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# SUNSHINE FOR SALE: ENVIRONMENTAL CONTRACTORS AND THE FREEDOM OF INFORMATION ACT

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*Sarah Shik Lamdan*\*

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“A thousand miles of silvered shore. An hundred thousand treasure isles—That sun-laved line broad sparkling aisles, Deep-steeped in wealth of Faery store;—Has Florida.”<sup>1</sup>

#### INTRODUCTION

In the bright blue waters off of Miami’s sun-bleached coast, trouble is brewing. In May 2013, Great Lakes Dredge & Dock (Great Lakes) announced its \$122 million contract with the U.S. Army Corps of Engineers (Army Corps). The Army Corps will pay Great Lakes, America’s largest dredging corporation, to deepen Miami Harbor’s entrance channel.<sup>2</sup> The project is happening in an environmentally sensitive waterway, where seagrass and a coral reef supply lifelines to sea life, and the coastline is a recreation site for millions of people. Press releases report that the Army Corps will supervise Great Lakes, but it is well documented that most government contractors are largely self-monitored and left to their own devices by agencies that do not have the time or resources to oversee every project.<sup>3</sup> As Great Lakes’ tugs and dredging boats gather off of Miami’s shores, Miami locals and ocean lovers everywhere may have reason to worry about this project.

Unfortunately, based on Great Lakes’ prior projects, there is cause for concern. Previously, the Army Corps, in nearby Delray Beach, Florida, hired Great Lakes to dredge an inlet and sand-settling basin. A Great Lakes barge left a stretch of beach littered with rocks and coral rubble threatening the annual moonlight process of sea turtle nesting. According to reports, the barge dragged cables across coral and sponge formations in the Flower

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1. GEORGE E. MERRICK, *Florida—The Treasure Land*, in SONGS OF THE WIND ON A SOUTHERN SHORE, AND OTHER POEMS OF FLORIDA (2d ed. 1920).

2. Press Release, Great Lakes Dredge & Dock Corp., Great Lakes Announces the Award of the Miami Deepening Project (May 16, 2013) available at <http://investor.gldd.com/releasedetail.cfm?ReleaseID=765563><http://investor.gldd.com/releasedetail.cfm?ReleaseID=765563>. Information about the flora and fauna of Miami waterways is available at the Florida Department of Environmental Protection’s website, [www.dep.state.fl.us](http://www.dep.state.fl.us).

3. Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 171–72 (2000); see also Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 241, 241 (Jody Freeman & Martha Minow eds., 2009) (describing that in addition to bearing responsibility over contracted border security plans, contractors also have oversight of the plan itself).

Garden Reef.<sup>4</sup> In 2002, the Department of Justice ordered Great Lakes to pay almost \$1 million for destroying the ecosystem of the Florida Bay with a dredging pipe and creating a hole in the ground the size of one and a half football fields.<sup>5</sup> The accident affected the flora and fauna in the Florida Keys National Marine Sanctuary, including seagrass meadows and finger coral that are critical to fish and other marine life populations as well as necessary to stabilize sediments and create clear waters.<sup>6</sup> The same company paid the United States a \$20,000 settlement in 2004 after its dredged waste spilled from barges into a marine sanctuary in California's Richmond Harbor.<sup>7</sup>

Although Great Lakes Dredge and Dock sounds like it could be a smaller business in the Great Lakes region of the country, the company is actually a gigantic corporation that conducts business worldwide. Great Lakes benefits from the Jones Act, which protects it from international competition.<sup>8</sup> As a result of this protection, Great Lakes is the largest dredging company in the United States, and it receives continuous workflow from the federal government.<sup>9</sup> Because Great Lakes does so much of America's coastal development work, their spotty environmental record should be open to public scrutiny. But, like other government contractors, Great Lakes cannot be easily scrutinized. Where the Freedom of Information Act (FOIA) requires government agencies to be transparent, government contractors do not have to provide information to the public, so Great Lakes' operation records, pollution data, and procedural documents remain private.

Government contractors, like Great Lakes, perform work all over the country. Great Lakes performs a variety of environmental projects, like the Great Lakes dredging operation in Miami to post-tornado waterway cleanup

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4. William Kelly, *Barge Damaged Reef, Spewed Rocks During Dredging*, PALM BEACH DAILY NEWS, Mar. 24, 2013, available at <http://www.palmbeachdailynews.com/news/news/national/barge-damaged-reef-spewed-rocks-during-dredging/nW22p/>.

5. Press Release, U.S. Dept. of Justice, Tug Company to Pay Nearly \$1 Million for Seagrass Damage (Dec. 20, 2002), available at [http://www.justice.gov/opa/pr/2002/December/02\\_enrd\\_738.htm](http://www.justice.gov/opa/pr/2002/December/02_enrd_738.htm).

6. *Id.*

7. U.S. EPA Fines Washington State Dredging Company for Ocean Dumping Violations, ENVTL. PROT. AGENCY (Apr. 1, 2004), <http://yosemite.epa.gov/opa/admpress.nsf/f2812c1a8484b3b5852572a000650c02/fda536a7c3726f7a852570d8005e1622!OpenDocument>.

8. 46 U.S.C. § 50101 (2006). The Jones Act requires that vessels working in United States waters must be three quarters United States owned.

9. *Great Lakes Dredge and Dock Corp at Deutsche Bank Securities Inc. Global Industrials and Basic Materials Conference—Final*, FAIR DISCLOSURE WIRE 1, 4 (June 16, 2011), available at Westlaw, 6/16/11 FD (Fair Disclosure) Wire 14:40:00.

and environmental analysis for mountaintop mining. Contractors do much of the hazardous waste disposal and remediation projects in the nation and gather much of the data and analysis about the toxins in our air, ground, and waterways. More and more, contractors do the work of government, to the point where some say that the traditional requirement that only the government should do work that is “inherently governmental: is no longer applied in practice.<sup>10</sup>

The more government work is taken over by private contractors, the less accessible project information is to the public. Government contractors are not subject to FOIA, which requires federal agencies to provide information to the public.<sup>11</sup> As contractors complete more “inherently governmental” work, less is known about the contractors and their projects. Those concerned with environmental hazards find it hard to advocate against these private entities cloaked in secrecy. Information plays a key role in educating people about environmental threats and assuring that an informed public can rally for or against activities that affect their environment. Access to information is vital for environmental progress in the United States, and citizens must be able to learn about environmental risks that may harm them.<sup>12</sup>

The international community recognizes that information access is imperative to environmental safety,<sup>13</sup> and the United States Congress designs environmental laws that provide for public participation.<sup>14</sup> Despite

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10. Paul R. Verkuil points out the futility of expecting the government to cull the inherently governmental tasks from competitive sourcing by quoting legal philosopher Leslie Green, “The idea that our leaders might have a fundamental duty to govern and to bear responsibility for doing so seems quaint.” Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 310, 334 (Jody Freeman & Martha Minow eds., 2009).

11. U.S. DEP’T OF JUSTICE, *GUIDE TO THE FREEDOM OF INFORMATION ACT 1*, (2009), <http://www.justice.gov/oip/procereq.htm>.

12. See Eric Barker, *Forest Service Faces More Scrutiny*, LEWISTON MORNING TRIB. July 20, 2012, [http://m.lmtribune.com/mobile/northwest/article\\_9d4d2050-fdc4-540f-bcd0-61c06750823a.html](http://m.lmtribune.com/mobile/northwest/article_9d4d2050-fdc4-540f-bcd0-61c06750823a.html) (reporting discomfort and dismay among private citizens and public interest groups trying to gain information related to the activities of a public interest group in relation to a U.S. Forest Service action).

13. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, 31 I.L.M. 874, 878 (June 14, 1992). This 1992 declaration was reaffirmed at the 2012 Rio Conference. Principle 10 says, “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” *Id.*

14. David Sarokin and Jay Schulkin demonstrated that government accountability leads to an expansion of the government’s right to know, using the Clean Water Act and the Emergency

those laws, FOIA remains the main tool for gaining access to government information. The public often utilizes FOIA to obtain information on potentially harmful environmental activities. For instance, farmers recently used FOIA to uncover hydrogen sulfide contamination of water systems caused by factory farms,<sup>15</sup> concerned local residents made FOIA requests to examine the oil dispersants used to clean up the BP oil spill,<sup>16</sup> and wildlife advocates used FOIA to get details of a mining project planned for a forest near Mount St. Helens.<sup>17</sup>

FOIA reaches its transparency limits when the government increasingly outsources projects to non-governmental entities outside of FOIA's scope. While contractors are integral to complex and large-scale environmental work in the United States, the contractors' status as private entities complicates public access to environmental information. America's laws give more privacy leeway to private entities. Even when performing government tasks, "private entities are not treated simply as part of the state."<sup>18</sup> This remains true even if the government uses these contractors to perform important state or state-like functions.<sup>19</sup> The opacity of contractors' information impedes many environmental laws designed to improve oversight of shared resources.

This article proposes using contract clauses in the government contracting process to improve the transparency of information among federal government contractors involved in environmental tasks. Part I of this paper explores FOIA, government contracting in the United States, and the dangers posed by limiting access to environmental information in contractors' work. Part II looks at the proliferation of environmental contractors and the damaging effects of increased contracting on the transparency goals of FOIA. Part III proposes contractual solutions to provide FOIA-like transparency requirements for projects undertaken by

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Planning and Community Right-to-Know Act of 1986 as examples of the federal government using the public's access to information as a tool of environmental policy. See David Sarokin & Jay Schulkin, *Environmentalism and the Right to Know: Expanding the Practice of Democracy*, 4 *ECOLOGICAL ECON.* 175, 180–84 (1991).

15. Yvonne Zipp, *One Farmer Acts to Save Environment from Factory Farms*, *CHRISTIAN SCI. MONITOR*, (Apr. 26, 2010), <http://www.csmonitor.com/World/Making-a-difference/2010/0426/One-farmer-acts-to-save-environment-from-factory-farms>.

16. *Activists Petition EPA for Oil Spill Dispersant Toxicity Criteria, Testing*, *INSIDEEPA.COM*, (Oct. 13, 2010), <http://insideepa.com/201010132341573/EPA-Daily-News/Daily-News/activists-petition-epa-for-oil-spill-dispersant-toxicity-criteria-testing/menu-id-95.html>.

17. Bianca Fortis, *Environmental Group Cautions About Impacts of Potential Mine*, *THE CHRONICLE* (Centralia, Washington), Oct. 21, 2011, available at <http://biancafortis.com/2201/12/environmental-group-cautions-about-impacts-of-potential-mine/>.

18. Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 *ADMIN. L. REV.* 617, 649 (2010).

19. *Id.*

federal government contractors. Part IV addresses critiques of utilizing contract clauses to address environmental transparency. By requiring contractors to sign contracts that include clauses requiring disclosure of environmentally sensitive information, requiring public participation and reporting, and providing incentives for information disclosures, the federal government will assure that the public has access to information vital for preserving human health and environmental safety. When contractors participate in agency undertakings, environmental advocates should be treated more like consumers or shareholders whose taxes pay the bills and less like market competitors deprived of information in order to protect corporate interests.<sup>20</sup>

Contractors, when tasked with a government assignment, should be required to provide transparency so the public can be assured the contractor does not deviate from the public interest. Great Lakes and other private entities performing government tasks fail to protect the best interests of the public thereby putting people and communities at risk.<sup>21</sup> A lack of transparency makes corruption, a disregard for rules and regulations, and overall mistreatment of people and their environment possible behind walls of secrecy.<sup>22</sup> Although the United States need not eliminate contracting or make things unduly difficult for contractors, whose work is integral to America's growth and progress, it should adopt contracting policies that assure public access to information.

## I: FOIA'S VITAL ROLE IN ENVIRONMENTAL HEALTH AND HUMAN SAFETY

### A. FOIA: America's Transparency Guarantee

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>23</sup>

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20. David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 173 (2007).

21. See, e.g., Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 335, 335 (Jody Freeman & Martha Minow eds., 2009).

22. Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 399 (2009).

23. Letter from James Madison to W. T. Barry (Aug. 4, 1822), in FOUNDERS' CONSTITUTION, at document 35 (1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

Freedom of information is vital to a successful democracy. FOIA facilitates the watchdog function of the public over the government to ensure that government officials act in the public interest.<sup>24</sup> The law creates a judicially enforceable public right of access to the information compiled by federal agencies.<sup>25</sup>

Justice Brandeis wrote, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>26</sup> Environmental protection hinges on the public’s “right to know” about environmental threats.<sup>27</sup> According to the EPA, citizen groups use environmental data collected by the government to help educate communities, identify environmental issues, and engage in negotiation for regulation of environmental undertakings.<sup>28</sup>

FOIA is the nation’s main tool for prying environmental information from the sometimes-reluctant government. Signed into law in 1966, FOIA requires federal agencies to disclose their activities to the public.<sup>29</sup> The law assures that anyone in the United States, including Miami citizens, can look into business conducted by federal agencies, like plans to dredge the earth beneath their coastlines. Under FOIA, any person has an enforceable right to obtain agency records about projects affecting the environment or anything else.<sup>30</sup> FOIA is America’s major transparency law, opening the government for public view. International environmental organizations tout

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24. Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 42 (1994).

25. Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 COMM. L. & POL’Y 511, 512 (2006).

26. *Justice Louis D. Brandeis*, BRANDEIS UNIV., <http://www.brandeis.edu/legacyfund/bio.html> (last visited Nov. 8, 2013).

27. Katherine Chekouras, *Balancing National Security with a Community’s Right-to-Know: Maintaining Public Access to Environmental Information Through EPCRA’s Non-Preemption*, 34 B.C. ENVTL. AFF. L. REV. 107, 125 (2007) (citing Thomas C. Beierle, *The Benefits and Costs of Disclosing Information About Risks: What Do We Know About Right-to-Know?*, 24 RISK ANALYSIS 335, 336 (2004) and Daniel J. Fiorino, *Citizen Participation and Environmental Risk*, 15 SCI. TECH., & HUM. VALUES 226, 227 (1990)).

28. In a report about its Toxics Release Inventory program, the EPA listed many specific examples where citizen activists and community organizations educated their citizens or residents about toxic chemicals, “often combining education with a call to action.” ENVTL. PROT. AGENCY, OFFICE OF INFO. ANALYSIS & ACCESS, EPA-260-R-002-004, HOW ARE THE TOXICS RELEASE INVENTORY DATA USED?—GOVERNMENT, BUSINESS, ACADEMIC & CITIZEN USES 3–9 (2003). See also Chekouras, *supra* note 27, at 125 (discussing how citizens use TRI data to educate communities, identify environmental concerns, and work to reduce pollution).

29. Sarah Lamdan, *Protecting the Freedom of Information Act Requestor: Privacy for Information Seekers*, 21 KAN. J.L. & PUB. POL’Y 221, 224 (2012).

30. U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 1 (2009), available at [http://www.justice.gov/oip/foia\\_guide09/introduction.pdf](http://www.justice.gov/oip/foia_guide09/introduction.pdf).



FOIA as a model for the transparency needed to foster progress in the environmental protection movement.<sup>31</sup> FOIA is supposed to prevent government secrecy and allow people to know “what their government is up to.”<sup>32</sup> States have also enacted Freedom of Information (FOI) laws for state agencies.<sup>33</sup>

FOIA’s importance has increased over the last few decades as environmental and public safety regulatory schemes have grown. Some argue this growth gives too much power to federal environmental agencies.<sup>34</sup> The regulatory growth conditions the assurance that the FOIA would keep the agencies accountable for the consequences of their new environmental and public safety regulatory responsibilities.<sup>35</sup> FOIA, which far pre-dates the new regulations and serves as a fundamental transparency commandment for federal agencies, was a precondition for the extra regulatory power given to the agencies. As these agencies give more power to contractors, the *quid pro quo* promise of transparency is thwarted, and FOIA’s information access dissolves.

The federal FOIA and state FOI laws are an integral part of the interplay between government agendas and the public’s voice on important national undertakings. This interplay is vital to staving off common governmental ailments that lead to iniquities. We need sunlight to prevent agency capture and regulatory slippage and to monitor for market failures that could lead to environmental detriment. Each of these can lead to environmental failures in the United States.

### B. Agency Capture

Shining transparency’s light onto agency dealings with contractors is necessary to “disinfect” the relationships from undue influence.<sup>36</sup> Agency capture, the undue influence of private industry on agencies’ processes and actions, can lead to regulatory deviation from the public interest. Because

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31. FRANCES IRWIN & CARL BRUCH, *Public Access to Information, Participation, and Justice*, in *STUMBLING TOWARDS SUSTAINABILITY* 511, 511 (John C. Dernbach ed., 2002).

32. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (quoting U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

33. Many websites contain links to every state’s FOI law. For example, the National Freedom of Information Coalition provides links to all states’ and the District of Columbia’s FOI and open meetings laws. See *Freedom of Information Laws*, NAT’L FREEDOM OF INFO. COAL., <http://www.nfoic.org/state-freedom-of-information-laws> (last visited Nov. 5, 2013) (providing links to information on various State Freedom of Information laws).

34. See Marlo Lewis, Jr., *Bureaucrats Have Gone Rogue*, N.Y. TIMES (Aug. 25, 2011), <http://www.nytimes.com/roomfordebate/2011/08/24/what-if-republicans-closed-the-epa/the-epa-has-gone-rogue> (arguing that the EPA has vastly exceeded its powers under the Clean Air Act).

35. *Id.*

36. See *supra*, note 26 accompanying text.

contractors are often large, highly structured organizations, they can monitor agencies more closely and react to agency challenges more rapidly than can most citizens or public interest organizations. Private entities can use monitoring to deter agency behavior that benefits the public and instead encourage agency behaviors that benefit private enterprise. Ordinarily, individual citizens and public interest groups lack the funding, resources, and industry to similarly affect agency views and to assure that agencies act in the public interest.<sup>37</sup>

For example, in Paducah, Kentucky, in the late 1990's, workers at a uranium enrichment plant were told by Union Carbide, a Department of Energy contractor running the plant, that the plant was not releasing a toxic level of radiation even as workers suffered cancer and other radiation-related illnesses.<sup>38</sup> Physicians for Social Responsibility, cites the "incestuous relationship between the US Government . . . and the large corporations doing most of the contracted work" for contamination exposure at nuclear sites like Paducah and the Hanford Site in Washington.<sup>39</sup> Only after FOIA allowed the public to review Hanford documents from the 1940s and 1950s were citizens able to see documentary evidence of "the incredible contamination of the environment and exposure of large numbers of citizens to dangerous amounts of radioactive nuclides [from] Hanford's earlier years."<sup>40</sup> The contractors' influence on the government led to an information cover-up that harmed plant workers. This cover-up could only be discovered through information transparency and public whistleblowing

When contractors regularly perform government functions, they can assert improper influence on those functions.<sup>41</sup> Regulatory capture can lead to catastrophic failures—BP's disastrous 2010 Gulf oil spill is perhaps the clearest example of how this kind of agency capture can destroy regulatory function.<sup>42</sup> In 2008, the *New York Times* described one example of capture

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37. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22 (2010).

38. Arjun Makhijani, *Paducah—Never Again*, WASH. POST, Aug. 17, 1999, at A15, available at <http://ieer.org/resource/health-and-safety/paducah-never-again/>.

39. *Hanford History: How Did We Get Where We Are?*, PHYSICIANS FOR SOC. RESPONSIBILITY, <http://www.psr.org/chapters/washington/hanford/hanford-history.html> (last visited Nov. 5, 2013).

40. *Id.*

41. LAURA A. DICKINSON, *OUTSOURCING WAR & PEACE* 117 (2011).

42. *Regulatory Capture Realized: The Oil Industry and the MMS Regulatory Agency*, THE WORDEN REP. (Mar. 8, 2011), <http://thewordenreport.blogspot.com/2011/03/regulatory-capture-realized-oil.html>.

by contractors in an environmental context.<sup>43</sup> The article depicts a “culture of ethical failure” pervasive in the Mineral Management Service (MMS), the arm of the Department of the Interior that collects oil and gas royalties. In several instances, former MMS employees returned to the MMS as consultants, creating overlaps between government functions and the private interests advanced by the former employees through close relationships.<sup>44</sup> Additionally, MMS’s leasing and revenue collection operations were not separate from the public safety and environmental enforcement side of the MMS. Staff biologists were often pressured by agency officials to change the findings of their studies if they predicted that an accident would likely occur.<sup>45</sup> Scientists’ findings were routinely overruled.<sup>46</sup> One scientist said, “You simply are not allowed to conclude that the drilling will have an impact,” or the MMS would rewrite the document.<sup>47</sup> The indiscretions and unethical behavior described in the article foreshadowed what would happen two years later. In 2010, the Center for Biological Diversity accused MMS of mismanaging the contractors that caused the Deepwater Horizon Oil Spill in the Louisiana Gulf.<sup>48</sup>

Sometimes, capture occurs systemically through regulatory schemes. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires the government to hire contractors to carry out Superfund site cleanups.<sup>49</sup> Private engineering firms carry out the site investigation, assessment of remedial alternatives, and remedial action.<sup>50</sup> “No sites would be cleaned up by America’s Superfund system if it were not for the army of contractors willing to profit from the work of planning and executing cleanups.”<sup>51</sup> In 1989, an Office of Technology Assessment (OTA) study found evidence that contractors captured the

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43. Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 10, 2008, at A1, available at <http://www.nytimes.com/2008/09/11/washington/11royalty.html>.

44. *Id.*

45. Ian Urbina, *U.S. Said to Allow Drilling Without Needed Permits*, N.Y. TIMES (May 13, 2010), <http://www.nytimes.com/2010/05/14/us/14agency.html>.

46. *Regulatory Capture Realized: The Oil Industry and the MMS Regulatory Agency*, WORDEN REP. (Mar. 8, 2011), <http://thewordenreport.blogspot.com/2011/03/regulatory-capture-realized-oil.html>.

47. *Id.*

48. Urbina, *supra* note 45.

49. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604 (2006) (giving the President the authority to act to arrange for removal of hazardous substance).

50. CAROLINE N. BROUN & JAMES T. O’REILLY, RCRA & SUPERFUND: A PRACTICE GUIDE § 10:23 (3d ed. 2013).

51. *Id.*

Superfund program.<sup>52</sup> The OTA revealed that pollution cleanup duties are often awarded to the very firms that polluted the land.<sup>53</sup> In short, the same firms that pollute get paid to clean up their self-made messes.<sup>54</sup> This is especially worrisome because the law requires CERCLA contractors to self-police.<sup>55</sup> Professor Bradford Mank describes the dependent relationship between agencies and private contractors in Superfund cleanups as a symbiotic relationship where Superfund contractors prosper by taking advantage of the federal government.<sup>56</sup>

### C. Regulatory Slippage

Another reason that transparency is necessary in environmental activities conducted through government contract is to prevent regulatory slippage. The attenuation of government activities from government direction can lead to inadequate oversight and quality control. Inadequate oversight flourishes because contractors lack the central focus and work force dedicated to regulatory compliance of federal agencies. Contractors disregard environmental compliance and other legal obligations, creating risks for national security, human health, and the environment.<sup>57</sup> Sunlight allows the public to monitor environmental processes to assure accountability where government oversight is lacking.

Miriam Seifter defines regulatory slippage as “a failure to take regulatory action or a decision to take action less rigorous than promulgated requirements mandate.”<sup>58</sup> In a study of CERCLA contractors working in Massachusetts, Seifter discovered widespread regulatory slippage.<sup>59</sup> She reported that contractors cut corners, failed to properly manage procedures and oversight, and did not discipline personnel to prevent malpractice or

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52. U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND—A BACKGROUND PAPER OF OTA’S ASSESSMENT ON SUPERFUND IMPLEMENTATION 2 (1989). The Office of Technology Assessment (OTA), was a Congressional office designed to provide Congress with analysis of complex scientific and technical issues. The OTA operated from 1972–1995. See generally, *Office of Technology Assessment*, THE OTA LEGACY, <http://www.princeton.edu/~ota/> (last visited Oct. 21, 2013) (describing the now defunct OTA’s objectives and mission and its years of operation).

53. *Id.*

54. ENVTL. PROT. AGENCY, EPA08: REFORM EPA’S CONTRACT MANAGEMENT PROCESS, available at <http://govinfo.library.unt.edu/npr/library/reports/EPA8.html>.

55. *Id.*

56. Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U ENVTL. L.J. 34, 80 (1993).

57. Mendelson, *supra* note 3, at 242.

58. Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 93, 95 (Jody Freeman & Martha Minow eds., 2009).

59. *Id.* at 94–95.

incentivize good behavior. Seifter used the example of contracting out hazardous waste remediation on an abandoned lot containing toxic pollutants in preparation for building a school on the grounds.<sup>60</sup> She found that in these cleanup situations, contractors were motivated to “underenforce” federal regulations because they had an interest in cost-cutting and convenience, and little fear of getting caught violating the rules.<sup>61</sup>

Contractors’ disregard for regulatory controls is a result of monitoring failures that allow environmental safeguards to fall through the cracks. According to Seifter, the Massachusetts Department of Environmental Protection hardly even monitors the contractors, and the agency is unable to perceive the sources or extent of regulatory slippage.<sup>62</sup> The lack of structured rules and regulations governing contractors’ activities protects their bad habits. “At best, the current laws governing contractors amount to a makeshift legal framework.”<sup>63</sup> While agencies, like contractors, can also suffer slippage if left to their own devices, strict disclosure requirements and legal accountability measures keep agencies on track.<sup>64</sup> Contractors can bypass the transparency and accountability requirements controlling government agencies, allowing the contractors’ slippage to go unchecked.<sup>65</sup>

As Gillian E. Metzger explains, the current policy for privatization involves completely separate rules to govern private and government entities.<sup>66</sup> Private entities are given a lot of leeway, making their own day-to-day decisions, getting trade secret and business information privacy, and implementing plans in the manner they select.<sup>67</sup> Conversely, government entities are highly regulated and controlled by legislative, executive, and judicial powers, as well as subject to public participation.<sup>68</sup> The laws of the United States treat non-governmental entities like contractors differently than government entities. Despite the growing role of private entities in government work, government contractors are rarely held to the standards

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60. *Id.* at 96–97.

61. *Id.* at 95.

62. *Id.* at 105.

63. Mendelson, *supra* note 3, at 242.

64. Stacey J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 508–09 (2001); 42 U.S.C. § 7401 *et seq.* (2006); 33 U.S.C. § 1251 *et seq.* (2006).

65. Silveira, *supra* note 64.

66. Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 291, 291–94 (Jody Freeman & Martha Minow eds., 2009).

67. *Id.* at 293.

68. *Id.*

of “state actors.”<sup>69</sup> Metzger describes the separate legal requirements for private and government entities as parallel binary systems that give private companies room for slippage.<sup>70</sup>

#### *D. Market Failure*

Transparency is also necessary so the public can assure that federal agencies try to minimize market failures in contractor situations that bring private market players into governmental roles. All sorts of failures occur in the free market; regulatory agencies have a duty to correct these failures and infuse the public’s best interests into market processes. In the government contractor setting, externalities (the failure of the market to ascribe value to social costs), such as environmental detriment, are particularly insidious and easy to miss without oversight. Most free market enterprises do not calculate a price for pollution and environmental damage, like the costs of a destroyed coral reef to environmental welfare. If not properly observed and regulated, contractors can choose economic prosperity over environmental protection without any negative consequences to their bottom line.

Additionally, environmental resources are easy to exploit in the free market because they cannot advocate for themselves and are often a necessary scapegoat for advancement. One can discount the importance of a healthy environment when the natural resources on which we depend have a high market value and appear to be in ample supply. For example, while clean air is just as important as more tangible resources, the open market puts a price on coal and timber but not clean air.<sup>71</sup>

Because the free market lacks a moral imperative for stewardship of the environment, many development operations pollute surrounding air and nearby waterways, leaving the cleanup costs with municipalities and their citizens who suffer the economic consequences. This is especially true in environmental situations where projects are often carried out near vulnerable populations. “Children, the elderly, the poor, and those in confinement for reasons of health or imprisonment—are largely excluded from participation in the market . . . .”<sup>72</sup> For example, toxic smoke released

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69. *Id.* at 292–93. Metzger says that this disparate treatment leads to a gap in oversight and government power, which works to the detriment of the public interest.

70. *Id.* at 291.

71. MARK SAGOFF, SHOULD MARKETS DECIDE?, 1 L. OF ENVTL. PROT. § 5:9 (2013), available at Westlaw 1 L. of Env'tl. Prot. § 5:9.

72. Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 261, 262 (Jody Freeman & Martha Minow eds., 2009).

from prospering factories, runoff released from animal waste from successful factory farms, and the destruction of fish populations caused when a dam builder finishes his work, all create negative effects on people who live nearby. Fishermen, the poor families living in the factory-adjacent building lot, and retired farm families on neighboring acreage will suffer economic difficulties and diminished quality of life.

Sometimes, the populace needs government intervention to save it from market failures. When the market fails to account for human suffering or imminent harm to society, the state often triggers responses for those failures.<sup>73</sup> If the free market goes too far afield of human safety the government intervenes, as it did during the 1970s with the development of environmental protection legislation.<sup>74</sup> This type of government intervention is important for protecting the environment, as businesses often exploit natural resources to drive market successes. Without transparency, government contractors can sacrifice human health and safety for market gain without the public knowing. Public advocacy for the silent, but important, natural resources requires public knowledge of contractors and their operations. Environmental advocates need contractors' information to advance environmental protection causes.

## II: A PROLIFERATION OF CONTRACTORS OBSCURES FOIA'S REACH AND THWARTS ITS PURPOSE

### *A. Increasing Reliance on Contractors*

Throughout American history, the government has used contractors to carry out many regulatory functions.<sup>75</sup> Private enterprise has brought about some of the greatest innovations in history, and private contractors have allowed the United States to reach otherwise unattainable goals. On many fronts, our nation's success is due to the work and expertise of the government's contracted assistants.

For example, imagine NASA operations without the help of contracted scientists and engineers to design shuttles, arrange projects, and track

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73. *Id.* at 268.

74. Silveira, *supra* note 64 at 508–09; 42 U.S.C. § 7401 et seq. (2006); 33 U.S.C. § 1251 et seq. (2006).

75. Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 1, 6 (Jody Freeman & Martha Minow eds., 2009) (offering a historical overview of government contracting in the United States).

NASA missions.<sup>76</sup> War efforts rely on contractor designed-and-constructed tanks, armored vehicles, and tools of combat. Contractors have created the plans, provided the tools, supplied the brute force, and lent their intellect to some of our nation's greatest challenges.<sup>77</sup> "In many instances, there are genuine advantages to relying on the private sector, including for-profit and non-profit organizations, for expertise, innovation, energy, and flexibility."<sup>78</sup>

Federal government contractors have proliferated in recent decades. Beyond launching space shuttles and fighting wars, a growing number of "mundane" government tasks are being outsourced. Since 1945, the amount of public government work conducted by private contractors has been growing, and the division between public and private workforces has steadily declined.<sup>79</sup> Now, contractors do "the basic work of government."<sup>80</sup> Contractors write regulations and budgets, produce reports, interpret laws, deliver social services, manage nuclear weapons sites, and other functions that were once wholly conducted by government officers.<sup>81</sup> The amount of research and development spending by the United States government dropped from 67% in 1960 to 26% in 2000, as the private sector took over the "development and provision of public infrastructure."<sup>82</sup>

Not only has outsourcing increased and expanded to cover "mundane" tasks, but the amount of responsibility granted to non-governmental entities has also grown. The term "public-private partnership" was coined in the last

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76. For example, NASA's Space Flight Operations Contract with its contractor, United Space Alliance, provided the company \$10 billion to handle virtually every aspect of a shuttle mission from astronaut training and system assembly to operations management during flight. See John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 41, 58-61 (Jody Freeman & Martha Minow eds., 2009).

77. Contractors play major roles in many national undertakings, including serving in paramilitary CIA units and preparing surveillance and targeting plans in Afghanistan and restoring the site of the 9/11 terrorist attacks, cleaning up following Hurricane Katrina, and helping to repair the Gulf Coast environments damaged by the BP oil spill. See Christina M. Blyth, *Minding the Liability Gap: American Contractors, Iraq, and the Outsourcing of Impunity*, 62 U. MIAMI L. REV. 651, 656-57 (2008); *Trade Group Praises Legislation Limiting Contractor Litigation Risk from Katrina Efforts*, 47 GOV'T CONTRACTOR 423 (2005), available at Westlaw 47 No. 37 Gov't Contractor 423 (describing the valuable role of private contractors in disaster relief following Hurricane Katrina and 9/11).

78. Freeman & Minow, *supra* note 76, at 15.

79. Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 564 (2010).

80. Freeman & Minow, *supra* note 76, at 2.

81. *Id.*

82. Levine, *supra* note 20, at 142. Also, in 2005, the U.S. General Accounting Office's Department of Acquisition and Sourcing Management reported that there was an 86% increase in government private sector goods and services spending between 2000 and 2005. MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES COMM. ON GOV'T REFORM, DOLLARS, NOT SENSE: GOVERNMENT CONTRACTING UNDER THE BUSH ADMINISTRATION i (2006).



two decades to denote “government contracts in which the private contractor takes on more responsibility than has been customary in the past for the delivery of the services contracted for.”<sup>83</sup> Through public-private partnerships, the government shifts much of the financing, maintenance, and operation of public infrastructure to private contractors. The increased use of public-private partnerships reflects a new enthusiasm for privatizing government functions.

The lines between “public” and “private” influences on government undertakings blur, despite the fact that the laws are still quite “binary” in separating rules governing public entities and those guiding the government.<sup>84</sup> Transparency guarantees, like FOIA, have no power over private entities and no similar laws exist to require contracted companies to be transparent.

### *B. Proliferation of Contractors Doing Environmental Work*

More than ever, federal agencies are using contractors to carry out work that affects the environment.<sup>85</sup> A 1992 report stated that EPA contract obligations increased from \$600 million in 1986 to approximately \$1.4 billion in 1992.<sup>86</sup> In 2010, the EPA spent \$413 million on private contractors for Superfund alone.<sup>87</sup> EPA contractors lend specific technical expertise for short-term projects.<sup>88</sup> External contractors are also easier to hire and fund than long-term internal employees.<sup>89</sup>

Not only has outsourcing increased, contractors now perform tasks once reserved for internal agency officials. “As early as 1989, it was uncovered during Senate hearings that EPA contractors were drafting budget documents, overseeing field investigators, drafting responses to public comments during the rulemaking process and writing regulation preambles, and organizing and conducting public hearings.”<sup>90</sup>

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83. Custos & Reitz, *supra* note 79, at 555.

84. Aman, *supra* note 72, at 269–70.

85. See generally ENVTL. PROT. AGENCY, *supra* note 53 (describing EPA’s increasing reliance on private contractors). Also see statistics like “The Department of Energy spends over 90 percent of its budget on contracts, including contracts to operate research laboratories, maintain nuclear weapons stockpiles, and clean up radioactive and hazardous wastes resulting from weapons production.” Mendelson, *supra* note 3, at 242.

86. ENVTL. PROT. AGENCY, EPA08: REFORM EPA’S CONTRACT MANAGEMENT PROCESS, <http://govinfo.library.unt.edu/npr/library/reports/EPA8.html> (last visited Nov. 11, 2013).

87. ENVTL. PROT. AGENCY, OFFICE OF INSPECTOR GEN., REPORT No. 12-P-0360, EPA SUPERFUND CONTRACT INITIATIVES & CONTROLS TO REDUCE FRAUD, WASTE, AND ABUSE 2 (2012).

88. ENVTL. PROT. AGENCY, *supra* note 53.

89. *Id.*

90. Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN

*C. Contractors Carry Out an Array of Environmental Tasks*

The EPA Office of Acquisition Management (OAM) uses Federal Acquisition Regulation (FAR) Subpart 37.101 to describe the role of their service contractors.<sup>91</sup> A service contract “directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.”<sup>92</sup> These tasks include maintenance, operations services, technical support, and management support services.<sup>93</sup> The EPA hires contractors for consulting, regulatory enforcement, auditing, managing, preparing analysis and reports, and other administrative operations.<sup>94</sup> Ecologists, engineers, chemists, and suppliers of manpower, as well as scholars and managers, are just some of the people hired by the EPA in a contractor capacity.<sup>95</sup>

The only tasks that contractors cannot perform are “inherently governmental functions,” which are activities “so intimately related to the public interest as to mandate performance by Government employees.”<sup>96</sup> The EPA defines “inherently governmental functions” as activities requiring “the exercise of value judgment in making decisions for the government.”<sup>97</sup> This definition seems like it would include many of the agency’s functions. However, upon closer inspection, many activities fall outside of the “inherent government function” parameters, and most activities can be outsourced.<sup>98</sup> This is especially true as government budgets grow sparser and agencies face cutbacks and aim to increase their cost effectiveness.

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DEMOCRACY 153, 177 (Jody Freeman & Martha Minow eds., 2009). *See also id.* at 204–06 (quoting PAUL C. LIGHT, TRUE SIZE OF GOVERNMENT 13–14 (1999)).

91. 48 C.F.R. § 37.101 (2007); OFFICE OF ACQUISITION MGMT., U.S. ENVTL. PROT.

AGENCY, SUPPORT SERVICE CONTRACTING: WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE 1 (2011), available at <http://www.epa.gov/oam/inventory/FY2011/attach4.pdf>.

92. *Id.*

93. *See* *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding data tapes created and possessed by contractor were under “constructive control” of agency because of agency’s extensive supervision).

94. OFFICE OF ACQUISITION MGMT., *supra* note 90, at 1–2.

95. *Id.* at 1.

96. *Id.* at 2.

97. *Id.*

98. *Id.*

*D. Contractor Documents Are Not Agency Records*

Citizens cannot use FOIA to obtain contractor materials because FOIA only applies to “agency records.”<sup>99</sup> In 1980, the Supreme Court decided in *Forsham v. Harris* that federal participation in, and funding of, the generation of information by a privately controlled organization does not render that information an “agency record” under FOIA.<sup>100</sup> Nine years after the *Forsham* decision, the Supreme Court developed a two-part test for “agency records” in *United States Department of Justice v. Tax Analysts*.<sup>101</sup> Under this test, a document is an agency record only if it is (1) created or obtained by an agency and (2) under agency control at the time of FOIA request.

The Supreme Court has, in limited instances, defined some contractor-generated documents as “agency records.”<sup>102</sup> In *Hercules, Inc. v. Marsh*, the court held that a telephone directory, created for an Army ammunition plant by a contractor at government expense, was an agency record.<sup>103</sup> Also, the D.C. Circuit Court found that contractor recordings created under agency supervision are “agency records.”<sup>104</sup> The District of New Mexico has held that, where agencies express that they intend to retain control over records created by contractors, the records are “agency records.”<sup>105</sup> In contrast, other federal courts have found that computer tapes maintained by contractors outside of agency control are not “agency records”, nor are records not possessed or controlled by an agency.<sup>106</sup> Overall, there is no decisive rule governing whether contractor creations and holdings are

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99. U.S. DEP'T OF JUSTICE, *Procedural Requirements*, GUIDE TO THE FREEDOM OF INFORMATION ACT 27, 33 (2009), available at [http://www.justice.gov/oip/foia\\_guide09/procedural-requirements.pdf](http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf) (hereinafter *Procedural Requirements*).

100. *Forsham v. Harris*, 445 U.S. 169, 171 (1980).

101. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

102. *Procedural Requirements*, *supra* note 98, at 75.

103. *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988).

104. *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992).

105. See *Los Alamos Study Grp. v. Dep't of Energy*, No. 97–1412, slip op. at 4 (D. N.M. July 22, 1998) (finding records created by contractor are agency records because the contract established agency intent to retain control over records). See also *Procedural Requirements*, *supra* note 98, at 35–36 nn.67–68.

106. See U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 36 (2009), available at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm) for a discussion of *Rush Franklin Publ'g, Inc. v. NASA*, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (holding that computer tape maintained by contractor is not an agency record when there is no agency control); See also *Sangre de Cristo Animal Prot., Inc. v. U.S. Dep't of Energy*, No. 96–1059, slip op. at 4–6 (D. N.M. Mar. 10, 1998) (holding that records not possessed or controlled by an agency but created by entity under contract with agency are not agency records, but are accessible under agency regulation requiring public availability of some Dep't. of Energy contractor records).

“agency records,” and the majority of decisions give deference to contractors’ privacy.

Congress has never moved to increase contractor transparency in a meaningful way. In 2007, Congress slightly expanded the definition of “agency record” to cover records kept by government contractors performing recordkeeping functions for the purposes of records management.<sup>107</sup> This expansion does apply to contractors’ materials, but it merely covers distinct situations where agencies relinquish possession of their records to a contractor “for the purposes of records management.”<sup>108</sup> The amendment keeps agency records within FOIA’s parameters—“even though they are no longer in the physical custody of the agency”—but it does not reach further to encompass contractor-created materials.<sup>109</sup> Situations where contractors serve “recordkeeping” functions include those where contractors are hired to “store, organize, or manage” agency records.<sup>110</sup> Beyond that, Congress has not extended FOIA to contractor materials.

FOIA practitioner guides similarly identify “agency records” as documents in an agency’s possession or otherwise under the agency’s exclusive control.<sup>111</sup> Materials outside of agency walls are not likely to fall under FOIA. Documents from the actual contracting procurement process are one of the few exceptions to this rule and are readily available to the public.<sup>112</sup> However, documents from the procurement process do not greatly enhance contractor transparency, as they do not offer information about the actual performance of the government contract (like pollution data, outlines of project plans, evidence of project oversight, etc.). Documentation of the contract’s performance, not the procurement process, contain the information needed to protect public safety and health..

Not only do contractors escape FOIA requirements, there are also exemptions built into FOIA that are especially suited to protect private company information. Trade secrets, business information, and privileged

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107. Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175 (codified as 5 U.S.C. § 552(f)(2) (2006)).

108. U.S. DEP’T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, *Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management*, FOIA POST (Sept. 9, 2008), available at <http://www.justice.gov/oip/foiapost/agencyrecords.htm>.

109. *Id.*

110. *Id.*

111. Paul G. Dembling et al., *Access to Contractor Records Under the Freedom of Information Act*, in 2-10 FEDERAL CONTRACT MANAGEMENT 10.15 (Matthew Bender & Co., Inc., 2011).

112. Jacquelyn L. Stanley, *Make Transparency Your Business: The Federal Awardee Performance and Integrity Information System and Its Implications for Contractors*, 41 PUB. CONT. L.J. 685, 686 (2012).

work product are just a few of the exemptions contractors can use to squirrel away information from public view. Contractors can also file reverse-FOIA lawsuits to protect requested documents from release to the public.

#### *E. Contractors Do Not Have to Keep Records*

Private contractors are free to work without much public disclosure. Contractors are not tasked with documenting their activities for the purposes of public oversight. There are not recordkeeping laws or regulations that require contractors to keep records or provide all of their documents to agencies. Unless there is a complaint entered into a court that demands review of a final agency action—and that action involves contractor records—there is never a time where records have to be handed over to anyone.<sup>113</sup>

Even if there is a complaint that calls for agency review, by the time litigation has commenced, compiling a paper trail may be nearly impossible. Craig D. Galli, a litigator advising contractors preparing environmental impact statements, says that it is nearly impossible to gather materials for judicial review and this “virtually guarantees” that the record will be haphazard and incomplete.<sup>114</sup> Even if contractors create paper trails and the government does successfully oversee their activities, the lack of transparency rules leave contractors’ activities largely inaccessible, especially by the time litigation arises.<sup>115</sup>

#### *F. Contractors Do Not Have Transparency Requirements*

Even if contractors choose to keep thorough records, they do not have to share them. FOIA, the federal government’s most important and far-reaching transparency law, does not apply to government contractors.<sup>116</sup> Nothing in FOIA accounts for third parties carrying out government work, and most of FOIA’s policy relating to contractors protects information in contractor bids (during the acquisition process) from other potential contractors. The government’s interest in attracting quality contractors and its national policy of promoting corporate privacy to stimulate development (such as protecting trade secrets and financial information) prevents the

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113. Craig D. Galli, *The Project Proponent, Third-Party Contractors, and the Administrative Record*, ROCKY MOUNTAIN MINERAL L. INST., SPEC. INST. ON THE NAT’L ENVTL. POL’Y ACT 8, available at Westlaw 2010 No. 4 RMMLF-INST Paper No. 9 (2010).

114. *Id.*

115. Freeman & Minow, *supra* note 75, at 3, 5.

116. *Id.* at 10.

government from implementing transparency measures for its contractors. The procurement process focuses on the issues facing potential contractors, not on public welfare or the transparency of contractors after they are awarded the contract.<sup>117</sup>

Transparency disparities between the government and its contractors arise from the different goals of private enterprise and democratic government. Government and private businesses operate from opposing perspectives. The private sector is guarded, protecting its precious trade secrets and maintaining financial opacity.<sup>118</sup> Conversely, government benefits from open democracy and the dissemination of information.<sup>119</sup>

The divergence of contractor treatment versus government treatment is built into the foundation of the United States government. The federal government and the laws that regulate its behavior were not designed for commercial venues. Government commercial activity is notably absent from both our traditional view of government and core democratic values, and it is in that absence that the conflict between trade secrecy and democratic values resides.<sup>120</sup> Although contractors are private entities, they should not be exempt from adherence to public values when they are performing government functions.<sup>121</sup> Other nations have recognized the need for equal transparency measures for government contractors. In Hungary “the transparency and controllability of the privatization processes, as public interest, takes precedence over the private interest of protection of business secrets.”<sup>122</sup>

As government contracting increases, the web of governmental and corporate forces working together to complete government tasks as a single workforce makes transparency all the more complicated.<sup>123</sup> Combining government and private activity obscures the boundaries of government

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117. Kelman, *supra* note 90, at 153.

118. *SEC Disclosure Laws and Regulations*, INC., <http://www.inc.com/encyclopedia/sec-disclosure-laws-and-regulations.html> (last visited Oct. 28, 2013) (stating that the SEC forces some revelations through public disclosure and reporting laws, but information excluded from those mandates are tightly held and not released).

119. Levine, *supra* note 20, at 157.

120. *Id.* at 164.

121. See Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1091 (2000) (explaining that contracting should not exempt the resulting activities from adherence to public values).

122. Levine, *supra* note 20, at 165.

123. Mark Fenster explains that the government’s organizational complexity increases when it delegates its authority to private entities, which decreases visibility to the public. He writes that, “to the extent that current law limits the FOIA’s applicability to new governance efforts, then the new governance approach appears significantly less than perfectly transparent.” Fenster, *supra* note 18, at 649–50.

activity when drafting and enforcing rules to govern functions that “appear governmental.”

Under current laws, citizens cannot use FOIA to find out how government contractors are exercising their discretion.<sup>124</sup> Private companies do not have to comply with FOIA, which is only meant to ensure access to government information.<sup>125</sup> Because no comprehensive legislative scheme governs contractors, they “function under a patchwork of laws and doctrines, many of which were designed primarily for other purposes. At best, the current laws governing contractors amount to a makeshift legal framework.”<sup>126</sup>

### III: IMPROVING ENVIRONMENTAL TRANSPARENCY WITH CLAUSES IN GOVERNMENT CONTRACTS

Many solutions have been suggested to increase the transparency of government contractors. National security contracting has been analyzed at length, exposing the types of contractor practices that turn companies like Blackwater and Halliburton into household names that demonstrate the ugly underworld of government outsourcing. National security scholars have determined that contractor oversight is an “inherently governmental function that, by law, should not be outsourced.”<sup>127</sup> Governmental oversight requires information access.

Experts also suggest that government favor transparency, as there is little value in obscuring information from the public. These experts claim that full disclosure of chemical hazard information would enhance national security, rather than diminish it, because it would allow communities to prepare for attacks, accidents, and other catastrophes through proper planning and preparation.<sup>128</sup>

Some legislative changes have been suggested to reach oversight and transparency ideals. Although legislative changes may be useful, this paper focuses on contractual changes. Utilizing the very document that binds government and contractor provides both parties with obligations that are easier to implement and enforce than a complex legislative scheme. New

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124. Custos & Reitz, *supra* note 79, at 578.

125. Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 110, 122 (Jody Freeman & Martha Minow eds., 2009).

126. Mendelson, *supra* note 3, at 242.

127. Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1014 (2005).

128. Joseph David Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 ENVTL. LAW. 327, 396–97 (2003).

laws would create new layers of responsibility on an already stressed legislative and regulatory system, which may result in a toothless, ineffective set of time consuming rules that fail to truly change the government contractor relationship. Experts are quick to point out that placing additional legislative rules on contractors may be ineffective, working only to “mar the system with red tape.”<sup>129</sup>

When Washington State attempted to beef up its contractor transparency requirements by including government contractors into its freedom of information law (the Public Records Act), agencies had to scramble to set up new disclosure systems to determine what documents were “critical” and to properly deliver those documents.<sup>130</sup> Because agencies do not have the staff to properly administer the new layer of procedures assigned by the disclosure law, contractors and agencies often decide what is “critical” without any oversight. As a result, there is no way to assure that all of the important material actually ends up in agency control.

In addition to preventing bureaucratic issues, contractual mandates also avoid the slow response time of legislatures, which often stalls statutory change indefinitely. Contracts work around disconnects between legislation and the free market world of contractors by reaching out directly to contractors and imposing obligations on them. Giving free market participants real-life, free market requirements fits in the flow of the contracting process.

Changing government contract terms to increase transparency incentives or requirements is the best way to assure access to environmental information. The three possible contract clauses discussed below require information disclosure for government contractors, offer contractual incentives for environmental information disclosure, or require public participation at certain points in the contracting process.

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129. Kelman, *supra* note 90, at 165.

130. Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Business Become Government “Agencies” Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741, 741–42 (2010). According to the court, the Public Records Act requires quasi-governmental agencies, or private entities that worked in the functional equivalency of government agencies to follow the state disclosure law so that contractors cannot “hide the details of their activities behind the smokescreen of ‘contracting out’ government services.” The judicial test for determining functional equivalency is called the “Telford Test”. *Id.*



*A. Contract Clauses Requiring Information Waivers for Government Contractors*

Scholars have recognized the value of contractual mechanisms mandating accountability in other contexts. Laura Dickinson suggests including accountability mechanisms into government contracts to create court enforceable standards of behavior.<sup>131</sup> She writes, “it is essential that, at the very least, the contracts themselves incorporate public values,”<sup>132</sup> so the public interest does not get lost in layers of contractor secrecy.<sup>133</sup> Including contractual provisions requiring contractors to provide public access to information on environmental issues would force contractors to comply with FOIA-like standards that would otherwise be unenforceable against the private entities.<sup>134</sup>

Steven J. Kelman suggests that government contract clauses could simply be a direct application of FOIA for “FOIA-type issues” that are considered to be important.<sup>135</sup> This direct inclusion of FOIA principles in government contracts would be an efficient solution to the opacity of contractors’ tasks. Alfred Aman suggests including modified FOIA request requirements that allow the public to make inquiries about contractors’ operations while the contract is in place.<sup>136</sup>

This type of clause would most directly apply “private-FOIA” obligations on contractors. While FOIA transparency would be optimal for gaining access to contractors’ information, it may also prove quite burdensome for contractors. Critics of imposing FOIA requirements on private entities worry that “productive and innovative private organizations may choose not to pursue government contracts to avoid the invasion of privacy, the added work, and the expense required to comply.”<sup>137</sup> They call the use of FOIA provisions for government contract work a “devastating policy that would almost certainly cause the wholesale withdrawal of firms not completely dependent on government business from the government marketplace.”<sup>138</sup>

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131. Dickinson, *supra* note 21, at 336.

132. *Id.* at 337.

133. *See id.* at 338 (recognizing that contracts can “be a tool to “publicize” the privatization relationship”).

134. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 634 (2000).

135. Kelman, *supra* note 90, at 185.

136. Aman, *supra* note 72, at 284.

137. Ware, *supra* note 129, at 766.

138. Kelman, *supra* note 90, at 185.

While these concerns may have some merit, the information gleaned from private-FOIA transparency would allow those concerned with the Great Lakes operations in Miami's reefs and seagrass beds to obtain records of work done, outlines of plans, and any information about pollution studies done before, during, and after the dredging project. The amount of information available to environmental advocates would be unparalleled by current contractor documentation, and, for the first time, the general public could actively track Great Lakes operations and have a real stake in the environmental outcomes of the port deepening.

*B. Contract Clauses Requiring Public Participation in Government Contractors' Activities*

Another type of contractual mandate could increase public participation in the activities of private contractors doing government work. In normal agency processes, public notice and comment periods guarantee public participation opportunities. The same opportunity to know about and comment on agency activities is missing in situations where contractors carry out government functions. Contract clauses infusing the contracting process with periods where interested citizens can actively engage government contractors would increase transparency in government contracting.

Aman urges maximizing public participation as early as possible in the contracting process, as contracts are often hard to terminate and sometimes become "immutable."<sup>139</sup> The "early and often" approach to public participation in government contracts would be especially helpful in situations where environmental safety is at risk, as once something harms the environment it is often irreversible or very difficult to repair. Aman suggests that contract clauses could be made to treat the contract more like an agency rule than a contract negotiated between two parties, so that it must be placed on the agency's website with a call for public comments, suggestions, alternative language, and ways to achieve its substantive goals from anyone wishing to comment, including affected parties.<sup>140</sup>

Continued participation in contractor activities, not just at the outset of contracts, but throughout the performance of contractual terms, would assure that the contractors do not fall outside of initial guarantees to utilize environmental safeguard as the process unfolds. Continued public participation would help safeguard contractor practices from regulatory

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139. Dickinson, *supra* note 21, at 353 (citing Aman, *supra* note 71).

140. Aman, *supra* note 72, at 284.

slippage, and it would prevent agencies from falling prey to capture by forcing discussion and communication, which is important to democratic procedure.<sup>141</sup>

In lieu of direct public participation, contracts could require contractors to enlist an ombudsman or designated person acting on behalf of the public. This system is utilized in New Zealand, where an ombudsman considers a particular set of rules when the government denies information disclosures to the public on the basis of commercial confidentiality.<sup>142</sup> The ombudsman weighs the activity being protected against the market forces that may harm the contractor should the information be released against the public interest.<sup>143</sup>

Another possibility would be creating opportunities for open discourse between government contractors and the beneficiaries of the contracts. On a state level, Wisconsin has successfully opened up its contracts with managed care organizations supplying Medicare and Medicaid recipients to community group participation.<sup>144</sup> This limited engagement provides increased transparency without the burden of a highly particularized notice and comment scheme.

### *C. Contractor Incentives for Information Disclosure*

The federal government and state governments offer incentives for some of their contractors' commitments. Contractor incentives include U.S. based business incentives, economic development incentives to companies willing to stimulate the national economy, and relocation incentives to business centers in a particular city or state. These practices could be used to urge contractors to waive information disclosure for environmentally relevant materials. Incentivizing contracts containing disclosure commitments would fit within the current contract-bidding scheme, as that scheme already contains incentives for other assurances.

The federal government and state governments have utilized incentivized contracts to encourage environmental contractors to take extra steps to assure that the public interest is not forgotten in the outsourcing process. For instance, the EPA has employed Superfund contractors under cost-plus-award-fee contracts, which reimburse for costs and provide an

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141. *Id.*

142. David S. Levine, *The People's Trade Secrets?*, 18 MICH. TELECOMM. TECH. L. REV. 61, 111 (2011).

143. *Id.* at 111–12.

144. Dickinson, *supra* note 21, at 353.

“award fee” to motivate “exceptional performance” where the contractors have to expend extra costs to assume extra benefits that help the public.<sup>145</sup>

Transparency incentives could benefit the contractor as much as the government itself, as more transparency and public participation can improve the plans of private institutions.<sup>146</sup> Using contract language to incentivize public participation is less burdensome on contractors than a private-FOIA mandate or public participation requirement, as it rewards good transparency behavior but does not force it. Federal Acquisition Regulation (FAR) permits incentives that motivate contractor efforts that might not otherwise be emphasized and incentives that discourages contractor inefficiency and waste.<sup>147</sup> If contractors were financially rewarded for providing environmentally relevant information about their projects, such a reward may compel Great Lakes to release data on its dredging progress or proactively provide progress reports to the public.

#### IV. CRITIQUES OF TRANSPARENCY CLAUSES

Transparency clauses in government contracts would increase desperately needed access to environmental information. Despite the ease of amending contracts and the great benefit the clauses would provide to environmental advocacy and environmental safety, critics would point out some possible negative outcomes from including those clauses into government contracts. Some possible issues with transparency clauses include concerns that they may dissuade private entities from contracting, may controvert FOIA’s protection of private entities, and may be insufficient to create transparency.

##### *A. Increased Contract Obligations May Turn Off Contractors*

Imposing “FOIA-like” procedures on government contractors may increase contract prices and frighten away potential contractors who prefer to work without heavy bureaucracy.<sup>148</sup> Federal agencies dedicate many resources to satisfying FOIA requirements, including FOIA officers, staff to process requests, and an infrastructure that properly stores information for

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145. Mank, *supra* note 56, at 78.

146. Levine, *supra* note 20, at 175.

147. See 48 C.F.R. § 16.403 (2013) (discussing how contract incentives can have a “meaningful impact on the contractors’ management of the work”).

148. See Kelman, *supra* note 90, at 186 (discussing how some contractors may find FOIA-like clauses undesirable).

easy access.<sup>149</sup> Most federal agencies have entire offices dedicated to fulfilling FOIA requirements and requests.<sup>150</sup> Hypothetically, contractors would have to supply a similar set of resources if they were subject to “FOIA-like” requirements. Whether the government would require contractors to supply this workforce and infrastructure themselves, or whether the government would create an intra-governmental system for contractor accountability, the undertaking would certainly require money, infrastructure, and manpower.

In a cost-benefit analysis, increased public access to information about environmental threats trumps contractors’ concerns about potential costs of environmental transparency requirements. Public health is more valuable than money saved by not disseminating information to the public. Contractors acting for the government should presume that they might be subject to public disclosure requirements. “We can and should expect such public disclosure when companies step out of the purely private commercial world and seek to reap the financial benefits of providing essential public infrastructure.”<sup>151</sup>

Dickinson suggests that allocating contract resources to oversight would not create financial hardship for either the government or its contractors.<sup>152</sup> She explains that, because of the “huge amounts of money flowing to these contracts,” the government could ensure that a small percentage of each contractual fee gets allocated to monitoring measures such as increasing transparency, thus financial interests would not be unduly burdened.<sup>153</sup>

### *B. Contractor Disclosure Conflicts with FOIA Protections*

Despite an obvious need to gain access to some types of contractor information (including the information that reflects potential environmental issues that could affect public health and welfare), FOIA itself protects a lot of corporate information. Thus, there is a chance that private contract clauses could contradict the legislative intent of FOIA. For instance,

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149. See, e.g., *Responding to Requests*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/open/responding.html> (last visited Nov. 20, 2013) (stating that the U.S. Department of Justice employed 528 personnel dedicated to processing and responding to 63,103 FOIA requests in Fiscal Year 2011).

150. See, e.g., *Defense Freedom of Information Policy Office*, U.S. DEP’T OF DEF., <http://www.dod.mil/pubs/foi/dfoipo/index.html> (last visited Nov. 20, 2013) (describing the U.S. Department of Defense’s FOIA Office).

151. Levine, *supra* note 20, at 140.

152. See Dickinson, *supra* note 21, at 335 (discussing various contract accountability mechanisms).

153. *Id.* at 345.

FOIA's fourth exemption protects commercial trade secrets and business information.<sup>154</sup> Although these exemptions are geared more towards protecting the profitability of private entities rather than withholding information of use to the public for health and safety reasons, there is little legislative history to clarify that intention, and the courts have read the trade secret exemption broadly.<sup>155</sup> Court opinions continue to expand the definitions of "secrecy" and "commercial use" to protect more information.<sup>156</sup>

Using FOIA's fourth exemption, federal courts permit companies to keep their documents hidden from the public. The D.C. Circuit Court held that any "commercial or financial matter" is confidential under the fourth exemption if disclosing the information might (1) impair the government's ability to obtain necessary information in the future or (2) harm the competitive position of the entity from which the information was obtained.<sup>157</sup> This test usually favors non-disclosure and is used despite the fact that it requires complicated economic analyses.<sup>158</sup> According to the D.C. Circuit, if contractors voluntarily provide agencies with information that would "customarily not be released to the public" by a corporation, then the agency also cannot release it.<sup>159</sup>

Courts read the fourth exemption so liberally in favor of corporations one commenter argued that the fourth exemption essentially offers "veto power" to government contractors so that contractors can hide whatever they want from government watchdogs.<sup>160</sup> Courts have interpreted the fourth exemption in favor of corporate secrecy over the public interest and Congress has not stepped in to curb this trend.<sup>161</sup> Thus, FOIA's fourth exemption has become a "shelter," protecting the private industry's damaging or embarrassing information from public disclosure.<sup>162</sup>

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154. 5 U.S.C. § 552(b)(4) (2006).

155. Dembling et al., *supra* note 111.

156. Levine, *supra* note 20, at 150.

157. Nat'l Parks & Conservation Assoc. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

158. U.S. DEP'T OF JUSTICE, *Protecting Business Information*, in IV FOIA UPDATE 4, 1 (1983), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_IV\\_4/page1.htm](http://www.justice.gov/oip/foia_updates/Vol_IV_4/page1.htm) (citing *Business Record Exemption of the Freedom of Information Act: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 2 (1977)).

159. Critical Mass Energy Project v. Nuclear Reg. Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992).

160. Wendell Cochran, *HUD Grants FOIA Request But Now Wants the Documents Back*, INVESTIGATIVE REPORTING WORKSHOP, <http://investigativereportingworkshop.org/blogs/exemption-10/posts/2011/jun/22/hud-grants-foia-request-now-wants-documents-back/> (last visited November 15, 2013).

161. Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 LAW & CONTEMP. PROBS. 99, 117 (2006).

162. Jessica Barkas, *Nuking Freedom of Information and Community Right to Know: How Post-9/11 Secrecy Politics Could Make America Less Safe*, 28 ENVTL. L. & POL'Y J. 199, 213 (2005).

Along with procurement policies that explain to contractors how their confidential business information (CBI) will be protected, several statutes dealing with environmental information also clarify whether certain information is CBI.<sup>163</sup> The Clean Air Act (CAA) specifies that emission data is not CBI.<sup>164</sup> However, it is not clear whether the data that goes into emissions calculations (raw material used, production volume, etc.) are CBI, so while contractors must disclose emissions data, they may not be obligated to offer any more than that.<sup>165</sup>

The amount of CBI privacy granted to contractors has spurred clashes between environmental advocates trying to get information and the federal government. When the Environmental Integrity Project sought data on coal ash disposal practices from power plants, some of the plants claimed their data was “confidential business information” (CBI) and did not turn over the information.<sup>166</sup> In 2006, environmentalists had to turn to the courts to attempt to get data on existing bromide stockpiles that the EPA refused to open to the public under the shield of CBI.<sup>167</sup> In addition, in 2005, a court upheld the public’s right to obtain documents regarding genetically modified crops after the EPA refused to disseminate them using the CBI exemption.<sup>168</sup> In San Jose, California, citizens seeking information about the government’s proposed purchase of industrial land in the South Bay

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163. For example, Andrew J. Moran, general counsel for the EPA, drafted Class Determination I-95: Confidentiality of Certain Business Information Submitted by Contractors and Prospective Contractors, explaining, “Every year, EPA receives numerous requests under the FOIA for release of information submitted to the Agency by its contractors and prospective contractors. . . . Such documents include contract proposals, awarded contracts and contract modifications, invoices, accounting and financial reports, and an array of other documents that trace the contracting process. In almost all cases, the businesses that submit these documents to the Agency claim at least portions of the information contained in them as confidential business information.” See ANDREW J. MORAN, U.S. EPA, OFFICE OF GEN. COUNSEL, CLASS DETERMINATION I-95, at 1 (1995), available at [www.epa.gov/oam/foia/i95.pdf](http://www.epa.gov/oam/foia/i95.pdf) (discussing the frequent requests under FOIA for release of information submitted by its contractors and prospective contractors).

164. 42 U.S.C. § 7414(c) (2006).

165. On August 2, 2012, EPA administrator Lisa Jackson signed confidentiality determinations for many types of toxic emission elements. See *Federal Confidentiality Determinations for Regulations Under the Mandatory Reporting of Greenhouse Gases Rule*, 77 Fed. Reg. 48, 072–1 (Aug. 13, 2013) (to be codified at 40 C.F.R. § 98 (2011)).

166. Coal ash contains dangerous pollutants like arsenic, boron, manganese, and selenium. *Activists Warn of Groundwater Risks from Coal Ash Disposal Sites*, 26 SUPERFUND REP. 1 (Apr. 30, 2012), available at Westlaw 2012 WLNR 9060427 (Coal ash contains dangerous pollutants like arsenic, boron, manganese, and selenium).

167. *Key Lawmaker May Open Investigation Into Methyl Bromide Stockpiles*, CLEAN AIR REPORT (Feb. 23, 2006), available at Westlaw 2006 WLNR 3065169.

168. *Ruling Forces USDA to Disclose Location of Genetically Modified Crops*, INSIDE THE EPA (Feb. 11, 2005), available at Westlaw 2005 WLNR 1863993.

were rebuffed by the U.S. Fish and Wildlife department, which claimed that the information was CBI belonging to Cargill.<sup>169</sup>

In 2007, Congresswoman Barbara Boxer criticized the EPA for hiding documents regarding CERCLA cleanup fund shortages as “privileged” under CBI even though they actually did not contain CBI information.<sup>170</sup> She said they should be available to the public automatically.<sup>171</sup> Environmentalists wanted the information in order to assess the agency’s ability to meet cleanup goals.<sup>172</sup> Disclosure clauses in contracts may resolve these types of battles, but the piles of court precedent stacked in favor of corporate privacy in the face of disclosure requirements may be tough to override if government contractors choose to fight the contractual obligations.

Some sources of hope for the success of contractual transparency requirements are the statutes that explicitly require transparency in environmentally sensitive situations. Some environmental legislation requires certain public disclosures, making it clear that in situations where public health and safety are at risk, the public’s right to know overrides corporate secrecy.

For example, the Emergency Planning and Community Right to Know Act (EPCRA), a law created in 1986 to prepare communities for emergencies, requires public notifications when potential chemical hazards exist.<sup>173</sup> Under EPCRA, owners and operators of some types of facilities must publish material safety data sheets and chemical inventories that exceed Occupational Safety and Health Administration (OSHA) thresholds.

Furthermore, the CAA provides for “community oversight and public dissemination of information on the consequences of potential accidental releases of dangerous compounds from private and public chemical facilities.”<sup>174</sup> The Act requires stationary chemical emission sources to give Risk Management Plans (RMP) to the EPA and the public, as well as a five-year release history, emergency prevention and response plans, and an “Off-Site-Consequence Analysis” summarizing the worst-case scenario for a facility.<sup>175</sup> These RMPs are technically publicly available, however, they

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169. Paul Rogers, *Federal Officials Remain Secretive on Plan to Buy \$300 Million Bay Habitat*, SAN JOSE MERCURY NEWS, Jul. 20, 2001, available at Infotrac Newsstand.

170. *Hill Oversight Prompts Activists to Hold Off on EPA Superfund Inquiry*, INSIDE THE EPA (Dec. 7, 2007), available at Westlaw 2007 WLNR 24076819.

171. *Id.*

172. *Id.*

173. Barkas, *supra* note 162, at 205.

174. *See id.* at 206 (discussing 42 U.S.C. § 7604 (2006) *et seq.* and specifically § 7412(r)(7)(B) (2006)).

175. 42 U.S.C. § 7412(r)(7)(B)(ii) (2006); Chekouras, *supra* note 27, at 113–14.



can only be viewed (no copying allowed) in on-site reading rooms.<sup>176</sup> Sean Moulton, an analyst with OMBWatch, a government watchdog organization, says that RMPs are light on details and cannot be relied upon as a sole source of environmental information.<sup>177</sup>

The National Environmental Policy Act (NEPA) requires federal agencies to draft Environmental Impact Statements (EISs) and release them to the public before engaging in activities that significantly affect the quality of the human environment.<sup>178</sup> EISs are open to public review, and the agency must include any comments and responses in the final draft of the EIS.<sup>179</sup>

The disclosure provisions found in EPCRA, CAA, and NEPA demonstrate that the government does not intend to shield environmental information from public view. These statutory disclosure requirements share the same purpose as environmental information transparency clauses in government contracts: to inform the public about environmental issues that may affect their safety. Because of this shared purpose, it is unlikely that courts would apply traditional FOIA exemptions to contractors unwilling to provide environmentally relevant information.

### *C. Public Participation Burden the System for Little Gain*

Although increased public participation would theoretically increase environmental transparency, adding additional processes to government contracting threatens to bog down an efficient contracting system with layers of process. Public participation may also delay projects if there are debates between the public and the contracted entity. Such debate is useful in a legislative forum, and in fact, is an integral part of our federal system's checks and balances. However, it could be argued that the administrative system must move more fluidly and with less external intervention so that contracts get fulfilled and projects do not stall, holding contractors in perpetual discourse with no resolution.

Additionally, public participation has not always proven to be the most effective way to guarantee transparency. For example, when the World Bank financed private contractors to build an oil pipeline in Chad, they

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176. *Id.* at 115.

177. JENNIFER LAFLEUR, WHITEPAPER: THE LOST STORIES 4 (2003), available at <http://www.rcfp.org/rcfp/orders/docs/LOSTSTORIES.pdf>.

178. Barkas, *supra* note 162, at 207 (citing the National Environmental Policy Act, 42 U.S.C. § 4332(C) (2006)).

179. 40 C.F.R. § 1506.6 (2012).

included provisions requiring local public participation throughout the contract's performance.<sup>180</sup> As a result of the public participation clauses, Exxon, the leading oil company on the project, "engaged in extensive consultations with local groups" and sent experts and consultants, including sociologists and ethnologists, to the region affected by the project.<sup>181</sup> In the end, the huge amount of public participation did not alleviate the concerns of non-governmental environmental organizations that, to this day, condemn the negative environmental impacts of the pipeline project.<sup>182</sup> Although there are many reasons for this, including political differences and the intricacies of international law, the example raises the possibility that public participation may be a lot of talk with far less action.

In the Miami port scenario, direct and open conversations among Great Lakes, the local and federal government entities, and members of the public would increase awareness and allow for debate. Whether public participation would actually change operations or sway the will of the contractor is unknown, at least the public would have a glimpse into a major project affecting their local environment. Even if a public participation clause does not have the full force of a "private-FOIA" requirement, it is a less burdensome approach and would bridge an important information gap. Cooperation between contractors and the public provides public deliberation, which forces determinations that are less partial and are more aligned with the public's interests. Public participation provides corporate activities with an audience, which "keeps the corporations honest" by making sure contractors satisfy the public's judgment on the merits of their goods and services.<sup>183</sup>

#### *D. Contracts May Not Be Enough*

Critics of enhancing public policies through private contracts are quick to point out that a contract is not an infallible document. Adequately specifying contractual terms in order to meet the needs of the public can be a daunting task.<sup>184</sup> Agencies drafting contracts often struggle with "defining requirements, establishing expected outcomes, and assessing contractor performance."<sup>185</sup> Even if the perfect contractual language properly holds government contractors to higher transparency standards, there is a proven

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180. DICKINSON, *supra* note 41, at 134.

181. *Id.* at 135.

182. *Id.* at 136.

183. Levine, *supra* note 20, at 175.

184. Mendelson, *supra* note 3, at 243.

185. *See id.* (quoting U.S. GEN. ACCT. OFFICE, CONTRACTING FOR BETTER OUTCOMES 15 (2006)).

lack of supervision over federal government contractors that increases the chances of poor contract performance.<sup>186</sup> The failures of government oversight could undermine the contractual FOIA language, making the inclusion of environmental transparency clauses nothing more than inserting toothless suggestions instead of well-enforced terms of agreement.

In addition to the inability of contracts to bind parties to best practices, incentives placed in contracts are not guaranteed to work. Gregory Garrett, an acquisitions expert specializing in federal government contracts, reports that contract incentives have had mixed results: “Sometimes they have worked very successfully and other times they have failed to motivate the contractor to achieve excellent results.”<sup>187</sup> Even with an incentive, there is no guarantee that the contractor will provide any additional information. Thus, this is the weakest transparency provision of the three contract clauses. Despite the offer of an incentive, Great Lakes, like other contractors, could choose to eschew the reward in favor of keeping its business affairs away from public view.

With the infallibility of contract clauses in mind, it is important to remember that in the current contracting scheme there are hardly any requirements that government contractors keep the public informed about any aspect of their operations. This is true even if they are engaged in activities that could greatly harm the public environment. Companies can easily bypass statutory transparency obligations by hiding behind trade secrets and business information protections. Corporations must be made accountable for keeping the public informed when they do things that affect the environment. Contract clauses are an efficient, fast, and comfortable mechanism through which the government can engage its contractors and compel them to be environmentally transparent. While contracts are rarely perfect, they do offer an opportunity to create enforceable transparency assurances and access to otherwise private information held by government contractors.

#### CONCLUSION

In 2007, David S. Levine said that contractor secrecy and “its attendant goals of pecuniary gain and commercial competition” conflicts with the goals of transparent and accountable democratic governance.<sup>188</sup> He warned

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186. *Id.*

187. Gregory A. Garrett, *Incentive and Award-Fee Contracting: Lessons Learned and Best Practices*, CONT. MGMT., May 2007, at 8, 9, available at [http://www.easc.noaa.gov/apg/bcm/BCM\\_Docs/CM\\_May07\\_p8.pdf](http://www.easc.noaa.gov/apg/bcm/BCM_Docs/CM_May07_p8.pdf).

188. Levine, *supra* note 20, at 138.

that if we do not improve contractor transparency, then contractor-created infrastructure will direct public law instead of the democratic legislative and regulatory processes designed to safeguard the public interest.<sup>189</sup>

To shed sunlight on agency activities FOIA fails to reach, the United States must create transparency obligations for private contractors working on environmental projects. Government contracting does not protect public health and environmental interests as outsourcing does not account for market failures, reign in regulatory slippage, or prevent agency capture. Public citizens are not mere “clients” in the government contracting process, and private entities should not be able to sidestep democratic safeguards carefully embedded in the federal government’s practices.<sup>190</sup> In the environmental context, where individual citizens cannot control the environmental effects of government projects, it is important that people have access to information vital to protecting public health. This is especially true in situations where private entities engage in cost-cutting, efficiency-maximizing behaviors that do not honor environmental protection and endanger land, air, and water.<sup>191</sup>

Thus, government contractors should comply with the same democratic norms as the government agencies that hire them.<sup>192</sup> Compliance with democratic, FOIA-like transparency measures should be written into contracts between federal agencies and third-party contractors. Clauses requiring information waivers for environmental activities and data, clauses requiring public participation and regular reporting for contractor activities, and contractual incentives for disclosure would force public openness and information accessibility for projects carried out by government contractors. In projects that involve the health and safety of millions of United States citizens, like the dredging project off Miami’s coast, contractors should be obligated to provide information and satisfy the public’s “right-to-know.”

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189. *Id.* at 140.

190. Aman, *supra* note 72, at 279.

191. See S. Res. 469, 151st Gen. Assemb., Reg. Sess. (Ga. 2005) (demonstrating a state’s attempt to balance competing interests); See also Aman, *supra* note 71, at 281 (discussing the recent Georgia bill).

192. Freeman & Minow, *supra* note 75, at 18.