FORGING COMPLETE JUSTICE: EQUITABLE RELIEF IN ENVIRONMENTAL ENFORCEMENT

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Fifty years after the rise of modern environmental law and its robust enforcement regime, there persists a disproportionate distribution of environmental burdens in the United States. Many underserved communities suffer from legacy pollution, siting of undesirable land uses, failing infrastructure, and attendant epidemiological and ecological harms. The environmental justice movement responds to these inequities and is receiving unprecedented focus in the Biden Administration. Communities, politicians, and attorneys are crafting legal and policy mechanisms to achieve environmental justice goals. However, there are presently tools that advocates can and should deploy in service of complete justice in environmental enforcement.

This Article advances a type of non-statutory, equitable relief called mitigation to provide redress to communities harmed by violations of environmental laws. Mitigation is restorative relief: it offsets or remedies harm from past violations of law. Some federal environmental statutes explicitly require cleanup of illegal pollution following a finding of liability. Some do not, including the two most commonly enforced environmental statutes, the Clean Air Act and the Clean Water Act. When statutes do not contain such a command, equity fills the gap. The principles of equity assist enforcers in securing the status quo ante for places and people impacted by illicit pollution. Indeed, in aiming to offset harm from environmental violations, the United States included mitigation in enforcement cases for decades, until the Trump Administration. Trump appointees at the Department of Justice authored policy memoranda curtailing tools for redressing environmental harm, including mitigation. While career officials rescinded those memoranda under the Biden administration, the arguments will no doubt resurface. Further, three recent Supreme Court cases have also reinvigorated debate over the scope of non-statutory equitable remedies that may be ordered for violations of federal law.

Mitigation, however, remains largely unaddressed by scholars. This Article provides legal and prescriptive arguments regarding mitigation as equitable relief. It offers an analysis of why mitigation is a remedy courts can award under their inherent equitable authority when it is not provided for explicitly in a statute. The Article then identifies how and why mitigation should be used more broadly in enforcement matters in robust consultation with communities harmed by illicit pollution to serve goals of corrective and restorative justice.

This Article is framed in the language of two foundational cases on equitable remedies, Porter v. Warner Holding Co. *and* Mitchell v. Robert De Mario Jewelry, Inc., *which speak of equitable relief enabling the achievement of "complete justice." This Article posits that complete justice in the environmental enforcement context demands more than an order to come into compliance and a civil penalty sent to the Treasury. It demands restorative relief. Otherwise, unauthorized pollution from violations of laws that do not specifically provide for remediation goes unabated. The expanded use of mitigation in settlements and litigation will provide concrete redress for harms in communities suffering environmental injustices.*

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Introduction

Environmental enforcement in the United States is both highly successful and distressingly deficient.[1] Since the emergence of modern environmental law, America as a whole has experienced massive progress in cleaning our air, water, and land, and addressing solid and hazardous wastes, conventional pollutants, and toxics. Yet the quality of the ambient environment remains demonstrably worse for non-white[2] and low-income communities.[3] This article advocates for a broader use of mitigation as equitable relief in environmental enforcement cases to better redress harms in disproportionately burdened communities.

Some federal environmental statutes explicitly provide for remediation after a finding of liability, such as the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[4] Others do not, such as the

1. The successes and deficiencies of the United States' environmental enforcement system are chronicled by many scholars. For detailed analyses, see, e.g., Robin Kundis Craig, *Valuing the Public Health Aspects of Environmental Enforcement: Qualitative Versus Quantitative Evaluations of Enforcement Effort*, 33 S. Ill. U. L.J. 403 (2009); Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 Env't L. Rep. News & Analysis 10,751 (2014); Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 Env't L. Rep. News & Analysis, 10,511 (2017); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 853–55 (1993). Many of the alleged deficiencies are mirrored in state environmental enforcement regimes as well. *See* Robert L. Glicksman & Yee Huang, Failing by the Bay: Clean Water Act Enforcement in Maryland Falling Short 29–37 (Ctr. for Progressive Reform, 2010). However, empirical evidence demonstrates that enforcement deters violations and encourages compliance to the benefit of the environment and human health. *See, e.g.*, Jonathan Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & Econ. 653, 671 (2005); Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 Env't L. Rep. 10,245, 10,247–50 (2000).

2. The nomenclature used in this Article is intended to be as circumstance-specific as possible in raising issues related to individuals with non-white racial identities, acknowledging there are complexities, concerns, and preferences among terminology including "communities of color" and "people of color."

3. *See, e.g.*, Elisheba Spiller et al., *Mortality Risk from PM2.5: A Comparison of Modeling Approaches to Identify Disparities Across Racial/Ethnic Groups in Policy Outcomes*, 129 Env't Health Persps. 127,004-1, 127,004-3 to 127,004-11 (2021); F.P. Perera, *Multiple Threats to Child Health from Fossil Fuel Combustion: Impacts of Air Pollution and Climate Change*, 125 Env't Health Persps. 141, 142–46 (2017); Jayajit Chakraborty & Paul A. Zandbergen, *Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air Pollution at School and Home*, 61 J. Epidemiology & Cmty. Health 1074, 1078–79 (2007); *see also* Catherine Coleman Flowers, Waste: One Woman's Fight Against America's Dirty Secret 119–206 (2020) (detailing the devastating sanitation inequities for rural minority communities and highlighting similar conditions in other marginalized rural low-income communities, such as Appalachia).

4. 42 U.S.C. § 9607.

Clean Air Act ("CAA")[5] and Clean Water Act ("CWA")[6] (together, "the Acts"). This Article establishes that a district court's award of mitigation as an equitable remedy under the CAA and CWA comports with longstanding legal doctrine.

The foundational Supreme Court cases on equitable relief for statutory violations refer to the "[t]he great principles of equity," in service of "complete justice."[7] But complete justice in environmental enforcement remains elusive for many communities of color and low income.[8] President Biden's January 27, 2021 Executive Order on environmental and climate justice rallies environmental enforcement to aid these communities. The Order directs the Department of Justice's Environment and Natural Resources Division ("ENRD") and the Environmental Protection Agency ("EPA") to "develop a comprehensive environmental justice enforcement strategy, . . . to provide timely remedies for systemic environmental violations."[9]

This Article promotes mitigation as an equitable remedy that would support a broader environmental justice enforcement strategy. Mitigation in the environmental enforcement context can remediate or offset harm from violations of law.[10] It is distinct from injunctive relief targeted to bring an entity into

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5. 42 U.S.C. §§ 7401–7671.

6. 33 U.S.C. §§ 1251–1387; *see infra* Part II.A–B. *See generally* John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors and Trends*, 18 NAT. RES. & ENV'T 10 (2004) (describing remedies under the federal environmental statutes).

7. Brown v. Swann, 35 U.S. 497, 503 (1836); Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946). *See generally* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2095 (1996) ("Faced with real-world issues that are important to them, people are unlikely to accept the idea that complete or nearly complete justice is impossible; they are unlikely to give up the fight and settle for partial justice . . . .").

8. Inequities in enforcement can be traced back decades. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J. (Sept. 21, 1992), https://perma.cc/VH2W-Y5UL (concluding in a "comprehensive analysis of every U.S. environmental lawsuit concluded in the past seven years" that enforcement penalties in minority areas were lower than those imposed for violations in largely white areas and hazardous waste sites took longer to address (citing COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987))).

9. Exec. Order No. 14,008, § 222(c)(ii), 86 Fed. Reg. 7619, 7631 (Jan. 27, 2021). The Department of Justice published its Comprehensive Environmental Justice Enforcement Strategy a few weeks prior to the printing of this Article. Accordingly, this Article is not intended to be a full or complete response to the Strategy, but observes broadly where the suggestions, arguments, or critiques herein may be reflected in the Strategy. See Memorandum from the Associate Att'y Gen., Comprehensive Environmental Justice Enforcement Strategy (May 6, 2022) [hereinafter EJ Enforcement Strategy Memo], https://perma.cc/G46R-BDHF.

10. There is a related but distinct type of mitigation called compensatory mitigation that is not addressed in this Article. Compensatory mitigation is a term used to describe mitigation

compliance with the law. Though mitigation had been used for decades by government and private environmental enforcers, the Obama Administration brought palpable momentum towards broader use of this tool. In 2012, EPA put forth the federal government's most robust guidance on the use of mitigation in environmental enforcement matters.[11] The 2012 EPA Mitigation Memo drew clear distinctions between mitigation and its sister form of relief, supplemental environmental projects, which, unlike mitigation, are voluntary projects and not required by law or legal doctrine. In many ways, the memo formalized years of practice by EPA and the Department of Justice ("DOJ") of seeking mitigation in settlements and litigation. In 2016, the complaint in the high-profile Volkswagen "dieselgate" requested mitigation by name in its prayer for relief.[12]

Then came the Trump Administration, and with it, a plummet in environmental enforcement.[13] The number of inspections, matters referred, and relief recovered dropped.[14] Efforts towards environmental justice that emerged

efforts in natural resources cases regarding the substitution of harmed resources. *See generally* Justin R. Pidot, *Compensatory Mitigation and Public Lands*, 61 B.C. L. REV. 1045 (2020). Mitigation in the context of climate change refers to "reducing and stabilizing the levels of heat-trapping greenhouse gases in the atmosphere." *Responding to Climate Change*, NASA, https://perma.cc/H8A4-X48G; *see, e.g.*, Kristen H. Engel, *Responses to Global Warming: The Law, Economics, and Science of Climate Change,* 155 U. PA. L. REV. 1563, 1572–78 (2007) (discussing various approaches to address climate change mitigation with a focus on nuisance suits).

11. Memorandum from EPA, Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (Nov. 14, 2012) [hereinafter 2012 EPA Mitigation Memo], https://perma.cc/392U-BFRK.

12. Complaint at 27, *In re* Volkswagen AG, No. 2:16-cv-10006 (E.D. Mich. Jan. 4, 2016).

13. During the Trump Administration, criminal referrals to DOJ plummeted to their lowest level in decades. Criminal Enforcement Collapse at EPA, PUB. EMPS. FOR ENV'T RESP. (Jan. 15, 2019), https://perma.cc/9SRL-WLHT. In the first nine months of the Trump Administration, "the EPA initiated roughly one-third fewer civil enforcement cases than the EPA had initiated over the same period under President Obama and a quarter fewer than under President George W. Bush." Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 406 (2019); *see also* Eric Lipton & Danielle Ivory, *Under Trump, EPA Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), https://perma.cc/DYT7-V77Y.

14. Metrics of enforcement success evidence these declines. Civil penalties collected and the value of injunctive relief secured were orders of magnitude lower than previous administrations. *See* ERIC SCHAEFFER & TOM PELTON, ENV'T INTEGRITY PROJECT, PAYING LESS TO POLLUTE 1 (2018), https://perma.cc/G795-3FBG (comparing penalties for pollution violations in civil cases by presidential administration); Juliet Eilperin & Brady Dennis, *Under Trump, EPA Inspections Fall to a 10-Year Low*, WASH. POST (Feb. 8, 2019), https://perma.cc/665C-L5BL (analyzing data released by EPA); Lipton & Ivory, *supra* note 13 (observing that the Trump EPA pursued civil penalties that were "39 percent of what the Obama Administration sought and about 70 percent of what the Bush Administration sought over the same period"); Anna M. Phillips, *Polluters Are Paying Much Lower Fines*

under the Obama Administration evaporated.[15] Trump's appointees instead authored a stream of policy memoranda curtailing tools for redressing environmental harm, including mitigation.[16] Indeed, the Trump Administration wrought significant damage to the fortitude and integrity of the administrative state.[17] For an enforcement system already overdue to evolve to foster justice for overburdened communities, this was not just a step, but a colossal leap, backwards.

During the pendency of the Trump Administration, three Supreme Court cases also reinvigorated the debate over the bounds of equitable remedies. These cases involved the Securities and Exchange Commission ("SEC") and Federal Trade Commission ("FTC") but address the scope and nature of equitable remedies that an agency may seek for violations of federal law.

This Article urges broad and immediate use of mitigation against this backdrop. Mitigation should be a component of the newly mandated environmental justice enforcement strategy, and, indeed it is acknowledged as a tool to address environmental justice concerns in the Comprehensive Environmental Justice Enforcement Strategy (the EJ Enforcement Strategy) that the DOJ released just before this Article proceeded to print.[18] To that end, this Article

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Under Trump, EPA Says, L.A. TIMES (Feb. 8, 2019), https://perma.cc/2GDB-L35E ("Injunctive relief—the amount of money polluters commit to pay to correct problems and prevent them from reoccurring—fell from $20.6 billion in fiscal 2017 to $3.95 billion in fiscal 2018. That represents a 15-year low for the agency.").

15. *See* Brie D. Sherwin, *The Upside Down: A New Reality for Science at the EPA and Its Impact on Environmental Justice*, 27 N.Y.U. ENV'T L.J. 57, 89 (2019); Outka & Warner, *supra* note 13, at 395; *cf.* OFF. OF RSCH. & DEV., EPA, ENVIRONMENTAL JUSTICE RESEARCH ROADMAP (2016) (describing "the interface between environmental justice and science" and providing "the scientific basis to improve EPA's and other stakeholders' ability to take actions to mitigate and prevent health disparities from environmental conditions and pollution").

16. *See infra* Part I.B.

17. These effects touch every aspect of environmental law and policy and were driven by anti-science and deregulatory agendas. For scholarship tracing these attacks and examining the illegitimacy of the Trump Administration's deregulatory efforts, see, for example, Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13 (2018); Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719, 1769 (2019); Sara A. Colangelo, *Science Under Assault – Reflections on the War on the EPA: America's Endangered Environmental Protections*, 44 PUB. LAND & RES. L. REV. 185 (2021); Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENVTL. L. REV. 247 (2019).

18. The EJ Enforcement Strategy broadly supports this proposal, providing that "[i]n all enforcement actions taken under this Strategy, the full range of remedies considered must also include measures to reduce or offset the environmetal harms that have resulted from past and ongoing violations (often referred to as 'mitigation')." EJ Enforcement Strategy Memo, *supra* note 9, at 5. Of course, *ex post* strategies alone will not be sufficient. *See* Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for* Ex Ante *Title VI Regulation and Enforcement*, 41 N.Y.U. REV. L. & SOC. CHANGE 45 (2017).

provides a comprehensive explanation of why the government can seek and a district court can order mitigation under its inherent equitable authority. I use the CAA and CWA as exemplars for two reasons. They are the most frequently used statutes in federal civil environmental enforcement and neither act provides explicitly for a mitigation remedy.[19] Congress granted district courts the jurisdiction to "restrain" violations and to "require compliance" under both acts and to "award any other appropriate relief" under the CAA.[20] Construing these phrases to invoke a court's inherent authority to award restorative equitable remedies is rooted in longstanding legal doctrine and improves enforcers' ability to redress violations that threaten public health and welfare.[21]

The Article is structured in three Parts. Part I offers a set of primers on environmental enforcement, mitigation, and equitable principles relevant to the analysis of mitigation as equitable relief. Part II presents a comprehensive argument for why courts can award mitigation as an equitable remedy in appropriate environmental enforcement matters.[22] Part II also grapples with the limitations imposed by strands of Supreme Court jurisprudence on equitable remedies and with the warnings raised by the Court's recent decisions in different government enforcement contexts. Part III asks why we *should*, and how we *can* aim to forge complete justice in environmental enforcement. Part III emphasizes the critical role affected communities should play in the process of developing mitigation actions. This final Part also highlights how mitigation can serve elements of corrective and restorative justice for disproportionately burdened communities.

19. Cruden & Gelber, *supra* note 6, at 17.

20. At the time Congress wrote and amended the Acts, the background law included Supreme Court cases that found such language to invoke broad equitable authority. *See infra* Part II.A.1. Congress is presumed to know the background principles of law relevant to the legislation it enacts. *See, e.g.*, Bristol-Myers Squibb Co. v. Royce Lab'ys, Inc., 69 F.3d 1130, 1136 (Fed. Cir. 1995).

21. *See infra* Part II.A.

22. There is a gap in full-length scholarly literature focusing on the legal basis for ordering mitigation as a form of equitable relief in environmental enforcement. Of note, Professor Seema Kakade addressed both SEPs and mitigation actions in her recent article *Remedial Payments in Agency Enforcement*, 44 HARV. ENVTL. L. REV. 117 (2020). And others have addressed mitigation's capacity for restorative justice. *See* Michael L. Rustad et al., *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000-2011*, 65 OKLA. L. REV. 427, 463–79 (2013). Additionally, some short-form articles surfaced following the 2012 EPA Mitigation Memo. *See, e.g.*, David Markell, *EPA Enforcement: A Heightened Emphasis on Mitigation Relief*, 45 TRENDS 13 (2014).

I. Primers: Environmental Enforcement, Mitigation, and Relevant Principles of Equity

Evaluating the availability and utility of mitigation under environmental statutes that do not specifically authorize remedial relief requires exploring the environmental enforcement process, the attributes and limitations of mitigation, and the basics of equity doctrine. Accordingly, this section offers a set of relevant primers. It provides brief introductions to environmental enforcement, mitigation, and equity principles to inform the analysis of mitigation as equitable relief in Part II.

A. Environmental Enforcement

1. The Structures and Purposes of the U.S. Environmental Enforcement System

The United States' environmental enforcement system is extremely complex. The analysis in Part II concerns a single strand: civil judicial environmental enforcement by the federal government.[23] But the broader system involves multiple enforcers, overlaps with state and tribal authority, intersects with common law claims, encompasses a multitude of statutes, and is comprised of criminal and civil liability. These components aim at three overarching goals to protect public health and natural resources: deterrence of violations of environmental laws and norms; punishment; and prevention of economic enrichment from those violations.[24]

The structures and players in enforcement are further varied in identity, authority, and priorities. Resident and local groups, tribes, state environmental and natural resources agencies, and state attorneys general are all critical participants.[25] These entities bring most of the environmental enforcement actions.[26]

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23. Still, most components of the analysis herein apply to multiple or all enforcers.

24. This is a mere summary of the goals of enforcement. These goals, associated regulatory design choices, and attendant federalism concerns are examined in great detail in other resources. *See, e.g.*, David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. Rev. 1 (2014); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547 (2007); Joel A. Mintz, Enforcement at the EPA: High Stakes and Hard Choices (2012); Max Minzner, *Why Agencies Punish*, 53 Wm. & Mary L. Rev. 853 (2012).

25. *See generally* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339 (1990) (describing the authority, conditions, and processes of citizen enforcement); Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 Env't L. 413, 427 (2008) (describing the delegated authority states possess from EPA over permitting and enforcement).

26. *See, e.g.*, Karl R. Heisler, *Understanding Environmental Enforcement*, *in* Environmental Law Enforcement and Compliance *4 (2011) ("Most environmental enforcement efforts are led by state and local governments."); David L. Markell, *The Role of Deterrence-*

Their respective authority to enforce state and/or federal environmental laws differs based on statutory language, principles of federalism, and judicial doctrines prescribing involvement, such as standing.[27] The aims of these enforcers are also diverse, and sometimes divergent. Even at the federal level, several agencies are involved in aspects of environmental enforcement, including the Departments of the Interior and Commerce, the Army Corps of Engineers, and the Coast Guard.[28] However, EPA is the primary enforcer of the nation's federal environmental laws, and is the agency involved in the analysis presented herein. The laws under its enforcement purview are many, involving air, water, toxics, waste, and community information and planning.[29]

Federal environmental statutes also contemplate multiple methods of enforcement—administrative, civil, and criminal.[30] And they authorize the executive branch to take different steps in response to violations.[31] Most of them authorize agencies to impose civil penalties and/or recover government enforcement costs and to issue various types of orders: emergency orders to stop threats to public health, compliance orders to address ongoing violations, and cleanup or corrective action orders.[32] As stated above, this article's analysis will employ two such statutes, the CAA and CWA, the specific provisions of which are discussed in Part II.

Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality, 24 HARV. ENVTL. L. REV. 1, 29 (2000). The scope of administrative actions tends to be less complex in terms of remedy and lower in terms of penalty than federal cases.

27. Many of these differences are explored throughout this Article, including some key statutory provisions which undergird, for example, the Supreme Court's opinion in *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), which denied a citizen suit seeking cleanup of petroleum contamination under the Resource Conservation and Recovery Act. *See infra* Part II.A.4. For background purposes, though, it suffices to note that many federal environmental statutes and some state equivalents permit a citizen to bring a claim for alleged violations of the law. *See, e.g.*, 42 U.S.C. § 7604 (CAA); 33 U.S.C. § 1365 (CWA); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act).

28. For example, under the CWA, the Army Corps of Engineers has authority over dredge and fill permits, *see* 33 U.S.C. § 1344, and the Coast Guard over prevention of pollution from ships, *see id.* § 1907. The Department of the Interior enforces the Endangered Species Act, 16 U.S.C. § 1538, and portions of the Marine Mammal Protection Act, *id.* § 3377.

29. For a current list of EPA regulatory areas by topic, see *Regulatory and Guidance Information by Topic*, EPA, https://perma.cc/Y2CZ-E544. The goals and regulatory strategies of each statute may differ among ecological media based on physical differences (i.e., the way that pollution behaves in air versus water) or in design (i.e., "command and control" versus retroactive liability).

30. *See* Cruden & Gelber, *supra* note 6, at 10.

31. *Id.*

32. *See id.*

2. The Federal Civil Environmental Enforcement Process

Many types of action or inaction can trigger the enforcement process under federal environmental statutes such as the CAA and the CWA. A company might violate its permit by discharging too much of a certain pollutant in a specific timeframe, or by discharging materials not covered by the facility's permit. A company might fail to report storing hazardous substances in large quantities onsite. These instances of potential violations are reported to an agency, such as EPA, in multiple ways. Local and state participation is often critical. Residents, first responders, state agencies, and local departments can all refer potential violations.[33] The enforcement process can also be triggered by self-reported violations under a statutory or regulatory mandate.[34] State and federal inspectors may also discover violations through inspections of a facility or review of a company's records.[35]

EPA and state agencies often coordinate on which group or groups will take the lead when enforcers pursue a matter beyond a Notice of Violation and an Administrative Order.[36] EPA or the agencies in conjunction analyze whether the matters involve complex injunctive relief and the likelihood of a substantial civil penalty. EPA commonly refers such complex and significant matters to the DOJ for civil litigation.[37] Attorneys at ENRD then conduct a robust analysis of the case, triaging for potential statute of limitations issues

33. *See* JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE 75–138 (2d ed. 1999).

34. *See, e.g.*, 40 C.F.R. § 64.3(a) (2021) (requiring monitoring to provide "reasonable assurance of compliance with emission limitations or standards"); *id.* § 70.6(a)(3) (requiring permits to contain record keeping and monitoring conditions).

35. *See* ANDERSON & HIRSCH, *supra* note 33, at 94. Of course, not every facility and permittee can be inspected. That is why deterrence is so critical. Instead, enforcement agencies play triage and inspect as many permittees as they can, and react to reported violations as they are able. Robert Glicksman and Yee Huang explain this gap between the number of permits issued by Maryland under their delegated authority pursuant to the CWA (tripled from 2000 to 2009) and the number of full-time inspectors (decreased by 25 percent) in GLICKSMAN & HUANG, *supra* note 1.

36. *See* Cruden & Gelber, *supra* note 6, at 12. For example, a particular matter may be discussed by a geographically linked group of local, state, and federal members called a Law Enforcement Coordinating Committee.

37. Accompanying the "referral" is a "litigation report" containing, *inter alia*, the "proposed defendant, the violation and basis for the claim, the evidence supporting the claim, any anticipated defenses, and the relief sought by the agency," along with the violator's "enforcement history" with state and federal entities. *See id.* Matters that are smaller in scope both in terms of injunctive relief, the size of the violator, and the amount of civil penalties, are usually suitable for administrative resolution. This Article does not address whether mitigation could be ordered in the administrative context but suggests in Part III.C that any potential legislative amendment should explicitly incorporate such a grant of authority.

and/or criminal claims, and evaluating the sufficiency of the evidence, proposed relief, and other legal issues.[38]

Throughout these developmental phases, technical staff and attorneys within EPA and the DOJ must consider whether the case implicates environmental justice issues.[39] Pursuant to President Clinton's 1994 Executive Order, every federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on [under-represented racial groups] and low-income populations."[40] If environmental justice concerns arise, steps are taken to incorporate those concerns into strategic decision-making, such as prioritizing the timing of enforcement resources and/or pursuing certain forms of relief.[41] The DOJ and EPA (and any other plaintiffs) coordinate to determine what relief they will seek.

Typically, negotiations commence and ultimately lead to a settlement embodied in a consent decree.[42] The vast majority of environmental enforcement cases settle rather than proceed to litigation.[43] Still, settlement strategy and terms are informed by what a party expects a court *could* order.[44] In an environmental enforcement settlement scenario, a consent decree is "lodged" simultaneously with a civil judicial complaint to provide a detailed description of the facts and claims resolved by the agreement. Regulations mandate a period of

38. *See id.*

39. *See id.* at 12–13. The May 2022 EJ Enforcement Strategy provides a broad foundation for implementing new protocols for prioritizing "cases that will reduce public health and environmental harms to overburdened" communities and "for assessing environmental justice impacts during investigations." EJ Enforcement Strategy Memo, *supra* note 9, at 2.

40. Exec. Order No. 12,898, § 1-101, 3 C.F.R. 859, 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321.

41. For example, multiple municipal sewer system upgrade cases under the CWA structured the deployment of certain components of injunctive relief to address neighborhoods with environmental justice concerns first. *See, e.g.*, Second Amended Consent Decree at 26–28, United States v. Ne. Ohio Reg'l Sewer Dist., No. 1:10-cv-02895 (N.D. Ohio Mar. 16, 2021); United States v. Mun. Sewer Dist. St. Louis (on file with author).

42. The DOJ attorneys then pen an "Executive Order letter" to the proposed defendant. The letter, required by Executive Order, is DOJ's notice to the defendant of the alleged violations and a formal salvo to negotiate. *See* Exec. Order No. 12,988, 3 C.F.R. 180 (1997). In rare instances, conditions necessitate that the government pursue relief immediately to stop ongoing violations through a temporary restraining order or preliminary injunction.

43. *See* Kakade, *supra* note 22, at 127 n.49 (collecting sources). Litigation of complex environmental enforcement cases is a highly time and resource intensive process, with uncertain outcomes. Further, liability for violations of environmental statutes is typically strict, without regard to intent to violate.

44. Accordingly, this Article details the authority for *courts* to order mitigation. Of course, settlements can contain broader relief or more than what a party might be entitled to under the law. *See, e.g.*, Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986).

public comment, and the settlement is described and published in the Federal Register.[45]

Finally, the DOJ files a motion to enter the decree. The motion must address negative comments or criticisms of the decree. Sometimes judges hold a hearing on the motion, particularly if comments objecting to the decree raise issues as to whether the agreement meets the standard for entry. The motion must explain why the agreement meets the standard of review for a consent decree; that is, whether the settlement is fair, reasonable, adequate, and consistent with the governing statute.[46] The process ends with entry of the decree, at which point it becomes a judicially enforceable agreement.[47]

B. Mitigation

Mitigation in the environmental enforcement context is restorative injunctive relief: it offsets or remedies harm from past violations of environmental law.[48] As summarized in the 2012 EPA Mitigation Memo, the purpose of mitigation is to ensure the government "not only correct[s] and deter[s] illegal conduct but maximize[s] the redress of its consequences."[49] Mitigation is distinct from prospective relief to bring a violator into compliance with the law. Instead, mitigation redresses past or present harm to human health and/or the environment typically from excess emissions or discharges. In environmental cases, private citizens, states, and the federal government seek this type of relief. Although statutory provisions granting enforcement authority differ among the three types of enforcers, all have succeeded in securing mitigation under multi-

45. 28 C.F.R. § 50.7(a), (b) (2021).

46. *See, e.g.*, United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997). Most motions to enter intone that judges should not substitute their own estimation of what the correct settlement should be. *See, e.g.*, United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), *aff'd*, 749 F.2d 968 (2d Cir. 1984).

47. *See generally* Pedreira v. Sunrise Children's Servs., Inc., 802 F.3d 865, 871 (6th Cir. 2015) ("A consent decree is essentially a settlement agreement subject to continued judicial policing. Consent decrees typically have two key attributes that make them different from private settlements. First, when a court enters a consent decree, it retains jurisdiction to enforce the decree. In contrast, the parties to a private settlement typically must bring another suit (for breach of contract) to enforce it. Second, a consent decree puts the power and prestige of the court behind the compromise struck by the parties.").

48. *See* Cruden & Gelber, *supra* note 6, at 14 ("When a defendant's cessation of violations and future compliance with the law will not fully redress the harm its violations have caused, ENRD's complaints have sought injunctive relief designed to mitigate the injuries caused by the polluting event."). Enforcement matters appropriate for mitigation are those in which there is harm from the alleged violations. *See* EPA 2012 Mitigation Memo, *supra* note 11, at 3–5. The 2012 EPA Mitigation Memo contrasts discharges of excess pollution in violation of a permit (which result in environmental harm) with recordkeeping violations (which do not) by way of example.

49. 2012 EPA Mitigation Memo, *supra* note 11, at 1.

ple statutes.[50] Of note, however, the Supreme Court has held that citizens may not seek equitable remedial relief under the Resource Conservation and Recovery Act ("RCRA")[51] for reasons inapplicable to the CAA and CWA, as discussed in Part II.A.4.[52]

Mitigation actions thus redress pollution where the harm occurs—often in communities of color and low income.[53] Mitigation actions might include establishing discharge limitations lower than those otherwise legally required to remedy a violator's prior excess discharges, cleaning up environmental media polluted by unauthorized discharges or emissions, or otherwise "addressing the impacts on human health, wildlife or the environment."[54] For example, a 2011 CAA settlement with the Tennessee Valley Authority ("TVA") "included $350 million of tailored mitigation actions . . . to provide redress for excess emissions from eleven coal-fired plants."[55] Mitigation actions in these types of settlements can be crucial for disproportionately burdened communities. Indeed, one of the plants covered in the TVA settlement is located on a tract of land in Memphis, Tennessee, surrounded by neighborhoods with 97–99 percent non-white racial identities, and high indicia of environmental burdens.[56]

Mitigation is often discussed concurrently with supplemental environmental projects ("SEPs") because they both offer concrete environmental benefits following violations of law.[57] Unlike mitigation, SEPs are the subject of enor-

50. In the federal government enforcement context and co-enforcement with state governments, see, for example, United States v. Deaton, 332 F.3d 698, 714 (4th Cir. 2003); United States v. Banks, 115 F.3d 916, 918 (11th Cir. 1997); United States v. Holtzman, 762 F.2d 720, 724–25 (9th Cir. 1985); United States v. Ameren Mo., 421 F. Supp. 3d 729, 820 (E.D. Mo. 2019); United States v. Cinergy Corp. (*Cinergy I*), 582 F. Supp. 2d 1055, 1060–61 (S.D. Ind. 2008); *accord* United States v. Cinergy Corp. (*Cinergy II*), 618 F. Supp. 2d 942 (S.D. Ind. 2009), *clarified by* 2009 WL 6327415, *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010). Citizen groups have likewise had success in litigation. *See, e.g.*, U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Me., LLC, 339 F.3d 23, 31 (1st Cir. 2003).

51. 42 U.S.C. §§ 6901–6992k.

52. Meghrig v. KFC W., Inc., 516 U.S. 479, 480 (1996). The narrower statutory provisions for citizen suit enforcement in RCRA played a key part in the denial of the cleanup order sought in *Meghrig*. See *infra* Part II.A.4 for analysis.

53. For a discussion of persistent environmental inequities, see *infra* Part III.A.1.

54. 2012 EPA Mitigation Memo, *supra* note 11, at 3.

55. *See* 2012 EPA Mitigation Memo, *supra* note 11, at 6 (describing Consent Agreement and Final Order, *In re* Tenn. Valley Auth., No. CAA-4-2010-1528(b)). The TVA had failed to obtain the requisite preconstruction permits and failed to install the necessary pollution control technology at its plants. *Id.*

56. U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 32820 – Memphis, TN-MS-AR, Tract Codes 222.10, 222.2, 223.1, https://perma.cc/6UHD-7FU9. EJScreen indicia of environmental burdens evidence very high levels of risk regarding lead paint, proximity to permitted facilities, and more. All EJScreen and Census data prints on file with author.

57. In reviewing years of these settlements, I encountered nomenclature inconsistencies, especially in earlier years of settlements. For the purposes of this Article, only actions clearly

mous scholarly attention.[58] And there are important legal distinctions between the two. SEPs are projects that a defendant is *not* required to undertake by law, and thus are actions voluntarily agreed to in settlements only. According to EPA, "[t]he primary purpose of [its] SEP Policy is to encourage and obtain environmental and public health . . . benefits that may not otherwise have occurred in the settlement of an enforcement action."[59] The nexus between the violation of law and the project being performed or financed by the defendant need not be as exacting for SEPs as compared to mitigation. That is, the project must reduce "the likelihood that similar violations will occur" and reduce "the adverse impact to public health," rather than be tailored precisely to redress the harm.[60] Unlike mitigation, project expenditures may offset a portion of a violator's civil penalty.[61]

Mitigation and SEPs are not without their limitations. Like any enforcement tool, there are matters in which their pursuit may not be appropriate. If a violation did not result in harm—a recordkeeping violation, for instance—then

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labeled as mitigation, and fitting the legal parameters of mitigation, are discussed. Further complicating this distinction is that the same project might be considered mitigation in one case based on a certain set of facts, and a SEP in another. EPA provides an illustration of this complexity: "A judge might order a defendant to provide diesel school bus retrofits as a mitigation action in a case involving excess emissions of the pollutants that would be reduced by the retrofits. In contrast, in a case involving failure to perform required testing for diesel-related pollutants in which EPA has no evidence of excess emissions that would require mitigation, the same retrofit project might be more appropriate . . . as a SEP." 2012 EPA Mitigation Memo, *supra* note 11, at 4.

58. *See, e.g.*, Kakade, *supra* note 22; Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 Tex. L. Rev. 1405 (2020); Patrice L. Simms, *supra* note 1, at 10,513–17; Steven Bonorris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 Hastings W.-Nw J. Env't L. & Pol'y 185 (2005). SEPs are often critiqued through separation of powers and executive overreach lenses. *See, e.g.*, Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., ENRD, to ENRD Deputy Assistant Attorneys General and Section Chiefs on Equitable Mitigation in Civil Environmental Enforcement Cases (Jan. 12, 2021), https://perma.cc/4845-624Z; William Yeatman, Competitive Enter. Inst., Ending the EPA's Billion-Dollar Green Energy Rip-Off 4–5 (Aug. 8, 2017), https://perma.cc/7AZN-5E7H.

59. EPA, Supplemental Environmental Projects Policy 2015 Update 1 (2015) [hereinafter EPA 2015 SEP Policy], https://perma.cc/6VC5-WFMFR2TJ-U5FW.

60. *Id.* at 8.

61. Since their introduction in federal enforcement in the 1980s, SEPs have evolved in response to legal and policy critiques, most significantly concerning the Miscellaneous Receipts Act ("MRA") and separation of powers arguments. The MRA mandates that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury." 31 U.S.C. § 3302(b). SEPs must meet a complex rubric of requirements to avoid running afoul of the MRA. Additionally, they must possess a nexus to the violations at issue such that the SEP reduces the likelihood of future violations and the adverse public health and/or environmental consequences of the violations. *See* EPA 2015 SEP Policy, *supra* note 59, at 7–11.

mitigation would not be appropriate.[62] Yet, despite varying levels of enthusiasm between administrations, each has pursued mitigation in environmental enforcement settlements and litigation on behalf of the United States.[63] For example, the United States sought mitigation in power plant agreements spanning multiple administrations and addressing hundreds of thousands of tons of illegally emitted sulfur dioxide, nitrogen oxide, and mercury.[64]

The Trump Administration, however, adopted a much narrower approach. Political appointees limited and ultimately prohibited SEPs in government agreements through a series of memoranda (now withdrawn as of February 4, 2021).[65] The administration took aim at mitigation, as well. For example, Trump's ENRD objected to a separate settlement between the Sierra Club and DTE Energy (apart from the United States' own consent decree in the case with Sierra Club and DTE) that contained millions of dollars' worth of mitigation benefiting environmentally burdened communities in Southeast Michigan.[66] Trump's ENRD raised multiple legal and policy arguments against the agreement, including that the Sierra Club must seek court approval of their settlement as a consent decree; could not seek further relief than the United States in its enforcement discretion determined to forgo; lacked standing to seek independent relief; and that the "open ended 'community projects' [mitigation] sought by Sierra Club violate the Act and sound environmental policy."[67] The U.S. District Court for the Eastern District of Michigan ruled that the separate agreement between Sierra Club and DTE was a private settlement and not a consent decree requiring court approval.[68] It rejected the United States' contentions regarding the projects' alleged legal and policy flaws and

62. *See* 2012 EPA Mitigation Memo, *supra* note 11, at 4–5. There might also be individual case considerations and circumstances that militate against seeking mitigation. *See id.* at 6–9 (detailing factors that each case team should consider when determining whether to seek mitigation).

63. This Article provides multiple examples of mitigation used in settlements under the Obama Administration; however, the DOJ and EPA pursued mitigation in many settlements in the George W. Bush Administration, as well. *See* Plaintiffs' Opposition to Cinergy's Motion for Partial Summary Judgment at 20, *Cinergy I*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) (No. IP99-1693 C-M/S), 2008 WL 5372166 ("Every [New Source Review] power plant settlement reached with the United States to date has included a mitigation component.").

64. *See, e.g.*, Rustad et al., *supra* note 22.

65. *See* Memorandum from Jean E. Williams, Deputy Assistant Att'y Gen., to ENRD Section Chiefs and Deputy Section Chiefs on Withdrawal of Memoranda and Policy Documents (Feb. 4, 2021), https://perma.cc/EC9J-96W4.

66. Brief for Sierra Club, United States v. DTE Energy, No. 2:10-cv-13101 (E.D. Mich. Aug. 6, 2020), ECF No. 289.

67. Brief for the United States, United States v. DTE Energy, No. 2:10-cv-13101 (E.D. Mich July 8, 2020), ECF No. 279.

68. Order, United States v. DTE Energy, No. 2:10-cv-13101 (E.D Mich. Dec. 3, 2020), ECF No. 293.

instead emphasized that the projects' benefits were "fully consistent with the goals of the CAA."[69]

In January 2021, out-going ENRD Assistant Attorney General Jeffrey Bossert Clark targeted mitigation again in a memorandum. He prescribed "auxiliary precautions" that career attorneys should take before pursuing mitigation and imposed a new set of "touchstones" that they must address in briefing memos if they wished to pursue mitigation.[70] After four years of backsliding on environmental justice and reduced environmental enforcement, the demand for complete justice is rendered all the more imperative.

C. Relevant Principles of Equity

The principles of equity and its historical roots are likely known to most readers. A few foundational aspects and maxims of equity are summarized here to provide an analytical grounding for the argument that a court may award mitigation as a form of equitable relief. Article III of the U.S. Constitution grants federal judicial power to "all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States."[71] As summarized by the Federal Judicial Center:

> Equity was a centuries-old system of English jurisprudence in which judges based decisions on general principles of fairness in situations where rigid application of common-law rules would have brought about injustice. Judges exercised equitable jurisdiction based on a distinct set of procedures and remedies . . . .[72]

In their earliest years, some states "followed the English tradition of maintaining separate courts for law and equity" and others provided courts with both types of jurisdiction.[73]

In the Process Act of 1792, Congress directed that the Supreme Court should supply rules for equity procedure and that cases should be governed "according to the principles, rules and usages which belong to courts of equity."[74] Courts were to look to the English Court of Chancery for such principles and rules.[75] In the mid-nineteenth century, some states began dissolving

69. *Id.*

70. Memorandum from Jeffrey Bossert Clark, *supra* note 58, at 2–6. This memorandum was also withdrawn on February 4, 2021. *See supra* note 65.

71. U.S. CONST. art. III, § 2, cl. 1.

72. *Jurisdiction: Equity*, FED. JUD. CTR., https://perma.cc/VQ76-MSWT; *see also* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.2, at 58–63 (3d ed. 2018).

73. *Jurisdiction: Equity*, *supra* note 72.

74. *Id.* (quoting Process Act of 1792, ch. 36, 1 Stat. 275, 276).

75. *Id.*; *see also* DOBBS & ROBERTS, *supra* note 72, §§ 2.2–2.3, at 58–63.

the formal divide between courts of equity jurisdiction and common law.[76] The 1938 Federal Rules of Civil Procedure codified this evolution. The rules formally combined both equity and law into a single type of case: a civil action.[77]

Today, both federal and state courts still intone several foundational principles when analyzing requests for equitable relief. A primary maxim is that equity will be invoked when there is no adequate remedy at law.[78] Other principles focus on the preservation of the *status quo* or return to the *status quo ante*—the condition prior to the illicit conduct.[79] And others emphasize that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong."[80]

What, then, is an equitable remedy? In his anthology of the evolution of remedies as a legal field, Professor Douglas Laycock describes the modern vision of a remedy as "what the court will do to correct or prevent the violation of legal rights that gives rise to liability."[81] Thus, when a court sits in equity, "equitable remedies usually contain a coercive or injunctive element."[82] They force the defendant to either do something or to stop doing something.

In acknowledging the variety of meanings behind "equity" and "equitable," scholar Dan B. Dobbs remarks on its ties to "fairness" and "morality," the "idea that equity [can] mean[ ] moral rectitude . . . coupled with . . . flexibility."[83] The Supreme Court confirms both the flexibility of equity and its historical bounds.[84] In *Hecht Co. v. Bowles*,[85] the Court observed that "[t]he essence of

76. *Jurisdiction: Equity*, *supra* note 72.

77. *See* FED. R. CIV. P. 2. Delaware, Mississippi, New Jersey, South Carolina, and Tennessee maintain courts of equity. For a detailed explanation of the historical debate over adoption of this rule, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

78. *See, e.g.*, Lehigh Valley R.R. Co. v. Bd. of Pub. Util. Comm'rs, 278 U.S. 24, 40 (1928); Bohler v. Callaway, 267 U.S. 479, 487 (1925) (equitable relief may be available if remedy by law is doubtful); *see also* Terrace v. Thompson, 263 U.S. 197, 214 (1923) ("[A] suit in equity does not lie where there is a plain adequate and complete remedy at law . . . . But the legal remedy must be as complete, practical and efficient as that which equity could afford.").

79. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1943 (2020) (discussing disgorgement and restitution as remedies which "restor[e] the status quo," thus situating the remedy squarely within the heartland of equity" (quoting Tull v. United States, 481 U.S. 412 (1987))); Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) ("[R]estoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant . . . is within the recognized power and within the highest tradition of a court of equity.").

80. *Liu*, 140 S. Ct. at 1937 (quoting Root v. Ry. Co., 105 U.S. 189, 207 (1882)).

81. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164 (2008).

82. DOBBS & ROBERTS, *supra* note 75, § 2.1(3), at 54.

83. *Id.*; *accord* M. Devon Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 942–43 (2019) (detailing the flexibility and fact-specificity of early equitable rulings from the Court of Chancery in the preliminary injunction context).

84. *See generally* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015) (cataloging and analyzing recent Supreme Court cases delineating "distinctive powers and limitations" of equitable remedies); Robert L. Munger, *A Glance at Equity*, 25 YALE L.J.

equity jurisdiction has been the power of the [adjudicator] to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."[86] However, as articulated by the Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*,[87] such "flexibility is confined within the broad boundaries of traditional equitable relief."[88]

II. Mitigation as Equitable Relief in Environmental Enforcement

Courts possess the equitable authority to order mitigation in a CAA or CWA enforcement matter once a violation that caused harm is established. The analyses in *Porter v. Warner Holding Co.*[89] and *Mitchell v. Robert De Mario Jewelry, Inc.*,[90] non-environmental enforcement cases, shed light on the CAA and CWA because they interpret similar language. They confirm that the language of the CAA and CWA invokes the full equitable discretion of district courts with their authorization to restrain violations, require compliance, and award any other appropriate relief.[91] Further, a district court's inherent discretion, at its height when the public interest is involved, is curtailed neither by a "clear . . . command" nor an "inescapable inference" from Congress in the Acts.[92] Awarding mitigation also furthers the purposes of both Acts.[93]

Equitable remedies of course have their limits. There is Supreme Court jurisprudence delineating those limits in environmental matters such as *Meghrig v. KFC Western, Inc.*,[94] and non-environmental government enforcement cases such as *AMG Capital Management, LLC v. Federal Trade Commission*.[95] Notably, the aspects of the statutes under which the Court determined Congress intended to preclude certain forms of equitable relief are not present in the CAA and CWA. Nonetheless, there are lessons to import from recent SEC and FTC enforcement cases for any environmental enforcer pursuing mitigation.

42, 56 (1915) ("Though the origin of equity and its development represent from the beginning to end the spirit of complete justice in a people" its popularity vacillated greatly with the legislature and courts.").

85. 321 U.S. 321 (1944).
86. *Id.* at 329; *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) ("Flexibility is the hallmark of equity jurisdiction . . . .").
87. 527 U.S. 308 (1999).
88. *Id.* at 322.
89. 328 U.S. 395 (1946).
90. 361 U.S. 288 (1960).
91. *See infra* Part II.A.
92. *Porter*, 328 U.S. at 398.
93. *See infra* Part II.A.3.
94. *See infra* Part II.A.4; Meghrig v. KFC W., Inc., 516 U.S. 479 (1996).
95. 141 S. Ct. 1341 (2021).

A. The Clean Air Act and Clean Water Act Jurisdictional Language Invoke the Full Scope of District Courts' Equitable Authority

The CAA stationary source provisions grant district courts "jurisdiction to restrain [a] violation [of the CAA], to require compliance, to assess [a] civil penalty, to collect any fees owed the United States . . . and award any other appropriate relief."[96] Under the CWA, the United States may seek "appropriate relief" and district courts are empowered to "restrain such violation and to require compliance."[97] As the Ninth Circuit in *United States v. Holtzman*[98] explained, "most cases interpreting statutes with similar jurisdictional grants have interpreted *the power to restrain as including the power to enjoin*."[99] Under the background law described below, these grants of jurisdiction to district courts invoke the full scope of their inherent equitable authority to order restorative injunctive relief.

1. The Porter *and* Mitchell *Paradigms*

The Supreme Court's decisions in *Porter v. Warner Holding Co.* and *Mitchell v. Robert De Mario Jewelry, Inc.* supply the framework for this analysis.[100] In *Porter*, the Court examined whether section 205(a) of the Emergency Price Control Act of 1942 authorized a district court to order restitution of rents collected in excess of statutory maximums.[101] While the statute did not expressly list restitution, it authorized several types of remedies, including ones in equity: the Administrator of the Office of Price Administration is authorized to seek a "permanent or temporary injunction, restraining order, or other order."[102]

In *Porter*, the Court held that when Congress invokes the equity jurisdiction of courts in a statute, "all the inherent equitable powers of the [courts] are available."[103] Only by a "clear and valid legislative command" or "necessary and

96. 42 U.S.C. § 7413(b)(3). The CAA regulates mobile source pollution in a separate title. *See infra* Part II.A.2.

97. 33 U.S.C. § 1319(b).

98. 762 F.2d 720 (9th Cir. 1985).

99. *Id.* at 724 (emphasis added) (citing United States v. U.S. Gypsum Co., 340 U.S. 76, 88–89 (1950) (interpreting the Sherman Act, which authorizes courts to "prevent and restrain" violations, as affording power to enjoin); United States v. Vitasafe Corp., 345 F.2d 864, 870 (3d Cir. 1965), *cert. denied*, 382 U.S. 918 (1965) (same with the Food, Drug & Cosmetic Act, which affords power to "restrain" violations).

100. *Porter* and *Mitchell* continue to be cited when courts review cases concerning authority to issue equitable remedies. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1943–44, 47 (2020); *Cinergy I*, 582 F. Supp. 2d 1055, 1058–60 (2008); *accord AMG Cap. Mgmt.*, 141 S. Ct. at 1349–50.

101. Porter v. Warner Holding Co., 328 U.S. 395, 396 (1946).

102. *Id.* at 397.

103. *Id.* at 398.

inescapable inference" does Congress restrict the "complete exercise of that jurisdiction."[104] Restitution was thus authorized under the Emergency Price Control Act because section 205(a) invoked a court's equity jurisdiction and nothing in the statute precluded the award of such equitable relief.[105] The Court added that because the public interest was involved, the courts' "equitable powers assume[d] an even broader and more flexible character than when only a private controversy is at stake."[106] Only then would the courts have power to do what is necessary and fair under the circumstances to "secur[e] complete justice."[107]

Separate from that basis for its holding, the Court also relied on the broad language of section 205(a) referring to "any . . . other order."[108] It construed this language to refer to a remedy other than an injunction or restraining order.[109] According to the Court, the restitution order requested by the government could be an "other order" either because it was "an equitable adjunct to the injunction decree," or because it was "appropriate and necessary to enforce compliance with the Act" and "to give effect to its purposes."[110] The Court also reasoned that a restitution order could help assure future compliance by eliminating "one's illegal gains."[111] In addition, the Court emphasized that restitution, as a type of compensatory redress, is "within the highest tradition of a court of equity."[112]

As evidenced by the Court's holding in *Mitchell*, however, such broad statutory language is not required to invoke equitable authority. This time, the Court interpreted language empowering district courts to "restrain violations."[113] In *Mitchell*, the Court held that the Fair Labor Standards Act ("FLSA") authorized courts to award reimbursement of lost wages caused by discharges in violation of the Act.[114] The FLSA provided "jurisdiction . . . for cause shown, to restrain violations" of the Act.[115] The Court again rejected the argument that Congress must expressly or impliedly grant equitable authority.[116] It confirmed that "[u]nless otherwise provided by statute, all the inherent

104. *Id.*
105. *See id.* at 397–98.
106. *Id.* at 398.
107. *Id.*
108. *Id.* at 397. Courts often characterize this as another argument relied on in part for the Supreme Court's holding in *Porter*. *See* Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291 (1960) (citing *Porter*, 328 U.S. at 397–98); *Cinergy I*, 582 F. Supp. 2d 1055, 1058 (2008) (citing *Porter*, 328 U.S. at 399).
109. *See Porter*, 328 U.S. at 399.
110. *Id.* at 399–400.
111. *Id.* at 400.
112. *Id.* at 402.
113. *Mitchell*, 361 U.S. at 296.
114. *Id.*
115. *Id.* at 289 (citing 29 U.S.C. § 217 (1938)).
116. *See id.* at 291.

equitable powers for the District Court are available for the proper and complete exercise of that jurisdiction."[117] And the district court is authorized to "provide complete relief in the light of statutory purposes."[118]

These cases and their progeny establish that once a statute invokes a court's general equity jurisdiction, the court may order all equitable remedies unless the statutory language expressly or inescapably implies that the relief is precluded.[119] Despite new assertions to the contrary,[120] the Supreme Court has not overruled these cases, and continues to cite them with approval.[121] Their analytic framework stands and supports the award of mitigation in environmental enforcement cases.

2. The Plain Language of the Clean Air Act and the Clean Water Act

The language of the CAA and CWA invokes a district court's equitable authority without limitation. When a court sits in equity, it possesses authority to order "categories of relief that were typically available in equity."[122] That authority includes the ability to enjoin otherwise lawful conduct or to order an equitable adjunct to address past harm from statutory violations.[123] Neither Act contains limitations on this authority. Instead, the authorizing language is unmistakably broad and multiple courts confirm it to invoke such jurisdiction.[124]

Section 13(b) of the CAA invokes a district court's inherent equitable authority with three phrases.[125] An order for mitigation is appropriate under the language authorizing courts to "restrain" a "violation," "require compliance," or order "any other appropriate relief."[126] The phrase "award any other appropriate

117. *Id.*

118. *Id.* at 292.

119. *See also* United States v. Rx Depot, 438 F.3d 1052, 1055 (10th Cir. 2006) ("[U]nder *Porter* and *Mitchell*, when a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute absent a clear legislative command or necessary and inescapable inference restricting the remedies available.").

120. *See* Fed. Trade Comm'n v. Credit Bureau Ctr., 937 F.3d 764, 776 (7th Cir. 2019) (positing that *Meghrig* "displaces [*Porter* and *Mitchell*'s] rationale").

121. *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) (citing *Porter* for the proposition that a court sitting in equity "ha[s] discretion unless a statute clearly provides otherwise"); Miller v. French, 530 U.S. 327, 340–41 (2000).

122. Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993). *But see* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great West, 103 COLUM. L. REV. 1317 (2003) (critiquing the narrowness of the majority opinion construing equitable remedies available in *Mertens*).

123. *See, e.g.*, Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 961 (10th Cir. 2002).

124. *See supra* note 52.

125. *Cinergy I*, 582 F. Supp. 2d 1055, 1063 (S.D. Ind. 2008) ("[T]he language [of § 113(b)] authorizes a court to award the full range of equitable relief.").

126. 42 U.S.C. § 7413(b).

relief" is broad, and the word "any" suggests an expansive meaning.[127] Indeed, when the Supreme Court analyzed the words "any other final action" in a different section of the CAA, it emphasized that in the absence of contradictory legislative history, "any" meant exactly what it said, "namely, *any* other final action."[128]

In private litigation, violators propose this very reading of the CAA. In litigation with its insurance carrier over expenditures to remediate its unauthorized pollution, the power company Cinergy argued that the CAA grants courts authority to order mitigation of "past harm and even payment of money damages."[129] Cinergy asserted that "'[a]ny other appropriate relief' includes environmental projects that mitigate past harm."[130] Cinergy prevailed.

Cinergy is not the only power company to admit in a private lawsuit that the CAA contemplates restorative relief. Louisiana Generating also took this position when it agreed to pay for projects offsetting its excess emissions. The projects involved the installation of solar panels and electric vehicle-charging infrastructure, and the restoration of national parks.[131] Louisiana Generating argued that the projects were covered under insurance provisions for "remediation costs," defined as "reasonable expenses incurred to investigate, quantify, monitor, mitigate, abate, remove, dispose, treat, neutralize, or immobilize pollution conditions to the extent required by environmental law."[132] The Fifth Circuit rejected the insurance company's objections that, among other things, the CAA contemplated only prospective relief.[133]

An award of mitigation would also "require compliance" with the CAA and the CWA. As the Court found in *Porter*, "[f]uture compliance may be

127. *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218–19 (2008) ("We have previously noted that '[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" (alteration in original) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997))).

128. Harrison v. PPG Indus., Inc., 446 U.S. 578, 598 (1980) (interpreting the phrase "any other final action" in section 307(b)(1) of the Act). *But see* United States v. Ameren Mo., 9 F.4th 989, 1009 (8th Cir. 2021) (construing "any other appropriate relief" as a "catch-all" provision yet acknowledging that "[u]nder § 7413, a district court 'has the authority to order [a defendant] to take appropriate actions that remedy, mitigate and offset harms . . . caused by the [defendant's] proven violations of the CAA" (quoting *Cinergy I*, 582 F. Supp. 2d at 1060)). For reasons that merit exploring in further scholarship, the *Ameren* court erred in its interpretation of "any other appropriate relief," including but not limited to flaws based on plain language and on the Supreme Court's construction of parallel statutory language in *Porter*.

129. Cinergy Corp. v. St. Paul Surplus Lines Ins. Co., No. 32A01-0605-CV-218, 2007 WL 4349705, at *3 (Ind. Ct. App. Nov. 13, 2007).

130. *Id.*

131. Louisiana Generating Settlement, United States v. La. Generating LLC, No. 3:09-cv-00100 (M.D. La. Mar. 5, 2013), ECF No. 427.

132. Expert Report of Michael B. Gerrard at 17, La. Generating LLC v. Ill. Union Ins. Co., No. 3:10-cv-00516, 2015 WL 10552014 (M.D. La. Feb. 22, 2015).

133. La. Generating LLC v. Ill. Union Ins. Co., 719 F.3d 328, 333 (5th Cir. 2013).

more definitely assured if one is compelled to restore one's illegal gains."[134] In addition, statutory language authorizing courts to "restrain [a] violation" is held to invoke equitable authority in multiple environmental contexts and other statutes, such as the FLSA under *Mitchell*.[135] The Ninth Circuit affirmed this reading in a CAA motor vehicle enforcement case.[136] The CAA mobile source enforcement provision refers only to the authority to "restrain violations."[137] In *United States v. Holtzman*, the Ninth Circuit rejected the defendant's argument that this phrase limited a court's equitable powers and did not permit the court to enjoin lawful activity.[138] It held that district courts possess equitable authority to "enjoin otherwise lawful activity when necessary and appropriate in the public interest *to correct or dissipate the evil effects of past unlawful conduct*."[139]

The CWA similarly authorizes the United States to seek "appropriate relief" and courts to "restrain such violation and to require compliance."[140] Many courts affirm the authority of courts to order restorative relief in CWA enforcement cases from permit violations to wetlands restoration, and by both governmental and private enforcers.[141] For example, in *United States v. Deaton*,[142] the Fourth Circuit upheld an injunction requiring more of defendants than if the defendants had secured a permit *prior* to their violations of the CWA.[143] It set forth factors for analyzing a specific mitigation request, which other courts have adopted.[144] Under *Deaton*, courts should evaluate whether a proposed mitigation action "(1) . . . 'would confer maximum environmental benefits,' (2) . . . is

134. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

135. *See also* United States v. Rx Depot, 438 F.3d 1052, 1061 (10th Cir. 2006) (finding that the Food, Drug and Cosmetic Act invokes courts' general equity jurisdiction).

136. United States v. Holtzman, 762 F.2d 720 (9th Cir. 1985).

137. *Compare* 42 U.S.C. § 7523, *with id.* § 7413(b).

138. *Holtzman*, 762 F.2d at 724–25.

139. *Id.* (emphasis added).

140. 33 U.S.C. § 1319(b).

141. Courts routinely order mitigation in the context of restoration of wetlands. *See, e.g.*, United States v. Ciampitti, 615 F. Supp. 116, 122 (D.N.J. 1984) ("There can be no doubt that this court has the power under the Clean Water Act to order the restoration proposed by the Government."); United States v. Banks, 115 F.3d 916, 918, 922 (11th Cir. 1997); United States v. Cumberland Farms of Conn., 826 F.2d 1151, 1164–65 (1st Cir. 1987); Leslie Salt Co. v. United States, 820 F. Supp. 478, 484 (N.D. Cal. 1992), *aff'd*, 55 F.3d 1388 (9th Cir. 1995); United States v. Larkins, 657 F. Supp. 76, 86 & n.25 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988). Of course, a substantial history in favor of one interpretation is not a guarantee of such interpretation enduring, as discussed herein Part II.B.

142. 332 F.3d 698 (4th Cir. 2003).

143. *Id.* at 714.

144. The U.S. District Court for the Western District of Maryland in *United States v. Westvaco Corp.* asked for briefing on these factors in the CAA context before the case settled. *See* No. MJG-00-2602, 2015 WL 10323214, at *12 (Feb. 26, 2015).

'achievable as a practical matter,' and (3) . . . bears 'an equitable relationship to the degree and kind of wrong it is intended to remedy.'"[145]

Pursuant to its authority to "restrain" a violation then, a court can order remediation of harm from violations or enjoin otherwise lawful conduct for restorative effect. For example, in a citizen suit arising in the District of Maine, the court ordered defendants to remediate the pollution illegally discharged prior to their application for a permit. The First Circuit affirmed the district court's authority to order injunctive relief in the form of permit limitations that were more stringent than those mandated by the state permit obtained during the pendency of the suit:

> [T]he court may grant additional injunctive relief governing the post-permit operations of the companies insofar as the court is remedying harm caused by their past violations. . . . Conventionally, a court's equitable power to enforce a statute includes the power to provide remedies for past violations—an area in which the courts have settled authority and competence . . . .[146]

Courts have also determined that they could order a defendant to pay into a remedial fund to redress harm from their illicit pollution.[147] Indeed, the Volkswagen settlement contained this type of "mitigation trust."[148]

3. The Purposes of the Clean Air Act and the Clean Water Act

The purposes of the CAA and CWA are served by awarding mitigation for statutory violations. Relief targeted at harm to human health and the environment from excess emissions and discharges comports with the Acts' tenets to protect and improve the quality of our air and water.

The purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[149] In the first CAA New Source Review power plant case to proceed to litigation over mitigation, *Cinergy I*, the trial

145. *Deaton*, 332 F.3d at 714.

146. U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon Council of Me., LLC, 339 F.3d 23, 31 (2003) (emphasis omitted) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

147. Pub. Int. Rsch. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 82 (3d Cir. 1990).

148. The creation of environmental trusts is an additional tool used to remedy harm from environmental violations used since the 1970s. These trusts have largely been established at the local and state levels, but there have been some established at the national level as well. For a comprehensive analysis of the promises and pitfalls of these trusts, see Charles H.W. Foster & Frances H. Foster, *The Massachusetts Environmental Trust*, 41 ECOLOGY L.Q. 751, 765–825 (2014) (critiquing operational flaws of the trust and its efficacy at remediating harm).

149. 42 U.S.C. § 7401(b)(1).

court observed that mitigation would "give effect to the CAA's purpose 'to protect and *enhance* the quality of the Nation's air resources so as to promote the public health and welfare'"[150] It is further telling that all prior New Source Review cases settled, and all settlements included a mitigation component.[151]

The purpose of the CWA is to "maintain the chemical, physical, and biological integrity of the Nation's waters."[152] Courts draw the obvious conclusion that awarding mitigation in CWA enforcement suits comports with the Act's purpose. In *United States v. Cumberland Farms of Connecticut*,[153] for example, the First Circuit confirmed that the district court had the "authority to issue such restorative orders so as to effectuate the stated goals of the Clean Water Act."[154]

It would work an injustice if the government was unable to secure relief to remedy harm from violations of federal environmental laws designed to protect and enhance human health and the environment.[155] As the *Mitchell* Court observed, it is "inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature."[156] Reading the Acts to contain a limitation on the ability of courts to order cleanup or offset of unauthorized pollution would thwart their purposes.

Finally, the public interest is intricately involved in CAA and CWA government enforcement actions.[157] The integrity of public health and public resources are at the heart of these violations, for which there is no adequate remedy at law when such violations cause harm.[158] As the Supreme Court observed in *United States v. Oakland Cannabis Buyers' Cooperative*[159] in 2001, "[f]or 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief."[160] Indeed, statutes must be construed "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . .

150. *Cinergy I*, 582 F. Supp. 2d 1055, 1061 (S.D. Ind. 2008) (emphasis in original).

151. Plaintiff's Opposition to Cinergy's Motion for Partial Summary Judgment at 20, *Cinergy I*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) (No. IP99-1693 C-M/S).

152. 33 U.S.C. § 1251.

153. 826 F.2d 1151 (1st Cir. 1987).

154. *Id.* at 1164.

155. *See supra* Part I.B (providing example of the power plant in Memphis, TN).

156. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (quoting Clark v. Smith, 38 U.S. 195, 200 (1839)).

157. This Article reserves discussion of whether this factor would ever be enough to tip the scales against awarding mitigation in an enforcement action brought by a public interest environmental group.

158. *See, e.g.*, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.")

159. 532 U.S. 483 (2001).

160. *Id.* at 496 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944)).

in accordance with . . . the necessities of the public interest which Congress has sought to protect."[161] The public interest in human health and the environment that Congress sought to protect in the Acts is best served by an interpretation that authorizes the award of mitigation for statutory violations that cause harm.

4. Nothing in the Acts Precludes the Award of Equitable Remedies

Congress limits the inherent equitable authority of a district court only by the "clear[est] . . . command" or "inescapable inference."[162] Neither of these limitations are present in the Acts. Defendants who forward these arguments nearly always fail.[163] The few courts that have declined to issue an order for mitigation under the CAA in a government enforcement case have done so not because of a feature of the statute but rather based on a factual analysis of the defendant or its facilities. For example, a district court refused to issue any injunctive relief after finding violations could not reoccur because the owners who allegedly failed to secure the necessary permits sold the power plants decades before the enforcement action.[164] In *United States v. EME Homer City Generation L.P.*,[165] the court reasoned that the "[f]ormer Owners' alleged . . . violations constituted wholly-past failures to obtain pre-construction permits that did not constitute continuing violations."[166] But the court specifically declined to find "as a broad principle that it lack[ed] authority to award injunctive relief."[167]

Still, as indicated in Part I.A.3, mitigation is not appropriate for every enforcement case, including where no environmental harm is alleged. As a general matter, equitable discretion brushed up against its boundaries in key cases, such as *Meghrig v. KFC Western, Inc.* and *United States v. Philip Morris USA*.[168] These cases apply the *Porter* and *Mitchell* framework but, based on characteristics specific to the statute at issue, find the award of equitable remedies precluded. *Meghrig* and *Philip Morris* are discussed and distinguished from the

161. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (quoting *Hecht Co.*, 321 U.S. at 330).

162. Porter v. Warner Holding Co., 328 U.S. 385, 398 (1946).

163. *See, e.g.*, United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 289 (W.D. Pa. 2011); New Jersey v. Reliant Energy Mid-Atl. Power Holdings, LLC, No. 07-CV-5298, 2009 WL 3234438, at *12 (E.D. Pa. Sept. 30, 2009).

164. *EME Homer City Generation*, 823 F. Supp. 2d at 288–90; *see also* United States v. Ameren Mo., 9 F.4th 989, 1009–10 (construing the language of § 7413(b) to allow a district court to award injunctive relief that would "redress a *violation* of the CAA" but reversing the mitigation award against another of defendant's power plants that was not alleged to be in violation of the CAA).

165. 823 F. Supp. 2d 274 (W.D. Pa. 2011).

166. *Id.* at 290.

167. *Id.* at 289.

168. 396 F.3d 1190 (D.C. Cir. 2005).

CAA and CWA below. Indeed, both have been cited unsuccessfully by defendants seeking to avoid the imposition of mitigation in the CAA and CWA context.

In 1996, the Supreme Court held that the grant of equity jurisdiction in RCRA's citizen suit provision did not authorize a district court to order restitution of past cleanup costs.[169] In *Meghrig*, a property owner incurred remediation costs for his property that was contaminated with petroleum products. He sued the former property owner for recovery of the cleanup costs under RCRA. The RCRA citizen suit provision grants district courts authority to "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both."[170] The Supreme Court acknowledged the holdings of *Porter* and *Mitchell* but found RCRA to evince a clear statement from Congress that foreclosed a remedial order.[171]

Specifically, the Court determined that RCRA contained a clear legislative command indicating that Congress did not intend citizens to recover past cleanup costs.[172] The Court relied on the citizen suit provision clause, which reads "may present an *imminent* . . . endangerment," as evidence Congress intended that provision to encompass situations in which there is a harm threatened in the immediate future and not to redress past harm.[173]

The Court also found that recovery of past cleanup costs would be inconsistent with the goals of RCRA based on its statutory structure and its differences from another federal environmental statute governing hazardous wastes, CERCLA. The primary purposes of RCRA, according to the Court, are to reduce the generation of hazardous and solid wastes, and to govern its treatment, storage, and disposal, as opposed to compelling the cleanup or compensating for the cleanup of such waste.[174] That latter purpose, Justice Antonin Scalia emphasized, is the subject of CERCLA.[175]

Another section of the opinion compared citizen suit and government enforcement purposes more generally and highlighted the primary enforcement

169. Meghrig v. KFC W., Inc., 516 U.S. 479, 487 (1996). *Meghrig* is a component of a broader arc of cases signaling what scholars such as David Vladeck term a "retrenchment" of equity in federal courts. *See* David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 MONT. L. REV. 159, 162–67 (2021).

170. 42 U.S.C. § 6972(a).

171. *Meghrig*, 516 U.S. at 487.

172. *Id.* at 484–88.

173. *Id.* at 485–86 (emphasis added).

174. *Id.* at 483.

175. *Id.* It is highly likely that the property owner risked this argument under RCRA because CERCLA contains a petroleum exclusion. In these situations, plaintiffs might explore the utility of state law tort claims. *See infra* note 187.

authority reserved for sovereigns.[176] The Court also looked to the CERCLA citizen suit provision, enacted years after RCRA. That CERCLA provision contains an explicit authorization for the recovery of cleanup costs. The absence of similar language in RCRA, according to the Court, compelled the inference that Congress did not intend to provide past cleanup costs under RCRA.[177]

Despite a recent suggestion from Judge Diarmuid O'Scannlain sitting in special designation in the Seventh Circuit that *Meghrig* "displaced" the *Porter* rationale, multiple courts have specifically found that *Meghirg* "did not overrule or limit *Porter* and *Mitchell*."[178] As the Tenth Circuit has indicated, *Meghrig* "merely demonstrates that a statute's particular characteristics may preclude application of the rule."[179] The *Cinergy* court echoed this reading: *Meghrig* "expressly recognized the *Porter* line of cases" but "simply found an exception to th[eir] general rule based on the 'limited remedies' described in RCRA's citizen suit provision and the 'stark differences' between that section and CERCLA's cost recovery provisions."[180] An application of *Porter* and *Mitchell*'s rule that equitable discretion would be curtailed only by a clear legislative command does not overrule those cases. Further, in the decades that followed *Meghrig*, the Supreme Court continued to cite *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary."[181] As detailed above, neither is present in the CAA or CWA.

Defendants in environmental cases have also attempted—unsuccessfully—to import the analysis from *Philip Morris* to argue that a statute has a "comprehensive and reticulated" remedial scheme that impliedly precludes traditional equitable remedies.[182] *Philip Morris* involved a request for disgorgement under the Racketeer Influenced and Corrupt Organizations Act.[183] The D.C. Circuit's opinion rested on the combination of the statute's criminal remedies such as forfeiture of illegal proceeds, imprisonment, and fines, and the potential for treble damages to compensate victims and punish violators. The court chafed at

176. *Meghrig*, 516 U.S. at 486–87.

177. *Id.* at 479.

178. United States v. Rx Depot, Inc., 438 F.3d 1052, 1057 n.3 (10th Cir. 2006); *Cinergy I*, 582 F. Supp. 2d 1055, 1059 (S.D. Ind. 2008); *accord* Fed. Trade Comm'n v. AbbVie, Inc., 976 F.3d 327, 375–76 (3rd Cir. 2020); *cf.* Fed. Trade Comm'n v. Credit Bureau Ctr., LLC, 937 F.3d 764, 776 (7th Cir. 2019) (positing that *Meghrig* displaces *Porter* and *Michell*'s rationale). *But see* Kokesh v. SEC, 137 S. Ct. 1635, 1639, 1644 (2017) (citing with approval *Porter*).

179. *Rx Depot*, 438 F.3d at 1057.

180. *Cinergy I*, 582 F. Supp. 2d at 1059–60.

181. *E.g.*, Miller v. French, 530 U.S. 327, 340–41 (2000).

182. *See, e.g.*, Cinergy's Reply Memorandum in Support of Its Motion for Partial Summary Judgment on the Remaining Remedial Claims at 16, *Cinergy I*, 582 F. Supp. 2d 1055 (S.D.Ind. 2008) (No. IP99-1693 C-M/S), 2008 WL 5372170 (citing United States v. Philip Morris USA, 396 F.3d 1190, 1200 (D.C. Cir. 2005)).

183. 18 U.S.C. §§ 1961–1968.

the potential for "duplicative recovery" if disgorgement was also allowed.[184] This is the type of remedial scheme that provides an "inescapable inference" that Congress intended to restrict equitable authority. Neither the CAA nor the CWA provides a duplicative mechanism by which the harm from illegal pollution can be remedied. The *Cinergy* court addressed the *Phillip Morris* holding directly: "There are no such concerns here with the CAA."[185]

Congress gave no signal, and certainly nothing approaching the actual "words" or "necessary and inescapable inference," that it intended to restrict the inherent authority of district courts to award equitable remedies for violations of the Acts.[186] Arguments to the contrary based on *Meghrig*, *Philip Morris*, or the like supply only the "light inferences [and] doubtful construction" that cannot thwart "complete justice."[187]

B. Lessons for Mitigation from Novel Securities Exchange Act and Federal Trade Commission Act Cases

For decades, courts consistently affirmed the use of the equitable remedies of restitution and disgorgement under provisions of the Securities Exchange Act of 1934[188] and the Federal Trade Commission Act ("FTCA").[189] Restitu-

184. *Philip Morris*, 396 F.3d at 1201 (citing Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269 (1992)).

185. *Cinergy I*, 582 F. Supp. 2d at 1064. It is also acknowledged in scholarship: "No provision under the CAA, allows for compensatory damages for loss to natural resources or public health from injurious conduct." Kakade, *supra* note 22, at 143 (comparing the CAA to the natural resources damage assessment process under CERCLA).

186. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

187. *Id.* (quoting Brown v. Swann, 35 U.S. 497, 503 (1836)); *see also* Town of Munster v. Sherman-Williams Co., 27 F.3d 1268, 1271 (1994) ("Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but the Supreme Court has taught that we should not lightly assume that Congress has intended to depart from established principles."). In a situation where an environmental statute did provide such a comprehensive and reticulated scheme, or provide a clear indication that Congress precluded award of equitable remedies for a statutory violation, common law state claims might provide a backstop. For a detailed treatment of this strategy, see Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859 (2018); *see also* Daniel A. Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael Hoeflich eds., 1988); Ezra M. Holczer, Boomer *Revisited: Using Experimental and Partial Injunctions in Private Nuisance Actions*, 64 DEF. COUNSEL J. 99 (1997).

188. 15 U.S.C. §§ 78a–78pp.

189. 15 U.S.C. §§ 41-58; *see* Brief for Former Federal Trade Commission Officials et al. as Amici Curiae Supporting Respondent at 11–12, 12 n.5, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501) (collecting cases over decades for the proposition that "[u]ntil the Seventh Circuit's recent ruling, courts had uniformly held that Section 139(b), which authorizes injunctions, permits courts to order equitable relief, including compensatory redress, in FTC enforcement cases").

tion involves the disgorgement of ill-gotten gains from a defendant's illicit conduct, and returning the victim to their position prior to the illicit conduct.[190] Mitigation is similarly restorative in that it aims to return the environment to its *status quo ante* as nearly as possible.

Recently, a trio of Supreme Court cases, *Kokesh v. SEC*,[191] *Liu v. SEC*,[192] and *AMG Capital Management, LLC v. Federal Trade Commission*, have renewed the debate over and refined the scope of equitable remedies available in government enforcement.[193] While the Court's findings in these cases are not controlling for enforcement under the CAA or CWA, they are relevant insofar as they delineate principles relevant to the scope of non-statutory equitable remedies for violations of federal law. These principles can be applied in the environmental context so as not to run afoul of the boundaries of equity in governmental enforcement.

1. Kokesh v. SEC, Liu v. SEC, *and Limiting Principles*

In *Kokesh*, the Court held that the five-year statute of limitations for "penalt[ies]" under 28 U.S.C. § 2462 applied to SEC enforcement cases disgorging illegally obtained funds.[194] Funds disgorged under the statute might "be dispersed to the . . . Treasury" and not necessarily returned to investors.[195] The Court reasoned that such non-compensatory disgorgement "is intended to deter," and thus bears "the hallmarks of a penalty."[196] The Court reserved the question of "whether courts possess authority to order disgorgement in SEC enforcement proceedings or . . . whether courts have properly applied disgorgement principles in this context."[197] That became the question presented in *Liu*.

In *Liu*, the Court upheld the SEC's ability to seek disgorgement pursuant to 15 U.S.C. § 78u(d)(5). Under the Securities Exchange Act, the Commission is authorized to seek and a federal court is authorized to grant "any equitable relief that may be appropriate or necessary for the benefit of investors."[198] The Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" securities

190. *See Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

191. 137 S. Ct. 1635 (2017).

192. 140 S. Ct. 1936 (2020).

193. Scholars are also demonstrating a renewed interest in the scope and limitations of equitable relief, including non-statutory equitable relief. *See, e.g.*, Bray, *supra* note 84; Urska Velikonja, *Public Enforcement After* Kokesh: *Evidence from SEC Actions*, 108 GEO. L.J. 389 (2019) (discussing non-statutory equitable remedies in the SEC enforcement context).

194. *Kokesh*, 137 S. Ct. at 1639, 1643–45.

195. *Id.* at 1644.

196. *Id.*

197. *Id.* at 1642 n.3.

198. 15 U.S.C. § 78u(d)(5).

laws.[199] A greater award would convert disgorgement into a penalty, placing it outside the equitable remedies that Congress authorized.[200] The Court also affirmed that disgorgement is a permissible equitable remedy because it falls into "those categories of relief that were *typically* available in equity."[201] Justice Thomas's dissenting opinion that the specific term "disgorgement" must have been used at the Court of Chancery to constitute a permissible equitable remedy garnered no votes.[202]

Kokesh and *Liu* serve as a cautionary tale to keep the purpose of a mitigation action remedial rather than punitive. The Court in *Liu* noted the "equitable principle that the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'"[203] But the spirit of that admonition to craft equitable relief such that it is not punitive cannot be used to curtail otherwise legitimate uses of mitigation. The fatally flawed 2021 decision in *United States v. Ameren Missouri*[204] did just that. The Eighth Circuit cited *Cinergy I* with approval and observed that "[u]nder § 7413, a district court 'has the authority to order [a defendant] to take appropriate actions that remedy, mitigate and offset harms . . . caused by the [defendant's] proven violations of the CAA."[205] Yet the court reversed an award of mitigation against *another* of defendant's plants where the government did not allege violations of the CAA, finding "the district court lacked authority to authorize injunctive relief as to [the other plant]."[206] For this proposition, the panel cited case law it described as "denying [the] government's requested relief because the remedy would be

199. Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

200. *See id.* at 1944–45, 1949–50.

201. *Id.* at 1946 (emphasis in original) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

202. *Liu*, 140 S. Ct. at 1950 (Thomas, J., dissenting).

203. *Id.* at 1943 (majority opinion) (alteration in original) (quoting Tilghman v. Proctor, 125 U.S. 136, 145–46 (1888)).

204. 9 F.4th 989, 1010 (8th Cir. 2021).

205. *Id.* at 1009.

206. *Id.* at 1009–1010. As indicated in note 128, the *Ameren* court erred in its decision that mitigation could not be awarded for the decade of violations by Ameren's Rush Island power plant by requiring a reduction in sulfur dioxide emissions at its nearby Labadie plant. *See supra* note 128. The United States did not allege violations at Ameren's Labadie plant but sought, and won from the district court, the required reductions from Labadie. The district court's analysis focused on the *harm* from the Rush Island violations, 200,000 tons of excess sulfur dioxide, being transported across the country and contributing to premature mortality far from Rush Island. *See* United States v. Ameren Mo., 421 F. Supp. 3d 729, 819 (E.D. Mo. 2019) ("Injunctive relief is necessary at Labadie in order to remediate Rush Island's excess emissions."). In sum, "[t]o remediate the harm Ameren caused through its excess SO2 emissions . . . the district court ordered Ameren to reduce emissions ton-for-ton from Ameren's Labadie facility, until the overall reductions offset the total excess emissions from Rush Island." Petition for Panel Rehearing by United States of America at 5, United States v. Ameren Mo., 9 F.4th 989 (8th Cir. 2019) (No. 19-3220).

punitive as the government proved no violation at the non-source unit against which it was sought."[207] The *Ameren* panel erred in conceiving of the requested relief at the second plant as punitive. The district court had appropriately exercised its inherent equitable authority to order "the wrongdoer," Ameren,[208] to "pay [its] fair compensation," by offsetting the 200,000 tons of illegal sulfur dioxide pollution, "to the person wronged"—i.e., in same downwind populations affected by its decades of violations.[209]

This is not to dispute that mitigation must continue to be tightly tailored to remedy the harms at issue and must be proportional to those harms, just as the 2012 EPA Mitigation Memo advises. This requires careful consideration by attorneys and technical staff in identifying environmental harm from violations.[210] However, courts will not demand perfection from the United States in formulating this symmetry.[211]

Beyond providing a reminder of those limiting principles, *Liu* serves another important purpose in this analysis. *Liu*'s affirmation that a remedy can be considered equitable when it falls into the types of categories typically available in equity supports the award of mitigation. The analytical process employed by the Court involved "consulting works on equity jurisprudence," such as Dobbs' Law of Remedies.[212]

After reviewing the works on equity jurisprudence, the Court in *Liu* determined that "equity practice long authorized courts to strip wrongdoers of their

207. *Ameren*, 9 F.4th at 1010 (citing *Cinergy II*, 618 F. Supp. 2d 942, 967 (S.D. Ind. 2009)).

208. Of note, the appropriate locus of the question of wrongdoing is Ameren. The Eighth Circuit mistakenly focused its analysis on the Labadie plant instead of the company itself—the "person" for purposes of the CAA—that committed the violations at issue.

209. Petition for Panel Rehearing by United States of America at 6, *Ameren*, 9 F.4th 989 (No. 19-3220). The district court's mitigation order was, to use the Court's formulation in *Porter*, the type of "other order" or "equitable adjunct to the injunction decree" or "appropriate and necessary to enforce compliance with the Act." Porter v. Warner Holding Co., 328 U.S. 395, 399–400 (1946). Further, the district court appropriately "restrain[ed]" Ameren's violations and awarded "appropriate relief" at the Labadie plant because "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400.

210. *See supra* Part I.A.2; *infra* Part III.C.1.

211. *E.g.*, United States v. Halper, 490 U.S. 435, 446 (1989) ("[T]he Government is entitled to rough remedial justice[:] it may demand compensation according to somewhat imprecise formulas."); United States v. Telluride, 146 F.3d 1241, 1247 (10th Cir. 1998) (upholding an injunction and rejecting an argument that it was a penalty due to a lack of exact symmetry of the cost of relief and the injury). Indeed, even Jeffrey Bossert Clark's memorandum agrees the tailoring of "equitable mitigation [does not] require[ ] surgical precision." Memorandum from Jeffrey Bossert Clark, *supra* note 58, at 4 n.4.

212. Liu v. SEC, 140 S. Ct. 1936, 1942–43 (2020) (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002)).

ill-gotten gains, with scholars and courts using various labels for the remedy."[213] Restorative relief for harm wrought by violations of federal environmental laws is justified for the same reasons as the relief in *Porter*. The Court upheld the award of restitution in *Porter* because it "restor[ed] the status quo" of those harmed by the violations just as mitigation seeks to do in the environmental context.[214] These types of remedies are "within the recognized power and within the highest tradition of a court of equity."[215]

Professor Dobbs' framing of equitable remedies supports this assertion:

> Equity courts traditionally awarded and continue to award a variety of remedies. Some equitable remedies are restitutionary . . . . Most . . . are coercive. Coercive remedies in equity are variants of the injunction . . . . For example, defendant might be enjoined to cease acts that constitute a nuisance, or *enjoined to remove waste wrongly deposited on plaintiff's land or otherwise damaging plaintiff's property*.[216]

By "depriving wrong-doers of their ill-gotten gains" and seeking a return to the *status quo ante*, mitigation is an equitable remedy that courts can order under the CAA and CWA.

2. AMG Capital Management, LLC *Interpretive Principles*

In *AMG Capital Management, LLC v. Federal Trade Commission*, the Court confronted whether section 13(b) of the FTCA, in authorizing "permanent injunction[s]," permits the FTC to demand monetary relief such as restitution "directly from courts."[217] For multiple reasons the Court held that section 13(b) does not authorize a court to award forms of equitable monetary relief.[218] Instead, the Court opined, the FTC must use sections 5 and 19 of the Act, which specifically allow for such relief following an administrative process.[219]

The Court's opinion in *AMG* is largely based on what statutory interpretation scholars such as Victoria Nourse and Anita Krishnakumar classify as "lan-

213. *Id.* (reviewing D. Dobbs, Restatement (Third) of Restitution and Unjust Enrichment (Am. Law Inst. 2010); 1 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 101, at 112 (4th ed. 1918)).

214. *Porter*, 328 U.S. at 402.

215. *Id.*

216. Dan B. Dobbs et al., Law of Remedies 46 (2018) (emphasis added); *accord* W. Page Keeton et al., On the Law of Torts § 90, at 643 (5th ed. 1984) ("The equitable remedy of injunction to enjoin a public nuisance developed early in the history . . . of equity jurisprudence . . . ."); *see also* Dobbs et al., *supra,* at 46 (collecting cases).

217. *Porter*, 328 U.S. at 1347.

218. *Id.* at 1347–49.

219. *Id.* at 1348–49.

guage canons."[220] "Language canons, as their name suggests, focus on the text of the statute and encompass rules of syntax and grammar, 'whole act' rules about how different provisions of the same statute should be read in connection with each other (e.g., to minimize internal inconsistency, to avoid superfluity)."[221] Indeed, the three rationales undergirding *AMG* reflect interpretative principles resting on "rules of grammar, logic, sentence organization, or even congressional drafting."[222]

In an analytical rubric similar to *Mehgrig*, the *AMG* Court determined the statute's particular characteristics precluded the award of monetary equitable relief under the provision at issue. The Court's primary basis for the decision was rooted in plain language. Justice Stephen Breyer opined that "[a]n 'injunction' is not the same as an award of equitable monetary relief."[223] The Court's interpretation was bolstered, according to Justice Breyer, by the "language and structure of § 13(b) taken as a whole, . . . [which] focuses upon relief that is prospective, not retrospective."[224] Finally, the Court found the "structure of the Act beyond § 13(b) confirms [its] conclusion."[225] Congress specifically authorized the award of "monetary relief" and "other and further equitable relief," in *other* provisions.[226] Accordingly, "to read § 13(b) . . . as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: [t]he Commission may obtain monetary relief by first invoking its administrative procedures and then § 19's redress provisions."[227]

Pursuing mitigation under the CAA or CWA presents critically different circumstances. As an initial matter, mitigation actions constitute *non-monetary* restorative relief that fits within the broader authorization that a court has to craft relief to "restrain" a "violation," "require compliance," or order "any other appropriate relief" under the Acts. Further, unlike the FTCA, there are no

220. Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 Tex. L. Rev. 163, 180 (2018) (citing William N. Eskridge Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 643–761 (5th ed. 2014)).

221. *Id.*; *see also* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1, 12–14 (2005); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 927–41 (1992)).

222. Krishnakumar & Nourse, *supra* note 220, at 181.

223. AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1347 (2021). In the next breath, however, he acknowledged with a citation to *Porter* and *Mitchell* that the Court has "interpreted similar language as authorizing judges to order equitable monetary relief." *Id.* 1347–48 (citing Porter v. Warner Holding Co., 328 U.S. 395, 395 (1946); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 288 (1960)).

224. *Id.* at 1348.

225. *Id.*

226. *Id.* at 1349.

227. *Id.* Of note, on July 20, 2021, the House passed the Consumer Protection and Recovery Act that would reinstate the FTC's authority to seek restorative monetary equitable relief. H.R. 2668, 117th Cong. § 2 (2021).

redundant mechanisms for abatement or offset of illicit pollution for routine violations of law under the CAA or CWA.[228] Still, environmental enforcers pursuing mitigation must weave *AMG* into their legal analyses alongside *Porter*, *Mitchell*, and the other key cases discussed herein. Collectively, *Kokesh*, *Liu*, and *AMG* dictate that the *size* of the remedy, the *party performing* the remediation, and the *recipient* all matter. Pursuant to this jurisprudence, enforcers can be expected to address interpretative tools including the plain language, statutory structure and purpose, and the grammatical implications from the verb tenses employed in the CAA and CWA provisions.[229]

Under the CAA and CWA, then, case law confirms what the principles of equity would dictate—that courts possess the equitable authority to order mitigation once enforcers establish a violation that caused harm. The language of the CAA and CWA invokes the full equitable discretion of district courts and that discretion is curtailed neither by a "clear . . . command" nor an "inescapable inference" from Congress. Awarding mitigation also furthers the purposes of both Acts and best serves the public interest, particularly when that public includes communities disproportionately harmed by pollution and environmental stressors.

III. A Path to Forging "Complete Justice"

A. Disparity and Justice

This Article is framed in the language of *Porter* and *Mitchell*, which speak of broad equitable relief enabling the achievement of "complete justice." What then should complete justice encompass in the context of environmental enforcement? What does it require of violators and for the people and places that experience the physical consequences of statutory violations? One element should be restorative relief, such as mitigation to redress harm, in addition to requiring future compliance with the law. Broader and immediate use of mitigation within the legal parameters discussed above will serve key principles of equity and multiple strands of justice, including environmental justice.

228. *See supra* Part II.A.4 and text accompanying notes 167–71.

229. In *AMG*, the Court read Congress' use of the present tense and present participle in section 13(b) of the FTCA to suggest a solely *prospective* focus. *AMG*, 141 S. Ct. at 1348. Of note, the opinion did not provide an authoritative ranking of its interpretative considerations. Scholars highlight this lack of clarity in the relative authority of interpretative considerations including canons. *See, e.g.*, Krishnakumar & Nourse, *supra* note 220, at 173; Anya Bernstein, *Before Interpretation*, 84 U. Chi. L. Rev. 567, 596–609 (2017) (analyzing statutory interpretation methodology and Justices' use of sources preceding or contemporaneous with enactment of a statute).

1. Persistent Environmental Injustices

By many metrics, U.S. environmental policies and regulations have facilitated great success in areas such as eliminating lead from gasoline and reducing stratospheric ozone.[230] Yet of all the problems that elude domestic environmental policies, and the enforcement system more specifically, one of the most critical is the disproportionate distribution of environmental burdens.[231] There persist significant, ongoing racial disparities in the basic quality of a person's ambient environment, as detailed through case studies and empirical evidence developed by scholars such as Luke Cole, Sheila Foster, and others.[232] As Cole and Foster warned more than two decades ago:

> Researchers [have] analyzed the distribution of numerous environmental hazards: garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazards, and rat bites. Their overwhelming conclusion is that these environmental hazards are inequitably distributed by income or race. In studies that looked at distribution of these hazards by income *and* race, race was most often found to be the better predictor of exposure to environmental dangers.[233]

These examples of environmental inequities span multiple media (air, water, and the land) and multiple pollutants. Professor Carlton Waterhouse's scholarly work provides powerful examples for lead, particulate matter, and ni-

230. William M. Alley & Rosemarie Alley, The War on the EPA: America's Endangered Environmental Protections 131, 215–22 (2020).

231. For a brief narrative on the multiple, complex factors contributing to environmental injustice, and the difficulties in "transforming environmental decision-making processes to take into account the social, political, and economic vulnerability of poor communities of color," see Sheila Foster, *The Challenge of Environmental Justice*, 1 Rutgers J.L. & Urb. Pol'y 1, 10 (2004).

232. *See* Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 54–79 (2000) (detailing "the structural processes that underlie . . . distributive outcomes. In this sense, unequal distribution . . . is a crucial entry point for exploring the social and institutional processes underlying distributional patterns"); *see, e.g.*, Spiller et al., *supra* note 3, at 127,004-1; Jayajit Chakraborty & Paul A. Zandbergen, *Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air Pollution at School and Home*, 61 J. Epidemiology & Cmty. Health 1074 (2017); Eric B. Brandt et al., *Air Pollution, Racial Disparities, and COVID-19 Mortality*, 146 J. Allergy & Clinical Immunology 61, 62 (2020) ("Lower income communities of color are more likely to have historical exposures to higher levels of air pollution.").

233. Cole & Foster, *supra* note 232, at 54–55 (emphasis in original) (collecting "an annotated bibliography of studies and articles that document the disproportionate impact of environmental hazards by race and, to a lesser extent, by income").

trogen dioxide.[234] Together, these pollutants can contribute to developmental disabilities, cancers, respiratory and cardiac diseases, and premature death.[235] Dr. Robert D. Bullard, a founding environmental justice scholar, has highlighted the continuing disparity in the context of toxic wastes.[236] Environmental justice activist Catherine Coleman Flowers exposes the ongoing sanitation inequities suffered by the rural citizens in the Black Belt of Alabama and elsewhere, for households with and without municipal water systems.[237] She describes raw sewage in yards, streets, and backing up into homes—cesspools next to children's toys.[238] And, as of the writing of this article, persistent exposure to these pollutants have left residents increasingly vulnerable to the ravages of the COVID-19 pandemic and virus variants.[239]

2. Environmental Justice in the Context of Mitigation Actions

Communities with environmental justice concerns are commonly characterized by higher populations of people with non-white racial identities, lower income, and environmental inequities.[240] These inequities manifest as worse air

234. Carlton Waterhouse's recent lectures for the American Law Institute and Environmental Law Institute are illustrative of his theory and research on this point, including *Environmental Justice in America—Where Do We Go Next?* (VCCX1202 ALI-CLE 177) (discussing racial disparities in pollution exposure and the need for enforcement initiatives across air and water); *accord* Spiller et al., *supra* note 3 (detailing differences in fine particulate matter exposure based on race). *See generally* Carlton M. Waterhouse & Ravay Smith, *The Lingering Life of Lead Pollution: An Environmental Justice Challenge for Indiana*, 49 IND. L. REV. 99, 99 (2015) (framing his work with the sobering statistic that even after twenty-two years of work on childhood lead exposure by EPA, "Black children continue to have substantially higher blood lead levels than their white counterparts even when socioeconomic variables are accounted for").

235. See, for example, EPA's discussion of the health impacts of pollutants generated from power plant combustion of fossil fuels in *Tennessee Valley Authority Clean Air Act Settlement*, EPA (Mar. 23, 2022), https://perma.cc/CM9X-WQLZ.

236. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV'T L. 371, 386 (2008).

237. FLOWERS, supra note 3. Though Flowers' focus is on rural communities without municipal systems, she includes examples with failing municipal service in communities of color in Alabama and Illinois. *Id.* at 150, 188–89.

238. *Id.*

239. *See, e.g.*, Alexis Okeowo, *The Heavy Toll of the Black Belt's Wastewater Crisis*, NEW YORKER (Nov. 23, 2020), https://perma.cc/7F29-WF5W (discussing the public health impacts of pollution and associated immune system and other vulnerabilities); Catherine Coleman Flowers, *Mold, Possums and Pools of Sewage: No One Should Have to Live Like This*, N.Y. TIMES (Nov. 14, 2020), https://perma.cc/7Y4S-DN67; Yvette Cabrera, *Coronavirus Is Not Just a Health Crisis—It's an Environmental Justice Crisis*, GRIST (Apr. 24, 2020), https://perma.cc/9R45-L3V4.

240. *See, e.g.*, Jonathan Colmer et al., *Disparities in $PM_{2.5}$ Air Pollution in the United States*, 369 SCIENCE 575 (2020); Frederica Perera, *Pollution from Fossil-Fuel Combustion Is the Leading*

or water quality than their white counterparts, under-enforcement of environmental violations, and proximity to a multiplicity of permitted facilities such as power generators, waste facilities, and/or chemical plants.[241] There is no agreed-upon, and perhaps no satisfactory, definition of environmental justice. Patrice Simms, among others, highlights the "common thematic features" and core goals that animate environmental justice efforts. He suggests focusing on the 17 principles stemming from the First National People of Color Environmental Leadership Summit in 1991.[242] Among the themes underlying the 17 principles, Simms emphasizes the propositions that "people have a right to an uncompromised environment, . . . where that right is violated, responsible parties should be held accountable, . . . [and that] [a]ccountability . . . incorporates an obligation to make whole both the environment and any affected people or communities."[243]

Others begin with EPA's definition: "[T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[244] EPA's explanations of "fair treatment" and "meaningful involvement" are relevant here:

> Fair treatment means that no group of persons should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.

Environmental Threat to Global Pediatric Health and Equity: Solutions Exist, INT'L J. ENV'T RSCH. & PUB. HEALTH 15, 19 (2018) (detailing the link between pollutants—specifically those emitted from fossil fuel combustion—and permanent health consequences for children in low-income communities and communities of color).

241. *See, e.g.*, COLE & FOSTER, *supra* note 232, at 54–55; ROBERT D. BULLARD, ET AL., TOXIC WASTES AND RACE AT TWENTY 1987-2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES (2007); Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001–02 (1993). These indicia listed in text are among the twelve environmental and seven demographic indicators that EPA considers in its environmental justice mapping tool called "EJScreen." *See Overview of Environmental Indicators in EJScreen*, EPA, https://perma.cc/4MWR-A88P; *Overview of Demographic Indicators in EJScreen*, EPA, https://perma.cc/S9LW-7VWV.

242. Simms, *supra* note 1, at 10,513–17; *see also* Michelle W. Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 942 (2010) (defining environmental justice concerns in the land use planning process "to include the distribution of neighborhood amenities, disamenities, and services").

243. Simms, *supra* note 1, at 10,515 (citing Principles Six and Nine from the First National People of Color Environmental Leadership Summit).

244. EPA, ENVIRONMENTAL JUSTICE-RELATED TERMS AS DEFINED ACROSS THE PCS AGENCIES (2013), https://perma.cc/6EX3-9RZY.

> Meaningful involvement means that: 1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; 2) the public's contribution can influence the regulatory agency's decision; 3) their concerns will be considered in the decision making process; and 4) the decision makers seek out and facilitate the involvement of those potentially affected.[245]

But in reflecting upon this definition, Simms critiques its "lack [of] a positive restorative or compensatory intention."[246] He observes that "it provides no instruction about whether or how communities that have borne a 'disproportion share of the negative environmental consequences . . .' should be made whole."[247]

Pursuing mitigation as equitable relief for communities harmed by violations of federal environmental law offers one step towards making communities whole, albeit through an *ex post* approach. But it reaches further toward forging complete justice than an environmental enforcement case without mitigation or a SEP. To be clear, bringing a violating entity into compliance with the law, and thereby sending a civil penalty to the U.S. Treasury, provides both specific and general deterrence. And it encourages compliance by ensuring a violator does not gain a competitive advantage through illicit acts. Yet these components do not remedy harm from the violations.

To provide this redress, environmental enforcers should seek mitigation where appropriate in both settlements and litigation.[248] Three recent CAA settlements demonstrate the capacity of mitigation to redress harm in communities with environmental justice concerns. Each case involves a subset of the following pollutants: nitrogen oxide, sulfur dioxide, particulate matter, and volatile organic compounds ("VOCs"), including benzene. These pollutants wreak epidemiological and ecological havoc:

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245. Simms, *supra* note 1, at 10,514 (citing OFF. OF SOLID WASTE & EMERGENCY RESPONSE, EPA, DRAFT ENVIRONMENTAL JUSTICE METHODOLOGY FOR THE DEFINITION OF SOLID WASTE FINAL RULE 1 (2009)).

246. *Id.*

247. *Id.* (quoting EPA, PLAN EJ 2014, at 3 (2011)).

248. *See* Glenn, *supra* note 18 (noting a range of *ex ante* and *ex post* tools will need to be deployed in the efforts for environmental justice). Accounting for one source of pollution, or one stream of environmental harm, will not cure the cumulative impacts and synergistic capacity of pollutants in air or water experienced by these communities. Framing the foundations of sanitation inequity broadly, Catherine Coleman Flowers explains:

> It's about how these areas have historically been overlooked because of who lives there. It's about who is and has been considered worthy—by politicians, bureaucrats, even society at large. And even though rural bias is real, rural communities aren't the only places where infrastructure is lacking. Just look at Flint, Michigan.

FLOWERS, *supra* note 3, at 168.

> [VOCs] are a key component in the formation of smog (ground-level ozone), a pollutant that irritates the lungs, exacerbates diseases such as asthma, and can increase susceptibility to respiratory illnesses. Chronic exposure to benzene, which EPA classifies as a carcinogen, can cause numerous health impacts, including leukemia and adverse reproductive effects in women . . . . [Sulfur dioxide] and [nitrogen oxide] have numerous adverse effects on human health and are significant contributors to acid rain, smog, and haze. These pollutants are converted in the air to particulate matter that can cause severe respiratory and cardiovascular impacts and premature death.[249]

For years, EPA prioritized bringing the stationary sources that emit these pollutants, such as oil refineries and chemical plants, into compliance with the CAA.

In one of its series of settlements with Marathon Petroleum Company, LP and Catlettsburg Refining, LLC (Marathon), EPA alleged CAA violations at Marathon's twenty-two flares.[250] More flaring results in more pollution, including VOCs, benzene, and toxic air pollutants.[251] Inefficient flaring also results in more pollution.[252] Marathon agreed to undertake a mitigation action at its Detroit refinery, one of the six refineries covered by the settlement. Census tract data adjacent to the refinery classifies the area as low-income and over 90 percent people of non-white racial identities.[253] The mitigation action required the installation of controls to reduce emissions of VOCs from the refinery's sludge handling system.[254] Marathon was not violating limits on VOCs or benzene from its Detroit sludge handling system.[255] But it agreed to mitigate its *other* VOC violations by instituting controls on the sludge system, reducing at least fifteen tons per year of VOCs and at least one ton per year of benzene at a cost of about $2.2 million.[256]

In *United States v. Flint Hills Resources Port Arthur, LLC*,[257] the United States sought relief to control the "industrial flar[ing] and leaking equipment at

249. Dep't of Just., ENRD Accomplishments Rep. FY 2015, at 24–26.

250. *Marathon Petroleum Company – LP and Catlettsburg Refining LLC Settlement (Flaring)*, EPA [hereinafter *Marathon Settlement*], https://perma.cc/YVK3-RZFQ.

251. *See* Dep't of Just., *supra* note 249, at 24.

252. *See id.*

253. U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 19804 – Detroit-Dearborn-Livonia, MI, Tract Code 5220.00, https://perma.cc/ZCE5-ADEJ.

254. Sludge is a semi-solid material generated during wastewater processing. *See* Consent Decree at 57–59, United States v. Marathon Petroleum Co. LP (E.D. Mich. 2012) (No. 2:12-cv-11544), https://perma.cc/K74B-BTFK.

255. *Marathon Settlement*, *supra* note 250.

256. *Id.*

257. No. 1:14-cv-00169 (E.D. Tex. Feb. 18, 2015).

the company's chemical plant in Port Arthur, Texas."[258] Census tracts surrounding the Port Arthur facility range from low- to medium-income and approximately 85–95 percent people of non-white racial identities.[259] Under the consent decree, Flint Hills agreed to perform a $2 million diesel retrofit-or-replace project "estimated to reduce carbon monoxide by 39 tons, and [nitrogen oxide] and particulate matter by a combined 85 tons" over fifteen years.[260] Flint Hills also agreed to complete a project valued at around $350,000 to reduce energy demand in low-income housing.[261]

In *United States v. Continental Carbon Co.*,[262] a Houston-based carbon black plant agreed to perform $550,000 worth of mitigation actions, prioritizing work in Phenix City, Alabama, and another city.[263] The Phenix City facility is surrounded by neighborhoods with low- to moderate-income levels and 76–95 percent people of non-white racial identities, according to census tract data.[264] Compliance and enforcement for the carbon black sector was an EPA National Enforcement Initiative during the Obama Administration.[265] The mitigation actions in *Continental Carbon* included energy efficiency projects and the installation of continuous-duty, cartridge dust collection technology to reduce particulate matter emissions from carbon black storage in Phenix City.[266] The inclusion of mitigation in these environmental enforcement matters was a key step in remedying harm for areas suffering the synergistic effects of multiple exposures to and risks from environmental hazards.

258. Dep't of Just., *supra* note 249, at 24.

259. U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 13140 – Beaumont-Port Arthur, TX, Tract Codes 59.00, 102.00, https://perma.cc/94XV-NGNC.

260. *See* Dep't of Just., *supra* note 249, at 25; Consent Decree at Appendix 4.1 at 2–3, Flint Hills Res. Port Arthur, LLC, No. 1:14-cv-00169 (E.D. Tex. Feb. 18, 2015), https://perma.cc/QG67-QSYM.

261. *See* Consent Decree, *supra* note 260, at Appendix 4.1 at 3–4.

262. No. 5:15-cv-00290-F (W.D. Okla. May 7, 2015).

263. Consent Decree at Appendix A at A1, *Continental Carbon Co.*, No. 5:15-cv-00290-F (W.D. Okla. May 7, 2015), https://perma.cc/RBT7-6X8W.

264. U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 17980 – Columbus, GA-AL, Tract Code 115.00, https://perma.cc/3NXL-NKSQ; U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 17980 – Columbus, GA-AL, Tract Code 308.00, 27.00, https://perma.cc/E6DG-M44L; U.S. Census Bureau, 2020 FFIEC Geocode Census Report, MSA: 17980 – Columbus, GA-AL, Tract Code 27.00, https://perma.cc/Z558-QSJY.

265. Dep't of Just., *supra* note 251, at 26 ("[T]he oil used to make carbon black is high in sulfur, [and] . . . production creates large amounts of [nitrogen oxide], [sulfur dioxide], and particulate matter.").

266. Consent Decree, *supra* note 260.

B. Centering Community Participation as an Integral Component of Justice

Multiple forms of justice result when communities harmed by violations of environmental law are central to the formulation of enforcement priorities and enforcement remedies. Requiring polluters to clean up or offset the harm wrought from their violations can facilitate elements of corrective and restorative justice for disproportionately burdened communities.[267] Corrective justice is most often associated with tort law, positing that "those who have caused harm [must] remedy the consequences of their fault."[268] Professor Jules Coleman described corrective justice as demanding that "wrongful losses" (an invasion of a right or harm to a legitimate interest) be compensated by the party responsible for the loss, absent an alternative remedy.[269] The concept that the person responsible for harm should bear responsibility for correcting that wrong is served by mitigation. This type of relief clearly satisfies "the moral obligation of repair."[270]

Restorative justice is a process whereby wrongdoers, typically in the criminal law context, engage in meaningful dialogue with their victims in an attempt to redress the harm and damage that they caused.[271] It is "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[272] Some scholars highlight the potential for restorative environmental relief, particularly in the settlement context, to serve such a purpose.[273] Professor Thomas McGarity observed that:

> Allowing victims to play a prominent role not only facilitates the selection of an appropriate restorative remedy, but it also can lead to

267. *See, e.g.*, McGarity, *supra* note 58, at 1415–16; Rustad et al., *supra* note 22, at 449.

268. *Corrective Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019). Scholars debate aspects of this term of art. *See, e.g.*, Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1311 (2006) (describing the "contemporary debate [ ]as one over the elimination of the notion of corrective justice. If corrective justice is merely instrumental to distributive justice, its normative character derives entirely from distributive justice"). This debate is beyond the scope of this article.

269. Professor Coleman's views on corrective justice evolved to encompass the idea that the party responsible for the wrongful loss should indeed be the source of compensation to the injured party between Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982), and JULES L. COLEMAN, RISKS AND WRONGS (1992).

270. Walt, *supra* note 268, at 1311.

271. *See* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002).

272. *Id.* (quoting T.F. MARHSALL, ALTERNATIVES TO CRIMINAL COURTS (1985)).

273. *See, e.g.*, McGarity, *supra* note 58, at 1416 n.71 ("[R]estorative justice is about restoring victims, restoring offenders, and restoring communities." (citing BRAITHWAITE, *supra* note 271, at 11)); Rustad et al., *supra* note 22, at 469; Eric Anthony DeBellis, *Implementing Supplemental Environmental Project Policies to Promote Restorative Justice*, ECOLOGY L.Q. CURRENTS (2016), https://perma.cc/WFR9-X6FX.

> some degree of reconciliation[,] . . . operate as a hedge against capture of the regulatory enforcement process[,] . . . provide[ ] an opportunity for the violator to . . . [and] play a role in taking responsibility for remedying the damage.[274]

McGarity also recognizes the link to communities with environmental justice concerns. "[T]he fact that the burden of many environmental violations fall more heavily on low-income and minority communities means that bringing restorative justice into . . . environmental enforcement actions will also advance environmental justice goals."[275]

But the restorative and corrective justice capacity of mitigation will not be realized fully without robust community participation.[276] This simple proposition presents massive challenges. Affected communities tend to be restricted from participation in environmental enforcement negotiations between a violator and the federal government.[277] Parties to negotiation desire privacy and confidentiality for various, and many legitimate, reasons. Accordingly, government policies historically encouraged consultation and involvement but did not mandate it.[278]

Even when citizens learn that settlement negotiations are occurring, those meetings and their substance often lack transparency until the end of the process. Only the final acts of settlement with the United States are played out in public, as described in Part I.A.2. That process can leave community members feeling as though others wield control over how harms that they experience will

274. McGarity, *supra* note 58, at 1416–17.

275. *Id.* at 1417.

276. Restorative justice by definition requires the participation and assent of victims in the legal resolution at hand. Accordingly, the environmental enforcement settlement process does not map precisely to restorative justice due to the lack of authority an aggrieved community has in the final settlement terms between a government enforcer and a violator. *See* BRAITHWAITE, *supra* note 271.

277. *See, e.g.*, Foster & Foster, *supra* note 148, at 814–16. *But cf.* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1315–16 (2014) (describing the successes of community engagement and action in the Title VI transportation realm with the assistance of public interest organizations).

278. *See, e.g.*, EPA Public Involvement Policy, 68 Fed. Reg. 33,946, 33,948 (June 6, 2003); 2015 SEP Policy, *supra* note 59, at 18–20; 2012 EPA Mitigation Memo, *supra* note 11, at 7. But the May 2022 EJ Enforcement Strategy offers some concrete requirements for community engagement. It mandates that the attorney handling "each case initiated under this Strategy, . . . develop and implement a case-specific community outreach plan." EJ Enforcement Strategy Memo, *supra* note 9, at 6–7. The EJ Enforcement Strategy tasks the attorney, at base, with describing the "timing and appropriate steps to take, if any, given the stage and circumstances of the case." *Id.* at 7.

be remedied.[279] This raises larger questions—asked for decades—about how community residents may give input on, if not drive, these remedies.[280]

There are several obstacles to unpack here, including publicity about an enforcement matter and practical barriers to participation in that enforcement process.[281] Power and information asymmetries abound, and each alone is significant. Such obstacles, however, should not deter us from tackling these challenges. This Article offers high-level thoughts on eroding barriers to public participation. Suggestions are posited with a measured dose of sensitivity to the purposes served by confidentiality of negotiations and the unique features of government enforcement.[282]

President Biden began his administration with immediate and unprecedented efforts to incorporate environmental justice goals across the government, including environmental enforcement.[283] While policy-makers work to convert ideas into action, the DOJ and EPA should update guidance to reflect an emphasis on community participation as the *default* rather than an *aspiration*

279. *See, e.g.*, Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENV'T L.J. 3 (1998); Foster & Foster, *supra* note 148, at 815 ("As a Pittsfield community group said of the GE negotiations, 'It has been painful to watch others negotiate the fate of our community and our river.'"). Concurrently, in the contexts raised in *Massachusetts Environmental Trust*, the settling parties risk not knowing whether there is community opposition until a settlement is published for comment. It is normatively valuable and strategically wise to obtain community input before these issues come before a court.

280. *See, e.g.*, Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS W.-NW. J. ENV'T L. & POL'Y, 573, 574 (2008) ("[I]t is not environmental justice to open up a decision-making process to 'public participation' by an affected community if that decision-making process has already been fashioned and has been going on for many years." (relaying remarks of Berkeley clinician, now Chief Administrative Law Judge Anne E. Simon from the Hastings West-Northwest Journal of Environmental Law and Policy Symposium on Urban Environmental Issues in the Bay Area (Mar. 23, 1996)). For county-level empowerment strategies, see generally Anderson, *supra* note 242, at 941–49 (discussing potential reforms to county policies and procedures such that they "apply more rigorous health, safety, and related land-use standards in their urbanized areas").

281. These issues have been raised for decades yet remain unresolved. *See, e.g.*, Scott Kuhn, *Expanding Public Participation Is Essential to Environmental Justice and the Democratic Decision-making Process*, 25 ECOLOGY L.Q. 647, 650–55 (1999); Neil A.F. Popoviæ, *The Right to Participate in Decisions That Affect the Environment*, 10 PACE ENV'T L. REV. 683, 691, 700–01 (1993).

282. My thanks to former Assistant Attorney General of ENRD John Cruden and former Deputy Assistant Attorney General of ENRD Patrice Simms for discussing some of these ideas with me in their personal capacities.

283. *See, e.g.*, Shalanda Young, Brenda Mallory & Gina McCarthy, *The Path to Achieving Justice40*, WHITE HOUSE BLOG (July 20, 2021), https://perma.cc/N2RK-ZWMQ; Press Release, EPA, EPA Announces $50 Million to Fund Environmental Justice Initiatives Under the American Rescue Plan (June 25, 2021), https://perma.cc/AM7M-PMCB; Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021); Juan Carols Rodriguez, *Biden's First 100 Days Put Environmental Justice in Spotlight*, LAW360 (Apr. 29, 2021), https://perma.cc/3HBZ-3RH8.

in settlement negotiations pertaining to the scope and design of mitigation relief. Past efforts can serve as starting points. For example, in Obama-era settlements, EPA and the DOJ coordinated with DOJ's Community Relations Service and local offices, to assist with community outreach regarding violations and potential remedies, including restorative relief like mitigation and SEPs.[284] They distributed surveys to ascertain a community's experiences with illicit pollution and gathered citizens' suggestions for relief.[285] This type of outreach should be normalized and prioritized at EPA and the DOJ. But for that progress to occur, EPA and the DOJ need both extra funds and additional time to conduct public engagement with tools such as factsheets and FAQs, community surveys, flyers, door hangers, newspaper and radio announcements, and direct discussions with community leaders.

There are other models of cooperative approaches to environmental decision-making, elements of which attorneys could reproduce in the environmental enforcement relief design process. For example, government officials might look to EPA's Community Action for a Renewed Environment ("CARE") program, a "grant program [offering] communities an innovative way to address the risks from multiple sources of toxic pollution in their environment."[286] CARE engaged local residents and stakeholders in a process that "educate[d] and support[ed] communities by helping them assess the pollution risks they face."[287] This grant program based on dialogue and engagement resulted in EPA providing assistance to address *local* priorities, and earned support from the National Environmental Justice Advisory Council.[288]

Further, the DOJ and EPA should more broadly publicize their National Compliance Initiatives to maximize awareness of areas of focus in enforcement.[289] "The EPA focuses its enforcement and compliance assurance resources on the most serious environmental violations by developing . . . priorities, called

284. *See, e.g.*, ENRD, DEP'T OF JUST., ACCOMPLISHMENTS REPORT FY 2014, at 24 (describing the outreach efforts in *United States v. Metal Dynamics Detroit LLC* (E.D. Mich.) and *United States v. Atlantic Richfield Co.* (N.D. Ind.)). In addition, the May 2022 EJ Enforcement Strategy provides that "DOJ Components should also consider whether assistance from the Department's Community Relations Service (CRS) is appropriate." EJ Enforcement Strategy Memo, *supra* note 9, at 7.

285. *See, e.g.*, ENRD, *supra* note 284, at 24 (describing the outreach efforts in *United States v. City of Columbia* (D.S.C.)).

286. *Community Action for a Renewed Environment (CARE) Basic Information*, EPA, https://perma.cc/VG4U-EEQB.

287. *Id.*

288. Letter from the National Environmental Justice Advisory Council to Lisa P. Jackson, EPA Administrator (Nov. 16, 2011), https://perma.cc/2S5S-SN5D (urging continuation and additional funding for the CARE program).

289. *See, e.g.*, Simms, *supra* note 1 (proposing the creation of SEP banks and libraries as a partial solution to the issues surrounding community input in developing proposals for restorative relief for violations of federal and state environmental law).

National Compliance Initiatives."[290] For the last twenty years, EPA has revised and published these initiatives every three years.[291] While regulated industries monitor these public declarations of agency priorities, community members often do not. The environmental justice advisory groups within EPA could establish contacts or deepen relationships with key organizations and academic institutions, including Historically Black Colleges and Universities and law schools, to share this information when it becomes public. EPA could also communicate these publicly noticed priorities in the recently relaunched National Environmental Justice Public Engagement Calls. These are "free and open" calls in which EPA can "inform the public about [its] environmental justice work and enhance opportunities to maintain an open dialogue with environmental justice advocates."[292] Progress is developing on this front: for example, EPA is now hosting open stakeholder listening sessions for underserved communities in which EPA is conducting revitalization work under the Superfund statute.[293] EPA could, of course, use these types of forums to *solicit* public input on enforcement priorities, as well, to better address violations affecting communities of color and low income.

Community groups, legal clinics, and non-profits could also actively monitor such announcements with more focused assistance from EPA regional offices. The potential role for law school clinics is well-documented by scholars such as Dean Jane Aiken, Hope Babcock, and Anthony Alfieri, and endorsed herein.[294] Community groups could then prepare statements to inform the agency how they are affected by the public health issues associated with the targeted industry violations. Public interest legal organizations or law clinics could assist in amplifying community voices by preparing sets of proposed mitigation actions or SEPs in anticipation of enforcement activity.[295] Not every proposal would be workable or meet the legal standards. But it would offer a *front-*

290. *National Compliance Initiatives*, EPA (Jan. 20, 2022), https://perma.cc/NF94-22EY. Prior to the Trump Administration, these priorities were termed National Enforcement Initiatives.

291. *See* Memorandum from Susan Parker Bodine, Assistant Administrator, EPA, to Regional Admininistrators on Transition from National Enforcement Initiatives to National Compliance Initiatives (Aug. 21, 2018), https://perma.cc/CK6B-GG2B.

292. *See, e.g.*, *National Environmental Justice Public Engagement Call*, EVENTBRITE (Feb. 17, 2021), https://perma.cc/H7VQ-PYLM.

293. Press Release, EPA, EPA to Host Brownfields Stakeholder Session on April 23rd to Hear from Nonprofit Organizations and Community Foundations Across the Country on Their Work at Sites in Underserved Communities (Apr. 8, 2021), https://perma.cc/VCH3-Q39B.

294. There is a robust role for law school clinics to play in facilitating the amplification of community voices and preferences in this effort. *See, e.g.*, Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017); Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENV'T L.J. 3 (1995); *see also* Jane H. Aiken, *The Clinical Model of Justice Readiness*, 32 B.C. J.L. & SOC. JUST. 231 (2012).

295. For detailed information about the creation of such "SEP banks," see Simms, *supra* note 1.

end opportunity for coordination with the agency. And from a resource perspective, it would alleviate the burden on the government to develop these actions from scratch for every case.

C. Practical Considerations in Forging Complete Justice

1. Identification and Understanding of Harm

Early identification of the harm associated with violations and early engagement with the affected community is critical to the success of mitigation in service of complete justice. A municipal sewer system matter can provide a brief example of how this suggestion might manifest in an enforcement matter.

"Sanitary sewer systems collect and transport domestic, commercial, and industrial wastewater and limited amounts of storm water . . . to treatment facilities for appropriate treatment."[296] A sanitary sewer overflow ("SSO") occurs when the system releases raw sewage. Traditionally, the DOJ and EPA have not sought mitigation in municipal sewer system cases under the CWA.[297] But they could and should consider doing so for SSO violations of the CWA because sewer infrastructure failures are found frequently in low-income communities of color.[298] When SSOs occur, the enforcement process described in Part I.A.2 should include early efforts at identifying the specific nature and concrete impact of these violations. A simple starting point might be: Where are the SSOs occurring and how frequently are they occurring? What neighborhoods and community resources are affected? Are residents, pastors, or other leaders reporting these problems and how might they best be contacted for community outreach? Are there parks, playgrounds, or beaches that require investigation, photographing during a wet weather event, and sampling to establish the overflows' impact on public areas? Only through these early investigations aimed at harm will a proposed mitigation action be properly tai-

296. EPA provides a succinct primer on sanitary sewer overflows and the conditions under which they violate the CWA. *See Sanitary Sewer Overflows (SSOs)*, EPA, https://perma.cc/HV7Q-56TX.

297. In my review of settlements over the last twenty-five years, I could not locate an example of mitigation used in a municipal CWA settlement, although there are many examples where SEPs were used to secure benefits to local communities, including communities of color. *See supra* notes 240–243.

298. *See* FLOWERS, *supra* note 3; *St. Louis Clean Water Act Settlement*, EPA (Aug. 4, 2011), https://perma.cc/AZ9Q-KN74 (describing *United States v. St. Louis Municipal Sewer District*). Mitigation could redress harm in both litigation and settlement contexts, unlike SEPs which can only be used in settlement. What is more, the United States could pursue both mitigation and SEPs in these cases to redress harm from the violations and allow municipalities to offset a portion of their civil penalties by taking additional steps to provide environmental benefits to the local communities.

lored to serve a clear remedial (rather than punitive) purpose.[299] And only through early outreach will it serve multiple notions of justice by centering community expertise and experience in the enforcement process.

Some of the tools necessary for analysis of whether violations are affecting disproportionately burdened communities are well known to EPA or the DOJ. Staff are familiar with programs such as EJScreen, which is relaunching under President Biden.[300] EJScreen "combines environmental and demographic indicators in maps and reports" that are publicly accessible.[301] Further, new environmental justice data visualization tools are flourishing.[302] Some have already caught the attention of Biden's EPA, such as the Mapping Inequality tool created by the University of Richmond Digital Scholarship Lab, which creates publicly accessible maps of redlining that can inform environmental justice analyses and action.[303] The data on communities impacted by a set of violations, and the harm experienced, should be gathered early in the case development process.[304] As Professor Seema Kakade, a former EPA enforcement attorney, explains:

> [I]dentification of specific harm from enforcement violations may not happen until late in the enforcement process . . . . [I]dentification of harms should happen earlier in the enforcement process. . . . Information is useful for negotiating parties when thinking through the quantity of excess pollution arising from a violation, above relevant standards or requirements, and the impact of such pollution.[305]

EPA regional offices and EPA headquarters can share mitigation actions tagged to specific categories of violations and resulting harms. This information-sharing across offices would cultivate a repeatable but customizable process that might ease the administrative burden of these proposals on both local and government attorneys. To be sure, there are transactional costs to these proposals. Still, directing resources towards community outreach and early identification of harms would ultimately produce accurate mitigation actions that would serve overburdened communities and better the environment.

The Biden Administration acknowledges the need for environmental enforcement to serve marginalized communities. Leveraging mitigation for envi-

299. *See supra* Part II.B.

300. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

301. *EJScreen: Environmental Screening and Mapping Tool*, EPA, https://perma.cc/49SN-JLSL.

302. *E.g.*, Press Release, EPA, EPA to Hold Webinar Briefing on Release of New Environmental Justice Web Resource (July 27, 2021), https://perma.cc/Z5WN-SBEJ.

303. For example, EPA relaunched an Environmental Justice series in March 2021 focusing on this tool. *Environmental Justice and Systemic Racism Speaker Series*, EPA, https://perma.cc/8FTV-WL78.

304. Kakade, *supra* note 22, at 157; *see supra* Part III.C.

305. Kakade, *supra* note 22, at 157.

ronmental justice goals might be one of the swiftest options in the enforcement context, as it demands fewer resources than other initiatives requiring longer-term investments. Complex initiatives may necessitate hiring additional staff, such as facility inspectors, and funding agency enforcement branches at more significant levels. But mitigation can be incorporated in matters *currently* referred to the DOJ and in the referral pipeline.[306] That means more relief for communities, right now.

2. Legislative Options

At their core, questions surrounding the authority to order mitigation as equitable relief could be construed as legislative. However, the CAA and CWA do not need to provide expressly for an award of mitigation for the reasons detailed in Part II. In fact, opening either Act up to amendment is not a guaranteed success for environmental advocates. When it comes to lobbying Congress, there is a vast power asymmetry between communities affected by the types of violations discussed herein and industrial forces that amass and wield significant influence.[307]

If the Acts were to be amended, though, the most obvious solution would be a clear statutory grant of authority for district courts to order restorative relief for established violations of law.[308] Another helpful legislative fix would be an explicit grant for *agencies* to order restorative relief in the *administrative* enforcement context.[309] As discussed in Part I.A.1, administrative processes comprise a significant portion of the enforcement system, and the grant of authority differs in the administrative context.[310] An explicit grant of authority in the administrative context—as opposed to relying on equitable principles in the judicial context—would allow agencies to pursue mitigation in the vast majority

306. *See supra* Part I.A.II.

307. *See* Simms, *supra* note 1; FLOWERS, *supra* note 3 (emphasizing rural power asymmetry).

308. In addition to changes to federal environmental statutes, environmental enforcers interested in pursuing mitigation should monitor any tax code changes. The 2018 tax law includes provisions that could allow tax deductions for mitigation actions, which has significant implications for defendants facing requests for restorative relief. *See* John R. Lehrer II et al., *New Tax Law Will Shape Future Environmental Settlements*, BAKER HOSTETLER (Mar. 13, 2018), https://perma.cc/N8V6-ZPHV.

309. *Cf.* Liu v. SEC, 140 S. Ct. 1936, 1946–47 (2020) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)) (distinguishing authority of agencies and the inherent equitable authority of district courts).

310. In 2016, there were 1,369 Administrative Penalty Complaints, 893 Administrative Compliance Orders, and 152 Civil Judicial Referrals to the DOJ. *See Enforcement Annual Results Numbers at a Glance for Fiscal Year 2016*, EPA, https://perma.cc/S579-32FN. In 2015, there were 1,400 Administrative Penalty Complaints, 833 Administrative Compliance Orders, and 141 Civil Judicial Referrals to the DOJ. *See Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2015*, EPA, https://perma.cc/2BS4-7SXH.

of enforcement matters that do not become judicial, securing additional remediation for communities harmed by violations. Further, any amendment to the Acts should remove the $100,000 cap on mitigation actions in the CAA citizen suit provision.[311] A review of the mitigation actions described above reveals how deficient that amount is to mitigate harm in most CAA cases.[312] Indeed, an empirical review of twenty-two EPA power plant settlements, which all included mitigation actions, determined the median cost of those mitigation actions was $6,125,000.[313] Ultimately, though, without any legislative changes, the authority exists to order mitigation as restorative equitable relief when violations of environmental laws such as the CAA and CWA cause harm.

Conclusion

Complete justice in the environmental enforcement context demands more than an order to come into compliance. It demands more than a civil penalty sent to the United States Treasury. It demands restorative relief. Otherwise, unauthorized pollution from violations of laws that do not specifically provide for remediation goes unabated. Accordingly, environmental enforcers should be able to seek mitigation as equitable relief whenever violations of the CAA or CWA result in harm. And they should do so in consultation with affected communities. The expanded use of mitigation in settlements and litigation would provide a small but concrete step to redress environmental harms in communities suffering environmental injustices. While not a panacea for violations that have already occurred, mitigation is progress towards redress. Nothing in the statutes themselves, Supreme Court case law, nor a Trump appointee's legal memoranda present viable reasons to forgo complete justice for environmentally burdened communities. Arguments to the contrary rely on

311. 42 U.S.C. § 7604(g)(2). In 1990, Senator Susan Collins "urg[ed] [her] colleagues to support the committee's en bloc amendment" to strengthen the CAA's citizen suit provision, stating:

> [T]he provision . . . offers an additional option to a court that chooses to impose civil penalties on a polluter, as enabled by H.R. 3030. While the penalty could accrue to the Federal Treasury, the court would be given discretion to direct that up to $100,000 of the penalty payments be committed to 'beneficial mitigation projects' which enhance public health or the environment. These payments will help to ameliorate air quality problems rather than merely assess responsibility for their occurrence.

136 Cong. Rec. H2771-03. Three decades of settlements and litigated judgments evidence that $100,000 is insufficient to even begin to "ameliorate air quality" following most violations of the CAA.

312. *See supra* Part III.A.1.

313. Rustad et al., *supra* note 22, at 443–47.

the impermissible "light inferences" and "doubtful construction" to which "[t]he great principles of equity, securing complete justice, [can] not be yielded."[314]

314. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).