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Looking for a Lorax: Environmental Prosecution and Regulatory Failings in Overseeing Pennsylvania's Fracking Industry

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Comment

LOOKING FOR A LORAX: ENVIRONMENTAL PROSECUTION AND REGULATORY FAILINGS IN OVERSEEING PENNSYLVANIA'S FRACKING INDUSTRY

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> "It is not yet widely understood, though it will be, that when a government relaxes regulations on coal-fired plants or erases scientific data from a federal website, it is guilty of more than merely bowing to corporate interests; it commits crimes against humanity."[1]

I. THE POLITICAL AND ECONOMIC LANDSCAPE OF FRACKING IN PA: "[B]USINESS IS BUSINESS! AND BUSINESS MUST GROW"[2]

The inception of the fracking boom can be traced roughly to 2005, when the first Marcellus Shale well started producing gas in southwestern Pennsylvania.[3] Only two years later, regulatory agencies had issued almost four hundred permits for drilling and fracking.[4] By 2010, the oil and natural gas industry had drilled more than three thousand wells and received almost ten thousand permits.[5] The process of

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1. RONALD C. KRAMER, CARBON CRIMINALS, CLIMATE CRIMES 125, 125 (2020) (quoting NATHANIEL RICH, LOSING EARTH: A RECENT HISTORY 195 (2019)) (discussing Obama and Trump administrations' failures adequately addressing climate change).

2. DR. SEUSS, THE LORAX 37 (1971).

3. *See* Candy Woodall, *The Rise and Fall—and Rise?—of Pa.'s Oil and Gas Industry*, PENNLIVE (last updated Jan. 5, 2019), https://www.pennlive.com/news/2016/03/the_rise_and_fall_and_rise_of.html [https://perma.cc/HQ6U-CK4S] (detailing expansion of fracking industry in Pennsylvania and its effect on the state and its citizens); *see also* Hobart M. King, *Marcellus Shale—Appalachian Basin Natural Gas Play*, GEOSCIENCE NEWS & INFO., https://geology.com/articles/marcellus-shale.shtml [https://perma.cc/R8SF-3CHE] (last visited Sept. 29, 2020) ("The Marcellus Shale, also referred to as the Marcellus Formation, is a Middle Devonian-age, black, low-density, carbonaceous (organic-rich) shale that occurs in the subsurface beneath much of Ohio, West Virginia, Pennsylvania and New York" with experts estimating it could contain up to "141 trillion cubic feet" of recoverable natural gas.).

4. *See* Woodall, *supra* note 3 (noting industry received rapidly increasing number of oil wells and permits in beginning of fracking boom).

5. *See id.* (tracing fracking boom's expansive drilling activities). Despite these large-scale numbers, a decade later Attorney General Shapiro's grand jury report noted this is merely the beginning for the fracking industry. *See* PA. OFFICE OF ATTORNEY GEN., REPORT 1 OF THE

fracking, or hydraulic fracturing, involves drilling vertically and horizontally into the ground before injecting highly pressurized mixtures of water, sand, and chemicals in order to extract oil and gas from shale rock.[6] This fracking technique allowed the oil and natural gas industry (the industry) to tap into previously unreachable oil reserves in Pennsylvania's Marcellus Shale.[7]

The industry's rapid expansion brought more residents and economic growth to rural areas of Pennsylvania and introduced a reliable domestic supply of oil to the United States.[8] The industry began contributing millions of dollars to political campaigns, championing fracking as a clean alternative to coal while bringing in over eleven-billion dollars and 140,000 jobs to the Pennsylvania economy in 2010 alone.[9] Despite its economic benefits, the fracking process is environmentally controversial due to its use of large amounts of water, its potential for water and soil pollution, and the air contamination released around drilling sites.[10] While the industry spread across the state, leasing more than a quarter of Pennsylvania's land by 2011,

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FORTY-THIRD STATEWIDE INVESTIGATING GRAND JURY 13 (2020) [hereinafter PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT], https://www.attorneygeneral.gov/wp-content/uploads/2020/06/FINAL-fracking-report-w.responses-with-page-number-V2.pdf [https://perma.cc/DMQ4-KMRV] ("Experts anticipate that there will be another 30,000 to 40,000 unconventional wells drilled in the Marcellus shale in the coming years.").

6. *See What Is Fracking and Why Is It Controversial?*, BBC (Oct. 15, 2018), https://www.bbc.com/news/uk-14432401 [https://perma.cc/VSF7-4KTE] (describing technical background, economic advantages, and controversial environmental effects of fracking process).

7. *See* King, *supra* note 3 (stating Marcellus Shale not considered a productive source of natural gas until fracking made process feasible and fruitful).

8. *See* Woodall, *supra* note 3 (examining industry's transformative effects on Pennsylvania's economy and oil dependency within United States). According to the Bureau of Labor Statistics, from 2007 to 2012, while total employment was declining in Pennsylvania, the oil and natural gas industry saw an employment increase of 259.3%. *See* Jennifer Cruz, Peter W. Smith & Sara Stanley, *The Marcellus Shale Gas Boom in Pennsylvania: Employment and Wage Trends*, MONTHLY LAB. REV., U.S. BUREAU OF LAB. STATS., Feb. 2014, at 1, 5, https://www.bls.gov/opub/mlr/2014/article/the-marcellus-shale-gas-boom-in-pennsylvania.htm [https://perma.cc/S4G6-GKRJ] (comparing Pennsylvania's overall employment and wage trends to those of oil and natural gas industry). Additionally, oil and natural gas wages increased by 36.3% while the average wage increased only by 11.9%. *Id.* Employment in areas of southwestern Pennsylvania increased by 287% from 2007 to 2012. *Id.*

9. *See* Woodall, *supra* note 3 (considering industry's financial involvement in political campaigns both nationally and in Commonwealth of Pennsylvania); *see also* Timothy J. Considine, Robert Watson & Seth Blumsack, *The Pennsylvania Marcellus Natural Gas Industry: Status, Economic Impacts and Future Potential*, PA. ST. UNIV. COLL. OF EARTH & MINERAL SCI. DEP'T OF ENERGY & MINERAL ENG'G (July 20, 2011), http://pasbdc.org/uploads/media_items/the-pennsylvania-marcellus-natural-gas-industry-status-economic-impacts-and-future-potential-july-2011.original.pdf [https://perma.cc/QHQ4-3DGG] ("This update finds that during 2010 Pennsylvania Marcellus natural gas development generated $11.2 billion in value added or the regional equivalent of gross domestic product, contributed $1.1 billion in state and local tax revenues, and supported nearly 140,000 jobs."(citation omitted)).

10. *See* Caroline Cecot, *No Fracking Way: An Empirical Investigation of Local Shale Development Bans in New York*, 48 ENVTL. L. 761, 767 (2018) (describing daily realities of fracking on local communities such as extensive noise and disruption, "air pollution, drilling and road accidents, fluid spills," well blowouts, contamination of groundwater and surface water, and water shortages); *What Is Fracking and Why Is It Controversial?*, *supra* note 6 (describing fracking's adverse environmental consequences).

environmental regulatory agencies at both the state and federal level struggled to keep up with overseeing this new process.[11]

During this time, citizens began submitting complaints to the Pennsylvania Department of Environmental Protection (DEP).[12] Between 2004 and 2016, citizens across the state made 9,442 complaints to the DEP, none of which were made public until investigative journalists formally requested them.[13] In 2016, Josh Shapiro campaigned for Pennsylvania Attorney General on a platform that included prosecuting the fracking industry for crimes against Pennsylvania citizens.[14] Once elected, Attorney General Shapiro upheld his campaign promise by launching an investigation into Pennsylvania's fracking industry and the effectiveness of the DEP's oversight measures.[15]

Attorney General Shapiro's grand jury report and the DEP's response provide a glimpse into how Pennsylvania officials could better regulate the industry.[16] Currently, the DEP has the authority to refer an environmental criminal matter to

11. *See* Woodall, *supra* note 3 (discussing regulatory agencies' inability to keep up with quickly expanding industry); *see also* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 105 (noting fracking techniques and chemicals were "standard operating procedures for virtually every conventional oil and gas well in Pennsylvania for decades—[but] the sheer scale of this new development was unprecedented").

12. *See* Melissa A. Troutman et al., *Hidden Data Suggests Fracking Created Widespread, Systematic Impact in Pennsylvania*, PUB. HERALD (Jan. 23, 2017), https://publicherald.org/hidden-data-suggests-fracking-created-widespread-systemic-impact-in-pennsylvania/ [https://perma.cc/23DL-4P2V] (describing process of making complaint to DEP about fracking activities under Title 58, Section 3218 of Pennsylvania Oil and Gas Act). In response to this increasing volume of complaints surrounding the industry, the DEP could "conduct its own complaint analysis and report those findings to the state legislature, which has the power to either limit the expansion of fracking, increase the breadth of DEP's resources, or both." *Id.* However, the DEP did not take this measure. *See id.* (criticizing the DEP's handling of increase in complaints resulting from fracking boom).

13. *See id.* (stating complaints were held as "confidential" and only made available after several requests, including a Right-to-Know request, were sent to the DEP). The citizen complaint data revealed several disconcerting facts: the DEP received an average of about one complaint per well, indicating that "unconventional wells, for whatever reason, generate more complaints per well" than other types of drilling operations. *See id.* (quoting Dr. John Stolz's comment that wells related to fracking seem to cause more issues for residents than their conventional counterparts). Of the 4,108 complaints relating to water supply, the DEP claimed that 94% of these complaints were "completely unrelated to oil and gas," which means that "thousands of people in shale gas counties, living near fracking operations, are experiencing water problems that DEP claims have nothing to do with oil and gas." *Id.* (asking why the DEP claims fracking is not causing a majority of complaints when increase in frequency correlates with rise in and location of unconventional drilling wells).

14. *See* Reid Frazier, *In Pa., an Echo of the Fracking Boom: Prosecutors Eye Potential 'Environmental Crimes.' Here's a Closer Look*, ST. IMPACT (May 2, 2019, 8:47 P.M.), https://stateimpact.npr.org/pennsylvania/2019/05/02/in-pa-an-echo-of-the-fracking-boom-prosecutors-eye-potential-environmental-crimes-heres-a-closer-look-at-the-effort/ [https://perma.cc/N8DZ-MBBQ] (revealing former Pennsylvania chief deputy attorney general couldn't "imagine a scenario where the attorney general's office could investigate the DEP for failing to do its job" since, typically, "environmental crimes are reserved for individuals or companies—not government agencies").

15. *See id.* (reporting the DEP hired "four criminal defense firms to represent the department and its employees" in response to grand jury investigation).

16. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 93, 152 (listing grand jury's recommendations for regulating oil and gas industry moving forward and the DEP's responses to those recommendations).

the Attorney General's office for investigation and prosecution.[17] This power, according to the grand jury report, is "virtually never invoked."[18] More referrals, and subsequently more investigations and prosecutions for crimes surrounding fracking activities, could make the industry safer and more closely supervised.[19] Following and updating rules that are already in place, such as the "zone of presumption" rule and water quality testing criteria, would help the DEP better respond to citizen complaints.[20] Lastly, although the general assembly is in charge of passing legislation, the DEP makes the regulations that contain the specific provisions governing oil and gas wells.[21] Passing stricter regulations would help the DEP better control the industry and minimize its adverse effects on Pennsylvania residents.[22]

This Comment contends that agency inaction should be curtailed through outsourcing of environmental criminal investigative power to executive offices and through legislation that penalizes agency omissions.[23] Part II outlines Attorney General Shapiro's grand jury report and provides an overview of the case law and statutory provisions governing environmental prosecution of both private individuals and government employees. Part III analyzes how the framework of environmental prosecution applied to the facts laid out in the grand jury report could rationally lead to criminal charges for regulatory agency employees, but Part IV contends that increasing oversight through executive powers and legislation would be more effective than employee criminal charges. Part V explores the impact of implementing these measures.

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17. *See id.* at 149.

18. *See id.* at 101–02 (questioning why the DEP rarely uses power of criminal referral to curb misconduct occurring around unconventional drilling). "[T]he lack of criminal prosecution is not because no such crimes have been committed." *Id.* at 102.

19. *See id.* at 102 (arguing that granting Office of Attorney General concurrent jurisdiction to investigate and prosecute environmental crimes would help fulfill Pennsylvania's constitutional promise of clean and healthy environment).

20. *See id.* at 6 (accusing the DEP of failing to carry out their existing powers of water quality testing and "zone of presumption," which puts burden on well operator to prove there was no contamination after suspected leak). The Attorney General also cited other instances of regulatory powers left unused, such as DEP employees deciding not to inspect reported violations, failing to notify neighbors of nearby contaminations, and issuing few Notice of Violations. *See id.*

21. *See id.* at 140, 142 (explaining certain standards were set through statutes enacted by general assembly). Despite the general assembly's legislative powers, the DEP can create more specific rules through regulations, policies, and technical documents that industry actors must comply with. *See The Basics of the Regulatory Process*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/laws-regulations/basics-regulatory-process [https://perma.cc/U3VB-N9UB] (last visited Nov. 28, 2020) (clarifying an environmental agency's role in rulemaking process); *see also Regulatory Agendas*, PA. DEP'T OF ENVTL. PROT., https://www.dep.pa.gov/publicparticipation/pages/regulatory-agendas-.aspx [https://perma.cc/RBZ9-NY6Y] (last visited Nov. 28, 2020) (stating the DEP publishes biannual agenda for proposed regulations in addition to lists of non-regulatory sources that guide the DEP in creating policies and procedures).

22. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 96 (suggesting stricter regulations for gathering lines, the smaller lines that transport gas to larger pipelines); *see also* 25 PA. CODE § 78a.68 (2016) (listing requirements the DEP's unconventional well regulations imposed on gathering lines).

23. For a further analysis of how to reduce harmful agency inaction through legislative and executive oversight, see *infra* Part IV.

II. "THERE'S NO CAUSE FOR ALARM. . . . I AM DOING NO HARM."[24]: BACKGROUND ON ENVIRONMENTAL ENFORCEMENT AND THE GRAND JURY REPORT FINDINGS

In the United States, environmental crimes were not prosecuted and enforced until the 1980s, when Congress passed federal environmental statutes.[25] When faced with an individual or corporation violating environmental laws, regulatory agencies have a range of enforcement options that includes both civil and criminal recourse.[26] They can issue administrative compliance orders, bring civil enforcement actions, or participate in criminal prosecutions in conjunction with the Department of Justice.[27] Prosecutors and agencies typically reserve criminal charges for cases of extremely culpable action and serious injury.[28] The mens rea for most environmental crimes is "knowingly" for felonies and "negligently" for misdemeanors.[29] While this gives prosecutors substantial discretion in environmental cases, most defendants who were criminally charged committed violations that "involved harm, deceptive or misleading conduct, or operating outside the regulatory scheme."[30]

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24. *See* SEUSS, *supra* note 2, at 24. In response to why the DEP was holding citizen complaints about contaminated water supplies as confidential, a DEP attorney responded that "Deputy Secretary Scott Perry didn't want complaints to 'cause alarm.'" *See* Troutman et al., *supra* note 12 (describing arduous process of accessing complaints records that were improperly being held confidential).

25. *See* David M. Uhlmann, *Environmental Crimes Come of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1224 (2009) [hereinafter Uhlmann, *Environmental Crimes*].

> The enactment and amendments of the federal Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Resource Conservation and Recovery Act ("RCRA") during the 1970s and 1980s brought more than the birth of the environmental crimes program in the United States. . . . As a result, the 1980s brought a series of "firsts" for environmental criminal enforcement: the first felony prosecutions under each of the major environmental laws, the first knowing endangerment cases, and the first jail sentences imposed for environmental crime under the federal sentencing guidelines.

Id. (footnotes omitted).

26. *See* TODD AAGAARD, DAVE OWEN, & JUSTIN PIDOT, PRACTICING ENVIRONMENTAL LAW 144–48 (Robert C. Clark et al. eds., 1st ed. 2017) (discussing varying degrees of enforcement actions that can be taken by regulatory agencies, government authorities, and citizens).

27. *See id.* at 144, 146–47. If an agency believes an individual or entity will observe with an administrative compliance order, they will likely bring this over civil or criminal charges save time and litigation expenses. *See id.* at 144. Civil and criminal litigation is a viable option for repeat offenders who are unlikely to follow an administrative compliance order. *See id.*

28. *See id.* at 147 (stating criminal enforcement of environmental violations usually reserved for cases involving "egregious violations" or cases "that combine environmental violations with dishonesty or malicious motives").

29. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1235 (explaining that "knowing" culpability requirement for environmental crimes supplanted "willfully or negligently" standard and includes knowledge of underlying facts of crime, but not knowledge of law being broken).

30. *See* David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159, 214–15 (2014) [hereinafter Uhlmann, *Prosecutorial Discretion*] (arguing large amount of discretion given to prosecutors regarding environmental crimes is appropriate given nature of environmental violations and has been exercised properly). The prosecutorial trend of only bringing criminal environmental charges on violators who are harming individuals, defrauding federal and state agencies, or attempting to evade government regulations demonstrates that

Another potential tool for prosecuting environmental crimes is a grand jury, which has the power to investigate prospective criminal offenses.[31] Grand juries do not determine whether a party is guilty or innocent, but rather decide if a case has enough evidence to bring charges against a party.[32] Thus, a grand jury does not have the power to convict, but its broad evidentiary powers enable prosecutors to conduct detailed investigations into criminal charges to bring later to court.[33] Attorney General Shapiro's grand jury report does not bring any charges against the DEP but lays out the evidence of the agency's failure to regulate the fracking industry.[34]

A. *Summarizing the Grand Jury Report*

On June 25, 2020, Attorney General Shapiro released the Forty-Third Statewide Grand Jury Report investigating the shale gas and fracking industry in Pennsylvania and its detrimental effects on the property, health, and safety of the afflicted Pennsylvania residents.[35] Remarkably, the report focused not on the industry itself but rather on the "systematic failure of the state environment and health departments in regulating the industry and protecting public health."[36] After two

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prosecutors typically act appropriately within the law and the bounds of their discretion when bringing environmental actions. *See id.* (offering evidence to support claim environmental prosecutors act reasonably within their discretionary powers).

31. *See* 42 PA. STAT. AND CONS. STAT. § 4541 (1980) (naming this subchapter the "Investigating Grand Jury Act," which states definitions, processes, and powers of grand jury).

32. *See* Charles Thompson, *What Is a Grand Jury, and How Does It Work*, PENNLIVE, https://www.pennlive.com/news/2018/08/what_is_a_grand_jury.html [https://perma.cc/47NC-44TL] (last updated Jan. 29, 2019) (clarifying role of statewide investigating grand juries within Pennsylvania's legal framework).

33. *See* 42 PA. CONS. STAT. § 4548(c) (1980) ("Except for the power to indict, the investigating grand jury shall have every power available to any other grand jury in the Commonwealth.").

34. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 104–10. In response to the grand jury report's condemnation of how it handled the fracking industry, the DEP pointed out the culpability of federal environmental agencies, the legislature, and its own lack of funding and resources that led to Pennsylvania's regulatory shortcomings. *See id.* at 109.

> Despite the seriousness of the allegations in the report, there is no discussion of the environmental laws that establish—and in important ways limit—the scope of governmental oversight of the industry. There is no acknowledgment of the fundamental "checks and balances" principle of government that the Legislature writes the laws, and the Governor and his agencies implement those laws.

Id. at 109–10.

35. *See* Susan Phillips, *Criminal Defense Counsel Represents DEP in Mariner East Probe*, ST. IMPACT PA, https://stateimpact.npr.org/pennsylvania/2019/08/30/criminal-defense-counsel-represents-dep-in-mariner-east-probe/ [https://perma.cc/58VL-GF86] (last updated Sept. 3, 2019) ("The Pennsylvania Department of Environmental Protection has engaged a criminal defense attorney to represent at least one employee with regard to a criminal investigation of the Mariner East pipeline project—a move several environmental attorneys said is unusual and possibly unprecedented for the regulatory agency."); *see also* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 1 (concluding poor government oversight led to officials "not do[ing] enough to properly protect the health, safety and welfare of thousands of Pennsylvania citizens who were affected by this industry").

36. *See* Don Hopey & Laura Legere, *State AG Shapiro: Grand Jury Report Reveals Pa.'s Systematic Failure to Regulate Shale Gas Industry*, PITTSBURGH POST-GAZETTE (June 25, 2020, 1:52 PM), https://www.post-gazette.com/news/environment/2020/06/25/Grand-jury-report-

years of investigation, the report found that the Pennsylvania DEP failed to properly regulate the practices surrounding fracking, thereby allowing the industry to harm citizens and violate their constitutional right to clean air and water under the Environmental Rights Amendment to the Pennsylvania Constitution.[37] Attached to the report is the DEP's response, which rebukes most of the report's findings and introduces other potential culpable parties.[38]

1. *The Main Report*

The grand jury report discussed the physical impact on Pennsylvania residents exposed to polluted air and water from gas and fracking activities, sometimes occurring as close as several hundred feet from families' water supplies and homes.[39] The resulting ailments from exposure to gases and drilling liquids involved severe and sudden nosebleeds, headaches, and chronic rashes, with younger residents experiencing troubling neurological problems more drastically than their adult counterparts.[40] Even more frightening, the long-term health effects of exposure to

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Pennsylvania-systemic-failure-regulation-fracking-shale-gas-industry-oil-Josh-Shapiro/stories/202006250132 [https://perma.cc/795F-8YYR] (reporting on grand jury report's condemnation of Pennsylvania's regulation of industry).

37. *See id.* ("There remains a profound gap between our constitutional mandate for clean air and pure water, and the realities facing Pennsylvanians who live in the shadow of fracking giants and their investors."); *see also* PA. CONST. art. 1, § 27 (1971) (granting right to clean air and water). The grand jury report also discusses the shortcomings of the Pennsylvania Department of Health (DOH) in their response to the fracking boom. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 7–8. The report describes a "hands off" approach that included "no special training for public health center staff in affected communities; no public education alerting people to the potential problem; [and] no centralized collection of data that might help pin down what was making people feel sick." *Id.* It also illustrated one of the ways DOH staff were told to ignore fracking-related complaints: staff members were given a list of around twenty words that related to fracking activity. *See id.* at 8. If a person called and used one of the terms, the staff member was told to end the call, directing it instead to the central office where nothing would happen. *See id.* (elucidating how Pennsylvania's DOH rerouted and then ignored citizen complaints using vocabulary related to fracking).

38. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 107 (claiming the DEP was surprised by "the extent of the factual inaccuracies and confused articulation of the relevant law in the excerpts of the draft" when reading the grand jury report).

39. *See id.* at 13 (asserting close proximity between homes and industry activities "results in unavoidable risks and problems").

40. *See id.* at 39 (revealing children's health effects from fracking activities were even more severe than those of adults). While adults experienced "lethargy, bruising, intense cramping, difficulty sleeping, and painful stomach problems, including nausea and vomiting," the concerning neurological problems exhibited by the children included frequent burning in the eyes, partial blindness, "twitching and tremors, erratic and uncontrollable eye movements, and neuropathy, which involves weakness, numbness, and stabbing or burning sensations throughout the body." *Id.*; *see also* PEGGY SLOTA, HYDRAULIC FRACTURING—"FRACKING"—AND CHILDREN'S HEALTH, MID-ATLANTIC CTR. FOR CHILD. HEALTH & ENV'T, https://www.environmentalhealthproject.org/sites/default/files/assets/resources/fracking-childrens-health-6.6.18-pslota.pdf [https://perma.cc/G64T-7KCL] (last visited Sept. 24, 2020) (explaining why children are more vulnerable to environmental hazards such as exposure to pollution related to fracking). The process of fracking uses over one thousand different chemicals, 75% of which "affect skin, eyes, respiratory, and [gastrointestinal] systems," approximately half of which affect "the brain, nervous, immune, renal, and cardiovascular systems," almost forty percent

these pollutants is unknown, with parents and doctors worrying that children who were exposed to fracking-related pollution could later face serious health complications such as infertility and cancer.[41]

The grand jury report also highlighted the damage done to the citizen-state relationship by sharing accounts of residents who lost faith in the agencies charged with protecting them.[42] One family, who suffered from nosebleeds, dizziness, and rashes from industry activities, called the DEP only to be told that the Department could not do anything to remedy the situation.[43] Although Attorney General Shapiro did not bring any criminal charges against the DEP, he exposed potential conflicts of interest in the common practice of the DEP employees being "lured away" to work for the industry "they were supposed to be regulating."[44]

2. *The DEP's Response*

While the grand jury report reveals alarming failures of the state regulatory agencies, even more unusual was the DEP's response.[45] When the investigation began, the DEP hired a criminal defense attorney "to represent at least one

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of which "affect the endocrine system," and a quarter of which "are carcinogens and mutagens." *See* SLOTA, *supra* (describing detrimental physiological impacts of potential toxins people are exposed to near fracking sites).

41. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 40 (revealing doctors have advised children who suffered symptoms due to exposure to fracking activities to "participate in regular cancer screening for decades to come"); *see also* Denise Meyer, *Fracking Linked to Cancer-Causing Chemicals, New Yale Study Finds*, YALE SCH. MED. (Oct. 24, 2016), https://medicine.yale.edu/news-article/13714/ [https://perma.cc/594C-LY9F] (explaining medical study found "numerous carcinogens" used in fracking have "the potential to increase the risk of childhood leukemia" while contaminating air and water in nearby communities).

42. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 52 (showing the DEP's "insufficient and untimely" regulation of industry led to breakdown in public trust between residents and government).

43. *See id.* (describing experience of a family in Washington County who reached out to the DEP for help when industry activities began making them sick). The mother who reached out to the DEP told Attorney General Shapiro: "I assumed by the title of their name, department of environmental, I just thought they were protecting the environment . . . . Now I really don't know what they do." *Id.* (internal quotation marks omitted). A resident of Bedford County, Pennsylvania, whose complaints about contaminated water were not properly resolved, called the DEP the "DGP—Department of Gas Protection—because that's what they're about." Melissa A. Troutman et al., *"To Hell With Us"—Records of Misconduct Found Inside Pa. Drinking Water Investigations*, PUB. HERALD (Feb. 14, 2017), https://publicherald.org/to-hell-with-us-records-of-misconduct-found-inside-pa-drinking-water-investigations/ [https://perma.cc/F5NV-CCPV] (Part 2 of investigative report into oil and gas practices in Pennsylvania).

44. PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 100 (observing revolving door between DEP and industry "they were supposed to be regulating" presented concerning "staffing issue"). Attorney General Shapiro continues: "If DEP employees know there may be a big paycheck waiting for them on an operator's payroll, they may be reluctant, consciously or otherwise, to bring to bear the full force of the law." *Id.* (discussing how the "revolving door" might affect the work of DEP employees). *But see* Michael Sanserino, *Pennsylvania DEP Revising Well-Plugging Regulations*, PITTSBURGH POST-GAZETTE (Mar. 3, 2014, 5:29 PM), https://www.post-gazette.com/business/powersource/2014/03/03/pennsylvania-dep-revising-well-plugging-regulations/stories/201403030182 [https://perma.cc/TH9Z-739D] (reporting on the DEP's proactive revisions of well-plugging regulations).

45. *See* Phillips, *supra* note 35 (calling the DEP's hiring of criminal defense attorneys "possibly unprecedented").

employee."[46] Despite the DEP hiring a criminal defense attorney, criminal charges never materialized against any employees.[47] The DEP submitted a response to the grand jury report in which the agency cited its efforts to regulate a novel, rapidly expanding industry.[48] The DEP criticized the general assembly for not passing more legislation during a time when the DEP was introducing new regulations of its own through the Pennsylvania regulatory rulemaking process.[49]

The DEP described its regulatory response to the initial fracking boom, such as restructuring its Oil and Gas Program, creating new offices with new staff, and expanding its oversight in order to be more stringent even while federal agencies were relaxing their policies on the industry.[50] The DEP is subject to administrative constraints, including orders coming from executive-level officials, the political lean of current state and federal administrations, the laws being created by the legislative branch, the limits of the regulatory rulemaking process, and the necessity of balancing environmental interests with the economic and employment benefits of the industry.[51] The DEP disparaged the grand jury report for presenting an "inaccurate and incomplete picture of Pennsylvania's regulatory program" and its implementation.[52] The agency characterized the grand jury report as detrimental to

46. *Id.* ("Environmental attorney David Mandelbaum, co-chair of Greenberg Traurig's environmental practice who teaches environmental law at Temple University, said he knows of no situations where a government employee doing a job like permit review, or issuing of permits, would be charged with a crime short of bribery.").

47. *See id.* (explaining the DEP's actions in overseeing fracking industry were not criminal and quoting David Mandelbaum that "the government is allowed to screw up"). While no criminal charges were brought against any of the DEP employees, Attorney General Shapiro did bring fifteen criminal charges against Cabot Oil and Gas and several environmental criminal charges against Range Resources, the company who drilled the first Marcellus Shale well in Pennsylvania. *See* Susan Phillips, *Pa. Attorney General Charges Cabot Oil and Gas with Environmental Crimes*, ST. IMPACT PA (June 15, 2020), https://stateimpact.npr.org/pennsylvania/2020/06/15/pa-attorney-general-charges-cabot-oil-and-gas-with-environmental-crimes/ [https://perma.cc/K3W2-CVUU]; *see also* Reid Frazier, *Range Resources Pleads No Contest to Environmental Crimes at Southwest Pa. Well Sites*, ST. IMPACT PA (June 12, 2020), https://stateimpact.npr.org/pennsylvania/2020/06/12/range-resources-pleads-no-contest-to-environmental-crimes-at-southwest-pa-well-sites/ [https://perma.cc/ACP6-MAPD] (discussing criminal charges brought against oil and gas companies in Pennsylvania for environmental crimes committed in relation to fracking activities).

48. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 104 (describing unconventional gas industry as posing a "unique challenge" for the DEP).

49. *See id.* at 109–10 (explaining the DEP's efforts to regulate fracking industry through regulatory rulemaking process, which is purposefully complicated in order to prevent agencies from creating legislation).

50. *See id.* at 106 (listing programs the DEP introduced to oversee industry).

51. *See id.* at 139 (discussing limitations on the DEP's ability to regulate industry); *see also* Coral Davenport, *E.P.A. Faces Bigger Tasks, Smaller Budgets and Louder Critics*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/us/politics/epa-faces-bigger-tasks-smaller-budgets-and-louder-critics.html [https://perma.cc/VA5T-STLP] (examining challenges federal environmental agencies face, including attacks from "the political right," "falling budgets," and "its very existence at stake"). Several comments from Republicans such as then-President Donald Trump discussed effectively getting rid of the EPA "in almost every form" through policy proposals that would take away the agency's authority such that it would "end up functioning only as a small scientific research agency, possibly swallowed into another department." *Id.* (describing planned political assault on environmental agency from Republican lawmakers).

52. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 108 (condemning grand jury report for relying on "unidentified witness snapshots" from over a decade ago, and for "demonstrating little knowledge or understanding" of the DEP's regulatory program).

the public for damaging Pennsylvania citizens' relationship with and confidence in the DEP.[53]

B. *Statutes for Environmental Enforcement*

Most federal environmental statutes contain provisions for both civil and criminal suits.[54] In environmental law, the distinguishing factor that separates a civil infraction from a criminal one is mental state.[55] An environmental felony occurs when a violator acts knowingly, which "merely requires proof of knowledge of the facts that constitute the offense" but not knowledge that the conduct was illegal.[56] Additionally, perpetrators attempting to conceal or lie about environmental infractions can violate several non-environmental criminal statutes at the state and federal level.[57]

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53. *See id.* at 152 (arguing grand jury report does "disservice" to public by encouraging them "to believe their government is incompetent and/or places the economic well-being of various corporations above their health and well-being and that of the Commonwealth's public natural resources"). Before Shapiro became the Pennsylvania Attorney General, reports had surfaced that the DEP "used flawed methodology to conclude that air pollution from natural gas development doesn't cause health problems." Lisa Song, *Public Trust in Pennsylvania Regulators Erodes Further Over Flawed Fracking Study*, INSIDE CLIMATE NEWS (Oct. 23, 2014), https://insideclimatenews.org/news/20141023/public-trust-pennsylvania-regulators-erodes-further-over-flawed-fracking-study [https://perma.cc/TH9Z-739D]. A toxicologist from the Southwest Pennsylvania Environmental Health Project claimed this was an unfixable severance of public trust in addition to the "years of criticism" the DEP received "for its handling of the Marcellus Shale boom." *Id.* (demonstrating that, even back in 2014, the DEP had a strained relationship with the public and breached its trust by mishandling fracking boom).

54. *See* AAGAARD, OWEN, & PIDOT, *supra* note 26, at 147 (demonstrating environmental statutes contain provisions which allow for both civil and criminal enforcement actions).

55. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1242 (explaining "it is not unusual that mental state requirements provide the primary distinction between criminal and civil liability, especially for regulatory violations"). Uhlmann continues:

> Because so much conduct is covered by the environmental laws, however, and the government is not required to prove knowledge of the law, prosecutors have broad discretion to determine what is criminal. Even when knowledge of the facts is present, the government can elect between criminal, civil, and administrative remedies.

Id. Therefore, the same underlying actions could result in any of these options depending on the violator's mental state and prosecutorial discretion. *See id.* at 1242, 1225. For a further analysis of why a prosecutor or agency would choose an administrative or civil option over criminal charges, see *supra* note 27 and accompanying text.

56. Uhlmann, *Environmental Crimes*, *supra* note 25, at 1237 (internal quotation marks omitted) (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)) (contrasting "knowing" with "willful" standard, which requires "that the defendant acted with an evil meaning mind"). Having a knowing standard for environmental crime encourages companies that engage in polluting activities to be aware of environmental laws and regulations and dissuades ignorance of the law as an excuse to legally pollute. *See id.* at 1239 (elucidating Congress's motivations for amending mental state requirement for environmental felonies). *But see* David E. Roth, Stephen R. Spivack, & Joseph G. Block, *The Criminalization of Negligence Under the Clean Water Act*, 23 CRIM. JUST., no. 4, 2009, at 5, https://www.bradley.com/-/media/files/insights/publications/2009/11/the-criminalization-of-negligence-under-the-clea__/files/criminalization-of-negligence/fileattachment/criminalization-of-negligence.pdf [https://perma.cc/UT78-E8LS] (arguing criminalization of negligence under CWA could lead to unfair prosecutions).

57. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 184 (describing prevalence of Title 18 Charges in environmental crimes, and denoting Title 18 as "the heart of the federal criminal code" which includes "conspiracy, false statements, fraud, obstruction of justice, and perjury").

1. *Environmental Criminal Provisions*

The enforcement provision of the Clean Water Act (CWA) punishes negligent violations with up to two years in prison and knowing violations with up to six years in prison.[58] Similarly, criminal penalties for negligent and knowing violations of the Clean Air Act (CAA) include both potential fines and prison sentences.[59] The Pennsylvania Solid Waste Management Act (SWMA) includes a section threatening criminal penalties for "any person, other than a municipal official exercising his official duties," who violates the Act.[60] Under both the CWA and SWMA, criminal provisions can be violated through negligence.[61] Under the CWA and CAA, a "person" includes responsible corporate officers, which means that corporate officers can be charged if they know the violation is happening, have the authority to stop it, and fail to do so.[62]

2. *Criminal Provisions Related to Environmental Crimes*

Violators engaging in deceitful conduct in the course of environmental crimes can face Title 18 charges.[63] If an environmental crime involves lying to agency employees about meeting standards, the offender could be charged for conspiracy to commit an offense or to defraud the United States and face up to five years in prison.[64] Similarly, falsifying or concealing documents or making false statements constitutes a crime punishable by varying prison sentences, depending on the issues

58. *See* 33 U.S.C. § 1319(c) (2018) (listing potential criminal penalties for negligent and knowing violations of Clean Water Act).

59. *See* 42 U.S.C. § 7413(c)(2) (2018) (stating criminal penalties for violations of Clean Air Act).

60. *See* Solid Waste Management Act, 35 PA. CONS. STAT. § 6018.606 (1980) (discussing criminal penalties for violations of Act); *see also id.* § 6018.302 (describing disposal, processing, and storage of residual waste).

61. *See id.* § 6018.606(f).

> Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

Id. (footnote omitted).

62. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1240–41 ("The doctrine imposes a duty to act on responsible corporate officials, thereby eliminating the direct act requirement and creating liability for a failure to act."). Responsible corporate officers are those "who stand in a responsible relationship to a violation" and "can be prosecuted for their failure to prevent the violation." *Id.* Uhlmann argues that the Responsible Corporate Officer doctrine aligns with the environmental objectives of protecting citizens and deterring industry actors from polluting by "ensuring that corporate officials with authority over environmental compliance cannot ignore violations they know are occurring and have the ability to prevent." *Id.* (finding Responsible Corporate Officer doctrine helps to realize aims of environmental law).

63. *See id.* at 1248 (discussing how environmental criminals can also be charged under 18 U.S.C. for crimes such as fraud, false statements, and concealment).

64. *See* 18 U.S.C. § 371 (2018) (discussing crime of conspiracy to commit offense or to defraud United States and its agencies).

being obscured.[65] Pennsylvania law also gives the Attorney General the power to criminally prosecute "[s]tate officials or employees affecting the performance of their public duties or the maintenance of the public trust . . . ."[66]

C. *Case Law: Environmental Criminals and Government Misconduct*

Government employees enjoy certain protections from civil lawsuits through sovereign immunity and the Eleventh Amendment.[67] Therefore, when a citizen is harmed by the actions of a government official, sometimes the only satisfactory recourse is criminal charges brought by federal or state prosecutors.[68] Furthermore,

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65. *See id.* § 1001 (stating knowingly and willfully falsifying, concealing, or covering up information, as well as making false statements or using false documents, can be punished with fines and prison sentences).

66. *See* 71 PA. CONS. STAT. § 732-205(a)(1) (1980) (authorizing prosecution of officials who violate public trust); *see also* THE WILDLIFE SOC'Y, THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA 9 (Sept. 2010), https://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf [https://perma.cc/3S27-UVNK] (explaining importance of Public Trust Doctrine).

> The Public Trust Doctrine (PTD), with its origin in Roman civil law, is an essential element of North American wildlife law. The Doctrine establishes a trustee relationship of government to hold and manage wildlife, fish, and waterways for the benefit of the resources and the public. Fundamental to the concept is the notion that natural resources are deemed universally important in the lives of people, and that the public should have an opportunity to access these resources . . . .

THE WILDLIFE SOC'Y, *supra*.

67. *See* U.S. CONST. amend. XI (providing state employees with sovereign immunity); 1 PA. CONS. STAT. § 2310 (1978) (amended 1998) (declaring that the Commonwealth's "officials and employees acting within the scope of their duties" enjoy sovereign immunity and official immunity); *see also* Hope Babcok, *The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters*, 83 OR. L. REV. 47, 105–06 (2004) (describing state's ability to "ignore federal environmental mandates largely without peril" due to the Eleventh Amendment sovereign immunity). *But see PennFuture Praises Philadelphia Court Decision as Victory for Justice*, BUS. WIRE (Feb. 16, 2011, 5:02 PM), https://www.businesswire.com/news/home/20110216007089/en/PennFuture-Praises-Philadelphia-Court-Decision-as-Victory-for-Justice [https://perma.cc/2AM2-P76A] (demonstrating the DEP employees can be sued in individual capacity when acting outside scope of employment). This verdict, in which four of the DEP's employees were held liable for $6.5 million in damages for pursuing violations against oil and gas companies, shows how private actions against government officials can sometimes work in favor of polluters and against agency employees trying to fulfill their duty to protect the public. *See id.* The United States District Court in the Eastern District of Pennsylvania overturned the $6.5 million verdict, holding that the employees were merely doing their jobs, thereby rectifying a potentially disastrous situation for Pennsylvania residents. *See id.* (calling overturned verdict "a victory for justice").

68. *See* AAGAARD, OWEN, & PIDOT, *supra* note 26, at 148 (discussing concept of forcing government enforcement). While many environmental statutes contain citizen suit provisions allowing private citizens to "step into the shoes of government enforcers" to "stop unlawful action" and compel legally required actions, these provisions have two shortcomings when it comes to redressing private harms. *See id.* First, citizens cannot use a citizen suit to force agencies to begin enforcement proceedings against another entity, such as the oil and gas industry. *See id.* Second, private citizens bringing these suits cannot recover compensatory or punitive damages, but merely attorney's fees. *See id.* at 144 (describing limitations on citizen suit provisions, including providing notice to government beforehand and being barred from suing if government is already "'diligently prosecuting' the same alleged violations").

oversight often occurs internally, either by senior officials in the same agency, and in the case of the DEP, by the federal Environmental Protection Agency (EPA).[69]

1. *Individuals*

Individuals facing criminal charges for environmental violations are often in oversight positions and are charged for crimes of omission.[70] In the case of *United States v. Maury*,[71] employees at a pipeline were criminally charged for violating the CWA and the CAA by failing to obtain the necessary permits and failing to report and comply with emissions limitations.[72] All of the charged employees were in oversight positions, and both negligently and knowingly broke environmental laws and federal laws for impeding investigations into those violations.[73] The defendants received prison sentences varying from six to seventy months.[74] In a similar case, *Commonwealth v. Farmer*,[75] both the M.W. Farmer Company and its president were found guilty on eight counts for failing to obtain a permit and violating the SWMA.[76] The company and its president were fined, and Mr. Farmer was sentenced to five years of probation for violating Section 401(b) of the SWMA.[77]

Likewise, the president of an exercise equipment manufacturing corporation was convicted by a jury for violating the SWMA in *Downs v. Commonwealth*.[78] He was charged with four criminal counts surrounding the improper storage, transportation,

69. *See Enforcement Policy, Guidance, and Publications*, ENVTL. PROT. AGENCY, https://www.epa.gov/enforcement/enforcement-policy-guidance-publications [https://perma.cc/ES32-P7XC] (last visited Sept. 27, 2020) (providing the EPA's enforcement policies and documents); *see also* OFFICE OF OIL & GAS MGMT., DEP'T OF ENVTL. PROT., EXPEDITED ESCGP-2 PROCESS INTERNAL REVIEW 6 (2016) (presenting conclusions of internal review); 25 SUMM. PA. JUR. 2D ENVIRONMENTAL LAW § 9:111 (2d ed. 2021) (explaining that the EPA's oversight authority of state agencies stems from original delegation of power to states to enact federal programs); Rosalie D. Morgan, *What the Frack?: An Empirical Analysis of the Effect of Regulation on Hydraulic Fracturing*, 16 QUINNIPIAC HEALTH L.J. 77, 92 (2013) (expounding on issue of fracking oversight).

70. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1232 (characterizing statutory language used by Congress in creating environmental legislation as broad in order to cover most pollution violations, such as "failure to obtain required permits" and the "failure to comply with" recordkeeping requirements).

71. 695 F.3d 227, 233 (N.J. 2012) (finding pipeline employees in oversight positions criminally liable for violating Clean Water Act and Clean Air Act).

72. *See id.* (explaining defendants' positions as supervisors).

73. *See id.* at 246 (noting jury found company guilty of "felony violations of the CWA for the 1999 spill on the Delaware River and the unpermitted pumping of the cement pit" but high-ranking employees guilty "only of negligent violations for those incidents.") "All Defendants were convicted of having knowingly and willfully engaged in a conspiracy . . . ." *Id.*

74. *See id.* (sentencing Prisque to seventy months, Faubert to forty-one months, Maury to thirty months, and Davidson to six months in prison).

75. 750 A.2d 925, 926 (Pa. Commw. Ct. 2000) (charging Farmer and M.W. Farmer Company with criminal violations of the Solid Waste Management Act).

76. *See id.* at 927 (elucidating the nature of Farmer's violations as "improperly dumping contaminated soil" without proper permits).

77. *See id.* at 926 ("The trial court sentenced Michael Farmer to an aggregate period of five years' probation and payment of a fine of $18,000."). The court ordered M.W. Farmer Company to pay $67,000. All told, the defendants had to pay nearly $6 million to cover prosecution costs. *See id.*

78. 616 A.2d 39, 42 (Pa. Commw. Ct. 1992) (sentencing Vienna Health Products, Inc. and its president and sole shareholder, Downs, for improperly disposing of hazardous wastes).

and disposal of hazardous wastes.[79] In the case of *United States v. Tonawanda Coke Corp.*,[80] the Department of Justice brought criminal charges against Tonawanda Coke Corporation for intentionally violating the CAA and RCRA.[81] The court found that the defendants did not have to know their actions were illegal in order to convict under the RCRA.[82]

2. *Government Officials and Misconduct*

One of the EPA's devices for oversight of state agency compliance and enforcement program is the State Review Framework (SRF).[83] The SRF report allows the EPA to work with each state and its environmental agency to "identify recommendations for improvement to ensure fair and consistent enforcement and compliance programs across the states."[84] The DEP also conducts internal reviews in order to evaluate its own application of the rules and regulations.[85] But internal and federal reviews become more questionable as oversight methods when

79. *See id.* (convicting Downs and punishing him with two to four years in prison, two years' probation, $70,000 in fines, and 750 hours of community service).

80. 636 F. App'x 24, 26 (2d Cir. 2016) (finding corporation guilty of violating CAA and RCRA despite defendant lacking notice that its actions were criminal). The court explains that the "active management" condition in RCRA violations is a threshold requirement that, once met, can result in a continuing storage violation. *See id.* at 29. In other words, once a manager has accumulated or added to wastes, the act of storing them (or failing to dispose of them or to obtain a storage permit) constitutes a violation. *See id.* (distinguishing between active management and storage).

81. *See id.* at 26, 29–30; *see also 2014 Major Criminal Cases*, ENVTL. PROT. AGENCY, https://www.epa.gov/enforcement/2014-major-criminal-cases [https://perma.cc/QH7F-CP3T] (last visited Mar. 17, 2021) (penalizing Tonawanda Coke Corp. with $12.5 million in fines and $12.2 million in community service for violating CAA and RCRA).

82. *See Tonawanda Coke Corp.*, 636 F. App'x at 26 (reiterating Tonawanda Coke Corp.'s contention that RCRA violations should be reserved because the corporation "lacked fair notice that its conduct was criminal under RCRA").

83. *See State Review Framework*, ENVTL. PROT. AGENCY, https://www.epa.gov/compliance/state-review-framework [https://perma.cc/DG2S-V2S8] (last visited Mar. 17, 2021) (describing State Review Framework Program and its reports); *see also* Candy Woodall, *Federal Regulators Find 'Major Issues' in DEP Review*, PENNLIVE (Nov. 5, 2015), https://www.pennlive.com/midstate/2015/11/federal_regulators_find_major.html [https://perma.cc/YEC2-CXMW] (reviewing EPA's 2009 evaluation of DEP, where EPA gave agency score of zero percent in data accuracy and found issues with DEP's oversight of Marcellus Shale wells during fracking boom).

84. *See State Review Framework*, *supra* note 83 (describing how EPA uses State Review Framework to enhance Compliance and Enforcement Program oversight); ENVTL. PROT. AGENCY, STATE REVIEW FRAMEWORK: PENNSYLVANIA 1 (Aug. 2, 2017), https://www.epa.gov/sites/production/files/2018-02/documents/srf-rd3-rev-pa.pdf [https://perma.cc/7K4G-VPMV] (evaluating the DEP's implementation and enforcement of CWA, CAA, and RCRA in fiscal year 2015). Notably, the EPA's Region 3 SRF for fiscal year 2015 praised the DEP's Air Quality Program and the agency's efforts in implementing efficient National Pollutant Discharge Elimination System (NPDES) permitting programs. *See id.*; *see also* Troutman et al., *supra* note 12 (discussing 2015 study by EPA asserting "fracking had no 'widespread, systemic impacts on drinking water supplies'"). The EPA's report had to be retracted less than a year later when "the EPA's own Science Advisory Board (SAB) called them out" for not having any scientific evidence to support their conclusions. Troutman et al., *supra* note 12.

85. *See* OFFICE OF OIL & GAS MGMT., *supra* note 69 (summarizing the report as an internal review in order to evaluate the DEP's own policies and recommend improvements).

misconduct occurs at management and executive levels and the EPA emphasizes partnership at the potential cost of an objective evaluation.[86]

Despite the difficulties in prosecuting government employees, it is not unheard of.[87] A former FDA Commissioner, Lester Crawford, was subject to a federal grand jury criminal investigation after financial records showed that he had "sold shares in companies regulated by the agency when he was its deputy commissioner and acting commissioner."[88] In the case *In re Thirty-Third Statewide Investigating Grand Jury*,[89] the attorney general launched a grand jury investigation against the Pennsylvania Turnpike Commission for violating criminal statutes.[90] The case's holding—that internal documents are not confidential when state agencies undergo investigations—suggests the judicial branch favors uncovering criminal activity and corruption over maintaining an agency's legal protections against investigation.[91]

In relation to the grand jury report, the most applicable example of criminal environmental prosecution against government officials occurred recently in the Flint, Michigan water crisis.[92] Government officials in Michigan "replaced safe public water supplied to Flint from Lake Huron with improperly treated water supplied from the polluted Flint River . . . despite evidence that the Flint River water was unsafe."[93] This resulted in an entire city, comprised mostly of low-income and minority groups, being "effectively poisoned."[94] In the wake of the Flint water crisis, there was criticism of the government's failure to take responsibility, even for

86. *See State Review Framework*, *supra* note 83 (stating EPA "works in partnership with each state to create a final SRF," which shows the DEP is heavily involved in their own compliance evaluation).

87. *See* U.S. Attorney's Office Middle Dist. of Pa., *Public Corruption Prosecutions*, U.S. DEP'T. JUST., https://www.justice.gov/usao-mdpa/public-corruption-prosecutions [https://perma.cc/8TW2-5JSC] (last updated Sept. 27, 2020) (informing public of recent public corruption cases in Middle District of Pennsylvania); *see also* Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 LOY. U. CHI. L.J. 207, 207 (2011) (discussing how "cases involving the investigation and prosecution of governmental corruption" create "concern about who should investigate and prosecute the matter").

88. *See* Gardiner Harris, *Ex-Head of F.D.A. Faces Criminal Inquiry*, N.Y. TIMES (Apr. 29, 2006), https://www.nytimes.com/2006/04/29/washington/exhead-of-fda-faces-criminal-inquiry.html [https://perma.cc/AY6Y-WXBR] (detailing case of Lester M. Crawford, who faced criminal charges for conflict of interest crimes while leading FDA).

89. 86 A.3d 204, 226 (Pa. 2014) (finding attorney–client privilege and work product doctrine do not preclude OAG's access to documents requested for grand jury subpoenas).

90. *See id.* at 206 (describing statewide grand jury's investigation into PA Turnpike Commission's "employment and procurement practices").

91. *See id.* at 229 ("State agencies and their officials should be cognizant that communications with counsel implicating criminal wrongdoing may be discoverable if the agency later becomes the subject of a criminal grand jury investigation initiated by the OAG.").

92. *See* Toni Massaro & Ellen Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 155–157 (2017) (discussing the difficulty of bringing constitutional claims in face of egregious government action).

93. *Id.* at 156 (footnotes omitted) (describing actions of government officials overseeing in Flint, Michigan as "shocking").

94. *See id.* at 192 ("Flint was an outrage of *epic* proportion. Human life, liberty, and property were undeniably compromised by grossly irresponsible government acts. A whole city was effectively poisoned because of official decisions made with knowledge of the water's contamination and its potential effects.").

calamities where culpability was evident.[95] One commentator suggests redesigning and expanding federal and state government's role in order to "make them primarily liable as regulated entities with respect to drinking water, as opposed to simply being regulators and enforcers."[96] Despite the egregious, purposeful actions and serious harm that occurred in Flint, Michigan, the criminal charges against the government officials were recently dropped.[97]

D. *Regulatory Capture and Environmental Agency Inaction*

Issues in agency oversight—namely, the lack of objective supervision and difficulty of holding government officials accountable—become even more pressing when an agency is staffed by people with dubious intentions.[98] Regulatory capture can be defined as "the result or process by which regulation, in law or application, through means induced by industry, is directed away from the public interest and towards the interests of the regulated industry."[99] In addition to appointing two men to executive-level positions who "have a history of hostility towards the agency and deep ties to the fossil fuel industry," the Trump administration attempted to shift the EPA's mission towards industry and away from public and environmental health.[100] As of July 15, 2020, the Trump administration rolled back almost seventy

95. *See* David A. Dana, *Escaping the Abdication Trap When Cooperative Federalism Fails: Legal Reform After Flint*, 44 FORDHAM URB. L.J. 1329, 1329 (2017) (arguing all levels of government abdicated responsibility in Flint drinking water crisis); *see also* David Markell, *"Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 17 (2005) (explaining how administrative state evades accountability).

96. Dana, *supra* note 95, at 1349 (suggesting that increasing liability for federal and state governments in testing and safeguarding drinking water would improve their own regulation and enforcement regimes). For a further discussion of expanding the government's role and culpability regarding issues such as contaminated water supply, see *infra* notes 184–92 and accompanying text.

97. *See* Mitch Smith, *Flint Water Prosecutors Drop Criminal Charges, With Plans to Keep Investigating*, N.Y. TIMES (June 13, 2019), https://www.nytimes.com/2019/06/13/us/flint-water-crisis-charges-dropped.html [https://perma.cc/K89B-7TJF] (discussing city's shocked reaction when prosecutors dropped all criminal charges against government officials "accused of ruining the community's drinking water and ignoring signs of a crisis").

98. *See* Alex Guillén & Andrew Restuccia, *Trump Picks Oil Ally Pruitt to Head EPA*, POLITICO (Dec. 7, 2016 5:17 PM), https://www.politico.com/blogs/donald-trump-administration/2016/12/oklahoma-ag-pruitt-epa-chief-232319 [https://perma.cc/B5KQ-9WSE] (reporting then-President Donald Trump chose Scott Pruitt, one of EPA's "most hostile critics and a skeptic of climate change science" to lead EPA); *see also* Sarah Gibbens, *15 Ways the Trump Administration Has Changed Environmental Policies*, NAT'L GEOGRAPHIC (Feb. 1, 2019), https://www.nationalgeographic.com/environment/article/15-ways-trump-administration-impacted-environment [https://perma.cc/Q3XN-6UDY] (demonstrating regulatory capture in environmental law, especially when subject to administration adverse to environmental concerns, can lead to lasting damage).

99. William C. Hudson, *When Influence Encroaches: Statutory Advice in the Administrative State*, 26 WM. & MARY BILL RTS. J. 657, 669–71 (2018) (distinguishing regulatory capture from a "'business-friendly' deregulatory President" who "appoints an industry-friendly administrator who makes many regulatory decisions that benefit industry while harming the public interest" because industry is not one shaping agency in latter case).

100. *See* Bryan Bowman, *Captured: How the Fossil Fuel Industry Took Control of the EPA*, GLOBE POST (Mar. 12, 2019), https://theglobepost.com/2019/02/01/epa-regulatory-capture/ [https://perma.cc/996C-YC89] (quoting Trump as stating "he would destroy the EPA 'in almost every form,' leaving 'only tidbits' intact"); *see also* Neela Banerjee, *Trump's EPA on the Verge of*

environmental regulations, with thirty more rollbacks pending.[101] Despite the EPA's duty to protect citizens and the environment, when faced with budget cuts, regulation rollbacks, and diminished authority, the public suffers the consequences of a crippled agency.[102]

Regulatory capture is closely related to executive-led nonenforcement.[103] Along with appointing leaders that will work against the mission of the agency, presidents can also deregulate an industry through a nonenforcement agenda.[104] This nonenforcement can be difficult to address due to requirements in the Administrative Procedure Act (APA), which codifies the judicial review standards for claims against agency actions.[105] First, agency actions are not reviewable unless they are final, an especially difficult standard to meet for a lack of action.[106] Second,

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Regulatory Capture, Study Says, INSIDE CLIMATE NEWS (May 1, 2018), https://insideclimatenews.org/news/01052018/trump-epa-regulatory-capture-industry-influence-climate-pruitt-compared-reagan-gorsuch-journal-public-health [https://perma.cc/3DMN-VXWK] (declaring Trump administration put EPA in danger of regulatory capture).

101. *See* Nadja Popovich et al., *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html [https://perma.cc/7444-28PE] (last updated Jan. 20, 2021) (describing how Trump administration rolled back regulations protecting clean air and water while Department of the Interior limited wildlife protections in order to lease more land to oil and gas companies).

102. *See Our Mission and What We Do*, ENVTL. PROT. AGENCY, https://www.epa.gov/aboutepa/our-mission-and-what-we-do [https://perma.cc/2SWN-TJTC] (last visited Apr. 3, 2021) (stating EPA's mission is to "protect human health and the environment"); *see also* Popovich et al., *supra* note 101 (claiming Trump administration's rollbacks could exacerbate climate change and cause thousands of deaths due to poor air quality).

103. *See* Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1555–56 (2018) (attributing Trump administration's effect on environmental law to nonenforcement).

104. *See id.* at 1552 (listing nonenforcement as preferred method of deregulation). Velikonja explains why this option is favored:

> The President, and by extension, agency heads, can achieve deregulatory objectives through nonenforcement without significant delays and without any real threat of judicial review, contrary to the very real roadblocks present in legislating and rulemaking. This is because the Supreme Court afforded agencies considerable enforcement discretion for piecemeal enforcement decisions. As long as a change in enforcement policy is not prospective and categorical, it is immune from judicial review.

Id.

105. *See Summary of the Administrative Procedure Act*, ENVTL. PROT. AGENCY, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act [https://perma.cc/ZM3X-KR42] (last visited Apr. 4, 2021) (describing APA and how it applies to federal agencies).

106. *See* Stephen Hylas, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1650 (2017) (explaining different types of agency action). Congress defines agency action as "the whole or a part of an agency rule, order, license, sanction relief, or the equivalent of denial thereof, or failure to act." 5 U.S.C. § 551(13) (2018). However, agency actions need to be *final* in order to be reviewable, and thus including "failure to act" in the definition of agency action has not allowed otherwise reviewable cases to come forth. *See* Hylas, *supra*, at 1675. For example, one death row case involved inmates challenging an agency's failure to approve a safe and effective drug for lethal injections. *See id.* at 1657 n.82. The court found this argument "presumptively unreviewable and 'committed to agency discretion by law' because there was 'no law to apply.'" *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 826 (1985)). Therefore, this inclusion of "failure to act" in the context of agency actions that must be final only leads to claims that are "presumptively

there is a presumption that agency nonenforcement is unreviewable, and therefore "[c]ourts routinely dismiss actions challenging agencies' failures to enforce."[107] Lastly, the finality requirement remains in place even when statutes explicitly require direct judicial review of agency action without any reference to finality.[108]

Parties have found some ways around these obstacles.[109] For example, in *Massachusetts v. EPA*,[110] several private organizations forced a final action by petitioning the EPA to regulate greenhouse gas emissions from vehicles under the CAA.[111] Another way to circumvent the APA's finality requirement and sue for inaction is by bringing tort or constitutional claims as demonstrated by *Juliana v. United States*.[112] Although the claim in *Juliana* was for violating due process and the

unreviewable." *See id.* (explaining why current definition of agency action and requirement of finality leads to inability to pursue claims of inaction); *see also* § 704 (allowing judicial review only for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court" and for "preliminary, procedural, or intermediate agency action or ruling not directly reviewable" but reviewable "on the review of the final agency action"); Sidney Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1808 (2019) (discussing how agency inaction is accepted by courts because of agency deference and lack of a rulemaking record available when no actions are taken).

107. Velikonja, *supra* note 103, at 1553–54 (characterizing *Heckler v. Chaney* as "the best-known Supreme Court decision on nonenforcement"); *see also* Shapiro, *supra* note 106, at 1808 (arguing "abject deference" courts give agency decisions leads to acceptance of inaction). The Supreme Court in *Heckler v. Chaney* ruled "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." Velikonja, *supra* note 103, at 1554 (internal quotation marks omitted) (quoting *Heckler*, 470 U.S. at 832).

108. *See* Roberto Borgert, *What About* Bell*? Overcoming the Presumption in Favor of Requiring Finality in the CWA's Direct-Review Provision*, 85 U. CHI. L. REV. 145, 151 (2018) ("The Supreme Court has recognized a 'strong presumption [ ] that judicial review will be available only when agency action be- comes final,' even if the direct-review statute does not mention finality. The presumption has never been overcome." (alteration in original) (quoting Bell v. New Jersey, 461 U.S. 773, 778 (1982))).

109. *See* Hylas, *supra* note 106, at 1675 (exploring potential solutions to problem of agencies avoiding judicial review through temporary and non-binding actions). Hylas discusses Section 706(1) of the APA, which allows courts to "'compel agency action unlawfully withheld or unreasonably delayed' before actions are final." *Id.* (quoting § 706(1)). The Supreme Court narrowly construed this authority so courts "can only compel agencies to take action under Section 706(1) when the agency fails to take discrete action that it is statutorily required to take." *Id.* (examining Section 706(1)'s reasonable delay provision as a way to skirt final action requirement). *Cf.* 2 PUB. NAT. RESOURCES L. § 17:14 (2d ed. 2020) (discussing how use of statutorily-mandated duties to act can give petitioner better claim of agency inaction).

110. 549 U.S. 497, 504–05 (2007) (challenging EPA's final action of refusing to regulate greenhouse gas emissions, including carbon dioxide).

111. *See id.* at 531–32 (exploring EPA's argument that it could not regulate motor vehicle carbon dioxide emissions "because doing so would require it to tighten mileage standards," which is DOT's job). The EPA denied the petition in an official written document. *See id.* at 510. Therefore, the plaintiffs were not suing the EPA for failing to act, but on the "final action" of their written denial to regulate the emissions. *See id.* at 514 n.16 (describing limitations on bringing petition for review of agency's final action).

112. 217 F. Supp. 3d 1224, 1246 (D. Or. 2016) (describing case as civil rights action charging government with "failure to act in areas where they have authority to do so"), *rev'd and remanded by* 947 F.3d 1159 (9th Cir. 2020). In this case, a group of young people sued the United States, President Barack Obama, and several executive agencies for violating due process and the public trust by permitting and encouraging pollution that exacerbated climate change. *See id.* After the plaintiffs received a favorable ruling in the U.S. District Court for the District of Oregon, the Ninth Circuit held in 2020:

public trust, private citizens were essentially able to sue government officials for *failing* to enact more stringent regulations to prevent climate change without confronting the APA's finality requirements.[113] In theory, parties can also avoid the finality requirement while still bringing a case under the APA as long as the claim falls under a direct-review provision within an applicable statute.[114]

Despite these potential workarounds, limiting judicial review of agency inaction makes nonenforcement an easy route to avoid accountability.[115] Parties who cannot organize a petition and get a definitive response from agencies will not meet the finality requirement.[116] Furthermore, there is currently no right to clean and safe air, water, or an environment under the Constitution, so constitutional

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> The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (citation omitted) (finding plaintiffs lacked standing to bring suit against government but suggesting plaintiffs could "goad" legislative and executive branches into action).

113. *See Juliana*, 947 F.3d at 1175 (acknowledging government's failure to act exacerbated climate change, thereby harming the plaintiffs).

114. *See* Borgert, *supra* note 108, at 155 ("The 'final' modifier in § 704 applies to agency action with no other remedy in court, not 'agency action made reviewable by statute.' That is, a party may bring a claim under the APA to challenge a nonfinal action directly reviewable under another statute. Recent Supreme Court decisions agree with this reading." (footnote omitted) (quoting Iowa League of Cities v. EPA, 711 F.3d 844, 863 n.12 (8th Cir. 2013))). Despite this possible method of circumventing finality, courts have frequently presumed finality in direct-review provisions even when it is left out of the statute. *See id.* at 149–50.

115. *See* Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1912–13 (2016) (identifying lack of transparency and accountability as two of the problems with the trend of executive-led nonenforcement); *see also* Maria E. Heckel, *Finding the Line Between Action and Inaction:* SUWA v. Norton *and Judicial Review of Statutory Land Management Standards*, 2004 UTAH L. REV. 789, 825 (asserting "limits on judicial review of agency inaction under a statutory standard would mean that judicial review of this issue would never be available unless the agency chose to codify its decision not to meet that standard").

116. Some commentators suggest the line between action and inaction is indistinct, and agency inaction claims can be avoided by reframing the inaction as an action. *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62 (2008) (arguing there is no fundamental distinction between agency action and inaction); *see also* Walters, *supra* note 115, at 1929 (suggesting plaintiffs "increase their chances of review by characterizing prospective nonenforcement decisions as affirmative rules or policies, which is often quite easy to do"). But the finality requirement makes it difficult to characterize lack of action as an action, as demonstrated by the current test for finality: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." William D. Araiza, *In Praise of a Skeletal APA: Judicial Discretion, Remedies for Agency Inaction and APA Amendment*, 56 ADMIN. L. REV. 979, 986 (2004) (internal quotation marks omitted) (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).

claims are extremely hard to bring.[117] Lastly, as mentioned, courts have been reluctant to interpret direct-review provisions as allowing judicial review of nonfinal actions even when they do not mention a finality requirement.[118] These challenges make viable inaction claims difficult to bring.[119]

III. "I SPEAK FOR THE [PERMITEES]"[120]: AN ANALYSIS OF REGULATORY NEGLIGENCE AND INDUSTRY PREFERENCE OVER PUBLIC PROTECTION

A similar problem exists when addressing regulatory capture of the EPA or the DEP's response to fracking: the system both protects and supports agencies' failure to act.[121] The mental state requirements for environmental crimes—negligence and knowledge of the underlying facts—demonstrate that inaction is criminally punishable under environmental law.[122] Additionally, the case law shows that those charged with environmental crimes often committed crimes of omission by failing to report and dispose of wastes and pollutants properly.[123] Comparably, the grand

117. *See* Emily Parsons, *The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality*, 95 WASH. L. REV. 495, 525 (2020) (describing challenge of bringing viable claims avoiding the APA's requirements, such as a constitutional claim, when faced with non-binding agency actions like guidance documents and policy statements that cannot otherwise be challenged).

118. *See* Borgert, *supra* note 108, at 156, 157–58 (recognizing "courts have been unwilling to recognize that some statutes authorize review for nonfinal actions"). Borgert contrasts the Clean Air Act's direct-review provision with that of the Clean Water Act. *See id.* Even though the former mentions a finality requirement and the latter does not, the circuits have split over whether finality is implied, even when it is not mentioned in a direct-review provision. *See id.* at 158.

119. *See* Heckel, *supra* note 115, at 801 (stating that cases of agency inaction create "a conundrum for the courts").

120. *See* SEUSS, *supra* note 2, at 28. The original quote is "I speak for the trees." *Id.*

121. *See* Massaro & Brooks, *supra* note 92, at 155 (arguing current regulatory regime could be modified to "provide space for the development of a potential fundamental right to uncontaminated water while allowing public airing of the serious harms to life"); *see also* Kristina Marusic, *Fractured: Distrustful of Frackers, Abandoned by Regulators*, ENVTL. HEALTH NEWS (Mar. 1, 2021), https://www.ehn.org/fractured-fracking-regulation-neglect-2650594611.html [https://perma.cc/6THY-QHKR] (listing ways current regulatory system failed Pennsylvania residents). The system's failures include "failing to adequately regulate the industry at its outset, failing to adequately train employees to respond to complaints, failing to adequately test for safety, and failing to notify residents about problems that could impact their health in a timely manner." Marusic, *supra*. The system also keeps open a "'revolving door' between industry and the department" that drained talent and cast doubt on the Department's integrity. *See id.*

122. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1240 (recounting rationale of Supreme Court regarding Responsible Corporate Officer doctrine). The Supreme Court explained it is permissible to hold a business official responsible for failing to "exercise the authority and supervisory responsibility reposed in them by the business organization" if it resulted in a violation because the law "imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Id.* (second internal quotation marks omitted) (quoting United States v. Park, 421 U.S. 658, 671–72 (1975)).

123. *See, e.g.*, United States v. Tonawanda Coke Corp., 636 F. App'x. 24, 26 (2d Cir. 2016) (holding administration of Coke was culpable for improper storage of hazardous waste); United States v. Maury, 695 F.3d 227, 233 (3d Cir. 2012) (finding defendants guilty of improper waste disposal and knowingly disguising the wrongdoing); Commonwealth v. Farmer, 750 A.2d 925, 926 (Pa. Commw. Ct. 2000) (ruling company liable for improper disposal of waste); Downs v. Commonwealth, 616 A.2d 39, 41 (Pa. Commw. Ct. 1992) (holding defendants responsible for improper management of hazardous waste).

jury report describes numerous instances where the agency's negligent and knowing lack of action in regulating fracking led to injury to citizens and their property.[124]

A. *Standards for Statutory Environmental Enforcement*

The fact that some environmental statutes merely require negligence for a criminal charge demonstrates that, when it comes to environmental crimes, failing to act is sometimes the same as, or even worse than, actively polluting.[125] Pollution is the result of industry activities, and industry actors who fail to minimize, control, or regulate pollution can receive sizeable fines and prison sentences.[126] Even knowing violations, whether they breach environmental criminal provisions or criminal statutes related to environmental crimes, involve knowing of a certain environmentally adverse situation and failing to act appropriately in response.[127] Therefore, when enforcing environmental statutes, agencies and prosecutors hold individuals criminally accountable for careless inaction—a standard that is not similarly applied to the government agencies regulating these industries.[128]

1. *Environmental Criminal Provisions*

Under the CWA and the CAA, unintentional pollution can result in criminal penalties for negligent discharges and negligent endangerment.[129] Some attorneys have described the criminalization of negligence for environmental violations as a "systemic transformation" that is "profoundly unfair."[130] While their expressed concern is for the "countless numbers of construction workers and contractors" being exposed to "heightened criminal liability for using ordinary devices to engage in normal industrial operations," the case law demonstrates those typically punished are in executive positions of companies acting outside of normal industrial operations.[131] The criminalization of negligence in certain environmental statutes is

124. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 67 (describing the DEP's actions in supporting fracking industry as combination of both "[a] deliberate policy decision" and "inadequate supervision").

125. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1236. "Although characterized as an issue of statutory construction, the question in cases addressing the mental state requirements for environmental crime was whether the government was required to prove knowledge of the law." *Id.*

126. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 179–81 (detailing how significant environmental harm, public health effects, deceptive or misleading conduct, operating outside the regulatory system, and repetitive violations determine severity of violation).

127. *See id.* at 180 (attributing failure to renew permits, monitor, report, and maintain records as characteristics of actors who are criminally prosecuted for environmental crimes).

128. *See* Dana, *supra* note 95, at 1330 (identifying extensive issue of government abdication of responsibility in wake of environmental crises).

129. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 171 (discussing CWA's and CAA's authorization of criminal prosecution in response to accidental pollution).

130. *See* Roth, Spivack, & Block, *supra* note 56, at 5 (expressing fears over seriously considering public welfare in environmental crimes: "To conclude that all statutes 'protecting the environment' are public welfare statutes would, in one fell swoop, allow imposition of strict liability for all environmental offenses").

131. *Id.* at 1 (quoting Hanousek v. United States, 585 U.S. 860, 861 (2000) (Thomas, J., dissenting from denial of petition for writ of certiorari)). While businesses deserve clarity in the

not meant to punish the industries they regulate, but is rather a recognition that negligence relating to pollution and hazardous substances can lead to serious consequences for people and the environment, including major environmental disruptions, illness, and death.[132]

2. *Criminal Statutes Related to Environmental Crimes*

Most criminal statutes related to environmental violations, such as conspiracy and false statements, require knowing violations due to the nature of the crime.[133] For example, a perpetrator must have knowledge of the underlying offense in order to conspire to commit or obscure the offense.[134] Similarly, falsifying and concealing documents requires knowledge of the original information and a willful intent to alter them.[135] In fact, the mental state standards for many of these offenses exceed the "knowledge" requirement of environmental laws that merely involves knowledge of the underlying facts.[136]

B. *Standards for Individual Enforcement*

In most environmental prosecutions, companies and corporate executives responsible for employee activity are charged with both negligent and knowing crimes.[137] In comparison, only overt and egregious misconduct by government officials is met with charges.[138] Even then, charges can be dropped in severe cases such as the Flint, Michigan water crisis, leaving little to no recourse for innocent

laws and regulations they must operate under, once the law is apparent—ensuring a company and its operators can face criminal prosecution for certain negligent violations—the importance of public health should be recognized in monitoring these industries whose byproducts are lethal to people and the environment. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 179 (identifying environmental harm or public health effects as an important factor in determining the severity of environmental violations).

132. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 168 ("Congress provided enhanced penalties for environmental violations that placed others in imminent danger of death or serious bodily injury.").

133. *See* 18 U.S.C. § 371 (2018) (describing crime of conspiracy to commit offense or to defraud United States); § 1001 (enumerating ways statements or entries can be falsified and concealed that could result in criminal charge).

134. *See* § 371 (codifying conspiracy as federal crime).

135. *See* § 1001 (stating explicitly a person must "knowingly and willfully" falsify or conceal documents, even though concept of falsification implies knowledge on part of perpetrator).

136. *See id.* (including willful in the mens rea requirements for falsifying information although most environmental statutes require negligence or knowledge, illustrating fact that environmental crimes hinge on inaction more than others); *see also* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1235 (explaining Congress removed willfulness requirement from CWA in favor of knowledge standard).

137. *See* U.S. Dep't of Justice, *Prosecution of Federal Pollution Crimes*, ENV'T & NAT. RESOURCES DIVISION (May 13, 2015), https://www.justice.gov/enrd/prosecution-federal-pollution-crimes [https://perma.cc/UT5F-PRRH] (listing federal pollution cases where companies and owners directing employee behavior were held criminally liable for environmental violations). For examples of case law illustrating executive liability for knowing or negligent conduct, see cases cited *supra* note 123.

138. *See* Harris, *supra* note 88 (describing case of Lester Crawford, who had personal, financial interests in companies he was in charge of regulating as head of the FDA).

citizens seriously harmed by government agency action ranging from negligent to overtly criminal.[139]

1. *Individuals*

In *United States v. Maury*, the court discussed the case *United States v. Hanousek*,[140] which had held that "the appropriate *mens rea* . . . was simple, rather than gross, negligence," under the criminal provision of the CWA for a railroad company polluting navigable waters with oil.[141] The court examined the legislative intent behind the CWA, categorizing it as "a form of public welfare legislation" which allows the CWA "to 'render criminal "a type of conduct that a reasonable person should know . . . may seriously threaten the community's health or safety."'"[142] Due to Congress's objective of protecting public welfare and its lack of explicit language in the criminal provision of this statute, the court in *Maury* and courts in other circuits have reasoned the mens rea for a CWA misdemeanor violation is simple negligence, as opposed to gross negligence.[143]

In *Commonwealth v. Farmer*, the court discussed its consistent holding "that certain strict liability or absolute liability criminal enactments are constitutional," including the strict liability standard in the criminal provisions of the SWMA.[144] Despite reiterating its support for the SWMA's negligence standard, the court also emphasized Farmer's profession as a petroleum engineer, which gave him expert knowledge of hazardous waste.[145] The court mentioned Farmer's acknowledgment that the industry is "highly regulated."[146] This inclusion implies that, even though the SWMA can apply to negligent actions, Farmer was even more culpable due to his knowledge and expertise of both the industry's regulation standards and of the hazardous waste products themselves.[147] By this logic, an agency such as the DEP,

139. *See* Smith, *supra* note 97 (stating decision to drop charges against officials responsible for Flint water crisis "stunned the city of Flint, Mich[igan]").

140. 176 F.3d 1116, 1120 (9th Cir. 1999) (detailing jury conviction stemming from negligent discharge of oil into navigable waters).

141. *See Maury*, 695 F.3d at 257 (citing *Hanousek*, 176 F.3d at 1121) (discussing past precedent in order to determine correct mens rea under Clean Water Act).

142. *Id.* (quoting *Hanousek*, 176 F.3d at 1121).

143. *See id.* at 257–58 (explaining Congress explicitly expressed intent in statutory text when intending gross negligence standard and lack of such language indicates Congress meant simple rather than gross negligence); *see also* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 169 (stating that, while most criminal violations of environmental statutes require knowing violations, accidental pollution under CWA and CAA can generate criminal prosecution through negligent discharges and negligent endangerment).

144. Commonwealth v. Farmer, 750 A.2d 925, 929–30 (Pa. Commw. Ct. 2000) (citing past precedent that ruled SWMA's strict liability standard for transferring and dumping hazardous waste did not violate due process).

145. *See id.* at 929 ("Michael Farmer is a petroleum engineer who realizes that petroleum products have a low flash point. Farmer asserts, however, that mixing products together and shipping them off for recycling should not be interpreted as handling a hazardous waste.").

146. *See id.* ("Farmer acknowledges that it is involved in a highly regulated industry and that Section 401(b) of the SWMA clearly subjects persons who store, transport, treat or dispose of waste to liability for harm even though they have exercised the utmost care.").

147. *See id.* (discussing void for vagueness doctrine as holding statute unconstitutional if it "fails to give a person of *ordinary* intelligence fair notice that contemplated conduct is forbidden"

which has expertise in both environmental science and environmental regulations, would be that much more culpable for negligent or knowing inadequacies in their oversight of the fracking industry.[148]

In *Downs v. Commonwealth*, the court found that Downs was criminally negligent because he should have known his cost-saving method of waste disposal was unsafe and created a "substantial risk."[149] In response to the argument that he could not be held responsible for his employees' actions, the court replied that he was being held accountable for his own negligent actions.[150] The court reasoned that, considering Downs's actions could significantly harm people and the environment, a prison sentence of two to four years was not disproportionate for the offense.[151] Similarly, the *Tonawanda* court held the company liable for environmental violations resulting in $12.2 million in damages, which were used to evaluate "the effects of its conduct on human health and the environment."[152] These cases demonstrate that substantial risks to public health and citizen fears over potential harms can justify hefty fines and even prison sentences for mere negligence in environmental criminal law.[153]

2. *Government Officials*

In the EPA's State Review Framework report, it summarized the DEP's area for improvement as updating penalty calculations in their National Pollutant Discharge Elimination System (NPDES) wastewater and stormwater programs.[154] Despite almost five trillion cubic feet of natural gas produced in Pennsylvania in 2015, the SRF evaluation does not mention the adverse effects of fracking in relation to the NPDES, the CWA, or the CAA.[155] In fact, the oversight program meant to

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immediately after mentioning that petroleum engineer Farmer understood intricacies of hazardous wastes (emphasis added)).

148. *See id.* (emphasizing Farmer's expertise as a factor in deciding his level of culpability).

149. *See* Downs v. Commonwealth, 616 A.2d 39, 464 (Pa. Commw. Ct. 1992) (finding that defendant's policy of "permitting employees to remove waste from the plant to save the cost of otherwise disposing of it" was clearly risky).

150. *See id.* at 466 (claiming Downs was charged for crimes he himself was personally responsible for).

151. *See id.* at 467 (stating Downs received lenient sentence considering potential penalties under SWMA).

152. United States v. Tonawanda Coke Corp., 636 F. App'x. 24, 29 (2d Cir. 2016) (finding Tonawanda Coke Corp.'s activities "caused harm to those members of the public who are reasonably concerned that their property or their health has been compromised by the effects of TCC's illegality").

153. *See id.* at 30 (discussing defendant's fine to be used for a study to benefit potentially afflicted community); *see also Downs*, 616 A.2d at 467 (considering proportionality of sentence in relation to potential and actual harm caused to citizens).

154. *See State Review Framework*, *supra* note 83 (providing results of State Review Framework reports by state).

155. *See id.* (evaluating the DEP's 2015 FY performance but neglecting to mention issues surrounding regulation of industry's fracking technique); *see also* DEP'T ENVTL. PROT., 2015 OIL AND GAS ANNUAL REPORT 6–31 (2015), http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=6318&DocName=2015%20OIL%20AND%20GAS%20ANNUAL%20REPORT.PDF%20%20%3Cspan%20style%3D%22color%3Agreen%3B%22%3E%3C%2Fspan%3E%20%3Cspan%20style%3D%22color%3Ablu

ensure the DEP is implementing and enforcing regulations in line with the statutes mentioned above, does not mention fracking at all.[156] As *In re Thirty-Third Statewide Investigating Grand Jury* and the charges brought against Lester Crawford show, when there is proper oversight and government misconduct is investigated and brought to light, the executive and judicial branches favor uncovering and disciplining such misconduct.[157]

In response to the dropping of charges against state officials, one Flint resident expressed dismay: "This is not justice . . . . The only thing it tells me is our lives don't matter."[158] The lawsuits brought against government actors in Flint included claims of substantive due process and equal protection rights violations.[159] Plaintiffs were forced to allege "ostensibly more restricted liberties" such as "a right to bodily integrity and a right to freedom from third-party harms" because the Supreme Court "has consistently refused to constitutionalize affirmative rights to basic human needs."[160] Without a solid legislative claim to bring forward, plaintiffs harmed by the Flint water crisis were unable to receive injunctive or economic relief for the government's "outrageous . . . man-made disaster that could have been avoided with a minimum of foresight and at relatively little expense."[161] The Flint water crisis sets a dangerous precedent in environmental law: government officials and agency employees can be the direct cause of poisoning citizens yet face no serious legal repercussions.[162]

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e%3B%22%3E%3C%2Fspan%3E [https://perma.cc/XK3Z-G9VR] (summarizing Pipeline Infrastructure Task Force's actions throughout year, including data trends and expectations from the DEP).

156. *See State Review Framework*, *supra* note 83 at 1 (describing the DEP's Air Quality Program as "thorough and comprehensive" and its RCRA program inspection reports as "well-written and organized").

157. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 226 (Pa. 2014) (favoring ability to root out official misconduct over government confidentiality when proper oversight allows such misconduct to be discovered); *see also* Harris, *supra* note 88 (reporting on charges brought against ex-head of the FDA, Lester Crawford).

158. Smith, *supra* note 97 (internal quotation marks omitted) (relaying one resident's view that dropped charges against state officials for "a failure of government at all levels" seem "like a political ploy"). These comments made by Flint residents are very similar to the ones made by Pennsylvania citizens in regard to the fracking industry, depicting feelings of hopelessness and distrust in the face of government failures to adequately protect them. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 52 (sharing story of family who called the DEP for help, only to be told agency could do nothing to assist them); *see also* Troutman et al., *supra* note 12 (reporting on resident who felt the DEP was more likely to protect gas and oil interests rather than PA citizens and environment).

159. *See* Massaro & Brooks, *supra* note 92, at 157, 158 (enumerating basis of the actions plaintiffs brought against Flint officials).

160. *Id.* at 158 (describing "narrower claims" plaintiffs were forced to bring as "quaky," "fragile," and difficult to satisfy due to lack of legislation or precedent affirming constitutional right to basic necessities, such as food and clean water).

161. *Id.* ("Not all outrageous government acts violate the Constitution, but the ones at stake in the Flint crisis did.").

162. *See id.* at 156 (tracing contamination of Flint's water directly to both negligent and intentional actions of government officials).

C. *The DEP's Policies: Negligence and Knowledge*

An overarching theme of the grand jury report's criticisms of the DEP and its response to the fracking boom is the department's failure to act.[163] These criticisms involve situations where it seems that there were both negligent and knowing violations of the DEP's mission and its own practices.[164] Despite the intentions or mental state behind each policy decision, Attorney General Shapiro emphasized that citizens of Pennsylvania were the ones who felt the consequences.[165]

1. *Negligence*

The grand jury report concluded by clarifying that the DEP's failure to protect Pennsylvania residents and the environment "may not have been intentional or malicious."[166] Notwithstanding the lack of malintent, the report considered multiple instances of employee negligence in their oversight of the oil and gas industry.[167] The report described how the DEP's reliance on inaccurate water testing methods led to confusion over whether fracking caused contamination.[168] It also examined how the DEP sometimes either did not answer or dismissed complaints by residents who had hired their own environmental experts.[169]

Attorney General Shapiro pointed out that the challenges the DEP faced from the industry and the fracking boom was "not the fault of Department employees" and that grand jury "believe[s] that many DEP employees were doing the best job possible with the limited resources they had."[170] For example, when the code used for water testing was updated, numerous employees continued using the outdated

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163. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 49, 53, 54, 55, 58, 60, 62, 64, 65 (breaking down review of the DEP's response to regulating industry into sections titled: "failure to regulate," "failure to train," "failure to communicate," "failure to test," "failure to inspect," "failure to notify," "failure to issue violations," "failure to refer," and "failure to listen").

164. *See id.* at 67 (attributing the DEP's inadequate response to fracking as both a "deliberate policy decision" and also one of "inadequate supervision," implying both willful and inadvertent actions).

165. *See id.* ("However, policy decisions also have consequences, and in this case, one consequence of the decisions made by multiple administrations and DEP was inadequate supervision of an industry which had—and continues to have—significant impacts on the Commonwealth's citizens.").

166. *Id.* (describing DEP's failure to "meet its mission" in protecting Pennsylvania's natural resources and its citizens as potentially not malicious or intentional).

167. *See id.* at 65–66 (outlining instances where the DEP failed to listen to citizens complaining about water contamination and pollution although citizens had video evidence or analyses of environmental consultants).

168. *See id.* at 6 (contending the DEP's water testing methods are inaccurate because of outdated criteria in studying water contamination, and as underutilizing the law's "zone of presumption"). The zone of presumption allows the DEP to presume water within 1,000 feet of a drilling site is contaminated, putting the onus on the industry to prove otherwise. *Id.*

169. *See id.* at 7 ("We believe that some DEP employees saw the job more as serving the industry than the public. We heard too many stories of complaints unanswered, or cavalierly dismissed.").

170. *Id.* at 48 (stating while many agency employees did their best, other employees "appeared to show undue deference to the fracking industry, and undue indifference to citizens with serious complaints about appalling effects they were suffering").

code because they were unaware of the new one.[171] Attorney General Shapiro noticed that some of the DEP employees were "unaware of crucial legal guidelines that govern the Department's testing program."[172] When investigating complaints from residents regarding fracking activities, the DEP employees revealed that, because it was not feasible to inspect each one, they would speak to the operator of the drilling well and close the complaint if they received a picture showing there was not an oil spill.[173] The DEP's use of outdated methods, failure to inform employees of important rules, and decision not to allocate adequate resources to respond to complaints can all be seen as negligent actions.[174]

2. *Knowing*

The grand jury report introduces the DEP's willful actions, highlighting new violations that were done knowingly.[175] The DEP knew about impoundment failures in solid waste management for years prior to phasing out the practice.[176] Testimony from DEP employees revealed they knew the agency required brand new regulations for fracking "early on," yet the regulations were not enacted until 2016.[177] Employee testimony disclosed that the DEP discouraged employees from taking training opportunities and ignored new methods gleaned from trainings.[178]

The DEP was hesitant to issue Notices of Violation (NOV), which identify violators and begin the regulatory enforcement process.[179] According to the grand

171. *See id.* at 56 (explaining that, despite the newly developed suit code 946, employees continued using the pre-fracking suit code 942 because they did not know about update).

172. *Id.* at 58 (characterizing the DEP employees' ignorance of certain significant legal guidelines as "troubling").

173. *See id.* at 59 (describing how the DEP employees had to "investigate" and close complaints "without ever leaving the office" due to their lack of resources). In response to these accusations, the DEP stated: "DEP staff investigate complaints from the public that an unconventional gas activity may be causing environmental or public safety concerns." *Id.* at 117.

174. *See id.* at 59 (balancing understanding that the "DEP is understaffed and employees cannot spend all their time making inspections" with the skepticism that "operators can fairly or effectively police themselves").

175. *See id.* at 6 (stating the DEP's failure to investigate complaints as employees "elect[ing] not to inspect reported violations").

176. *See id.* at 50 ("In the mid-2010s, DEP recognized that impoundments were not safe, and they were phased out in favor of more secure storage methods. But by that time, DEP had years of knowledge about impoundment failures."). Earlier in the grand jury report, Attorney General Shapiro describes impoundments as "man made ponds, several acres in size, where oil and gas operators stored millions of gallons of fluid" that sometimes included toxic fluids such as contaminated wastewater. *Id.* at 32. These impoundments lacked the proper lining to prevent leakages into the soil and water and would release harmful chemicals into the air as essentially "enormous open toxic pits." *Id.* The DEP exempted these impoundments from the permitting requirements of the Solid Waste Management Act. *See id.* at 32, 50.

177. *See id.* at 52 (demonstrating the DEP "developed concepts" for fracking regulations years before regulations were adopted).

178. *See id.* at 53 (revealing employees were told outside training opportunities would violate the "gift ban" policy).

179. *See id.* at 6 (explaining what NOVs are and that there was a lack of NOVs issued during the beginning of the fracking boom); *see also Compliance and Enforcement Division*, PA. DEP'T ENVTL. PROT., https://www.dep.pa.gov/Business/Air/CAEDivision/Pages/default.aspx [https://perma.cc/JJ6H-Q9T7] (last visited Sept. 15, 2020) (giving overview of compliance monitoring tools the DEP uses).

jury report, executive decisions and communications from top staff influenced employees, who interpreted emails as saying: "To leave the Marcellus alone. . . . Don't interfere with their business."[180] These willful violations of the DEP's duty to protect the environment and Pennsylvania residents in favor of the regulated industry become even more incriminatory when considering the court's remarks in *Commonwealth v. Farmer*.[181] If a petroleum engineer should know how to properly dispose of waste, an agency with environmental regulatory expertise should have even more knowledge about the harmful impacts that could occur by ignoring or condoning unsafe industry practices.[182]

IV. "UNLESS SOMEONE LIKE YOU CARES A WHOLE AWFUL LOT, NOTHING IS GOING TO GET BETTER. IT'S NOT."[183]: USING LEGISLATION AND EXECUTIVE OUTSOURCING TO SPEAK FOR CITIZENS AND THE ENVIRONMENT

Better oversight and easier avenues for prosecution would ensure regulatory agencies are held accountable for helping industries violate the regulations they are meant to enforce.[184] The ability to prosecute state and federal environmental employees for blatantly violating the "foundational mission of protecting human health and the environment" is increasingly crucial because federal agencies like the EPA are vulnerable to changing political administrations whose policy decisions can have lasting detrimental effects on the agency.[185] Even if a large portion of an agency remains committed to its mission, a few high-level employees can heavily sway the entire agency's regulatory policies.[186]

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180. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 62–63 (alteration in original) (internal quotation marks omitted) (quoting employee who believed "the message was clear" not issue violations against fracking activities for Marcellus Shale wells, even after Executive Deputy Secretary characterized email as "a misunderstanding").

181. *See* Commonwealth v. Farmer, 750 A.2d 925, 929 (Pa. Commw. Ct. 2000) (implying Farmer's knowledge as petroleum engineer makes his improper disposal of solid waste more culpable).

182. *See id.* (using expertise as factor in determining degree of accountability); *see also* Massaro & Brooks, *supra* note 92, at 169–70, 207 (cataloging defendants' violations as misrepresenting and concealing truth while having expertise and knowledge regarding detrimental effects of switching water supply).

183. *See* SEUSS, *supra* note 2, at 58.

184. *See* Massaro & Brooks, *supra* note 92, at 172 (citing investigative report finding Michigan "'fundamentally accountable' because agencies charged with enforcing drinking water regulations and protecting public health had failed to do their job").

185. *See* Banerjee, *supra* note 100 (concluding EPA is verging on regulatory capture because business and industry, rather than scientific data and public welfare, are deciding factor in developing policy).

186. *See* Hudson, *supra* note 99, at 672.

> It should therefore be appreciated that an agency may consist of 90% individuals whose views and decisions are perfectly aligned with the public interest, and 10% who are not, and by that constitution still make rules and decisions that are harmful to the public interest. It follows that an interest group may reap large benefits from the "capture" of a relatively limited number of persons within the agency, especially high-level officials, as, in general, an agency administrator who shares an industry's views will be capable of exerting greater influence in that industry's favor than a low-level employee.

Id.

Considering the barriers to prosecuting government officials, the important work of employees at regulatory agencies, and the limitations they face, encouraging widespread criminal prosecution of agency employees is not a feasible option for situations described in Attorney General Shapiro's grand jury report.[187] However, by analyzing how individuals are charged and prosecuted for environmental violations, it becomes clear that failing to act is a large part of environmental crimes.[188] When such failure comes from the regulators, the executive branch should be able to step in to protect citizens from inaction.[189] Criminal statutes already discourage industry actors from this crime of inaction; legislators should similarly pass laws that effectively penalize egregious inaction from agency executives.[190]

A. *Criminal Charges and Pennsylvania DEP Employees*

While the DEP's employees should be protected and given the benefit of the doubt due to the constraints of governmental work, cases of explicit corruption and conflicts of interest should be eligible for environmental prosecution.[191] Attorney General Shapiro's concern with the "revolving door" of employees leaving the DEP to work for the oil and gas industry after purposefully under-regulating the industry is analogous to the situation of Lester M. Crawford, the FDA Commissioner who was criminally prosecuted for owning stock in the companies he regulated.[192] The failure to act according to one's duty as a government employee for the future receipt of monetary compensation should be no different than a private individual failing to follow environmental regulations in order to maximize profits.[193] For example, Attorney General Shapiro reviewed a DEP employee's testimony regarding a drilling

187. *See* Uhlmann, *Prosecutorial Discretion*, *supra* note 30, at 163 (discussing benefits of giving heightened prosecutorial discretion for those enforcing environmental crimes).

188. *See* KRAMER, *supra* note 1, at 91 ("These nondecisions constitute a significant portion of the state climate crimes of political omission.").

189. See PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 102 (recommending law be amended to "give the Attorney General direct jurisdiction over environmental crimes").

190. *See* KRAMER, *supra* note 1, at 90 ("State crimes of omission occur when states and their officials fail to act, or neglect to notice bad things happening, or even enter into a state of denial. This leads to significant, even life-threatening occasions for harm to particular groups of people simply because state officials have not acted." (quoting ROB WATTS, STATE OF VIOLENCE AND THE CIVILIZING PROCESS: ON CRIMINOLOGY AND STATE CRIME 10 (2016))); *see also* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 9 ("We urge the executive and legislative branches of Pennsylvania's government to seriously consider the findings of this Report, and to act in favor of the common good of Pennsylvania and its citizens. We think there is more that can and must be done to minimize the hazards arising from unconventional drilling.").

191. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 102 (arguing "criminal charges can provide an effective way to help carry out the constitutional mandate of article 1, section 27: to conserve and maintain the people's right to clean air, pure water, and a healthy environment").

192. *See id.* at 100 (witnessing concerning and "troubling" staffing issues such as temptation the DEP employees would hesitate "to bear the full force of the law" in hopes of later attaining higher paying industry job); Harris, *supra* note 88.

193. *See* KRAMER, *supra* note 1, at 124 (describing "critical delay" in government response to global warming made through deliberate decisions motivated by economic gains as "predatory and criminal").

well that the agency allowed to shutdown unsafely using a method called "plugging."[194] The employee responsible had left the DEP to work for the company "to whom the certificates were issued."[195]

B. *Outsourcing Prosecution to Executives*

The grand jury report introduced a better way to handle the intersection of agency misconduct and criminal prosecution: outsource state environmental criminal investigations to other parts of the executive branch by allowing the Office of the Attorney General to receive citizen complaints and investigate them.[196] According to the report, "the lack of criminal prosecution" for environmental violations is not due to a lack of crimes occurring but rather due to bureaucratic obstacles.[197] Although the Commonwealth Attorneys Act gives the Attorney General the power to prosecute criminal charges against Pennsylvania officials and employees whose behavior hurts "the public trust," the DEP must refer criminal conduct to the Office of the Attorney General before the Office can investigate and prosecute environmental misconduct.[198] The general assembly should amend the law to "give the Attorney General direct jurisdiction over environmental crimes" so that the office "can begin an investigation on its own, whenever it has proper cause to do so" without waiting for the DEP referrals that rarely come.[199] Giving the DEP

194. *See* Sanserino, *supra* note 44 (discussing the DEP's revisions to well-plugging regulations for unconventional wells). Plugging involves sealing off inactive and abandoned wells to prevent leakage of gas into the air, water, and soil. *See id.*

195. PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 60 (clarifying that, while such a "career progression was not uncommon," the revolving door between the DEP and the industry "is not a recipe for restoring public confidence in the DEP inspection process").

196. *See id.* at 102 (detailing potential solutions to avoid situation created by fracking boom in Pennsylvania); *see also* Abrams, *supra* note 87, at 207 ("As long as law enforcement power is kept in the hands of those who are themselves corrupt, the public interest is frustrated. The only hope lies in vesting jurisdiction in an outside body that has the capacity and the will to investigate and prosecute as needed." (quoting WHITNEY NORTH SEYMOUR, UNITED STATES ATTORNEY 174–75 (1975))).

197. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 102 (explaining that, despite Attorney General's Office "special environmental crimes section," the Office is unable to investigate and prosecute unless the DEP first asks it to do so); *see also* The Commonwealth Attorneys Act of 1980, 71 PA. STAT. § 732-205(a)(6) (1980). When criminal prosecutions intersect with agency enforcement, the attorney general must wait for the agency's investigation and referral. *See* § 732-205(a)(6). Because the DEP is already "understaffed" and underfunded, it would be much more efficient for the agency to circumvent the investigation and referral process and share jurisdiction with the Attorney General's environmental crimes unit. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 59.

198. *See* § 732-205(a)(1), (6); PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 59.

> Yet, in recent years DEP has seldom asked. DEP employees testified to various explanations for this lack of criminal referrals for oil and gas violations. Some said they don't need to seek criminal prosecutions, because their own internal regulations provide sufficient deterrence. Some said they would refer more cases, if only prosecution didn't take so long. Some said they wanted to send out cases for prosecution, but supervisors didn't always approve.

PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 102.

199. *See id.* (suggesting environmental laws be amended to give Attorney General direct jurisdiction over criminal environmental violations).

and the Attorney General concurrent jurisdiction over environmental criminal investigations would spread the administrative burden, thus, contributing more oversight and resources to curbing environmental misconduct.[200] Outsourcing enforcement and oversight of both individuals and agencies would allow for more frequent, effective execution of environmental law.[201]

One commentator has emphasized the importance of moderating bureaucracy with "an informed public capable of holding administrators and public officials accountable" in order to remedy the issue of environmental regulation oversight.[202] While an informed and educated public is a crucial check on the government's power, the responsibility of regulating an entire industry should fall on the agency created to do so, not citizens who may potentially lack the time, resources, and expertise necessary to do so.[203] Nevertheless, even citizens with those resources still need the legislative tools to pursue claims of accountability against the government.[204]

C. *Creating Legislation that Deters Inaction*

In addition to outsourcing investigative powers to law enforcement, legislation should be passed at state and federal levels that addresses agency inaction.[205] Amending current legislation and passing new legislation at both the state and federal level would give citizens a stronger legal basis for bringing claims against egregious failures of government.[206] This Comment proposes two legislative

200. *See id.* (indicating Attorney General's Office has resources to prosecute environmental crimes through its specialized environmental crimes division but not authority, whereas the DEP has authority to pursue and refer environmental crimes but lacks funding, staffing, and internal policies to do so).

201. *See* Abrams, *supra* note 87, at 226 ("If enforcement actions are to be undertaken in situations involving complex relationships such as these, they cry out for them to be carried on by officials who have significant distance from the matter, the people involved, and probably the jurisdiction itself.").

202. Morgan, *supra* note 69, at 92 (answering question of "[w]ho shall watch the watchers themselves?" in context of hydraulic fracturing and agency regulations (alteration in original) (internal quotation marks omitted) (quoting Garrett Hardin, *The Tragedy of the Commons: The Population Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCI. 1243, 1245–46 (1968))).

203. *See id.* at 112 (arguing data suggests public education and awareness of adverse effects of fracking is greater deterrent than regulation in reducing industry expansion).

204. *See* Massaro & Brooks, *supra* note 92, at 158 (describing equal protection claims plaintiffs brought against Flint officials as "doctrinally fragile" and unable to properly hold officials accountable).

205. *See id.* at 182 ("There was no perfect fit between the Flint debacle and any existing, formal constitutional category that protected the residents from such environmental harms. Each of the constitutional claims was a salmon argument, swimming upstream against multiple adverse doctrinal currents.").

206. *See* Markell, *supra* note 95, at 17 (describing how government tools of enforcing environmental laws can turn into obstacles obscuring culpability and transparency). "These seemingly fundamental features of governance have the potential to create substantial 'slack' and to reduce rather than increase openness and accountability in governance." *Id. But see Pennsylvania's Environmental Rights Amendment Grows Some Teeth*, CIRCLE OF BLUE (Feb. 22, 2018), https://www.circleofblue.org/2018/world/pennsylvanias-environmental-rights-amendment-grows-teeth/ [https://perma.cc/4AS7-2LP7] (tracing evolution of Pennsylvania Constitution's

changes to safeguard the public interest against agency inaction: adding direct-review provisions to environmental legislation that explicitly waive finality and imposing a duty to act on environmental agencies.

1. *Adding and Amending Direct-Review Provisions*

Environmental agencies can currently avoid most litigation over inaction, in part due to the difficulty of applying the APA when harm arises from the failure to act rather than from action.[207] One commentator describes this asymmetry as a "deregulatory bias," where deliberate nonenforcement faces little to no judicial review, while large surges in enforcement give individuals the opportunity to bring cases, even though both can cause the same amount of damage.[208] The commentator then asserted deregulatory bias could be appropriate because "nonenforcement does not threaten individual liberties in the same way as enforcement."[209] However, as demonstrated by the grand jury report and discussed case law, in environmental law, nonenforcement is just as bad—and often even worse—than enforcement.[210]

Environmental Rights Amendment). While originally more aspirational than effective, in recent years courts have given more credence to the Environmental Rights Amendment, which guarantees Pennsylvania citizens the right to clean air, clean water, and the conservation of natural resources. *See id.* This amendment to the Pennsylvania constitution has resulted in citizens successfully bringing cases addressing environmental issues and fracking. *See id.*; *see also* PA. CONST. art. 1, § 27 (1971) (codifying Environmental Rights Amendment); Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017) (strengthening Environmental Rights Amendment and its effectiveness for citizens bringing suits against state).

207. For a further discussion of the difficulty of applying the APA to nonenforcement, see *supra* Part II.D; *see also* Hylas, *supra* note 106, at 1675–76 (discussing ways agencies avoid judicial review). Hylas mentions an exception in Section 706(1) of the APA that allows the court to force an action that is "unlawfully withheld or unreasonably delayed" before the action is considered final. *See* Hylas, *supra* note 106, at 1675–76. The Supreme Court then limited this exception to cases where "the agency fails to take discrete action that it is statutorily required to take." *Id.* Therefore, in situations such as fracking in Pennsylvania or the climate change crisis, even with the Section 706(1) exception there would still be standing issues for a case of government inaction leading to egregious public harms. *See id.* (offering unreasonable delay provision as potential structure to help frame issue of "finality" in determining agency actions).

208. *See* Velikonja, *supra* note 103, at 1562 (describing *Heckler v. Chaney*'s effect on nonenforcement and subsequent disproportionality of judicial review available for shifts in enforcement versus nonenforcement).

209. *Id.*

210. *See* Massaro & Brooks, *supra* note 92, at 192 (asserting that life, liberty, and property were "undeniably compromised" by government officials in the Flint water crisis); *see also* Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (reviewing claim that government actors "have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty"), *rev'd and remanded by* 947 F.3d 1159 (9th Cir. 2020); PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5. Plaintiffs in *Juliana* brought suit under the Due Process Clause, arguing a safe and healthy environment is "a necessary condition to exercising other rights to life, liberty, and property." *Juliana*, 217 F. Supp. 3d at 1250. Judge Aiken discussed the possibility of "new" fundamental rights, relying on Justice Kennedy's words from *Obergefell v. Hodges*:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a

One way around this problem involves adding direct-review provisions to environmental legislation that clearly state finality is not required absent explicit statutory language to the contrary.[211] When a direct-review provision is silent on finality, courts typically presume finality is required and dismiss inaction claims.[212] The presumption of finality in environmental statutes such as the CWA has spawned confusion over a court's power to review inaction claims, leading to disparate outcomes depending on where in the country one lives.[213] To rectify this problem of judicial guesswork, federal environmental legislation should be amended to include direct-review provisions that explicitly do *not* require finality to challenge an action.[214]

Potential criticisms for this measure echo the reasons that support the inclusion of the finality requirement within APA Section 704: fears about waves of litigation for ongoing action, overstepping agency authority regarding resource allocation, and hindering agency rulemaking.[215] But courts will still have other tools to limit judicial review to appropriate cases, such as the ripeness doctrine, which considers "whether an issue is 'fit' for review" along with "the potential hardship to the parties of withholding review."[216]

> charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 1249 (quoting Obergefell v. Hodges, 567 U.S. 644, 664 (2015)). For a further discussion of the harm that can result from inaction, see *supra* Part II.

211. *See* Borgert, *supra* note 108, at 155 (explaining APA allows parties to challenge "a nonfinal action directly reviewable under another statute" under APA).

212. *See* Bell v. New Jersey, 461 U.S. 773, 778 (1982) (establishing presumption of finality requirement when direct-review statute is silent); Borgert, *supra* note 108, 152–54 (discussing different approaches to presumption of finality requirement taken by federal circuit courts).

213. *See* Clean Water Act, 33 U.S.C. § 1369(b) (2018) (not explicitly requiring final agency action before judicial review); Iowa League of Cities v. EPA, 711 F.3d 844, 863 (8th Cir. 2013) (finding finality not required); Champion Int'l Corp. v. U.S. EPA, 850 F.2d 182, 187 (4th Cir. 1988) (requiring finality under CWA); Pa. Dep't of Envtl. Resources v. EPA, 618 F.2d 991 (3d Cir. 1980) (requiring finality under CWA); *see also* Borgert, *supra* note 108, at 158 (discussing circuit split over existence and reasoning behind CWA's finality requirement).

214. To overcome this presumption of finality, plaintiffs must show the court that a statute contains no "explicit finality language" as well as the existence of other, "fairly discernable" factors indicating Congress's intent. Borgert, *supra* note 108, at 179 (second internal quotation marks omitted). Explicit statutory text could eliminate much judicial "discernment" of Congress's intent.

215. *See* Heckel, *supra* note 115, at 825 (maintaining requirements such as finality protect decision-making processes of agencies); *see also* Borgert, *supra* note 108, at 161 (reiterating policy reasons judges have cited to support a finality requirement, including the fear that "unlimited interlocutory review could seriously impede the performance of the EPA's rulemaking functions" (quoting *Pa. Dep't of Envtl. Resources*, 618 F.2d at 997)); Biber, *supra* note 116, at 467–68 (identifying resource allocation as one of the main areas of discretion necessary to the executive branch and its agencies); Parsons, *supra* note 117, at 510 (noting APA seeks to limit "undue judicial interference" and "avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve" (quoting Norton v. S. Utah Wilderness, 55 U.S. 55, 55 (2004))). *But see* FEC v. Akins, 524 U.S. 11, 20 (1998) (finding suit for inaction warranted when injury was kind statute sought to address and was supported explicitly by language of statute).

216. *See* Borgert, *supra* note 108, at 180 (arguing ripeness doctrine is sufficient to assess suitableness of judicial review in absence of finality requirement and describing ripeness doctrine's "two-pronged inquiry").

Other constraints for parties attempting to challenge agency inaction would prevent an onslaught of litigation and ensure only cases with concrete and addressable harms are reviewed.[217] Furthermore, portions of the APA and environmental statutes were drafted in order to increase agency accountability to the public.[218] Removing the finality requirement in certain direct-review provisions of environmental statutes would promote agency accountability and guarantee that injured parties are not unfairly left without recourse merely because their injury arose from inaction rather than action.[219]

2. *Imposing a Duty to Act*

Congress should pass federal legislation imposing a duty to act onto environmental agencies through a mechanism similar to the Responsible Corporate Officer (RCO) doctrine.[220] Statutorily requiring an agency to create a regulation that includes a duty to act explicitly directed at executive agency officials, similar to the Responsible Corporate Officer doctrine present in the CWA and CAA, would target inaction and give citizens firmer standing.[221] The RCO doctrine imposes a duty to act by holding that "corporate officials, who stand in a responsible relationship to a violation, can be prosecuted for their failure to prevent the violation."[222] This

217. *See* Parsons, *supra* note 117, at 509 (listing "daunting number of obstacles" litigants must overcome before reaching court that would still be in place even if finality requirement was removed for certain environmental claims). Challenges include standing, remedy exhaustion, issue exhaustion, and preclusion. *See id.*

218. *See id.* at 523 (discussing notice-and-comment procedures of APA § 553 that "were intended to make agencies more accountable to the public"); *see also* Borgert, *supra* note 108, at 174 (reviewing legislative history of amendments to CWA and finding Congress wanted to give public ample opportunities to participate in reviewing and challenging environmental rules and violations).

219. *See* Borgert, *supra* note 108, at 145 (stating "[r]eview is categorically unavailable under the APA for a claim" if it fails to meet the finality requirement). Borgert argues removing this finality requirement would enable "social welfare gains" that are "currently precluded by the finality rule's strict requirements." *See id.* at 191; *see also* Hylas, *supra* note 106, at 1648, 1650 (explaining *Bennett* test for finality "can make it exceptionally difficult for beneficiaries of regulation . . . to challenge potentially dangerous deregulatory agency programs" and "plaintiffs have a harder time establishing final agency action and thus more difficulty challenging the rule in court").

220. *See* 42 U.S.C. § 7413(c)(6) (2018) (codifying Responsible Corporate Officer doctrine into CAA by defining "person" as including "any responsible corporate officer" within section of statute discussing criminal penalties for negligence); *see also* 33 U.S.C. § 1319(c)(6) (2018) (incorporating Responsible Corporate Officer doctrine into CWA in same way as CAA); *The Climate Act*, GRANTHAM RES. INST. ON CLIMATE CHANGE & THE ENV'T, https://climate-laws.org/geographies/denmark/laws/the-climate-act [https://perma.cc/F5GG-YQLB] (last visited Mar. 17, 2021). The idea of compelling government action through legislation in the field of environmental law, especially within international climate change law, is not completely new or unheard of. *See The Climate Act*, *supra.* In 2020, Denmark passed the Climate Act, which sets emissions targets the Danish government is obligated to meet. *See id.*

221. *See The Climate Act*, *supra* note 220; *see also* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1240–41 (describing Responsible Corporate Officer doctrine in context of CWA and CAA).

222. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1240–41 (explaining how RCO doctrine functions).

doctrine works well in the context of environmental law because it prompts officials to intervene when harm would otherwise occur if action was not taken.[223]

This obligation to act should be applied to those in the greatest position to fight environmental violations: agency officials.[224] Instead of resulting in criminal charges, however, an agency official's duty to act should give individuals a better avenue to confront government inaction and, in cases where the courts deem it appropriate, encourage agency action.[225] Citizens in Flint, Michigan were forced to bring flimsy constitutional claims for a failure to act to protect their drinking waters because there were no other applicable avenues for redress.[226] If environmental statutes included a duty to act, those citizens would have a stronger claim against officials who failed to ensure the city's waters were not poisoned.[227] Furthermore, plaintiffs battling the ever-growing climate crisis, like those in *Juliana*, would have firmer standing to bring their suits in the pursuit of environmental justice.[228]

Duty to Act legislation would establish and codify Congress's intent that the mission of environmental agencies above all should be to protect the environment and American citizens from harms caused by business and industry interests.[229] It would also formally recognize that, especially in the field of environmental law, failing to act is just as bad, or sometimes worse than, acting inadequately.[230] This type of thinking is already recognized in environmental law through the Responsible

223. *See id.* at 1241 (noting RCO doctrine ensures "corporate officials with authority over environmental compliance cannot ignore violations they know are occurring and have the ability to prevent").

224. *See* Markell, *supra* note 95, at 24 (explaining state agencies have worked with EPA to gain increasing autonomy).

225. *See* Massaro & Brooks, *supra* note 92, at 172 (recognizing "formidable procedural and substantive obstacles" plaintiffs faced when bringing lawsuits after Flint water crisis); *see also* Juliana v. United States, 947 F.3d 1159, 1169, 1175 (9th Cir. 2020) (explaining plaintiff's sole claim was a constitutional one and not a claim alleging violation of a statute or regulation). The court reversed and remanded the case for lack of Article III standing due to redressability, suggesting the best recourse for addressing climate change harms in the absence of legislatively-defined redress is to "goad the political branches into action." *See Juliana*, 947 F.3d at 1175.

226. *See* Massaro & Brooks, *supra* note 92, at 157 (stating Flint crisis exposed "many weaknesses of constitutional law" when confronted with complex environmental harms derived from government official misconduct and irresponsibility).

227. *Compare Juliana*, 947 F.3d at 1169, 1175 (noting plaintiff failed to raise actionable statutory or regulatory violations), *with* FEC v. Akins, 524 U.S. 11, 20–21 (1998) (finding respondents raised statutory violation by asserting agency's failure to provide information to respondents was "injury in fact"). Because the statute at issue in *Akins* sought to promote information-gathering, withholding that information was an injury. *See Akins*, 524 U.S. at 20–21.

228. *See Juliana*, 947 F.3d at 1164 (acknowledging plaintiffs brought "compelling evidence" that government promotion of fossil fuels, with the knowledge that such behavior "can cause catastrophic climate change," exacerbated climate crisis).

229. *See* KRAMER, *supra* note 1, at 199 (characterizing climate change as political problem, rather than a technical one, and stating that public must participate in holding industry and state accountable for climate).

230. *See id.* at 87 (discussing Court Judge Aiken's assertions in *Juliana* that "the government will have to stand trial for its actions and omissions concerning climate change"). The dissenting opinion disparaged the majority's decision to dismiss the case for lack of standing: "Despite countless studies over the last half century warning of the catastrophic consequences of anthropogenic greenhouse gas emissions, many of which the government conducted, the government not only failed to act but also 'affirmatively promote[d] fossil fuel use in a host of ways.'" *Juliana*, 947 F.3d at 1176 (Staton, J., dissenting) (alteration in original) (quoting *id.* at 1167).

Corporate Officer doctrine, enshrined in the CWA and CAA.[231] Enacting legislation or amending current environmental statutes to condemn inaction would recognize that government officials, just like corporate officers, have a similar, if not greater, duty to act and the necessary authority to do so.[232]

V. "TREAT IT WITH CARE. GIVE IT CLEAN WATER. AND FEED IT FRESH AIR."[233]: THE IMPACT OF EMBOLDENING ENVIRONMENTAL REGULATION

While public education is an effective tool in checking administrative action, systemic problems facing environmental law and environmental agencies need to be addressed.[234] These issues include a lack of money, resources, and incentives given to environmental agencies and its hardworking government employees.[235]

Outsourcing environmental prosecutions from the DEP to the Pennsylvania Attorney General's Office would allow greater oversight and alleviate the burden on environmental state agencies who are overwhelmed and underfunded.[236] Passing legislation that penalizes agency inaction would reiterate a point already apparent in criminal provisions of environmental statutes: simple negligence can be criminal when it endangers public welfare.[237] In order to help environmental agencies achieve their missions and to better safeguard the environment and its citizens, these measures should be implemented to ensure the next unconventional technology does not operate for decades at the expense of innocent lives and the health of the environment.[238]

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231. *See* Uhlmann, *Environmental Crimes*, *supra* note 25, at 1241 (reasoning RCO doctrine does not deviate from typical environmental law standards and objectives but rather helps achieve them by imposing a duty to act on officials with authority to do so).

232. *See id.* (providing public policy reasons for holding officials responsible for negligence and failing to act).

233. *See* SEUSS, *supra* note 2, at 61.

234. *See* Morgan, *supra* note 69, at 114 ("The empirical results illustrate that education has the largest effect on the rate of new drilling in a given state in a certain year.").

235. *See Pennsylvania's Environmental Rights Amendment Grows Some Teeth*, *supra* note 206 ("The most recent state budget left the Department of Environmental Protection with *no new money*, despite receiving warning letters from the U.S. Environmental Protection Agency about Pennsylvania's lagging performance in reducing nutrient pollution to the Susquehanna River and the Chesapeake Bay, and the state's shortcomings in ensuring public drinking water safety." (emphasis added)).

236. *See* PA. OFFICE OF ATTORNEY GEN., GRAND JURY REPORT, *supra* note 5, at 101 (contending the DEP is "understaffed and undertrained" and in need of more resources).

237. *See id.* at 11 ("This is the time to learn our lesson for the future: who will bear the inevitable risks? We say it should be those who exploit the resources, not those who live among them. That means let industry pay the price of harm reduction, and let government take the time to get it right before we hand over the keys. And for the present, let us at least do all we can to catch up.").

238. *See id.* (describing succession of resource exploitation that has occurred in Pennsylvania, from timber to coal to, most recently, shale oil).