POWER TO THE PEOPLE? TRUE JUSTICE UNDER NEW JERSEY'S ENVIRONMENTAL JUSTICE LAW

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I. INTRODUCTION

In September 2021, the United States District Court for the District of New Jersey confronted the city of Hoboken's claim that oil and gas company defendants undertook a decades-long campaign designed to downplay the negative effects of fossil fuel usage on climate change.[1] This claim resembled similar actions in other courts throughout the United States, with localities seeking to punish corporate defendants for disinformation campaigns that, as the plaintiffs in each case argued,

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1 City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191, 196 (D.N.J. 2021).

worsened global warming.[2] In eleven of such cases, the corporate defendants sought removal to federal court, and plaintiffs' subsequent motions to remand to state court were granted in nine of the eleven cases.[3] The New Jersey District Court similarly granted the city of Hoboken's motion to remand to state court, finding that Exxon Mobil failed to identify any federal law that would provide a remedy upon which Hoboken's claims were predicated.[4]

The desire to hold large oil companies responsible for their damage to the environment is not limited to the eleven aforementioned cases.[5] As of August 2022, cities and states have filed at least twenty lawsuits against the fossil fuel industry, alleging that large corporations in the industry misled the public and caused devastating environmental consequences.[6] While the causes of action vary in each case, ranging from securities fraud to negligence and tort, the idea of using the court system to hold corporations responsible for their role in climate change is a relatively novel one, and tensions still remain whether this is appropriate at all.[7] This is partly due to doubts whether it is possible to overcome First Amendment protections against companies in public deception lawsuits and establish a link between climate-change related injuries and disinformation campaigns.[8]

But some states also intend to hold corporations responsible for environmental degradation in ways that are not limited to climate change. New Jersey, for example, has enacted legislation designed to control and limit the detrimental effects that large organizations'

2 *Id.* at 198; *see also id.* at 210 n.4 (listing similar cases ranging geographically from Maryland and Rhode Island to Colorado and California).

3 *Id.* at 198–99.

4 *Id.* at 204.

5 *See* Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand,* PBS (Aug. 27, 2023), https://www.pbs.org/wgbh/frontline/article/us-cities-states-sue-big-oil-climate-change-lawsuits/.

6 *Id.*

7 *See id.* (explaining that before the current "wave of litigation," courts were not viewed as "a viable path for accountability," and the "foundational" tension remains whether this conflict is appropriate for the courts at all).

8 *See* Jessica A. Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T. L. REP. 10995, 10996 (2022) (explaining that climate-related public deception lawsuits "raise questions related to the scope of liability and First Amendment protections for defendants in public deception lawsuits. One critical question is whether the plaintiffs will be able to prove that the defendants' false and misleading statements contributed to climate change- related injuries at the state and local levels."). Wentz and Franta further explain that "[m]uch has been written on the challenge of establishing causation in climate torts between global climate change and specific injuries, but the challenge of linking disinformation to climate change-related injuries remains less examined."

operations have on certain overburdened communities.[9] Specifically, on September 18, 2020, New Jersey Governor Phil Murphy signed New Jersey's Environmental Justice Law into law.[10] Subsequently, on June 6, 2022, the New Jersey Department of Environmental Protection proposed implementation rules that would make New Jersey's Environmental Justice Law (the EJ Law) arguably the most far-reaching in the United States.[11] The New Jersey Legislature found that all New Jersey residents have a right to live in a clean environment and that no community should shoulder a disproportionate share of the environmental and public health consequences that accompany economic advancement.[12] Further, the Legislature declared that the placement and expansion of pollution-generating facilities in overburdened communities should be limited, and that citizens in overburdened communities must have opportunities to participate in decisions that allow pollution-generating facilities to be located in such communities.[13]

Both the EJ Law and the various suits from cities and states throughout the country, however, do not allow private citizens to hold corporations responsible for the damage they cause. This Comment argues that provisions permitting individuals to recover damages from corporations based on the Responsible Corporate Office Doctrine would enhance the effectiveness of the EJ Law.

Part Two of this Comment will first provide background on the permitting power of administrative agencies. Permits are a means for legislatures to demand that both public and private actors receive permission from administrative agencies before conducting certain activities.[14] An overview of the citizen-suit provisions in the Clean

9 *See* Stacey Sublett Halliday, Julius M. Redd, Hilary Jacobs, *Three Key Takeaways of New Jersey DEP's Proposed EJ Rules*, NAT'L L. REV. (Aug. 27, 2023), https://www.natlawreview.com/article/three-key-takeaways-new-jersey-dep-s-proposed-ej-rules. Overburdened communities refer to any census block group "in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency." N.J. STAT. ANN. § 13:1D-158 (West 2020).

10 *NJ Environmental Justice Law and Rules*, OFF. OF ENV'T JUSTICE., https://www.nj.gov/governor/news/news/562020/20200918a.shtml (last visited Oct. 2, 2023).

11 Halliday et al., *supra* note 9.

12 N.J. STAT. ANN. § 13:1D-157 (West 2020).

13 *Id.*

14 Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L. J. 133, 138 (2014) [https://doi.org/10.2139/ssrn.2397425].

Water Act ("CWA") will subsequently follow.[15] Part Two then discusses corporate non-compliance with permits and the Responsible Corporate Officer Doctrine (RCOD). The RCOD is an approach to liability that allows the government to hold corporate officers accountable for violations of criminal and civil statutes.[16] Historically, piercing the corporate veil and imposing direct liability for tortious conduct were common strategies for holding corporate officers responsible for misconduct.[17] But veil piercing is a relatively inflexible doctrine because it requires evidence of an extreme unity of interest between a corporate officer and the corporation.[18] Further, direct liability for tortious conduct requires prosecutors to establish that a corporate officer directly engaged in tortious conduct, which is not an easy task.[19] Because establishing liability under a theory of either veil piercing or direct liability for tortious conduct has proven challenging, the RCOD has increased in popularity.[20] Part Two then continues to explain why the RCOD is therefore an effective tool to impose individual liability absent the ability to clearly prove an act or intent.[21]

Finally, Part Three of this Comment will analyze the EJ Law, its capabilities, and its limitations before ultimately proposing that citizen-suit provisions are a necessary addition to the law. Citizen-suit provisions can empower private individuals to hold corporate officers responsible for acts that directly cause communities to be overburdened. Such empowerment promotes the spirit and intent of the EJ Law.

II. BACKGROUND

A. Permitting Power

Permits offer legislatures the ability to demand that both public and private actors receive permission from administrative agencies before conducting certain activities.[22] This section will provide an overview of the historical usage of environmental permits, including the statutory provisions that incorporate the permitting system.

15 33 U.S.C.A. § 1365 (West 2018).

16 Valorie Cogswell, *Catching the Rabbit: The Past, Present, and Future of California's Approach to Finding Corporate Officers Civilly Liable Under the Responsible Corporate Officer Doctrine*, 33 ENVIRONS ENV'T L. & POL'Y J. 343, 345 (2010).

17 *Id.*

18 *Id.* at 348.

19 *Id.* at 348–49.

20 *Id.* at 345.

21 *Id.* at 350.

22 Biber & Ruhl, *supra* note 14, at 138.

Subsequently, this section will describe the development of citizen-suit provisions and the benefits inherent to citizens maintaining the power to enforce environmental standards, even without prosecutorial involvement.

1. Permitting Power Historically

Permit power, broadly speaking, empowers legislatures to require that public and private actors gain permission from administrative agencies before engaging in certain restricted activities.[23] The permitting system is vast and complex.[24] Thousands of agencies at the federal, state, and local levels influence the permitting system, which retains authority over matters as complex as massive industrial facilities and as simple as backyard construction.[25] Controversies and criticisms are not absent from such a complex system, with some objecting that the breadth of permitting activity provides the government with too much power, thereby disrupting the distribution of authority in the legal system.[26] This Comment is not intended to advance an argument either in for or against the constitutionality of the permit system.[27] Rather, the purpose of this section is to provide background on activities that constitute permit violations and the resultant litigation.

The Clean Water Act maintains an extensive permit program and illustrates the thorough history, power, and limitations of environmental permit programs.[28] According to the most recent data the United States Environmental Protection Agency ("EPA") provides, nearly 430,000 facilities nationwide hold permits under the CWA.[29] More than 43,000 of these facilities face current violations and over 13,000 face "significant" violations.[30] In sum, penalties due to permit

23 Biber & Ruhl, *supra* note 14, at 138.

24 Biber & Ruhl, *supra* note 14, at 137.

25 Biber & Ruhl, *supra* note 14, at 137.

26 *See, e.g.*, Biber & Ruhl, *supra* note 14, at 137–38.

27 *See, e.g.*, Biber & Ruhl, *supra* note 14, at 137–38 (referring to concern that "When legislatures change the default rule from 'permitted-until-judicially-prohibited' to 'legislatively-prohibited-until-administratively-permitted,' they create an 'enormous power in the state' that . . . 'results in a complete inversion of the proper distribution of power within a legal system.'" (quoting Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 416 (1995))).

28 33 U.S.C. § 1342.

29 *Facility Search Results,* EPA, https://echo.epa.gov/facilities/facility-search/results (last visited Oct. 2, 2023).

30 *See Facility Search Results*, *supra* note 29; *see infra* p. 13 and note 92 (for the definition of a significant violation).

violations over the last five years total $461,337,096.[31] New Jersey specifically has over 12,000 permit-holding facilities with penalties dating back five years totaling $5,794,955.[32]

Based on this data, it is logical to question why permit violations are so pervasive. Most CWA permitting activity takes place under general permits, which minimize burden and delay and allow developers to proceed without a site-specific permit.[33] General permits, however, can cover a wide range of sources and consequently fail to account for potential site-specific reasons for being concerned about environmental damage.[34] Further concerns exist that activities conducted during the use of general permits are not reported when required, resulting in inaccurate gauges of environmental damage.[35]

Despite the volume and related concerns pertaining to regulated activities and permit violations under the CWA permitting program, there are numerous examples of permit violations that do not constitute CWA violations. In *Prairie Rivers Network v. Dynegy Midwest Generation*[36], for example, the Illinois District Court held that permit violations may not act as stand-alone actionable violations under the CWA when the plaintiff fails to demonstrate direct discharge into navigable waters from a point source.[37] The court reasoned that the discharges in question were not released into navigable waters of the United States, and as such plaintiff cannot argue that discharges not into United States waters are actionable federal claims simply because they violated a National Pollutant Discharge Elimination System (NPDES) permit.[38] While the definition of navigable waters and point sources are subject to their own respective controversies that are severe enough to prompt Supreme Court action on the issue, this Comment does not purport to elaborate on the importance of their meaning.[39] *Prairie*

31 *Facility Search Results*, *supra* note 29.

32 *Facility Search Results*, *supra* note 29.

33 Biber & Ruhl, *supra* note 14, at 162–63; *see also* Biber & Ruhl, *supra* note 14, at 196 (specifying that the NPDES general permit program is part of the CWA).

34 *See* Biber & Ruhl, *supra* note 14, at 196–97 (explaining that while justifications for general permits include arguments that general permits "avoid regulatory burdens for small discharges with minimal impacts[,]" general permits come at a cost of failing to restrict use to minor point sources, and "any one permit can cover a range of sources").

35 Biber & Ruhl, *supra* note 14, at 188.

36 Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 350 F. Supp. 3d 697, 703–06 (C.D.Ill. 2018).

37 *Id.*

38 *Id.* at 707.

39 *See, e.g.*, City of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020).

Rivers Network demonstrates that permit violations do not necessarily equate to statutory violations.[40]

Furthermore, discharges of pollutants that are not specified in the permit do not *automatically* equate to permit violations.[41] For example, holders of individual permits are not liable for discharge of pollutants not listed in their permits as long as (1) the CWA's disclosure requirements are met, and (2) the discharges were within the permitting authority's reasonable contemplation.[42] As the United States Court of Appeals for the Fourth Circuit explained, "Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority . . . do not come within the protection of the permit shield."[43]

Given such a permissive framework for individual permits, it would logically follow that holders of general permits may enjoy similar flexibility. Indeed, in *Sierra Club v. ICG Hazard, LLC*,[44] the United States Court of Appeals for the Sixth Circuit rejected Sierra Club's argument that the scope of permissible discharges pursuant to a general permit are limited to the specified pollutants on the permit.[45] While recognizing that no other circuit had analyzed the applicability of a permit shield to operations under a general permit, the court reasoned that despite ambiguity in the CWA, the EPA interpretation that some pollutants may be discharged even if not specifically allowed in the general permit was sufficiently rational to prevent a court from inserting its own judgment.[46] The logic that permits are intended to limit only the most harmful pollutants and leave control of other pollutants to disclosure requirements was applicable not just to individual permits, but also general permits.[47]

Many permit violations are, of course, not permissible and warrant injunctive relief.[48] But if permit violations are not necessarily statutory

40 *See Prairie Rivers Network*, 350 F. Supp. 3d at 703–06.

41 *See, e.g.*, Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 287 (6th Cir. 2015).

42 Piney Run Pres. Ass'n v. Cnty. Comm'rs, 268 F.3d 255, 268 (4th Cir. 2001) [https://doi.org/10.1515/9783110950434.255].

43 *Id.*

44 Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 287 (6th Cir. 2015).

45 *Sierra Club*, 781 F.3d at 287.

46 *Id.* at 286.

47 *Id.*

48 *See, e.g.*, Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, L.L.C, 717 F. Supp. 2d 541, 579–80 (S.D.W.V. 2010) (granting citizen-plaintiffs declaratory relief upon successful establishment of continuing permit violations of water quality standards).

violations[49] and discharges of non-permitted pollutants are not necessarily permit violations,[50] the range of environmentally degrading yet permissible actions undertaken under a permit shield is significant. One way to combat this issue is through citizen-suits.

2. Citizen-Suit Provisions of the CWA

Despite the many examples of permit violators who escape punishment, enforcement of permit violations is not limited to prosecutorial discretion.[51] The citizen-suit provisions of the CWA,[52] for example, were one of the key environmental law innovations of the 1970s.[53] These provisions acted as a counterbalance to state and federal agencies' enforcement discretion and helped reduce underenforcement of statutory norms.[54] The effect of citizen-suits was also not limited to increased enforcement.[55] By bypassing the regulatory process and proceeding directly to courts, citizen-suits offered individuals a key role in developing environmental law.[56] As opposed to the classic administrative law model where federal agencies answered issues of first impression, citizen-suits allowed nongovernmental organizations a means to develop their own understandings of environmental norms and test these understandings in courts.[57]

These developments were not insignificant, as critiques about "agency capture" were common.[58] The agency capture theory referred to the process where "regulatory agencies become subject to the control of the industries that they were meant to regulate."[59] This resulted from agencies' dependence on cooperation from the industries they sought to control in order to gather information, agencies' avoidance of adversarial relationships with the regulated industries, and agencies' proliferation of employment relationships with employers in the regulated industries.[60] The need for expanded plaintiff standing to

49 *See, e.g.*, Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 350 F. Supp. 3d 697, 706 (C.D.Ill. 2018).

50 *See, e.g.*, *Sierra Club*, 781 F.3d at 287.

51 Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen-suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENV'T. L. REV. 61, 65 (2014).

52 33 U.S.C.A. § 1365 (West 2018).

53 Coplan, *supra* note 51, at 63.

54 Coplan, *supra* note 51, at 63.

55 Coplan, *supra* note 51, at 63.

56 Coplan, *supra* note 51, at 63.

57 Coplan, *supra* note 51, at 63.

58 Coplan, *supra* note 51, at 75.

59 Coplan, *supra* note 51, at 75.

60 Coplan, *supra* note 51, at 75.

better represent the public's interest in regulatory action and judicial review was thus readily clear.[61]

Judicial interpretation of Congress' intent in enabling citizen-suit provisions also instructs that citizen groups are not nuisances, but welcome participants in the pursuit of environmental interests.[62] Citizen-suits are designed to promote the enforcement of anti-pollution standards and provide alternative enforcement mechanisms.[63] Indeed, the citizen-suit provisions of the CWA are heavily litigated and in 2016 represented the majority of reported federal CWA cases.[64] Specifically, the United States was a plaintiff in only ten of the seventy-nine reported CWA decisions.[65] In total, the DOJ reported 567 citizen-suit complaints under the CWA against non-federal defendants for the years 2010-2016.[66] Regional environmental groups and individual plaintiffs constituted a significant portion of these complainants, exemplifying the interests those located near violators maintain in exercising their statutory rights to enforce CWA provisions.[67]

Despite the benefits and prevalence of citizen-suits, challenges still exist for citizen-plaintiffs to maintain standing to sue.[68] The diligent prosecution bar contained in the CWA, for example, places a limit on citizen-suit provisions.[69] The United States Court of Appeals for the Fourth Circuit explained the diligent prosecution bar as preventing private citizen-suits for CWA violations if a state is diligently prosecuting the same violation.[70] The Fourth Circuit also recognizes an

61 Coplan, *supra* note 51, at 75.

62 Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

63 Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979).

64 Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, A.B.A. (Oct. 1, 2017), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2017-18/fall/clewater-act-citizen-suits-what-numbers-tell-us/.

65 *Id.*

66 *Id.*

67 *Id.*

68 *See, e.g.*, 33 U.S.C.A. § 1319(g)(6)(A)ii (West 2019) (describing situations in which the possibility for suit may be limited).

69 *See* 33 U.S.C.A § 1365(b)(1)(B) (West 2018).

70 *See* Naturaland Tr. v. Dakota Fin., L.L.C. 41 F.4th 342, 346 (4th Cir. 2022). The Fourth Circuit is not the only Circuit to recognize the diligent prosecution bar. Indeed, prosecution bars are found throughout environmental law. *See generally* Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91 (2003) (explaining "[t]o ensure that citizen suits assist but do not replace or overshadow government enforcement actions, all environmental statutes which authorize citizen suits bar such suits in certain circumstances.").

analogous provision, which it calls the judicial proceeding bar.[71] This provision expressly states that citizen-suits cannot be brought if the Administrator or the state is prosecuting either a civil or criminal action in a United States court to command compliance with a limitation or standard.[72] Instead, private citizens can bring suits when the government "either cannot or will not command compliance."[73] Lack of diligence in state prosecution was illustrated, for example, in *Ohio Valley Environmental Coal, Inc. v. Hobet Mining, L.L.C.,*[74] where the court found that the West Virginia Department of Environmental Protection was not diligent in its prosecution of a permit violation because the WVDEP failed to include selenium limits in the permit, failed to take any action to prosecute company violations of selenium limits, and failed to address selenium concerns related to the permit in a consent decree.

In addition to meeting all other standing requirements, citizen-plaintiffs must also demonstrate ongoing violations.[75] In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,[76] the Supreme Court held that citizens may only seek civil penalties under the citizen-suit provisions of the CWA when there is an ongoing violation. The Court reasoned that because statutory language throughout the CWA is in the present tense, any harm citizens seek to address in citizen-suits must lie in the future, not the past.[77]

In sum, the CWA illustrates the opportunities inherent in citizen-suits. While challenges remain and citizen-plaintiffs must meet certain conditions, placing power in the hands of those who directly experience harm offers direct and impactful benefits, and aids in holding polluters accountable. Such accountability presents a challenge in the corporate context, but in many ways is exceedingly important.

B. Corporate Non-Compliance

In 2015, Deputy Attorney General Sally Yates published a memo addressing individual accountability for corporate wrongdoing.[78] This

71 Naturaland Tr. v. Dakota Fin., L.L.C. 41 F.4th 342, 346 (4th Cir. 2022).

72 33 U.S.C.A. § 1365(b)(1)(B) (West 2018).

73 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62 (1987).

74 Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, L.L.C, 7223 F. Supp. 2d 886, 906–08 (S.D.W.V. 2010).

75 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62 (1987).

76 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 58–59 (1987).

77 *Id* at 59.

78 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, on Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015) (https://www.justice.gov/archives/dag/file/769036/download).

memo announced that the Department of Justice would prioritize combating corporate fraud and misconduct.[79] Ms. Yates elaborated that seeking accountability from individuals who perpetrate wrongdoing would provide incentives to change corporate behavior, ensure responsible parties are held accountable, and promote public confidence in the justice system, thereby deterring future illegal activity.[80] According to Ms. Yates, such individual accountability is one of the most effective ways to fight corporate misconduct.[81] Ms. Yates further advised that her guidance applies not just to criminal matters, but to civil corporate matters as well.[82] Civil enforcement entails what Ms. Yates describes as two equally important aims: recovering as much money as possible and deterring individual misconduct.[83] Prosecutors should not make charging decisions based on individual defendants' abilities to pay, but instead "should make individualized assessments . . . , taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities [prosecutors] serve, and federal resources and priorities."[84]

The reasons for corporate misconduct are complex.[85] While misconduct may be inadvertent or simply occur by mistake, it is sometimes undertaken deliberately.[86] One theory connects increased executive compensation to increased environmental harm.[87] Specifically, "high powered executive compensation can increase the odds of environmental law-breaking by [40 to 60 percent] and the magnitude of environmental harm by over [100 percent]."[88] Similar changes in compensation also increase the likelihood of accounting misconduct.[89]

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79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015) (https://www.justice.gov/archives/dag/file/769036/download).

85 Seema Kakade & Matt Haber, *Detecting Corporate Environmental Cheating*, 47 ECOLOGY L.Q. 771, 777-78 (2020).

86 *Id.*

87 Dylan Minor, *Executive Compensation and Misconduct: Environmental Harm* 1 (Harvard Bus. Sch., Working Paper No. 16-076, 2016) [https://doi.org/10.2139/ssrn.2714438].

88 *Id.*

89 *Id.*

Quantifying and determining the causal chain for many other instances of corporate misconduct and cheating, however, is not easy.[90] As previously discussed, current EPA data shows that more than seventy-five thousand facilities face current CWA permit violations and over nineteen thousand face "significant" violations.[91] Significant violations indicate "environmental violations of sufficient magnitude or duration to be an enforcement priority."[92] These statistics closely resemble data from previous years. In 2018, for example, the United States EPA reported that nearly 30 percent of facilities that possessed NPDES permits under the CWA significantly failed to comply with their permits.[93] While the permit violations ranged from simple matters, such as failing to submit reports, to more complex actions, such as exceeding effluent limits,[94] the "everyday noncompliance" that accompanies permit violations is particularly troublesome because it may simply occur as a byproduct of nobody watching.[95]

Even when oversight is present, internal compliance structures—and oversight of those structures—are sometimes insufficient to actually ensure compliance.[96] While this is partly because employees in many corporations feel pressure to cheat and managing officers may exert pressure on employees to produce results even if violations occur, compliance sometimes is not justifiable financially.[97] Purchasing pollution control equipment is expensive, and cost-benefit analyses may show that "if a corporate entity is able to fly under the regulatory radar, it is hard to justify the need to spend money on compliance. There is simply no return on investment."[98] The logical question then becomes how to structure enforcement programs to ensure compliance when organizations have competing incentives both to comply and not to

90 Kakade & Haber, *supra* note 85, at 779.

91 *Facility Search Results,* EPA, https://echo.epa.gov/facilities/facility-search/results (last visited Aug. 27, 2023).

92 *Search Results Help – All Media Programs,* EPA, https://echo.epa.gov/help/facility-search/all-data-search-results-help#results (last visited Aug. 27, 2023).

93 Memorandum from Susan Parker Bodine on FY2020–FY2023 National Compliance Initiatives to Regional Administrators 3 (June 7, 2019) (https://www.epa.gov/sites/default/files/2019-06/documents/2020-2023ncimemo.pdf).

94 *Id.*

95 Kakade & Haber, *supra* note 85, at 779.

96 Kakade & Haber, *supra* note 85, at 781.

97 Kakade & Haber, *supra* note 85, at 782.

98 Kakade & Haber, *supra* note 85, at 783.

comply.[99] One answer to that question is the Responsible Corporate Officer Doctrine (RCOD).

C. The Responsible Corporate Officer Doctrine

The RCOD is an approach to liability that allows the government to hold corporate officers accountable for violations of criminal and civil statutes.[100] This section first discusses the origins of the RCOD and explains why the doctrine is so unique. Subsequently, this section discusses controversies and criticisms surrounding the RCOD before analyzing counterarguments that the doctrine is actually an essential tool to hold corporate officers responsible for reckless acts. Finally, this section proposes that civil use of the RCOD in the environmental context would avoid much of the controversy and offer tremendous benefits.

1. History and Controversy of the RCOD

One way to hold corporate officers liable for their misconduct is through the RCOD. Historically, piercing the corporate veil and imposing direct liability for tortious conduct were common strategies for holding corporate officers responsible for misconduct.[101] But as the difficulty of using these doctrines has continued to prove challenging, the RCOD has increased in popularity.[102] Before discussing modern usages of the RCOD, it is important to trace the doctrine's development.

United States v. Dotterweich[103] is often considered the origin of the modern RCOD.[104] In *Dotterweich*, the Supreme Court upheld Dotterweich's conviction under the Food and Drug Act of 1906 for shipping misbranded and adulterated drugs in interstate commerce and recognized that the statute authorizes punishment without any conscious awareness of wrongdoing.[105] The Food and Drug Act, recognizing that modern industrialism had prevented the possibility of self-protection, was designed to protect the lives and health of the public.[106] The legislation eliminated the conventional awareness of wrongdoing that criminal conduct normally requires, placed "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger[,]" and accepted that

99 Kakade & Haber, *supra* note 85, at 783.
100 Cogswell, *supra* note 16, at 345.
101 Cogswell, *supra* note 16, at 345.
102 Cogswell, *supra* note 16, at 345.
103 United States v. Dotterweich, 320 U.S. 277, 277 (1943).
104 Cogswell, *supra* note 16, at 352.
105 United States v. Dotterweich, 320 U.S. 277, 281 (1943).
106 *Id.* at 280.

violations of the Act could occur without conscious fraud.[107] Under these parameters, the Court held that all who have a responsibility for a corporation's outlawed act can be deemed to have committed the offense.[108] Despite any hardship that may result from punishing an act committed without conscious awareness of its illegality, Congress decided in the Food and Drug Act to penalize those who possessed but failed to take the opportunity to inform themselves of the illegality of their organization's acts, rather than the innocent and helpless public.[109] As such, the District Court properly allowed the jury to decide Dotterweich's individual liability.[110]

The Supreme Court once again addressed the RCOD in *United States v. Park,*[111] clarifying that the government can establish a prima facie case of criminal liability if a defendant's position in an organization bestows responsibility and authority to prevent or correct a violation and they fail to do so. Finding criminal culpability in such a situation, however, presents a controversy. While in some instances the RCOD has been used to punish those who carried out a corporation's misconduct, "the standard case involves a corporate officer who neither participated in, nor perhaps even knew about, the corporation's criminal conduct."[112] This poses a concern because criminal culpability normally involves a guilty mind.[113] For example, in *Dotterweich*, Justice Murphy's dissent emphasized the fundamental principle that guilt is personal and should not be imputed to one without evil intentions or consciousness of wrongdoing.[114] Justice Murphy also argued that even if finding a corporate officer liable furthered public welfare and policy goals, the Court should not impose liability without Congressional authorization to do so.[115] And, as Justice Murphy further emphasized, the statutory language at issue failed to contain any reference to corporate officers.[116]

Considering this history, it is unsurprising that many have argued for greater restraints on prosecutorial use of the RCOD.[117] Critics urge

107 *Id.* at 281.

108 *Id.* at 284.

109 *Id.* at 284–85.

110 *Id.* at 285.

111 United States v. Park, 421 U.S. 658, 673–74 (1975).

112 Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 382 (2014) [https://doi.org/10.2139/ssrn.2513431].

113 *Id.* at 372.

114 *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

115 *Id.* at 286–87.

116 *Id.* at 287.

117 *See, e.g.*, Bentivoglio et al., *The Responsible Corporate Officer Doctrine: Protections Are Needed Despite DOJ's Cautious Approach*, FOOD AND DRUG L. INST.,

that safeguards are necessary to prevent prosecutorial overreach and ensure criminal liability is justly imposed.[118] Given that prosecutors may seek incarceration, even absent a defendant's knowledge of the alleged violation, the consequences of a conviction are significant.[119] In some cases, consequences are not limited to incarceration, but can also include collateral punishments against corporations—in addition to and separate from individual punishment under the RCOD—which may involve monetary fines and exclusion from certain federal programs.[120]

For some, however, recent instances of corporate crime that have failed to generate a significant volume of prosecutions exemplify the need for strong enforcement.[121] The public backlash that has resulted from high-profile examples of corporate officials acting with extreme irresponsibility yet escaping prosecution has been significant.[122] For example, no executives on Wall Street whose wrongdoing led to the financial crisis in 2007-09 were ever charged; officers of drug manufacturing companies are rarely prosecuted, despite the volume of drug recalls; executives at British Petroleum avoided criminal prosecution after the explosion on the Deepwater Horizon that led to eleven deaths; and "executive impunity seems to be the norm at mining companies where substandard safety conditions lead to explosions and deaths."[123]

According to Amy Sepinwall, the RCOD first recognized in *Dotterweich* is the necessary tool to hold executives responsible for their corporations' wrongful actions, irrespective of their individual role in the crime.[124] Convictions of corporate executives serve as a strong deterrence against further wrongdoing because the threat of prison can change an organization's actions more efficiently than extreme fines.[125] Further, targeting individual wrongdoers helps avoid punishing companies that are thought of as "too big" to punish due to the implication that thousands of low-level workers could be unemployed if

https://www.fdli.org/2018/11/the-responsible-corporate-officer-doctrine-protections-are-needed-despite-dojs-cautious-approach/ (last visited Aug. 27, 2023) (arguing that consequences to use of the RCOD are significant because convictions or pleas, even when corporate officers are not aware of violations, can lead not just to incarceration, but also expulsion from federal health plans).

118 *Id.*

119 *Id.*

120 *Id.*

121 *See generally* Sepinwall, *supra* note 112, at 374.

122 *See* Sepinwall, *supra* note 112, at 376.

123 Sepinwall, *supra* note 112, at 374–76.

124 Sepinwall, *supra* note 112, at 377–78.

125 Sepinwall, *supra* note 112, at 376–77.

the organization dissolved.[126] Only prosecuting corporate officers for their wrongdoing when direct evidence exists pertaining to their role in the crime is extremely challenging, but such complications are minimized when executives are held responsible based on the RCOD.[127] But minimizing these complications does not necessarily minimize the controversy surrounding criminal usage of the RCOD. Utilizing the RCOD in the civil context provides a more optimal solution.

2. A More Appropriate Use of the RCOD

The controversy surrounding the mens rea requirements of the RCOD, as well as its rare prosecutorial usage, exemplifies the need for increased civil, rather than criminal, adoption of the doctrine.[128] Because a significant criticism of the RCOD is the doctrine's criminal application (particularly the weakening of the mens rea requirement when a corporate executive is found guilty of a crime without conscious awareness of wrongdoing), employing the RCOD to find civil liability could mitigate this concern.[129] Civil usage of the RCOD also finds support from critics of the doctrine who recognize that civil liability lacks the same stigma typically present in criminal convictions and does not involve the loss of physical freedom.[130]

Civil use of the RCOD has further evidentiary benefits because of the lesser preponderance of the evidence burden of proof requirement. Prosecutors in criminal cases (aside from those involving strict liability offenses) typically must prove mental state beyond a reasonable doubt.[131] As discussed, permitting liability when an executive lacks knowledge of wrongdoing could be viewed as an extreme departure from norms.[132] But if the prosecution is attempting to impose liability without regard to a corporate officer's intent, proving that punishment is justifiable is significantly less controversial when only civil liability is to be imposed. In other words, when the executive's intent is being disregarded, the lesser civil evidentiary burden is simpler to meet and provides a more minimal departure from norms.[133]

126 Sepinwall, *supra* note 112, at 377.

127 *See* Sepinwall, *supra* note 112, at 377 (explaining that "[i]f we seek to prosecute corporate executives only if and where we can prove that they culpably contributed to their corporation's crime, we will see few, if any, individual prosecutions, let alone successful ones").

128 Cogswell, *supra* note 16, at 356–57.

129 Cogswell, *supra* note 16, at 357.

130 Cogswell, *supra* note 16, at 357.

131 Cogswell, *supra* note 16, at 357.

132 Cogswell, *supra* note 16, at 357.

133 Cogswell, *supra* note 16, at 357.

Courts have also recognized the applicability of civil use of the RCOD.[134] In *United States v. Hodges X-Ray*,[135] the government imposed civil penalties on Hodges—the company's president and principal shareholder—because Hodges violated the Radiation Control for Health and Safety Act (RCHSA) of 1968 when he introduced into interstate commerce x-ray machines that failed to adhere to applicable standards. Hodges argued that the government could not hold him individually liable for RCHSA violations because he did not fit into the applicable statutory definition of "manufacturer."[136] The court rejected Hodges' argument that the RCOD was not applicable because *Dotterweich* and *Park* were premised on criminal liability rather than civil liability, explaining that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty."[137] Such reasoning is applicable not only in cases involving the RCHSA, but in any case where a prosecutor or individual is attempting to hold a corporate officer civilly liable for misconduct. The court also recognized that while the RCOD in *Dotterweich* and *Park* was developed in the context of the FDCA, it was equally applicable to cases involving the RCHSA because both laws were public welfare statutes.[138]

Cases such as *Hodges* demonstrate how criticisms with regard to the mens rea requirement are unjustifiably weakened and unconvincing in the civil context. If a defendant faces only civil rather than criminal penalties, and the statute at issue is not one that imposes strict liability, it is not necessary to depart from the norm that requires a defendant to possess the proper intent to obtain a conviction. Therefore, *Hodges* exemplifies how much of the controversy around the mens rea requirement with criminal use of the RCOD is diluted in the civil context.[139]

134 *See, e.g.*, United States v. Hodges X-Ray, Inc. 759 F.2d 557, 561 (6th Cir. 1985) (recognizing that "[t]he fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well."); People v. Roscoe, 87 Cal. Rptr. 3d 187, 189 (Ct. App. 2008) (imposing nearly $2,500,000 in liability against the officers and directors of a family company for violating underground storage of hazardous substances laws because the RCOD subjects a corporate officer to liability when the officer's actions furthered an outlawed activity).

135 United States v. Hodges X-Ray, Inc. 759 F.2d 557, 560 (6th Cir. 1985).

136 *Id.*

137 *Id*. at 561.

138 *Id.* at 561.

139 Cogswell, *supra* note 16, at 357.

Civil use of the RCOD is also practical and beneficial when viewed from a utilitarian perspective.[140] Financial burdens for criminal convictions are taxpayers' responsibility and include the costs to incarcerate responsible individuals.[141] When a company's actions hurt the public, civil penalties may help reverse any damage or injury.[142] Imposing civil liability furthers socially desirable goals, as the government could recover money from responsible corporate officers individually and from the entity.[143] After all, "the primary object of civil awards is not to punish but to compensate."[144] While the threat of financial penalties may fail to deter large corporations that can afford to pay significant fines, combined criminal and civil enforcement of the RCOD may be highly effective both to punish the organization and compensate the public.[145] Yet civil penalties for smaller organizations, in particular, may serve an even more important purpose.[146] Not only can civil fines be extremely damaging financially for smaller companies, but public debts may embarrass local organizations in ways that large public corporations would not realize.[147] Local organizations could subsequently face losses of credibility, customers, and employees that large organizations could withstand, but smaller corporations find too damaging.[148] Therefore, the "use of the RCOD's civil arm can deter lax corporate oversight within smaller companies while simultaneously offering a means of compensating the public for the harmful mistakes of both small and large corporations."[149] In the environmental context, civil use of the RCOD would be particularly beneficial.

3. Environmental Usage of the RCOD

The RCOD is certainly not limited to environmental enforcement. The doctrine originated in the context of the Food and Drug Act.[150] But the practicalities of the RCOD fit particularly well in the environmental context, and many courts around the country are now employing the RCOD as a civil strategy to hold corporate officers liable for

140 Cogswell, *supra* note 16, at 358.
141 *See* Cogswell, *supra* note 16, at 358.
142 Cogswell, *supra* note 16, at 358.
143 *See* Cogswell, *supra* note 16, at 358.
144 Cogswell, *supra* note 16, at 359.
145 Cogswell, *supra* note 16, at 358–59.
146 *See* Cogswell, *supra* note 16, at 359.
147 Cogswell, *supra* note 16, at 359.
148 *See* Cogswell, *supra* note 16, at 359.
149 Cogswell, *supra* note 16, at 359.
150 *See generally* United States v. Dotterweich, 320 U.S. 277 (1943).

environmental damage.[151] The Supreme Court of Indiana, for example, held the sole corporate officer and shareholder of RLG Inc.'s Spring Valley Landfill ("RLG") personally liable for civil penalties in the amount of $3,175,000.[152] RLG initially negotiated an agreement with the Indiana Department of Environmental Management ("IDEM") to remedy violations and close the landfill, but an environmental scientist later determined that Roseman failed to remedy the initial violations and also breached subsequent agreements with IDEM.[153] The court deemed Roseman a responsible corporate officer because his position afforded him influence over RLG's polices and he held himself out as the responsible party in RLG's permit application.[154]

The California Court of Appeals, Third Division, also upheld a trial court's use of the RCOD to impose more than two million dollars in civil liability against the officers and directors of a family company called The Customer Company.[155] In this case, an underground storage tank leaked over three thousand gallons of gasoline.[156] Defendants John and Ned Roscoe were officers, directors, and shareholders of the company, but subsequent to the leak occurring, the Roscoes failed to take timely remedial action.[157] Specifically, the Sacramento County Environmental Management Department sent multiple notices to the company that it was in violation of both federal and state statutes, but nobody addressed the issues.[158] The eventual lawsuit accused the Roscoes of failing "to submit mandatory work plans for source removal of an existing unauthorized fuel release, fail[ing] to take or contract for mandatory interim remedial actions to abate or correct the effects of the unauthorized fuel release, fail[ing] to submit appropriate work plans, and fail[ing] to timely submit mandatory quarterly reports."[159] In its explanation of the Roscoes' guilt, the court explained that the Roscoes were personally liable based on the RCOD because they retained authority for company affairs and could have remedied regulatory

151 *See, e.g.*, Comm'r, Ind. Dep't of Env't Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001); People v. Roscoe, 87 Cal. Rptr. 3d 187, 190 (Ct. App. 2008); State, Dep't of Env't. Prot. v. Standard Tank Cleaning Corp., 665 A.2d 753, 764 (N.J. Super. Ct. App. Div. 1995) (citing United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir., 1991)).

152 *Comm'r, Ind. Dep't of Envtl. Mgmt.*, 755 N.E.2d at 563-64.

153 *Id.* at 558.

154 *Id.* at 561–62.

155 *Roscoe*, 87 Cal. Rptr. 3d at 189.

156 *Id.* at 189.

157 *Id.* at 191.

158 *Id.* at 190.

159 *Id.*

violations but failed to do so.[160] The court further justified imposing liability based on the RCOD because the applicable tank laws were strict liability public welfare statutes, similar to the kind the Supreme Court was concerned about in *Dotterweich*.[161]

New Jersey has also applied the RCOD framework in environmental contexts.[162] For example, the court in *Standard Tank Cleaning* recognized that the Water Pollution Control Act (WPCA) "was designed to establish a state system for enforcement of the provisions of the Federal Clean Water Act" and found it reasonable to apply the RCOD as developed in *Dotterweich* and *Park*.[163] Under this guidance, the appellate division held that a corporate officer can be liable for WPCA violations if that individual was responsible for a violation or failed to prevent its occurrence, despite being in a position to do so.[164]

These examples are not meant to provide an exhaustive list of cases involving the RCOD's environmental or civil applications. Instead, they are intended merely to illustrate this specific use of the doctrine. In this context, this Comment will next turn to a discussion of New Jersey's recently passed Environmental Justice Law.

III. ANALYSIS OF NEW JERSEY'S ENVIRONMENTAL JUSTICE LAW

This section begins with a discussion of New Jersey's Environmental Justice Law and its central provisions before turning to the legislative intent behind the law. Subsequently, this section argues that the Law's enforcement mechanisms are notably weak. Directly empowering state residents to hold corporate officers liable for any permit violations based on the RCOD is the exact enforcement mechanism that can augment the EJ Law's effectiveness and maintain the spirit of and motivation behind the law.

A. Overview of the EJ Law

New Jersey's Environmental Justice Law was signed into law in September 2020.[165] Several of the EJ Law's provisions are of particular importance. First, the EJ Law specifies that

160 *Id.* at 190–91.

161 People v. Roscoe, 87 Cal. Rptr. 3d 187, 195 (Ct. App. 2008).

162 State, Dep't of Env't Prot. v. Standard Tank Cleaning Corp., 665 A.2d 753, 764 (N.J. Super. Ct. App. Div. 1995).

163 *Id.*

164 *Id.*

165 *NJ Environmental Justice Law and Rules*, OFFICE OF ENVIRONMENTAL JUSTICE., https://dep.nj.gov/ej/law/ (last visited Aug. 26, 2023).

the department shall not consider complete for review any application for a permit for a new facility or for the expansion of an existing facility, or any application for the renewal of an existing facility's major source permit, if the facility is located, or proposed to be located, in whole or in part, in an overburdened community.[166]

Permits, however, may be granted if several conditions are met. Applicants must: prepare an environmental justice impact statement; hold a public hearing in the overburdened community; and transmit the impact statement to the department and governing body where the overburdened community is located at least sixty days before the public hearing.[167]

The EJ Law contains numerous other provisions designed to protect overburdened communities. For example, applications for permits to build a new facility or expand an existing facility in an overburdened community will not be approved until at least forty-five days after the public hearing; permits will be denied if issuing the permit would contribute to environmental or public health stressors in the overburdened community; and conditions will be applied to permits upon a finding that the permit could contribute to environmental or public health stressors.[168]

Certain words and phrases are used throughout the EJ Law, and their definitions are important to consider. "Overburdened communities" refers to a census block group in which "(1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency."[169] Further, "facilities" include but are not limited to major sources of air pollution, resource recovery facilities, landfills, scrap metal facilities, and medical waste

166 N.J. STAT. ANN. § 13:1D-160(a) (West 2020) [https://doi.org/10.36910/6775-2310-5283-2020-13-13].

167 *Id.* § 13:1D-160(a)(1)-(3) (West 2020).

168 *Id*. § 13:1D-160(b)-(d) (West 2020). Environmental or public health stressors refer to

sources of environmental pollution, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution including, but not limited to, water pollution from facilities or combined sewer overflows; or conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community. N.J. STAT. ANN. § 13:1D-158 (West 2020).

169 N.J. STAT. ANN. § 13:1D-158 (West 2020).

incinerators.[170] Finally, "permit" refers to "any individual permit, registration, or license issued by the department to a facility establishing the regulatory and management requirements for a regulated activity" under a wide variety of state environmental laws.[171]

B. Motivation Behind and Reception of the EJ Law

Upon enacting the EJ Law, the New Jersey Legislature announced that all state residents, "regardless of income, race, ethnicity, color, or national origin, have a right to live, work, and recreate in a clean and healthy environment [and] that, historically, New Jersey's low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors."[172] Because such stressors have created adverse health effects that continue to threaten the societal well-being and success of some of New Jersey's most vulnerable residents, the state deemed it necessary to correct this injustice.[173]

The Legislature also found that no community should shoulder a disproportionate share of any environmental and health consequences that occur as a result of economic growth, and "the State's overburdened communities must have a meaningful opportunity to participate in any decision to allow in such communities certain types of facilities which, by the nature of their activity, have the potential to increase environmental and public health stressors."[174]

The result of these legislative considerations is an environmental justice law that is arguably the most far-reaching in the United States.[175] Specifically, the EJ Law creates the strongest rules for permitting nationwide.[176] For example, while the environmental agencies in some states *consider* cumulative impacts of pollution on neighborhoods, New Jersey is the first state that would actually *deny* permit requests if a facility disproportionately contributes to pollution in overburdened

170 *Id.*

171 *Id.*

172 N.J. STAT. ANN. § 13:1D-157 (West 2020) [https://doi.org/10.22548/shf.v13i1.526].

173 *Id.*

174 *Id.*

175 Stacey Sublett Halliday et al., *Three Key Takeaways of New Jersey DEP's Proposed EJ Rules*, NAT'L L. REV. (June 17, 2022), https://www.natlawreview.com/article/three-key-takeaways-new-jersey-dep-s-proposed-ej-rules.

176 Zach Bright, *New Jersey Debated 'Overburdened' in Environmental Justice Rule*, BLOOMBERG L.: ENV'T AND ENERGY (Aug. 10, 2022, 5:30 AM), https://news.bloomberglaw.com/environment-and-energy/new-jersey-debates-overburdened-in-environmental-justice-rule.

communities.[177] As the concept of environmental justice gains popularity as an aspirational goal throughout the country, lawmakers have turned to New Jersey's law in consideration of their own states' environmental issues.[178]

This is not to say criticisms of the EJ Law are absent. Indeed, a close reading of the EJ Law demonstrates that the law is only concerned about permits for *new* facilities or expansion of *existing* ones, but does not address whether existing facilities would have to scale back operations in already overburdened communities.[179] Further, proponents of strict environmental rules criticize an exception in the law for polluting facilities that serve essential community needs.[180] These critics seek to ensure this exception does not result in a significant loophole.[181] Manufacturers and labor groups, on the other hand, have also criticized the law, explaining that the law's standards regarding which specific population groups pollution would "overburden" are overinclusive and would prevent development.[182] While some emphasize that it is important not to overlook the economic benefits that accompany polluting facilities, proponents counter that jobs are not the only important consideration.[183] The goal of the EJ Law is, as advocates explain, to consider community members that were previously unconsidered and counteract the history of high pollution that was concentrated in such communities.[184]

C. Enforcement of the EJ Law

This Comment does not purport to conduct an economic analysis or a balancing test between the interests of overburdened communities and the financial interests of companies that the EJ Law would affect. This Comment does, however, seek to address the lack of permit enforcement mechanisms in the EJ Law. As enacted, the EJ Law's

177 Julia Kane, *New Jersey Releases Blueprint for Landmark Environmental Justice Law*, GRIST (June 22, 2022), https://grist.org/accountability/new-jersey-environmental-justice-law-closer-reality/.

178 *See* Debra Kahn & Ry Rivard, *N.J. Gets Real on Environmental Justice*, POLITICO (June 14, 2022), https://www.politico.com/newsletters/the-long-game/2022/06/14/ej-makes-inroads-in-nj-00039412 (describing how environmental justice has become a buzzword, and legislators in other states are watching developments of New Jersey's EJ Law as they consider their own laws).

179 N.J. STAT. ANN. § 13:1D-160 (West 2020) [https://doi.org/10.1007/s12561-020-09290-3].

180 Kane, *supra* note 177.

181 Kane, *supra* note 177.

182 Bright, *supra* note 176.

183 Bright, *supra* note 176.

184 Bright, *supra* note 176.

proposed implementation rules regarding violation of permit conditions are notably thin.[185] While permit violations may "constitute grounds for suspension or revocation" of the permit, incorporating the RCOD into the EJ Law offers another means of enforcement if permits are not in fact revoked when violations occur.[186]

This is vital because suspension or revocation of a permit is arguably insufficient punishment in light of the spirit of the law and recognition of loose permit enforcement in other environmental laws. This Comment previously discussed issues with permits under the CWA. *Prairie Rivers*, for example, demonstrated that actionable violations under the CWA required more than a stand-alone permit violation.[187] *Sierra Club v. ICG Hazard* exemplified that it is permissible to discharge pollutants not specified in a permit, and such actions are not automatically permit violations.[188] Therefore, at least as it pertains to the CWA, a wide range of environmentally harmful activities fail to rise to the level of permit and statutory violations.[189]

Permitting activity under New Jersey state law does not, of course, equate to permitting under the CWA. But the history of permit violations cannot be ignored, particularly when the goal of the EJ Law is to correct historic injustices.[190] This history demonstrates that, at least under the CWA, establishing permit violations sufficient to warrant recovery is exceedingly difficult;[191] that limitations such as the diligent prosecution bar only allow CWA enforcement actions absent state prosecution;[192] that private citizens may only bring suits when the government first fails to command compliance;[193] and that citizen-suit provisions only allow for recovery when there is an ongoing violation, foreclosing recovery for any harm that exists solely in the past.[194] Under these considerations, the question necessarily becomes how the EJ Law can achieve its goals to correct historic injustices and provide meaningful community engagement when the law's enforcement

185 *See* 54 N.J. Reg. 971(a), 7:1C-9.4 (June 6, 2022).

186 *Id.*

187 *See* Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 350 F. Supp. 3d 697, 706 (C.D.Ill. 2018).

188 *See* Sierra Club v. ICG Hazard, L.L.C., 781 F.3d 281, 286–87 (6th Cir. 2015).

189 *See, e.g.*, *id.*; *Prairie Rivers Network*, 350 F. Supp. 3d at 706.

190 N.J. STAT. ANN. § 13:1D-157 (West 2020).

191 *See Prairie Rivers Network*, 350 F. Supp. 3d at 706; *Sierra Club*, 781 F.3d at 286–87.

192 Naturaland Tr. v. Dakota Fin., L.L.C. 41 F.4th 342, 346, (4th Cir. 2022).

193 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62 (1987).

194 *Id.* at 59.

mechanisms are limited to possible suspension or revocation of permits.[195]

Such concerns take on even greater significance upon consideration of the history of corporate non-compliance and the priorities of the Department of Justice.[196] Failing to comply with permitting conditions is not uncommon: nearly 30 percent of NPDES permit holders significantly fail to comply with their permits.[197] According to the EPA, in New Jersey specifically there are currently more than twenty-nine thousand facilities that maintain NPDES permits.[198] More than five thousand of these facilities have violated their permits over the last three years; nearly 1,300 facilities have had Formal Enforcement Actions against them; and penalties over the last five years total almost thirty million dollars.[199]

Reasons for non-compliance, as previously discussed, are complex, and while some violations may occur because of a lack of oversight, other violations are more widespread.[200] Officers in some organizations may pressure employees to cheat in order to produce better results, but in other situations compliance is simply not worth the cost.[201] Given the volume of permit violations and the competing incentives both to comply and not comply with permits, it is wise to ask how enforcement programs can be better formulated to assure compliance.[202]

As Ms. Yates instructed the Department of Justice, seeking individual accountability for those who perpetrate wrongdoing may provide incentives to change behavior, hold responsible parties to account, and promote confidence in the justice system.[203] Indeed, Ms. Yates stated directly that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[204] Without calling it by name, Ms.

195 54 N.J. Reg. 971(a), 7:1C-9.4 (June 6, 2022).

196 *See* Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Department of Justice, Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015) https://www.justice.gov/archives/dag/file/769036/download.

197 Kakade & Haber, *supra* note 85, at 779.

198 Facility Search Results, *Enforcement and Compliance History Online*, U.S. ENVTL. PROTECTION AGENCY, https://echo.epa.gov/facilities/facility-search/results, (last visited Oct. 2, 2023).

199 *Id.*

200 *See* Kakade & Haber, *supra* note 85, at 779.

201 Kakade & Haber, *supra* note 85, at 782–83.

202 Kakade & Haber, *supra* note 85, at 783.

203 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Department of Justice, Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015) (https://www.justice.gov/archives/dag/file/769036/download).

204 *Id.*

Yates alludes to the RCOD, urging prosecutorial discretion when weighing both criminal and civil enforcement that takes into account the individual wrongdoer's actions, past history of violations, and community needs.[205]

Internalizing Ms. Yates' guidance into the enforcement provisions of New Jersey's EJ Law, directly allowing for citizen-suits based on the theory of the responsible corporate officer, is exactly what is sensible and necessary to not only augment the effectiveness of the EJ Law, but to also achieve the legislative goal of providing underserved communities with a voice and reversing historic injustice.[206] First, limiting enforcement to civil rather than criminal matters averts much of the controversy around the RCOD. Criminal conduct normally requires a guilty mind, and the standard RCOD case involves corporate officers who may not have even known about the criminal conduct.[207] This was the issue that caused Justice Murphy's dissent in the RCOD's seminal case.[208] Without legislative authorization to do so, Justice Murphy argued, criminal liability should not be imposed, even if doing so would further public welfare goals.[209] Many share Justice Murphy's concerns, warning against prosecutorial overreach that may lead to unjustified incarceration.[210] These concerns are echoed in criticisms of the EJ Law that fear corporations may avoid conducting business in New Jersey because of the EJ Law's regulations.[211] Yet competing interests that on the one hand fear loss of jobs,[212] and on the other seek to respond to outrage that Wall Street managers, drug manufacturers, and oil executives all avoided criminal responsibility, must somehow be balanced.[213]

Imposing civil liability provides such balance. As discussed, even critics of the RCOD accept the reduced stigma and punishment standards inherent in civil fines compared to criminal convictions.[214] Further, because civil suits would not entail proving an executive's

205 *See id.*

206 N.J. STAT. ANN. § 13:1D-157 (West 2020).

207 Sepinwall, *supra* note 112, at 372, 380–81.

208 *See* United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).

209 *Id.* at 286–87.

210 *See, e.g.*, Bentivoglio, et al., *The Responsible Corporate Officer Doctrine: Protections Are Needed Despite DOJ's Cautious Approach*, FOOD AND DRUG L. INST., https://www.fdli.org/2018/11/the-responsible-corporate-officer-doctrine-protections-are-needed-despite-dojs-cautious-approach/ (last visited Oct. 2, 2023).

211 *See* Bright, *supra* note 176.

212 *See* Bright, *supra* note 176.

213 Sepinwall, *supra* note 112, at 374–76.

214 Cogswell, *supra* note 16, at 357.

mental state beyond a reasonable doubt, evidentiary standards are easier to meet and do not result in an extreme departure from norms.[215] As the *Hodges* court recognized, the rationale for holding executives responsible for the acts of an entire corporation is even more persuasive when only considered in the civil context and the most severe penalties are monetary fines.[216]

In addition, citizen-suits imposing civil penalties are beneficial to the public at large.[217] Monetary fines, imposed on either individuals or corporations, have the power to reverse societal injury by returning funds to the communities that were wronged, whereas criminal convictions serve only as punishment.[218] This argument gains further support upon consideration that New Jersey's EJ Law applies to many local polluting facilities, such as landfills, scrap metal facilities, and medical waste incinerators.[219] As Cogswell argues, civil fines may not only punish an executive wrongdoer financially, but may embarrass local organizations into compliance in ways that would not so severely affect large corporations.[220] The loss of credibility for local organizations may serve as a significant deterrence to those facilities that face regulations from the EJ Law.[221]

Finally, provisions for citizen-suits are essential to achieve the EJ Law's purpose. If the law was designed to provide New Jersey's residents with a clean and healthy environment to live and work; if it was designed upon recognition that low-income communities and communities of color have historically faced a disproportionate share of public health stressors; if it was designed to alleviate the continued adverse health effects of New Jersey's most vulnerable residents; and if it was designed to ensure that those in overburdened communities are able to meaningfully participate in any decision regarding a facility that can increase environmental and public health stressors, then how can these purposes be realized if citizens have no say on when and how responsible parties are punished?[222] Relying on prosecutorial discretion without the potential for impacted communities to take independent, direct action in the form of citizen suits risks the EJ Law providing little real possibility for NJ's most vulnerable and impacted

215 Cogswell, *supra* note 16, at 357.
216 United States v. Hodges X-Ray, Inc. 759 F.2d 557, 561 (6th Cir. 1985).
217 *See* Cogswell, *supra* note 16, at 358.
218 *See* Cogswell, *supra* note 16, at 358.
219 N.J. STAT. ANN. § 13:1D-158 (West 2020).
220 Cogswell, *supra* note 16, at 359.
221 Cogswell, *supra* note 16, at 359.
222 N.J. STAT. ANN. § 13:1D-157 (West 2020).

citizens and communities to hold corporate wrongdoers responsible for the acts the EJ Law was designed to address.

IV. CONCLUSION

Environmental Justice is not a new movement in the United States. The goal to protect the environment and correct the wrongs that have been thrust on low-income communities has existed for decades. Permit violations are also not a new concept. Abundant legal analysis exists analyzing permitting activity and its enforcement. Indeed, allowing citizens to hold corporate wrongdoers accountable for their actions is an enforcement provision included in many environmental laws.

Perhaps that is why it is puzzling that New Jersey's EJ Law lacks such provisions. The EJ Law's intended purpose is to restore justice to communities that experience disproportionate levels of pollution and consequently suffer from adverse health impacts. The law not only strives to reverse this problem, but also offer those in underserved communities a voice in determining what facilities are allowed to pollute and where they are allowed to be located.

Directly incorporating citizen-suit provisions based on the RCOD into the EJ Law is a necessary and logical addition. Such provisions can help achieve true justice, return money to the communities that have been wronged, and deter future wrongdoers. Other states already consider New Jersey's EJ Law a leading example of environmental justice, but perhaps bestowing more power to the underserved communities of New Jersey could actually result in greater justice for all.