new enforcement actions taken by the state during the previous quarter to EPA.[151] Community water systems must also deliver water quality and risk assessment reports to its customers each year.[152] If an operator of a public water system detects any amount of a regulated contaminant after conducting tests, the operator must disseminate a statement describing the MCLG, MCL, and the level of the contaminant in the water to customers.[153] If an operator detects an exceedance that has the potential to have serious adverse health impacts from short-term exposure, he must give notice to the Administrator, the state, and the public within 24 hours.[154]

B. The Citizen Suit Provision of the SDWA: An Underutilized but Mighty Tool

The SDWA's citizen suit provision offers citizens—whether or not they are incarcerated—a method to enforce water contaminant regulations that help ensure their safe drinking water.[155] Compared to citizen suits under the Clean Water Act ("CWA"), for example, SDWA citizen suits are few.[156] One scholar has posited that the lack of SDWA citizen plaintiffs is due to the lack of public awareness about the SDWA: quite simply, people don't know it exists.[157] This Note aims to correct the lack of public awareness about this protective statute.

SDWA citizen plaintiffs must meet four requirements: (1) they must ensure that neither the Administrator, the Attorney General, nor the state is actively prosecuting a case against the alleged violators to compel compliance with EPA requirements,[158] (2) they must determine who are operators of the water source alleged to be in violation,[159] (3) they must provide proper notice to defendants,[160] and (4) they must establish standing.[161] To meet these requirements, incarcerated plaintiffs can make use of several EPA and online databases, including the Echo System[162] and Safe Drinking Water Information System.[163]

134. *Id.* at 4.
135. *See id.* at 4–5.
136. *See, e.g.*, *Southwestern Correctional Facilities' Drinking Water Puts Inmate Health at Risk*, Columbia Mailman Sch. of Pub. Health (June 7, 2022), https://www.publichealth.columbia.edu/public-health-now/news/southwestern-correctional-facilities'-drinking-water-puts-inmate-health-risk [https://perma.cc/582W-8ADV].
137. Humphreys & Tiemann, *supra* note 124, at 5.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 4.
143. *See* 42 U.S.C. § 300g-2.
144. 40 C.F.R. § 142(b).
145. *Safe Drinking Water Act (SDWA) and Federal Facilities*, U.S. EPA, https://www.epa.gov/enforcement/safe-drinking-water-act-sdwa-and-federal-facilities#EPA%20Enforcement [https://perma.cc/U9S3-9URE] (Nov. 24, 2021).
146. Humphreys & Tiemann, *supra* note 124, at 1 n.1.
147. 40 C.F.R. § 141.21.
148. *See generally* 40 C.F.R. § 141.21–29.
149. *Compare* 40 C.F.R. § 141.21, *with* 40 C.F.R. § 142.15.
150. 40 C.F.R. § 142.15(a)(1).
151. 40 C.F.R. § 142.15(a)(2).
152. 42 U.S.C. § 300g-3(c)(4). Customer is defined as "billing units" or "service connections to which water is delivered by a community water system." 40 C.F.R. **§** 141.151(C).
153. 42 U.S.C. § 300g-3(c)(4)(B).
154. 42 U.S.C. § 300g-3(c)(2)(C). The *Code of Federal Regulations* outlines a tier-system that clarifies which contaminants have the potential to cause serious adverse health effects and are thus subject to the 24-hour reporting rule. Some of those contaminants include E. coli, nitrate, nitrite, and chlorine dioxide. 40 C.F.R. § 141.202.
155. *See* 42 U.S.C. § 300j-8(a).
156. *See* Christine L. Rideout, *Where Are All the Citizens Suits?: The Failure of Safe Drinking Water Enforcement in the United States*, 21 Health Matrix: J. L.-Med. 655, 679 n.177 (2012).
157. *See id.* at 688.
158. 42 U.S.C. § 300j-8(b)(1)(B).
159. 42 U.S.C. § 300f(5).
160. 42 U.S.C. § 300j-8(b).
161. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).
162. U.S. EPA: Enf't & Compliance Hist. Online, https://echo.epa.gov [https://perma.cc/2CK8-783Q] (last visited Oct. 15, 2022).
163. U.S. EPA: SDWIS Fed. Reps. Advanced Search, https://sdwis.epa.gov/ords/sfdw_pub/f?p=108:9 [https://perma.cc/8TA9-D93S] (Feb. 18, 2022) [hereinafter *SDWIS Federal Reports Advanced Search*].

1. The First Requirement: No Diligent Prosecution by EPA Administrator, the Attorney General, or the State

A prospective plaintiff in an SDWA citizen suit must first ensure that neither the Administrator, the Attorney General, nor the state is actively prosecuting a case against the alleged violators to compel compliance with EPA requirements.[164] If the government prosecuted a defendant for an SDWA violation and that prosecution resulted in an active consent decree, the government is "diligently prosecuting" that civil action.[165] Moreover, the SDWA plaintiff must ensure that there is no ongoing action in *federal* court for the violation they seek to remedy.[166]

To ensure that no parties are prosecuting defendants for the violation a plaintiff wishes to remedy, the plaintiff should use a zip code search in EPA's Echo System—an enforcement and compliance database with reports about the CWA, the Clean Air Act ("CAA"), and the SDWA—which may show if there is a current MCL violation at their facility, the number of noncompliant quarters, and whether there have been informal or formal enforcement actions.[167]

2. The Second Requirement: The Operators of the Water System Will Be Defendants

For an alleged violation of the SDWA, a plaintiff can sue any individual who is a "supplier" of the water alleged to be contaminated.[168] A supplier is defined as "any person who owns or operates a public water system."[169] The statute does not define who qualifies as an owner and operator of a water system, but courts have found that individuals who manage, oversee, and direct the workings of the water system are covered by the statute.[170] At least one court has read the statute's language to attach liability to shareholders of a corporate owner of a water system when that water system was contaminated.[171] Noting that the plain language of the SDWA shows Congress intended to impose liability on *violators*, the court held "nothing in the SDWA or in cases interpreting environmental statutes suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of the corporation which actually owned the water system."[172]

The incarcerated plaintiff, then, should name as defendants any individual, organization, or municipality responsible for providing clean water to the prison.[173] The plaintiff may use an online database which will help him determine what kind of system services the prison.[174] That database will also give him information about who oversees the water system.[175] The overseer will become the defendant in the incarcerated plaintiff's SDWA citizen suit.[176]

3. The Third Requirement: Notice

Next, an SDWA plaintiff must provide the proper notice to the Administrator, the state where the alleged violation occurred, and to the defendants.[177] Many cases brought under the citizen suit of the SDWA fail because plaintiffs did not comply with the mandated notice procedures.[178] In the notice letters, the plaintiff must provide the defendants with enough information so they can identify the specific SDWA requirement they have allegedly violated.[179] The crucial requirement of the plaintiff's notice of intent to sue is that it must put the defendants "in a position to remedy the violation alleged . . . ."[180] For instance, if a plaintiff seeks relief for uranium contamination of his water, his notice should cite to the federal regulation which sets the uranium standard at 30 micrograms per liter, 40 C.F.R. § 141.66(d).

After providing sufficient notice, the plaintiff must wait sixty days before commencing the civil action to give the violators the opportunity to fix the violation.[181] Thus, when the plaintiff initiates the lawsuit with his complaint, he

164. 40 U.S.C. § 300j-8(b)(1)(B).
165. Levin v. Cnty. of Westchester, No. 16 CV 3627, 2017 WL 3309757, at *4 (S.D.N.Y. Aug. 2, 2017).
166. A district court in Ohio was asked to interpret the meaning of "diligently prosecuting" and "a court of the United States." *See* Carr v. Arrowhead MHC, LLC, 518 F. Supp. 3d 1018, 1022 (N.D. Ohio 2021). The court found that the latter text referred *only* to federal courts and did not reach the meaning of "diligently prosecuting." *See id.* at 1024.
167. *See, e.g.*, Detailed Facility Report for TDCJ Luther Unit, U.S. EPA: Enf't & Compliance Hist. Online, https://echo.epa.gov [https://perma.cc/2CK8-783Q] (last visited Sept. 11, 2022) (search by location and input "77868" and find "TDCJ Luther Unit" in the list of facilities and follow the link).
168. *See* 42 U.S.C. § 300f(5); 42 U.S.C. § 300g-3(a)(1)(A).
169. *Id.* The term "public water system" encompasses community water systems, non-transient non-community water systems, and transient non-community water systems. 42 U.S.C. § 300f(15)–(16).
170. *E.g.*, United States v. Ritz, 772 F. Supp. 2d 1017, 1022 (S.D. Ind. 2011) ("[A]n operator is someone who manages, directs, or conducts operations specifically related the PWS's compliance with, or violation of, the SDWA."); United States v. Alisal Water Corp., 114 F. Supp. 2d 927, 938 (N.D. Cal. 2000) (finding that directors and major shareholders of water corporation, who were involved in making hiring and firing decisions, were operators under the SDWA).
171. *Alisal Water Corp.*, 114 F. Supp. 2d at 938–39.
172. *Id.* at 939.
173. Defendants could include, for instance, a prison warden or prison operations manager.
174. *See* My Tap Water, https://mytapwater.org [https://perma.cc/M34D-8PZC] (last visited Apr. 10, 2022); *SDWIS Search*, U.S. EPA, https://www.epa.gov/enviro/sdwis-search#geography [https://perma.cc/6436-MTQ5] (July 25, 2022).
175. *See* My Tap Water, *supra* note 174; *SDWIS Search*, *supra* note 174.
176. *See* 42 U.S.C. § 300f(5); 42 U.S.C. § 300j-8(b).
177. *See* 42 U.S.C. § 300j-8(b).
178. *See, e.g.*, Ketchup v. Barr, No. 21-10510, 2021 WL 3360959, at *3 (11th Cir. Aug. 3, 2021); Kent Vu Phan v. Aurora City Water Util. Admin., No. 21-CV-00960, 2021 WL 5629068, at *1 (D. Colo. Apr. 13, 2021); Mercer v. Poland Springs, No. 20-CV-2140, 2020 WL 1330743, at *2 (S.D.N.Y. Mar. 20, 2020).
179. 40 C.F.R. § 135.12(a) provides that plaintiffs must provide: sufficient information to notify the recipient the specific requirement alleged to have been violated, the activity alleged to constitute a violation, the people responsible, the date of the alleged violation, the full name, address, and telephone of the person giving notice. *See also* ACORN v. Edwards, 842 F. Supp. 227, 231–32 (E.D. La. 1993) (finding the plaintiff complied with its notice obligations under the SDWA because it gave the defendant sufficient information to identify the specific SDWA requirement allegedly violated in its notice letter).
180. Rauseo v. Army Corps of Eng'rs, 368 F. Supp. 3d 202, 210 (D. Mass. 2019) (holding that plaintiffs' failure to name a particular pollutant in their notice of intent to sue was not dispositive of the sufficiency of pre-suit notice in a CWA and SDWA citizen suit).
181. 42 U.S.C. § 300j-8(b)(1)(A).

must make a showing of proper notice.[182] Accordingly, the plaintiff should attach his date-stamped letters of intent to sue, sent to EPA, the state, and prospective defendants, as exhibits to his complaint.[183]

4. The Final Requirement: Proving Standing

The SDWA plaintiff must also meet standing requirements under the U.S. Constitution: (1) injury-in-fact that is concrete and particularized and actual or imminent, (2) traceability, and (3) redressability.[184] Before the plaintiff alleges injury-in-fact, he must show that the water is actually contaminated and allege how they know the water is contaminated.[185] A plaintiff's claim that the water is contaminated cannot be based only on his personal belief that it is contaminated.[186] The plaintiff must have objective evidence of contamination.[187]

A prisoner plaintiff can obtain objective evidence from SDWIS Federal Reports, a database specific to SDWA violations and enforcement.[188] Because the SDWA mandates consistent reporting from public water systems,[189] the data about public water systems—including their MCL violations—is publicly available on the SDWIS website.[190] A prisoner plaintiff can find details about each violation in the water system that services the prison: if the violation was based on an exceeded maximum contaminant level, when it began, whether the water operator has returned to compliance, and other enforcement information.[191] Inmates should look for those violations with the notation "MCL," because that will indicate that the water operator allowed a contaminant in the water supply to exceed the level permitted by EPA.[192]

The plaintiff should include the SDWIS reports in pleadings because they will show that water is contaminated and how the plaintiff knows that the water is contaminated. The plaintiff must also allege injury-in-fact.[193] It is more difficult for SDWA plaintiffs to show physical injury than material injury.[194] The plaintiff shows injury-in-fact if he shows his concerns about the alleged environmental harm have affected his material interests and choices.[195] An incarcerated plaintiff alleging SDWA violations could, for example, allege that he was forced to deplete his savings accounts because he bought bottled water from the prison commissary to avoid the prison tap water. He could also allege that he was forced to boil water before drinking it. So long as the plaintiff's concerns and fear about drinking contaminated water are reasonable and personal, the court will consider them "injury-in-fact."[196]

Next, an SDWA plaintiff must show that the violation is traceable to the defendant or defendants.[197] This second requirement compels the plaintiff to show that his injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."[198] Here, the plaintiff should show that defendants are operators of the water system in question by including reports from the online databases discussed above.[199] Those reports establish that defendants are operators and thus subject to the provisions of the SDWA.[200]

Lastly, the plaintiff must show redressability to show standing.[201] In an SDWA citizen suit, the plaintiff will establish redressability only if the violation they allege is ongoing.[202] The court can only provide relief for a violation that is ongoing.[203] Courts may not consider a violation ongoing for purposes of standing if, for example, the plaintiff is no longer incarcerated in the facility where he alleges contaminated water is present.[204] In *Ford v. California*,

182. *See* Ford v. California, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at *3 (E.D. Cal. Apr. 2, 2013); *see also ACORN*, 842 F. Supp. at 231 (holding that plaintiffs' notice of intent to sue was sufficient because plaintiffs cited the specific requirements of the LCCA, which amended the SDWA, and described the particular aspects of defendants' failure to comply with the provisions).
183. 42 U.S.C. § 300j-8(b)(1)(A).
184. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)); *see also* Rauseo v. Army Corps of Eng'rs, 368 F. Supp. 3d 202, 210 (D. Mass. 2019).
185. *Contra* Simmons v. Hooper, No. 1:18-CV-0069-BU, 2021 WL 861716, at *9 (N.D. Tex. Jan. 13, 2021) (holding that prisoner plaintiff failed to allege facts demonstrating how he knew that the water was contaminated or that anyone of authority in the prison conducted water quality tests that revealed contaminated water).
186. *See id.* For instance, a court will not be convinced if a plaintiff alleges that he suffers from stomach pain because of his consumption of what he believes to be contaminated water. *Id.* at *8.
187. *See, e.g.*, *id.* at *9.
188. *See SDWIS Federal Reports Advanced Search*, *supra* note 163.
189. *See* Part III.A, *supra*, for a discussion on the SDWA's reporting requirements.
190. *See* 40 C.F.R. § 141.21-29; *SDWIS Federal Reports Advanced Search*, *supra* note 163.
191. *See SDWIS Federal Reports Advanced Search*, *supra* note 163.
192. *E.g.*, Water Systems Search Results for "CO" and "Sterling," U.S. EPA: SDWIS Fed. Reps. Search, https://sdwis.epa.gov/ords/sfdw_pub/f?p=108:200 [https://perma.cc/N6RZ-RMJX] (fill "CO" for the state drop-down option and search "Sterling" in the city option) (last visited Apr. 9, 2022).
193. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Allen v. Wright, 468 U.S. 737, 756 (1985), Warth v. Seldin, 422 U.S. 490, 508 (1975), and Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972)).
194. *See, e.g.*, Ford v. California, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at *4 (E.D. Cal. Apr. 2, 2013) (dismissing plaintiff's SDWA complaint because he failed to show that he had been diagnosed with any illnesses caused by arsenic poisoning when he alleged that his prison's water was contaminated with arsenic).
195. *See, e.g.*, Friends of the Earth v. Laidlaw Env't Servs., 528 U.S. 167, 183–84 (2000) (holding plaintiffs' alleged injury-in-fact in a CWA suit when they presented evidence that they stopped hiking, picnicking, camping, and engaging in their usual recreational activities around a local river due to mercury discharges from a nearby wastewater treatment plant).
196. *See id.*
197. *Lujan*, 504 U.S. at 560–61 (quoting Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).
198. *Id.*
199. *See* My Tap Water, *supra* note 174; *SDWIS Search*, *supra* note 174.
200. 42 U.S.C. § 300f(5).
201. *Lujan*, 504 U.S. at 560–61 (quoting *Simon*, 426 U.S. at 38, 43).
202. *Contra* Mattoon v. City of Pittsfield, 980 F.2d 1, 6–7 (1st Cir. 1992) (internal quotation marks omitted). In *Mattoon*, the U.S. Court of Appeals for the First Circuit affirmed the defendants' motion for summary judgment because plaintiffs failed to show that the violation was ongoing. *Id.* at 8. Appellants filed their citizen suit in June 1988, two-and-a-half years after the reservoir in question was connected to widespread reports of giardiasis in the community. *Id.* at 2–3. In January 1987, the city installed a new filtration system. *Id.* at 2. The court acknowledged that even though there was evidence that the filtration system would not filter the particles causing giardiasis, there also was no evidence supporting an inference that post-1985 giardiasis cases were linked to the city's water system. *Id.* at 2–3.
203. *See id.* at 7.
204. *E.g.*, Ford v. California, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at *1, *3 (E.D. Cal. Apr. 2, 2013) (dismissing plaintiff's SDWA claim and

the plaintiff was no longer incarcerated at the facility with the alleged contaminated water and the court dismissed his SDWA claim for lack of standing and redressability.[205] The court relied on the Supreme Court's interpretation of a similar citizen suit provision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, *Inc.*,[206] which held that a citizen suit is authorized only if there is a "continuous or intermittent violation" because the "harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."[207] Ray Ford faced no present or future harm from the contaminated water because he was no longer incarcerated at the facility with the contaminated water.[208]

Standing is a significant substantive hurdle to a plaintiff's success in an SDWA case. The plaintiff needs objective evidence of water contamination, and he needs to name the proper defendants. However, one legal scholar believes that "once a citizen establishes standing, the fact that a violation occurred is enough to win a citizen suit, and this is the strength of the citizen suit provision."[209]

C. The SDWA's Remedies

The strength of the SDWA is that it is a strict liability statute: once the court finds that a violation is taking place, it may impose a penalty.[210] If a plaintiff is successful, the court may "award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate."[211] The Supreme Court interpreted identical language in the CAA and held that the provision allowed fees only when a party achieves "some degree of success on the merits."[212] Courts have found a plaintiff may be considered a prevailing party even in the absence of a judicial determination on the merits.[213] "Plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[214] Therefore, an SDWA plaintiff will recover if his suit forces defendants to comply with SDWA regulations even absent a final determination on the merits.

In addition to the collection of attorney fees and expert witness fees, the citizen suit of provision of the SDWA provides "nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief."[215] The citizen plaintiff can obtain, for example, injunctive relief and consent decrees.[216] In *Colorado Environmental Coalition*, the citizens there sought a consent decree that required defendants to implement remedial programs and testing schedules for waters in schools.[217] Consent decrees for prison defendants could include implementation of more frequent testing requirements and provision of bottled water to inmates while the prison water remains contaminated. Even though the SDWA does not allow plaintiffs to recover damages, plaintiffs are still entitled to strong legal protection of consent decrees that they help create.[218]

IV. Returning to Duncan: Where the Eighth Amendment Failed to Provide Protection

In *Duncan*, the plaintiff brought Eighth Amendment suits regarding the alleged contaminated water in Sterling Correctional Facility.[219] He was unsuccessful because he could not prove a causal link between his ailments and the contaminated water.[220] This section will show how Duncan could have used the SDWA to obtain injunctive relief. He must follow the four steps discussed in the previous Part II(B): (1) he must ensure that neither the Administrator, the Attorney General, nor the state is actively prosecuting a case against the alleged violators to compel compliance with EPA requirements, (2) he must determine who are operators of the water source alleged to be in violation, (3) he must provide proper notice to defendants, and (4) he must establish standing.[221]

Colorado, where Duncan is incarcerated, is a primacy state,[222] which means that it, rather than the federal government, oversees implementation and enforcement of the provisions of the SDWA.[223] Like the federal MCL for uranium, Colorado's is thirty micrograms per liter.[224] If Sterling Correctional Facility's

noting that "[t]he harm sought to be addressed by the citizen suit lies in the present or the future, not in the past" (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987)).

205. *Ford*, 2013 WL 1320807, at *3.

206. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987).

207. *Ford*, 2013 WL 1320807, at *3 (quoting *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 59).

208. *Id.*

209. Rideout, *supra* note 156, at 684.

210. *See, e.g.*, 42 U.S.C. § 300j-8(d).

211. *Id.*

212. Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983).

213. *See, e.g.*, Foremaster v. St. George, 882 F.2d 1485, 1488 (10th Cir. 1989); Colo. Env't Coal. v. Romer, 796 F. Supp. 457, 459 (D. Colo. 1992).

214. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)) (internal quotation marks omitted). The Tenth Circuit has employed the "catalyst test" to evaluate whether a party is "prevailing" absent a judicial determination. *Foremaster*, 882 F.2d at 1488. A plaintiff who wants to recover attorney fees absent a favorable judicial determination on the merits must show that the lawsuit is causally linked to securing the relief obtained and the defendants' conduct in response to the lawsuit was required by law. *Id.*

215. 42 U.S.C. § 300j-8(e).

216. Injunctive relief is a remedy that restrains or requires certain acts on behalf of a party. Fed. R. Civ. P. 65(d). A consent decree is a judicially enforceable settlement agreement between two parties to litigation. United States v. Chromalloy Am. Corp., 158 F.3d 345, 349–50 (5th Cir. 1998).

217. *Colo. Env't Coal.*, 796 F. Supp. at 458.

218. *See, e.g.*, *id.*

219. Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *1 (D. Colo. July 13, 2017); Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *8 (D. Colo. Aug. 3, 2015).

220. *Duncan*, 2017 WL 2986495, at *7–8.

221. *See infra* Part III.B.

222. *Safe Drinking Water Act (SDWA) Resources and FAQs*, U.S. EPA, https://echo.epa.gov/help/sdwa-faqs [https://perma.cc/TD7N-YLY8] (last visited Nov. 1, 2022) ("Most states and the U.S. territories have been approved to exercise primary responsibility in their jurisdictions. Exceptions are the state of Wyoming and the District of Columbia, which are implemented by EPA.").

223. 42 U.S.C. § 300g-2.

224. Radionuclides Rule, 5 Colo. Code Regs. § 1002-11.22. Colorado's Radionuclides Rule requires that new sources of water conduct sampling for four consecutive quarterly samples within one year of suppling water to people. 5 Colo. Code Regs. § 1002-11.22(3)(b)(ii). If the average of those samples reveals that uranium is present in the water at a rate higher than thirty micrograms per liter, the provider must continue quarterly sampling until four

water contains more than thirty micrograms per liter of uranium, Duncan has a cause of action under the SDWA and the Colorado Primary Drinking Water Regulations.[225]

Duncan must first ensure that neither the Administrator, Attorney General, nor Colorado is diligently prosecuting a case in response to Sterling Correctional Facility's contaminated water.[226] Then, Duncan must use online databases to determine who operates the water supply.[227] Those individuals will be the defendants in the case. Before giving them notice, Duncan must gather information related to the contamination.[228] The period during which plaintiff alleged Sterling Correctional Facility's water was contaminated with uranium was between 2008 and 2012.[229] There are sixteen facilities with current violations.[230] The page lists all the facilities in the Sterling area that are covered by various environmental laws; one of them is "Colo Dept of Corrections—SCF."[231]

A search based on city and state on SDWIS Federal Reports shows "Sterling City Of," the public water system which services Sterling Correctional Facility.[232] SDWIS shows that the city of Sterling has violated the SDWA sixty-seven times since 1985.[233] Duncan was concerned about the period between 2008 and 2012. SDWIS shows that the city of Sterling's water supply was contaminated with uranium at levels exceeding the maximum contaminant level in the following time period: May 16, 2008, to September 17, 2014.[234]

Armed with this information, Duncan is ready to take steps to commence his citizen suit. He must send a notice of intent to sue to the Administrator of EPA, the state of Colorado, and the operator of Sterling's water system,[235] citing to the citizen suit provision of the SDWA, 42 U.S.C. § 300j-8. Duncan should state that the SDWIS Database indicates that Sterling's water supply is contaminated with uranium at levels prohibited by EPA, and he should include SDWIS reports as exhibits to his letter. Moreover, Duncan should cite to 42 U.S.C. § 300g-1(b)(1)(A), 40 C.F.R. § 141.66(d), and 5 Colo. Code Regs. § 1002-11.22; those are the provisions that grant EPA the authority to set MCL levels, the federal regulation which sets uranium's MCL at thirty micrograms per liter, and the state regulation for uranium respectively.[236] He should attach a current report of Sterling Correctional Facility's Report on EPA ECHO Database system.

Once the sixty-day notice period elapses, Duncan should file a complaint in the U.S. District Court for the District of Colorado. To demonstrate injury for standing purposes, Duncan must show injury-in-fact, traceability, and redressability.[237] To show injury, he should include any medical records from prison which substantiate his claims of suffering from thyroid issues, kidney injuries and pain, liver damage, and immune and nervous system ailments that he alleged in his Eighth Amendment suit.[238] If Duncan has medical records from before the water was contaminated, which show fewer ailments, he should include those as well.[239]

Duncan may also allege injury-in-fact by explaining how fear of drinking contaminated water and its health effects impacted his choices while in prison.[240] Perhaps he tried to buy bottled water from commissary whenever he could afford it. This would have affected his financial interests. He may have tried to avoid drinking water altogether. This may have had negative health implications, forced him to boil water, or liquidate his prison commissary account. Simply put, Duncan should include any conduct that he adopted to avoid the contaminated water.

Duncan will show traceability by showing that the named defendant is the operator of the water system alleged to be in violation of the SDWA. He should include database docu-

consecutive samples comply. 5 Colo. Code Regs. § 1002-11.22(3)(b)(iii). Once new water sources clear this initial sampling hurdle, they must conduct sampling at intervals of once every three years, six years, or nine years. 5 Colo. Code Regs. § 1002-11.22(3)(b)(iv). The length of the sampling interval depends on how much uranium was detected in the water during initial sampling; the closer the uranium amount was to thirty micrograms per liter, the more frequent the sampling. *Id.* Furthermore, after initial sampling, if routine sampling reveals that the uranium amount is above thirty micrograms per liter, the water source must begin sampling quarterly. 5 Colo. Code Regs. § 1002-11.22(3)(b)(v)(B). It may sample less frequently only after four consecutive quarters of sampling show compliance with uranium's MCL or if it enters into a formal compliance agreement with the Department that dictates other terms. *Id.* This information will be useful for Duncan because he can use the SDWIS database to not only look for data on current violations but also assess whether Sterling Correctional Facility has been compliant with Colorado's testing requirements.

225. 42 U.S.C. § 300j-8(a)(1); 5 Colo. Code Regs. § 1002-11.

226. Now, it is not possible to determine whether there was an active prosecution at the time when Duncan would have filed suit.

227. The current operator of Sterling Department of Corrections' water supply is Morris Smith. *Sterling Department Of Corrections Water System*, MyTapWater.org, https://mytapwater.org/pws/co0138044/sterling-department-of-corrections/logan-co/ [https://perma.cc/7WE2-4S9G] (last visited Apr. 10, 2022). However, the operator may have been different at the time that Duncan would have brought this suit.

228. 40 C.F.R. § 135.12(a) provides that plaintiffs must provide: sufficient information to notify the recipient the specific requirement alleged to have been violated, the activity alleged to constitute a violation, the people responsible, the date of the alleged violation, the full name, address, and telephone of the person giving notice.

229. *See* Duncan v. Milyard, No. 14-CV-00301-REB, 2017 WL 2986495, at *4 (D. Colo. July 13, 2017); Cary v. Hickenlooper, No. 14-CV-00411-PAB, 2015 WL 5432793, at *2 (D. Colo. Aug. 3, 2015).

230. Search Results for 80751, U.S. EPA: Enf't & Compliance Hist. Online, https://echo.epa.gov [https://perma.cc/XG3T-2GU9] (search by location and input "80751") (last visited Apr. 10, 2022).

231. *Id.* The Echo System page for Sterling Correctional Facility contains information only about Clean Air Act and Resource Conservation and Recovery Act compliance. Detailed Facility Report for Colo Dept of Corrections—SCF, U.S. EPA: Enf't & Compliance Hist. Online, https://echo.epa.gov [https://perma.cc/5Q79-SF74] (search by location and input "80751." Find "Colo Dept of Corrections—SCF" in the list of facilities and follow the link).

232. Water Systems Search Results for "CO" and "Sterling", U.S. EPA: SDWIS Fed. Reps. Search, https://sdwis.epa.gov/ords/sfdw_pub/f?p=108:200 [https://perma.cc/N6RZ-RMJX] (fill "CO" for the state drop-down option and search "Sterling" in the city option) (last visited Nov. 2, 2022).

233. *Id.*

234. *Id.*

235. Duncan can determine who this is by using the MyTapWater.org database mentioned in Part III.A.

236. 42 U.S.C. § 300g-1(b)(1)(A); 40 C.F.R. § 141.66(e); 5 Colo. Code Regs. § 1002-11.22.

237. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

238. Duncan v. Hickenlooper, 631 F. App'x 644, 649 (10th Cir. 2015). Duncan alleged that CT scans showed a cyst on his kidney which caused blood to discharge into his urine, that a doctor said the nerve damage to his liver was caused by radiation exposure, and that a physician's assistant told him his thyroid gland was failing due to excess uranium in his system. *Id.*

239. The Colorado Department of Corrections allows inmates to access their own medical records. E-mail from Michelle A. Bond, Open Records Specialist, Colorado Department of Corrections, to author (Mar. 1, 2022, 9:33 AM) (on file with author). Federal inmates may review their medical records pursuant to 28 C.F.R. § 513.42.

240. *Cf.* Friends of the Earth v. Laidlaw Env't Servs., 528 U.S. 167, 183–84 (2000).

ments that name the operator of the water system and the type of water system.

The last issue of Duncan's standing is redressability: Duncan must establish that the court can provide relief.[241] Duncan should include information about the city of Sterling's violations from the SDWIS database that will show the type of violation—uranium in the water which exceeds MCL levels—and the absence of a "return to compliance date."[242] The absence of a return to compliance date suggests that the violation is *ongoing*, a crucial element about the violation that Duncan must adequately show to the court.[243] Furthermore, Mr. Duncan should cite to 40 C.F.R. § 141.66(d), which limits the uranium levels to thirty micrograms per liter of water. Even if Duncan does not know the exact amount of uranium in the prison water, he knows that there is a violation, and he knows what the amount *should be*. EPA reports that demonstrate the existing violation are compelling evidence.[244] Finally, Duncan must also cite to 42 U.S.C. §§ 300j-8(d), (e) and ask that the court order injunctive relief and mandate, for example, that Sterling provide inmates with bottled water as long as the water continues to be contaminated with uranium and hazardous to inmate health.

A. *Obstacles for Duncan and Incarcerated Plaintiffs in SDWA Citizen Suits*

The SDWA's protections are expansive. Individuals who demonstrate standing and a contaminant level exceedance in their drinking water have a strong case.[245] However, even though plaintiffs inside of prisons may have more success obtaining legal relief with the SDWA than they do with the Eighth Amendment, incarceration frustrates their access to legal protections to which they are entitled. People inside of prisons do not have unlimited access to the Internet.[246] Even when inmates are allowed to access the Internet, it may be strictly monitored.[247] Government websites and databases, such as SDWIS, may be off limits.

People inside of prison may rely on family, friends, or civil legal aid organizations to help them collect documents necessary to build their case. Duncan or another prospective plaintiff in Colorado could contact the American Civil Liberties Union of Colorado or Colorado Legal Services.[248] Still, contacting individuals on the outside has its own set of hurdles—inmates must cover the cost of their communications.[249]

Lastly, litigation takes time. SDWA plaintiffs must act swiftly to bring litigation. Swift action will ensure that plaintiffs demonstrate standing by showing that a violation is ongoing.[250] If a prison corrects contaminated water before the plaintiff brings a case, the plaintiff will be at least temporarily freed from the dangers of drinking contaminated water. But Sterling Correctional Facility's history of water contamination shows us that water contamination can be a recurring issue inside prisons.[251] An enforceable consent decree is a powerful product of a successful SDWA citizen suit.[252] Therefore, plaintiffs must work as hard as possible to get their cases to court soon after they discover contaminated water.

The SDWA presents obstacles.[253] Those obstacles are particularly difficult for incarcerated plaintiffs to overcome. With the help of people on the outside, incarcerated plaintiffs will increase their chances of success. Even without outside resources, the *pro se* SDWA incarcerated plaintiff may face significantly fewer hurdles than a *pro se* Eighth Amendment plaintiff.

V. Conclusion

The SDWA is a powerful statute because it addresses the problem of contaminated water from multiple angles. It mandates water suppliers to monitor their supplies and report contamination levels to EPA and the public.[254] If water contamination does occur, the SDWA automatically triggers notification requirements to ensure the public is aware of their compromised water.[255] It seeks to hold water suppliers accountable by allowing EPA and citizens to initiate enforcement actions and advocate for penalties.[256] Above all, the SDWA is powerful because it operates under strict liability.[257] The court does not have to find that any state employee ignored a problem that presented grave risks to inmate health.[258] Rather, the court may simply find that water is contaminated at levels prohibited by EPA and can provide relief to inmates. The Constitution may not mandate comfortable prisons, but the SDWA promises clean water.

241. *Lujan*, 504 U.S. at 560–61 (quoting *Simon*, 426 U.S. at 41–42).
242. *Column Name: RTC_DATE*, U.S. EPA: Envirofacts, https://enviro.epa.gov/enviro/EF_METADATA_HTML.sdwis_page?p_column_name=RTC_DATE [https://perma.cc/9TFN-NQ8Q] (last visited Sept. 12, 2022).
243. *Compare* Ford v. California, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at *3 (E.D. Cal. Apr. 2, 2013), *with* Mattoon v. City of Pittsfield, 980 F.2d 1, 6–7 (1st Cir. 1992).
244. *Contra* Simmons v. Hooper, No. 1:18-CV-0069-BU, 2021 WL 861716, at *9 (N.D. Tex. Jan. 13, 2021) (holding that no SDWA violation occurred because plaintiff failed to present any facts that demonstrated that the water was, in fact, contaminated as he suspected or that the any authority conducted water quality testing and obtained results).
245. *See* Rideout, *supra* note 156, at 684.
246. Dan Tynan, *Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?*, The Guardian (Oct. 3, 2016, 6:00 AM), https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay [https://perma.cc/W3BE-X89E].
247. *Id.*
248. *See* ACLU of Colo., https://www.aclu-co.org [https://perma.cc/HP9M-LNQH] (last visited Apr. 10, 2022); Colo. Legal Servs., https://www.coloradolegalservices.org [https://perma.cc/AMJ4-5TPE] (last visited Apr. 10, 2022).
249. Peter Wagner, *Will the Postal Service Ignore Its Most Vulnerable Customers?*, Prison Pol'y Initiative (Oct. 29, 2019), https://www.prisonpolicy.org/blog/2019/10/29/postal/ [https://perma.cc/8TZA-LQB2].
250. *See contra* Ford v. California, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at *1, *3 (E.D. Cal. Apr. 2, 2013).
251. *See supra* Part II.B.
252. *See, e.g.*, Colorado Env't Coal. v. Romer, 796 F. Supp. 457, 459 (D. Colo. 1992).
253. *See supra* Part IV.A.
254. 40 C.F.R. § 141.21(g).
255. 42 U.S.C. § 300g-3(c)(4)(B).
256. 42 U.S.C. § 300j-8.
257. *See, e.g.*, 42 U.S.C. § 300j-8(a)(1).
258. Because the SDWA is a strict liability statute, no mens rea is required to prove a violation. *See id.*

STRIKING A BALANCE: INTERPRETING "RESOLVED" TO INCENTIVIZE SUPERFUND SETTLEMENT AND EXPEDITE CLEANUP

Sarah Newman*

ABSTRACT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") governs cleanup of hazardous waste sites and imposes liability on potentially responsible parties ("PRPs"), the actors responsible for the contamination. CERCLA provides the U.S. Environmental Protection Agency ("EPA") with two major avenues for effectuating cleanup: EPA may use government money to finance a cleanup and seek reimbursement from PRPs ("government-funded cleanup") or PRPs may undertake cleanup and seek reimbursement from other PRPs ("PRP-led cleanup"). Both government-funded and PRP-led cleanups are necessary to accomplish CERCLA's goal to revive contaminated land and protect public health and the environment. Congress envisioned the bulk of cleanups to be PRP-led, pursuant to settlement agreements with EPA, because government funds are limited, and settlements are quicker. The need for expedient cleanups is particularly dire given the growing threat of climate change, which exacerbates the threat of harm posed by hazardous waste sites. To preserve government funds and promote expedient cleanups, adequate incentives must be in place to bring PRPs to the negotiating table. This Note focuses on one important settlement incentive: the right to contribution. The Sixth, Seventh, and Ninth Circuits disagree as to whether covenants not to sue with conditions precedent and nonadmissions of liability negate contribution eligibility under CERCLA section 113(f)(3)(B). This Note analyzes each circuit's approach and suggests a reconciling framework that balances a PRP's interest in some degree of certainty and finality with EPA's interest in ensuring that PRPs finance cleanups. Under the framework proposed by this Note, a settlement agreement resolves at least some PRP liability when EPA promises not to sue for actions already carried out pursuant to a settlement agreement, regardless of whether the covenant not to sue contains a condition precedent or whether the PRP admits liability. This approach will incentivize settlement and expedite cleanups while leaving EPA ample latitude to reopen agreements.

I. Introduction

Several tragic episodes in the 1970s exposed the precarious situation created by past improper disposal of hazardous waste. In Brooks, Kentucky, a neglected industrial waste dump nicknamed "Valley of the Drums" contaminated the drinking source for a populous community.[1] Wilson Creek, a small stream that flowed through the dump en route to the Ohio River, collected hazardous materials oozing from as many as 100,000 deteriorating drums.[2] The stream, overrun with oil and paint,[3] caught fire and burned for nearly a week.[4] In Hopewell, Virginia, a chemical production plant dumped massive quantities of Kepone, a pesticide, into the James River, destroying the fishery.[5] Perhaps the most egregious disaster occurred at

* *Sarah Newman is a third-year law student at The George Washington University Law School. She earned her Bachelor of Arts from Vassar College in 2020. She would like to thank her mentors and her family for their support and encouragement.*

1. Joel A. Mintz, Enforcement at the EPA 34 (2012).

2. *See* John Filiatreau & Margot Hornblower, *Kentucky Hunts Cleanup Funds for Valley of the Drums*, Wash. Post (Feb. 4, 1979), https://www.washingtonpost.com/archive/politics/1979/02/04/kentucky-hunts-cleanup-funds-for-valley-of-the-drums/ea2fabcc-ccbf-4d1c-8c85-b9d3b58fe7d4/ [https://perma.cc/CKU7-JHX5].
3. *See id.*
4. U.S. Env't Prot. Agency Region 4 Atlanta, Ga., Sixth Five-Year Review Report for A.L. Taylor (Valley of the Drums) Superfund Site Brooks, Bullitt County, Kentucky 2 (2018), https://semspub.epa.gov/work/04/11111974.pdf [https://perma.cc/GT5J-PRYB].
5. *See* Bill McAllister, *James River Kepone Removal to Lost Billions*, Wash. Post (Feb. 8, 1978), https://www.washingtonpost.com/archive/local/1978/02/08/james-river-kepone-removal-to-lost-billions/8ee4bb5f-6155-494f-8b42-5e0308924beb/ [https://perma.cc/P8A9-5FNN].

Love Canal in Niagara Falls, New York, where William T. Love had envisioned a picturesque community powered by a hydroelectric canal.[6] Love's vision never came to fruition, and the ditch where canal construction had commenced was converted into an industrial waste dump. In the 1950s, the city purchased the site, which had been loosely covered with soil, from Hooker Chemical Company for $1 and built homes and a school there.[7] In 1978, corroding drums burst through the earth and toxic chemicals leached into yards, basements, and school grounds. Residents were forced to permanently evacuate and suffered adverse health effects, including miscarriages, birth defects, and elevated white blood cell counts.[8]

The U.S. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to clean up these chemical disasters.[9] One of the main goals underlying CERCLA is to impose cleanup liability on the actors that created the chemical mess.[10] Due to the sheer number of contaminated sites, government-funded cleanups are insufficient to carry out CERCLA's goals[11]; therefore, CERCLA provides a constellation of enforcement options that ideally work together to effectuate quick and efficient cleanup of the nation's chemical threats.[12] One important way that the U.S. Environmental Protection Agency ("EPA") ensures cleanup of a contaminated site is by settling with parties who are potentially responsible for a release or threatened release of hazardous substances.[13] However, there must be adequate incentives in place to bring parties to the negotiating table.

This Note focuses on one important settlement incentive: the right to contribution.[14] In contribution actions, courts perform equitable allocations of liability, which softens the impact of CERCLA's joint and several liability.[15] Under CERCLA section 113(f)(3)(B), a party must have "resolved" at least some of its liability to be eligible for contribution.[16] The U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Seventh Circuit have held that covenants not to sue with conditions precedent[17] and nonadmissions of liability[18] negate resolution. The U.S. Court of Appeals for the Ninth Circuit has rejected both principles and held that a settlement agreement resolves potentially responsible party ("PRP") liability when it decides at least some liability with certainty and finality.[19] This Note is an exploration of, and proposed resolution to, the circuit split regarding which linguistic and conceptual components of settlement agreements resolve PRP liability for purposes of section 113(f)(3)(B).

Part II begins with a brief history of CERCLA, which provides context behind the statutes' highly criticized inartful drafting. Part III discusses the doctrinal development and the approaches taken by the Sixth, Seventh, and Ninth Circuits. Part IV proposes a reconciling framework that balances a PRP's interest in some degree of certainty and finality with EPA's interest in ensuring that PRPs finance cleanups. In short, this Note distinguishes between admitting liability, resolving liability, and entering into a settlement agreement. It rejects the Sixth and Seventh Circuits' position regarding covenants not to sue with conditions precedent and supplements the Ninth Circuit's test with a workable standard.

II. CERCLA Background

In the late 1970s, Americans were growing increasingly concerned with the sudden onslaught of hazardous waste emergencies.[20] EPA managers believed that the Resource Conservation and Recovery Act of 1976 ("RCRA") inadequately addressed the issue of inactive disposal sites and that the federal government urgently needed a new, robust program.[21] The Jimmy Carter Administration, however, wanted to reduce government spending and was initially unenthusiastic about another large-scale environmental statute.[22] Nevertheless, in the waning hours of President Carter's term, Congress managed to pass CERCLA.[23]

CERCLA's hasty enactment resulted in imprecise and often contradictory language. Commentators unanimously ridicule CERCLA's inartful drafting.[24] One court described the last-minute statute as "so badly drafted as

6. *See* Richard S. Newman, *Making Love Canal*, Lapham's Q. (July 13, 2016), https://www.laphamsquarterly.org/roundtable/making-love-canal [https://perma.cc/7MDV-WZC7].
7. *See id.*
8. *See id.*
9. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675.
10. *See* 42 U.S.C. § 9607 (setting forth liability scheme).
11. *See* Katherine N. Probst & David M. Konisky, Superfund's Future: What Will It Cost? 85 (2001) ("[The U.S. Government Accounting Office] and others have estimated the number of contaminated sites in the country to range from 150,000 to 500,000, although only a small percentage of these sites are likely to warrant placement on the NPL [national priorities list].").
12. *See* 42 U.S.C. § 9622 (settlement authority); 42 U.S.C. § 9607 (cost recovery); 42 U.S.C. § 9606 (abatement actions).
13. *See* 42 U.S.C. § 9622(a) ("Whenever practicable and in the public interest . . . the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.").
14. *See* 42 U.S.C. § 9613(f)(3)(B):
    > A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement.
15. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 615 n.9 (2009) ("contribution actions allow jointly and severally liable PRPs to recover from each other on the bases of equitable considerations").
16. *See* 42 U.S.C. § 9613(f)(3)(b).
17. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1003 (6th Cir. 2015); Bernstein v. Bankert, 733 F.3d 190, 212 (7th Cir. 2013).
18. *See* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 460 (6th Cir. 2007); *Bernstein*, 733 F.3d at 212 (finding that a nonadmission of liability rendered it "very difficult to say . . . that the agreement between the parties constituted a resolution of liability").
19. *See* Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1125 (9th Cir. 2017). The Sixth, Seventh, and Ninth Circuits are the only federal circuit courts that have addressed this precise issue.
20. *See* Mintz, *supra* note 1, at 34–35.
21. *See id.* at 35.
22. *See id.*
23. *See* Mintz, *supra* note 1, at 40.
24. *See, e.g.*, John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1406 (1997).

to be incomprehensible," akin to King Minos' labyrinth.[25] The U.S. Court of Appeals for the Second Circuit has criticized "CERCLA's miasmatic provisions"[26] and the Ninth Circuit has characterized RCRA and CERCLA as "[t]he two environmental statutes everyone loves to hate."[27] Justice Samuel Alito recently lamented the "devilishly difficult" jurisdiction provisions, sections 113(b) and 113(h).[28]

CERCLA section 104 empowers the president to act "[w]henever [ ] any hazardous substance is released or there is a substantial threat of such a release into the environment . . . which may present an imminent and substantial danger to the public health or welfare."[29] With certain exceptions not relevant here, the president has delegated such authority to EPA.[30] CERCLA established the Hazardous Substance Superfund Trust ("Trust") to fund the cleanup of abandoned hazardous waste sites.[31] Congress imposed a tax on crude oil, petroleum products, and forty-two chemical feedstocks to fund the Trust.[32] Although the original tax program expired in 1995, the Infrastructure Investment and Jobs Act passed in November of 2021 revived the tax with some modifications.[33]

Section 107 lays out the liability scheme for cleanup costs.[34] Cleanup costs are known as "response costs,"[35] and the parties on the hook for such costs are the PRPs.[36] PRPs are divided into four classes of persons: (1) current owners/operators, (2) owners/operators at the time of disposal, (3) arrangers/generators, and (4) transporters.[37] Courts generally construe these categories broadly with little regard for causation.[38] PRPs are liable for response costs, natural resource damages, and "the costs of any health assessment or health effects study carried out under section [104(i)]."[39] Liability under CERCLA is strict, retroactive, and often joint and several, which some scholars and courts have criticized as draconian and inequitable.[40]

EPA has several options for exercising its authority under section 104. EPA may withdraw from the Trust to initiate its own cleanup, and then seek reimbursement from PRPs.[41] Alternatively, EPA may enter into consent decrees (settlement agreements with PRPs)[42] or issue Unilateral Administrative Orders to compel cleanup.[43] Importantly, a PRP that has incurred cleanup costs pursuant to a qualifying settlement agreement may bring contribution actions against other PRPs.[44] A PRP may also undertake its own cleanup, and then recoup from other PRPs via a cost recovery action.[45] Courts typically treat cost recovery and contribution as mutually exclusive remedies, with the former available to any party that has incurred response costs and the latter available to parties found liable.[46] Another important difference between cost recovery and contribution is their respective statutes of limitations: the statute of limitations for cost recovery actions is six years,[47] while contribution actions are only available for three years.[48] Why the difference?

In the early 1980s, PRPs criticized EPA's settlement policies for generating litigation and discouraging voluntary cleanups.[49] EPA acknowledged these areas for improvement in the Interim CERCLA Settlement Policy ("Policy") of 1984,[50] published two years before the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[51] With hundreds of thousands of contaminated sites across the nation and limited resources in the Trust,[52] EPA recognized that PRP-led cleanups are indispensable to a successful program.[53] To bring PRPs to the negotiating table, the Policy highlighted the importance of "a climate that is receptive to private party cleanup proposals"[54] and the need for "some measure of finality in determination of liability and in settlement agreements generally."[55] One way that EPA provides finality—and incentivizes settlements—is covenants not to sue. [56] PRPs want to walk away from the negotiating table with some degree of repose; they want to know that EPA cannot reopen the agreement at will. EPA has an interest, however, in retaining authority

25. In re Acushnet River & New Bedford Harbor Proc. Re Alleged PCB Pollution, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987).
26. Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 326 (2d Cir. 2000).
27. Voggenthaler v. Md. Square LLC, 724 F.3d 1050, 1055 (9th Cir. 2013).
28. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1358 (2020) (Alito, J., concurring).
29. 42 U.S.C. § 9607(a).
30. *See* Exec. Order No. 12,580, 3 C.F.R. 1987 (1987).
31. *See* 26 U.S.C. § 9507.
32. *See* 26 U.S.C. § 4611; 26 U.S.C. § 4671.
33. *See* Nana Ama Sarfo, *Superfund Tax Puts United States on the Right Environmental Track*, Forbes (Dec. 30, 2021, 10:13 AM), https://www.forbes.com/sites/taxnotes/2021/12/30/superfund-tax-puts-united-states-on-the-right-environmental-track/?sh=71f2dad91970 [https://perma.cc/8YR9-W3GR].
34. *See* 42 U.S.C. § 9607.
35. *See* 42 U.S.C. § 9601(25).
36. *See, e.g.*, Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1114 (9th Cir. 2017).
37. *See* 42 U.S.C. § 9607(a).
38. *See, e.g.*, Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 St. John's L. Rev. 821, 824 n.22 (1989).
39. *See* 42 U.S.C. § 9607(a)(4).
40. *See, e.g.*, Nagle, *supra* note 24, at 1446–59.
41. *See* 42 U.S.C. § 9604(a)(1).
42. For purposes of this Note, "settlement agreement" and "consent decree" mean the same thing.
43. *See* U.S. Env't Prot. Agency Off. of Solid Waste & Emergency Response, Superfund: 20 Years of Protecting Human Health and the Environment 10 (2000).
44. *See* 42 U.S.C. § 9613(f).
45. *See* 42 U.S.C. § 9607(a).
46. *See* Jeffrey M. Gaba, *The Private Causes of Action Under CERCLA: Navigating the Intersection of Sections 107(a) and 113(f)*, 5 Mich. J. Env't & Admin. L. 117, 141–42 (2015).
47. *See* 42 U.S.C. § 9613(g)(2).
48. *See* 42 U.S.C. § 9613(g)(3).
49. *See* Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5,034, 5,035 (Feb. 5, 1985) (recognizing that the agency must "create a climate that is receptive to private party cleanup proposals").
50. *See id.*
51. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9657).
52. *See* Probst & Konisky, *supra* note 11.
53. *See* Hazardous Waste Enforcement Policy, *supra* note 49, at 5035:
> An effective program depends on a balanced approach relying on a mix of Fund-financed cleanup, voluntary agreements reached through negotiations, and litigation. Fund-financed cleanup and litigation under CERCLA will not in themselves be sufficient to assure the success of this cleanup effort. In addition, expeditious cleanup reached through negotiated settlements is preferable to protracted litigation.

54. *See id.*
55. *See id.*
56. *See id.* at 5035–56.

to reopen settlements to guarantee that PRPs pay for the entire cleanup.

The language of SARA reflects Congress' intention to balance PRPs' interest in some degree of certainty and finality with EPA's interest in ensuring that PRPs finance cleanups.[57] Section 122(f)(1) empowers EPA to "provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release of a hazardous substance addressed by a remedial action," if certain conditions are met.[58] Importantly, section 122(f)(3) requires that the remedial action be completed before a covenant not to sue for future liability takes effect.[59] Moreover, section 122(f)(5) provides that "[any] covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned."[60] Section 122(f)(6) further establishes that such covenants are also subject to reopening for unknown conditions.[61] Additionally, Congress empowered EPA to adopt any other reopeners "necessary and appropriate to assure protection of public health, welfare, and the environment."[62] In a 1987 guidance document, EPA exercised this power to establish a reopener for "situations where additional information reveals that the remedy is no longer protective of public health or the environment," citing scientific uncertainty and the need to ensure that PRPs are responsible for 100% of cleanup costs.[63] In sum, the availability of covenants not to sue recognizes PRPs' interest in some degree of repose, while EPA's broad authority to reopen such covenants reflects the government's interest in holding PRPs accountable for cleanup costs.

Congress hoped that section 122 would "encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups."[64] For these reasons, settlement agreements are EPA's preferred method of resolving PRP liability.[65] The need for speedy cleanups is particularly dire now, as climate-driven natural disasters amplify the harm caused by toxic pollution.[66] According to the U.S. Government Accountability Office ("GAO"), approximately sixty percent of Superfund sites are in areas that may be impacted by wildfires and different types of flooding—natural hazards that may be exacerbated by climate change.[67] Therefore, expeditious cleanups are necessary to mitigate the impacts of climate-driven natural disasters.

Unfortunately, courts have created unnecessary hurdles to contribution eligibility, a critical settlement incentive. The presence or absence of certain covenants not to sue and reopener provisions in settlement agreements impact a PRP's eligibility to recover its equitable share of cleanup costs from other PRPs.[68] Section 113(f)(3)(B) provides:

> A person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement.[69]

Courts have varying interpretations of the term "resolved."[70] The Sixth, Seventh, and Ninth Circuits agree that case-by-case analyses are appropriate in determining whether a particular agreement resolves a PRP's liability to the United States; however, the circuits disagree as to whether certain linguistic and conceptual components "resolve" a PRPs liability for purposes of section 113(f)(3)(B).[71] In short, all three approaches fail to adequately balance EPA's interest in ensuring that PRPs are responsible for cleanup costs with PRPs' interest in some degree of certainty and finality.

III. The Circuit Split

The Sixth, Seventh, and Ninth Circuits have developed different approaches for determining whether a settlement agreement "resolves" a PRP's liability within the meaning of section 113(f)(3)(B).[72] The doctrinal development reflects an active conversation among the sister circuits and exemplifies the difficulties of interpreting CERCLA's puzzling language.[73] This section expounds the Sixth, Seventh, and Ninth Circuit approaches and highlights three components of settlement agreements that have informed courts' determinations of whether a PRP resolved its liability: (1) covenants not to sue with conditions precedent; (2) covenants not to sue with conditions subsequent; and (3) nonadmissions of liability.[74]

Subpart A below describes the narrowest interpretation of "resolve": the Seventh Circuit's position in *Bernstein v.*

57. *See* 42 U.S.C. § 9622(f)(1), (f)(3), (f)(5), (f)(6).
58. 42 U.S.C. § 9622(f)(1).
59. *See* 42 U.S.C. § 9622(f)(3).
60. 42 U.S.C. § 9622(f)(5).
61. *See* 42 U.S.C. § 9622(f)(6)(A).
62. *See* 42 U.S.C. § 9622 (f)(6)(C).
63. *See* U.S. Env't Prot. Agency & U.S. Dep't of Just., Directive No. 9834.8, Covenants Not to Sue Under SARA 9 (1987).
64. *See* H.R. Rep. No. 99-253, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41.
65. *See* U.S. Gov't Accountability Off., GAO-09-656, Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements 24 (2009).
66. *See* Emily Russell, *Superfund and Climate Change: Lessons From Hurricane Sandy*, 28 Nat. Res. & Env't 3, 3 (2014) (Hurricane Sandy floodwaters carried lead from the Raritan Bay Slag Superfund Site into neighboring playgrounds).
67. *See* U.S. Gov't Accountability Off., GAO-21-555T, Superfund: EPA Should Take Additional Actions to Manage Risks From Climate Change Effects 1, 2, 8 (2021) ("Federal data suggests about 60 percent of Superfund sites overseen by EPA are in areas that may be impacted by wildfires and different types of flooding—natural hazards that may be exacerbated by climate change.").
68. *See* Bernstein v. Bankert, 733 F.3d 190, 212–13 (7th Cir. 2013); RSR Corp. v. Com. Metals Co., 496 F.3d 552, 557–58 (6th Cir. 2007); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007); Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 770–72 (6th Cir. 2014); Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1003 (6th Cir. 2015).
69. 42 U.S.C. § 9613(f)(3)(B).
70. *See Bernstein*, 733 F.3d 190 at 212; *RSR Corp.*, 496 F.3d at 558; *ITT Indus., Inc.*, 506 F.3d at 459–60; *Hobart Corp.*, 758 F.3d at 768–72; *Fla. Power Corp.*, 810 F.3d at 1003.
71. See cases listed *supra* note 66.
72. *Id.*
73. *Id.*
74. *Id.*

Bankert.[75] Subpart B explains the Sixth Circuit's flipflopping approach, beginning with *RSR Corp. v. Com. Metals Co.* ("*RSR*"),[76] followed by *ITT Indus., Inc. v. BorgWarner, Inc.* ("*ITT*"),[77] *Hobart Corp. v. Waste Management of Ohio* ("*Hobart*"),[78] and *Florida Power Corp. v. FirstEnergy Corp.* ("*Florida Power*").[79] This Note affords special attention to Sixth Circuit Judge Richard Suhrheinrich's exceptionally thorough and well-reasoned dissent in *Florida Power*,[80] which heavily influenced the Ninth Circuit's approach in *Asarco LLC v. Atl. Richfield Co.* ("*Asarco*")[81] and the framework proposed by this Note. Subpart C explains the Ninth Circuit's position in *Asarco*, the most liberal interpretation of "resolve."[82]

In short, all three approaches have serious problems. Namely, the Sixth and Seventh Circuits draw an arbitrary distinction between covenants not to sue with conditions precedent and covenants not to sue with conditions subsequent.[83] As Judge Suhrheinrich explained in his *Florida Power* dissent, there is no practical difference between a covenant not to sue with a condition precedent (once the PRP performs, EPA may not sue), and an immediately effective covenant not to sue, or a condition subsequent (if the PRP fails to perform, EPA may sue).[84] In both instances, the PRP must perform its contractual obligations to avoid future litigation with EPA because section 122(f)(5) conditions covenants not to sue on satisfactory performance of contractual obligations.[85] This distinction also distorts the statute of limitations in certain circumstances.[86] Moreover, the Sixth and Seventh Circuits' position that nonadmissions of liability negate resolution is unnecessarily restrictive and departs from CERCLA's statutory language and purpose.[87]

The Ninth Circuit rejected the Sixth and Seventh Circuits' positions with respect to conditions precedent and nonadmissions of liability.[88] The court created its own standard for determining a PRP's contribution eligibility: a PRP "resolves" its liability when "a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement" ("Certainty and Finality Test").[89] The framework proposed by this Note generally endorses the Ninth Circuit approach[90] but supplements the Certainty and Finality Test with a workable, concrete standard. This Note proposes that a settlement agreement resolves at least some PRP liability when EPA promises not to sue for actions already carried out pursuant to a settlement agreement, regardless of whether the covenant not to sue contains a condition precedent or subsequent ("Modified Certainty and Finality Test").

A. *The Seventh Circuit:* Bernstein

Bernstein involved two consent decrees between EPA and a group of PRPs in connection with a contaminated industrial waste-handling and recycling plant.[91] Both consent decrees included nonadmissions of liability and covenants not to sue with conditions precedent—EPA promised not to sue once the PRPs performed certain actions.[92] The court held that resolution of PRP liability is contingent on fulfillment of the conditions precedent.[93] According to the Seventh Circuit, cost recovery actions are available once a PRP incurs cleanup costs, while contribution actions are available once the PRP fulfills the condition on which resolution of liability depends.[94] "The situation would be different," according to the court, if EPA's covenant not to sue were immediately effective, that is, written with a condition subsequent.[95] The result of this distinction between conditions precedent and subsequent is a statute-of-limitations distortion: covenants not to sue with conditions precedent do not trigger the statute of limitations until the PRP fulfills the condition, while covenants not to sue with conditions subsequent trigger the statute of limitation upon settlement entry.[96]

The court rejected the interpretation of section 113(f)(3)(B) urged by the PRPs and EPA writing as *amicus*, which equated "resolved its liability . . . in an administrative or judicially approved settlement" with "entered into an administrative or judicially approved settlement."[97] The PRPs and EPA essentially argued that since "resolve" is not a term of art, entering into an agreement in which the PRP agrees to undertake certain actions in exchange for a covenant not to sue resolves PRP liability.[98] This approach, the argument goes, will incentivize settlement by assuring PRPs that contribution is available upon settlement execution and protect settling PRPs from footing the entire bill until cleanup completion.[99]

The court found that this interpretation of "resolve" deprives the term of any meaning by failing to ensure some degree of certainty and finality with respect to the PRPs'

75. *See generally Bernstein*, 733 F.3d 190.
76. *See generally* RSR Corp. v. Com. Metals Co., 496 F.3d 552 (6th Cir. 2007).
77. *See generally* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452 (6th Cir. 2007).
78. *See generally* Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757 (6th Cir. 2014).
79. *See generally* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996 (6th Cir. 2015).
80. *Id.* at 1010–19 (Suhrheinrich, J., dissenting).
81. *See generally* Asarco LLC v. Atl. Richfield Co., LLC, 866 F.3d 1108 (9th Cir. 2017).
82. *See id.* at 1125.
83. *See* Bernstein v. Bankert, 733 F.3d 190, 212–13 (7th Cir. 2013); RSR Corp. v. Com. Metals Co., 496 F.3d 552, 557–58 (6th Cir. 2007); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007); *Hobart Corp.*, 758 F.3d at 770–72 (6th Cir. 2014); *Fla. Power Corp.*, 810 F.3d at 1003.
84. *See Fla. Power Corp.*, 810 F.3d at 1017–19 (Suhrheinrich, J., dissenting).
85. 42 U.S.C. § 9622(f)(5).
86. *See id.* at 1018–19.
87. *See id.* at 1016–17.
88. *See* Asarco LLC v. Atl. Richfield Co., LLC, 866 F.3d 1108, 1125 (9th Cir. 2017).
89. *Id.*
90. *Id.*
91. *See* Bernstein v. Bankert, 733 F.3d 190, 196–97 (7th Cir. 2013).
92. *See id.* at 197, 207.
93. *See id.* at 204–06.
94. *See id.* at 214 (addressing policy considerations).
95. *See id.* at 213.
96. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1018–19 (6th Cir. 2015) (Suhrheinrich, J., dissenting).
97. Bernstein v. Bankert, 733 F.3d 190, 210 (7th Cir. 2013).
98. *See id.*
99. *See id.* at 214.

liability.[100] The court dismissed concerns that its refusal to avail contribution actions at the date of settlement entry would disincentivize settlement agreements because cost recovery actions are available until the PRP resolves liability pursuant to the terms of the agreement.[101] The framework proposed by this Note adds a caveat to EPA's and the PRPs' position: the statute of limitations begins to run upon entry of a *qualifying* settlement agreement; it rejects the blanket assertion that entering into any consent decree with a covenant not to sue is synonymous with resolving liability. This approach reflects the Seventh Circuit's emphasis on giving effect to the negotiated language of the consent decree and ensuring at least some degree of certainty and finality.[102] Moreover, the framework proposed by this Note rejects the Seventh Circuit's assumption that availability of cost recovery cures the statute-of-limitations distortion.

B. *The Sixth Circuit:* RSR, ITT, Hobart, *and* Florida Power

RSR stands for the proposition that a covenant not to sue with a condition precedent may resolve PRP liability.[103] The court retreated from this premise in *Hobart* and *Florida Power*, in which the court held that only covenants not to sue with conditions subsequent resolve liability.[104] *ITT* and *Florida Power* also established that nonadmissions of liability negate resolution.[105] *ITT* also stands for the proposition that EPA's retention of all enforcement options precludes a finding that the PRP resolved liability.[106] *ITT* is of particular importance to this Note because it models the outer limits of this Note's proposed framework for determining whether a settlement agreement resolves liability.[107] This section presents the cases in chronological order to illuminate the doctrinal development and the undue influence of *Bernstein*.[108]

1. *RSR*

In *RSR*, the Sixth Circuit established that a PRP's promise of future performance, in exchange for EPA's covenant not to sue, may resolve PRP liability, regardless of whether the covenant not to sue contains a condition precedent or subsequent.[109] This case involved a battery-reprocessing site where lead oxide sludge leaked into the ground.[110] A PRP and EPA entered into a consent decree in which EPA promised not to seek additional damages in exchange for the PRP's promise to perform certain actions.[111] The court rejected the PRP's argument that resolution of its liability was contingent on cleanup completion because the "[PRP's] promise of future performance was the very consideration it gave in exchange for the United States' covenant not to seek further damages."[112] The court also established that the statute of limitations begins on the date the parties enter into the consent decree, irrespective of conditions precedent and subsequent.[113] In sum, *RSR* established that covenants not to sue with conditions precedent may resolve PRP liability upon execution of the agreement.[114]

2. *ITT*

ITT models the outer limits of the framework proposed by this Note.[115] In *ITT*, the Sixth Circuit held that a settlement agreement in which the PRP refused to concede liability and EPA retained *all* enforcement options did not resolve PRP liability.[116] *ITT* involved a former fishing reel manufacturing facility where EPA discovered contaminated groundwater.[117] A PRP entered into a consent decree with EPA in which the PRP promised to perform certain studies and EPA retained the right to enforce the consent decree and to seek recovery of past, present, and future response costs.[118] Importantly, EPA also reserved "all of its rights under this [consent decree] and CERCLA, including but not limited to, the right to terminate this [consent decree], complete all [studies], and obtain reimbursement."[119] The consent decree also contained a nonadmission of liability.[120] The court concluded that the nonadmission of liability, coupled with EPA's broad reservation of rights, tipped the scales against finding that the PRP resolved liability.[121] Under the framework proposed by this Note, the provision permitting EPA to terminate the consent decree, complete the studies, and sue the PRP for reimbursement[122] would preclude finding that the PRP resolved liability. By leaving the door open for EPA to scratch the entire consent decree, the PRP is deprived of any repose or certainty with respect to at least some of its liability.

3. *Hobart*

In *Hobart*, the Sixth Circuit departed from *RSR* and endorsed the Seventh Circuit's artificial distinction between covenants not to sue with conditions precedent

100. *See id.* at 212.
101. *See id.* at 214.
102. *See id.* at 212.
103. *See* RSR Corp. v. Com. Metals Co., 496 F.3d 552, 558 (6th Cir. 2007).
104. *See* Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 771 (6th Cir. 2014); Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1003 (6th Cir. 2015).
105. *See* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007); *Fla. Power Corp.*, 810 F.3d at 1003.
106. *See ITT Indus., Inc.*, 506 F.3d at 459–60.
107. *Id.*
108. *See Fla. Power Corp.*, 810 F.3d at 1010–19 (Suhrheinrich, J., dissenting) (describing the impact of *Bernstein* on Sixth Circuit case law).
109. *See* RSR Corp. v. Com. Metals Co., 496 F.3d 552, 558 (6th Cir. 2007).
110. *See id.* at 553.
111. *See id.* at 554.
112. *See id.* at 558.
113. *Id.*
114. *Id.*
115. *See* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007).
116. *Id.*
117. *See id.* at 454.
118. *See id.* at 459–61.
119. *See id.* at 459–60.
120. *See id.* at 460.
121. *See id.* at 459–60.
122. *Id.*

and covenants not to sue with conditions subsequent.[123] The court determined that the consent decree at issue resolved liability because it was immediately effective, just like the consent decree in *RSR*.[124] The framework proposed by this Note rejects this line of reasoning. First, although the Sixth Circuit did not quote the entire covenant not to sue at issue in *RSR*, it contained a condition precedent[125]; furthermore, the court clearly indicated that both constructions avail contribution rights upon settlement execution.[126] The Sixth Circuit's flipflopping approach[127] regarding covenants not to sue with conditions precedent and those with conditions subsequent is unnecessarily confusing and departs from the statutory language. Second, although the consent decree in *Hobart* contained an immediately effective covenant not to sue,[128] the consent decree is still subject to SARA section 122(f)(5), which conditions any covenant not to sue on a PRP's satisfactory performance of the terms of the agreement.[129] An immediately effective covenant not to sue is functionally equivalent to a covenant not to sue conditioned on performance of the terms of the agreement and therefore should not serve as a basis for determining whether a consent decree resolves PRP liability.[130]

4. *Florida Power*

The Sixth Circuit's reasoning in *Florida Power*[131] mirrors the logic of *Hobart*: the court held that the consent decree at issue did not resolve the PRP's liability because it contained a covenant not to sue with a condition precedent and a nonadmission of liability.[132] In dissent, Judge Suhrheinrich called into question the stability of the majority's reasoning.[133] He argued that *RSR*'s holding with respect to the conditions precedent was controlling, but even if it were not, the distinction between conditions precedent and conditions subsequent is arbitrary and immaterial.[134] Delaying the right to contribution, he reasoned, departs from the purpose of consent decrees, which is "to ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later."[135]

Judge Suhrheinrich also criticized the significance afforded to nonadmissions of liability.[136] He argued that the majority improperly conflated admitting with resolving and that a PRP may assume liability without admitting fault.[137] He highlighted that CERCLA section 122 contemplates a distinction between admitting and resolving—section 122(d)(1)(B) provides: "the participation by any party in the process under this section shall not be considered an admission of liability for any purpose."[138] Judge Suhrheinrich also noted that the settlement agreements in *RSR* and *Hobart* both contained nonadmissions of liability, but neither court included that fact in the published opinion.[139] In sum, Judge Suhrheinrich illuminated the irrelevance of the hurdles to resolution that the court adopted from the Seventh Circuit.[140]

C. *The Ninth Circuit:* Asarco

In *Asarco*, the Ninth Circuit purported to adopt "a meaning of the phrase 'resolved its liability' that falls somewhere in the middle of these various cases."[141] The court articulated its position as follows:

> A PRP "resolve[s]" its liability to the government where a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement. A covenant not to sue or release from liability conditioned on completed performance does not undermine such a resolution, nor does a settling party's refusal to concede liability.[142]

Essentially, the court rejected the Sixth and Seventh Circuits' positions with respect to covenants not to sue with conditions precedent and nonadmissions of liability in favor of the Certainty and Finality Test.[143]

The Certainty and Finality Test is grounded on the plain meaning of "resolve," which implies "an element of finality."[144] The court reasoned that CERCLA section 122(f)(3), which conditions covenants not to sue on a PRP's completed performance, negates the distinction between conditions precedent and subsequent.[145] The court nodded to the inconsistency in the Sixth Circuit regarding covenants not to sue with conditions precedent and rejected the premise that EPA must relinquish its right to enforce settlement agreements to avail contribution rights.[146] The court noted that its position comports with SARA's legislative history, in which Congress criticized covenants not to sue that fail to protect the public health, welfare, and the environment.[147]

123. *See* Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 771 (6th Cir. 2014).
124. *See id.* at 770–71.
125. In dissent, Judge Suhrheinrich noted that the *Hobart* court adopted the Seventh Circuit's misguided interpretation of *RSR*—in *Bernstein*, the court relied upon a fragment of the covenant not to sue to mistakenly conclude that it was immediately effective—which the majority cited, "[r]ather than accepting what [*RSR*] says on its face." Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1014 (6th Cir. 2015) (Suhrheinrich, J., dissenting).
126. *See* RSR Corp. v. Com. Metals Co., 496 F.3d 552, 558 (6th Cir. 2007).
127. *Compare RSR Corp.*, 496 F.3d at 558, *with Hobart Corp.*, 758 F.3d at 771.
128. *Hobart Corp.*, 758 F.3d at 770.
129. *See* 42 U.S.C. § 9622(f)(5).
130. *See Fla. Power Corp.*, 810 F.3d at 1018–19 (Suhrheinrich, J., dissenting).
131. *See id.* at 1003–09 (majority opinion).
132. *See Hobart Corp.*, 758 F.3d at 769–71 (rejecting appellants' counterarguments).
133. *See Fla. Power Corp.*, 810 F.3d at 1010–19 (Suhrheinrich, J., dissenting).
134. *See id.* at 1018–19.
135. *See id.*
136. *See id.* at 1016–17.
137. *See id.*
138. *See id.* at 1017; 42 U.S.C. § 9622(d)(1)(B).
139. *See Fla. Power Corp.*, 810 F.3d at 1017 (Suhrheinrich, J., dissenting).
140. *See id.* at 1016–19 (Suhrheinrich, J., dissenting).
141. Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1124 (9th Cir. 2017).
142. *Id.* at 1125.
143. *See id.* at 1122–25.
144. *Id.*
145. *See id.* at 1123–24.
146. *See id.*
147. *See id.* at 1119. The court cites H.R. Rep. No. 99-253, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41, which indicates Congress' intent to incentivize settlements, but criticized certain covenants not to sue as against the public interest. The report provides: "[T]he Committee specifically notes its disapproval of the releases granted in the settlements entered into in the *Seymore Recy[c]ling* case and the *Inmont* case and expects

The court also determined that the Sixth and Seventh Circuit positions with respect to nonadmissions of liability undercut Congress' objective to incentivize settlements.[148] Admissions of fault leave PRPs vulnerable to additional litigation; if liability concessions are necessary to seek contribution, PRPs may be dissuaded from coming to the negotiating table.[149] The framework proposed by this Note endorses the Ninth Circuit's reasoning[150] but criticizes the unworkable standard it created. The Ninth Circuit's holding[151] begs the question: what does it mean to resolve at least some of a PRP's liability with certainty and finality?

IV. Proposed Framework

This Note offers a resolution to the problems created by each circuit's approach, all of which have the potential to disincentivize settlements and undercut CERCLA's goals. As Part III described, the doctrinal development is riddled with tortured logic, unpredictable applications of law, and murky standards. The framework proposed by this Note for determining whether a settlement agreement resolves PRP liability draws upon the most well-reasoned aspects of each circuit's position. Siding with Judge Suhrheinrich[152] and the Ninth Circuit,[153] the framework proposed by this Note rejects the Sixth and Seventh Circuits' position that nonadmissions of liability and conditions precedent negate resolution. It also dispenses with, but endorses the reasoning behind, the Ninth Circuit's Certainty and Finality Test.[154]

EPA should consider an interpretive rule incorporating the Modified Certainty and Finality Test and the premise that nonadmissions of liability have no bearing on contribution eligibility. Importantly, the proposed rule recognizes that courts construe settlement agreements in accordance with state contract law principles. Therefore, courts should conduct case-by-case analyses guided by the limitations in the interpretive rule and state contract law principles, which generally endorse freedom of contract and effectuate the parties' intent based on the totality of the circumstances.[155] Although EPA may be reluctant to issue an interpretive rule purporting to limit its authority, the framework proposed by this Note is clear and fair and may encourage PRPs, who would otherwise be reluctant to voluntarily involve themselves with EPA, to come to the negotiating table. With limited money in the Trust[156] and the growing threat of climate change, it is in the public interest to clean up contaminated sites as quickly as possible.[157]

A. The Modified Certainty and Finality Test: A Settlement Agreement Resolves at Least Some PRP Liability When EPA Promises Not to Sue for Actions Already Carried Out Pursuant to a Settlement Agreement, Regardless of Whether the Covenant Not to Sue Contains a Condition Precedent or Subsequent

The framework proposed by this Note answers the question begged by the Ninth Circuit's holding in *Asarco*[158]: what conceptual component of settlement agreements should courts be looking for to determine whether it resolves at least some PRP liability? This Note proposes that at the very least, EPA must promise not to sue a PRP for actions already carried out under the settlement agreement (Modified Certainty and Finality Test). The consent decree in *ITT*[159] is instructive: under the Modified Certainty and Finality Test, EPA's reservation of the right to scratch the consent decree, undertake the studies itself, and then recoup from the PRPs, would preclude a finding that the PRP resolved liability because these reservations paralyze the covenant not to sue—EPA has reserved *all* enforcement options. This breed of reopeners deprives PRPs of any repose, a critical settlement incentive,[160] for no practical reason.

EPA's interest in ensuring that PRPs do not renege their contractual obligations is already protected by section 122(f)(3), which conditions covenants not to sue for future liability on remedial action completion, and subsection (f)(5), which conditions any covenant not to sue on satisfactory performance of contractual terms.[161] Moreover, covenants not to sue may also be subject to reopeners for unknown circumstances,[162] and EPA can always proceed against nonsettling PRPs.[163] Therefore, the minimum requirement that EPA uphold its end of the bargain is reasonable and may encourage more PRPs to come to the negotiating table.

and intends that any compara[b]le releases that might be presented for court approval would be rejected as not in the public interest." *Id.*

148. *See Asarco LLC*, 866 F.3d at 1125.
149. *Id.*
150. *See id.* at 1123–25.
151. *See id.* at 1125.
152. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1010–19 (6th Cir. 2015) (Suhrheinrich, J., dissenting).
153. *See Asarco LLC*, 886 F.3d at 1123–25.
154. *See id.* at 1125.
155. *See, e.g.*, Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 768 (6th Cir. 2014):

> In determining whether the ASAOC resolves some of Appellants' liability, we interpret the settlement agreement as a contract according to state-law principles . . . Under Ohio law, "[t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement."

(internal citations omitted).

156. *See* 26 U.S.C. § 9507; Probst & Konisky, *supra* note 11.
157. *See* U.S. Gov't Accountability Off., *supra* note 67.
158. *See Asarco LLC*, 886 F.3d at 1125.
159. *See* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007).
160. *See* H.R. Rep. No. 99-253 pt. 1, at 58–59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41.
161. *See* 42 U.S.C. § 9622(f)(3), (5).
162. *See* 42. U.S.C. § 9622(f)(6)(A), (C).
163. *See* 42 U.S.C. § 9613(f)(3)(A).

1. The Modified Certainty and Finality Test Aligns With the Plain Meaning of "Resolve" and the Legislative History of SARA

The Modified Certainty and Finality Test aligns with the plain meaning of resolve.[164] In the absence of a statutory definition, courts should construe an ambiguous term "in accordance with its ordinary and natural meaning."[165] *Merriam-Webster* defines "resolve" as "to find an answer to" something, to settle or solve (something) or "to make a formal decision about something."[166] The Modified Certainty and Finality Test is compatible with these definitions because it requires a tangible, unchangeable solution to at least a portion of PRP liability—liability for the actions the PRP agrees to perform pursuant to the agreement. This reading is consistent with the U.S. Supreme Court's emphasis on giving "some operative effect" to every word Congress enacted.[167] The PRPs' and EPA's position in *Bernstein*—that entering an agreement is synonymous with resolving liability—deprives resolved of any independent meaning.[168] The Modified Certainty and Finality Test gives teeth to the term resolved.

The Modified Certainty and Finality Test also reflects Congress' interest in providing PRPs with some final determination with respect to their liability. Legislative history to the 1986 Amendments reveals that lawmakers "generally endorse[d]" EPA's Interim CERCLA Policy, which recognized the advantages of "a climate that is receptive to private party cleanup proposals," and the need for "some measure of finality in determination of liability and in settlement agreements generally."[169] As the Ninth Circuit explained in *Asarco*,[170] the legislative history also reflects Congress' dedication to covenants not sue that serve the public interest.[171] The Modified Certainty and Finality effectuates Congress' goal of incentivizing settlements and promoting the public's interest in quick, efficient cleanups.

2. The Modified Certainty and Finality Test Contemplates CERCLA's Remedial Purpose Without Disregarding the Text

The Modified Certainty and Finality Test gives meaning to the statutory language but does not mandate the narrowest reading possible. This approach aligns with the way courts construe another ambiguous, undefined CERCLA verb: "select." In *Tippins v. USX Corp.*,[172] the U.S. Court of Appeals for the Third Circuit rejected an overly narrow interpretation of the term "select" within the context of transporter liability. The court held that a transporter need not have made the ultimate selection of the disposal location; it was enough that the transporter provided guidelines that led to the ultimate selection.[173] Similarly, under the Modified Certainty and Finality Test, every provision of a consent decree need not have gone into effect to resolve a PRP's liability; it is enough if the consent decree provides guidelines that lead to ultimate resolution of a PRP's liability. Because CERCLA section 122(f)(5) already ensures that a PRP will comply with the terms of the agreement, there is no need to construe resolve in the narrowest possible sense.[174]

Similarly, the Modified Certainty and Finality Test recognizes CERCLA's broad remedial purpose[175] without disregarding the text. In *CTS Corp. v. Waldburger*, the Supreme Court scolded lower courts for using CERCLA's broad remedial purpose as a scapegoat for giving meaning to the words Congress enacted.[176] The Court held that "[t]he Court of Appeals was in error when it treated [the proposition that remedial statutes should be interpreted in a liberal manner] as a substitute for a conclusion grounded in the statute's text and structure."[177] Although the purpose of CERCLA is to hold polluters liable for cleanups, the Court noted that Congress does not pursue statutory goals at all costs.[178] The Modified Certainty and Finality Test heeds this warning while leaving EPA ample room to ensure that PRPs shoulder costs.

164. *Resolve*, The Britannica Dictionary, *available at* https://www.britannica.com/dictionary/resolve [https://perma.cc/RRW9-Y7LL] (last visited Sept. 10, 2022).
165. F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994); *see also, e.g.*, BP P.L.C. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1537 (2021) ("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption."); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them.").
166. *Resolve*, The Britannica Dictionary, *available at* https://www.britannica.com/dictionary/resolve [https://perma.cc/RRW9-Y7LL] (last visited Sept. 10, 2022).
167. United States v. Nordic Vill. Inc., 503 U.S. 30, 35–36 (1992) (relying on "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *see also* Louisville & N.R. Co. v. Mottley, 219 U.S. 467, 475 (1911) ("We must have regard to all the words used by Congress, and, as far as possible, give effect to them."); Inhabitants of Montclair Twp. v. Ramsdell, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").
168. *See* Bernstein v. Bankert, 733 F.3d 190, 210 (7th Cir. 2013).
169. *See* Hazardous Waste Enforcement Policy, *supra* note 49, at 5035.
170. *See* Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1119 (9th Cir. 2017).
171. *See* H.R. Rep. No. 99-253, pt. 1, at 102 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41 (authorizing the Administrator to include covenants not to sue in agreements "where they are appropriate and in the public interest").
172. *See* Tippins Inc. v. USX Corp., 37 F.3d 87, 94–95 (3d Cir. 1994).
173. *See id.*
174. *See* 42 U.S.C. § 9622(f)(5).
175. *See* 42 U.S.C. § 9604(a)(1) (empowering the president to respond to "a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare").
176. *See* CTS Corp. v. Waldburger, 573 U.S. 1, 12 (2014).
177. *Id.*
178. *Id.*

3. The Modified Certainty and Finality Test Supports the Well-Established Principle That Cost Recovery and Contribution Are Distinct, Mutually Exclusive Remedies

The Modified Certainty and Finality Test recognizes that cost recovery and contribution are distinct,[179] mutually exclusive remedies.[180] Under the Sixth and Seventh Circuit approaches, covenants not to sue with conditions subsequent immediately avail contribution and preclude cost recovery.[181] On the other hand, covenants not to sue with conditions precedent do not avail contribution until the PRP fulfills the condition on which liability depends; until then, cost recovery remains available.[182] This result is absurd and unbalanced. Why should PRPs with covenants not to sue containing conditions precedent—and not conditions subsequent—be able to bring cost recovery actions after settling? In other words, why should a condition precedent confer additional benefits beyond the scope of those Congress afforded under section 113(f)(3)(B)?[183]

In *Hobart*, the Sixth Circuit acknowledged that cost recovery and contribution are mutually exclusive, and that cost recovery is broader:

> If § 113(f)'s enabling language is to have bite . . . it must also mean that a PRP, eligible to bring only a contribution action, can bring only a contribution action. Given the choice, a rational PRP would prefer to file an action under [§ 107] in every case.[184]

For three reasons, cost recovery is a more expansive form of relief.[185] First, the statute of limitations for cost recovery actions is six years,[186] while contribution actions are only available for three years.[187] Second, a PRP can seek joint and several liability in a cost recovery action, but only its equitable share in a contribution action.[188] Finally, a PRP can bring a cost recovery action, but not a contribution action, against a PRP who has settled with the government and bargained for contribution protection.[189]

At a policy level, PRPs may be more likely to settle quickly and efficiently if application of the law is predictable and balanced. Application of the Sixth and Seventh Circuit framework is not predictable, as demonstrated in Judge Suhrheinrich's *Florida Power* dissent.[190]Moreover, it is unbalanced. Just as the meaningless distinction between conditions precedent and subsequent[191] should not preclude contribution rights, it should not confer cost recovery rights. The Modified Certainty and Finality Test evens the playing field by unambiguously establishing that all PRPs with qualifying settlement agreements may only bring contribution actions. PRPs without qualifying settlement agreements, such as the PRPs in *ITT*,[192] may bring cost recovery actions because they have not obtained the benefits contemplated by section 113(f)(3)(B).[193] In conclusion, the Modified Certainty and Finality Test unambiguously establishes that all PRPs who have resolved at least some liability are only eligible for contribution.

4. The Modified Certainty and Finality Test Harmonizes Sections 113(f)(2), 113(f)(3)(A), 113(f)(3)(B), and 113(g)(3)(B) by Giving Effect to Congress' Word Choices and Promoting CERCLA's Goals

Unlike the position advanced by the PRPs and EPA in *Bernstein*, the Modified Certainty and Finality Test affords meaning to the linguistic differences between section 113(f)(3)(B), which establishes the right to contribution, and section 113(g)(3)(B), which ties the statute of limitations to "entry of a judicially approved settlement."[194] According to *Merriam-Webster*, "entry" simply means "the act of making or entering a record."[195] If Congress had intended any settlement agreement to avail contribution actions, it would have reused the term "entry" in section 113(f)(3)(B).[196] Similarly, if Congress intended the statute of limitations to differ depending on whether the covenant not to sue contains a condition precedent or subsequent, it would have explained that distinction in section 113(g)(3)(B).[197] The Modified Certainty and Finality Test harmonizes sections 113(f)(3)(B) and 113(g)(3)(B) by interpreting "resolved" and "entry" in accordance with their ordinary meanings in a way that promotes CERCLA's goal of encouraging settlement and cleaning up contaminated sites as quickly as possible.[198]

179. *See* United States v. Atl. Rsch. Corp., 551 U.S. 128, 129 (2007) (describing cost recovery and contribution as "two clearly distinct remedies" that "complement each other" and apply "to persons in different procedural circumstances").
180. *See* Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 766 (6th Cir. 2014) ("In holding that §§ 107(a)(4)(B) and 113(f)(3)(B) provide mutually exclusive remedies we are saying nothing new or controversial. Every one of our sister circuits to reach this issue has held that [cost recovery] and [contribution] provide mutually exclusive remedies."); *see also* Bernstein v. Bankert, 733 F.3d 190, 202 (7th Cir. 2013); Solutia, Inc. v. McWane, Inc., 672 F.3d 1230, 1237 (11th Cir. 2012); Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 603 (8th Cir. 2011); Agere Sys., Inc. v. Advanced Envt'l Tech. Corp., 602 F.3d 204, 217 (3d Cir. 2010); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 127 (2d Cir. 2010).
181. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1003–04 (6th Cir. 2015); *Bernstein*, 733 F.3d at 212–13.
182. *See Bernstein*, 733 F.3d at 214.
183. 42 U.S.C. § 9613(f)(3)(B).
184. *Hobart Corp.*, 758 F.3d at 767.
185. *Id.*
186. *See* 42 U.S.C. § 9613(g)(2).
187. *See* 42 U.S.C. § 9613(g)(3).
188. *See* United States v. Atl. Rsch. Corp., 551 U.S. 128, 139 (2007).
189. *See id.* at 138–39.
190. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1010–19 (6th Cir. 2015) (Suhrheinrich, J., dissenting).
191. *See id.* at 1017–19.
192. *See* ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 459–60 (6th Cir. 2007).
193. *See* 42 U.S.C. § 9613(f)(3)(B).
194. 42 U.S.C. § 9613(g)(3)(B).
195. *Entry*, Merriam Webster, *available at* https://www.merriam-webster.com/dictionary/entry#:~:text=1%20%3A%20the%20act%20of%20going,denied%20entry%20into%20the%20club.&text=4%20%3A%20the%20act%20of%20making,hired%20to%20do%20data%20entry [https://perma.cc/5X7T-S7QF] (last visited Sept. 10, 2022).
196. 42 U.S.C. § 9613(f)(3)(B) (nowhere using the term "entry").
197. *Id.* (nowhere distinguishing between these two types of agreements).
198. *See* 42 U.S.C. § 9622(a).

Furthermore, the Modified Certainty and Finality Test gives meaning to the word "resolved" in section 113(f)(3)(A), which empowers the government, when it has obtained less than complete relief from a PRP who has resolved liability, to proceed against PRPs who have not resolved liability.[199] Sections 113(f)(3)(A) and (B) work in tandem to ensure that the government can recover all response costs from PRPs.[200] If Congress intended EPA to retain all enforcement options and reopen settlements at will, section 113(f)(3)(A) would be superfluous because section 113(f)(2) already establishes that settlement with one PRP "does not discharge any of the other [PRPs]."[201] In other words, section 113(f)(3)(A)'s express distinction between PRPs who have resolved liability and PRPs who have not[202] suggests that Congress intended covenants not to sue to be more than nominal—to preclude EPA from proceeding against PRPs who have resolved liability with respect to the response action unless the circumstances trigger section 122.[203]

5. The Modified Certainty and Finality Test Accords With the Government's Approach to Settlement Agreements Under the Endangered Species Act

The Modified Certainty and Finality Test corresponds with the government's approach to conservation plans, which function like settlement agreements, under the Endangered Species Act ("ESA").[204] Under the ESA's No Surprises Policy, nonfederal landowners that obtain incidental take permits under ESA section 10(a)[205] are assured that the government will not impose additional restrictions or financial obligations that are not covered by the permit and habitat conservation plan.[206] This policy balances the landowners' interest in some degree of certainty and finality with the species' interest in bringing landowners to the negotiating table and ensuring sufficient habitat protection.[207] As one scholar put it, "rather than give away the store on species conservation, the [No Surprises Policy] simply promises that the government will abide by the terms of the negotiated deal."[208] In the same way, the Modified Certainty and Finality Test ensures that the government will not impose additional requirements on the work already performed under the agreement.

199. 42 U.S.C. § 9613(f)(3)(A).
200. *See* 42 U.S.C. § 9613(f)(3)(A)–(B).
201. 42 U.S.C. § 9613(f)(2).
202. 42 U.S.C. § 9613(f)(3)(A).
203. 42 U.S.C. § 9622(f)(3), (5), (6).
204. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973).
205. 16 U.S.C. § 1539(a).
206. U.S. Dep't of the Interior, Administration's New Assurance Policy Tells Landowners: "No Surprises" in Endangered Species Planning (1994), 1994 WL 440313.
207. *See id.*
208. *See* Donald C. Baur & Karen L. Donovan, *The No Surprises Policy: Contracts 101 Meets the Endangered Species Act*, 27 Env't L. 767, 769 (1997).

B. *Nonadmissions of Liability Should Not Preclude a Finding That a PRP Resolved Liability*

Non-admissions of liability should not negate a PRP's resolution of liability because their practical value is negligible.[209] If a settlement agreement requires PRPs to finance cleanups, CERCLA's purpose is fulfilled.[210] Judge Suhrheinrich highlighted that resolving liability is not synonymous with admitting liability: "A person can agree to undertake actions to resolve a claim against it without admitting to the factual or legal truth purportedly underlying that claim."[211] Additionally, non-admissions of liability are commonly included in other types of settlement agreements.[212] For example, non-admissions of liability are widely accepted in the context of tort settlements so long as the agreement supplies the claimant with other benefits.[213] Similarly, defendants in employment-related disputes frequently refuse to admit responsibility.[214] The relevant consideration is whether the consent decree effectuates cleanup, not whether the PRP admits wrongdoing. This sentiment is reflected in CERCLA's strict liability scheme and broad categories of PRPs; the purpose of CERCLA is to remediate contaminated sites, not to punish PRPs.[215] For these reasons, nonadmissions of liability should have no bearing on whether a PRP resolved liability.

V. Conclusion

The framework proposed in this Note reconciles the circuit split regarding the role of covenants not to sue and nonadmissions of liability in determining whether a settlement agreement resolves PRP liability and avails contribution. The Modified Certainty and Finality test supplements the Ninth Circuit's approach[216] with a workable standard: for a settlement agreement to resolve at least some PRP liability, EPA must relinquish the right to compel a PRP to reperform or finance work already carried out pursuant to the agreement. This approach aligns with the plain mean-

209. *See* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1016–17 (6th Cir. 2015) (Suhrheinrich, J., dissenting).
210. *See* 42 U.S.C. § 9622(a).
211. *Fla. Power Corp.*, 810 F.3d at 1017 (Suhrheinrich, J., dissenting).
212. *See* 53 Am. Jur. Trials 1 at § 259 (originally published in 1995); § 259 provides:
> A tortfeasor nearly always wants to establish that settling the case is not an admission of liability which could be used in actions by other parties (for example, in product liability settlements). The non-admission of liability clause is common in a settlement agreement. If terms of the settlement are beneficial to the individual claimant, this type of release usually poses no problem.

213. *Id.*
214. *See* Andrew H. Friedman, Litigating Employment Discrimination Cases § 10:157 (2022) ("Almost every settlement agreement contains a provision indicating that the settlement is merely the resolution of a disputed claim and that neither party is admitting any liability by entering into the settlement.").
215. *See* 42 U.S.C. § 9607(a); *see also Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. Env't Prot. Agency (Sept. 12, 2022), https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act [https://perma.cc/5RSB-AQL9].
216. *See* Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1125 (9th Cir. 2017).

ing of "resolve"[217] and the legislative history of SARA.[218] It contemplates CERCLA's remedial purpose[219] without disregarding the text, affords meaning to the linguistic differences across section 113,[220] and recognizes that cost recovery and contribution are distinct, mutually exclusive remedies.[221] Additionally, the Modified Certainty and Finality Test accords with the government's approach to conservation plans under the ESA.[222] This Note also posits that nonadmissions of liability should not negate resolution because their practical value is negligible. EPA should consider an interpretive rule incorporating the Modified Certainty and Finality Test and the premise that nonadmissions of liability do not negate resolution. This approach will effectuate CERCLA's goals[223] by preserving Trust funds and encouraging expedient cleanups to help mitigate the growing threat of climate change.

217. *Resolve*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/resolve?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [https://perma.cc/6PC3-AGVT].
218. *See* H.R. Rep. No. 99-253 pt. 1, at 58–59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41.
219. *See* 42 U.S.C. § 9604(a)(1).
220. *See* 42 U.S.C. § 9613(f)(3)(A); 42 U.S.C. § 9613(g)(3)(B).
221. *See* Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757, 767 (6th Cir. 2014).
222. 16 U.S.C. § 1539(a).
223. *See* 42 U.S.C. § 9604(a)(1); 42 U.S.C. § 9622(a).

George Washington Journal of Energy & Environmental Law
Environmental Law Institute
1730 M Street, NW, Suite 700
Washington, DC 20036

Non-profit Org.
US POSTAGE PAID
Permit 8102
Washington, DC

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

ENVIRONMENTAL LAW • INSTITUTE®