USING NON-ENVIRONMENTAL LAW TO ACCOMPLISH ENVIRONMENTAL OBJECTIVES

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The current prolonged period of congressional impasse on environmental issues, in which symbolic ideological skirmishes have largely supplanted constructive engagement, makes clear that Congress is unlikely to generate progress on environmental issues any time soon. In response to this legislative stalemate, some environmental law scholars have advocated giving the Environmental Protection Agency enhanced capability to take administrative action under the authority of existing environmental statutes.

Without disagreeing with those arguments, this article contends that we also need strategies for environmental law that transcend, not just adapt, the canonical environmental statutes that have been the field's mainstay since the early 1970s. Some of the more promising prospects for new and innovative environmental law lie outside of its traditional realm, in a variety of other fields—for example, energy law, land use law, agriculture law, consumer protection law, securities regulation—that increasingly incorporate environmental concerns. Moreover, these other fields are not simply borrowing from the environmental law canon; their forays into environmental law utilize quite different models for environmental lawmaking. Policymakers, scholars, and advocates interested in environmental law should pay more

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attention and invest more effort in exploring these alternative venues.

I. BACKGROUND

At the federal level, the United States is in an extended period of legislative impasse on environmental issues.[1] Congress has not enacted a major federal environmental statute since the Clean Air Act Amendments of 1990.[2] This legislative stalemate coincides with increased partisanship as environmental issues have become a proxy for an ideological battle over the appropriate extent of federal regulatory authority.[3] This ideological battle incentivizes symbolism and extreme positions, rather than compromise and reason.[4]

The effects of this partisan, ideological struggle are not limited to the legislative arena. The Environmental Protection Agency ("EPA") has become a political lightning rod,[5] complicating the ability of the agency to substitute new executive branch regulation for new legislation. EPA has some, but only some, insulation from the partisan legislative skirmishing.

Historically, environmental legislation has often fed on disasters. For example, the massive and horrific release of toxic fumes from a Union Carbide chemical plant in Bhopal, India, in 1984, which killed 2500 and injured thousands, led Congress to enact the Emergency Planning and Community Right-to-Know Act (EPCRA).[6] The ecological catastrophe caused when the Exxon Valdez oil tanker ran aground in Prince William Sound, Alaska, in 1989, spilling eleven million gallons of crude oil, led Congress to pass the Oil Pollution Act.[7] But not even crises have broken the

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1. *See, e.g.*, E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and Policy During A Logjam Era*, 17 N.Y.U. ENVTL. L.J. 24, 27-38 (2008); Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 629-30 (2006); Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2366-79 (2013).

2. Pub. L. No. 101-549, 104 Stat. 2399.

3. *See* Richard N.L. Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENVTL. L. & POL'Y F. 223, 255 (2011); Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1002, 1004 (2003).

4. *See* Elliott, *supra* note 1, at 31-32.

5. *See, e.g.*, Robin Bravender & Gabriel Nelson, *Republicans Blitz Obama Over EPA's 'Anti-Industrial' Regulations*, N.Y. TIMES, Sept. 28, 2010; John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 17, 2011; John M. Broder, *House Votes to Bar E.P.A. From Regulating Industrial Emissions*, N.Y. TIMES, Apr. 7, 2011.

6. 42 U.S.C. §§ 11001-11050; *see* RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 273 (2d ed. 2006).

7. 33 U.S.C. §§2701-2761; *see* Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*,

stalemate spell over Congress, as witnessed by the lack of legislative response to the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.[8]

Several of the speakers at this symposium have referred to the federal legislative impasse that afflicts environmental law as a "logjam," invoking a metaphor most commonly associated with Professors David Schoenbrod, Richard Stewart, and Katrina Wyman's *Breaking the Logjam Project*.[9] One of my favorite pieces from the 2008 *Breaking the Logjam* Symposium was Don Elliott's *Portage Strategies* article.[10] In that article, Elliott compared the situation of environmental law to a canoeist paddling down a river: "[W]e are like the canoeist who is confronted with a really big logjam. . . . There is only one sensible solution: portage; pick up the canoe, go around the logjam, and put the canoe back in the water."[11] Elliott defined "portage strategies" as "law-making techniques for adapting environmental policy to new problems and changing realities without legislation in an era in which Congress is paralyzed."[12]

Although in his article Elliott mentioned four portage strategies,[13] his most interesting proposal was for an enhanced *Chevron* doctrine[14] that would give agencies more flexibility to

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24 TUL. MAR. L.J. 481, 481 (2000); Steven R. Swanson, *The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135, 137 (2001).

8. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011).

9. Breaking the Logjam: Environmental Reform for the New Congress and Administration, www.breakingthelogjam.org. This symposium, which explores *Environmental Law Without Congress*, differs somewhat in focus from the *Breaking the Logjam Project*, which identified the problem of the somewhat more broadly as an obstacle composed of "obsolescent statutes and regulatory strategies." Carol A. Casazza Herman et. al., *The Breaking the Logjam Project*, 17 N.Y.U. ENVTL. L.J. 1 (2008).

10. Elliott, *supra* note 1.

11. *Id.* at 40-41.

12. *Id.* at 24.

13. *Id.* at 41-50. Elliott's four portage strategies were as follows:

(1) "Address Environmental Issues More on the State and Local Level"

(2) "Policy-Making by Default by the Courts"

(3) "Use the *Chevron* Doctrine to Develop Innovative Policies Under Existing Statutes"

(4) "Develop Expert Consensus Recommendations and Present the Politicians with a Pre-Packaged Compromise." *Id.*

14. Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984). The Court described what has become known as the *Chevron* doctrine as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative

apply environmental statutes creatively, in light of the dim likelihood that Congress would be able to enact new legislation.[15] Elliott argued that courts applying the *Chevron* doctrine to review agency regulations should be more willing to find statutory ambiguity, which under *Chevron* would give agencies more deference and flexibility, and thereby more leeway in addressing emerging problems with outdated statutes.[16]

Sandy Zellmer, in a recent article,[17] referenced Elliott's article and advocated her own set of portage strategies: invigorate petitions for rulemaking, make more effective use of executive orders, and engage in ramped-up enforcement efforts.[18]

Both Elliott's and Zellmer's portage strategies make use of the distinction between legislative and administrative lawmaking; they advocate bypassing legislative dysfunction by relying on administrative lawmaking as a substitute. This does seem like a worthwhile strategy for attempting to make progress in environmental policy during periods such as the present when Congress seems unable to act.

This article, however, focuses on a different distinction—not between legislative and administrative lawmaking, but between environmental and non-environmental law. Specifically, we can make progress in environmental policy, despite the legislative logjam in Congress, by making better use of non-environmental law to accomplish environmental objectives. Just as administrative lawmaking can substitute for legislative lawmaking, employing non-environmental statutes to accomplish environmental objectives can substitute for new environmental legislation. Moreover, doing so will broaden the scope of laws and institutions pursuing environmental goals, producing a more pluralistic,

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interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43 (footnotes omitted).

15. Elliott also gave substantial pages to his proposal for greater use of expert recommendations to drive legal change. *See* Elliott, *supra* note 1, at 50-52. I am skeptical, however, of this idea. Elliott argues that using expert panels "reduces the potential for demagoguery and political posturing by striking reasonable compromises *before* an issue is presented to the legislature." *Id.* at 50. But, as Elliott himself and others including Richard Lazarus and Richard Andrews have observed, demagoguery and political posturing are not the result of a lack of available reasonable comprises, but rather because political incentives reward demagoguery and political posturing more than compromise. *See generally,* J.B. Ruhl, *Environmental Law Without Congress: An Interdisciplinary Conference on Environmental Law: Does Congress Exist?*, 30 J. LAND USE & ENVTL. L. 79 (Fall 2014).

16. Elliott, *supra* note 1, at 47-49.

17. Zellmer, *supra* note 1.

18. *Id.* at 2384-97.

innovative, and flexible mix of legal approaches to environmental protection.[19]

II. EXAMPLES

To illustrate how non-environmental law can be used to accomplish environmental objectives, this Part offers four diverse examples of non-environmental statutes with potentially important applications to environmental problems: the Plant Protection Act, the Securities and Exchange Commission's environmental disclosure requirements, the Federal Trade Commission's "Green Guides" regarding environmental marketing, and the Federal Energy Regulatory Commission's orders regarding demand response. Although these examples arise in a variety of fields—agricultural law, securities regulation, consumer protection, and energy law—they share common characteristics that form the basis for some generalized observations presented *supra* in Part III.

A. Plant Protection Act

Congress enacted the Plant Protection Act[20] as part of the Agricultural Risk Protection Act of 2000.[21] In addition to the Plant Protection Act, the Agricultural Risk Protection Act also addressed traditional agricultural issues such as crop insurance coverage and agricultural assistance.[22] Congress passed the Act with overwhelming bipartisan support.[23]

The Plant Protection Act expanded prior federal pest and weed statutes,[24] all of which had been aimed at protecting agriculture, to

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19. This article is part of my ongoing scholarly focus on environmental law outside of the traditional environmental law canon that dominates the field. In a recent article, I argued that environmental provisions embedded in larger non-environmental statutes offer an attractive alternative legislative model to the environmental law canon. *See* Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239 (2014). Here, my focus is not on the possibility of new legislation—even isolated embedded environmental provisions—but on the potential application of existing non-environmental statutes to address environmental harms.

20. 7 U.S.C. §§ 7701-7786 (2000).

21. Pub. L. No. 106–224, 114 Stat. 358.

22. Pub. L. No. 106–224, tit. I, II, 114 Stat. at 360-428.

23. *See* Bill Summary & Status: H.R. 5946, Library Cong., http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02559:@@@R|TOM:/bss/d106query.html| (reporting that the House passed the bill on a voice vote and the Senate by a vote of 95-5 on the Senate bill and 91-4 on the conference report).

24. *See, e.g.*, Plant Quarantine Act of 1912, 7 U.S.C. §§ 151-164a (repealed); Federal Plant Pest Act of 1957, 7 U.S.C. §§ 150aa-150jj (repealed); Federal Noxious Weed Act of 1974, 7 U.S.C. §§ 2801-2813 (repealed); *see also* James S. Neal McCubbins, et. al., *Frayed Seams in the "Patchwork Quilt" of American Federalism: An Empirical Analysis of Invasive*

include injury to the environment as well.[25] The Plant Protection Act authorizes the Animal and Plant Health Inspection Service (APHIS), an agency within the Department of Agriculture, to prohibit or restrict the import, entry, export, or interstate movement of plant pests and noxious weeds.[26] Since Congress enacted the Plant Protection Act in 2000, APHIS has regulated invasive species on the basis of their environmental effects,[27] in addition to continuing to act against invasive species that threaten agriculture.[28] For example, APHIS has regulated the importation of solid wood packing material—e.g., wood pallets—citing the effect of plant pests that infest such material on forests.[29] In doing so, APHIS has brought to bear its resources and expertise, which it originally acquired for the purpose of preventing crop damage, to avoid ecological harms. Giving APHIS this dual mission recognizes and takes advantage of the complementarity and interrelatedness of protecting agricultural crops from invasive species and protecting natural resources from invasive species.

This is not to say that the Plant Protection Act has uniformly beneficial environmental consequences. In fact, pursuant to the Plant Protection Act, APHIS has approved the use of genetically engineered, pesticide-tolerant crops, which some environmentalists fear may cause environmental harm by enabling farms to dramatically increase their use of pesticides.[30] Moreover, APHIS

Plant Species Regulation, 43 ENVTL. L. 35, 43-45 (2013) (summarizing the history of federal invasive species laws).

25. *See* 7 U.S.C. § 7702(10) (defining "noxious weed" to include plants that "injure or cause damage to . . . the environment"). The statute assigns regulatory authority to the Secretary, who has in turn delegated that authority to APHIS. *See* Plant Protection Act: Delegation of Authority, 65 Fed. Reg. 49,471 (Aug. 14, 2000).

26. *See* 7 U.S.C. §§ 7711-7714.

27. *See, e.g.*, Noxious Weeds: Old World Climbing Fern and Maidenhair Creeper, 74 Fed. Reg. 53,397, 53,397 (Oct. 19, 2009) (restricting the importation of L. microphyllum, a vine-like fern, on the basis of the environmental damage it has caused to habitats of federally listed threatened and endangered species).

28. *See, e.g.*, Potato Cyst Nematode: Quarantine and Regulations, 72 Fed. Reg. 51,975 (Sept. 12, 2007) (quarantining two counties in Idaho to prevent the spread of a pest infesting potato crops); Importation of Clementines from Spain, 67 Fed. Reg. 64,702 (Oct. 21, 2002) (regulating the importation of clementines from Spain to reduce the risk of introducing Mediterranean fruit flies into the United States).

29. *See* Importation of Wood Packaging Material, 69 Fed. Reg. 55,719, 55,732 (Sept. 16, 2004) (codified at 7 C.F.R. pt. 319) (noting the goal of protecting against invasive pests that could devastate forest ecosystems); APHIS, U.S. DEP'T OF AGRIC., IMPORTATION OF SOLID WOOD PACKING MATERIAL, FINAL ENVIRONMENTAL IMPACT STATEMENT 45-46 (2003) (noting the importance of forests to ecosystems and wildlife), available at http://www.aphis.usda.gov/plant_health/ea/downloads/swpmfeis.pdf.

30. Under APHIS's regulations, certain genetically engineered plants are presumed to be "plant pests" regulated under the Plant Protection Act. *See* 7 C.F.R. § 340.2. APHIS can determine, however, that a genetically engineered plant subject to this presumption nevertheless does not present a risk as a plant pest and therefore should not be regulated under the Act. *See* 7 C.F.R. § 340.6. APHIS has made numerous such determinations. *See, e.g.*, Monsanto Company and KWS SAAT AG: Determination of Non-regulated Status of

has construed the Act to preclude it from considering such adverse environmental consequences in determining how to regulate genetically engineered crops.[31]

In addition, some of APHIS's efforts to protect against invasive pests have themselves generated environmental concerns. The treatment that APHIS required for solid wood packing material, for example, involves the use of methyl bromide, a substance known to contribute to the depletion of the stratospheric ozone layer.[32] When APHIS promulgated its rule for solid wood packing material, the Natural Resources Defense Council brought suit challenging APHIS's rule, arguing that the agency should have required alternatives to methyl bromide fumigation, such as phasing out the use of raw wood packing material.[33] The litigation highlights the potential tension that can arise between the specific objective of protecting against invasive species and the broader aims of environmental protection.

B. SEC Environmental Disclosure Requirements

Congress enacted the Securities Act of 1933[34] and the Securities Exchange Act of 1934[35] to increase the transparency of securities markets by requiring disclosure of key information about securities.[36] In furtherance of this purpose, the statutes

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Sugar Beet Genetically Engineered for Tolerance to the Herbicide Glyphosate, 77 Fed. Reg. 42,693 (July 20, 2012); Pioneer Hi-Bred International, Inc.: Determination of Non-regulated Status for Genetically Engineered High-Oleic Soybeans, 75 Fed. Reg. 32,356 (June 8, 2010); Syngenta Biotechnology, Inc.: Determination of Non-regulated Status for Corn Genetically Engineered for Insect Resistance, 75 Fed. Reg. 20,560 (Apr. 20, 2010).

31. *See* Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 832 (9th Cir. 2013) (affirming APHIS's position that the Plant Protection Act does not regulate these types of environmental harms).

32. APHIS, U.S. DEP'T OF AGRIC., IMPORTATION OF SOLID WOOD PACKING MATERIAL, FINAL ENVIRONMENTAL IMPACT STATEMENT 47 (2003) (noting the importance of forests to ecosystems and wildlife), available at http://www.aphis.usda.gov/plant_health/ea/downloads/swpmfeis.pdf (noting that "the use of methyl bromide in fumigations could result in damage to the stratospheric ozone layer and contribute to increased ultraviolet radiation received over large areas of the earth").

33. Natural Res. Def. Council, Inc. v. U.S. Dep't of Agric., 613 F.3d 76 (2d Cir. 2010) (affirming APHIS's conclusion that either heat treatment or methyl bromide fumigation was the most technically and economically feasible method of protecting against plant pests in solid wood packing materials).

34. 15 U.S.C. §§ 77a-77aa.

35. 15 U.S.C. §§ 78a-78pp.

36. *See, e.g.*, Securities Act of 1933, 48 Stat. 74, 74 ("To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."); Securities Exchange Act § 13(a), 15 U.S.C. § 78m (requiring issuers of securities to file information required by the Securities and Exchange Commission "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security"). The Securities Act regulates public offerings of securities, and the Securities Exchange Act regulates securities trading

prohibit misstatements or omissions of a "material fact" with respect to certain communications regarding federally regulated securities.[37] The Securities and Exchange Commission, the federal agency charged with administering these statutes, defines information as material if "there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security."[38] The SEC's Regulation S-K delineates reporting requirements, which include descriptions of material information, for publicly traded companies.[39]

Since the early 1970s, the SEC has issued a series of interpretive releases providing guidance regarding what environmental information might be considered material under Regulation S-K.[40] In these releases the SEC has focused on information about how environmental laws directly affect the finances of businesses. In short, the SEC releases note that Regulation S-K requires companies to disclose the business effects—including capital expenditures, earnings, and competitive position—of complying with federal, state, and local environmental laws.[41] Regulation S-K also requires companies to report legal proceedings in which they are involved that arise under a federal, state, or local environmental law.[42]

Such environmental information about the costs of environmental compliance and liabilities unquestionably meets the SEC's general definition of material, at least when those costs are of a magnitude that is significant to the company's overall financial picture. Thus, the SEC's determination that companies

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markets. *See* Stephen J. Schulte, *Corporate Public Disclosure: Primer for the Practitioner*, 15 CARDOZO L. REV. 971, 971 (1994).

37. *See, e.g.*, Securities Act of 1933 ("Securities Act") §§ 11, 12(a)(2), 15, 17, 15 U.S.C. §§ 77k, 77*l* (a)(2), 77o, 77q; Securities Exchange Act of 1934 ("Exchange Act") §§ 10, 14, 15 U.S.C. §§ 78j, 78n.

38. *See* Securities Act Rule 405, 17 C.F.R. § 230.405; Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2.

39. 17 C.F.R. § 229 (2014).

40. *See, e.g.*, Environmental Disclosure, 44 Fed. Reg. 56,924 (Oct. 3, 1979) (reporting Release Nos. 33-6130 & 34-16224); Release No. 33-5385, 1 SEC DOCKET 1 (1973); Disclosures Pertaining to Matters Involving the Environment and Civil Rights, 36 Fed. Reg. 13,989 (July 19, 1971) (reporting Release No. 33-5170). These releases were issued in the context of a dispute with the Natural Resources Defense Council and other public interest organizations who petitioned the SEC to issue rules regarding environmental and nondiscrimination policies. *See, e.g.*, Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979); Natural Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689 (D.D.C. 1974). The SEC did not adopt the rules NRDC requested, but NRDC's petition seems at least in part to have motivated the agency to take the actions it did. *See generally* John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 266-82 (1995); Gerard A. Caron, *SEC Disclosure Requirements for Contingent Environmental Liability*, 14 B.C. ENVTL. AFF. L. REV. 729, 734 (1987).

41. *See* 17 C.F.R. § 229.101(c)(xii), 229.102(h)(4)(xi) (2014).

42. *See* 17 C.F.R. § 229.103 (Instruction 5) (2014).

must disclose this environmental information seems easily justified.

The effect of requiring disclosure of such information, however, is probably rather limited. This is because the underlying conduct that triggers the disclosure—a company's compliance, or lack thereof, with environmental laws—is already mandated under those environmental laws. At most, requiring companies to report legally mandated business effects such as compliance costs increases the incentives for companies to pay attention to their environmental liabilities and compliance, so that they do not have unfavorable information to disclose to investors. Such an effect may be salutary, but it seems unlikely to be large.

Arguably, however, much more environmentally related information than this is material to a company's financial performance and therefore to investors. Regulation S-K requires companies to disclose, in their Management Discussion and Analysis ("MD&A"), any facts that are reasonably likely to have a material effect on the company's financial condition or operating performance.[43] Regulation S-K also requires companies to disclose risk factors that may affect them.[44]

Environmentally related information may meet this description, even if it does not arise from an environmental law. Take changes to a company's business that involve legally exogenous—that is, not legally mandated or induced—changes in behavior. For example, independent of any environmental requirements imposed by law, over time consumers may demand more or less of a company's product based on perceptions of the product's environmental effects. Companies that sell organic food products may see increased demand.[45] A company that develops a negative reputation for its environmental practices may suffer decreased demand for its products or services.[46] Accordingly, information about such exogenous trends would be relevant to the company's present and future financial performance and therefore material under Regulation S-K.[47]

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43. *See* 17 C.F.R. § 229.303(a)(3)(ii) (2014).

44. *See* 17 C.F.R. § 229.503(c) (2014).

45. *See* Matthew Saltmarsh, *Strong Sales of Organic Foods Attract Investors*, N.Y. TIMES, May 23, 2011, at B8.

46. THE PROCTER & GAMBLE CO., 2013 ANNUAL REPORT 16, 17 (2013) (noting how such a development could damage the value of Procter & Gamble's brands).

47. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations: Certain Investment Company Disclosures, 54 Fed. Reg. 22,427, 22,429 (May 24, 1989) ("A disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation."). It is curious, however, that even in its general guidance not specifically aimed at environmental information, to the

Requiring disclosure of exogenous changes in consumer demand could result in substantial environmental benefits. This is because—unlike legally mandated business changes such as environmental compliance expenditures—exogenous changes involve conduct not already mandated under environmental law. Thus, these environmental disclosures do not duplicate legal mandates in environmental laws. The SEC's environmental guidance, however, has not addressed the materiality of information about exogenous changes in consumer behavior related to a company's environmental reputation or the environmental attributes of its products, even though such information seems potentially relevant to investors and therefore material under Regulation S-K.[48]

A third category of environmental disclosure would push the boundaries of the SEC's authority with potentially far-reaching environmental impacts. This third category, instead of disclosing business changes, would induce business changes through the disclosure of information about a firm's environmental performance—for example, a requirement that companies report the environmental performance of their supply chain. Some major companies, most famously WalMart, have imposed environmental requirements on their supply chains.[49] Scholars studying the phenomenon have linked companies' decisions to impose environmental standards on their supply chain to pressure from consumers and investors[50]—a fact that, if true, would seem to suggest the materiality of information about supply chain environmental performance.

Although information about the environmental performance of a company's supply chain would extend environmental disclosure requirements significantly beyond anything currently required,

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extent the SEC has addressed environmental information, the information has been linked to legally mandated business factors. Thus, in its 1989 guidance on MD&A disclosures, the SEC offered an example of a company facing potential liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. at 22,430. The SEC noted the company would have to disclose its potential CERCLA liability. *Id.*

48. The SEC's 2010 interpretive release on climate change, Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010), is at least susceptible of a reading that would include exogenous environmental factors. The interpretive release refers to changes in demand for a company's products, but is unclear as to whether this refers to legally mandated changes in demand or would also extend to exogenous changes in consumer demand.

49. *Sustainability Index*, WALMART, http://corporate.walmart.com/global-responsibility/environment-sustainability/sustainability-index (last visited Oct. 6, 2014).

50. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 947 (2007).

there is precedent for such an extension in at least two analogous SEC rules. In 2003, the SEC issued a rule requiring a company to disclose (1) whether it has an independent financial expert on its audit committee, and if not, then why not; and (2) whether it has adopted a code of ethics that applies to certain financial officers, and if not, then why not.[51] In 2012, the SEC issued a rule requiring a company to disclose its use of any "conflict mineral" originating in the Democratic Republic of the Congo or an adjoining country.[52] The Conflict Minerals Rule essentially requires companies to exercise due diligence in investigating their supply chains and to disclose the results of their investigations.[53]

Both the Audit Committee Financial Expert and Code of Ethics Rule and the Conflict Minerals Rule create incentives for companies to change their conduct, or else face negative repercussions from investors and customers. Although framed in terms of disclosure, they ultimately seem likely to induce companies to alter their behavior—that is, to include independent financial experts on their audit committees, to adopt a code of ethics, and not to use conflict minerals. Requiring disclosure of environmental performance similarly could induce companies to take steps to improve their environmental performance.

But analogizing from the Audit Committee Financial Expert and Code of Ethics Rule and the Conflict Minerals Rule to environmental disclosures presents a problem, in that Congress specifically mandated those rules in the Sarbanes-Oxley Act[54] and Dodd-Frank Act,[55] respectively.[56] One could argue, however, that both rules would be authorized under the Exchange Act as providing transparency regarding issues that investors consider significant. The argument seems easy to make for the Audit Committee Financial Expert and Code of Ethics Rule, which addresses factors that pertain directly to a company's financial performance. And indeed the SEC's preambles to the Proposed Rule and Final Rule contended that the disclosures required under

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51. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 5110 (Jan. 31, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 249).

52. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b). Armed groups in the Congo are using the exploitation and trade of conflict minerals to finance the conflict in the region, exacerbating the humanitarian catastrophe there. *See id.* at 56,275; Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 362-63 (D.C. Cir. 2014).

53. *See* 77 Fed. Reg. at 56,275.

54. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

55. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections U.S.C.).

56. 15 U.S.C. § 78m(p) (conflict minerals); 15 U.S.C. § 7265 (audit committee financial expert).

the Rule are significant to investors, and that the enhanced transparency will support investor confidence in the financial markets.[57] It is less clear that the disclosures required under the Conflict Minerals Rule, which are not as directly linked to financial performance, are material to investors. Not surprisingly, the SEC's discussion of the rationale for the Conflict Minerals Rule is more equivocal. The SEC cited several purposes of conflicts minerals disclosure, some linked more to underlying humanitarian objectives[58] and some linked more to financial objectives.[59]

The SEC's hesitation to embrace the materiality of conflict minerals disclosures may have less to do with a concern about the significance of the information to investors and more to do with a concern about opening the floodgates of required disclosure to encompass numerous other social causes of potential concern to investors—including environmental performance. The SEC also might be concerned that requirements to disclose very specific information that is not directly financial, such as a firm's adoption of a code of ethics for its financial officers or its use of conflict minerals, begins to look less like a disclosure requirement and more like a substantive mandate intended to shame companies into adopting ethics codes and not using conflict minerals.

Both of these concerns raise legitimate questions about efforts to expand environmental disclosures by, for example, requiring companies to investigate and monitor the environmental performance of their supply chains. To what extent do we want the SEC to pursue social objectives outside of its core mission of protecting the integrity of financial markets? To what extent do we want the SEC to impose substantive requirements that effectively change behavior instead of merely requiring disclosure? There also are legitimate policy concerns about the cost of expansive disclosure requirements, especially those involving supply chain management. The SEC estimates that initial compliance with the

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57. *See, e.g.*, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 60 Fed. Reg. at 5110; Disclosure Required by Sections 404, 406, and 407 of the Sarbanes-Oxley Act of 2002, 67 Fed. Reg. 66,208, 66,210 (Oct. 30, 2002).

58. *See* Conflict Minerals, 77 Fed. Reg. at 56,275 ("Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.").

59. *See id.* at 56,276 (noting that the disclosures "will 'enhance transparency,' " " 'help American consumers and investors make more informed decisions,' " and "will provide information that is material to an investor's understanding of the risks in an issuer's reputation and supply chain") (quoting and citing statements from members of Congress as well as other commenters).

Conflict Minerals Rule will cost companies between $3 and $4 billion.[60]

In addition to these broad policy questions, the Conflict Minerals Rule raises some difficult legal problems for the agency. On April 14, 2014, a divided panel of the D.C. Circuit held that relevant provisions of the Dodd-Frank Act and the SEC's Rule "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."[61] Judge Sri Srinivasan dissented.[62] The SEC has petitioned for en banc review of the panel decision,[63] citing a related First Amendment issue already under en banc review in another case.[64] Regardless of the resolution of the First Amendment issue, however, the D.C. Circuit upheld the remainder of the Conflict Minerals Rule, which the SEC has continued to implement.[65] The litigation over the Conflict Minerals Rule illustrates how aggressive use of disclosure requirements can push the boundaries of government's authority, although perhaps with significant beneficial consequences.

C. FTC Green Guides

Section 5 of the Federal Trade Commission Act[66] broadly prohibits "unfair or deceptive acts or practices in or affecting commerce."[67] The FTC has issued thirteen "guides" that interpret the FTC Act in various applications.[68] Some guides are aimed at

60. 77 Fed. Reg. at 56,334.

61. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014).

62. *Id.* at 373-76.

63. Inside Washington Publishers, *Eyeing COOL Case, SEC Asks Court To Revisit Conflict Minerals Ruling*, 2014 WLNR 15342572 (June 6, 2014).

64. Am. Meat Inst. v. USDA, No. 13-5281, 2014 WL 3732697, at *1 (D.C. Cir. 2014).

65. *See* Press Release, SEC Issues Partial Stay of Conflict Minerals Rules, SEC (May 2, 2014) (noting that the SEC stayed the portion of the Rule held invalid by the D.C. Circuit but declined to stay the remainder of the Rule).

66. 15 U.S.C. §§ 41-58 (2000).

67. *Id.* at § 45(a)(1).

68. *See* 16 C.F.R. §§ 18-260 (2000). The Guides, although non-binding, "represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements . . . . The Guides provide the basis for voluntary compliance with the law by members of the industry, and practices inconsistent with these Guides may result in corrective action by the Commission under section 5 of the FTC Act . . . ." *E.g.*, 16 C.F.R. §§ 24.0(b), 254.0(b), 260.1(a).

specific industries,[69] and some are aimed at particular marketing practices.[70]

The FTC's Guides for the Use of Environmental Marketing Claims ("Green Guides")[71] describe the agency's views regarding environmental claims in marketing, so as to "help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act."[72] The Green Guides articulate general principles,[73] warn against "unqualified general environmental benefit claims,"[74] and provide specific guidance regarding matters such as third-party seals of approval and compostability.[75] Since first releasing the Green Guides in 1992,[76] the FTC has taken enforcement actions against numerous companies regarding green marketing claims.[77]

The FTC Act vests enforcement authority exclusively in the FTC and creates no private right of action allowing private

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69. *See, e.g.*, 16 C.F.R. pt. 18 (Guides for the Nursery Industry); 16 C.F.R. pt. 24 (Guides for Select Leather and Imitation Leather Products); 16 C.F.R. pt. 254 (Guides for Private Vocational and Distance Education Schools).

70. *See, e.g.*, 16 C.F.R.pt. 233 (Guide Against Deceptive Pricing); 16 C.F.R. pt. 238 (Guides Against Bait Advertising); 16 C.F.R. pt. 255 (Guides Concerning Use of Endorsements and Testimonials in Advertising).

71. 16 C.F.R. pt.260. In addition to the Green Guides, the FTC also administers several other environmental and energy-related rules and guides. *See* Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. § 259; Appliance Labeling Rule, 16 C.F.R. § 305; Fuel Rating Rule, 16 C.F.R. § 306; Alternative Fuels and Alternative Fueled Vehicles Rule, 16 C.F.R. § 309; Recycled Oil Rule, 16 C.F.R. § 311; Labeling and Advertising of Home Insulation Rule, 16 C.F.R. § 460.

72. 16 C.F.R. § 260.1.

73. *See, e.g.*, 16 C.F.R. § 260.3(a) ("To prevent deceptive claims, qualifications and disclosures should be clear, prominent, and understandable.").

74. 16 C.F.R. § 260.4(b)

75. 16 C.F.R. § 260.5-.17.

76. *See* Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (to be codified at 16 C.F.R. pt. 260); *see also* Petitions for Environmental Marketing and Advertising Guides, 56 Fed. Reg. 24,968 (May 31, 1991) (to be codified at 16 C.F.R. Ch. I) (request for public comment). The FTC subsequently revised the Green Guides in 1996, 1998, and 2012. *See* Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 1, 2012) (to be codified at 16 C.F.R. pt. 260); Guides for the Use of Environmental Marketing Claims, 63 Fed. Reg. 24,240 (May 1, 1998) (to be codified at 16 C.F.R. pt. 260); Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53,311 (Oct. 11, 1996) (to be codified at 16 C.F.R. pt. 260).

77. *See, e.g.*, Pure Bamboo, LLC & Bruce Dear—Consent Order & Complaint, Trade Reg. Rep. (CCH) ¶ 16,347 (2009) (summarizing complaint and consent decree alleging that company deceptively advertised rayon product as biodegradable bamboo manufactured using an environmentally friendly process); In re Benckiser Consumer Products, Inc., 121 F.T.C. 644 (1996) (alleging in consent decree that company falsely represented that it donates a portion of its revenue to non-profit environmental organizations); Nationwide Industries, Inc.—Complaint and Proposed Consent Order, Trade Reg. Rep. (CCH) ¶ 23,407 (1993) (noting FTC complaint alleging that company falsely advertised and labeled its aerosol tire inflator as "environment friendly" and containing "no CFC's"); *see also* Julie Brill, *FTC Advertising Enforcement*, SR040 ALI-ABA 259 , 313-15 (2010) (summarizing other FTC enforcement actions against environmental marketing claims).

individuals to bring suits to enforce the Act's provisions.[78] The lack of a private right of action and the resulting dependence on the FTC, with its limited resources for enforcement, constrain the FTC Act's effectiveness.[79] State consumer protection statutes, by contrast, almost universally provide a private right of action for damages for violations of their provisions.[80] Moreover, these "little FTC Acts" also often incorporate by reference the substantive law of the federal FTC Act,[81] and sometimes specifically the FTC's Guides, including the Green Guides.[82] This creates a synergistic relationship between the federal FTC Act and state little FTC Acts, whereby "the federal authorities would provide the substantive guidelines while state authorities would provide enforcement and remedies."[83] In addition, private self-regulatory bodies such as the National Advertising Division of the Better Business Bureau also apply the FTC's Guides.[84]

Consumer protection statutes supplement conventional environmental standards by providing incentives for environmental protection that go beyond what environmental statutes and regulations require. For example, the Green Guides state that it is deceptive for a company to claim environmental benefits that merely reflect compliance with mandatory legal standards.[85] Thus, to claim an environmental benefit from its product, a company must go beyond the level of environmental performance required by the applicable environmental laws.

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78. *See* Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-989 (D.C. Cir. 1973); Carlson v. Cola-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973).

79. *See* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1910 (2013); *see also* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 3 (2005) (listing some of the advantages, as compared with the FTC Act, of state consumer protection statutes that do provide a private right of action).

80. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 23 (2006). The FTC actually urged states during the 1960s to enact state consumer protection statutes that provided a private right of action. *See* D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083, 1085-86 (2011).

81. *See* J.R. Franke & D.A. Ballum, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 357 (1992).

82. *See, e.g.*, Cal. Pub. Res. Code § 42357.6; Minn. Stat. § 325E.41; R.I. Gen. Laws § 6-13.3-1(2).

83. J.R. Franke & D.A. Ballum, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 357 (1992).

84. *See National Advertising Division*, Council of Better Business Bureaus, http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division/ (last visited Oct. 10, 2014).

85. *See, e.g.*, 16 C.F.R. § 260.5(c) (2012).

Consumer protection statutes also empower consumers to act on their environmental preferences with confidence that they will not be deceived with false marketing regarding environmental attributes. This, in turn, creates market incentives for businesses to respond to consumer environmental preferences with products to meet that demand.

The substance of the FTC Green Guides in combination with the private enforcement under state little FTC Acts provides important legal protection against deceptive environmental marketing. There is potential, however, to extend enforcement against deceptive marketing to additional categories of environmental claims not reached by existing enforcement. It appears that, to date, enforcement actions have only been taken against misleading claims about the environmental attributes of specific products—for example, a claim that a product was biodegradable when it was not.[86] It does not appear that public or private enforcement actions have been taken against deceptive statements about the overall environmental performance of a company, not linked to a specific product.[87]

General principles and precedent, however, support a claim against deceptive marketing based on misrepresentations about a company's overall environmental commitment and performance, provided that the deceptive information is sufficiently specific and significant that it would mislead reasonable consumers.[88] Information about a firm's environmental commitment and performance is considered significant, as evidenced by the fact that more than seventy-five percent of S&P 100 companies publicize their environmental policies and performance on their web sites.[89] Given the significance of this information, misleading information about environmental performance must violate the FTC Act.

In 1996, for example, the FTC took action against Benckiser Consumer Products, a Connecticut-based company, for misrepresenting that a portion of the revenue from the sale of its household cleaning product was donated to non-profit environmental organizations.[90] Although the Benckiser Consumer Products case involved environmental claims about a specific

86. *See* FED. TRADE COMM'N, THE FTC IN 2010: FEDERAL TRADE COMMISSION ANNUAL REPORT 45 (2010).

87. *See* Miriam A. Cherry & Judd F. Sneirson, Chevron, *Greenwashing, and the Myth of "Green Oil Companies,"* 3 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 133, 144 (2012).

88. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 19 (2005).

89. *See* Igor Alves, *Green Spin Everywhere: How Greenwashing Reveals the Limits of the CSR Paradigm*, 2 J. GOVERNANCE 1, 8 (2009).

90. In re Benckiser Consumer Products, Inc., 121 F.T.C. 644 (1996).

product rather than the company generally, it would seem a small step—given the right facts—to apply the same general principle to a case in which a company had misrepresented its overall environmental commitment and performance.

The problem with general, as opposed to product-specific, representations about corporate environmental commitments and performance, is that they are often framed in broad and vague terms that may be difficult to prove deceptive.[91] Can one prove, for example, that an energy company does not actually make environmental protection "the highest priority"?[92] It also is possible that scrutinizing environmental claims more closely would merely induce companies to make fewer environmental claims altogether, preventing consumers from acting on their environmental preferences.

D. FERC Demand Response Orders

The Federal Power Act[93] charges the Federal Energy Regulatory Commission (FERC) with regulating "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce."[94] The Federal Power Act further directs FERC to ensure rates in wholesale electricity markets are "just and reasonable."[95] In recent orders, FERC applied the "just and reasonable" standard to determine that wholesale electricity markets needed to allow greater participation by what are known as demand response resources.[96]

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91. *See, e.g.*, Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109, 116 (Cal. App. 2011) (holding that use of green drop of water and "Every drop is green" slogan by Fiji bottled water would not mislead a reasonable consumer).

92. *See* Cherry & Sneirson, *supra* note 877, at 136 (" 'We place the highest priority on the health and safety of our workforce and protection of our assets and the environment.' ") (quoting a Chevron website).

93. 16 U.S.C. §§ 791a-828c.

94. 16 U.S.C. § 824(a).

95. *See, e.g.*, 16 U.S.C. § 824d(a) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."); 16 U.S.C. § 824e(a) (directing FERC, when it has found a public utility rate to be "unjust, unreasonable, unduly discriminatory or preferential," to "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order").

96. *See, e.g.*, Demand Response Supporters v. N.Y. Indep. Sys. Operator, 145 FERC ¶ 61162 (Nov. 22, 2013); Midwest Indep. Transmission Sys. Operator, Inc., 137 FERC ¶ 61212 (Dec. 15, 2011); Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658 (Mar. 24, 2011) (to be codified at 18 C.F.R. § 35.28) [Order 745]; Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64,100 (Oct. 28, 2008) (to be codified at 18 C.F.R. § 35.28) [Order 719].

Demand response refers to reductions in electric energy consumption—nicknamed "negawatts"[97]—in response to an increase in price or to incentive payments.[98] These demand reductions can substitute, sometimes at a lower cost, for additional electricity generation that otherwise would be required to meet peaking demand. In two recent orders, Order 719 [99] and Order 745,[100] FERC essentially ordered wholesale market system operators to treat demand response resources more like electricity generators—that is, to treat negawatts like megawatts.

Because demand response reduces or redistributes consumption (and therefore generation) of electric power, it has potentially significant environmental effects. The magnitude and perhaps even direction of those environmental effects, however, are unclear. Several nonprofit environmental organizations commenting on FERC's proposed rules argued that demand response creates important environmental benefits by displacing fossil fuel-combusting electricity generation.[101] Some energy law scholars have similarly argued that demand response can "reduc[e] greenhouse gas emissions and the need for constructing new power plants."[102]

Generator-affiliated commenters on Order 745, on the other hand, argued that incentivizing demand response would lead to increased off-grid power, such as the use of on-site diesel generators, that produces more emissions than grid power generation.[103] And some environmental and energy law scholars have expressed a similar concern that demand response may actually increase carbon emissions by shifting electricity use from high-cost peak load periods, when more generation comes from

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97. *See, e.g.*, Joel B. Eisen, *Who Regulates the Smart Grid?: FERC's Authority over Demand Response Compensation in Wholesale Electricity Markets*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 69, 76 (2013); Michael P. Vandenbergh & Jim Rossi, *Good for You, Bad for Us: The Financial Disincentive for Net Demand Reduction*, 65 VAND. L. REV. 1527, 1560 (2012). Armory Levins, cofounder of the Rocky Mountain Institute, apparently originated the term "negawatt" in a presentation at the 1984 Annual Meeting of the National Association of Regulatory Utility Commissioners. *See* Michael T. Burr, *Turning Energy Inside Out*, PUB. UTIL. FORT., Mar. 1, 2013, at 28, 33; *see also* Armory Lovins, *Saving Gigabucks with Negawatts*, PUB. UTIL. FORT., Mar. 21, 1985, at 19 (using the term for the first time in print, in an article based on his remarks at the 1984 NARUC meeting).

98. 18 C.F.R. § 35.28(b)(4).

99. Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64,100, 64,101 (Oct. 28, 2008) (to be codified at 18 C.F.R. § 35.28).

100. Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658 (Mar. 24, 2011) (to be codified at 18 C.F.R. § 35.28).

101. 76 Fed. Reg. at 16,664 (citing comments by the Environmental Defense Fund and the American Clean Skies Foundation).

102. Eisen, *supra* note 977, at 102-03.

103. 76 Fed. Reg. at 16,664 (citing the comment of the Electric Power Supply Association).

expensive but relatively low-emission natural gas plants, to lower-cost off-peak periods, when more generation comes from cheaper coal-fired power plants.[104]

FERC's own analysis has been cautious, referring to "possible environmental benefits" from demand response.[105] FERC notes that "[d]emand response may provide environmental benefits by reducing generation plants' emissions during peak periods," but also that "[r]eductions during peak periods should be balanced against possible emissions increases during off-peak hours, as well as from increased use of on-site generation."[106] FERC's Orders 719 and 745 do not ascribe any environmental benefits to demand response.

It is apparent from this debate that whether demand response results in environmental benefits depends on how it is managed. The Federal Power Act gives FERC little if any authority to regulate energy transactions, including demand response, for the direct purpose of accomplishing environmental objectives. Other federal, state, and local regulators, however, do have that authority. Pursuant to its authority under the Clean Air Act, for example, EPA regulates diesel generators that are sometimes used for on-site generation as part of demand response.[107] Included in these regulations are specific limits on the operation of such generators for demand response.[108] Ultimately, demand response appears to have significant potential to reduce air pollutant emissions, if energy policies governing the grid incentivize demand response and environmental policies governing emissions channel demand response toward environmentally beneficial energy usage.

FERC's efforts to expand demand response recently hit a significant legal snag. Five energy industry associations[109] petitioned for review of Order 745 in the D.C. Circuit, and on May 23, 2014, a divided panel of that court vacated Order 745, holding that it exceeded FERC's jurisdiction over wholesale

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104. Vandenbergh & Rossi, *supra* note 977, at 1541-43.

105. FERC, ASSESSMENT OF DEMAND RESPONSE & ADVANCED METERING 6 (2006), available at http://www.ferc.gov/legal/staff-reports/demand-response.pdf.

106. *Id.*

107. National Emissions Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, New Source Performance Standards for Stationary Internal Combustion Engines, 78 Fed. Reg. 6674 (Jan. 30, 2013) (to be codified at 40 C.F.R. pts. 60, 63).

108. *Id.* at 6679-81.

109. The five petitioners, aligned with the interests of electric power generators who under Order 745 faced competition from demand response resources bidding into wholesale electric power markets, were the Electric Power Supply Association, American Public Power Association, National Rural Electric Cooperative Association, Old Dominion Electric Cooperative, and Edison Electric Institute.

electric power markets under the Federal Power Act.[110] The panel majority held that demand response, because it involves end users of electricity who are customers in the retail market, is inherently a phenomenon of the retail market and therefore outside of FERC's jurisdiction.[111] The effect of the D.C. Circuit's decision on FERC's attempts to incentivize demand response remains to be seen. FERC may seek certiorari in the Supreme Court, which could reinstate Order 745, or find ways to extend or preserve other demand response initiatives.

II. OBSERVATIONS

The title of this article refers to accomplishing environmental objectives with "non-environmental laws," and in many respects that characterization is accurate. The four illustrative laws described in Part II—the Plant Protection Act, SEC environmental disclosure requirements, FTC Green Guides, and FERC's demand response orders—have different objectives than environmental laws; they arise under statutes not primarily aimed at environmental concerns. They are administered by agencies—APHIS, SEC, FTC, FERC—that do not specialize in environmental law. They employ different regulatory mechanisms—import limits, financial disclosures, marketing restrictions, and economic regulation—than canonical environmental regulation, which more directly regulates environmental emissions and discharges. They are associated with, and have the primary attributes of, legal fields other than environmental law—agricultural law, securities law, consumer protection law, and energy law.

And yet, despite these characteristics that differentiate them from what is generally regarded as environmental law, as Part II showed, these non-environmental laws are being used to accomplish environmental objectives. Moreover, Part II also showed that these non-environmental laws exhibit potential for significant expansions of their environmental applications. The Plant Protection Act can be used to strengthen import controls against the movement of invasive species into the country.[112] The SEC can clarify the breadth of environmental information that companies must disclose, recognizing that information about a firm's environmental performance is important to its financial

110. Elec. Power Supply Ass'n v. FERC, No. 11-1486, 2014 WL 2142113 (D.C. Cir. May 23, 2014).

111. *Id.* at *4.

112. *See* National Environmental Coalition on Invasive Species, Invasive Species Solutions, necis.net (urging more aggressive regulation of imported plant species).

outlook and therefore material to investors.[113] The FTC can pursue enforcement actions against companies that make deceptive claims about their environmental performance and commitments.[114] FERC can continue to develop programs that incentivize energy efficiency.[115] None of these initiatives involves environmental statutes or environmental agencies, and none would require new legislation from Congress.

Any particular expanded use of non-environmental laws to pursue environmental objectives will require more substantial consideration and analysis than is possible in this exploratory article. It is important not to allow dissatisfaction with the familiar realm of environmental law to lead us to idealize unfamiliar alternatives. Specific proposals necessitate thorough consideration and balancing of advantages and disadvantages. That being said, thinking generally about environmental applications of non-environmental laws, and drawing on the examples from Part II, we can identify likely upsides and downsides.

A. Potential Upsides

The characteristics that differentiate non-environmental laws from environmental laws potentially give them certain advantages over relying solely on environmental statutes to address environmental problems. Using non-environmental laws to pursue environmental objectives can leverage these advantages.

Parallelism and Synergy. Non-environmental laws applied to environmental concerns can work independently of, but synergistically with, environmental statutes. Effective use of the Plant Protection Act to exclude invasive weeds and plant pests could substantially reduce pesticide use, supporting the goals of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[116] The SEC's environmental disclosure requirements, by requiring a company to disclose any environmental enforcement action taken

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113. *See supra* note 50 and accompanying text.

114. *See supra* notes 86-90 and accompanying text.

115. *See supra* notes 107-108 and accompanying text. Even if the D.C. Circuit's decision remains intact and hinders FERC's ability to promote demand response, the agency has other policy avenues it can employ to facilitate energy efficiency and clean energy. *See, e.g.*, Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013) (affirming FERC's approval of regional transmission organization's rate design for transmission project that facilitated development of renewable energy resources).

116. 7 U.S.C. §§ 136-136y. Approximately $500 million of pesticides are used each year against invasive pest insects. *See* David Pimentel et al., *Update on the Environmental and Economic Costs Associated with Alien-Invasive Species in the United States*, 52 ECOLOGICAL ECON. 273, 281 (2005).

against it,[117] incentivize compliance with environmental regulations. The FTC's Green Guides, by precluding companies from environmental marketing that highlights attributes required by law,[118] may motivate companies to go beyond what is legally mandated. Finally, FERC demand response orders work with environmental regulations, such as EPA regulations governing the use of diesel generators,[119] to induce environmentally beneficial demand response measures.

Institutional and Policy Pluralism. Although designated environmental expert agencies such as EPA and Fish and Wildlife Service will always be responsible for the lion's share of environmental regulation, there are important advantages to including other agencies in the effort as well. Non-environmental agencies and laws apply different perspectives and policy instruments than typical environmental standards. The FTC's Green Guides and the SEC's environmental disclosure requirements, for example, leverage exogenous consumer and investor demand for environmentally beneficial products and companies. This approach is decidedly different from environmental emissions standards that operate in a way that largely obscures both their benefits and burdens from the view of the public. Adding non-environmental laws to the mix of legal responses to environmental problems thus diversifies and expands the field of environmental law. As long as these additions do not lead to wasteful duplication or work at cross-purposes, environmental policy benefits from having a diversity of agencies addressing environmental problems through various policy mechanisms.

Non-Environmental Attributes. Relying on non-environmental law to accomplish environmental objectives recognizes the connections and relationships that environmental issues have with other, non-environmental issues. These non-environmental connections may be at least as strong as their connections with other environmental issues. Environmental marketing claims, for example, arguably have more in common with other marketing claims than they do with air pollutant emissions. Indeed, the very act of categorizing a problem or policy as environmental deemphasizes its other important aspects, obscuring important connections with other fields.[120]

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117. *See* 17 C.F.R. § 229.103 (Instruction 5); *see also supra* text accompanying note 42.

118. 16 C.F.R. § 260.5(c); *see also supra* text accompanying note 85.

119. *See* 78 Fed. Reg. 6674; *see also supra* text accompanying note 107.

120. *Cf.* Todd S. Aagaard, *Environmental Law As A Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 234 (2010) ("Fields of law focus attention on particular aspects of the law only by intentionally obscuring other aspects.").

Finding environmental applications of policies in legal fields outside of environmental law—such as agricultural law, securities law, consumer protection law, and energy law—therefore allows environmental policy to benefit from non-environmental connections. It is telling, for example, that the legal questions raised by the examples of environmental applications of non-environmental laws described in Part II implicate issues fundamental to their respective fields—for example, what information is material to an investor, what marketing misleads a consumer, or the distinction between wholesale and retail electric power markets. Environmental policy benefits from the application of the existing frameworks in these fields to these questions.

In addition, these fields may benefit from application to the environmental context. Applying their existing frameworks to environmental problems may raise important questions for the field.[121] If, for example, information about a firm's overall environmental performance appears likely to be significant to investors, and therefore would meet the existing definition of materiality under the securities laws, but there are legitimate concerns about broadening the definition of materiality to encompass factors not directly related to financial performance,[122] then this raises an important problem for securities regulation generally. Both environmental law and other fields—in this example, securities regulation—thus can benefit from applying doctrine and analytical methods from these other fields to environmental problems.

Political Dynamics. Non-environmental laws also create different, and perhaps more constructive, political dynamics than laws more specifically focused on environmental protection. During times like the present in which environmental policies trigger such visceral and ideological debate, it is beneficial to have areas, such as securities regulation and consumer protection, in which policies can be developed and implemented in a more productive environment. Non-environmental laws may offer more fruitful political dynamics than environmental laws can offer, for several reasons.

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121. *See, e.g.*, Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011) (arguing that climate change litigation asserting common law causes of action raise questions regarding harm, causation, and responsibility that could lead to important innovations in tort law). The Supreme Court's subsequent decision in *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527 (2011), holding that the Clean Air Act preempted climate change causes of action under federal common law, foreclosed many opportunities for the innovations Kysar envisioned.

122. *See* text accompanying *supra* note 60.

Non-environmental laws disrupt the contentious and entrenched environmentalist-industry interest group alignments that pervade environmental law. Because they aim at goals other than environmental protection, non-environmental laws may create a broader coalition of support. Farmers concerned about plant pests and noxious weeds that threaten their crops may support the Plant Protection Act's regulation of invasive species. Investors concerned about a company's business risks may support strong disclosure requirements that include environmental information. Consumers concerned about confusing and deceitful marketing may support strict enforcement against misleading and unsupported claims that include claims about environmental benefits. Consumers of electric power may support efforts to create a more efficient and reliable grid that include environmentally beneficial demand response measures.

Non-environmental laws also may elicit weaker anti-regulatory political opposition, because the institutions and regulatory mechanisms they employ are considered less intrusive than environmental regulation. As far as agencies go, the FTC, for example, is not the bogeyman for conservatives that the EPA is. As for policy instruments, whereas conventional environmental regulation—often termed "command and control" regulation[123]—is perceived as contrary to free market principles,[124] non-environmental laws often arguably facilitate free markets—for example, by creating more informed investors and consumers rather than mandating certain levels of environmental protection, or by incorporating demand response resources into wholesale electricity markets.

Finally, non-environmental laws may be overall less politically volatile than environmental laws, because the economic and political costs of regulation are generally lower outside of environmental law. With reduced stakes, there may be less of a rush to symbolic ideological battles. EPA rules are, compared to other agencies' regulations, extremely costly.[125] They generate

123. *See, e.g.*, Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1235-36 (1995) (describing command-and-control environmental regulation); Michael P. Vandenbergh, *From Smokestack to SUV: The Individual As Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 526 (2004) (same).

124. *See, e.g.*, Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275 (2000) (contrasting command-and-control regulation and market-based regulation).

125. OFFICE OF MANAGEMENT & BUDGET, 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 15 (2012) (noting that "the rules with the highest benefits and the highest costs, by far, come from the Environmental Protection Agency").

huge benefits as well,[126] but the regulated industries for the most part do not experience those benefits as directly as the costs. Because the economic and political stakes of non-environmental regulation are generally lower than for environmental regulation, fewer resources are expended opposing them.

B. Potential Downsides

Despite these advantages of using non-environmental law to pursue environmental objectives, there are potential downsides. These potential causes for concern can be categorized as legal risks, efficacy risks, and political risks.

Legal risks. The example statutes described in Part II aptly illustrate that using non-environmental laws to accomplish environmental objectives does not rid environmental policy of legal risks, but rather substitutes one set of legal risks for another. Every agency's and statute's regulatory authority, whether it be EPA's authority under the Clean Water Act or the FTC's authority under the FTC Act, has limits. Laws also tend to induce the broadest consequences when applied the most expansively, which explains why agencies are sometimes tempted to push the boundaries of their authority. When agencies apply their authority expansively, as several of the potential applications discussed in Part II entail, this increases the legal risks. Agencies are more likely to get sued, and more likely to lose when they are sued. Indeed, as noted in Part II, both the SEC and FERC recently lost key challenges in the D.C. Circuit,[127] evidencing the legal risks to agencies of pursuing innovative policies for which there is little established precedent.

Efficacy risks. Although using non-environmental laws to pursue environmental objectives has the potential to result in significant additional environmental benefits beyond what can be accomplished with environmental statutes alone, the efficacy of environmental applications of non-environmental laws is best regarded as potential and contingent for several reasons.

First, because environmental concerns are not a primary purpose of these non-environmental laws, pursuit of their core objectives may at times actually impede environmental protection. Some environmentalists think this is true for APHIS's approval of genetically modified crops and methyl bromide treatments under

126. *Id.* at 12 (noting that 30 major EPA rules issued between 2001 and 2011 generated between $84.8-565.0 billion in benefits, compared with $22.3-28.5 billion in costs).

127. *See supra* notes 61-65 and 109-111 and accompanying text.

the Plant Protection Act.[128] It also may be true of demand response measures that use diesel generators.[129] Environmental concerns can be addressed if they are considered, but these examples highlight the dangers of assuming that non-environmental laws will result in environmental benefits simply because such benefits are possible.[130]

Second, because of the type of policy instruments used in environmental applications of non-environmental laws, there is significantly more uncertainty about the environmental benefits they will obtain. For example, the extent to which using the FTC Act to prevent deception in environmental marketing actually leads markets to develop and sell more environmentally beneficial goods and services is unknown and very difficult to predict or determine. Unlike the EPA, the FTC and the SEC do not—and indeed cannot—regulate directly environmentally harmful behavior. To the extent that regulatory tools such as import limits, sanctions against deceptive advertising, investor disclosure, or compensation for demand response affect environmental quality, that effect is quite indirect and difficult to ascertain. The potential for environmental benefits exists, but realization of that potential is uncertain.

Third, institutional factors also may limit the effectiveness of entrusting environmental objectives to non-environmental agencies. When environmental objectives are not the primary focus of a program or agency, they may be disregarded or at least diluted in strength. The SEC, for example, faces overwhelming challenges in maintaining the integrity of financial markets, and as a consequence, understandably may not prioritize using securities laws to pursue environmental objectives. Non-environmental agencies also may lack the expertise to understand environmental issues.

Political risks. Despite the potential political advantages of using non-environmental law to accomplish environmental objectives, there are significant political risks. Environmental advocates may find it more difficult to monitor and participate in policymaking outside of environmental law's conventional boundaries, although several of the examples in Part II illustrate

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128. *See supra* notes 30-31 and accompanying text.

129. *See supra* note 103 and accompanying text.

130. *Cf.* David Zaring, *Op-Ed: Although Lacking in Potency, 'Minerals' Rule Empowers SEC*, NAT'L L.J., June 16, 2014 (acknowledging that the Conflict Minerals Rule involves areas that "are not a core competency" for the SEC). *But see id.* (Applauding the Conflict Minerals Rule, which "adds a role for a financial regulator to do something about human rights," as "reflect[ing] a particular American vision about what transparent governance requires").

instances in which environmental groups participated effectively in proceedings before non-environmental agencies.[131] More difficult to assess, but arguably more dangerous, is the possibility that efforts to infuse environmental objectives into other areas of law will infect those other areas with environmental law's poisonous politics. Political posturing can arise in unlikely places, as evidenced by the controversies over light bulb efficiency standards[132] and Lacey Act enforcement against the Gibson Guitar Company.[133]

III. CONCLUSION

Some day—hopefully—Congress will return to constructive engagement with environmental issues. In the indefinite meantime, however, the legislative impasse presents a significant obstacle to progress against environmental problems. But, consistent with the old adage that necessity is the mother of invention, that obstacle also can be an impetus for forward movement, insofar as it can drive environmental policymaking to consider underutilized and unexplored alternatives to the environmental law canon.

Efforts to use law and policy to protect the environment should look beyond just environmental statutes. As the examples in Part II illustrate, a variety of non-environmental statutes demonstrate an ability to apply effectively to environmental problems. They do so, moreover, in ways that complement environmental statutes,

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131. *See, e.g.*, *supra* note 40 (noting that NRDC's petition to the SEC seems at least in part to have motivated the agency to issue its interpretive releases regarding environmental disclosures).

132. The Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, included efficiency standards of light bulbs that will phase out many traditional incandescent light bulbs. *See id.* § 321, 121 Stat. at 1573-87. Despite the significant environmental and economic benefits of the legislation, it generated a substantial backlash from conservatives. *Compare Facts About the Incandescent Light Bulb Law*, GE LIGHTING, http://www.gelighting.com/LightingWeb/na/consumer/inspire-and-learn/lighting-legislation (last visited Oct. 10, 2014) (referring to federal legislation that will "replace energy-wasting incandescent light bulbs with more efficient options," which will "reduce energy usage, save billions of dollars, and protect the environment"), *with* Sen. Paul Rails Against the Collective (Apr. 12, 2011) (accusing the legislation of "taking away people's freedom").

133. In 2012, the Justice Department entered into a criminal enforcement agreement with the Gibson Guitar Company arising out of allegations that Gibson illegally procured imported ebony and rosewood from Madagascar and India in violation of the Lacey Act, 16 U.S.C. §§ 3371-3378. *See* Letter from Jerry E. Martin, United States Attorney, to Donald A. Carr (June 27, 2012), available at http://legaltimes.typepad.com/files/gibson.pdf. The enforcement action precipitated a backlash from some conservatives. *See* Editorial, *Gibson Axed Up by Lacey Act*, WASH. TIMES, Aug. 14, 2012 (characterizing law enforcement officers as "armed thugs" and accusing the Lacey Act of "sabotage[ing] American businesses and hav[ing] created a malaise of high unemployment and low growth"); Henry Juszkiewicz, *Gibson's Fight Against Criminalizing Capitalism*, WALL ST. J., July 20, 2012.

creating a synergistic combined effect. More can and should be done to consider expanding environmental applications of non-environmental statutes to take advantage of the opportunities they present.

Each legal field has its own distinctive perspectives, institutions, and policy instruments, as well as recurring controversies. Broadening our thinking about environmental policy tools to include more non-environmental laws diversifies the options available to policymakers and ultimately can make environmental policy more nimble, adaptive, and resilient to the vexing challenges it faces.