

# Beyond FOIA: Improving Access to Environmental Information in the United States

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## ABSTRACT

*The Freedom of Information Act (“FOIA”) does not provide sufficient public access to environmental information. FOIA has long been hailed as the best transparency law scheme in the world. In many ways, that claim is true—FOIA does provide for a significant amount of proactive agency disclosure, and gives the public the right to ask for all manner of agency records. However, other nations have both the basic FOIA statute as well as additional transparency measures for environmental information. This Article compares U.S. progress on providing access to environmental information with international efforts. It recommends the adoption of a specialized scheme like the one implemented by the United Kingdom, which fulfills certain obligations under the 1992 Rio Convention on Biological Diversity and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.*

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## INTRODUCTION

U.S. citizens recently became aware of several environmental calamities. First, the public discovered that Volkswagen, a major automobile maker, had programmed its diesel engine cars to foil emissions testing, tricking consumers and regulators into believing that these cars were within emissions levels permitted by the United States.<sup>1</sup> Meanwhile, in Colorado, a mismanaged federal mine cleanup led to a massive toxic wastewater spill that polluted waterways in three states.<sup>2</sup> Finally, water tests in Flint, Michigan revealed that state and federal government oversight and reporting failures had resulted in a lead poisoning

1. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), <http://www.bbc.com/news/business-34324772>.

2. Dan Elliott, *Colorado Disputes Key Part of EPA Mine Report*, SALT LAKE TRIB. (Nov. 13, 2015), <http://www.sltrib.com/home/3173105-155/colorado-disputes-key-part-of-epa>.

crisis that left thousands of children drinking lead-contaminated water for at least eighteen months.<sup>3</sup> Each of these incidents could have been prevented or better remedied by providing the public with better access to environmental information.

Access to environmental information is imperative to ensure human health and safety. Environmental harms and hazards are more likely to occur—and more likely to escape detection for longer—where there is inadequate access to environmental information. Environmental catastrophes often disparately impact people with less access to information and resources, as was the case in Flint, Michigan. There was a brief period several decades ago, after the 1984 Bhopal disaster,<sup>4</sup> when the world recognized the importance of environmental information access. The realization that environmental information is crucial to environmental protection and progress has been expressed and developed in a series of multilateral agreements. The Rio Declaration of 1992 provided guidelines for the development of enhanced environmental information access.<sup>5</sup> Later agreements built on Rio's foundation, with more specific models for national legislation and, in some cases, the capacity for international review and enforcement.<sup>6</sup>

Other nations—especially the United Kingdom—have developed holistic and streamlined environmental information access regulations and practices, which meet and often exceed the guidelines laid down by the Rio Declaration. In contrast, the United States rests on the laurels of the Freedom of Information Act (“FOIA”), which is only partially effective for environmental information access. This has left U.S. citizens without reliable, centralized access to critical environmental information.

Part I of this Article will provide a primer on the environmental information access available in the United States under the current transparency regime. Part II will describe the shortcomings of this status quo. Part III will describe the international efforts to improve environmental transparency, and Part IV will discuss how the United Kingdom has done a commendable job of implementing an environmental information access scheme at the national level, via the Environmental Information Regulations (“EIRs”) of 2004. Part V will discuss how the United States could bring its own environmental information access laws up to international standards, using the EIRs as a template.

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3. Lenny Bernstein & Brady Dennis, *Flint's Water Crisis Reveals Government Failures at Every Level*, WASH. POST (Jan. 24, 2016), [https://www.washingtonpost.com/national/health-science/flints-water-crisis-reveals-government-failures-at-every-level/2016/01/23/03705f0c-c11e-11e5-bcda-62a36b394160\\_story.html](https://www.washingtonpost.com/national/health-science/flints-water-crisis-reveals-government-failures-at-every-level/2016/01/23/03705f0c-c11e-11e5-bcda-62a36b394160_story.html).

4. Tim Edwards, *What Happened*, THE BHOPAL MEDICAL APPEAL, <http://bhopal.org/what-happened/> (last visited May 9, 2017). Bhopal was the world's worst industrial disaster, when a gas leak at the Union Carbide India Limited pesticide plant in Bhopal, Madhya Pradesh exposed over 500,000 people to deadly chemicals, killing thousands.

5. See *infra* section III.A.

6. See *infra* section III.B.

## I. AN OVERVIEW OF ENVIRONMENTAL INFORMATION ACCESS IN THE UNITED STATES

To understand how the United States' current environmental information transparency scheme could be improved, it is useful to observe the system as a whole. Overall, FOIA<sup>7</sup> is a robust transparency statute. It was enacted in 1966, after years of attempts to advance transparency litigation against the backdrop of Cold War government secrecy and resistance from the executive branch.<sup>8</sup> Congressman John Moss, a longtime proponent of transparency litigation, spoke in favor of the bill on the day it would later pass the U.S. House of Representatives, noting that the legislation was critical "if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship."<sup>9</sup> FOIA has been amended numerous times over the years, in reaction to technological, judicial, and social developments.<sup>10</sup> The following section describes the system that environmental information seekers currently navigate under U.S. law.

### A. FOIA DISCLOSURE

FOIA disclosure from federal agencies is required in two forms: proactive disclosure of certain types of information and responses to requests for information not affirmatively disclosed. These two types of federal agency disclosures work in tandem to create a blended transparency scheme for agency records.

#### 1. Proactive Disclosure

FOIA's proactive disclosure component requires agencies to publish final administrative adjudication orders and opinions (including concurring and dissenting opinions), agency guidance (i.e., policy statements and interpretations adopted by the agency but not published in the Federal Register), administrative staff manuals and instructions to staff that affect a member of the public, and copies of all records—regardless of form or format—that have been released to any person via a previous FOIA request.<sup>11</sup> This last group includes materials that are likely to become the subject of subsequent requests for substantially the same

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7. Freedom of Information Act, 5 U.S.C. § 552 (2015).

8. President Lyndon B. Johnson issued a signing statement that sought to limit the effects of certain provisions of the bill, primarily as it related to national security. But his statement concluded, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." Press Release, Office of the White House Press Secretary, Statement by the President upon Signing S.1160 (July 4, 1966).

9. 112 CONG. REC. 13,641 (1966) (statement of Rep. Moss).

10. *FOIA Legislative History*, THE NAT'L SEC. ARCHIVE, <http://nsarchive.gwu.edu/nsa/foialeghistory/legistfoia.htm> (last visited May 9, 2017) (citing, *inter alia*, the Watergate Scandal (1974 Amendment), the advent of the Internet (1996 Amendment), and the 9/11 attacks (2002 Amendment)).

11. 5 U.S.C. § 552(a)(2)(A).

records and a general index of those FOIA request records. All records must be available for the public to inspect and copy.<sup>12</sup> There is no central repository for FOIA records, but each agency is required to maintain a “reading room.” Nowadays, much of the reading rooms’ content is available on each agency’s website.<sup>13</sup> Some information is also centrally available at FOIAonline,<sup>14</sup> an inter-agency FOIA database, but this database is incomplete. When information seekers cannot find what they need in an agency reading room, they can file a FOIA request to obtain that information.

## 2. Disclosure by Request

The information-upon-request section of FOIA is the primary way to obtain government information that is not otherwise disclosed. The statute is intentionally broad, allowing any person to make a FOIA request without having to explain why they want the information.<sup>15</sup> Even though FOIA is a broad transparency statute, it does contain some limitations and bars to information access. The limitations and bars arise from scope-setting definitions and explicitly articulated exemptions from disclosure.

One FOIA information-access limitation is its statutory scope: FOIA only covers “agency records” (i.e., documents maintained by a federal agency).<sup>16</sup> FOIA does not apply to the President, Congress, or the courts. Also, the federal FOIA does not apply to state government agencies.<sup>17</sup> Finally, FOIA does not apply to information created and kept by government contractors.<sup>18</sup> This can be a

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12. *Id.* § 552(a)(2).

13. See U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 12–13 (2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf>.

14. FOIAONLINE, <https://foiaonline.regulations.gov/foia/action/public/home> (last visited May 6, 2016).

15. FOIA states broadly that agencies should grant requests made by “any person.” 5 U.S.C. § 552(a)(3)(A). Additionally, courts have interpreted FOIA’s provisions to not require any of the persons making FOIA requests to explain the motives, rationale, or intent for their requests. See *NARA v. Favish*, 541 U.S. 157, 172 (2004) (“[A]s a general rule, when documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information.”).

16. See *Department of Justice Freedom of Information Act Reference Guide*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Jan. 30, 2017) (“The FOIA applies to records of the Executive Branch of the federal government and does not provide access to records held by Congress, the federal courts, advisory offices of the President, state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records; state agencies should be consulted for further information about obtaining access to their records.”).

17. Each state and the District of Columbia have their own freedom of information laws. The National Freedom of Information Coalition (“NFOIC”) provides overviews and links to each state’s freedom of information law (sometimes called “FOI”) scheme. See *State FOI*, NFOIC, <http://www.nfoic.org/state-foi> (last visited Mar. 23, 2017).

18. See generally Sarah Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENVTL. L. 227 (2014); see also Press Release, Environmental Restoration, LLC, Environmental Restoration LLC Comments Regarding the Gold King Mine Release (Aug. 13, 2005),

major limitation for environmental information seekers, as much of the environmental work in the United States is managed, supervised, and conducted by private entities contracted by the government.<sup>19</sup>

Another limitation to FOIA is its definition of what is a “record.” “Records” include photographs and electronic document delivery mechanisms—like CDs and USB drives—but do not include tangible, evidentiary objects—like computer hardware—or archival exhibits like guns, bullets, or clothing.<sup>20</sup> For example, you are unlikely to be able to obtain water samples used in EPA testing through FOIA, even if you can likely get the data collected through the testing of those samples.

Beyond the limitations discussed so far, there are nine explicit exemptions set out in subsection (b) of the statute. These include classified information, trade secrets and confidential information, information that would invade personal privacy, certain types of information compiled for law enforcement purposes, and geological information on wells.<sup>21</sup> These FOIA exemptions are not all-or-nothing. Agencies are supposed to release responsive documents that redact information protected by FOIA exemptions, rather than reject requests outright for records that contain some exempted information.<sup>22</sup> FOIA exemptions are also not consistently applied by agencies, in part because FOIA is carried out by administrators, and not computer programs or other electronic systems. Depending on the administrator fulfilling FOIA requests at a particular agency, determinations about redactions and exemptions may vary by request, or even within the same request.<sup>23</sup>

FOIA is only one of several types of laws that may provide for the collection and dissemination of environmental information. Two other types of laws—

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<http://www.erllc.com/pdfs/Gold-King-Press-Release.pdf> (explaining that EPA, not the government contractor, is the entity that can provide information about the incident).

19. See Lamdan, *supra* note 18, at 230.

20. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 10 (2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf> (referencing *Nichols v. United States*, 325 F. Supp. 130, 135–36 (D. Kan. 1971), where a requester wanted evidentiary items pertaining to the assassination of President John F. Kennedy).

21. 5 U.S.C. § 552(b)(1)–(9) (2015).

22. *Id.* § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

23. See, e.g., *Prison Legal News v. Samuels*, 787 F.3d 1142, 1151 n.7 (D.C. Cir. 2015) (“While the Bureau [of Prison]’s redactions are far from uniform between documents, they are also inconsistent within a single Exhibit. When a victim’s name appears both in a settlement document and in a public court filing, the Bureau redacts the name from the former but not the latter.”); see also Lucas W. Hixson, *NRC’s Inconsistent Interpretations and Applications of Rules Governing FOIA Releases*, ENFORMABLE (Mar. 10, 2014), <http://enformable.com/2014/03/nrcs-inconsistent-interpretations-applications-rules-governing-foia-releases>; Jennifer Lynch, *The FBI Arbitrarily Covers up Evidence of Misconduct: Is This the Transparency Obama Promised?*, ELEC. FRONTIER FOUND. (Dec. 8, 2010), <https://www.eff.org/deeplinks/2010/12/fbi-arbitrarily-covers-evidence-misconduct>.

environmental laws and corporate disclosure laws—are discussed in the next section.

## B. ENVIRONMENTAL LAW DISCLOSURE

Aside from FOIA, a myriad of other U.S. environmental laws mandate both the creation and reporting of many kinds of environmental information. Each law has a different database or information-access point created by the EPA, other government agencies, or even private entities. Most environmental statutes fall into one of four broad categories, discussed below.

### 1. Right-to-Know and Proactive Planning Laws

There are several laws that provide prospective plans and information about potential environmental hazards. These laws are the most overtly transparency-focused of the U.S. environmental law spectrum, as they warn the public about environmental risks.

The Emergency Planning and Community Right-to-Know Act (“EPCRA”)<sup>24</sup> provides public information about what hazardous materials are present in a given area, so that local municipalities can be prepared for things like toxic gas leaks, explosions, or other environmental catastrophes.<sup>25</sup> One of EPCRA’s most noteworthy points of environmental information access is the EPA-maintained Toxics Release Inventory (“TRI”), which compiles the data submitted by the facilities subject to EPCRA’s public notice requirements.<sup>26</sup>

The National Environmental Policy Act (“NEPA”)<sup>27</sup> is another statute that provides information proactively. The broad, wide-sweeping law forces federal agencies to stop and think about the environmental impacts of federal or federally funded activities and to take a “hard look” at the potential environmental ramifications of government activities.<sup>28</sup> To those ends, NEPA requires agencies to draft an environmental impact statement (“EIS”) whenever an agency activity may have significant environmental consequences.<sup>29</sup> These EISs are made available to public officials and citizens, and the agency must provide a comment period for the draft version of the document, and may also request comments on

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24. Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–05, 11021–23, 11041–50 (2014).

25. Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 *ECOLOGY L.Q.* 989, 1017–19 (2012); *see also* 40 C.F.R. §§ 350–72 (2016).

26. 42 U.S.C. §§ 11023, 11044.

27. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (2014).

28. *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972) (“So long as the officials and agencies have taken the ‘hard look’ at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.”).

29. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502 (2016).

the final version.<sup>30</sup>

## 2. Tracking and Reporting for Hazardous Substances

Some environmental laws require polluters to track dangerous waste from its creation to its eventual disposal, and to carefully label toxic chemicals. Toxic substance laws attempt to keep the public informed about possible chemical hazards related to substances transported and used in their local environments.

The Resource Conservation and Recovery Act (“RCRA”) requires companies that deal with certain types of toxic chemicals—which pass specified thresholds for toxicity, persistence, degradability, flammability, and the potential to accumulate in living tissues—to track those chemicals throughout their life cycles.<sup>31</sup> Section 3002 of RCRA requires hazardous waste generators to keep waste manifest records tracking toxic chemicals from creation (“cradle”) to disposal (“grave”) and to report this information to the EPA.<sup>32</sup> Other agencies, such as the Occupational Safety and Health Administration (“OSHA”) oversee programs related to certifications for government and private sector personnel involved in operations at sites subject to RCRA and other statutes.<sup>33</sup>

The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) focuses on the harmful chemicals in pesticides, fungicides, and rodenticides.<sup>34</sup> FIFRA requires that all such chemicals sold and used in the United States be registered with the EPA, and further requires entities producing these chemicals to report the types and amounts they are producing.<sup>35</sup> FIFRA authorizes the EPA to require chemical producers to maintain records about their operations (including data about selling, delivering, or transporting the chemicals).<sup>36</sup> When the EPA collects these records, it must make them available for inspection and copying.<sup>37</sup>

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30. 40 C.F.R. § 1503.1 (2017).

31. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2014). RCRA is also known as the Solid Waste Disposal Act (“SWDA”), because RCRA amended the previously enacted SWDA in its entirety. *See* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795.

32. *See* *Shell Oil Co. v. EPA*, 950 F.2d 741, 745 (D.C. Cir. 1991) (“RCRA created a ‘cradle-to-grave’ system for tracking wastes from their generation to disposal.”).

33. *See* *Frequently Asked Questions: HAZWOPER*, OSHA, <https://www.osha.gov/html/faq-hazwoper.html> (last visited May 9, 2017) (regarding OSHA’s Hazardous Waste Operations and Emergency Response (“HAZWOPER”) program for personnel who deal with toxic wastes).

34. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1964, 7 U.S.C. §§ 136–136y (2015).

35. *Id.* § 136a(a) (requiring pesticide registration); *id.* § 136a(c)(1)(C) (requiring a statement of “all claims to be made” for the pesticide being registered).

36. *Id.* § 136f(a) (“The Administrator may prescribe regulations requiring producers, registrants, and applicants for registration to maintain such records with respect to their operations and the pesticides and devices produced as the Administrator determines are necessary for the effective enforcement of this subchapter and to make the records available for inspection and copying in the same manner as provided in subsection (b).”).

37. *Id.*

The Toxic Substances Control Act (“TSCA”)—another law providing information about hazardous substances—authorizes the EPA to track and report on certain chemical substances, including asbestos and polychlorinated biphenyls (“PCBs”).<sup>38</sup> Under TSCA, EPA can assess and regulate commercial chemicals before they enter the market, and EPA can regulate the distribution and use of already marketed chemicals that pose an “unreasonable risk of injury to health or the environment.”<sup>39</sup> Chemicals regulated by TSCA appear on the TSCA Inventory<sup>40</sup> that is publicly accessible on the EPA website. Manufacturers must submit a Premanufacture Notice (“PMN”) to the EPA before manufacturing new chemicals for commercial purposes.<sup>41</sup>

### 3. Laws Requiring Permits and Ongoing Reporting for Regulated Entities

Some environmental laws collect post-hoc pollution information from regulated entities and provide that data to the EPA. The Clean Water Act (“CWA”)<sup>42</sup> and Clean Air Act (“CAA”)<sup>43</sup> focus on pollution output data, not on cradle-to-grave tracking. Both the CWA and the CAA require similar types of data reporting, and the types of records disseminated to the public are similar. For example, each of the laws requires certain types of sources to regularly report their pollution amounts to the EPA.<sup>44</sup>

Some examples of this type of post-hoc reporting include the CWA-mandated National Water Quality Inventory Report<sup>45</sup> and the Assessment and Total Maximum Daily Load Tracking and Implementation System (“ATTAINS”), both of which provide information about water pollution and water quality to the public.<sup>46</sup> Information related to CAA pollution and air quality is scattered throughout several EPA databases and information depositories. For instance, the EPA maintains a webpage that provides information about air trends for six common air pollutants, and publishes an annual report on the status of air quality and air pollutant emissions.<sup>47</sup> There is also the National Emissions

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38. Toxic Substances Control Act of 1976, 15 U.S.C.A. §§ 2601–97 (West 2017).

39. *Id.* § 2605(a).

40. *Id.* § 2607(b).

41. *Id.* § 2604(a)(1); *see also* 40 C.F.R. § 720.3(kk) (2016).

42. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2014).

43. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2014).

44. *See, e.g.*, 33 U.S.C. § 1342(a)(2); 42 U.S.C. § 7661c(c).

45. Often called a 305(b) report, because it is required by CWA section 305(b). 33 U.S.C. § 1315(b). This information is contained in an online database.

46. Databases containing this information are: *Assessment and Total Maximum Daily Load Tracking and Implementation System (ATTAINS)*, ENVTL. PROT. AGENCY, <http://www.epa.gov/waterdata/assessment-and-total-maximum-daily-load-tracking-and-implementation-system-attains> (last visited May 9, 2017), and *National Water Quality Inventory Report to Congress*, ENVTL. PROT. AGENCY, <http://www.epa.gov/waterdata/national-water-quality-inventory-report-congress> (last visited May 9, 2017) (listing reports for 1992, 1994, 1996, 1998, 2000, 2002, and 2004).

47. *National Air Quality: Status and Trends of Key Air Pollutants*, ENVTL. PROT. AGENCY, <https://www.epa.gov/air-trends> (last updated May 4, 2017). This website was formerly called “AirTrends.”

Inventory,<sup>48</sup> and AirNow,<sup>49</sup> among other databases that are maintained for similar purposes.

Both laws also provide access to information about permits that allow sources to emit pollution into waterways and airways. The CWA provides for CWA permit searching in its National Pollution Discharge Elimination System (“NPDES”).<sup>50</sup>

#### 4. Labeling Laws

Sometimes environmental information—particularly regarding hazardous materials—is required to be printed on product labels. Labeling requirements help the public recognize the presence of hazardous chemicals and provide information on safe usage and recommended cleanup and decontamination procedures. In addition to the labeling requirements in RCRA,<sup>51</sup> FIFRA,<sup>52</sup> and TSCA,<sup>53</sup> the CAA requires labels on products that contain ozone-depleting substances to warn that their use contributes to ozone depletion.<sup>54</sup> OSHA<sup>55</sup> also requires labels and pictograms on cleaning and industrial materials used in workplaces.<sup>56</sup> Additionally, labels on energy efficient products are required under some federal laws, in order to increase awareness and encourage use.<sup>57</sup>

Similarly, the Food and Drug Administration (“FDA”) also provides the public with warning information about food, beverage, drug, and cosmetic products that may contain harmful chemicals. The agency reviews applications for chemicals and products subject to the Federal Food, Drug, and Cosmetic Act (“FFDCA”).<sup>58</sup> Items like food additives, cosmetic colors and dyes, dietary supplements, and drugs undergo an environmental assessment as part of their testing processes.<sup>59</sup>

#### C. MANDATED CORPORATE DISCLOSURE VIA SEC FILINGS

Traditional environmental statutes are not the only laws that require certain types of environmental reporting. For instance, the Securities and Exchange Commission (“SEC”) requires that corporations’ regular disclosures include information about climate change and other environmental factors that may

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48. *National Emissions Inventory*, ENVTL. PROT. AGENCY, <http://www.epa.gov/air-emissions-inventories/national-emissions-inventory> (last updated Oct. 26, 2016).

49. AIRNOW, <https://www.airnow.gov/> (last visited May 9, 2017).

50. See 33 U.S.C. § 1342(j) (2014); 40 C.F.R. § 122.7 (2016).

51. 40 C.F.R. §§ 262.30–262.34 (2014).

52. 40 C.F.R. § 156.10 (2014).

53. See, e.g., 15 U.S.C.A. § 2643(i)(3) (West 2017).

54. 42 U.S.C. § 7671j.

55. 29 U.S.C. § 655(b)(7) (2015); 29 C.F.R. § 1910.1200 (2016).

56. OSHA, HAZARD COMMUNICATION STANDARD: LABELS AND PICTOGRAMS (2013), <https://www.osha.gov/Publications/OSHA3636.pdf>.

57. See, e.g., 16 C.F.R. § 305 (2014).

58. 21 U.S.C. § 355 (2015) (governing FDA review of new drugs and devices).

59. 25 C.F.R. §§ 25.15, 25.40 (2016).

impact the investment values of those businesses.<sup>60</sup> These corporate disclosures include descriptions of any costs incurred by companies in complying with environmental laws, information about any litigation related to environmental issues, and any environmental risk factors that have impacted or may impact their business in the future.<sup>61</sup> This information can be found on a company-by-company basis by searching the SEC's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") database.<sup>62</sup>

There is transparency and access to environmental information in the current patchwork of FOIA, environmental law provisions, and other federal agency modes of information reporting and publication. However, the current environmental information access regime in the United States could be far more streamlined, thorough, and efficient. The next section covers the deficiencies in the current system that need correction.

## II. ENVIRONMENTAL INFORMATION ACCESS ISSUES IN THE UNITED STATES

As the overview of environmental information sources in the United States makes clear, there is, in theory, a huge amount of data that could potentially aid academics, researchers, political decision makers, and the general public. But this data is not as useful as it could be because there is no streamlined environmental information transparency regime in the United States. The federal government has largely left the EPA in charge of trying to restructure environmental information provisions by itself, and the agency has failed to create an efficient solution.

To improve its process, the EPA created an "Information Access Strategy" in 2009.<sup>63</sup> While crafting the Strategy, the EPA's Office of Environmental Information—which is charged with creating procedures and tools for improving the quality of the collection and use of environmental information<sup>64</sup>—collected comments from people who use environmental information in order to learn about those individuals' informational needs and access preferences.<sup>65</sup>

The comments illustrated that environmental information access in the United States requires information seekers to navigate a "thicket of technology, data and information management issues . . . ."<sup>66</sup> The Strategy also noted the difficulty of

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60. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) (to be codified at 17 C.F.R. pts. 211, 231, 241).

61. See 17 C.F.R. §§ 229.101(c)(xii), 229.103 (2016).

62. *EDGAR: Company Filings*, SEC, <http://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited May 9, 2016).

63. See ENVTL. PROT. AGENCY, INFORMATION ACCESS STRATEGY (2009) [hereinafter INFORMATION ACCESS STRATEGY], <http://nepis.epa.gov/Exe/ZyPDF.cgi/P1003T4W.PDF?Dockey=P1003T4W.PDF>.

64. *About the Office of Environmental Information*, ENVTL. PROT. AGENCY, <http://www.epa.gov/aboutepa/about-office-environmental-information-oei> (last updated Apr. 9, 2017).

65. INFORMATION ACCESS STRATEGY, *supra* note 63, at 1.

66. *Id.* at 2.

collecting information under the various environmental statutes and program offices, and understanding and analyzing EPA's information without expert assistance.<sup>67</sup> Commenters also reported a lack of sufficient online access.<sup>68</sup> Among the recommendations in the 2009 Strategy were to "Organize EPA Information and Data into Formats that Promote Better Understanding" and "Use New Web Technologies to Empower People to Find, Understand and Use Environmental Information."<sup>69</sup>

Unfortunately, the EPA has not fully realized the Strategy's goals. Numerous issues still pervade environmental information access in the United States. First, information is contained in a labyrinth of links from various points. Second, when it can be located, information can be cloaked in jargon and difficult to understand. Third, FOIA exemptions can block information access. Fourth, there are often long delays for obtaining access, and, finally, environmental information providers often use outdated technology. These issues are discussed in greater detail below.

#### A. A LABYRINTH OF ENVIRONMENTAL INFORMATION

Although the EPA has attempted to ameliorate the siloed, statute-specific nature of its data,<sup>70</sup> there is currently no single point of entry from which to access all of the types of information generated by environmental law requirements. Most information collected through environmental laws is still separated into distinct, unique databases and systems. Searching for information collected under U.S. environmental laws can be somewhat of a scavenger hunt.

In 2009, an EPA administrator admitted that even after fifteen years of working at the EPA, he still had trouble finding environmental data. He wrote, "[w]eb searches don't help that much so I rely on people like my friend Tim to email me data about hazardous waste. But I shouldn't have to know every database manager to get EPA's data."<sup>71</sup>

The EPA's website is huge, with many pages and even more web links on each page. Unfortunately, many of the EPA's webpages are outdated and many of the links do not work.<sup>72</sup> As a result, many searches take researchers on a clicking

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67. *Id.* at 5–6.

68. *Id.* at 4.

69. *Id.* at 11.

70. See ENVIROFACTS: YOUR ONE-STOP SOURCE FOR ENVIRONMENTAL INFORMATION, ENVTL. PROT. AGENCY, <https://www3.epa.gov/enviro/> (last updated Feb. 23, 2017) [hereinafter ENVIROFACTS]. The Envirofacts information portal is the EPA's major attempt to streamline and centralize environmental information gathered by the agency.

71. Ethan McMahon, *I Know That Data is Here Somewhere . . .*, THE EPA BLOG (July 31, 2009), <https://blog.epa.gov/blog/2009/07/datafinder/>.

72. See Taryn Rucinski, *An Environmental Legal Practitioner's Guide to EPA's Website*, 42 ENVTL. L. REP. 10416 (2012) (describing issues with the EPA's website).

spree through EPA websites full of broken links.<sup>73</sup> Webpages that do work often contain links that do not clearly or accurately explain what the links lead to. The issue of missing and broken EPA links was highlighted during the 2017 administrative transition under President Donald J. Trump, when a number of federal environmental webpages were modified, scrubbed of key information, or deleted entirely. As a result, environmental researchers and advocates are more concerned than ever about the future of EPA data access.<sup>74</sup>

Since 1998, EPA has provided a tool, called Envirofacts, to help researchers navigate this labyrinth.<sup>75</sup> Although the purpose of Envirofacts is to “make all EPA information that is subject to FOIA publicly accessible,”<sup>76</sup> Envirofacts is not easy to search. The landing page looks promising and up-to-date, but the format of the portal and underlying databases have changed very little since their inception. Envirofacts users can only access the data through the individual environmental laws’ distinct programs. This makes it burdensome and confusing to try to gather a full environmental picture for a specific type of pollutant, geographic region, municipal project, or other data sources. Additionally, Envirofacts’ information coverage is incomplete and often outdated.<sup>77</sup>

Another source of environmental information, the Federal Register, is similarly difficult to use. In theory, the Register is how government entities discharge their responsibility to make information known to the public. The annual volume is gigantic—each year’s compilation of daily reports is tens of thousands of pages long. Thus, without a clear idea of where you are going as a researcher (i.e., without a Federal Register citation, specific date, or Regulation Identifier Number) the Federal Register can be quite difficult to search. It is so hard to navigate that President Richard Nixon’s Special Assistant for Consumer Affairs stated in 1971 that the Federal Register “is absolutely incomprehensible to the average consumer.”<sup>78</sup>

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73. When using EPA.gov, it doesn’t take long to hit a broken or inaccessible link. For example, the following URL used to be EPA’s NPDES webpage, but it is now a dead link: <https://cfpub.epa.gov/npdes/index.cfm>. For an archived snapshot of what this webpage used to be, visit <https://web.archive.org/web/20090205220044/https://cfpub.epa.gov/npdes/index.cfm>.

74. See Zoë Schlanger, *Rogue Scientists Race to Save Climate Data from Trump*, WIRED (Jan. 19, 2017, 9:00 AM), <https://www.wired.com/2017/01/rogue-scientists-race-save-climate-data-trump/>.

75. See Michael L. Ford, *EPA’s Envirofacts Warehouse*, 4 ENVTL. LAW. 713 (1998); see also ENVIROFACTS, *supra* note 70.

76. Pat Garvey, *Web-Enabled Warehouse Brings Power to the People*, INFORM, May 1997, at 34.

77. Apparently, the EPA was considering the next iteration of Envirofacts in 2015, and contacted some developers about possible enhancements and improvements. One developer noted cryptic table names, cluttered landing pages, and lack of a clear Application Programming Interface (“API”) group, with acronyms failing to depict the content of various databases to Envirofacts researchers. See *Taking a Look at What’s Next for the Environmental Protection Agency (EPA) Envirofacts Data Service API*, API EVANGELIST (July 25, 2015), <https://apievangelist.com/2015/07/25/taking-a-look-at-whats-next-for-the-environmental-protection-agency-epa-envirofacts-data-service-api/>.

78. Preparation and Transmittal of Documents Generally, 36 Fed. Reg. 5203 (Mar. 18, 1971) (to be codified at 1 C.F.R. pt. 16).

If an information seeker does find seemingly relevant information, the victory is often short-lived. A single EIS can be thousands of pages long, and EPA data files are often so large that they can be difficult to download, filled with many pages of numbers and chemical formulae.<sup>79</sup> The next section discusses issues related to the quality and understandability of environmental information after the research and retrieval process. It also discusses the problem of information that may not be required to be available through FOIA or other means, even though that information plays a role in government decisions.

#### B. INFORMATION THAT IS INCOMPLETE OR HARD TO UNDERSTAND

In addition to being hard to find, much of the environmental information provided by the federal government is thick with jargon and nearly impossible for a layperson (or even an expert) to understand. Although the Federal Register is the main form of notice to the public for federal agency activities, its entries are often full of complex language, terminology, and acronyms. For example, a Final Rule approving the State of Missouri's Clean Air Act implementation plan revisions is summarized as follows:

What is being addressed in this document? EPA is approving a revision to the SIP and Part 70 permits program for the state of Missouri that was state effective on February 28, 2006. The revisions include the 8-hour ozone and PM<sub>2.5</sub> NAAQS that were finalized by EPA on July 18, 1997.<sup>80</sup>

People unfamiliar with the acronyms of the Clean Air Act cannot even begin to unpack this short paragraph. Without expertise or access to experts, EPA data can be very hard for laypeople to understand or use. A person may not be able to understand how an EPA regulation will affect their health, safety, environment, or economic interests due to its complexity. This is especially problematic if someone wants to participate in the public comment process for a regulation: If a person cannot understand how a proposed regulation impacts them, it will be difficult to convey their concerns to the agency and help shape the rulemaking process.

The passage of the Plain Writing Act of 2010<sup>81</sup> was intended to curb the overuse of jargon and difficult-to-understand writing in federal agencies. EPA recognizes that it has a hard time incorporating plain language into the informa-

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79. Laura Vernon, *Taking Public Out of Participation: How Rhetorical Conventions of Environmental Impact Statements Discourage Citizen Action*, 10 PROC. BIENNIAL CONF. ON COMM. & ENV'T 552 (2009), [https://theieca.org/sites/default/files/COCE\\_2009\\_Proceedings.pdf](https://theieca.org/sites/default/files/COCE_2009_Proceedings.pdf) (describing the writing in EIS documents as "full of technical and government jargon" written in a "detached tone and objective style" that limits access to understandable information).

80. Approval and Promulgation of Implementation Plans and Operating Permits Program; State of Missouri, 71 Fed. Reg. 70,468, 70,469 (Dec. 5, 2006) (to be codified at 40 C.F.R. pts. 52 and 70).

81. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010). The government maintains a resource for agency compliance with the Act, which contains sometimes-humorous examples of before-and-after text. See *Before-and-After Comparisons*, PLAINLANGUAGE.GOV (last visited May 10, 2017), <http://www.plainlanguage.gov/testexamples/indexSearch.cfm?subject=BA>.

tion it provides to the public. In fact, the EPA's Information Access Strategy notes that the EPA's published information is often so hard to understand that even the EPA must obtain expertise and assistance in deciphering it.<sup>82</sup> The agency Strategy advises that environmental information access should be enhanced with access to experts.<sup>83</sup> The EPA also realizes that it is critical to improve the descriptions it provides to the public about environmental information. Without descriptions, it is hard to understand and analyze the environmental data's full meaning, pedigree, reliability, and quality.<sup>84</sup>

Though the EPA aspires to provide the public with understandable information, virtually all of EPA's websites and databases continue to be written in jargon, without the assistance of summaries, overviews, or reading aids.<sup>85</sup>

Even if the Federal Register and other environmental information sources were easily understood, critical information is often not available at all. Although open meeting laws<sup>86</sup> and the rulemaking process<sup>87</sup> require many types of environmental information to be shared in the Federal Register, much of what agencies do happens outside of the realm of the "official agency activities" that require transparency. There are pre- and post-rulemaking activities that involve things like data collection, regulatory analyses, policy research, lobbying, and negotiations.<sup>88</sup> Because there are no publication requirements for those kinds of activities, much of this information is difficult or impossible to find.<sup>89</sup>

### C. FOIA EXEMPTIONS BLOCK INFORMATION ACCESS<sup>90</sup>

FOIA's exemptions prevent access to a lot of environmental information. While any exemption could impact the disclosure of environmental information

82. INFORMATION ACCESS STRATEGY, *supra* note 63, at 7.

83. *Id.* at 9.

84. *Id.* at 7–8.

85. Alexander Volokh, *The Pitfalls of the Environmental Right-to-Know*, 2 UTAH L. REV. 805, 807 (2002) ("Most [TRI] information is not meaningful in itself, but requires interpretation and analysis. . . . not all information is relevant to making an informed decision . . .").

86. These include statutes like the Government in the Sunshine Act, 5 U.S.C. § 552b (2012), and the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1–15 (2012).

87. Administrative Procedure Act, 5 U.S.C. §§ 500–706 (2012).

88. See OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 3 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (describing pre-rulemaking as "gather[ing] information through unstructured processes and informal conversations with people and organizations interested in the issues").

89. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992).

90. This Article will not address the inherent issues with FOIA practice that further hamper the efficacy of FOIA (i.e., agencies sitting on requests, bottlenecks, redaction overuse, etc.) as those issues are already addressed in congressional inquiries, in media exposés, and plentifully in FOIA scholarship by the academy. For example, a recent House Committee on Oversight and Government Reform report is simply titled "FOIA is Broken: A Report." H.R. COMM. ON OVERSIGHT & GOV'T REFORM, FOIA IS BROKEN: A REPORT (2016), <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf>. Instead, this Article touches more broadly on FOIA's purpose, goals, and statutory language, to demonstrate why, even if FOIA is carried out in an idyllic administrative ecosystem, it still lags behind other nations for environmental transparency.

records, a commonly invoked exemption is Exemption 4,<sup>91</sup> which bars the release of trade secrets or commercial and financial information.<sup>92</sup> This exemption removes a significant amount of environmental information from public access because it often operates to shield chemical compounds and processes created and used by polluting industries from disclosure.

Though FOIA Exemption 4 expressly exempts “trade secrets,” the statute does not actually define “trade secret.” Courts have defined it as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities” where there is a “direct relationship” between the trade secret and the productive process.<sup>93</sup> This definition includes everything from lists of chemicals used in the fracking process,<sup>94</sup> to descriptions of chemicals in pesticides sprayed over fields and gardens.<sup>95</sup> Because many environmental laws require or encourage polluters to self-report, the EPA often allows polluters to preemptively mark their documents “confidential” to ensure that the information will not be publicly released, despite the fact that the records will be agency records under FOIA.<sup>96</sup>

In the case of the controversial practice of hydraulic fracturing for natural gas and oil, some states recognize the harmful effects of hiding chemical pollution data from the public, and have outlawed some trade secret protections for fracking companies.<sup>97</sup> However, other states have done the opposite, making it a crime to disclose trade-secret-protected fracking chemicals.<sup>98</sup> Without a federal environmental information access scheme, states are free to regulate environmental information access, for better or worse.

FOIA’s limited scope, extending only to agency records, also keeps environmental information from the public. For example, government contractors conduct many environmental projects in the United States, but their records are

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91. See ENVTL. PROT. AGENCY, EPA FOIA ANNUAL REPORT FOR 10/01/2015 THROUGH 09/30/2016, at 6 (2016), [https://www.epa.gov/sites/production/files/2017-01/documents/2016\\_foia\\_annual\\_report.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/2016_foia_annual_report.pdf) (showing that only Exemption 6 (for private information) and Exemption 5 (for inter-agency memoranda) were applied more frequently than Exemption 4).

92. 5 U.S.C. § 552(b)(4) (2015).

93. Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

94. Zoë Schlanger, *There’s Still a Lot We Don’t Know About Fracking Chemicals*, NEWSWEEK (Aug. 13, 2014, 3:06 PM), <http://www.newsweek.com/theres-lot-we-still-dont-know-about-fracking-chemicals-264452>.

95. Pesticide compounds are famously protected from public access by trade secret provisions. See *Limitations on Disclosure of Information under Pesticide Law*, ENVTL. PROT. AGENCY, (last updated Dec. 13, 2016), <https://www.epa.gov/foia/limitations-disclosure-information-under-pesticide-law> (listing the many records related to pesticides that are exempt under FOIA Exemption 4).

96. AM. BAR ASS’N., ABA SEER TSCA TRADE SECRET AND CONFIDENTIAL BUSINESS INFORMATION BRIEFING PAPER 8 (2014) (explaining how to claim confidentiality for the disclosure of information under TSCA).

97. See, e.g., CAL. PUB. RES. CODE § 3160(c)(3) (West 2016) (requiring the division of the Natural Resources Agency tasked with overseeing hydraulic fracturing projects and programs to “provide for ready public access to information related to well stimulation treatments and related activities”).

98. See, e.g., The Oil and Gas Conservation Act, N.C. GEN. STAT. ANN. § 113-391.1(d) (West 2017) (making unlawful disclosure a Class I misdemeanor).

not agency records because they are not created or maintained by a federal agency.<sup>99</sup> Many dredging projects are carried out by government contractors under the auspices of the U.S. Army Corps of Engineers.<sup>100</sup> Although some environmental laws require private entities to release certain specific types of information to the federal government,<sup>101</sup> there is no overarching guarantee that these types of documents will be made available to the public through transparency mandates.

#### D. LONG DELAYS FOR INFORMATION ACCESS

A major shortcoming of the current environmental information access scheme is the amount of time it takes to obtain environmental information from the federal government. FOIA provides a twenty-day limit for initially responding to a request, but no time limit for actually providing the information requested.<sup>102</sup> That lack of a deadline predictably creates long delays before access is provided. FOIA is all too often reduced to a post-hoc investigative tool, having failed to prevent a harm in the first place.<sup>103</sup>

The time lags for FOIA requests are so significant that politicians recently declared that “[t]he FOIA process is broken.”<sup>104</sup> Citing excessive delays and redactions, the House Committee on Oversight and Government Reform found that the power of FOIA as a research and access tool is fading. The report reveals that agencies delay and obstruct the release of information, making the process of government transparency, in its current form, slow going at best.<sup>105</sup> FOIA exemptions and delays often lead to FOIA litigation that can drag on for years, diverting time from environmental advocacy efforts and draining funds that

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99. See generally Lamdan, *supra* note 18.

100. For instance, Great Lakes Dredge & Dock is a major contractor involved in many dredging projects contracted out by the government. Sometimes, these projects result in environmental degradation, and even litigation. See, e.g., Carolina Bolado, *Fla. Judge Reopens PortMiami Dredging Suit*, LAW360 (July 5, 2016, 10:24 PM), <https://www.law360.com/articles/814103/fla-judge-reopens-portmiami-dredging-suit>; see also Lamdan, *supra* note 18, at 228.

101. See Clean Air Act, 42 U.S.C. § 7414 (2014); Safe Drinking Water Act, 42 U.S.C. § 300j-4 (2015); Clean Water Act, 33 U.S.C. § 1318 (2014).

102. 5 U.S.C. § 552(a)(6)(A) (2015). Although agencies are supposed to respond to FOIA requests either with the records, the reason that the records cannot be disclosed, or a rationale for extending the request past the twenty-day period under § 552(a)(6)(A), in practice, the twenty-day limit is rarely followed. See Kirsten Mitchell, *Twenty Days . . . or Not*, THE NAT’L ARCHIVES: THE FOIA OMBUDSMAN (Sept. 29, 2011), <https://foia.blogs.archives.gov/2011/09/29/twenty-days-or-not/>.

103. See, for example the Gold King Mine wastewater spill, Juan Carlos Rodriguez, *New Mexico to Sue EPA over Gold King Spill*, LAW360 (Jan. 14, 2016, 2:48 PM), <http://www.law360.com/articles/746817/new-mexico-to-sue-epa-over-gold-king-spill>, and the Flint, Michigan water crisis, *Flint Water Debacle Raises Freedom-of-Information Issues*, SOC’Y OF ENVTL. JOURNALISTS (Jan. 20, 2016), <http://www.sej.org/publications/watchdog-tipsheet/flint-water-debacle-raises-freedom-information-issues>.

104. H.R. COMM. ON OVERSIGHT & GOV’T REFORM, *supra* note 90, at 2.

105. *Id.* at ii.

could be better used to solve environmental problems.<sup>106</sup>

#### E. OUTDATED ENVIRONMENTAL INFORMATION TECHNOLOGY

Federal environmental information data storage and access systems are rife with outmoded technology. Documents cannot be downloaded because they are made available in obsolete formats,<sup>107</sup> commercial search engines cannot properly access agency websites,<sup>108</sup> and poor web design leaves agencies with web pages full of poorly organized links.

The fragility of the agency's research and document retrieval capabilities was recently illustrated by a FOIA request that asked for emails sent by a top EPA administrator. An email search project that could be done with a push of a button using modern information storage and retrieval devices<sup>109</sup> brought the agency's FOIA practices to a standstill.<sup>110</sup> A FOIA lawsuit alleged that, at the pace EPA was proceeding, it would take over 100 years to process the FOIA request.<sup>111</sup> The current state of the EPA's record management systems is obviously ineffective for responding to FOIA requests for online data.<sup>112</sup>

Federal agencies should be enhancing information availability and access by using modern technology and moving away from decades-old database systems. The federal government is thinking about these changes, and aspires to improve its document-related technology.<sup>113</sup> Aspirations aside, the EPA should, at the very

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106. See, e.g., *Envtl. Integrity Project v. EPA*, 177 F. Supp. 3d 36 (D.D.C. 2016) (resolving FOIA litigation in 2016, three years after the initial FOIA request for information about "the amount of pollutants that individual power plants discharge to water bodies, data on the cost of wastewater treatment technologies, and data on how well those technologies perform in reducing pollutants that power plants discharge" was filed by plaintiff).

107. Many EPA documents are stored in the National Service Center for Environmental Publications ("NSCEP"), which is outdated. Information that is available is not provided in a searchable format. See, e.g., *National Service Center for Environmental Publications: Simple Search*, ENVTL. PROT. AGENCY, <https://nepis.epa.gov/Exe> (search text string "RIN2040AC98"). Incidentally, to be able to use this database efficiently, you would need this document identification number, which you would only know if you already had access to the desired document. Searching based on the title of the document returns thousands of results.

108. For example, the underlying data in the Envirofacts website do not appear in Google search results. You can only access Envirofacts data by searching through the Envirofacts portal. See ENVIROFACTS, *supra* note 70. Much of EPA's underlying data and reports (including those in NSCEP documents) similarly do not appear in general search engine search results. You must know where to go to search for and retrieve these environmental records.

109. For example, Google mail technology, or any one of the document e-discovery software tools on the market today.

110. Sarah Lamdan, *Electronic Communication Should Force FOIA Advancement*, JURIST (June 9, 2015), <http://www.jurist.org/forum/2015/06/sarah-lamdan-FOIA-requests.php>.

111. Complaint for Declaratory and Injunctive Relief at 3, *Competitive Enter. Inst. v. EPA*, No. 15-346 (D.D.C. Feb. 11, 2015).

112. Siri Srinivas, *Is the EPA Having a Transparency Crisis?*, THE GUARDIAN (Mar. 18, 2015), <http://www.theguardian.com/sustainable-business/2015/mar/18/epa-government-transparency-foia-public-information-sunshine-week>.

113. Memorandum from Jeffrey D. Zients, Acting OMB Director & David S. Ferriero, Archivist of the United States (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf> (regarding a presidential memorandum on the management of government records).

least, make its records searchable by commercial search engines like Google and Bing—a common feature of most every website created today—and ensure that PDF documents are in searchable (i.e., optical character recognition or “OCR”) format.<sup>114</sup> Creating online finding aids, digitizing crumbling records rooms, repairing old and corrupt files or outdated storage formats, and providing sufficient staff to get these advancements in place would be steps in the right direction.<sup>115</sup> Unfortunately, recent administrative funding challenges make these upgrades improbable.<sup>116</sup>

In summary, these obstacles prevent environmental data, already collected and maintained at great expense, from serving its primary purpose: preventing environmental disasters. By making information hard to access, making it too technical to understand, and by failing to deliver it in a timely fashion, the U.S. government fails to ensure that those who would be the first to notice and react to environmental issues are equipped to do so. Although environmental laws allow citizens to file lawsuits when polluters violate environmental laws, the lack of access to environmental information makes it hard for people to exercise that power.<sup>117</sup> The next section discusses international efforts to improve access to environmental information.

### III. ENVIRONMENTAL INFORMATION ACCESS IN INTERNATIONAL & FOREIGN LAW

The international community recognizes the importance of environmental information transparency, and some nations have established streamlined environmental information access statutes and systems. This section provides an overview of the development of international environmental information access agreements and principles.

In the period following the Bhopal disaster in 1984, the international community focused on environmental information access as an integral part of human safety and environmental stewardship. During the 1990s, two international treaties emerged with the goal of encouraging easier public access to environmental information, supporting the notion that “an informed public plays an important role in environmental protection and enhancement.”<sup>118</sup> These agreements

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114. Cf. Leo T. Sorokin, *The Computerization of Government Information: Does It Circumvent Public Access Under the Freedom of Information Act and the Depository Library Program*, 24 COLUM. J. L. & SOC. PROBS. 267, 274 (1991) (explaining that agencies take the position that FOIA only requires them to release information in the same form in which it was extracted).

115. See generally ACCESS TO GOVERNMENT IN THE COMPUTER AGE: AN EXAMINATION OF STATE PUBLIC RECORDS LAWS (Martha Harrell Chumbler ed., 2007).

116. *EPA Library Closings*, AM. LIBRARY ASS'N, <http://www.ala.org/advocacy/advleg/federallegislation/govinfo/fedlibs/epalibraries> (last visited May 10, 2017) (archiving information about threatened and actual closures of EPA libraries due to lack of funding and personnel).

117. William A. Wilcox, Jr., *Access to Environmental Information in the United States and the United Kingdom*, 23 LOY. L.A. INT'L & COMP. L. REV. 121, 131–32 (2001).

118. *Id.* at 122.

recognize that environmental information access is a human right, and is necessary for equal access to justice.<sup>119</sup> The Rio Declaration of 1992 is a broad-based agreement that sets out principles for nations to strive for while encouraging sustainable development.<sup>120</sup> While not legally enforceable, the Rio Declaration influenced later developments on the international stage, including the Aarhus Convention of 1998.<sup>121</sup> Aarhus is only a regional European agreement, but it demonstrates how the Rio Declaration can be implemented and formed the basis for the U.K. reforms discussed later in this Article.

#### A. AN ASPIRATIONAL FRAMEWORK: THE RIO DECLARATION OF 1992 & BALI GUIDELINES OF 2010

The Rio Declaration on Environment and Development is a list of twenty-seven principles created to guide countries as they try to encourage sustainable development.<sup>122</sup> It was drafted at the Earth Summit, which was officially titled the U.N. Conference on Environment and Development (“UNCED”).<sup>123</sup> The Rio Declaration builds off of the U.N. Conference on the Human Environment of 1972, which encouraged individual nations to work together towards sustainable development.<sup>124</sup>

Rio Principle 10 states that “[a]t the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities.”<sup>125</sup> This provision was the first international affirmation that public access to environmental information is a right that is necessary for grappling with environmental issues.<sup>126</sup>

Over 170 countries adopted the Rio Declaration, including the United States.<sup>127</sup> Principle 10 is now widely accepted as providing three cornerstones of a healthy

119. David Banisar et al., *Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice*, 12 SUSTAINABLE DEV. L. & POL’Y 8 (2012).

120. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/126/Rev.1 (Aug. 12, 1992) [hereinafter Rio Declaration].

121. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

122. Principle 10 of the Rio Declaration identifies information access and public participation in environmental decision-making as vital tenets of sustainable environmental development. See Rio Declaration, *supra* note 120, princ. 10.

123. *United Nations Conference on Environment and Development (UNCED), Earth Summit*, U.N. SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM, <https://sustainabledevelopment.un.org/milestones/unced> (last visited May 10, 2017).

124. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) (commonly known as the Stockholm Declaration).

125. See Rio Declaration, *supra* note 120, princ. 10.

126. RESEARCH HANDBOOK ON TRANSPARENCY 347 (Padideh Ala’i & Robert G. Vaughn eds., 2014).

127. SUSTAINABLE DEV. IN THE 21<sup>ST</sup> CENTURY, REVIEW OF IMPLEMENTATION OF THE RIO PRINCIPLES 1 (2011), <https://sustainabledevelopment.un.org/content/documents/1127rioprinciples.pdf> [hereinafter SD21]; *George Bush: The President’s News Conference in Rio de Janeiro*, THE AMERICAN PRESIDENCY PROJECT (June 13, 1992), <http://www.presidency.ucsb.edu/ws/?pid=21079>.

democratic governance system: access to information relating to environmental issues, comprehensive involvement in decision-making, and government accountability in environmental issues.<sup>128</sup>

In 2010, the U.N. Environment Programme (“UNEP”)<sup>129</sup> adopted the Bali Guidelines—a companion to Principle 10—as a “tool to assist countries in filling gaps in national and sub-national legislation in order to facilitate broad access to information, public participation and access to justice in environmental matters.”<sup>130</sup> The Bali Guidelines propose concrete steps and statutory language models for effective environmental information access. The first seven Guidelines focus on information access, and the last two deal with public participation.<sup>131</sup>

The Guidelines advise that people should have affordable and timely access to environmental information. Like the U.S. FOIA, the Bali Guidelines suggest that people should not have to prove a legal or other interest in environmental information in order to gain access to the records. Under the Guidelines, countries should also clearly set out FOIA-like exemptions, specifically defining grounds on which environmental information requests will be refused. These exemptions should be construed narrowly. The Guidelines also suggest that nations should proactively disclose some environmental information, in a fashion similar to the U.S. FOIA.

Unlike the U.S. FOIA, the Bali Guidelines also prompt countries to ensure that public authorities collect and update environmental information. The Bali Guidelines also recommend EPCRA-like warnings and safety plans for imminent threats of harm to human health and the environment. The last two Bali Guidelines suggest that countries make environmental decision-making more transparent, and provide opportunities for public participation, akin to the informal rulemaking goals in the U.S. Administrative Procedure Act,<sup>132</sup> which provides for public notice and the solicitation of public comments on proposed rules.

Principle 10 of the Rio Declaration has been the leading source of progress for environmental information access. It has led to a number of international projects and agreements across the globe.<sup>133</sup> Most notably, Principle 10 prompted the

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128. SD21, *supra* note 127, at 68.

129. U.N. ENVTL. PROG., GUIDELINES FOR THE DEVELOPMENT OF NATIONAL LEGISLATION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (2010) [hereinafter Bali Guidelines].

130. *Bali Guideline Implementation Guide Published*, UNEP, <http://www.unep.org/about/majorgroups/bali-guideline-implementation-guide-published> (last visited May 10, 2017). The UNEP has since joined with other international groups to draft a Guide to the Guidelines (published in 2012), which was designed to be a practical tool for governments and other stakeholders to help them implement Rio Principle 10. *Id.*

131. Bali Guidelines, *supra* note 129.

132. Administrative Procedure Act, 5 U.S.C. §§ 500–706 (2012).

133. *The Rio Summit's Principle 10 and Its Implications*, GLOBAL DEV. RESEARCH CTR., <http://www.gdrc.org/decision/principle-10.html> (last visited May 4, 2017).

Aarhus Convention, which is the first international, legally binding instrument specifying detailed obligations for effective implementation of Principle 10.

B. A BINDING (REGIONAL) COMMITMENT: THE AARHUS CONVENTION OF 1998 & THE 2003 KYIV PROTOCOL

The U.N. Economic Commission for Europe (“UNECE”) Convention on Access of Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (popularly known as the Aarhus Convention) is a regional agreement involving forty-seven European nations and the United Kingdom.<sup>134</sup> The Convention entered into force in 2001 as part of the Environment for Europe process.<sup>135</sup> The Aarhus Convention implements Principle 10 of the Rio Declaration by creating mandatory obligations for all members.<sup>136</sup> The Aarhus Convention has been called “the most impressive elaboration of Principle 10 of the Rio Declaration,”<sup>137</sup> for turning the vague commitments of Principle 10 into specific legal obligations.<sup>138</sup>

The Aarhus Convention centers around three pillars:<sup>139</sup> the right to obtain environmental information held by public authorities; the right to participate and provide comments on public authorities’ environmental plans; and the right to challenge and review environmental determinations made in secrecy and without public participation.<sup>140</sup> The first pillar—access to environmental information—is the central imperative of the Convention. Two 2003 European Union (“EU”) Directives inserted the first and second pillars of the Convention into EU law.<sup>141</sup>

The Convention mandates that European nations provide access to all information on the state of the environment, on public policies that affect the environment, and on any imminent threats to human health or the environment.<sup>142</sup> Furthermore, people seeking the information are entitled to materials within one month of the request<sup>143</sup> and without having to provide a reason for the request.<sup>144</sup>

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134. *What is the Aarhus Convention?*, EUR. COMM’N, <http://ec.europa.eu/environment/aarhus/> (last updated Mar. 2, 2017).

135. *Id.*

136. *Public Participation*, U.N. ECON. COMM’N FOR EUR., <https://www.unece.org/env/pp/welcome.html> (last visited Apr. 30, 2017) (“Aarhus Convention, and its Protocol on Pollutant Release and Transfer Registers (PRTRs) are the only legally binding international instruments on environmental democracy that put Principle 10 of the Rio Declaration on Environment and Development in practice.”).

137. SD21, *supra* note 127, at 69.

138. *Id.*

139. EUR. COMM’N, *supra* note 134.

140. Aarhus Convention, *supra* note 121.

141. *See The Aarhus Convention: Legislation*, EUR. COMM’N, <http://ec.europa.eu/environment/aarhus/legislation.htm> (last updated Apr. 27, 2017) (summarizing and linking to Directive 2003/4/EC on public access to environmental information, and Directive 3002/35/EC on public participation).

142. Aarhus Convention, *supra* note 121, art. 5.

143. *Id.* art. 4(1)(a).

144. *Id.* art. 4(2).

One difference between the Aarhus provisions and the U.S. FOIA is that under Aarhus, information transparency reaches far beyond the limited scope of agency records. The Aarhus Convention's transparency decree reaches *all* environmental information possessed by any public authority.<sup>145</sup> "Public authority" is defined in Article 2(2) of the Convention as national, regional, and municipal governments; anyone who performs public administrative functions under national law or has public responsibilities or functions in relation to the environment; or institutions of any regional economic integration organization that is a party to the Aarhus Convention.<sup>146</sup> Only judicial and legislative institutions are excluded from this inclusive definition. This definition captures far more information than the U.S. FOIA does.

Another difference between the Aarhus Convention and the U.S. FOIA law is that the Convention defines "environmental information." Article 2(3) of the convention states that:

"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.<sup>147</sup>

This is the first time that environmental information has been legally defined. The definition is broad, decreeing that environmental information includes not just pollution statistics and chemical lists, but also less explicitly environmental information like cost-benefit analyses and assumptions used in environmental decision-making. Judicial interpretations of the Convention and its related directives by the EU Court of Justice ("CJEU") have interpreted the environmen-

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145. *Id.* art. 6(6).

146. *Id.* art. 2(2).

147. *Id.* art. 2(3).

tal information definition to have a wide scope and broad purpose.<sup>148</sup>

The Aarhus Convention led to the 2003 Kyiv Protocol on Strategic Environmental Assessment (“SEA”),<sup>149</sup> which is the first international agreement regarding pollutant release and transfer registers (similar to the U.S. Toxic Release Inventory). It also established a Compliance Committee<sup>150</sup> that reviews member states’ compliance with the Convention.<sup>151</sup>

The European Court of Human Rights has held that Aarhus’s standards inform and augment the rights contained in the European Convention on Human Rights.<sup>152</sup> Various European tribunals have referred to the Aarhus Convention in their determinations.<sup>153</sup> The Aarhus Convention’s environmental information access provisions have influenced many other nations as well. The next section discusses how other nations have used Principle 10 of the Rio Declaration and the Aarhus Convention provisions as models for their national environmental information access legislation.

### C. OVERALL IMPLEMENTATION OF ENVIRONMENTAL TRANSPARENCY PRINCIPLES FROM THE AARHUS & RIO CONVENTIONS

Implementation by the signatories of Rio and Aarhus varies. Since the Rio Declaration, eighty governments across the world have enacted laws furthering access to information on environmental matters,<sup>154</sup> and international efforts and partnerships have formed to make progress on implementing Principle 10.<sup>155</sup> Some nations have made transparency moves that, while productive first steps, are still not up to the U.S. FOIA’s transparency standards. For instance, Lebanon and Chile have affirmed the importance of environmental information access, and Hungary has pledged to commit staff and resources to manage Rio Principle 10 commitments.<sup>156</sup>

148. See Case C-142/07, *Ecologistas en Acción-CODA v. Madrid*, 2008 E.C.R. I-06097; Case C-420/11, *Leth v. Republik Österreich*, 2013 E.C.J. EUR-Lex LEXIS 4286 (Mar. 14, 2013); see also Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 1 (2007) (citing examples from other courts).

149. Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, May 21, 2003, 2685 U.N.T.S. 140.

150. Veit Koester, *The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence*, 37 ENVTL. POL’Y & L. 83 (2007) (describing the Aarhus Convention).

151. Reviews are available at *Compliance Committee: Documents*, U.N. ECON. COMM’N FOR EUR., <http://www.unece.org/env/pp/ccdocuments.html> (last visited May 10, 2017).

152. *Taşkin v. Turkey*, App. No. 46117/99, 2004-X Eur. Ct. H.R. 179, ¶¶ 98–100.

153. UNECE maintains a database of case law related to the Aarhus Convention. See *Case Law Related to the Convention*, U.N. ECON. COMM’N FOR EUR., <https://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html> (last visited Apr. 30, 2017); see also CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2014) (A. Andrusovich & S. Kern eds., 2016) (reviewing Aarhus cases in various tribunals).

154. SD21, *supra* note 127, at 68.

155. *Id.* at 70.

156. *Id.*

In 2014, the Chinese National People's Congress amended Chapter Five of China's Environmental Protection Law, establishing a right to environmental information.<sup>157</sup> African nations have suggested constitutional provisions, legislative actions, and the creation of special institutions to incorporate Principle 10.<sup>158</sup> Similarly, Caribbean and South American nations formed working groups and are working on implementation plans.<sup>159</sup>

Although countries have made some aspirational proclamations about Rio Principle 10 and the Aarhus Convention, few have truly embraced the concept of environmental information access as a human right and embedded it into their national laws. However, one government has been a leader in implementing Rio Principle 10 and the Aarhus Convention: the United Kingdom.

#### IV. U.K. IMPLEMENTATION OF THE AARHUS & RIO PRINCIPLES

The United Kingdom was the first country to enact Environmental Information Regulations ("EIRs").<sup>160</sup> The Regulations were created in 1992, and then amended in 1998 when the United Kingdom signed the Aarhus Convention.<sup>161</sup> The EIRs are a separate, special information access scheme just for environmental information.

##### A. DIFFERENCES BETWEEN THE U.S. AND U.K. ACCESS SCHEMES

The United Kingdom's general freedom of information law, the Freedom of Information Act ("FOIA"), has existed since 1989.<sup>162</sup> The U.K. EIRs (amended

157. See Tseming Yang, *The 2014 Revisions of China's Environmental Protection Law*, SWISS RE INST. (Oct. 16, 2014), [http://institute.swissre.com/research/risk\\_dialogue/magazine/Environmental\\_liability/The\\_2014\\_Revisions\\_of\\_Chinas\\_Environmental\\_Protection\\_Law.html](http://institute.swissre.com/research/risk_dialogue/magazine/Environmental_liability/The_2014_Revisions_of_Chinas_Environmental_Protection_Law.html).

158. BENSON OWUOR OCHIENG, U.N. ENVTL. PROG., IMPLEMENTING PRINCIPLE 10 AND THE BALI GUIDELINES IN AFRICA (2015), <http://staging.unep.org/civil-society/Portals/24105/documents/RCMs/2015/Issue%20Paper%20on%20P10%20and%20Bali%20Guidelines%20in%20Africa.pdf>.

159. See U.N. ENVTL. PROG., PUTTING RIO PRINCIPLE 10 INTO ACTION: AN IMPLEMENTATION GUIDE 26 (2015), <http://wedocs.unep.org/bitstream/handle/20.500.11822/11201/UNEP%20MGSB-SGBS%20BALI%20GUIDELINES-Interactive.pdf?sequence=1&isAllowed=y>; *Implementation of Rio+20*, U.N. ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN, <http://www.cepal.org/rio20/default.asp?idioma=IN> (last visited May 10, 2017).

160. The Environmental Information Regulations 1992, SI 1992/3240 (UK).

161. The Environmental Information (Amendment) Regulations 1998, SI 1998/1447 (UK). Initially, Northern Ireland had a unique set of EIRs. The Environmental Information Regulations (Northern Ireland) 1993, Stat. R & O 1993/45, *amended by* The Environmental Information (Amendment) Regulations (Northern Ireland) 1998, Stat. R & O 1998/238. The 2004 EIRs repealed the Northern Ireland EIRs and placed Northern Ireland within the scope of the U.K. EIRs. See The Environmental Information Regulations 2004, SI 2004/3391, Explanatory Note (UK) [hereinafter 2004 Explanatory Note]. Scotland now has a separate, but similar, EIR scheme to bring the commands of the Convention and related Directives into practice. The Environmental Information (Scotland) Regulations 2004, SI 2004/520; *see also* SCOTTISH EXEC. ENV'T GRP., ACCESS TO ENVIRONMENTAL INFORMATION GUIDANCE FOR SCOTTISH PUBLIC AUTHORITIES AND INTERESTED PARTIES, Paper 2004/18 (2004).

162. The U.K. FOIA updated the Official Secrets Act of 1911, which avoided releasing information to the public. See Steve Platt, *Britain: Since 1968 (the United Kingdom)*, in 1 CENSORSHIP: A WORLD ENCYCLOPEDIA 317, 320 (Derek Jones ed., 2001).

again in 2004) now work in tandem with its FOIA. The U.K. FOIA is similar to the U.S. FOIA with one major exception: The United Kingdom exempts environmental information from disclosure, directing environmental information seekers to the EIRs.<sup>163</sup>

In 2001, the legal advisor for the U.S. Section of the International Boundary and Water Commission noted that “[c]itizens of the United States and the United Kingdom have had two different experiences regarding public access to government-held information and, more specifically, environmental information.”<sup>164</sup> He points out that, while “access to information in the United States is deeply rooted,” and the United Kingdom’s historical experience has been “quite the opposite,” the United Kingdom recently surpassed the United States by providing increased access to environmental information.<sup>165</sup>

Since 2001, the United Kingdom has even further expanded environmental information access. Its 1992 EIRs were rewritten in 2004 and now more clearly identify environmental information and the public authorities subject to the Regulations. The 1992 amendment also decreased the time for responding to a request, from two months to twenty working days.<sup>166</sup> The new Regulations also require public authorities to fulfill environmental information requests—unless the public interest in making the information available is less than the public interest in maintaining its secrecy—and sets out a clearer process for reviewing and appealing request denials.<sup>167</sup> The following section details the many advantages of the U.K. EIRs over the U.S. FOIA with respect to environmental information.

#### B. SUBSTANTIVE ADVANTAGES OF THE U.K. EIRs OVER THE U.S. FOIA

The EIRs operate similarly to the U.S. FOIA, but provide access to even more kinds of records from a wider variety of public authorities, making it easier to make requests, and shortening the deadlines for responding.<sup>168</sup> In short, the EIRs’

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163. Freedom of Information Act 2000, c. 36, § 39 (UK).

164. Wilcox, *supra* note 117, at 121.

165. *Id.* at 121–22. In 2002, the United Kingdom’s Interdepartmental Liaison Group on Risk Assessment (“UK-ILGRA”) adopted the precautionary principle, which is encompassed in Rio Principle 15. *See* Rio Declaration, *supra* note 120, princ. 15. The precautionary principle requires governments to make decisions, even without scientific certainty, when there is good reason to believe that harmful effects may occur to human, animal, or plant health or to the environment, and declares that openness and transparency of environmental information is imperative for the precautionary principle to succeed. *See* INTERDEPARTMENTAL LIAISON GRP. ON RISK ASSESSMENT, THE PRECAUTIONARY PRINCIPLE: POLICY AND APPLICATION 3 (2002).

166. These changes are described in the Explanatory Note at the end of the 2004 EIRs. *See* 2004 Explanatory Note, *supra* note 161. Additionally, the Northern Ireland EIRs were also repealed. *Id.* One other difference is that the 1992 EIRs were under the authority of DEFRA, and the 2004 EIRs are the responsibility of the Information Commissioner’s Office. *Id.*

167. *Id.*

168. *See* Code of Practice on the Discharge of the Obligations of Public Authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391), Foreword ¶ 14 (Feb. 2005) [hereinafter Code of Practice].

scope is broad and access is streamlined.<sup>169</sup> Here are some specific ways the EIRs are superior to the U.S. FOIA with respect to access to environmental information.

### 1. The EIRs Require Proactive, Centralized Disclosure of Environmental Information

Like the U.S. FOIA, the EIRs require proactive disclosure of some environmental information.<sup>170</sup> The Regulations require EIR information to be made available online and in a format that is easily accessible to the public.<sup>171</sup> The U.K. Department for Environment, Food & Rural Affairs (“DEFRA”) has created an online center for some environmental databases and information, and the rest should be available in the national data.gov.uk catalogue.<sup>172</sup> Data.gov.uk is a huge improvement on the outmoded EPA website scheme. The development of this U.K. data portal began in 2010 with the governmental goal of “opening up its data for other people to re-use.”<sup>173</sup> This national open-access information model has been declared a success in the United Kingdom, and is a model that nations like the United States can aspire to.<sup>174</sup>

### 2. The EIRs Exempt Far Less than the U.S. FOIA Does

EIRs have different exemptions than the U.S. FOIA. A public authority can withhold information if it would adversely affect national security or public safety, criminal or civil proceedings, intellectual property rights, confidentiality, and protection of the environment to which the information relates.<sup>175</sup> Each of these EIR exemptions is subject to the Public Interest Test, which instructs public authorities to weigh the public interest in obtaining the environmental information against the interest in withholding it.<sup>176</sup> Lack of consent from a third party to disclose information is just another factor to be weighed,<sup>177</sup> unlike in the United States, where it is easier to restrict allegedly commercially valuable informa-

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169. See *Archive: What is Environmental Information?*, DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, <http://webarchive.nationalarchives.gov.uk/20121204113252/http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/whatis.htm> (last modified Oct. 9, 2007).

170. The Environmental Information Regulations 2004, SI 2004/3391, ¶ 4(1)(a) (UK) [hereinafter 2004 EIRs].

171. *Id.* (requiring U.K. public authorities to “progressively make the information available to the public by electronic means which are easily accessible”).

172. *Environmental Open-Data Applications and Datasets*, DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, <http://environment.data.gov.uk/index.html> (last visited May 12, 2017).

173. *FAQ*, DATA.GOV.UK, <https://data.gov.uk/faq> (last visited May 12, 2017).

174. Rebecca Hill, *Government Claims Open Data Successes*, PUBLICTECHNOLOGY.NET (Oct. 17, 2016), <https://www.publictechnology.net/articles/news/government-claims-open-data-successes>.

175. 2004 EIRs, *supra* note 170, ¶ 12(5)(a)–(g).

176. *Id.* ¶ 12(1)(b). Guidance for applying the Public Interest Test is provided by the Information Commissioner’s Office. See INFO COMM’R’S OFFICE, *THE PUBLIC INTEREST TEST* (July 19, 2016), [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf).

177. Code of Practice, *supra* note 168, ¶ 41.

tion.<sup>178</sup> Public authorities cannot contract out of their EIR disclosure obligations, even where third party contractors are involved.<sup>179</sup> EIR exemptions are far more limited than the exemptions in both the U.S. and U.K. FOIA laws. Overall, the EIR disclosure scheme is far more transparent than the U.S. FOIA scheme.

### 3. The EIRs Define “Public Authority” More Broadly than the U.S. FOIA Defines “Agency”

The EIRs provide more sources from which information seekers can request information. While the U.S. FOIA limits requests to agency records, and the U.K. FOIA provides a specific list of entities to which one can make a FOIA request, the EIRs offer a wider definition of “public authority.” It includes any person or entity that has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment, or provides public services relating to the environment.<sup>180</sup>

The definition of public authority is so broad that it includes public utilities and certain public private partnerships, and even private companies, “such as those in water, waste, transport, and energy sectors.”<sup>181</sup> Also, in contrast to the U.S. FOIA, public authorities are found to hold environmental information in their possession even when that information is being held on someone else’s behalf, so even that information is available for disclosure under the EIRs.<sup>182</sup>

### 4. The EIRs Define “Environmental Information” Broadly and Explicitly

Additionally, the EIRs provide an explicit definition of “environmental information,” describing actual types of data and reports, rather than an amorphous concept. The definition is broad, and includes:

[A]ny information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

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178. In the United States, “reverse” FOIA lawsuits allow the submitter of “confidential business information” and commercially valuable information to preemptively restrict its disclosure in response to a third party’s FOIA request. See *FOIA Guide, 2004 Edition: “Reverse” FOIA*, U.S. DEP’T OF JUSTICE (July 24, 2014), <https://www.justice.gov/oip/foia-guide-2004-edition-reverse-foia>.

179. Code of Practice, *supra* note 168, ¶ 46.

180. 2004 EIRs, *supra* note 170, ¶ (2)(2)(d); Code of Practice, *supra* note 168, Foreword ¶ 14.i; Case C-279/12, *Fish Legal v. Info. Comm’r*, 2013 E.C.J. EUR-Lex LEXIS 4031 (Dec. 19, 2013).

181. *Fish Legal*, 2013 E.C.J. (holding water company was “public authority” under the 2004 EIRs).

182. Code of Practice, *supra* note 168, ¶ 32; *Fish Legal*, 2013 E.C.J.

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).<sup>183</sup>

This definition is more inclusive than the general agency records transparency provisions of the U.S. FOIA, which relies on the general test of whether or not something is an “agency record.”<sup>184</sup> The EIRs’ definition captures many types of information that would likely be excluded by the U.S. FOIA exemptions,<sup>185</sup> such as government contractor records and the records of private entities that carry out major infrastructure functions like cleaning wastewater and providing electricity. The more explanatory language almost certainly prevents litigation over the scope of the law, as compared with the U.S. FOIA.

### 5. The EIRs Require Faster & Easier Processing for Information Requests

The requesting process under the EIRs is more streamlined than under either the U.K. or U.S. FOIA provisions. The EIRs do not require requests to be in writing, which allows verbal requests and simplifies the request process.<sup>186</sup> The EIRs also set a twenty-day response time limit for requests, with a forty working day maximum for very complex and high-volume requests.<sup>187</sup> Additionally, the EIRs require public authorities to respond to all requests without imposing

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183. 2004 EIRs, *supra* note 170, ¶ 2(1)(a)–(f).

184. *See* *Forsham v. Harris*, 445 U.S. 169 (1980); *see also* *FOIA Update: What is an “Agency Record?”*, U.S. DEP’T OF JUSTICE (Jan. 1, 1980), <https://www.justice.gov/oip/blog/foia-update-foia-counselor-what-agency-record>.

185. The U.S. FOIA exemptions are contained in 5 U.S.C. § 552(b)(1)–(9) (2015).

186. The Information Commissioner’s Office Guide to the Environmental Information Regulations explains that requests can be made verbally or in writing. *See* *What Should We Do when We Receive a Request for Environmental Information?*, INFO. COMM’R’S OFFICE, <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/receiving-a-request/?q=verbal> (last visited Apr. 30, 2017).

187. 2004 EIRs, *supra* note 170, ¶ (7)(1).

unreasonable charges, even when those costs are in excess of the “appropriate limit” within the U.K. FOIA guidelines.<sup>188</sup> Each of these provisions makes the EIR request process faster and easier to use.

#### V. HOW THE UNITED STATES CAN IMPROVE ACCESS TO ENVIRONMENTAL INFORMATION

The United States must improve its environmental information access scheme. International progress—from the Rio Declaration of 1992, to the regionally binding Aarhus Convention, and ultimately culminating in the U.K. EIRs—demonstrates just how antiquated the U.S. environmental information access scheme has become.

The United States must act before a lack of information reduces public participation in environmental decisions to, at best, a guessing game with murky facts or, at worst, merely a forum for advancing commercial interests without reference to any facts whatsoever.<sup>189</sup> Although information itself cannot stop environmental calamity, an informed populace might be able to prevent events like the Volkswagen scandal and the Flint water crisis.

Fortunately, the Rio Declaration of 1992 and its Bali Guidelines, as well as the Aarhus Convention and U.K. EIRs, provide excellent models for improving environmental information access in the United States. The United States should take steps, per the Bali Guidelines, to ensure affordable, effective, and timely access to environmental information. Members of the public should always be able to investigate environmental concerns they have, and should never lack access to information about what is happening in their environment. Optimal legislation for improving environmental information access in the United States would:

- Create a separate, unique statutory scheme that requires environmental information access, like that of the U.K. EIRs;
- Define environmental information using the same or similar terms as the inclusive and explicit U.K. definition;
- Expand categories of available documents to include records from all public authorities, as defined in the EIRs, not just from federal agencies;
- Change the exemptions for environmental information, crafting special exemptions like those in the EIRs, and explicitly carving out a public interest

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188. Code of Practice, *supra* note 168, ¶ 20.

189. Wilcox, *supra* note 117, at 124; Neil A.F. Popović, *The Right to Participate in Decisions That Affect the Environment*, 10 PACE ENVTL. L. REV. 683, 708 (1993) (“Effective public participation in environmental decision-making requires . . . ready access to government-controlled information and a structure that makes such information usable for the public.”).

consideration in the statute;<sup>190</sup>

- Make sure that environmental information requests are responded to in a timely manner and completely fulfilled within months, not years;
- Require expert summaries that laypeople can understand and descriptions that allow people to find and use the information without first sifting through thousands of jargon-filled pages; and
- Create a special compliance committee—like the Aarhus Compliance Committee—to ensure that environmental information access is being provided in accordance with the new rules, in order to give the public recourse in a faster way than via citizen suits.<sup>191</sup>

When there is an imminent threat of harm to the human health and environment, the United States should immediately provide all information to the public to enable people to engage in preventative measures.<sup>192</sup> The federal government should also ensure that it has the capacity to facilitate the access needed by the public.<sup>193</sup> This would require upgrading technological capacity in the EPA website and other online spaces, like FOIA reading rooms, to make information more easily accessible.

## CONCLUSION

Environmental information access legislation in the United States would be especially useful as the nation grapples with increasing evidence that environmental catastrophes often disparately impact communities that are not fairly equipped to prepare for environmental hazards.<sup>194</sup> In some cases, individuals—or entire communities—will suspect that something is environmentally harmful, but have no information to either confirm or allay their fears. This was the case for residents of Flint, Michigan, who became suspicious when their water turned murky and people began getting skin irritations and other illnesses.<sup>195</sup> Easy access to information about local water composition, and access to government tests of the waterways, would have greatly benefitted the local community and

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190. Such language would assure that, for example, public interest overrides trade secret for hazardous chemicals, like California did for fracking fluids. *See* CAL. PUB. RES. CODE § 3160(c)(3) (West 2016).

191. SD21, *supra* note 127, at 73.

192. Bali Guidelines, *supra* note 129, Guideline 6.

193. *Id.* Guideline 7.

194. The environmental justice field of legal work continues to grow in the United States as the disparate impacts of environmental issues become more widely recognized. The EPA publishes environmental justice resources online to raise awareness about environmental justice topics. *See Environmental Justice*, ENVTL. PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last updated Apr. 10, 2017).

195. Monica Davey, *Flint Officials Are No Longer Saying the Water Is Fine*, N.Y. TIMES, Oct. 7, 2015, at A18 (“All along, through months of complaints from residents of this city about the peculiar colors and odors they said were coming from their faucets, the overriding message from the authorities here was that the water would be just fine.”).

allowed residents to make informed choices about the water they consumed and used daily.

To prevent future Flint, Volkswagen, and Gold King mine scenarios and better prepare the public to engage in environmental decision-making, the United States should follow the United Kingdom's lead and strengthen its environmental access laws.