

# Protecting Nature in a “Legal in Nature” Seventh Amendment Framework: Reimagining EPA Enforcement Post- *Jarkesy*

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*In Securities and Exchange Commission v. Jarkesy, the Supreme Court held that defendants accused of securities fraud were entitled to jury trials under the Seventh Amendment, and that the SEC could not adjudicate these cases before their expert administrative law judges. Worryingly, this case implicates the Environmental Protection Agency, whose enforcement strategy similarly relies on internal adjudication. This Note proposes various legal and policy solutions that mitigate the impacts of Jarkesy to preserve the critical work of the EPA in protecting the health, safety, and environment of the American public. First, the EPA can attempt to distinguish itself from the SEC through the public rights exception, and through the statutory language that empowers its enforcement. Second, the EPA can emphasize non-traditional forms of environmental redress that do not involve penalties that implicate the Seventh Amendment. Finally, the EPA can engage with state actors to fill in potential gaps in federal enforcement. While the current Supreme Court seems determined to declaw administrative agencies, alternative means remain for the EPA.*

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## I. INTRODUCTION

On June 27, 2024, the Supreme Court reached a pivotal decision in *SEC v. Jarkesy*. In a 6-3 ruling, the Court ruled that under the Seventh Amendment, a defendant accused of securities fraud was entitled to a jury trial.<sup>1</sup> This holding effectively prohibited the Securities and Exchange Commission (SEC) from using its administrative law judges (ALJs) to adjudicate their cases, placing a stranglehold on one of the agency's primary enforcement tools.<sup>2</sup> Worryingly, this decision is part of a larger effort by the Supreme Court to limit the ability of administrative agencies to function effectively.<sup>3</sup> The legal implications of *Jarkesy* extend beyond the SEC and could create significant disruptions across all federal agencies, with potentially dire consequences.

Among the agencies that may be affected, a negative application of *Jarkesy* to the Environmental Protection Agency (EPA) would have far reaching societal consequences.<sup>4</sup> Established in 1970 during a unique time of public environmental activism, a lack of modern legislative support has increasingly forced the EPA to rely on internal rulemaking and administrative adjudication to preserve effective enforcement of federal

<sup>1</sup> Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024).

<sup>2</sup> Daniel T. Shedd, Cong. Rsch. Serv., LSB11229, SEC v. Jarkesy: Constitutionality of Administrative Enforcement Actions at 4 (2024).

<sup>3</sup> See *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (2024); *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024); *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023); see also Michael Showalter, *Jarkesy and Gravitational Pull: The Supreme Court's Approach to Precedent and Its Implications*, 30 HARV. J.L. & PUB. POL'Y (2024).

<sup>4</sup> Cameron J. Bonnell, *Gathering Storm: Sec v. Jarkesy and Implications for Environmental Enforcement*, 54 ENV'T L. REP. (ELI) 10395 (2024).

environmental statutes.<sup>5</sup> The regulatory uncertainty introduced by *Jarkesy* threatens to undermine the EPA's framework, possibly leading to a fragmented regulatory landscape with inconsistent interpretations and enforcement practices across states and federal circuits.<sup>6</sup> Thus, any applicability of *Jarkesy* to the EPA's internal adjudication has the potential to seriously disrupt its critical mission of protecting the American public from pollution.

Given the importance of preserving the benefits of internal adjudication for the EPA, this Note aims to analyze and understand how the enforcement scheme and practices of the EPA are implicated by *Jarkesy*, and how the EPA might avail itself of the Seventh Amendment concerns raised. Part I explains the legal rationale of *Jarkesy* and how it will substantively impact the function of the EPA. Part II discusses various legal solutions for the EPA to distinguish itself, including notably the public rights exception, as well as additional legal risks and considerations that necessitate the need for more novel solutions. Part III explores the function and applicability of Supplemental Environmental Projects to the Seventh Amendment issues. Finally, Part IV covers cooperative federalism and discusses how state environmental regulators can work with the EPA to fill in gaps in enforcement. This Note acknowledges the unique political landscape in which these proposed solutions are intended to operate and attempts to strike a balance between the need for immediate enforcement and the importance of sustainable long-term policy.<sup>7</sup>

## II. UNDERSTANDING *JARKESY* AND EPA

The Supreme Court held in *Jarkesy* that when the SEC seeks civil penalties for securities fraud, the Seventh Amendment right to a jury trial applies.<sup>8</sup> This holding effectively required the agency to bring all such future cases in federal courts, eliminating the ability of the SEC to use

<sup>5</sup> *Origins of the EPA*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/history/origins-epa> (last visited Dec., 2024). [On File with the Columbia Journal of Environmental Law].

<sup>6</sup> Bonnell, *supra* note 4 at 10397.

<sup>7</sup> This Note was researched and written prior to the 2024 presidential election and the start of the second Trump Administration. Since then, the Trump Administration has enacted various policies and decisions that limit the short-term applicability and relevance of this Note. *See, e.g.*, Stacey Geis & Shennie Patel, *Is there a Role Anymore for Supplemental Environmental Projects in Environmental Enforcement Settlements?*, CROWELL (July 10, 2025), <https://www.crowell.com/en/insights/client-alerts/is-there-a-role-anymore-for-supplemental-environmental-projects-in-environmental-enforcement-settlements>. (Notably, the Department of Justice prohibited the use of Supplemental Environmental Projects on February 5, 2025.) While many of the solutions proposed in this note are not currently applicable given the political stance of the Trump Administration, they will be relevant when the next Democratic administration navigates the implications of *Jarkesy*.

<sup>8</sup> *Jarkesy*, 144 S. Ct. at 2117.

internal adjudication for these purposes.<sup>9</sup> The Court reasoned that such enforcement actions were "legal in nature" and replicated common law fraud, and thus the "public rights" exception to the Seventh Amendment did not apply.<sup>10</sup> This reasoning behind *Jarkesy* is key to understanding how the case as a whole could implicate and affect the EPA. This part of the Note explains the legal rationale of *Jarkesy*, relevant EPA practices, and how *Jarkesy* will substantively impact these practices and the larger function of the EPA.

#### A. Seventh Amendment Right to a Jury Trial

Under the Supreme Court's holding in *Granfinanciera S.A. v. Nordberg*, the Seventh Amendment extends to statutory claims if they are "legal in nature."<sup>11</sup> Before *Jarkesy*, this determination was based on comparisons between the statutory claim in question and similar suits at common law.<sup>12</sup> If a statutory claim was sufficiently based in a traditional common law claim, then a defendant was entitled to a jury trial.<sup>13</sup> Based on this test, agencies like the SEC argued that cases involving statutory public rights designed to regulate public safety or welfare, like securities fraud, were sufficiently novel and did not trigger the Seventh Amendment.<sup>14</sup> However, *Jarkesy* overturned this earlier precedent, holding that the determination of "legal in nature" is primarily focused on the nature of relief sought, and less on historical or comparative factors.<sup>15</sup> The Court's decision explained that the remedy sought was the dispositive indicator of whether or not a case was legal in nature.<sup>16</sup> Citing earlier decisions, the majority identified situations where defendants effectively faced legal claims, despite nominal distinction from traditional claims at common law.<sup>17</sup> Thus, the

<sup>9</sup> CONG. RSCH. SERV., *supra* note 2.

<sup>10</sup> *Jarkesy*, 144 S. Ct. at 2130; The Seventh Amendment requires that in suits at common law, parties are entitled to a jury trial. U.S. Const. amend. VII.; The public rights exception is the legal doctrine that grants Congress the authority to assign adjudication of disputes involving certain public issues to non-Article III tribunals, including administrative agencies. John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1164 (2023).

<sup>11</sup> *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33 (1989).

<sup>12</sup> *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U. S. 442 (1977).

<sup>13</sup> *Tull v. United States*, 481 U. S. 412 (1987) (holding that the Seventh Amendment was not triggered where the claim could not be said to involve the substance of a common-law right to, nor a fundamental element of, a jury trial).

<sup>14</sup> *Jarkesy*, 144 S. Ct. at 2136.

<sup>15</sup> *Id.* ("what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled").

<sup>16</sup> *Id.*

<sup>17</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 689 (1999) (the Amendment's jury guarantee extends to statutory claims unknown to the common law, so long as

Court rejected the SEC's argument that securities fraud was distinct from common law fraud, given that the relief sought of civil penalties clearly indicated a claim that was "legal in nature."

*Jarkesy* additionally narrowed the applicability of the Seventh Amendment's public rights exception, emphasizing that it should be applied sparingly and cannot override the broad presumption in favor of Article III courts in cases seeking legal relief.<sup>18</sup> Historically based on sovereign immunity and the ability of the government to dictate how disputes involving itself were resolved, this exception allowed the government to avoid jury trials in cases of public rights.<sup>19</sup> Historical examples of public rights have included patent, immigration, and labor disputes.<sup>20</sup> However, the Court in *Jarkesy* pushed back against the perceived overexpansion of the exception. Emphasizing the importance of preserving the Amendment's protection for defendants, the Court stated that "Congress cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal.'" <sup>21</sup> The critical question for determining the applicability of the exception was rather whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."<sup>22</sup> Contrasting with its previous decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, the Court clarified that the public rights exception is not a blanket authorization for Congress to assign all statutory claims to agencies, especially when the claims resemble traditional common-law actions.<sup>23</sup> Unlike in *Atlas Roofing*, where the laws in question were created by Congress to "develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems,"<sup>24</sup> the SEC's securities fraud claim simply adopted actions rooted in common law fraud for the Federal

the claims can be said to "soun[d] basically in tort," and seek legal relief"); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (holding that a jury trial right that otherwise would exist cannot be defeated by characterizing some equitable claim as "basic" and treating the legal claim as merely "incidental").

<sup>18</sup> *Jarkesy*, 144 S. Ct. at 2135.

<sup>19</sup> Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1035 (1994).

<sup>20</sup> Golden, *supra* note at 10.

<sup>21</sup> *Jarkesy*, 144 S. Ct. at 2136 (quoting *Granfinanciera*, 492 U. S. at 52).

<sup>22</sup> *Granfinanciera*, 492 U. S. at 54 (quoting *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 593-94 (1985)).

<sup>23</sup> *Jarkesy*, 603 U.S. at 137 (citing 29 U.S.C. § 651(b)(5) (1976 ed.)).

<sup>24</sup> *Id.*

Government. Although the Court in *Jarkesy* did not overturn *Atlas Roofing*, Justice Robert's majority clearly demonstrated a broader shift in the Court's attitude against internal administrative adjudication.<sup>25</sup> The Court further referenced prior rulings to demonstrate that the public rights exception applies narrowly.<sup>26</sup>

Analyzed within the context of other recent cases including *West Virginia v. EPA*, *Loper Bright Enterprises v. Raimondo*, and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court's decision in *Jarkesy* demonstrates a broader attempt by the judiciary to push back against the perceived overreach of administrative agencies.<sup>27</sup> However, while the Court may be well-meaning in their desire to reinforce Seventh Amendment concerns, the implications of *Jarkesy* pose much more significant risks to the administrative state and the American public in turn.

## B. EPA Internal Adjudication

Like other federal agencies that utilize similar systems of enforcement, the EPA derives many benefits from its internal adjudication scheme—namely, efficiency, expertise, and discretion. Compared to traditional civil actions in federal district courts, administrative proceedings generally occur much faster.<sup>28</sup> This is particularly useful for addressing environmental issues, where timely action is often necessary to mitigate harm.<sup>29</sup> Internal adjudication further allows settlement negotiations with regulated parties to occur earlier and in closer connection to ongoing agency investigations, leading to decreased costs for all parties by simplifying the process and lowering legal expenses.<sup>30</sup>

<sup>25</sup> *Jarkesy*, 603 U.S. at 197-299 (Sotomayor, J. dissenting).

<sup>26</sup> See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856) (upholding summary proceedings for the recovery of public debts owed by government agents without the need for judicial intervention); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (upholding Congress' broad and plenary power over foreign commerce, including immigration and the exclusion of aliens).

<sup>27</sup> John J. Healy Jr. & Emanuele S. Putrino, *The Three Crumbling Pillars of Administrative Authority*, 91 TENN. L. REV. 979 (2024); Deborah Sivas, *Environmental Law Expert Deborah Sivas Discusses the Death of the Chevron Doctrine and Other Pushback Against the Administrative State*, Stanford Law School (Aug. 12, 2024), <https://law.stanford.edu/2024/08/12/environmental-law-expert-deborah-sivas-discusses-the-death-of-the-chevron-doctrine-and-other-pushback-against-the-administrative-state/> [https://perma.cc/J43N-T636].

<sup>28</sup> Kenneth Oshita, *Home Court Advantage? The SEC and Administrative Fairness*, 90 S. CAL. L. REV. 879, 889 (2017).

<sup>29</sup> Lowell Rothschild, *Before and After Sackett v. U.S. Environmental Protection Agency*, FED. LAWYER, 46, 47 (July 2012), <https://www.fedbar.org/wp-content/uploads/2012/07/feature1-jul12-pdf-1.pdf> [https://perma.cc/2RVR-A3H6].

<sup>30</sup> *Id.* at 52.

Additionally, internal agency adjudication allows the EPA to exercise its expertise in the complex regulatory laws and industry practices surrounding environmental protection.<sup>31</sup> ALJs are particularly valuable for the EPA, as the presence of experienced judges creates more efficient, equitable, and consistent outcomes for all parties.<sup>32</sup> Environmental cases consistently involve navigating complex webs of procedural rules drawn from environmental and agency-specific regulations and guidance, further necessitating expert judges.<sup>33</sup> Combined, the inherent flexibility of the EPA's internal enforcement scheme allows for better responsiveness to political changes within the executive branch and fluid agency enforcement priorities.

Finally, internal adjudication allows the EPA to more effectively exercise enforcement discretion to improve their regulatory system. In addition to discretion over the decision of whether to bring legal action in the first place, agencies rely on the selection of an enforcement forum as a means of administering their regulatory schemes.<sup>34</sup> Based on an analysis of SEC enforcement outcomes stemming from these forums, administrative courts allowed the SEC to pursue non-monetary penalties more readily than in traditional Article III courts, demonstrating a direct correlation between agency forum selection and the ability of the agency to create a broad enforcement scheme shift.<sup>35</sup> Critically, administrative proceedings are an important opportunity for agencies to better control relevant law.<sup>36</sup> This is especially pertinent to the EPA, given the complexity and fluidity of environmental law.

The insulation of agency judicial decisions has been criticized as a barrier to the traditional development of administrative law.<sup>37</sup> However,

<sup>31</sup> Stone Washington, *Regulatory Advantages of the Administrative Law Court System*, *Geo. Wash. Univ. Reg. Stud. Ctr.*, 1 (Apr. 17, 2024), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-04/commentary\\_admin\\_law\\_courts\\_swashington\\_final.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-04/commentary_admin_law_courts_swashington_final.pdf) [https://perma.cc/A8LT-9H7F].

<sup>32</sup> *Id.*

<sup>33</sup> BEN HARRINGTON & DANIEL J. SHEFFNER, Cong. Rsch. Serv., R46930, 9, *Informal Administrative Adjudication: An Overview*, (Oct. 1, 2021), <https://crsreports.congress.gov/product/pdf/R/R46930> [On File with the Columbia Journal of Environmental Law].

<sup>34</sup> David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1206 (2016).

<sup>35</sup> Eric Helland & George Vojta, *Legal Outcomes and Home-Court Advantage: Evidence from the Securities and Exchange Commission's Shift to Administrative Courts*, 66 J.L. & ECON. 797, 826 (2023).

<sup>36</sup> Alexander I. Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 YALE J. ON REG. 439 (2017).

<sup>37</sup> See Gideon Mark, *SEC and CFRC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 116 (2016); Jed S. Rakoff, *Is the S.E.C. Becoming a Law unto Itself?*, *PLI Securities Regulation Institute Keynote Address*, 7 (Nov. 11, 2014), <https://securitiesdiary.files.wordpress.com/2014/11/rakoff-phi-speech.pdf> [https://perma.cc/86VP-8BK6]; Brittany Hunter & Adi Dynar, *What*

ALJs are limited by agency interpretations of statutes and thus are restrained in their ability to assess novel legal arguments.<sup>38</sup> In fact, this system of emphasizing ALJ control creates stability and predictability for regulated parties, as decisions will consistently match existing agency regulatory policy. The enforcement fallout following the Supreme Court's decision in *Sackett v. EPA* demonstrates the regulatory uncertainties that can result when external courts drastically alter an agency's enforcement scheme.<sup>39</sup> In that case, the court severely complicated the ability of the EPA to determine whether certain wetlands fell under the Clean Water Act (CWA), creating confusion and increased costs for the agency and regulated parties alike.<sup>40</sup>

### C. Implications of *Jarkesy* for EPA

Although the holding in *Jarkesy* appears narrowly confined to the SEC's securities actions, its legal implications could profoundly impact the EPA's enforcement mechanisms if applied.<sup>41</sup> Like most federal agencies, the EPA's enforcement actions heavily rely on civil penalties for effective enforcement and thus likely meet the "legal in nature" standard, effectively eliminating the ability to pursue such penalties through internal adjudication.<sup>42</sup> While the EPA would, in theory, retain the ability to internally pursue injunctive relief post-*Jarkesy*, the interconnected nature of injunctive relief and civil penalties in environmental statutory enforcement makes it unlikely that restrictions on one would not significantly impact the other.<sup>43</sup>

ALJs are a critical part of assessing civil penalties for environmental violators.<sup>44</sup> Although injunctive relief is important in environmental

*Harry Potter's House System Can Teach Us About Agency Adjudication*, PAC. LEGAL FOUND. (Jan. 05, 2024), <https://pacificlegal.org/harry-potters-can-teach-us-about-agency-adjudication/> [https://perma.cc/GTB2-22ND].

<sup>38</sup> A. Spencer Osborne, *Out of Sight, Out of Mind: America's Broken Administrative Judiciary and the Tools to Fix It*, 14 WAKE FOREST J.L. & POL'Y 103, 124 (2024).

<sup>39</sup> Rothschild, *supra* note 29.

<sup>40</sup> E.A. Crunden, *Post-Sackett, Chaos Erupts for Wetlands Oversight*, E&E NEWS (June 2, 2023), <https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/> [https://perma.cc/YT4Y-5S6F].

<sup>41</sup> Richard Frankel, *Corporate Exceptionalism: What's Behind the Business Community's Newfound Love of Jury Trials*, 34 WIDENER COMMONWEALTH L. REV. 115 (2025) (describing how corporations have already begun to take advantage of *Jarkesy* when facing enforcement).

<sup>42</sup> Noah Rosenblum, *The Case That Could Destroy the Government*, THE ATLANTIC (Nov. 27, 2023), <https://www.theatlantic.com/ideas/archive/2023/11/securities-and-exchange-commission-v-jarkesy-supreme-court/676059/> [https://perma.cc/2VHX-U8ED].

<sup>43</sup> William Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 ADMIN. L. REV. 857 (2024).

<sup>44</sup> See 40 C.F.R. § 22.27.



protection, civil penalties are essential for deterrence, as they bring immediate enforcement and pose significant financial consequences for violators.<sup>45</sup> To this end, the EPA considers the severity of an offense when assessing penalties, mirroring the deterrent purpose of punitive damages in tort law.<sup>46</sup> In many environmental cases, the conduct or actions in question occurred in the past, leaving proactive injunctions moot. By allowing the EPA to identify and address violations after their occurrence, civil penalties act as a strong deterrent tool against future violations.<sup>47</sup>

Furthermore, applying *Jarkesy* to the EPA would limit the ability of the EPA to negotiate penalties through settlements, harming both the government and regulated parties.<sup>48</sup> Environmental enforcement litigation is often costly, with legal fees, expert witnesses, and lost time adding up for all parties alike.<sup>49</sup> Settlement negotiations allow defendants to better present mitigating factors such as compliance history and prompt corrective actions while also minimizing trial risks for all parties.<sup>50</sup> Limiting negotiations further harms the EPA's ability to tailor penalties to violators' unique financial circumstances, such as through its "ability to pay" calculations, in which the penalty amount accounts for the violator's ability to actually pay.<sup>51</sup> Without negotiated penalty settlements, the EPA would have a tougher time addressing financially diverse violators, potentially leading to administrative inefficiencies and reduced deterrence for larger and wealthier violators.

The focus in *Jarkesy* on the nature of the remedy and its narrow interpretation of the public rights exception may be suitable for the SEC's securities fraud claims. However, extending *Jarkey*'s reasoning to the EPA could disrupt essential components of the agency's enforcement

<sup>45</sup> Daniel P. Selmi, *Enforcing Environmental Laws: A Look at the State Civil Penalty Statutes*, 19 LOY. L.A. L. REV. 1279 (1986).

<sup>46</sup> Michael J. Podolsky, *The Use of the Discount Rate in EPA Enforcement Actions*, 52 CASE W. RES. L. REV. 1009, 1026 (2002).

<sup>47</sup> Selmi, *supra* note 45; see also *Wasteland, Inc. v. Illinois Pollution Control Bd.*, 118 Ill. App. 3d 1041, 1055 (1983) ("We find that the penalty serves the legislative purpose of aiding enforcement of the Act, for through penalties upon those who blatantly disregard applicable rules and regulations, others, who might consider cutting corners at the expense of the environment, are deterred."); *New Jersey Dep't of Env't Prot. v. Town & Country Devs., Inc.*, 396 N.J. Super. 280, 287 (App. Div. 2007) ("The penalty assessment formula is specifically structured to serve as both a specific deterrent against the violator and a general deterrent for the regulated community.").

<sup>48</sup> Dietrich Earnhart & Lana Friesen, *Certainty of Punishment versus Severity of Punishment: Enforcement of Environmental Protection Laws*, 99 LAND ECON. 245 (2023).

<sup>49</sup> Jon S. Faletto, *Negotiating Resolution of Environmental Enforcement Actions*, 18 N. ILL. U. L. REV. 527, 529 (1998); Jon Paul Suttle, *Separating Litigation: How Seps Demonstrate the Need for Centralized Environmental Civil Litigation*, 47 WM. & MARY ENV'T L. & POL'Y REV. 357 (2023).

<sup>50</sup> *Id.* at 538.

<sup>51</sup> Nicholas S. Dufau, *Too Small to Fail: A New Perspective on Environmental Penalties for Small Businesses*, 81 U. CHI. L. REV. 1795, 1797 (2014).

framework. Thus, any application of *Jarkesy* could unintentionally create disastrous consequences for environmental enforcement.

### III. PRESERVING EPA ENFORCEMENT

Although the potential implications of *Jarkesy* for other administrative agencies cannot be understated, the Supreme Court's decision provides various potential "offramps" to limit its applicability.<sup>52</sup> However, distinguishing the EPA from the holding of *Jarkesy* may not be enough in light of the mounting pushback against agency adjudication generally and the high likelihood of EPA enforcement being directly impacted in the future. This in turn necessitates more novel solutions to preserve long-term agency stability. This part of the Note discusses various legal solutions for the EPA to distinguish itself, the potential applicability of the public rights exception, and additional legal risks that necessitate the need for more novel solutions.

#### A. Distinguishing from SEC

The EPA can point to several arguments to limit the applicability of *Jarkesy* to just the securities fraud action in question. The EPA is granted explicit statutory authority by several environmental laws to commence administrative enforcement actions.<sup>53</sup> This authority sets the EPA apart from the SEC by offering specific enforcement mechanisms designed for safeguarding public health and the environment.<sup>54</sup> The EPA can rely on case law that supports the clear congressional delineation of authority granted to itself.<sup>55</sup> In *International Paper Co. v. Ouellette*, the Supreme Court affirmed that Congress, by establishing a clear regulatory framework, demonstrated its intent to limit common-law suits that would undermine that regulatory system.<sup>56</sup> This adds heft to Congress' judgment on how to balance the interests of those affected by pollution while safeguarding public health and the environment.<sup>57</sup> The EPA can

<sup>52</sup> Interview with Thomas W. Merrill, February 6, 2025 (discussion of how federal agencies can limit the applicability of *Jarkesy*).

<sup>53</sup> Tori Osler, *Environmental Protection Agency's Enforcement Mechanisms After Sackett v. EPA*, 50 IDAHO L. REV. 71 (2014); Robert Esworthy, Cong. Rsch. Serv., RL34384, *Federal Pollution Control Laws: How Are They Enforced?* (2014).

<sup>54</sup> Joel Mintz, *Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS*, 17 J. LAND USE & ENV'T L. 127, 148 (2001).

<sup>55</sup> *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 497 ("This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate permit system

additionally distinguish from *Jarkesy* by emphasizing that its enforcement actions are designed to address environmental and public health concerns, a focus that differs from the financial regulations enforced by the SEC.<sup>58</sup>

Further, the EPA can point to the history of environmental regulations to better differentiate from securities fraud.<sup>59</sup> The history of environmental law is heavily based in common law nuisance and trespass claims. Recognizing that ecological harms often resulted in nuisance or trespass to one's property, early environmental suits often heavily relied on these existing claims.<sup>60</sup> As environmental laws developed into a distinct legal field, the concept of nuisance separated into public and private claims, with public nuisance leading to modern environmental statutes.<sup>61</sup> Trespass claims similarly evolved to suit more modern conceptions of pollution and ecological damages.<sup>62</sup> However, the EPA's creation of modern environmental statutes, such as the Clean Air Act (CAA), created new rights and obligations intended to supersede these historical legal analogs.<sup>63</sup> For example, in *American Electric Power Co. v. Connecticut*, the Supreme Court ruled that federal environmental laws, including the CAA, displace the common law regarding pollution.<sup>64</sup> Drawing upon such rulings, the EPA can update its regulations to distinguish itself from traditional common law claims.

Although there is a potential legal argument for distinguishing enforcement of environmental statutes from securities fraud actions, the EPA's current enforcement scheme would likely be found to be "legal in nature" given its emphasis on civil penalties. While environmental statutes are generally structured under equitable principles, certain mandatory processes ensure that the EPA will seek civil penalties as part of enforcement actions.<sup>65</sup> Under *Jarkesy*, an enforcement claim that seeks civil penalties is dispositively "legal in nature."<sup>66</sup> Thus, distinguishing the

that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.").

<sup>58</sup> *Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/basic-information-enforcement> [https://perma.cc/MY2A-WTVT] (last visited Dec., 2024).

<sup>59</sup> Robert L. Glicksman, *The Disintegration of Administrative Adjudicatory Enforcement Authority*, 34 WIDENER COMMONWEALTH L. REV. 71 (2025).

<sup>60</sup> Jack Wold-McGimsey, *Climate Change and Modern State Common Law Nuisance and Trespass Tort Claims*, 94 U. COLO. L. REV. 815, 819 (2023).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 829-31.

<sup>63</sup> Glicksman, *supra* note at 59.

<sup>64</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

<sup>65</sup> *ESG Watts, Inc. v. Ill. Pollution Control Bd.*, 668 N.E.2d 1015, 1023 (1996). *See also Enforcement under CWA Section 404*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404> [https://perma.cc/6VUZ-QD4E] (last visited Dec., 2024).

<sup>66</sup> *Jarkesy*, 603 U.S. at 134.

EPA from the holding of *Jarkesy* would likely have to occur through the public rights exception.

## B. Public Rights Exception

Environmental claims are more likely to fall under the public rights exception, compared to the SEC's securities fraud actions. Despite *Jarkesy*'s narrowing of *Atlas Roofing*'s applicability, environmental statutes and EPA enforcement mechanisms could arguably constitute a public regulatory scheme appropriate for independent agency resolution.<sup>67</sup> In *Atlas Roofing*, the Court recognized that under certain policy circumstances, Congress “may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment.”<sup>68</sup> This holding was based on certain defined policy matters specifically delegated to the sole authority of Congress.<sup>69</sup> This exception is explicitly acknowledged by the majority in *Jarkesy*, which stated that “certain other historic categories of adjudications fall within the exception . . . including the administration of public lands.”<sup>70</sup>

Although the courts have never defined what counts as the administration of public lands, many of the EPA's actions contain elements that are common to traditional forms of land management. Historically, the administration of public lands has been identified as an area where Congress could delegate the determination of public rights in connection with the exercise of congressional power to an administrative agency.<sup>71</sup> However, since courts have never clearly defined what constitutes the administration of public lands,<sup>72</sup> significant ambiguity remains with regard to whether environmental statutes might literally constitute public lands administration or instead merely operate under an analogous congressional delegation. Regardless, many of the EPA's enforcement actions contain elements that are common to traditional

<sup>67</sup> *Atlas Roofing*, 430 U.S. at 455.

<sup>68</sup> *Id.*

<sup>69</sup> *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.”).

<sup>70</sup> *Jarkesy*, 603 U.S. at 130.

<sup>71</sup> See *Burfenning v. Chicago, St. P., M. & O. Ry. Co.*, 163 U.S. 321 (1896).

<sup>72</sup> See *Crowell*, 285 U.S. 22; *Jarkesy*, 603 U.S. at 130.

forms of land management, potentially constituting the administration of public lands.<sup>73</sup>

Several aspects of the EPA's broader enforcement scheme point towards the potential application of the exception. Many internal branches of the EPA engage in regulatory management of public lands. For example, the Office of Land and Emergency Management's responsibilities include developing guidelines for hazardous waste disposal, providing grants for safe waste management, supporting the redevelopment of contaminated sites through the Brownfields program, and responding to hazardous waste sites under the Superfund program.<sup>74</sup> While these responsibilities are primarily regulatory, there are strong connections with land management, including land use, sustainability management, and monitoring.<sup>75</sup> Furthermore, the EPA's collaboration with agencies and partners often involves more land management specific actions.<sup>76</sup> Joint enforcement of the CWA is an example of this characteristic. CWA enforcement at local levels often involves highly specific land and wetland-based management practices as part of broader water quality goals.<sup>77</sup>

Similarly, the CAA also involves a certain degree of public land administration. Under the CAA, the EPA enforces air quality standards, issues permits and compliance orders, and assesses penalties for violations.<sup>78</sup> While these activities are primarily regulatory, they again involve localized land management practices as part of broader efforts to protect public access to a healthy environment. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) further demonstrates how environmental regulations often directly involve

<sup>73</sup> *About the Office of Land and Emergency Management*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/aboutepa/about-office-land-and-emergency-management> [<https://perma.cc/Q96P-J73F>] (last visited Dec., 2024).

<sup>74</sup> *Id.*

<sup>75</sup> *Waste, Chemical, and Cleanup Enforcement*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/waste-chemical-and-cleanup-enforcement> [<https://perma.cc/UT3H-3MBL>] (last visited Dec., 2024); *Land Management: What It Means and Why Is It Important*, FITZROY BASIN ASS'N (Apr. 1, 2024), <https://fba.org.au/land-management-what-it-means-and-why-is-it-important> [<https://perma.cc/V68X-WNUW>].

<sup>76</sup> *Land*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/report-environment/land> [<https://perma.cc/NF6D-ZVTX>] (last visited Dec., 2024).

<sup>77</sup> *Enforcement under CWA Section 404*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404> [<https://perma.cc/6VUZ-QD4E>] (last visited Dec., 2024); *How Enforcement Actions Protect Wetlands under CWA Section 404*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/cwa-404/how-enforcement-actions-protect-wetlands-under-cwa-section-404> [<https://perma.cc/PP9Y-GTT2>] (last visited Dec., 2024).

<sup>78</sup> *Air Enforcement*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/air-enforcement> [<https://perma.cc/EHM4-TJ3E>] (last visited Dec., 2024); *Overview of the Enforcement Process for Federal Facilities*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities> [<https://perma.cc/J8SW-XKPS>] (last visited Dec., 2024).

the management of land.<sup>79</sup> Although CERCLA actions are separate from traditional public lands administration, the program often involves targeting public properties in order to effectuate long-term federal cleanup programs.<sup>80</sup> Given the lack of clear case law, CERCLA activities could readily be interpreted as constituting public lands administration for the Seventh Amendment public rights exception.

However, there are many counterarguments against the potential application of the public rights exception. A key challenge is the fact that most EPA actions are regulatory in nature, which distinguishes them from traditional public rights that have evaded the Seventh Amendment.<sup>81</sup> Critically, there is no clear precedent regarding how regulatory enforcement actually falls under the “administration of public lands,” creating arguments in either direction.<sup>82</sup> While the EPA’s regulation of the environment and public lands does serve public interests, that may not be enough to constitute public rights and justify applying the exception. This distinction becomes more apparent in cases where the EPA action involves private property or conduct. In these situations, enforcement actions could be argued to very closely resemble conventional legal claims that would warrant Seventh Amendment protections.<sup>83</sup> Furthermore, within *Jarkesy*, the Court listed administration of public lands exception alongside categories that are much more clearly understood to fall outside the scope of Article III courts.<sup>84</sup> Attempting to interpret massive environmental statutes into such a narrow exception has been described as a “kitchen sink approach.”<sup>85</sup> Through these various arguments, opponents of the EPA can build a strong argument against applying *Jarkesy*’s already narrow interpretation of public rights.

While the EPA’s case for distinguishing itself from the SEC contains several robust arguments, the strength of potential counterarguments

<sup>79</sup> *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [https://perma.cc/BN3W-768M] (last visited Dec., 2024).

<sup>80</sup> *Id.*

<sup>81</sup> *Basic Information on Enforcement*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/basic-information-enforcement> [https://perma.cc/38RV-PFL6] (last visited Dec., 2024).

<sup>82</sup> *See Crowell*, 285 U.S. 22; *Jarkesy*, 603 U.S. at 130.

<sup>83</sup> *Jarkesy*, 603 U.S. at 127 (“we have repeatedly explained that matters concerning private rights may not be removed from Article III courts”).

<sup>84</sup> *Jarkesy*, 603 U.S. at 130 (“relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights”).

<sup>85</sup> Personal communication with Thomas W. Merrill, February 6, 2025 (discussion of how federal agencies can limit the applicability of *Jarkesy*; analogizing such legal arguments to the idiom of throwing everything but the kitchen sink at the issue).

highlights the legal uncertainty facing the EPA. This is especially relevant in light of the current pushback against internal agency adjudication.<sup>86</sup> While the EPA may be able to rely on the public rights exception, the clear intent of the Court in *Jarkesy* to limit that exception leaves the EPA extremely vulnerable.

### C. Additional Risks and Considerations

The risks to the EPA's enforcement abilities are not limited to the Seventh Amendment issues raised in *Jarkesy*. The EPA is exposed to ever-mounting litigation risks that necessitate the need for more comprehensive solutions to preserve agency enforcement ability.<sup>87</sup> These include further criticism of the public rights exception, pushback against the broad use of ALJs based on structural arguments opposing the administrative framework, inconsistent case law across Circuit Courts, and the likely increase in the use of nationwide injunctions targeting key elements of the EPA's regulatory scheme.

Although *Jarkesy* already restricts the public rights exception's applicability, legal scholars have advocated for its complete abolition. Those who oppose agency overreach contend that the exception, together with the "rights-neutral" framework of the Administrative Procedure Act (APA), obscures the distinction between public and private rights.<sup>88</sup> This, in turn, leads to protracted litigation such as *Sackett v. EPA*, where defendants facing penalties challenged the ability of the EPA to enforce actions that implicated their property rights.<sup>89</sup> *Jarkesy* could result in an increase of these types of unnecessary lawsuits against the EPA, with defendants opting to contest the agency's authority in its entirety.<sup>90</sup> These arguments have even extended to the contention that the public rights doctrine has no historical foundation and should be completely discarded.<sup>91</sup> Other authors have similarly called for alternative legal frameworks.<sup>92</sup> The increasing doubt about the public rights exception underscores the legal fragility of the administrative adjudication processes employed by the EPA.

<sup>86</sup> See Rothschild, *supra* note 29.

<sup>87</sup> Healy Jr., *supra* note 27.

<sup>88</sup> Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 779 (2021).

<sup>89</sup> *Id.* at 793.

<sup>90</sup> Misty Howell et al., *Supreme Court Skeptical of ALJs' Role in Regulatory Enforcement*, Hogan Lovells, JD SUPRA (Dec. 14, 2023), <https://www.jdsupra.com/legalnews/supreme-court-skeptical-of-aljs-role-in-1851504/>.

<sup>91</sup> Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1035 (1994).

<sup>92</sup> Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424 (2024).

Moreover, critics contend that administrative adjudication generally poses serious constitutional issues. Providing administrative agencies with unrestrained power poses a risk of merging judicial, legislative, and executive authorities.<sup>93</sup> This, in turn, would weaken constitutional safeguards and raise liberty issues that are at the heart of cases such as *Jarkesy*.<sup>94</sup> Such critiques could further fuel challenges to the legitimacy of the EPA's administrative enforcement processes. The EPA's reliance on ALJs and the Environmental Appeals Board (EAB) has similarly been criticized for inconsistency in penalty assessments.<sup>95</sup> The EAB has permitted ALJs to deviate from established EPA policies, compromising the credibility and equity of the agency's enforcement efforts.<sup>96</sup> This inconsistency undermines the principle of treating similar cases in similar ways, a cornerstone of the EPA's enforcement framework.<sup>97</sup> The Sixth Circuit's decision in *Steeltech, Ltd. v. U.S. EPA* exemplifies this issue, as the court recognized an ALJ's discretion to depart from the Enforcement Response Policy, raising concerns about the uniform application of EPA rules.<sup>98</sup>

The unclear legal status of ALJs further threatens to upset the EPA's enforcement framework. In *Jarkesy*, a legal question ignored by the Supreme Court was the lower court's ruling that the statutory removal protections for SEC ALJs rendered that adjudicatory scheme structurally unconstitutional.<sup>99</sup> The Fifth Circuit in *Jarkesy v. Sec. & Exch. Comm'n* ("*Jarkesy v. SEC*") ruled that SEC ALJs violated the separation of powers principle due to their removal protections.<sup>100</sup> The majority further held that the SEC could not be delegated the authority to unilaterally choose whether to bring enforcement actions in Article III courts or within the agency.<sup>101</sup> Given the similar structure of other agency internal adjudication systems, this essentially acted as a complete ban on ALJs.<sup>102</sup> The Supreme Court's ruling in *Jarkesy*, while not explicitly addressing the Fifth Circuit's

<sup>93</sup> Alison Somin & Oliver Dunford, *Jarkesy and Chicken Little Law Professors*, L. & LIBERTY (Jan. 3, 2024), <https://lawliberty.org/jarkesy-and-chicken-little-law-professors/>.

<sup>94</sup> *Id.*

<sup>95</sup> Richard R. Wagner, *Administrative Decisionmaking by Judges in the United States' Environmental Protection Agency Administrator's Civil Penalty Assessment Process: Whatever Happened to the Law?*, 32 WM. & MARY ENV'T L. & POL'Y REV. 57 (2007).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 72.

<sup>98</sup> *Steeltech, Ltd. v. U.S. EPA*, 273 F.3d 652, 656 (6th Cir. 2001) ("The ALJ expressly stated that the ERP was not a rule and that she had the discretion to depart from the ERP, if appropriate.").

<sup>99</sup> Petition for Writ of Certiorari, *Jarkesy*, 603 U.S. 109 (2024) (No. 22-859).

<sup>100</sup> *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 462 (5th Cir. 2022).

<sup>101</sup> *Id.* at 459.

<sup>102</sup> Sydney G. Rusovich, *Jarkesy v. SEC: The U.S. Fifth Circuit's Crucial Challenge to Administrative Agency Adjudicative Authority*, 69 LOY. L. REV. 577 (2023).



more extreme holding on the unconstitutionality of ALJs, nonetheless upheld the lower court's decision.<sup>103</sup> This leaves the current law regarding the constitutionality of ALJs extremely unclear for agencies like the EPA.<sup>104</sup> Continued litigation across various agencies, including the EPA, that directly reference arguments based on *Jarkesy* demonstrates the significant effect the decision is likely to have on lower court litigation.<sup>105</sup> The Supreme Court's decision in *SEC v. Jarkesy*, which affirmed the judgment on Seventh Amendment grounds while the Fifth Circuit's doubts about ALJs and their function in regulatory enforcement remained unresolved, nevertheless carries significant consequences for agencies such as the EPA. Even a modest acceptance of *Jarkesy v. SEC* could significantly curtail the EPA's capacity to use ALJs.<sup>106</sup> This could lead to an increase in lawsuits aimed at the EPA, where defendants challenge enforcement actions by invoking Seventh Amendment arguments from *Jarkesy*.<sup>107</sup> Ultimately, these additional challenges to agency authority will likely weaken the EPA's regulatory power.

Another significant threat facing the EPA are nationwide injunctions, which have seen an increase in usage in recent years.<sup>108</sup> Thus, the EPA should plan accordingly. Nationwide injunctions are federal district court orders that are issued to broadly block government policies and have seen expanded usage across the political spectrum since 2008.<sup>109</sup> Historically, nationwide injunctions have been used as political tools for blocking executive actions.<sup>110</sup> Conservative litigants have used them to disrupt or even completely halt progressive EPA actions.<sup>111</sup> In response to a perceived politicization of the practice, there has been growing judicial

<sup>103</sup> See *Jarkesy*, 603 U.S. 109.

<sup>104</sup> Jennifer Hill, *Jarkesy v. SEC: Are Federal Courts Pushing the U.S. Toward the Next Financial Crisis?*, 51 PEPP. L. REV. 381 (2024).

<sup>105</sup> Robert Iafolla, *Attacks on Agency In-House Judges Heat Up, Blunting Enforcement*, BLOOMBERG L. (Oct. 8, 2024), <https://news.bloomberglaw.com/daily-labor-report/attacks-on-agency-in-house-judges-heat-up-blunting-enforcement-43>. [<https://perma.cc/2QJ3-9UXH>]

<sup>106</sup> Misty Howell et al., *supra* note 90.

<sup>107</sup> *Id.*

<sup>108</sup> Amanda Frost & Samuel Bray, *One for All: Are Nationwide Injunctions Legal*, 102 JUDICATURE 70, 71 (2018), <https://judicature.duke.edu/articles/one-for-all-are-nationwide-injunctions-legal/> [<https://perma.cc/99NT-SFSH>].

<sup>109</sup> *Id.* at 70.

<sup>110</sup> Lauren Aguiar, *The Current State of Nationwide Injunctions*, BLOOMBERG L., (Feb. 2021), [https://www.skadden.com/-/media/files/publications/2021/03/the\\_current\\_state\\_of\\_nationwide\\_injunctions.pdf?rev=7c1926b6039948758aa59c767368587f](https://www.skadden.com/-/media/files/publications/2021/03/the_current_state_of_nationwide_injunctions.pdf?rev=7c1926b6039948758aa59c767368587f) [On File with the Columbia Journal of Environmental Law].

<sup>111</sup> See *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015) (nationwide injunction staying EPA and Army Corps of Engineers' rule defining "waters of the United States"); *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 962 F. Supp. 2 (D.D.C. 1997) (nationwide injunction staying Army Corps of Engineer's rule governing dredging activities).

hesitancy and legislative debates regarding the usage of these injunctions.<sup>112</sup> The Supreme Court recently in *Trump v. CASA, Inc.* struck down the ability of federal district courts to issue injunctions that extended beyond the specific parties before them, severely limiting the practice of nationwide injunctions.<sup>113</sup> However, the decision still left open many avenues that remain risks for the EPA.<sup>114</sup> These include class actions, APA vacatur, and certain lawsuits by states.<sup>115</sup>

Despite the holding of *Trump v. CASA*, nationwide injunctions pose a significant risk to the EPA, especially during the second Trump administration and beyond. These broad judicial orders can completely block EPA enforcement policies, undermining regulatory consistency and creating uncertainty for all parties involved.<sup>116</sup> The EPA's recent litigation and policy issues surrounding its enforcement of the CWA demonstrate the real dangers facing agency efforts to enforce environmental statutes.<sup>117</sup> The Supreme Court's decisions in *Sackett v. EPA* and *Loper Bright Enterprises v. Raimondo* highlight a judiciary increasingly hostile to both the EPA's general authority and its ability to effectively enforce that authority.<sup>118</sup> Combined with the fact that the Trump administration is likely to continue pushing for deregulation, especially in environmental areas, the EPA must proactively plan to mitigate the impact of potential adverse nationwide injunctions. This involves working to bolster enforcement mechanisms that are less vulnerable to judicial interference, relying on state partnerships, and preparing enforcement frameworks for fragmented legal landscapes. Without strategic planning, nationwide injunctions could significantly weaken the EPA's capacity to address environmental harm effectively.

The legal uncertainty following *Jarkesy* underscores the urgent need for the EPA to develop solutions that go beyond merely distinguishing its

<sup>112</sup> Aguiar, *supra* note 110, at 5.

<sup>113</sup> *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

<sup>114</sup> Jack Goldsmith, *The Clear Winner in Trump v. CASA: The Supreme Court*, AM. ENTER. INST. (June 29, 2025), <https://www.aei.org/op-eds/the-clear-winner-in-trump-v-casa-the-supreme-court/>. [On File With the Columbia Journal of Environmental Law].

<sup>115</sup> *Id.*

<sup>116</sup> Frost & Bray, *supra* note 108, at 73.

<sup>117</sup> Jeffrey Porter, *EPA May Avoid a Nationwide Injunction Against its Most Recent WOTUS Rule, but the Rule is Still in Hot Water*, JD SUPRA, (May 13, 2024), <https://www.jdsupra.com/legalnews/epa-may-avoid-a-nationwide-injunction-1698314/>. [https://perma.cc/8Y6K-RAAU].

<sup>118</sup> See Jess Bravin, *Supreme Court is Swamped with Emergency Appeals, Led by Challenges to EPA*, WALL ST. J. (Sep. 9, 2024), <https://www.wsj.com/us-news/law/supreme-court-sees-wave-of-emergency-appeals-led-by-epa-challenges-d72f2bf6>; Andrew Chung, *US Supreme Court Won't Pause EPA Power Plant Emissions Rule*, REUTERS (Oct. 16, 2024), <https://www.reuters.com/legal/us-supreme-court-wont-pause-epa-power-plant-emissions-rule-2024-10-16/>. [https://perma.cc/29ZE-ZJ3L].

enforcement scheme from that of the SEC. The lower court challenges posed by the *Jarkesy v. SEC* decision, compounded by the growing prevalence of nationwide injunctions, threaten to undermine the Agency's ability to effectively enforce environmental protections.<sup>119</sup> ALJs are currently under increased scrutiny, and structural arguments opposing administrative frameworks contribute to the regulatory environment's uncertainty.<sup>120</sup> This necessitates that the EPA adopt a proactive stance, which could include enhancing its enforcement strategies, exploring alternative adjudication methods that align with evolving judicial standards, and engaging in cooperative federalism. Failure to do so entails the risk of prolonged legal conflicts, diminished enforcement capacities, and a fragmented regulatory system that lacks the resources to protect the environment.

#### IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental Environmental Projects (SEPs) are a settlement option the EPA offers to violators as a means of mitigating and/or offsetting conventional penalties.<sup>121</sup> As part of a binding settlement agreement, violators may choose to finance or perform beneficial environmental projects to supplement traditional elements of enforcement action.<sup>122</sup> Violators can opt to implement projects that offer direct environmental or public health benefits, often in the communities affected by their violations, instead of paying penalties.<sup>123</sup> Such projects can involve habitat restoration, pollution reduction infrastructure, and educational outreach efforts.<sup>124</sup> SEPs allow the EPA to work closer with defendants to address the direct harm of the violation while pursuing additional environmental and public health benefits.<sup>125</sup> Violators critically benefit from SEPs, as avoiding traditional penalties allows offenders to evade potential obligatory disclosures of misconduct to shareholders or the general

<sup>119</sup> See *Jarkesy v. Sec. and Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022).

<sup>120</sup> See Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 448 (2024); Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 188 (2025).

<sup>121</sup> *Supplemental Environmental Projects (SEPs)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps> [<https://perma.cc/3TJR-FVPE>].

<sup>122</sup> *Id.*

<sup>123</sup> David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181, 1181 (1998).

<sup>124</sup> *Id.* at 1185–86.

<sup>125</sup> *Supplemental Environmental Projects (SEPs)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps> [<https://perma.cc/3TJR-FVPE>].

public.<sup>126</sup> As a response to *Jarkesy*, SEPs offer the EPA the ability to avoid the Seventh Amendment concerns associated with seeking civil penalties while preserving its broader enforcement scheme. This part of the Note will explore the history, function, and applicability of SEPs to the Seventh Amendment issues of *Jarkesy*.

#### A. Understanding SEPs

The EPA established SEPs as a flexible enforcement alternative designed to encourage compliance and tackle environmental damage more effectively. Formalized by the EPA's 1998 SEP Policy, they have since developed through case law, statutory interpretation, and policy refinement.<sup>127</sup> SEPs function critically through twofold incentives: they motivate violators to pursue less expensive settlements while also offering opportunities for significant environmental contributions.<sup>128</sup> Judicial rulings and congressional action have been essential in clarifying the legal status of SEPs. Legal frameworks like the CAA empower the EPA to levy administrative penalties that come with stipulations, such as SEPs.<sup>129</sup> Courts have generally supported the adaptability of negotiated settlements, acknowledging that SEPs can meet the specific needs of impacted communities while complying with legal requirements.<sup>130</sup>

Critically, SEP discussions and agreements all take place after an environmental violation has occurred and an enforcement action has begun, but before the final settlement is reached.<sup>131</sup> The actual implementation of SEPs follows a structured legal procedure to ensure compliance with environmental enforcement policies. First, the entity

<sup>126</sup> Frankel, *supra* note 41.

<sup>127</sup> Jeffrey Davidson & Susan Richardson, *Supplemental Environmental Projects: A Long History and an Uncertain Future*, JD SUPRA (Jun. 15, 2021), <https://www.jdsupra.com/legalnews/supplemental-environmental-projects-a-6437535/> [https://perma.cc/24PR-GC7U].

<sup>128</sup> Dana, *supra* note 123, at 1191; *see also* Suttle, *supra* note 49 at 371; Pouyan Foroughi et al., *Environmental Violations in the Power Sector: Accountability and Community Welfare 2* (European Corp. Governance Inst., Finance Working Paper No. 1019/2024, 2024), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5008249](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=5008249) [On File with the Columbia Journal of Environmental Law].

<sup>129</sup> Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENV'T. L. REV. 789, 812 (1995); *see also* 42 U.S.C. § 7413(d) (the CAA gives the EPA Administrator the authority to "compromise, modify, or remit, with or without conditions, any administrative penalty").

<sup>130</sup> Droughton, *supra* note 129 at 820.

<sup>131</sup> CYNTHIA GILES, U.S. ENV'T PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY: 2015 UPDATE 6 (2015), <https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf> [On File with the Columbia Journal of Law].

facing an enforcement action must voluntarily agree to a SEP.<sup>132</sup> The violator proposes a SEP, which is then subject to review and approval by the relevant agency, such as the EPA.<sup>133</sup> The proposed project cannot be something the entity is already legally obligated to perform, ensuring that SEPs serve as an additional benefit rather than a substitute for existing regulatory responsibilities.<sup>134</sup> Furthermore, SEPs must be included as part of a legally enforceable settlement document, meaning the project cannot begin until after the violation has been identified and the settlement has been finalized.<sup>135</sup>

A key legal element of SEPs is the nexus requirement, which mandates a direct connection between the proposed project and the underlying environmental violation.<sup>136</sup> This ensures that the SEP effectively addresses the harm caused by the violation or helps prevent similar violations in the future. SEPs cannot include actions that the entity is already required to take, such as injunctive relief or actions that were initiated before the enforcement action began.<sup>137</sup> Additionally, the EPA or other overseeing agencies may not manage or control funds set aside for SEPs, nor can they direct the violator to use specific contractors or consultants for the project.<sup>138</sup> Although SEPs must be voluntary, the EPA retains significant discretion in their implementation.<sup>139</sup> The agency can encourage violators to consider SEPs as part of their settlement and has flexibility in shaping the nature of the projects once an agreement is reached. The EPA carefully reviews each proposed SEP to ensure compliance with legal requirements, policies, and enforcement priorities.<sup>140</sup> Even if an SEP meets all criteria, its approval ultimately remains within the agency's discretion, allowing the EPA to prioritize projects that fit within its broader enforcement policies.<sup>141</sup>

<sup>132</sup> PAMELA CAMPA & LUCIA MUEHLENBACHS, ADDRESSING ENVIRONMENTAL JUSTICE THROUGH IN-KIND COURT SETTLEMENTS, 6 (2023), [https://media.rff.org/documents/WP\\_23-21.pdf](https://media.rff.org/documents/WP_23-21.pdf) [<https://perma.cc/8HJ8-2UN5>].

<sup>133</sup> GILES, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; see also Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137 (2023).

<sup>136</sup> *Id.* at 7-8.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> *Id.* at 8-9.

<sup>139</sup> Campa, *supra* note 132, at 6.

<sup>140</sup> Owen, *supra* note 135.

<sup>141</sup> GILES, *supra* note 131, at 2-3.

## B. SEPs and the Seventh Amendment

The ability of SEPs to provide the EPA with an alternative to civil penalties represents a powerful tool for the agency to avoid the implications of *Jarkesy*. However, to address Seventh Amendment concerns more directly, it will be necessary to actively clarify and update the operation of SEPs within the larger enforcement framework. The agency can avert concerns regarding jury trials by stressing that SEPs function as a remedial mechanism instead of a punitive one.<sup>142</sup> Importantly, it should be clear that SEPs are not viewed as penalties or alternatives to them. As SEPs are primarily intended to ensure environmental and public health benefits that might not have arisen in the absence of the settlement, they offer a means to exceed standard compliance and tackle community impacts resulting from violations.<sup>143</sup> This represents principles of equitable relief, not legal actions, which are crucial to the analysis in *Jarkesy*.<sup>144</sup>

The EPA can further rely on *Tull v. United States* to distinguish SEPs from the SEC's enforcement actions.<sup>145</sup> In *Tull*, the Court determined that certain environmental enforcement actions, especially those aimed at non-monetary remedies such as abatement, do not fall under the same Seventh Amendment requirements as civil penalties.<sup>146</sup> This line of reasoning implies that actions taken to enforce environmental regulations, including those related to SEPs, might not be covered by the implications of *Jarkesy*. SEPs are clearly a component of administrative settlement proceedings, rather than judicial decisions.<sup>147</sup> SEPs are applied on a completely voluntary basis, in contrast to conventional civil penalties that are usually determined by a court or jury.<sup>148</sup> Additionally, the EPA can strengthen its position by refining its SEP procedures to clarify that these projects are an alternative to, rather than an addition to, traditional civil penalties. This could help frame SEPs as remedial actions designed to address environmental harm directly, further distancing them from punitive civil penalties. Another crucial aspect of this strategy is the emphasis on public rights. By framing environmental enforcement as serving public rights,

<sup>142</sup> *Id.* at 21-22.

<sup>143</sup> Droughton, *supra* note 129, at 26.

<sup>144</sup> *Jarkesy*, 144 S. Ct. at 2129.

<sup>145</sup> See generally *Tull v. U.S.*, 481 U.S. 412 (1987).

<sup>146</sup> *Id.* at 426-27.

<sup>147</sup> Diego Huerta, *One Step Forward, Two Steps Back? Supplemental Environmental Projects, Environmental Justice, and Deterrence*, 36 GEO. ENV'T L. REV. 303, 321 (2024).

<sup>148</sup> Michael J. Amato, *The Best and Worst Form of Environmental Enforcement: Third-Party Payments and Executive Settlement Policy*, 110 GEO. L.J. 1171, 1179-81 (2022); Bonnell, *supra* note 3 at 10401; Bonnell, *supra* note 4 at 10401.

particularly in the realm of public health and environmental protection, the EPA may be able to argue that SEPs meet the narrow Seventh Amendment exceptions set forth in *Jarkesy*.<sup>149</sup> Moreover, the EPA's capacity to seek settlements through SEPs enables it to prevent litigation entirely, possibly sidestepping the *Jarkesy*-related Seventh Amendment issues that emerge when enforcement cases proceed to trial.

This method, however, is not without its restrictions. The Court's rationale in *Jarkesy* concerning civil penalties will still be relevant to SEPs if they are viewed as punitive.<sup>150</sup> It is also possible that the Court's doubts about agency adjudication, as stated in *Jarkesy*, may apply to SEPs, irrespective of their role in a settlement agreement.<sup>151</sup> The EPA should make it clear that SEPs are part of its wider enforcement framework, intended as remedial measures to address harm rather than to punish violators. It is essential to underscore the voluntary nature of SEPs in order to draw a line between punitive and remedial actions.<sup>152</sup> Finally, the EPA could establish a more robust public rights framework by emphasizing the various public benefits of SEPs.

### C. Implementation Strategies

Despite the demonstrated benefits of SEPs, there are significant challenges to implementing them on the scale needed to comprehensively fill enforcement gaps potentially created by *Jarkesy*.<sup>153</sup> In addition to responding to pushback from anti-regulatory critics, the EPA must update its policies regarding the scope of SEP penalty mitigation measures to completely avail itself of Seventh Amendment concerns from *Jarkesy*.

Political shifts have periodically threatened SEPs, as evidenced by the Trump Administration's directives limiting SEP use.<sup>154</sup> SEPs have been criticized for potentially violating federal funding laws.<sup>155</sup> Specifically, the Miscellaneous Receipts Act and the Anti-Deficiency Act have been raised as potential Congressional oversight requirements that are violated by the SEP fund management.<sup>156</sup> These statutes ensure that funds owed to the government are properly allocated, leading to the concern that SEPs

<sup>149</sup> *Jarkesy*, 144 S. Ct. at 2134.

<sup>150</sup> *Id.* at 2130.

<sup>151</sup> Hill, *supra* note 104 at 399-401.

<sup>152</sup> Daniel Alvarez, Hannah Perls, & Jonas Monast, *Clearing the Air on Supplemental Environmental Projects*, 54 ENV'T L. REP. (ELI) 10390 (2024).

<sup>153</sup> Jorden Messmer, *Reviving Supplemental Environmental Projects*, 53 U. TOL. L. REV. 527 (2022).

<sup>154</sup> Joel Smith, *Supplemental Environmental Projects' Wild Ride Is a Call for Legislative Action to Protect a Valuable Negotiation Tool*, 2021 J. Disp. Resol. 369, 378 (2021).

<sup>155</sup> Dana, *supra* note 123, at 1191.

<sup>156</sup> Alvarez, *supra* note 101, at 10382.

unlawfully divert penalties from the U.S. Treasury.<sup>157</sup> However, the EPA has established oversight measures that directly address these concerns.<sup>158</sup> For example, its 1998 guidance established a detailed procedure to ensure settlement payments included valuations of the penalty's gravity, guaranteeing that the EPA's statutory mandate of levying penalties still occurred.<sup>159</sup> The EPA's 2015 guidance further refined these procedures.<sup>160</sup> Additional reforms to enhance and preserve the legality of SEPs have been proposed, including the creation of an Environmental Trust, more comprehensive congressional authorization, and expansion of nexus requirements.<sup>161</sup>

The EPA's policy requires that any penalty imposed, even with the inclusion of a SEP, must meet minimum thresholds, ensuring that the penalty reflects the economic benefit of noncompliance and a portion of the gravity component of the violation.<sup>162</sup> This ensures that the enforcement action remains aligned with the deterrent purposes of civil penalties, but the nature of the remedy is reframed as one that directly benefits the environment and public health, as opposed to a punitive legal outcome.<sup>163</sup> Furthermore, SEPs must adhere to the specific statute under which the violation occurred, reinforcing the principle that these projects directly address the harm caused by the violation without exceeding the EPA's statutory authority.<sup>164</sup> This principle ensures that SEPs are legally consistent with the enforcement framework of the relevant law, thereby preventing overreach. The EPA creates a separation between itself and the funds for SEPs, upholding the separation of powers doctrine.<sup>165</sup>

Furthermore, the EPA must address the fact that in many situations involving SEPs, civil penalties are still required as part of the settlement agreement. Under the EPA's current SEP guidance, SEPs do not completely replace penalties but are rather potential mitigations or reductions of the penalty amount.<sup>166</sup> The amount of penalty mitigation is based on the estimated cost of the SEP and its environmental and public

<sup>157</sup> *Id.* at 10390-93.

<sup>158</sup> Eric Grillé, *From Lemons to Lemonade: A Call to Aggregate Settlement Payments Toward Supplemental Environmental Projects*, 39 NAT. RES. & ENV'T. 52, 53 (2024).

<sup>159</sup> Faletto, *supra* note 49, at 548.

<sup>160</sup> See GILES, *supra* note 131, at 22-24.

<sup>161</sup> Brooke E. Robertson, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U.L. REV. 1025, 1038-1039 (2009).

<sup>162</sup> Huerta, *supra* note 147.

<sup>163</sup> *Id.*

<sup>164</sup> Steven Bonorris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 185, 189 (2005).

<sup>165</sup> *Id.* at 193.

<sup>166</sup> GILES, *supra* note 131 at 22-24.



health benefits. However, there are limits to the amount of penalty mitigation available. The maximum mitigation credit is generally 80% of the SEP's cost.<sup>167</sup> The penalty mitigation amount may be as high as 100% for certain cases of outstanding quality, such as when the defendant is a small business, government agency, or non-profit, or when the SEP project provides significant benefits to a community with environmental justice concerns.<sup>168</sup> In these exception cases, the EPA has relied on enforcement discretion granted through statutes.<sup>169</sup> The EPA can promulgate new guidance that further expands upon these exceptions, citing the corresponding improvements to the SEP program as a whole that will ensure a greater number of SEPs are of "outstanding quality."<sup>170</sup>

To this end, SEPs could be improved to more comprehensively cover key elements of the EPA's enforcement scheme. These potential improvements include expanding the scope of eligible projects, increasing mitigation percentages, and relaxing nexus requirements.<sup>171</sup> Additionally, involving third-party contractors or nonprofits in SEP planning and execution could help ensure accountability and promote community engagement.<sup>172</sup> Proponents of SEPs have highlighted the flexibility of the program, emphasizing its ability to align enforcement with community-specific needs and long-term environmental objectives.<sup>173</sup> Because SEP agreements are flexible, the EPA may be able to better customize enforcement to directly address the needs of certain communities. SEPs can result in voluntary environmental participation and protection above and beyond statutory requirements by enticing violators to participate in a cooperative and restorative process.<sup>174</sup> Projects that address disproportionate environmental consequences, for instance, could be included in SEPs in order to support larger environmental justice objectives.<sup>175</sup>

<sup>167</sup> *Id.* at 24.

<sup>168</sup> *Id.*

<sup>169</sup> Campa, *supra* note 132.

<sup>170</sup> *Id.*; U.S. ENV'T PROT. AGENCY, *supra* note 166, at 24 n.33 ("Outstanding quality may be based on how well a SEP meets and exceeds one or more of the evaluation criteria described in Section VIII, as well as on relevant case-specific factors.").

<sup>171</sup> See Robertson, *supra* note 161, at 1026.

<sup>172</sup> Faletto, *supra* note 49.

<sup>173</sup> See Droughton, *supra* note 129; Smith, *supra* note 154.

<sup>174</sup> Campa, *supra* note 132, at 2.

<sup>175</sup> It should be noted that under the second Trump administration, federal agency programs that address environmental justice concerns have been categorically rejected or eliminated. However, this note's discussion of environmental justice issues remains relevant for future administrations. See Lisa Friedman, *EPA to Close Environmental Justice Offices in Budget Cuts*, N.Y. TIMES (Mar. 11, 2025), <https://www.nytimes.com/2025/03/11/climate/epa-closure-environmental-justice-offices.html>. [<https://perma.cc/3JZV-9236>].

While there are many challenges to SEPs, their potential to transform enforcement practices and strengthen community trust is worth the effort. Careful policy refinements, robust oversight mechanisms, and clear statutory authorization are essential. SEPs are a compelling potential answer to *Jarkesy*, but in order to ensure that the approach remains effective and applicable, the EPA must continuously update its processes. The ever-changing legal landscape around federal administrative authority necessitates the EPA continue to be proactive.

## V. COOPERATIVE FEDERALISM

A critical element of the American administrative system is cooperative federalism, a system in which the federal government and state jointly share enforcement responsibilities. Following *Jarkesy*, the EPA should rely more on the states to perform administrative adjudication functions in order to maintain broader enforcement capacity.<sup>176</sup> The EPA may continue to pursue national policy goals while giving state agencies more enforcement discretion to handle adjudication by working with states and depending on state enforcement.<sup>177</sup> Given the necessity to refrain from interfering with federal SEPs, this includes state participation in their own SEP programs. However, communication problems and inconsistent enforcement must be addressed if cooperative federalism is to be successfully implemented with regards to environmental enforcement. This part of the Note will discuss the legal foundations of cooperative federalism, joint enforcement strategies, and the benefits of state SEP programs in response to *Jarkesy*.

### A. Legal Framework

Under a cooperative federalism framework, states have significant authority to engage in administrative adjudication when administering federal statutes, particularly in areas like environmental law.<sup>178</sup> Congress often delegates the power to states to enforce federal laws, such as the CAA, allowing state agencies to implement federal standards through their

<sup>176</sup> See Robert L. Glicksman & Johanna Adashek, *Agency Authority to Address Chemicals of Emerging Concern: EPA's Strategic Use of Emergency Powers to Address PFAS Air Pollution*, 48 HARV. ENV'T L. REV. 369 (2024) (exploring how the EPA may rely on states to avoid challenges to federal enforcement by the Major Questions Doctrine).

<sup>177</sup> See Catherine M. Sharkey & Daniel J. Kenny, *FDA Leads, States Must Follow*, 102 WASH. U.L. REV. 155 (2024).

<sup>178</sup> Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 729 (2003); see also Ryan B. Stoa, *Cooperative Federalism in Biscayne National Park*, 56 NAT. RES. J. 81 (2016).

own adjudicatory processes.<sup>179</sup> States typically follow their own APAs, although these must comply with minimum constitutional protections, like Due Process.<sup>180</sup> Despite this autonomy, federal agencies retain oversight, reviewing state implementation plans and potentially withdrawing delegation if federal standards are not met.<sup>181</sup> Additionally, recent Supreme Court decisions questioning executive branch authority to impose penalties without judicial oversight may influence how states structure their adjudication processes, particularly in enforcing federal environmental laws.<sup>182</sup> These developments could shape the future of state-level administrative adjudication within the cooperative federalism model.

Critically, the Seventh Amendment remains one of the few provisions in the Bill of Rights that has not been incorporated to apply to the states through the Fourteenth Amendment.<sup>183</sup> The U.S. Supreme Court has consistently held that the Seventh Amendment applies only to federal courts and does not govern civil trials in state courts.<sup>184</sup> Most states have provisions in their own constitutions guaranteeing jury trials in civil cases, but these vary significantly in scope and application.<sup>185</sup> States are free to define their own standards for civil jury trials without federal oversight due to the Seventh Amendment's unincorporated status.<sup>186</sup> Given that the Court has shown little inclination to revisit its earlier rulings on the Seventh Amendment's non-incorporation, this represents a convenient

<sup>179</sup> *Id.*; Ryan B. Stoa, *Cooperative Federalism in Biscayne National Park*, 56 NAT. RES. J. 81, 88 (2016).

<sup>180</sup> MICHAEL ASIMOV, ADMIN. CONF. OF THE U.S., *Federal Administrative Adjudication Outside the Administrative Procedure Act* (2015).

<sup>181</sup> David L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 191-92 (2006).

<sup>182</sup> Eric Katz, Supreme Court Deals "Earth-Shattering" Blow to Federal Agencies' Administrative Powers, GOVEXEC (June 2024), <https://www.govexec.com/management/2024/06/supreme-court-deals-earth-shattering-blow-federal-agencies-administrative-powers/397697/>.

[<https://perma.cc/WG5R-7H8T>]; Christopher J. Walker, *Reform Agenda for Administrative Adjudication, Regulation*, CATO INST. (Spring 2021), <https://www.cato.org/regulation/spring-2021/reform-agenda-administrative-adjudication>. [<https://perma.cc/P54L-3FMJ>].

<sup>183</sup> Andrew Cohen, *Is There Any Way to Resuscitate the Seventh Amendment Right to a Jury Trial?*, BRENNAN CTR. FOR JUST. (Nov. 28, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial>. [<https://perma.cc/MQ7G-CVHV>].

<sup>184</sup> *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916). See *Curtis v. Loether*, 415 U.S. 189 (1974); *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415 (1996); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

<sup>185</sup> Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 Stan. L. Rev. 851, 855-59 (2013).

<sup>186</sup> *Id.* at 859-61.

opportunity for the EPA to work with states to develop solutions that more comprehensively address the Seventh Amendment concerns of *Jarkesy*.<sup>187</sup>

## B. Joint Enforcement

For environmental regulation to be effective, it is essential that state and federal regulators collaborate closely. This framework enables states to assume additional enforcement responsibilities to enhance efficiency, all while retaining federal oversight for consistency and accountability.<sup>188</sup> Nonetheless, the system has its imperfections, facing challenges such as inconsistent federal oversight, variations in enforcement among states, and an absence of accountability mechanisms.<sup>189</sup> This has resulted in demands for reforms, particularly aimed at establishing more uniform procedures for the delegation of enforcement across various states.<sup>190</sup> These challenges are worsened by existing technological and practical constraints in environmental monitoring, which hinder attempts to establish standardized environmental indicators that would facilitate effective cooperative federalism.<sup>191</sup> Furthermore, the EPA must ensure that states are in alignment with broader federal policy objectives, especially as states take on a more central role within the delegation of enforcement authority. Initiatives and programs like the National Environmental Performance Partnership System have been introduced to shift the focus more to holistic environmental outcomes, as opposed to individual cases of enforcement.<sup>192</sup>

Cooperation between the EPA and states on enforcement is a practical way to address the constitutional and procedural concerns raised by *Jarkesy*. State-level enforcement systems, which are not subject to the

<sup>187</sup> Andrew Cohen, *Is There Any Way to Resuscitate the Seventh Amendment Right to a Jury Trial?*, BRENNAN CTR. FOR JUST. (Nov. 28, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial>. [<https://perma.cc/MQ7G-CVHV>].

<sup>188</sup> Weiser, *supra* note 178 at 730-31.

<sup>189</sup> Joel Mintz, *Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS*, 17 J. LAND USE & ENV'T L. 127, 136-39 (2001); Jerry L. Anderson & Amy Grace Vaughan, *Environmental Penalties: Discretion and Disparity*, 42 STAN. ENV'T L.J. 3, 33 (2023).

<sup>190</sup> *Id.* at 138.

<sup>191</sup> David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENV'T L. REV. 1, 42-44 (2000).

<sup>192</sup> *Id.* at 64; *National Environmental Performance Partnership System (NEPPS)* (Apr.), U.S. ENV'T PROT. AGENCY: CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS (OCT. 17, 2025), <https://www.epa.gov/ocir/national-environmental-performance-partnership-system-nepps> [<https://perma.cc/R6RC-QER9>] (the NEPPS is a collaborative framework that enables state and tribal agencies to partner with the EPA through Performance Partnership Agreements (PPAs) and Performance Partnership Grants (PPGs) to achieve various environmental goals and facilitate funding and cooperation).

same constitutional constraints, can help close gaps in federal enforcement.<sup>193</sup> This strategy highlights how important it is to strengthen federal-state collaboration, define roles precisely, and establish new frameworks for cooperative enforcement initiatives. Transparency might be further improved by making enforcement data publicly accessible, which would enable cross-state comparisons and the discovery of best practices.<sup>194</sup> Such transparency would also address concerns about states enforcing environmental laws less rigorously than the federal government.<sup>195</sup> While factors like information imbalances, limited sanctions, and credibility issues have raised concerns about state enforcement, studies show no significant differences in penalties between federal and state-led enforcement actions.<sup>196</sup> This suggests that cooperative enforcement may be able to preserve efficient regulation without sacrificing environmental requirements. Additionally, by creating a more transparent framework for federal-state enforcement collaboration, the EPA can better handle upcoming obstacles following *Jarkesy*, such as the Fifth Circuit's ban on ALJs.<sup>197</sup> The EPA's goals of enforcing national environmental standards, outlawing "pollution havens," and maintaining state equality are all in keeping with this approach.<sup>198</sup> Through cooperative federalism, the EPA and states can successfully protect the environment despite shifting legal landscapes. Even in the face of changing legal environments, the EPA and states can effectively safeguard the environment through cooperative federalism.

The flexibility of state enforcement programs is further underscored by cases like *Ouellette*, which affirm states' ability to impose standards beyond federal requirements.<sup>199</sup> States can enforce stricter environmental protections within their borders, leveraging their authority to bridge gaps left by weakened federal enforcement.<sup>200</sup> Such proactive state engagement

<sup>193</sup> Cohen, *supra* note 117. 183

<sup>194</sup> Markell, *supra* note 191, at 102.

<sup>195</sup> Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in A Delegated Environmental Program*, 41 L. & SOC'Y REV. 939, 940 (2007).

<sup>196</sup> *Id.* at 968.

<sup>197</sup> Dominic E. Draye, *Landmark Rulings in Jarkesy and Loper Bright to Reset Course of Federal Administrative Law*, GT ALERT (June 28, 2024), <https://www.gtlaw.com/en/insights/2024/6/landmark-rulings-in-jarkesy-and-loper-bright-to-reset-course-of-federal-administrative-law>. [<https://perma.cc/JD2W-ZFRD>].

<sup>198</sup> See Atlas, *supra* note 195; Arik Levinson & M. Scott Taylor, *Unmasking the Pollution Haven Effect*, 49 INT'L ECON. REV. 223, 223 (2008) (The pollution haven theory argues that due to disparate regulatory schemes, polluting entities will relocate to states or countries to reduce compliance costs, concentrating pollution impacts and raising environmental justice concerns.).

<sup>199</sup> *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).

<sup>200</sup> Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. ENV'T L.J. 211 (1995).

highlights the potential for states to step in where federal enforcement is constrained, ensuring consistent and rigorous environmental regulation.<sup>201</sup> This dynamic can also offset political pressures that might reduce enforcement at the state or federal level, thereby bolstering the overall regulatory framework. Such a framework would allow states to intervene in place of a weakened EPA—and vice versa—thereby addressing potential issues of uncooperative federalism.<sup>202</sup> In order to accomplish this, it is important for states to reassess and improve their environmental legislation so that effective enforcement measures are guaranteed.<sup>203</sup> This entails raising penalties for infringements, broadening enforcement scopes, and guaranteeing sufficient resources for state agencies.<sup>204</sup> Proactive oversight and strict enforcement are crucial as well, enabling states to tackle violations effectively and discourage potential noncompliance.<sup>205</sup> In addition, cultivating a robust, collaborative connection between federal and state agencies can facilitate smooth transitions in enforcement when one governmental level encounters political or legal difficulties.

### C. State SEP Implementation

A cooperative federalism approach to environmental regulation allows states to have significant authority in implementing SEPs within their jurisdictions, giving them the ability to develop their own policies while adhering to essential SEP principles.<sup>206</sup> A common example of these policies is the incorporation of SEPs into enforcement settlements, enabling states to choose case resolutions that involve SEPs instead of relying solely on financial penalties.<sup>207</sup> States maintain the authority to approve or reject SEP proposals, ensuring that projects meet their specific

<sup>201</sup> Bonnell, *supra* note 4, at 10408.

<sup>202</sup> Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009) (Defining uncooperative federalism as situations where states “use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”).

<sup>203</sup> See Michele N. Gagnon, *Creative Settlements: A Comparison of Federal and State SEP Policies*, 17 No. 1 NAAG NAT’L ENV’T ENF’T J. 3 (Feb. 2002). (describing the range of enforcement measures in state supplemental environmental project policies).

<sup>204</sup> See Markell, *supra* note 191, at 37-39.

<sup>205</sup> *Id.* at 70.

<sup>206</sup> See CAL. ENV’T PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECT GUIDANCE (2018), [https://calepa.ca.gov/wp-content/uploads/2018/06/CalEPA\\_SEP\\_Guidance-June-2018.pdf](https://calepa.ca.gov/wp-content/uploads/2018/06/CalEPA_SEP_Guidance-June-2018.pdf) ) [On File with the Columbia Journal of Environmental Law] (example of a state SEP policy).

<sup>207</sup> MICH. DEP’T OF ENV’T, GREAT LAKES, & ENERGY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS FOR PENALTY MITIGATION (2020), <https://michigan.gov/egle/-/media/Project/Websites/egle/Documents/Policies-Procedures/Department/04-002-Supplemental-Environmental-Projects-Penalty-Mitigation.pdf> [<https://perma.cc/Y3SY-D7L4>].

criteria, such as demonstrating a clear connection between the violation and the environmental project, and guaranteeing that the project offers additional environmental benefits suited to their needs.<sup>208</sup> In order to better meet their unique requirements and circumstances, some states have enhanced and expanded the fundamental federal framework of SEPs.<sup>209</sup> Massachusetts and New York have implemented narrower definitions of the EPA's nexus requirement, while states like California, Connecticut, Maryland, Minnesota, and Virginia apply broader definitions, allowing for SEPs to address indirect or long-term environmental goals.<sup>210</sup> States also vary in their approaches to penalty mitigation. California caps the percentage of penalty reductions for SEPs, whereas Texas and Pennsylvania use sliding scales based on the type of SEP undertaken.<sup>211</sup> Programs such as SEP Banks, which provide pre-approved projects for violators, further highlight states' adaptability and potential in gap filling for the EPA.<sup>212</sup>

States can step in to cover any gaps that may arise because SEPs are expected to encounter resistance at the federal level. Even without federal SEPs, states can continue to enforce environmental laws vigorously by using their regulatory latitude and customizing SEPs at the local level.<sup>213</sup> To guarantee openness, uniformity, and equity in enforcement procedures, states must have official, published SEP policies.<sup>214</sup> These would simplify the use of SEPs in state enforcement actions and increase public trust.<sup>215</sup> This flexibility allows states to expand SEP adoption and effectiveness. For instance, states might expand the definitions of nexus, include a broader array of eligible project categories, and create additional programs aimed at motivating violators to undertake significant environmental restoration efforts.<sup>216</sup> Not only would such measures improve environmental results, they would also lessen the administrative burdens on violators, thereby fostering increased compliance with environmental

<sup>208</sup> Cal. Env't Prot. Agency, *supra* note 206; N. J. DEP'T OF ENV'T PROT., STANDARD OPERATING PROCEDURES FOR INCORPORATING SUPPLEMENTAL ENVIRONMENTAL PROJECTS INTO SETTLEMENT AGREEMENTS AND ADMINISTRATIVE CONSENT ORDERS (2024), <https://nj.gov/dep/enforcement/docs/final-sep-policy-2-15-2024.pdf> [<https://perma.cc/RHV4-7AHV>].

<sup>209</sup> See Gagnon, *supra* note 203.

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Id.* at 6.

<sup>212</sup> *Id.* at 7.

<sup>213</sup> See Caroline Cecot, *Filling the Federal Enforcement Gap*, 33 NAT. RES. & ENV'T SPRING 36 (2019).

<sup>214</sup> Bonorris, *supra* note 164 at 220.

<sup>215</sup> *Id.* at 200.

<sup>216</sup> Brooke E. Robertson, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U.L. REV. 1025 (2009).

regulations.<sup>217</sup> Texas provides a model state SEP program through the Texas Commission on Environmental Quality, which grants prorated reductions in civil penalties for contributions to pre-approved SEPs.<sup>218</sup> Texas works with the EPA on enforcement measures to ensure state SEP policies are in sync with federal goals.<sup>219</sup> In Texas, third-party administration of some SEPs lessens the penalties for violators while guaranteeing the projects' successful completion.<sup>220</sup> These creative strategies show how states might accommodate local needs while upholding strict environmental enforcement.

With regards to federal oversight of state SEPs, the EPA does not directly oversee state SEP programs but provides general guidance and policy frameworks that states may choose to follow.<sup>221</sup> The EPA, for example, released the 2015 SEP Policy that details the features, legal stipulations, and acceptable categories for SEPs.<sup>222</sup> Although these policies are designed for EPA enforcement actions, they provide a framework for states to create their own SEP programs. Moreover, the EPA promotes the use of SEPs in enforcement settlements by states and provides resources like toolkits to assist them in creating and executing successful projects.<sup>223</sup> These resources showcase effective methods and opportunities for integrating SEPs into enforcement actions at the state level.

Some states encounter limitations on the use of SEP funds, akin to those imposed by the EPA and the MRA.<sup>224</sup> Nonetheless, a number of states lack these restrictions, with some even allocating funds to departments focused on environmental protection.<sup>225</sup> Additionally, most states impose limits on the amount of a penalty that can be reduced by a SEP, with mitigation percentages or multipliers differing widely from state to state.<sup>226</sup> As an example, Texas restricts SEPs to a maximum of 50% of the penalty for for-profit entities, whereas other states impose varying limitations.<sup>227</sup> This may change if penalty offsets are revised to be in accordance with federal

<sup>217</sup> *Id.*

<sup>218</sup> Eric Grillé, *From Lemons to Lemonade: A Call to Aggregate Settlement Payments Toward Supplemental Environmental Projects*, 39 NAT. RES. & ENV'T 52, 54 (2024).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See, e.g., GILES, *supra* note 131.

<sup>222</sup> *Id.*

<sup>223</sup> See e.g., U.S. ENV'T PROT. AGENCY, *Toolkit for States to Support Environmental Justice* (2004).

<sup>224</sup> *Id.* at 9.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> TEX. COMM'N ON ENV'T QUALITY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS, GI-352 2 (2015), <https://www.tceq.texas.gov/downloads/compliance/enforcement/sep/gi-352.pdf> [<https://perma.cc/8U6V-NMVV>].



SEP policy.<sup>228</sup> The EPA does not directly participate in state or local settlements unless they involve violations of federal laws or regulations, offering a potential means of control within the cooperative federalism framework.<sup>229</sup> This brings in new considerations, especially regarding administrations that are anti-regulatory.<sup>230</sup> Should the Trump administration prohibit SEPs within the EPA, states desiring to continue using SEPs must guarantee that their operations fall within their own enforcement and settlement discretion.

In general, the relationship between the EPA and states concerning SEPs involves a balance of guidance and independence. Although the EPA advocates for SEPs and offers resources, states have considerable leeway in developing and executing their own policies.<sup>231</sup> This results in a variety of approaches and differing degrees of consistency with federal policies. States can significantly aid in federal enforcement initiatives by enhancing the practicality and durability of SEPs, particularly in situations where federal SEPs are not accessible.<sup>232</sup> These state SEPs allow states to guarantee that environmental enforcement is effective and corresponds to federal standards as well as local needs. Thus, state SEPs offer a strong framework for upholding the integrity of environmental enforcement while avoiding the Seventh Amendment issues linked to direct enforcement actions for federal agencies.

As political and legal resistance to federal environmental regulation grows, cooperative federalism presents an essential remedy. States can help address the gaps created by a weakened federal system by taking on a leading role in enforcement through flexible and adaptive programs like SEPs.<sup>233</sup> The EPA and states can uphold strict environmental protection standards and ensure the integrity of enforcement actions through collaborative enforcement efforts, more robust state-specific programs, and improved regulatory flexibility. A framework that is more resilient and cooperative will safeguard the environment while maintaining effective enforcement in the face of changing legal contexts and political pressures.

<sup>228</sup> See Sharkey, *supra* note 177.

<sup>229</sup> Cathleen Day, *Down by the Chesapeake Bay: Cooperative Federalism, Judicial Intervention, and the Boundary Between State Land Use and Federal Environmental Law*, 38 ENERGY L.J. 253 (2017).

<sup>230</sup> Josh Van Eaton et al., *Environmental Enforcement Update: Supplemental Environmental Projects and Mitigation in the Second Trump Administration*, BEVERIDGE & DIAMOND (Dec. 18, 2024), <https://www.bdlaw.com/publications/environmental-enforcement-update-supplemental-environmental-projects-and-mitigation-in-the-second-trump-administration/> [On File with the Columbia Journal of Environmental Law].

<sup>231</sup> U.S. ENV'T PROT. AGENCY, *Toolkit for States to Support Environmental Justice* (2005), at 7.

<sup>232</sup> Van Eaton et al., *supra* note 230.

<sup>233</sup> Gagnon, *supra* note 203.

## VI. CONCLUSION

The *Jarkesy* decision poses a significant risk to the EPA. The Supreme Court's concerns regarding the Seventh Amendment and administrative adjudication threaten the ability of the agency to effectively protect the American public from irreversible environmental harm. However, the EPA may be able to legally distinguish itself from the holding of *Jarkesy*, and if not, can turn to a myriad of solutions to preserve its enforcement capabilities, including improvement of SEPs and enhancement of cooperative federalism. As pressure continues to mount against the EPA and federal agencies as a whole, it becomes ever more critical that innovative legal strategies are developed to preserve the critical mission of environmental protection.