

Environmental Law and Policy Annual Review Conference

March 25, 2022

9:30 AM – 2:00 PM EST



ENVIRONMENTAL
LAW • INSTITUTE®



VANDERBILT
LAW SCHOOL

Environmental Law and Policy Annual Review: Advisory Committee

- **Jay Austin**, Senior Attorney and Editor-in-Chief, Environmental Law Reporter, Environmental Law Institute
- **Barry Breen**, Adjunct Professor, Washington College of Law, American University
- **Miles Farmer**, Legal Advisor, Federal Energy Regulatory Commission
- **Ben Grumbles**, Maryland Secretary of the Environment
- **Alan Horowitz**, Principal and Managing Director, Trusted Companies LLC
- **Raymond B. Ludwiszewski**, Partner, Gibson, Dunn & Crutcher, LLP
- **Roger Martella**, General Counsel, Environment, Health and Safety, General Electric
- **Vickie Patton**, General Counsel, Environmental Defense Fund
- **James Salzman**, Donald Bren Distinguished Professor of Environmental Law, UCLA School of Law and Bren School of the Environment at UC Santa Barbara
- **LaJuana Wilcher**, Partner, English, Lucas, Priest & Owsley, LLP

Analysis of Articles Published in 2020-2021



Environmental Law & Policy Annual Review

2020-2021 Article Analysis

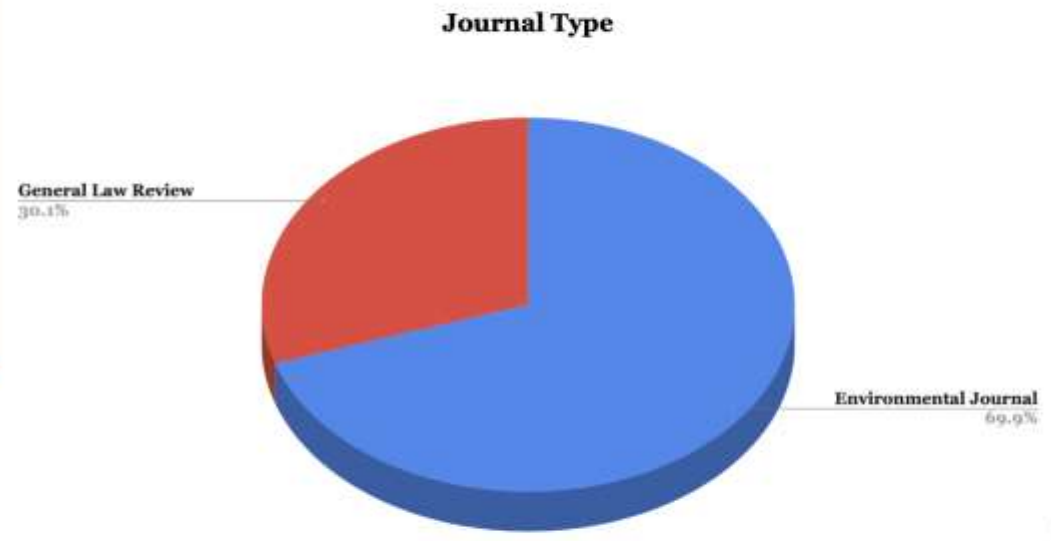
Methodology

- Detailed Methodology:
 - <https://www.eli.org/environmental-law-policy-annual-review/publications>
- 206 Environmental Law Articles Catalogued

2020-2021 Article Analysis

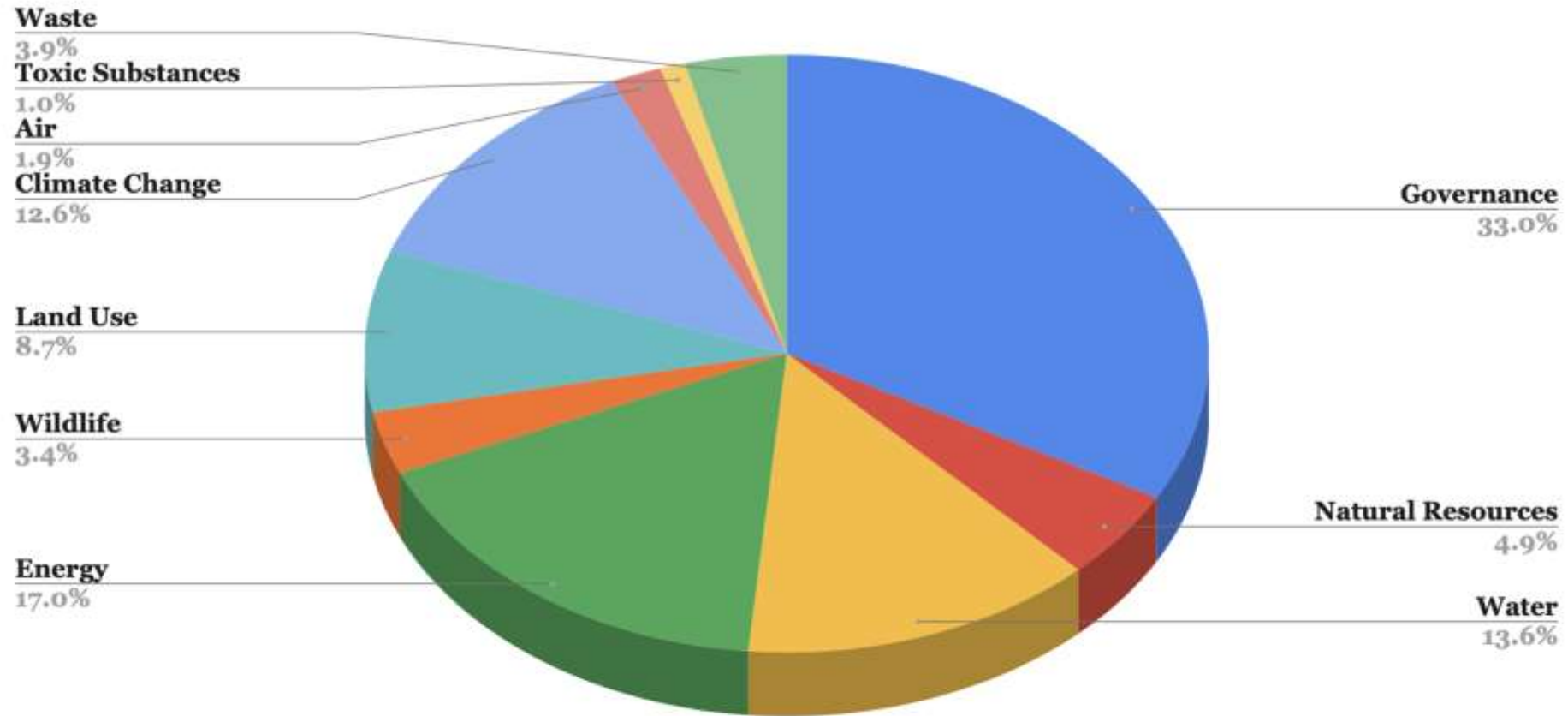
Environmental Journals vs. General Law Reviews

- 206 Environmental Law Articles Catalogued
- General Law Reviews: 62 (30.1%)
- Environmental Law Journals: 144 (69.9%)

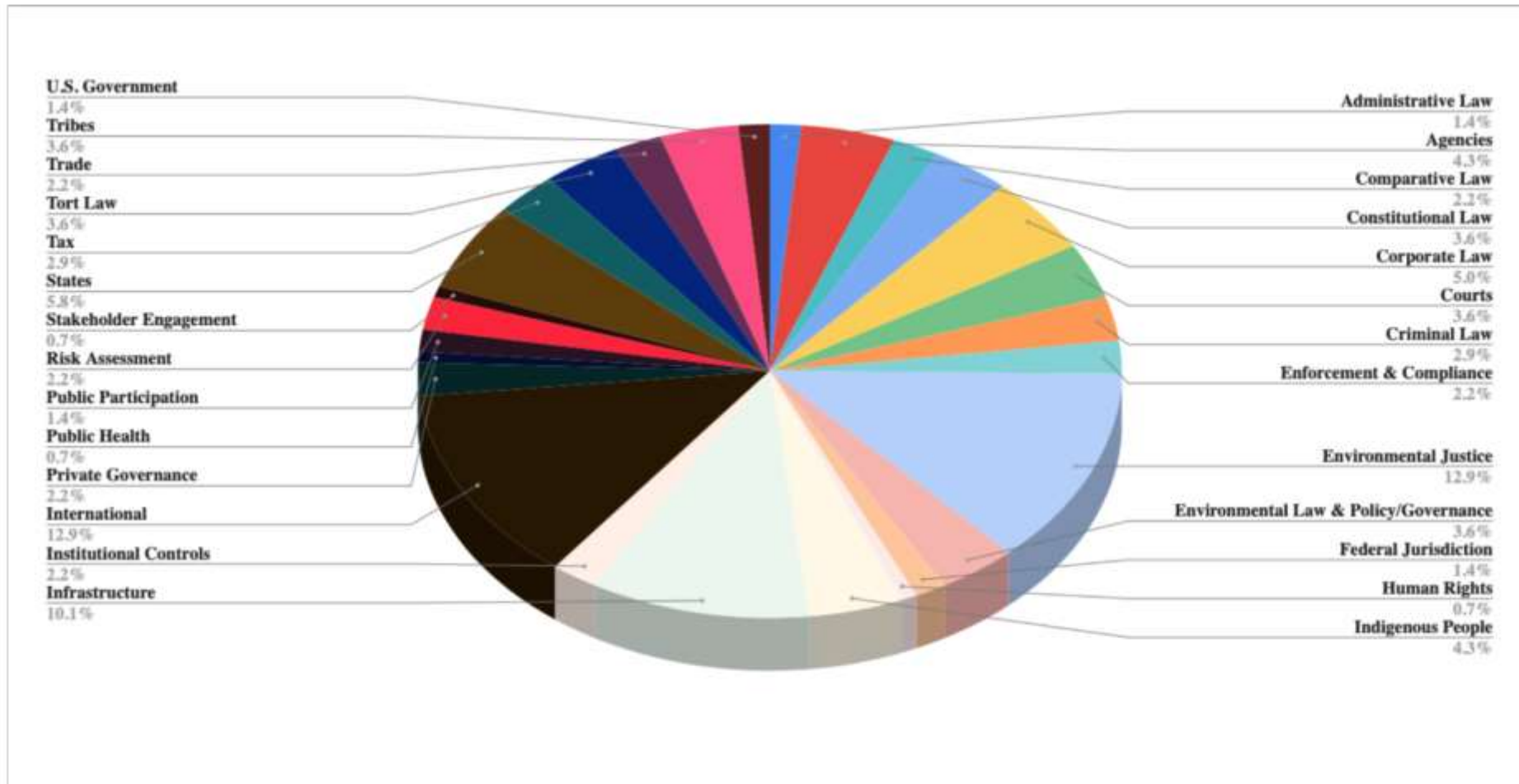


2020-2021 Article Topic Areas

Primary Topics

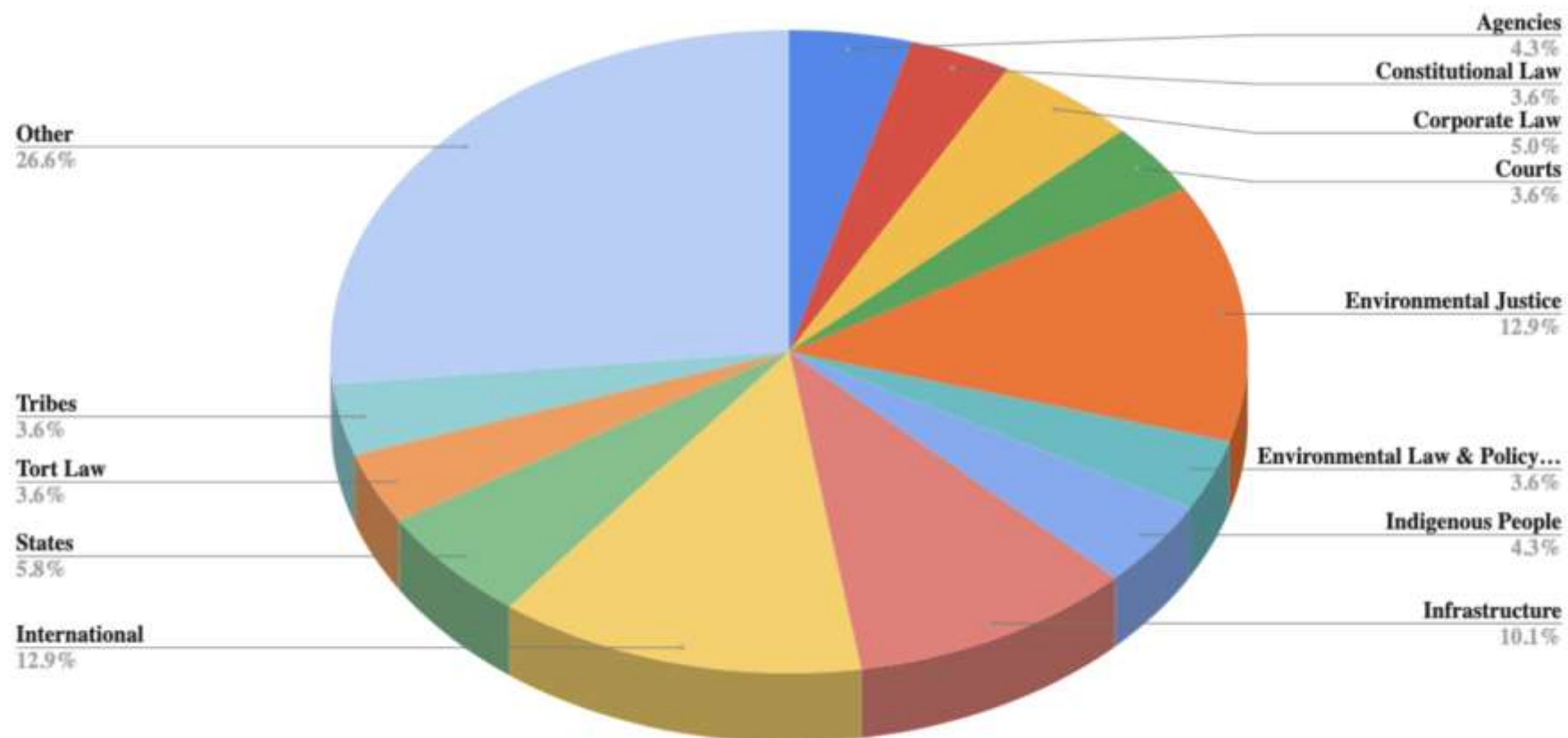


Governance Sub-Topics



Governance Sub-Topics With <3% Categories Combined into “Other”

6



Top 20 Article Analysis

Environmental Journals vs. General Law Reviews

- Articles Selected from Environmental Journals: **8**
- Articles Selected from General Law Reviews: **12**

Top 20 Article Analysis

Primary and Secondary Topics

Primary Topics	
Governance	8
Energy	7
Land Use	2
Water	1
Climate Change	1
Air	1

Secondary Topics	
Governance	8
Climate Change	4
Land Use	1
Water	1
Energy	1

Top 20 Article Analysis

Policy Proposals

- 10 articles called for action by state and local governments as a part of their proposal
- 5 for action by the federal government, whether executive agencies, legislative branch, or judicial
- 4 articles for updates to federal or international law.
- 1 article proposed private governance measures.

Panel 1: *Environmental Citizen Suits and the Inequities of Races to the Top*

Vanderbilt Law School Student and ELPAR Articles Editor: Izzy
Fishbach

Authors: David Adelman and Jori Reilly-Diakun

Commenters: Bina Reddy and Howard Learner



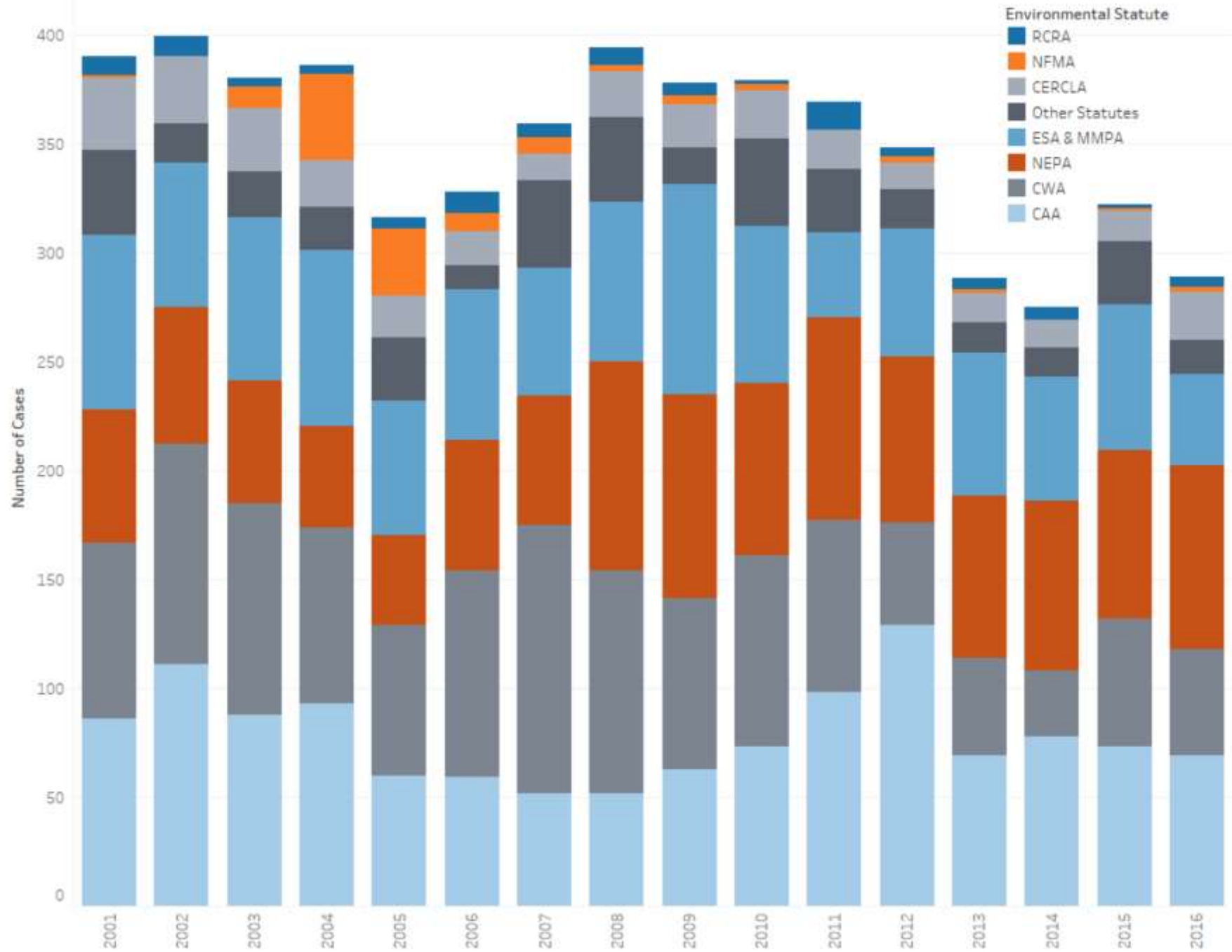
ENVIRONMENTAL
LAW • INSTITUTE®



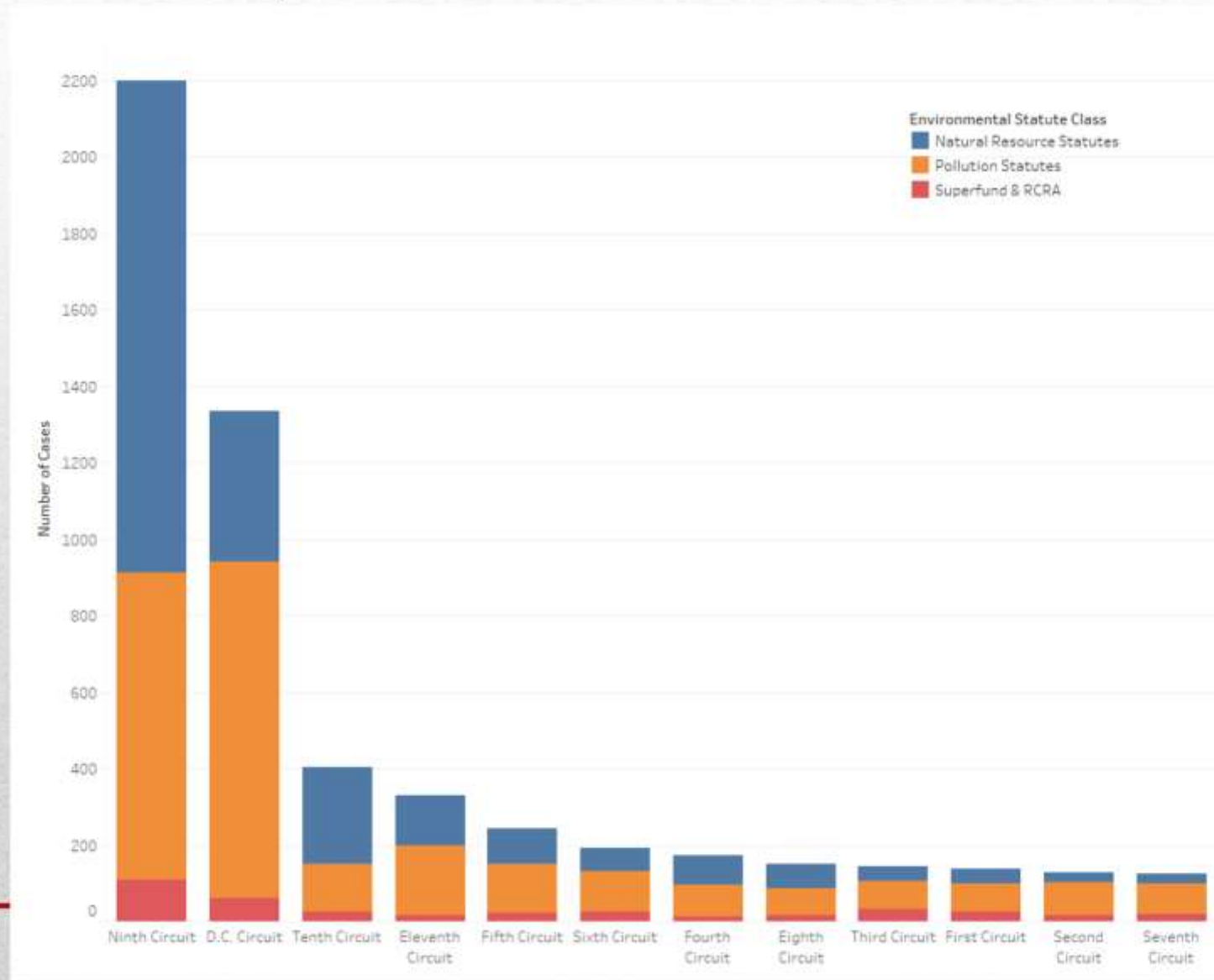
VANDERBILT
LAW SCHOOL

- Citizen suits are filed in a small number of states with strong public support for environmental policies and robust state programs
- Different statutory regimes facilitate or impede citizen suits in predictable ways.
 - 40% of cases centered on procedural claims
 - 18% of the cases were filed against private parties
 - *Estimate* 6 EJ & 36 NIMBY cases annually
- The views of proponents and skeptics of citizen suits are not borne out by the data.

General Findings



Litigated Cases by Class of Environmental Statute and Circuit

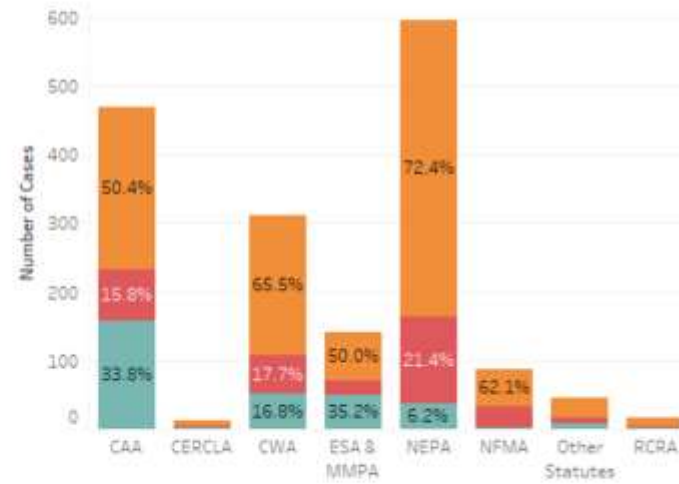


Environmental Cases Litigated in Fifteen Top States

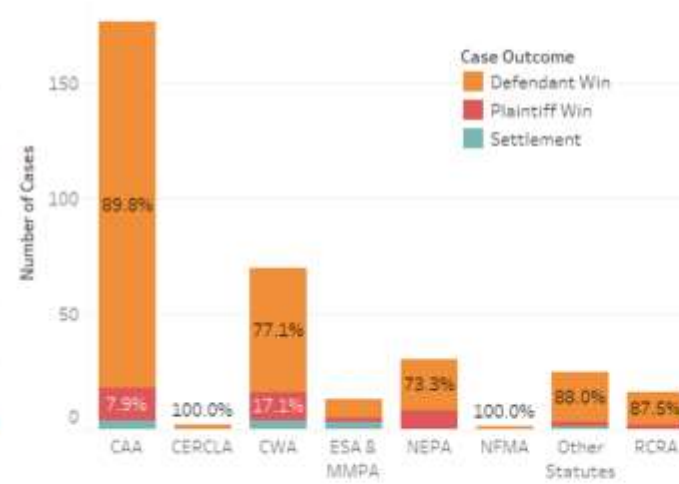
Natural Resource (81%)		Pollution (76%)		CERCLA & RCRA (67%)	
California	499	California	345	California	57
D.C.	364	D.C.	213	Washington	20
Oregon	178	Washington	148	New Jersey	19
Montana	134	Georgia	57	Ohio	15
Idaho	112	Florida	55	Pennsylvania	15
Arizona	102	New York	37	New York	14
Washington	100	Colorado	33	Texas	14
Florida	90	Oregon	33	Arizona	13
Colorado	83	Louisiana	30	Illinois	13
New Mexico	76	Pennsylvania	30	D.C.	12
Alaska	65	Wisconsin	29	New Mexico	12
Texas	46	Alabama	28	Rhode Island	11
Wyoming	45	Idaho	27	Florida	10
Nevada	44	Ohio	25	Massachusetts	10
Utah	37	West Virginia	24	Alaska	8

Case Outcomes by Statute and Class of Plaintiff

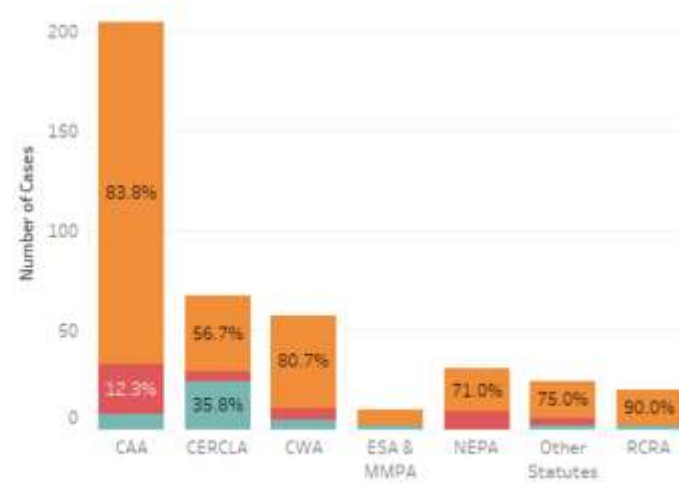
Environmental NGO is a Plaintiff



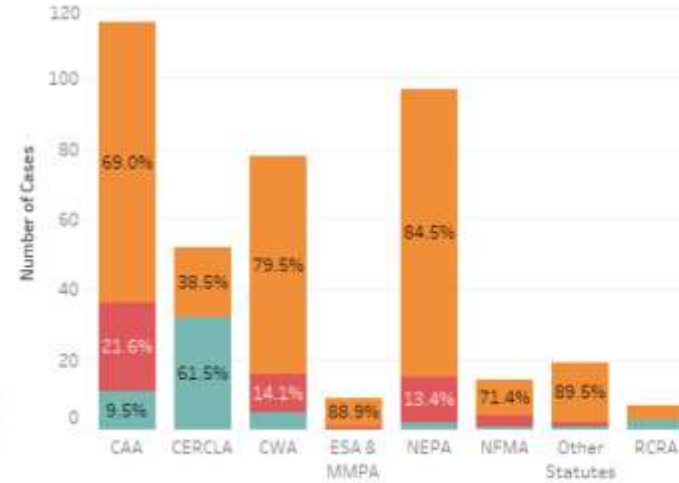
Trade Group is a Plaintiff



Corporation is a Plaintiff



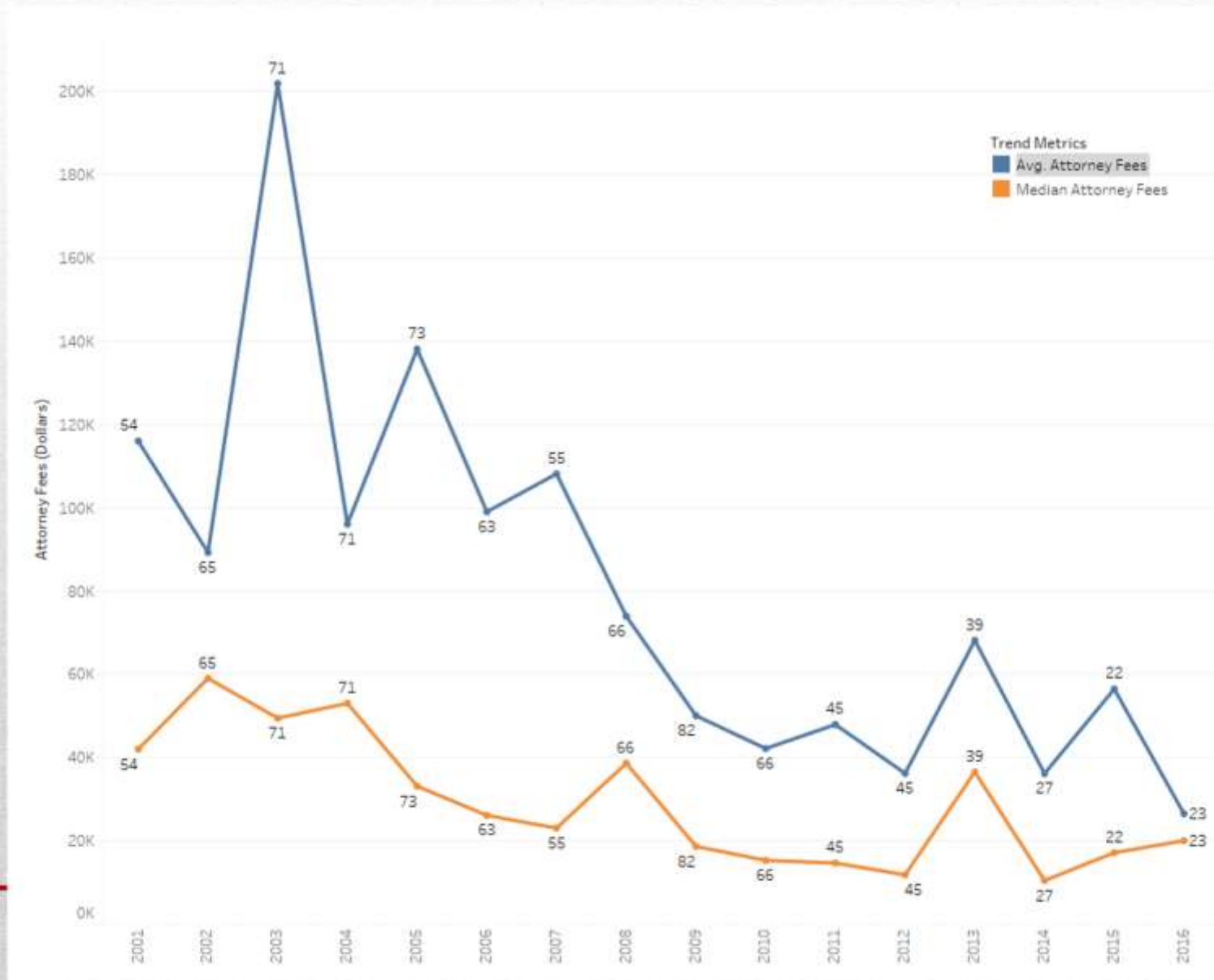
State or Local Government is a Plaintiff



- Natural Resource Cases
 - States with highest number of environmental NGOs (top 15%; CA, WA, OR) had 5 times more citizen suits filed than the median state (85 versus 17 cases)
 - States within the Ninth Circuit, on average, had 47 more citizen suits filed 3.8-times more citizen suits filed than the median state (64 versus 17 cases)
- Pollution Statute Cases
 - Top 15% of cases for environmental NGOs had almost five times more cases filed than the median state (49 versus 11)
 - States in the Ninth Circuit, on average, had more than 5 times more citizen suits than the median state

Predictors of Citizen Suits

Average and Median Attorney's Fee Awards by Year



- 1.** The number of citizen suits filed and concentration of cases in certain jurisdictions largely foreclose conflicts between agency priority setting and local communities.
- 2.** The barriers to filing citizen suits and the difficulty of obtaining attorney's fee awards exacerbate rather than mitigate disparities across states in the implementation and enforcement of environmental laws
- 3.** Most citizen suits are filed against the federal government rather than private entities, and a large share of these cases involve broad, wholesale challenges to regulations rather than retail litigation over discrete agency decisions.

Reassessing Citizen Suits

- Roughly 9,000 informal enforcement actions undertaken by EPA and state agencies annually
 - An average of ~2,500 administrative and judicial orders are issued annually in federal enforcement actions under the major pollution statutes
 - Versus roughly 80 third-party citizen suits filed annually under the CAA, CWA, and RCRA
- Tens of thousands of federal actions are potentially subject to NEPA or the ESA annually
 - An average of just 82 and 78 citizen suits are filed annually under these statutes, respectively.

Citizen Suits in Perspective

1. Targeted legislative reforms for lowering the barriers to filing citizen suits and creating incentives for filing them where they are most needed.
2. Enhanced transparency about the filing of citizen suits and coordination among environmental organizations.
3. Education of judges about the types and importance of environmental citizen suits, including the volume of litigation, the tangible benefits, and the rates at which attorney's fee awards are granted.

Potential Avenues for Reform

- Criteria for Aligning Citizen Suits Under Pollution Statutes
 - Low local enforcement rates
 - Impacts of violations on human health or welfare
 - Disparate impacts on underserved communities
- Difficulties with Natural Resource Statutes
 - Nothing analogous to the enforcement rates
 - Claims turn on allegations that a federal agency is violating a statutory requirement over which it has significant discretion.
 - Chronic agency lapses below legal requirements would be a more direct metric, but evidence of them would be dependent on independent reports.

Shifting the Presumption Towards Granting Attorney Fees

- Data accuracy was a major challenge for this project.
- The DOJ data required us to take several steps to ensure the integrity of the dataset, including:
 - Removing duplicates, consolidated, and abandoned cases
 - Reviewing party data for inconsistencies and data entry issues (*e.g.*, “Sierra Club” v. “The Sierra Club” v. “The Seirra Club”)
 - Removing atypical litigations (*e.g.*, Deepwater Horizon and Volkswagen mass litigations)
- We also determined that the DOJ dataset lacked accurate data on third-party citizen suits, leading us to supplement that dataset with data gathered from Westlaw’s federal cases database.

Data Cleaning Methods

- Environmental Justice: any case where
 - (1) the complaint clearly reflects environmental justice matters (e.g., the facts assert there is a disparate impact on minority communities),
 - (2) the parties are those that focus on environmental justice issues (such as tribal organizations), or
 - (3) the complaint directly referenced environmental justice or a Title VI administrative action.
- NIMBY: any case aimed at stopping
 - (1) a major infrastructure project or transportation funding project (e.g., targeting NEPA and USDOT Act § 4(f) for a highway construction project); or
 - (2) any environmentally impactful project prior to construction, including so-called “aggrieved neighbor” suits (e.g., targeting the validity of a CAA construction permit or CWA § 404 permits for pipelines, residential developments, water diversion structures, and other projects).

NIMBY & EJ Case Criteria

Type of Challenge	CAA	CWA	ESA	NEPA	RCRA	Other Statutes	Total
Connected Litigation	3	25	7	3	0	52	90
Federal Action	3	10	57	109	4	13	196
NIMBY	2	0	1	4	0	1	8
Permit by Permittee	2	1	1	0	0	1	5
Rulemaking	197	42	70	13	6	52	380
Permit by Third-Party	19	89	14	12	2	5	141
Total	226	167	150	141	12	124	820

Types of Legal Challenges by Statute for the DOJ Data

Environmental Law and Policy Annual Review

*The next panel will start at 11:15 am EST.
Thank you for your patience as we do a
technical check with our panelists.*



VANDERBILT
LAW SCHOOL

**Panel 2: Caremark *and* ESG, Perfect Together:
A Practical Approach to Implementing an
Integrated, Efficient, and Effective Caremark
and EESG**

Vanderbilt Law School Student and ELPAR Articles Editor: Paul
d'Ambrosio

Authors: Leo Strine, Kirby Smith, and Reilly Steel

Commenters: Jonas Kron, Margaret Peloso, and Todd Phillips



VANDERBILT
LAW SCHOOL

***Caremark* and ESG, Perfect Together:
A Practical Approach to Implementing an Integrated, Efficient and
Effective *Caremark* and EESG Strategy**

ELPAR

**Friday, March 25, 2022
11:15 a.m. - 12:30 p.m.**

Kirby M. Smith, Reilly S. Steel and Leo E. Strine, Jr.

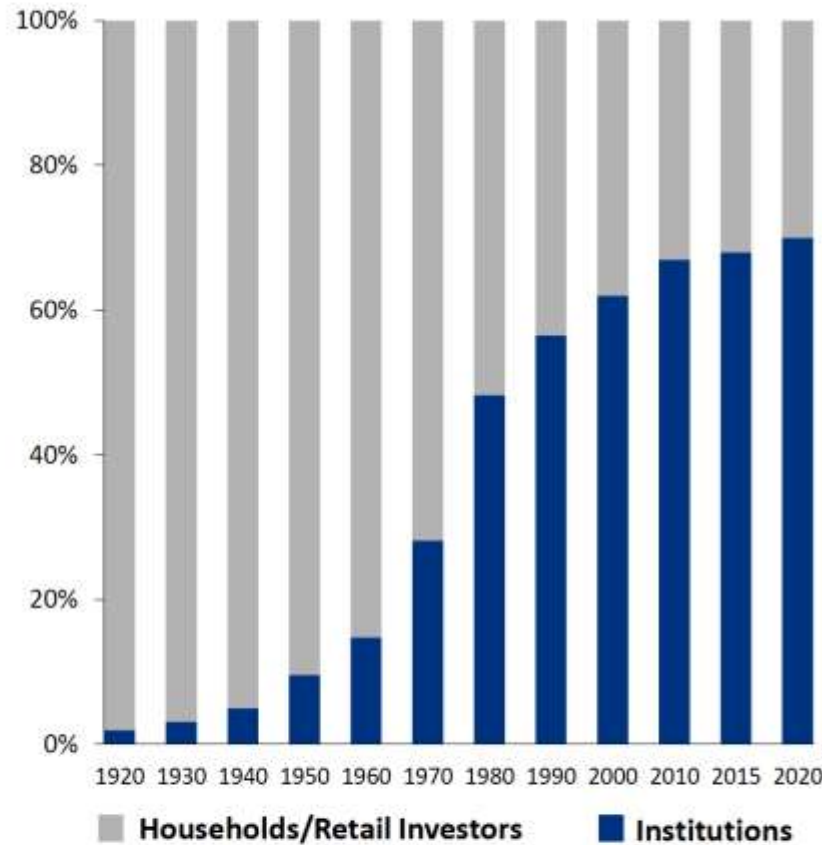
Table of Contents

- The Rise of Institutional Investors and Their Increased Focus on EESG
- The Proliferation of EESG Reporting Guidelines
- Cutting through the Noise: A Principled Approach to EESG
- A Management-Led, Board-Approved EESG Assessment and Realignment Process so that Directors' Role Is Enhanced

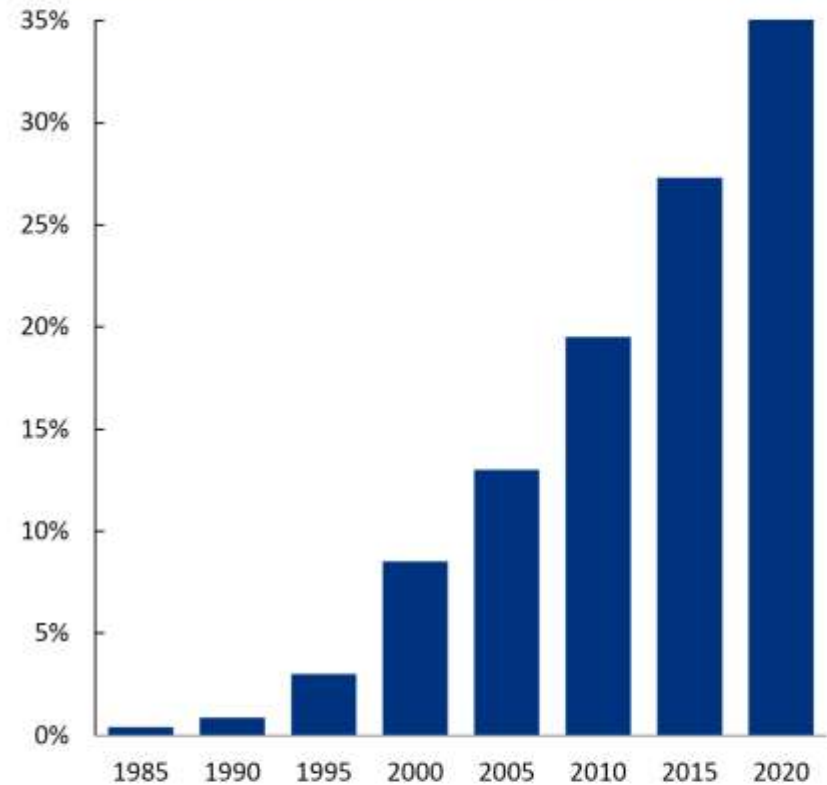
The Rise of Institutional Investors and Their Increased Focus on EESG

The Rise of Institutional Ownership and Index Funds

Share of Institutional Ownership of U.S. Common Stock



Indexed Assets as a Percentage of All Mutual Fund Industry Assets



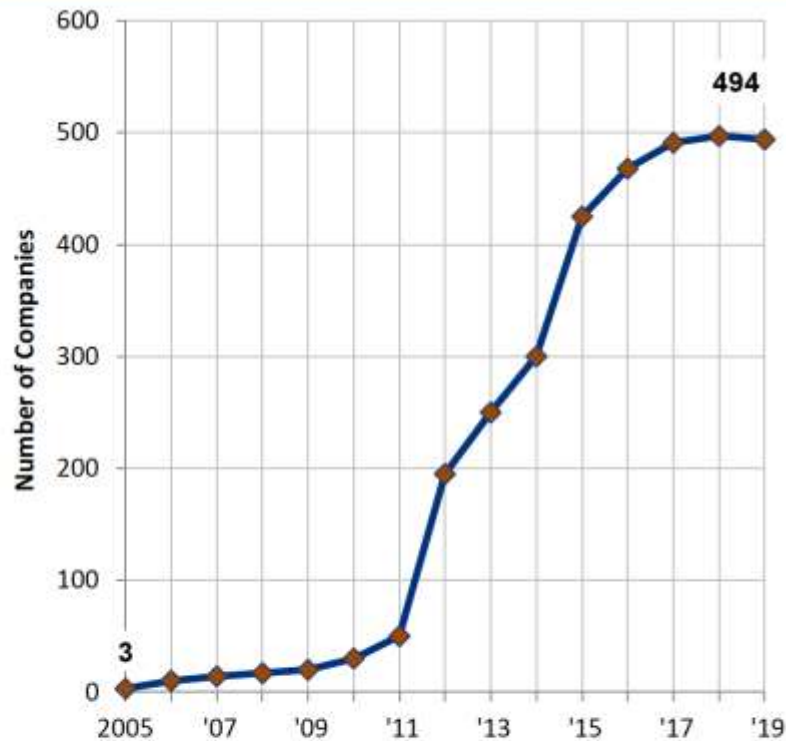
Source: Blume and Keim (2012), Wharton School Dept. of Finance, "Institutional Investors and Stock Market Liquidity: Trends and Relationships"; Strategic Insight 2010; Proxy Pulse (2015); Broadridge Financial Solutions, Inc. (2015, 2019); Bloomberg (2016); 2016 and 2019 data for S&P 500 companies only.

The Rise of Institutional Ownership and Index Funds

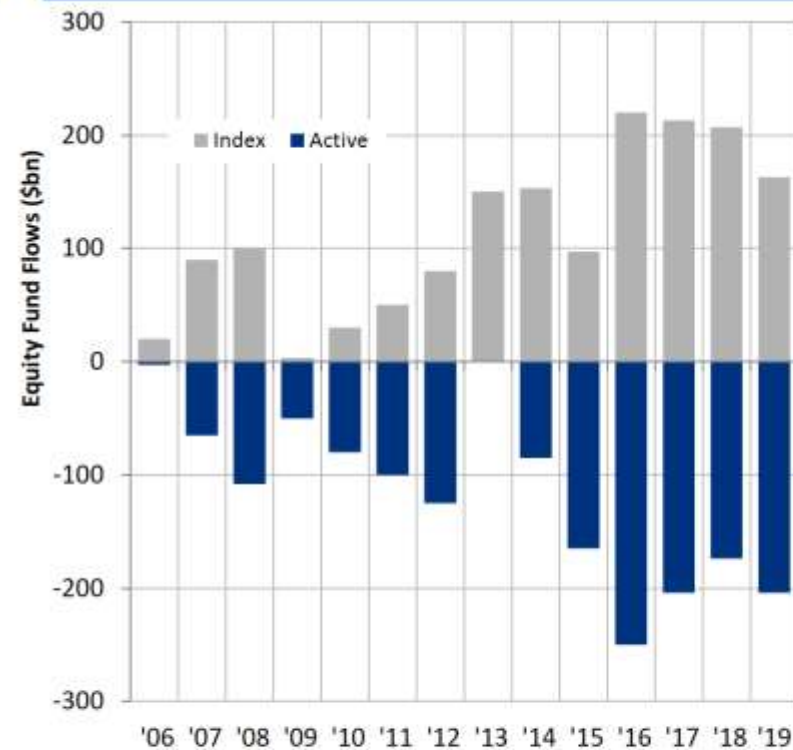
(cont'd)

- In the U.S., index funds are accumulating larger stakes in more big companies, and equity flows have dramatically favored passive funds over active ones.

Number of S&P 500 Companies in which Vanguard Group's U.S.-Based Index Funds and Exchange-Traded Funds Owned 5% or More



Active vs. Index Funds—U.S. Equity Flows



Sources: Morningstar (funds and stock ownership), dated January 29, 2018; S&P Global Market Intelligence (S&P 500 constituents, share classes, share counts and market values), Capital IQ and Vanguard 13-F for December 31, 2019.

The Rise of Institutional Ownership and Index Funds

(cont'd)

- Passive mutual funds are accumulating larger stakes in all companies, often collectively exceeding the holdings of actively managed funds.
- The top 10 institutional investors owned 31% of the S&P 500 in 2019, an increase from the 24% this same group owned in 2008.



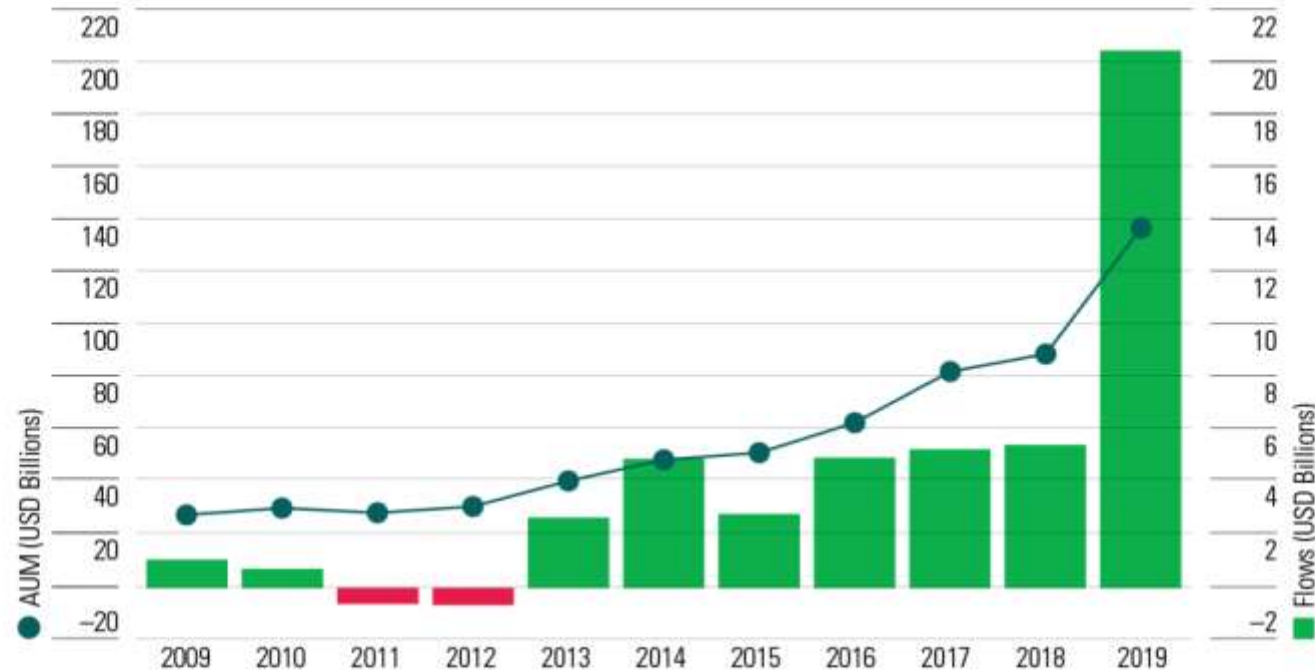
Source: Lazard, 2019 Review of Shareholder Activism.

Leading Institutional Investors Are Governance Focused

Investor	Key Areas of Engagement with Public Companies
<p>BLACKROCK® (Indexed + active BR positions)</p>	<ul style="list-style-type: none"> • Long-term strategic plan reviewed by board and updated (2016-19) • Long-term approach ≠ infinite patience (2017-20) • ESG (board composition, diversity, climate); human capital (2017-20) • Corporate purpose; strategy, capital allocation and pay (2018-19) • Purpose alignment with culture, strategy; world leadership (2019-20)
<p>STATE STREET GLOBAL ADVISORS</p>	<ul style="list-style-type: none"> • Structures for independent boards; long-term value (2016) • Board to protect the long term in activist settlements (2016) • Pay concerns; incentives aligned with strategy (2017-18) • Sustainability in strategy/value creation (2017-20) • Gender diversity on boards (2017-19) • Board ownership of strategy and ESG (2018; 2020) • Corporate culture alignment with strategy (2019-20)
<p> Vanguard®</p>	<ul style="list-style-type: none"> • Director involvement; strategy; informed voting—outlier? (2016) • Thinking like a long-term activist in the best sense (2017-18) • Dealmaking with companies in activist situations (2017-19) • Maintaining long-term focus; how does board work with and evaluate management (2017-20) • “Four Pillars” (Board; Governance; Pay; Strategy/Risk) (2017-20) • Societal risks as material risks to long-term value? (2019-20) • Beginning in 2020, active portfolio managers will direct votes of allocated accounts

Investors Are Flocking to EESG-Oriented Funds . . .

Sustainable Funds Estimated Annual Flows



Source: <https://www.morningstar.com/articles/961765/sustainable-fund-flows-in-2019-smash-previous-records>.

. . . and Institutional Investors Are Increasingly Focused on EESG

"Our focus in recent years has been on good governance and other practices that affect a company's ability to generate positive returns for investors over the long run. Those issues span a variety of [ESG] topics material to sustainable performance. **We approach these issues from the perspective of long-term investment value, not from a political or social agenda (aka 'values').** This distinction is especially important to understand in light of growing concerns about the influence of large index managers."

– *Cyrus Taraporevala, State Street Global Advisors*

"Three years ago, we first called on boards to consider sustainability across the environmental, social and governance (ESG) spectrum. Having already engaged with companies on a number of governance matters for many years, we see that shareholder value is increasingly being driven by issues such as climate change, labor practices, and consumer product safety. **We believe that addressing material ESG issues is good business practice and essential to a company's long-term financial performance – a matter of value, not values.**"

– *Cyrus Taraporevala, State Street Global Advisors*

"To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. **Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.**"

– *Laurence D. Fink, BlackRock*

"Some people may be surprised to hear we have a dedicated team that analyzes and engages on an array of governance, environmental, and social risks. But this is nothing new for Vanguard. Through quiet diplomacy, we often discuss headline-grabbing issues directly with company leaders. For example, conversations about climate risk oversight and disclosure are a regular part of our engagements with companies in carbon-intensive industries. . . . **We also know that over the long term, the interests of fund shareholders and the broader stakeholder community often converge.**"

– *Vanguard*

2021 Updates to ISS Policies on ESG

Institutional Shareholder Services (ISS) has released 2021 voting policy updates that require boards to oversee ESG performance.

Diversity and Inclusion:

- Beginning in 2021, ISS would highlight in research reports U.S. companies “with no apparent racial and/or ethnic diversity.”
- Beginning with the 2022 proxy season, ISS would apply a new withhold-the-vote policy (similar to its gender diversity policies), generally recommending against the chair of the nominating committee (or other relevant directors on a case-by-case basis) where the board has no apparent racial and/or ethnic diversity.

Environmental and Social Risk Oversight:

- ISS is proposing making explicit that “demonstrably poor risk oversight of environmental and social issues, including climate change” under extraordinary circumstances may result in ISS recommending withhold votes against individual directors, specific board committee matters or the whole board.

BlackRock: Focus on Climate and Sustainability (2021)

- In his 2020 Letter to CEOs, Larry Fink reiterated his focus on long-term thinking, acknowledging that the vast majority of BlackRock's capital is from long-term savers
- The letter re-emphasized BlackRock's commitment to sustainability and net-zero emissions, but also emphasized BlackRock's focus on social issuing, including confronting issues of race and ethnicity in a company's talent pool
- BlackRock encouraged companies issuing sustainability reports to disclose their talent strategy, including how the strategy interacts with a company's long-term plans to improve diversity, equity and inclusion
- Overall, the letter emphasized that BlackRock expects more disclosure on stakeholder issues in the coming years

"Questions of racial justice, economic inequality, or community engagement are often classed as an "S" issue in ESG conversations. But it is misguided to draw such stark lines between these categories. For example, climate change is already having a disproportionate impact on low-income communities around the world – is that an E or an S issue? What matters is less the category we place these questions in, but the information we have to understand them and how they interact with each other. Improved data and disclosures will help us better understand the deep interdependence between environmental and social issues."

— Larry Fink, BlackRock Chairman & CEO, January 2021

BlackRock: Focus on Climate and Sustainability (2020)

- In his 2020 Letter to CEOs, Larry Fink reiterated his prior year's statement that long-term profits cannot be achieved without embracing a corporate purpose and considering the needs of all stakeholders—not just shareholders.
- Of particular emphasis in Fink's 2020 letter was environmental sustainability and reporting. BlackRock believes that climate change will reshape financial markets and is focused on ensuring that companies are investing sustainably.
- To promote such investment, Fink encouraged more companies to improve their disclosure around these topics and embraced the Sustainability Accounting Standards Board ("SASB") as providing a clear set of standards for reporting sustainability information across a wide range of issues, from labor practices to data privacy to business ethics.

"We believe that all investors, along with regulators, insurers, and the public, need a clearer picture of how companies are managing sustainability-related questions. This data should extend beyond climate to questions around how each company serves its full set of stakeholders, such as the diversity of its workforce, the sustainability of its supply chain, or how well it protects its customers' data. Each company's prospects for growth are inextricable from its ability to operate sustainably and serve its full set of stakeholders. . . . Given the groundwork we have already laid engaging on disclosure, and the growing investment risks surrounding sustainability, **we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them.**"

— Larry Fink, BlackRock Chairman & CEO, January 14, 2020

BlackRock: Focus on Purpose (2019)

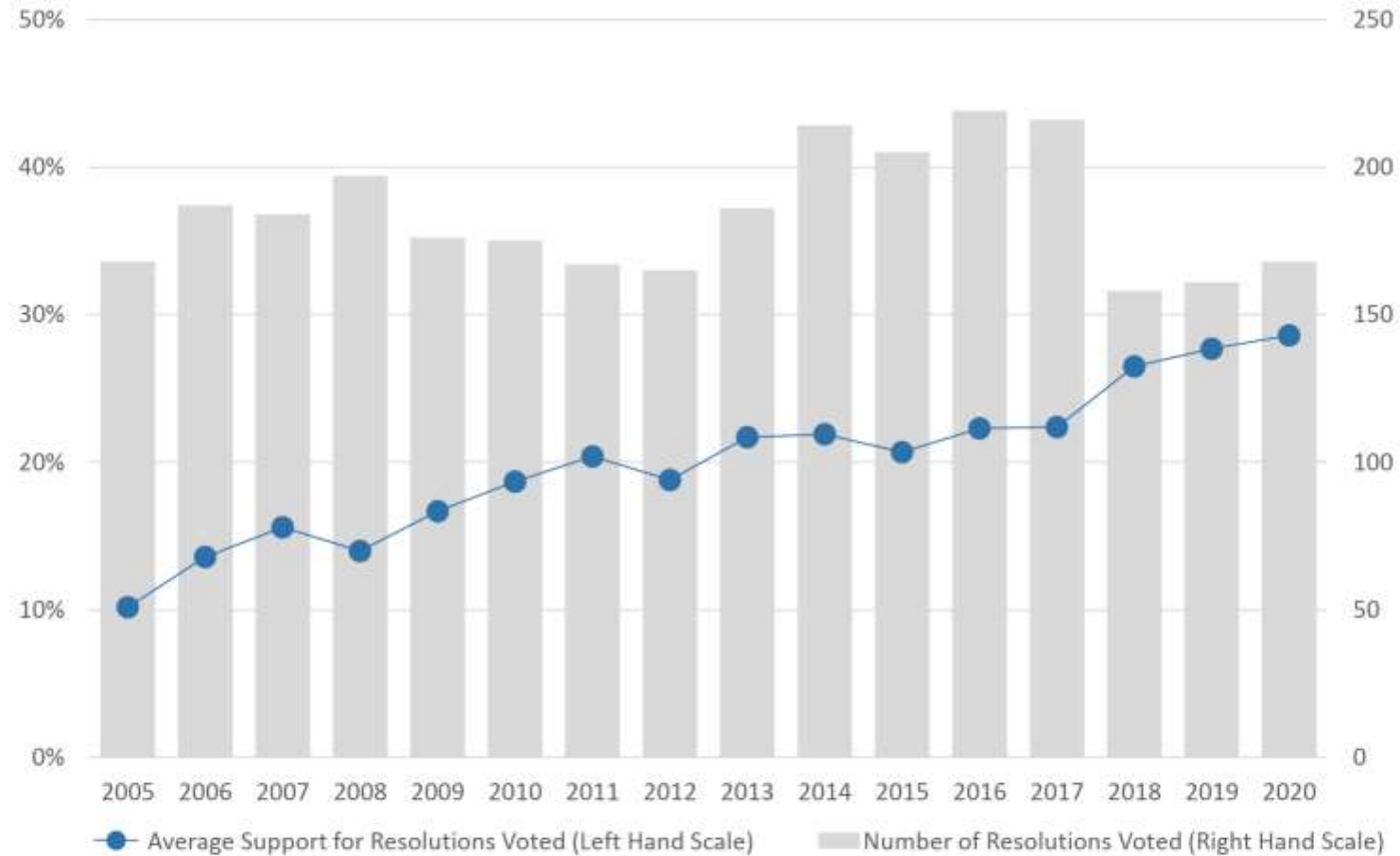
- In his 2019 Letter to CEOs, Larry Fink reiterated his prior year's statement that every company must have a clear purpose in its business model and corporate strategy.
- Fink again stated that companies should demonstrate their commitment to their communities, particularly on issues central to the world's future prosperity.
- BlackRock's Investment Stewardship engagement priorities for 2019 are: Governance, including board diversity; corporate strategy and capital allocation; compensation that promotes long-termism; environmental risks and opportunities; and human capital management.

“Purpose is not the sole pursuit of profits but the animating force for achieving them. Profits are in no way inconsistent with purpose—in fact, profits and purpose are inextricably linked. Profits are essential if a company is to effectively serve all of its stakeholders over time—not only shareholders, but also employees, customers, and communities. Similarly, when a company truly understands and expresses its purpose, it functions with the focus and strategic discipline that drive long-term profitability. Purpose unifies management, employees, and communities. It drives ethical behavior and creates an essential check on actions that go against the best interests of stakeholders. Purpose guides culture, provides a framework for consistent decision-making, and, ultimately, helps sustain long-term financial returns for the shareholders of your company.”

— Larry Fink, BlackRock Chairman & CEO, January 17, 2019

Growing Support for ESG Shareholder Proposals

16-Year Trend in Average Support for Resolutions Addressing Environmental and Social Issues



Source: FactSet, as of January 2, 2021.

Rising Demand for an EESG Focus

Institutional Investors are not alone in demanding more focus on ESG:

Business Roundtable Adopts New Corporate Purpose

"While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. . . . Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."

Senator Warren Proposes Accountable Capitalism Act

- Large U.S. companies must become benefit corporations, with a legal requirement to consider all the interest of corporate stakeholders—including employees, customers, shareholders and the communities in which the company operates.
- Boards must include substantial employee participation.
- Companies must obtain supermajority support before they can spend corporate dollars on politics.

SEC Commissioner Lee Calls for Enhanced EESG Reporting

Both diversity and climate risk generally fall under the rubric of Environmental, Social, and Governance or ESG risks. ESG investing is no longer just a matter of personal choice. Asset managers responsible for trillions in investments, issuers, lenders, credit rating agencies, analysts, index providers, stock exchanges—nearly all types of market participants—use ESG as a significant driver in decision-making, capital allocation, pricing, and value assessments A broad swath of investors find ESG risks to be as or more important in their decision-making process than financial statements, surpassing traditional metrics such as return on equity and earnings volatility.

GAO Report Calls Attention to EESG Issues

"Institutional investors with whom we spoke generally agreed that ESG issues can have a substantial effect on a company's long-term financial performance. All seven private asset managers and representatives at five of seven public pension funds said they seek ESG information to enhance their understanding of risks that could affect companies' value over time. . . . Additionally, most institutional investors said that there is fragmentation in the format or location of companies' ESG disclosures, which can make this information hard to compile and review."

The Proliferation of EESG Reporting Guidelines

Proliferating EESG Ratings Providers



- 1) No uniform standards
- 2) Need to monitor and correct
- 3) Need to be proactive in articulating company goals



You Can't Manage What You Don't Measure

BlackRock[®]



Push for “more widespread and standardized” disclosure.
(SASB & TCFD)

STATE STREET GLOBAL
SPDR[®] ADVISORS



Introduced R-Factor[®]
ratings system.
(SASB)

WORLD
ECONOMIC
FORUM



Push for “a common, core set of metrics.” Backed by Big Four
(GRI, SASB, TCFD & others).

Laggards can expect to face consequences.

Yet SEC Adopts a Principles–Based Approach

- Pressure for enhanced EESG reporting is not only growing among investors and politicians. Recent amendments to Regulation S-K will place more focus on the actual metrics boards and management use to monitor and run their business.
- Despite the proliferating EESG Rating and Disclosure systems, on August 26, 2020, the SEC adopted a “principles-based” approach to disclosure about a company’s business, legal proceedings and risk factors
- This approach permits issuers to determine, in their judgment, what is material to their business and the risks their business faces and requires issuers to provide more meaningful principles-based narrative disclosure around areas that affect their business, such as human capital, sustainability, and regulatory compliance.
- The SEC refrained from adopting specific guidance around what metrics each company should disclose, recognizing that each business and industry is different, and disclosures should be tailored by each company’s management team and board.

“Our rules also are designed to elicit disclosure tailored to each company’s particular industry and business model, while being flexible enough to continue to allow for fulsome disclosure as businesses evolve in the future. . . . [The] rules require that, in crafting their human capital disclosure, companies must incorporate the key human capital metrics, if any, that they focus on in managing the business, again to the extent material to an understanding of the company’s business as a whole. Experience demonstrates that these metrics, including their construction and their use, widely from industry to industry and issuer to issuer, depending of a wide array of company-specific factors and strategic judgments. . . . It would run counter to our proven disclosure system, particularly as we first increase regulatory emphasis in an area of such wide variance, for us to attempt to prescribe specific, rigid metrics that would not capture or effectively communicate these substantial differences. That said, under the principles-based approach, I do expect to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs.”

— Jay Clayton, SEC Chairman & CEO, August 26, 2020

And Investors Prefer Bespoke Company-Specific Disclosure over Consistency for Now

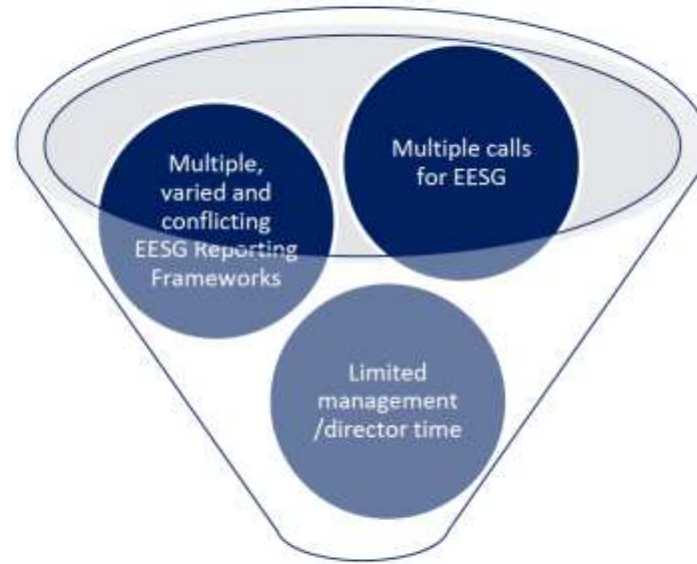
- Although certain Institutional Investors have adopted or championed specific EESG disclosure regimes, overall Institutional Investors are more focused on obtaining timely, actionable, focused, and material EESG disclosure and less fussed about the format it is provided
- Blackrock, for example, has encouraged companies to make progress towards “TCFD- and SASB-aligned reporting.” And in 2020, Blackrock will be asking companies it invests in to “(1) publish a disclosure in line with industry-specific SASB guidelines by year-end, if [the company] ha[s] not already done so, **or disclose a similar set of data in a way that is relevant to [the company’s] particular business**; and (2) disclose climate-related risks in line with the TCFD’s recommendations, if [the company] ha[s] not already done so.” That is, although Blackrock is encouraging companies to place their disclosures within an existing framework, Blackrock recognizes that similar data more relevant to the particular business at issue can be useful.
- Similarly, State Street has embraced the SASB guidelines, but recognizes that “material ESG issues are also deeply embedded within a company’s business operations.” As such, State Street seems to prefer that companies “identify, manage and publicly disclose what they consider to be financially material ESG issues” rather than adopt any single ESG disclosure framework.

“[M]ost institutional investors said that there is fragmentation in the format or location of companies’ ESG disclosures, which can make this information hard to compile and review. **However, these investors generally said that it is more important for companies to focus on providing disclosures than on how or where the disclosures are presented.**”

— GAO Report: *Disclosure of Environmental, Social and Governance Factors and Options to Enhance Them (July 2020)*

**Cutting through the Noise:
A Principled Approach to EESG**

The EESG Noise



Our Solution: Return to First Principles

Managers and directors can cut through the noise and implement an EESG program that is tailored to corporate needs and capitalizes on existing governance structures without utilizing increasingly scarce corporate resources by aligning EESG with the company's existing compliance and operational risk systems.

First Principles: Conduct Lawful Business by Lawful Means

- Corporate law requires corporations to conduct only lawful business by lawful means.
- This first principle of corporate law is enshrined in the corresponding fiduciary duty of directors to implement a reporting system to monitor the corporation's compliance with the law and then use that system to oversee the corporation's operations.

“Corporate boards may [not] satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.”

— *Chancellor William T. Allen, In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996)

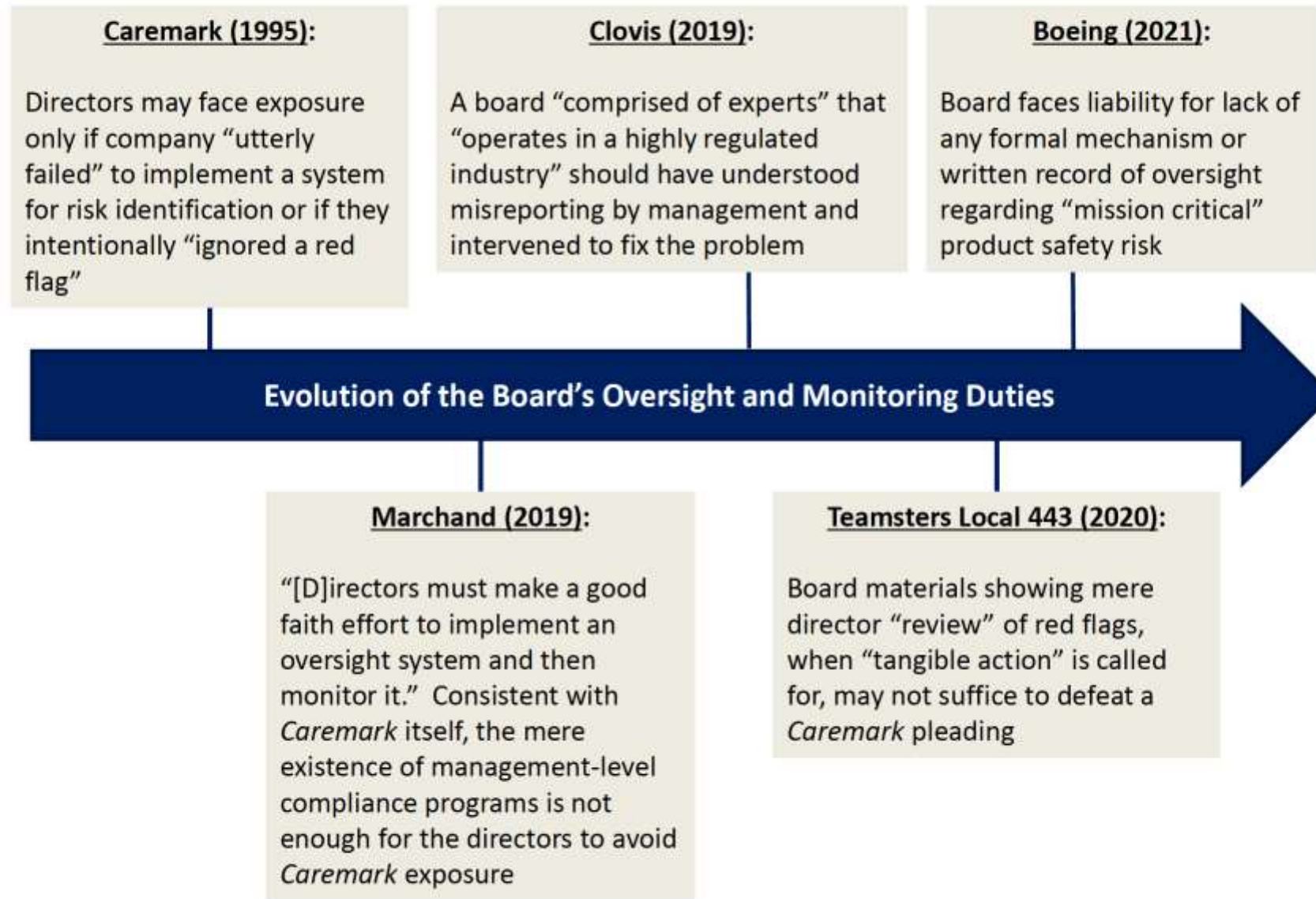
Caremark's Flexibility

- Although directors and officers must “implement an oversight system and then monitor it,” they are given a great deal of latitude in how they implement that system.
- Each corporation is different, and the appropriate monitoring system should be tailored to the corporation’s legal obligations, operations, and risks.

“[D]irectors have great discretion to design context- and industry-specific approaches tailored to their companies’ businesses and resources. But *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting.”

— *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019)

Recent *Caremark* Decisions: Internal Monitoring and Reporting are Crucial



Boeing: What Exposed the Board

- Locus of Monitoring:
 - No board committee was charged with direct responsibility to monitor airplane safety—no mention in any charter.
 - Risk oversight generally was concentrated within audit committee, which had no specific mandate to oversee airplane safety.
- Reporting System:
 - There was no internal reporting system by which whistleblowers and employees could make concerns known to the board (as opposed to management).
- Records:
 - Minutes and agendas reflected a lack of urgency and minimal time allocated to airplane safety, even after a fatal crash.
 - When mission-critical risk—here, airplane safety—was discussed, it was couched in terms of profitability and production efficiency.
 - There was no apparent record of stand-alone focus on customer safety.
 - No committee charter mentioned the central business and consumer risk of airplane safety.
 - 220 is a sword and shield.

Boeing: Lessons & Cautions

- Director Engagement:
 - Lack of active engagement and pushback from directors can expose the board.
- Identify and recognize risks that are “mission critical”:
 - These are often not directly financial in character, and even when a business’s products are financial – such as insurance or banking – that does not mean they should be assumed to be properly covered by Audit Committee’s focus on financial reporting.
 - These non-financial but central risks merit proper, stand-alone attention.
 - Ask this question: what could go wrong that would cause the most harm to the company and its stakeholders?
 - The answer will usually be an area where high legal, business, stakeholder, and reputational risk come together.
 - Airplane safety was Boeing’s biggest risk in all these areas.

Boeing: Lessons & Cautions (cont'd)

- Consider locus of oversight:
 - Audit Committee is typically not the best place for consideration of core industry compliance.
 - Financial expertise may not be necessary or sufficient.
 - Directors with relevant expertise – pharma or food safety or aircraft industry experts – may not qualify for the Audit Committee.
 - Audit Committee’s traditional duties themselves are challenging and can crowd out other issues.
 - Audit already covers financial reporting and (typically) cybersecurity.
 - The line at Audit is too long and Audit looks at risk through a primarily financial lens, when other perspectives are often as or more relevant.
 - Spread The Load: Consider board structures that more effectively address all material risks.
 - Audit remains important, and can and should approve the overall EESG/compliance approach, but spreading the load makes sure all risks are likely to be covered well, and, most critically, that the most important industry-specific risks are handled with appropriate care and expertise.

Boeing: Lessons & Cautions (cont'd)

- Compensation Committee often is a full-blown workforce committee and addresses all HR issues, including not just executive compensation, but workforce and contracted workforce pay issues, DEI, and issues of workplace tolerance and climate (e.g., policies precluding sexual harassment and promoting an inclusive workplace).
- Consider deploying a committee that focuses on the central business risks of the company and other existential risks outside the core concerns of Audit and Compensation.
- Too many board structures do not give key managers with risk/compliance responsibilities – such as HR or core product safety/reliability – adequate time regularly with a sector of the board.
- **Use This Opportunity To Capitalize on Diversity In All Respects:**
 - The public sector, educational institutions, non-profits, and military in particular have done better in creating racially and gender-diverse management ranks.
 - Many of these managers have relevant expertise in key issues like cybersecurity, supply chain risk, HR management, and regulatory risk that can be valuable to a well organized board.
 - Thus, by organizing the board well, the needs for more diverse talent can be met while meeting the demand for more racial and gender diversity.

Boeing: Lessons & Cautions (cont'd)

- Discuss, push back, and put it on the record:
 - Board should consider and discuss core industry compliance and safety issues separately from financial impact.
 - Directors should press management on its evaluation of these issues.
 - Make sure there is a good record of that discussion and consideration:
 - Absence from 220 production of records of evidence of oversight supports pleading stage inference of lack of good faith effort: Where “the board minutes of the relevant period revealed no evidence that these [red flag safety concerns] were disclosed to the board, it is reasonable to infer the absence of a reporting system”
 - Good records can aid a dismissal motion.

Caremark and EESG

- *Caremark* sets the floor: requiring a business to operate a lawful business by lawful means
- A Company looking to implement an EESG program is focused on going above and beyond the floor, and by doing so, the Company can both satisfy legitimate demands for strong EESG programs and promote compliance with the law

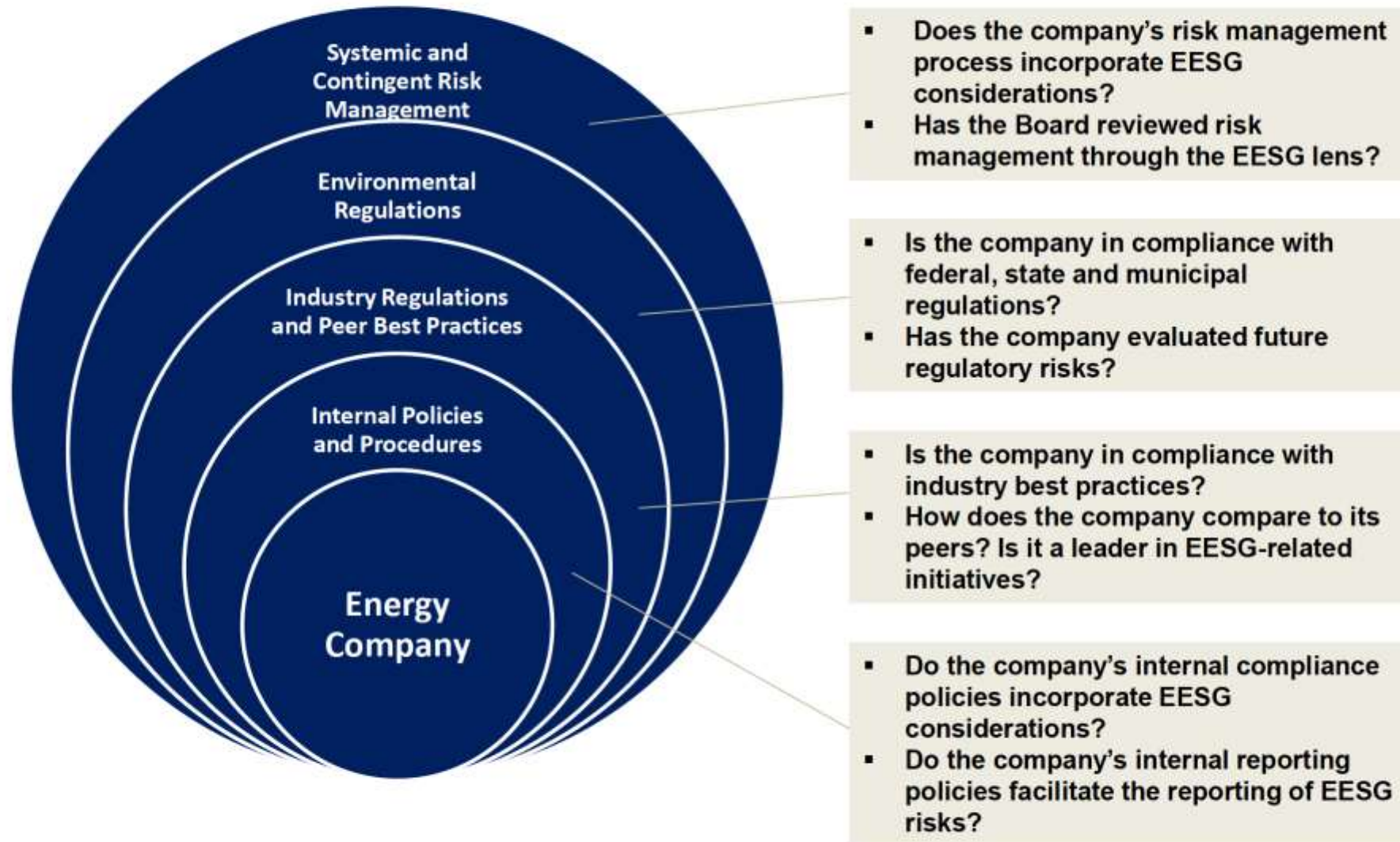
What Caremark Requires:

- Understand the company's business:
 - How does the Company make money?
 - What risks are inherent in the Company's operations?
 - What legal requirements must the Company comply with?
 - What key regulatory frameworks does the Company operate within?
- Create a reporting infrastructure for monitoring legal/operational risk:
 - Does the Board receive reports about the amount of operational risk the Company is taking?
 - Has the Board considered the appropriate amount of operational risk?
 - Is the Company complying with its key legal requirements?
- Monitor the Company's legal compliance:
 - Does the Board regularly review reports about legal/operational risk?
 - Does the Board receive regular updates from management about the Company's regulatory compliance or operational risks?

Existing Caremark Processes Inform EESG:

- Business operations and risks should be the focus of EESG—the company's biggest risks are also the areas where it can have the largest affect.
- EESG Reporting can be created or enhanced based on the existing reports the Board or management receives on operational risk/compliance.
- Monitoring the Company's EESG performance and setting appropriate EESG targets can only be holistically done if the Board has the information to understand what the current reality is and what is possible.

Example: Overlap Between EESG and Compliance Function



Bottom Line:
EESG is an Extension of the Board's
Oversight or "*Caremark*" Duty

**Management-Led, Board-Approved EESG
Assessment and Realignment Process so
that Directors' Role is Enhanced**

Management-Led, Board Approved EESG Assessment and Realignment Process so that Directors' Role is Enhanced

To move towards an EESG reporting and monitoring system that builds on the company's current monitoring and reporting obligations involves engaged management leading a process of (1) assessment; (2) engagement; and finally (3) realignment.



Assessment

Through an assessment of the Company's existing governance structure, operational risk and legal requirements, and existing reporting capabilities, company management create a holistic picture of the current governance structure around reporting on and monitoring of risks and legal compliance.

Existing Governance Structure	Operational Risk and Legal Requirements	Existing Reporting Capabilities
<ul style="list-style-type: none">• Existing board committee structure• Allocation of responsibilities among board committees• Director skills and committee membership	<ul style="list-style-type: none">• Industry-specific risks• Company-specific operational risks• Regulatory environment	<ul style="list-style-type: none">• Existing board-level reports (e.g., sustainability reports)• Publicly available regulatory reports

Engagement

Conducting a targeted dialogue with members of management and staff can help create a better understanding of (1) existing internal reporting relationships; (2) existing information creation, dissemination and flow; (3) capacity for expanded reporting or oversight; and (4) under focused areas of risk can be discovered.



Realignment

Based on the additional insights gleaned from engagement with management and key staff, management can engage the board in assessing the necessary realignment of (1) governance responsibilities; (2) management responsibilities and oversight; (3) reporting priorities and expectations; and (4) goals around compliance and EESG.



Environmental Law and Policy Annual Review

*The next panel will start at 12:40 pm EST.
Thank you for your patience as we do a
technical check with our panelists.*



VANDERBILT
LAW SCHOOL

Panel 3: *Rethinking Grid Governance for the Climate Change Era*

Vanderbilt Law School Student and ELPAR Articles Editor: Joe Hendricks

Author: Shelley Welton

Commenters: Tom Hassenboehler, Casey Roberts, Rebecca Tepper



VANDERBILT
LAW SCHOOL

Rethinking Grid Governance for the Climate Change Era

Shelley Welton

University of South Carolina School of Law

March 25, 2022

1 in 3

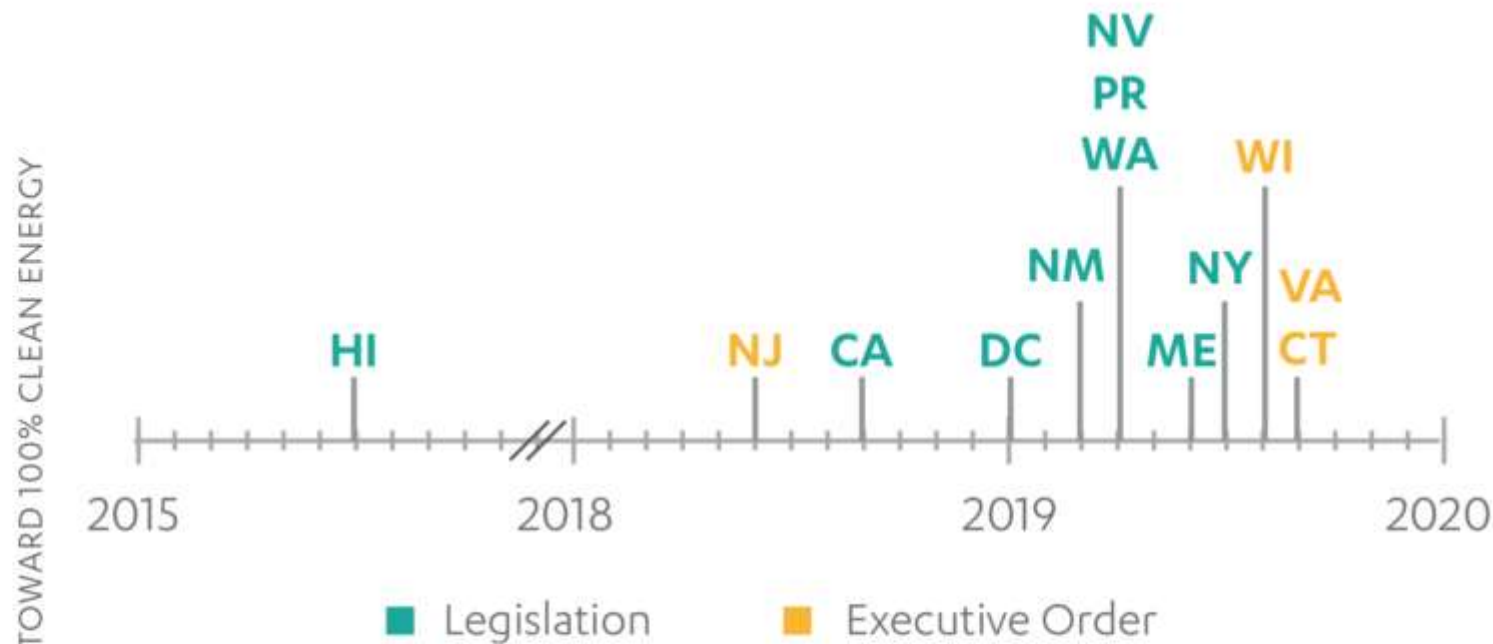
Americans

Lives in a city or state
that has committed to, or
achieved, 100% clean
electricity

Source: UCLA Luskin Center for Innovation, Progress Toward 100% Clean Energy (Nov. 2019)

1 in 3
Americans
Lives in a city or state
that has committed to, or
achieved, 100% clean
electricity

FIGURE 2.
TIMELINE OF THE ADOPTION OF 100% CLEAN ENERGY LAWS AND
EXECUTIVE ORDERS



Source: UCLA Luskin Center for Innovation, Progress Toward 100% Clean Energy (Nov. 2019)

**1 in 3
Americans**

Lives in a city or state
that has committed to, or
achieved, 100% clean
electricity



Source: UCLA Luskin Center for Innovation, Progress Toward 100% Clean Energy (Nov. 2019)

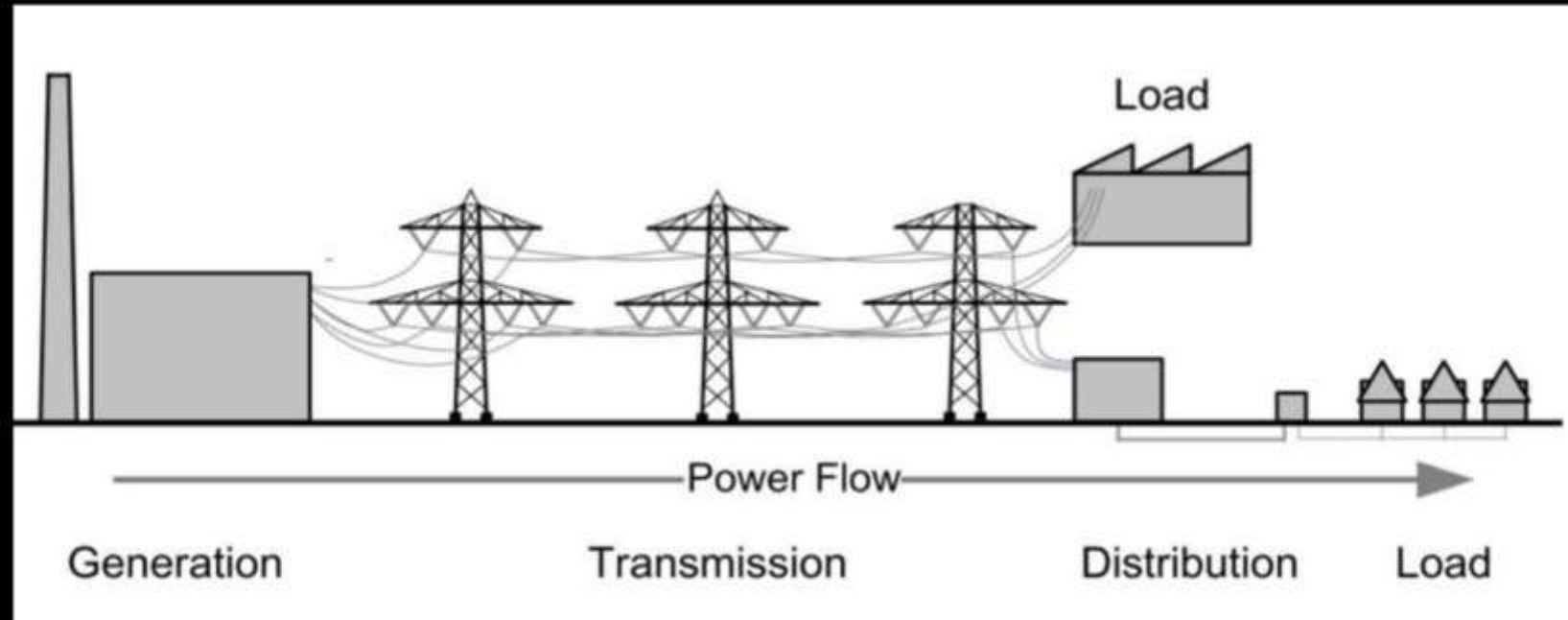
**1 in 3
Americans**

Lives in a city or state
that has committed to, or
achieved, 100% clean
electricity

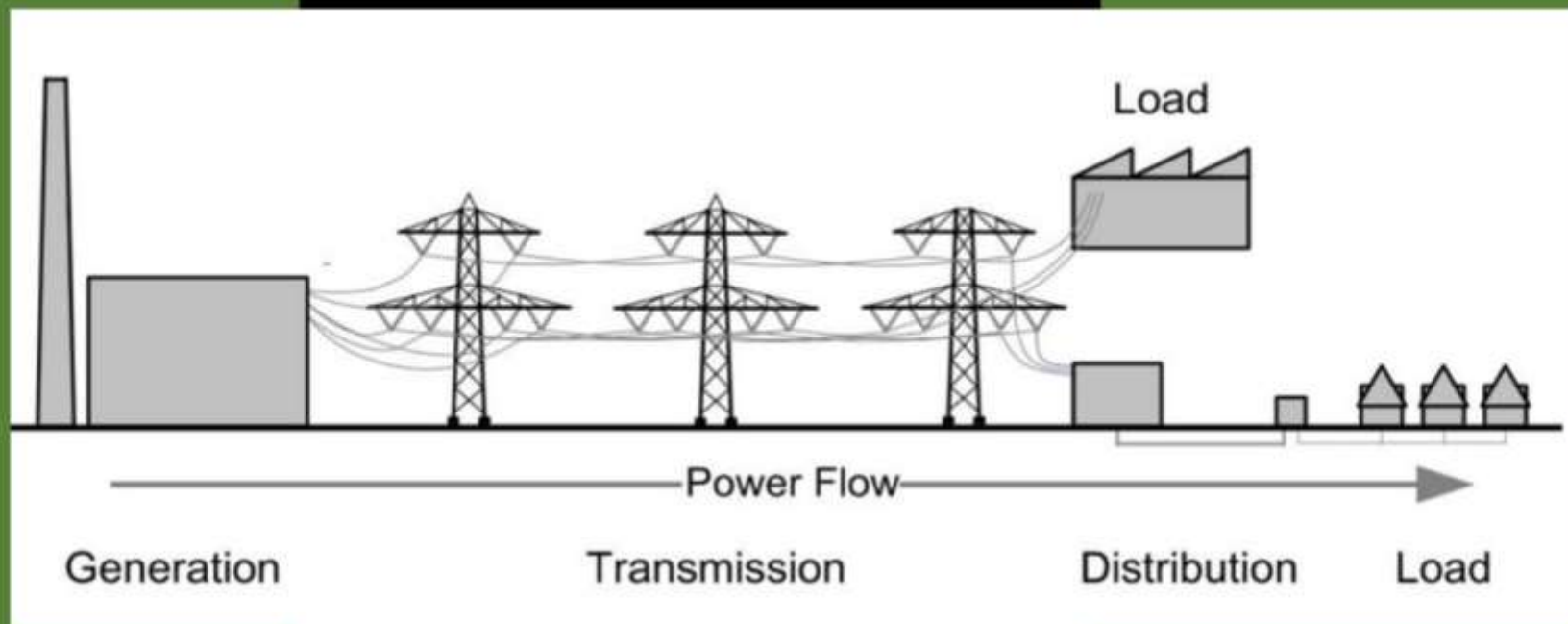


In many regions, privatized grid governance is emerging as a hurdle to hard-earned democratic progress on climate change.

Governance of the Electricity Grid



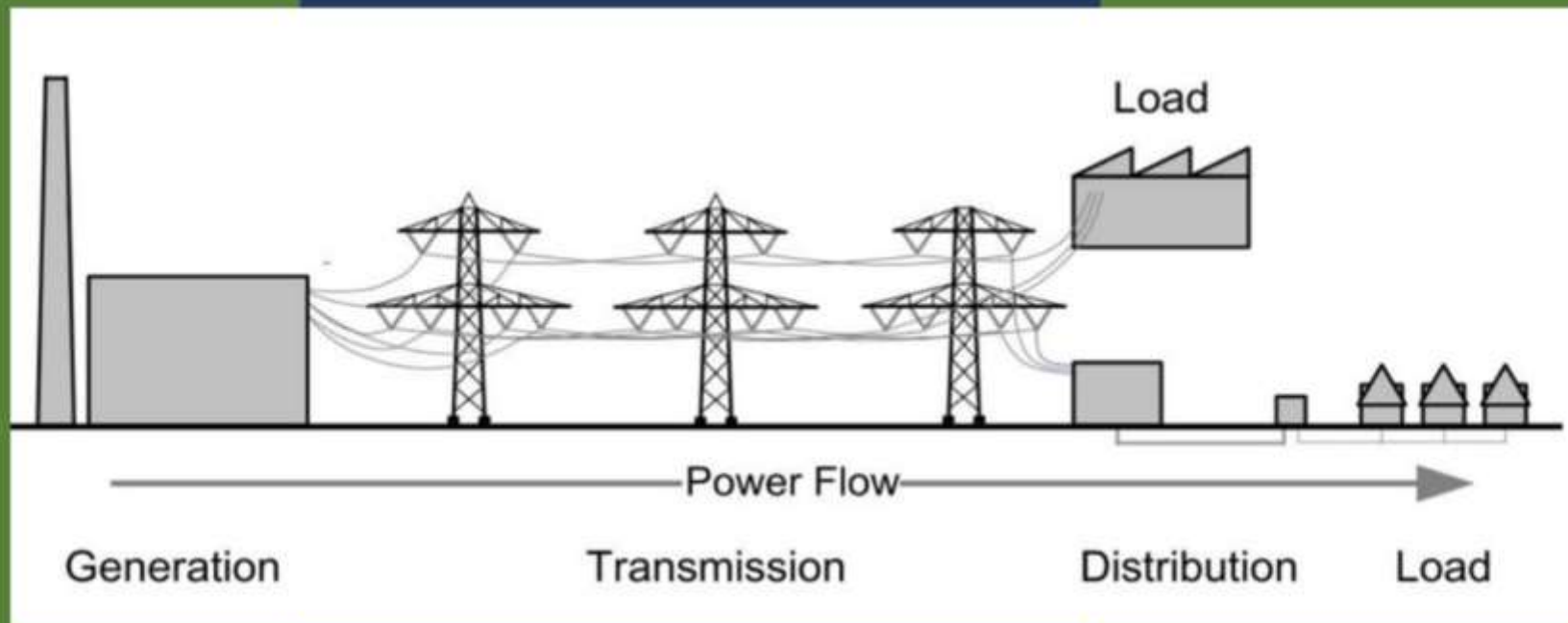
Governance of the Electricity Grid



State control

State control

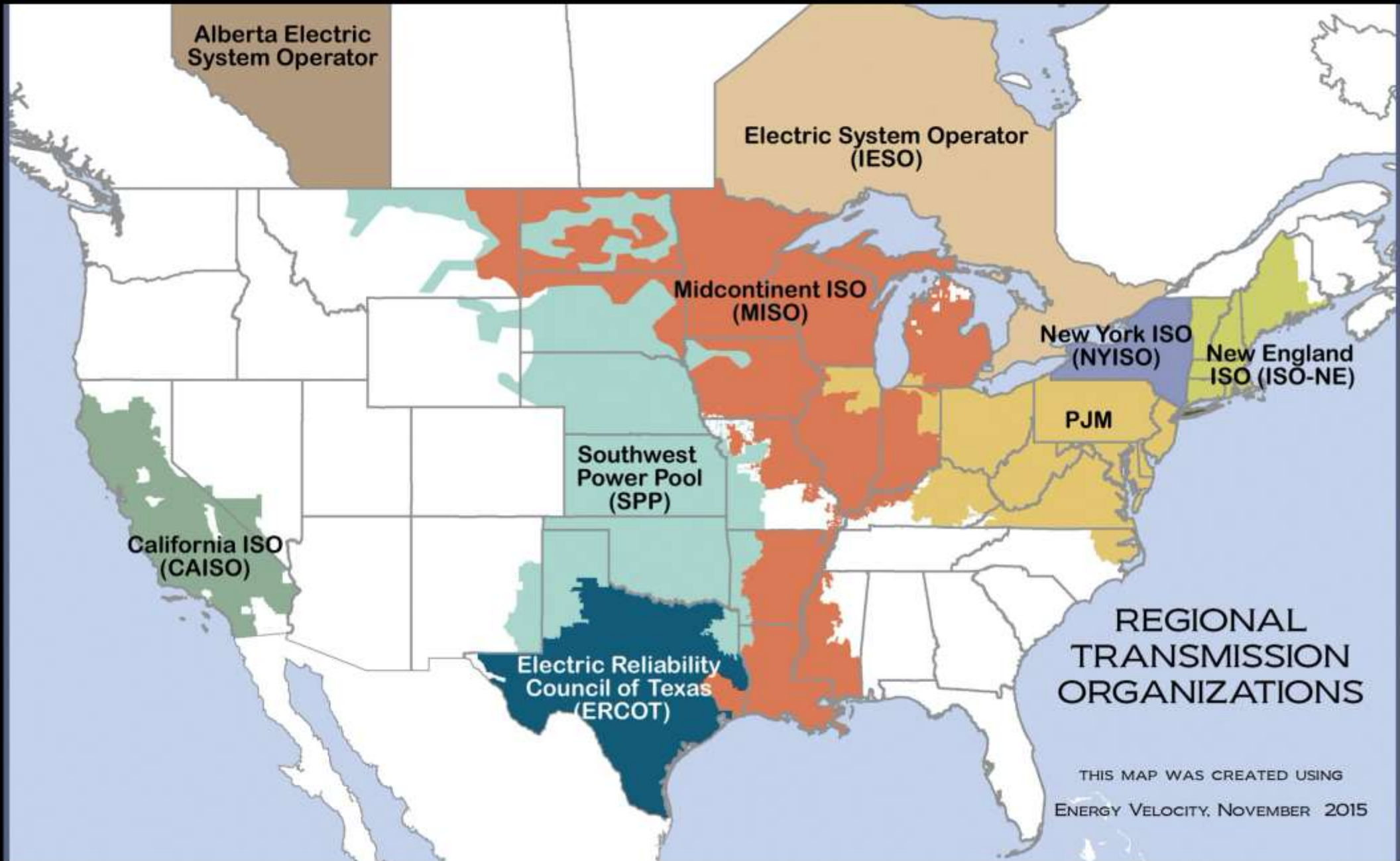
Governance of the Electricity Grid

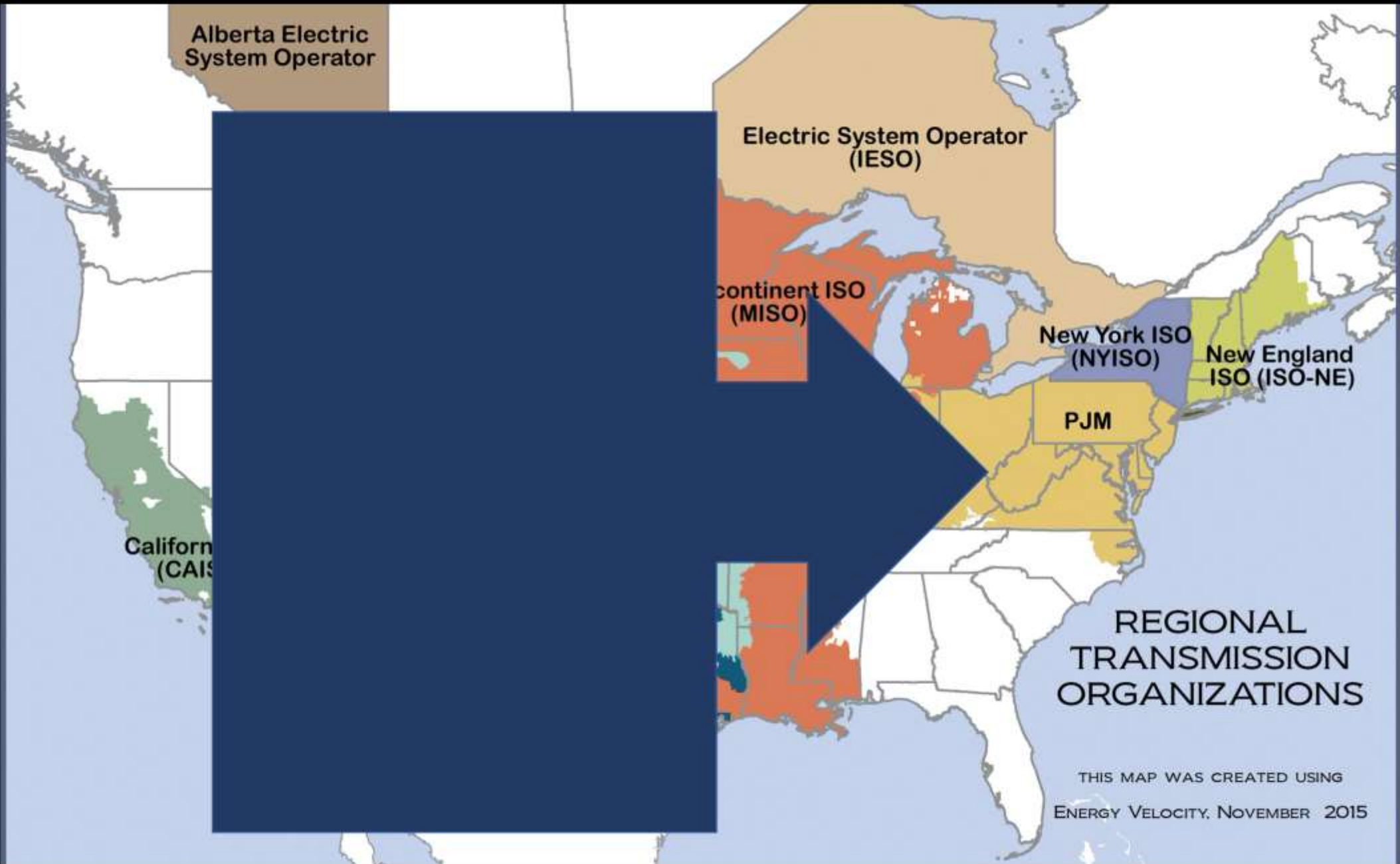


State control

FERC Control

State control





Alberta Electric
System Operator

Weighted Sectoral Voting:

- (1) transmission owner
- (2) generation owner
- (3) other supplier
- (4) electric distributor
- (5) end-use customer

Electric System Operator
(IESO)

continent ISO
(MISO)

New York ISO
(NYISO)

New England
ISO (ISO-NE)

PJM

California
(CAISO)

REGIONAL
TRANSMISSION
ORGANIZATIONS

THIS MAP WAS CREATED USING
ENERGY VELOCITY, NOVEMBER 2015

Alberta Electric
System Operator

Weighted Sectoral Voting:

- (1) transmission owner
- (2) generation owner
- (3) other supplier
- (4) electric distributor
- (5) end-use customer

Or independent board
filing (on certain issues)

Electric System Operator
(IESO)

continent ISO
(MISO)

New York ISO
(NYISO)

New England
ISO (ISO-NE)

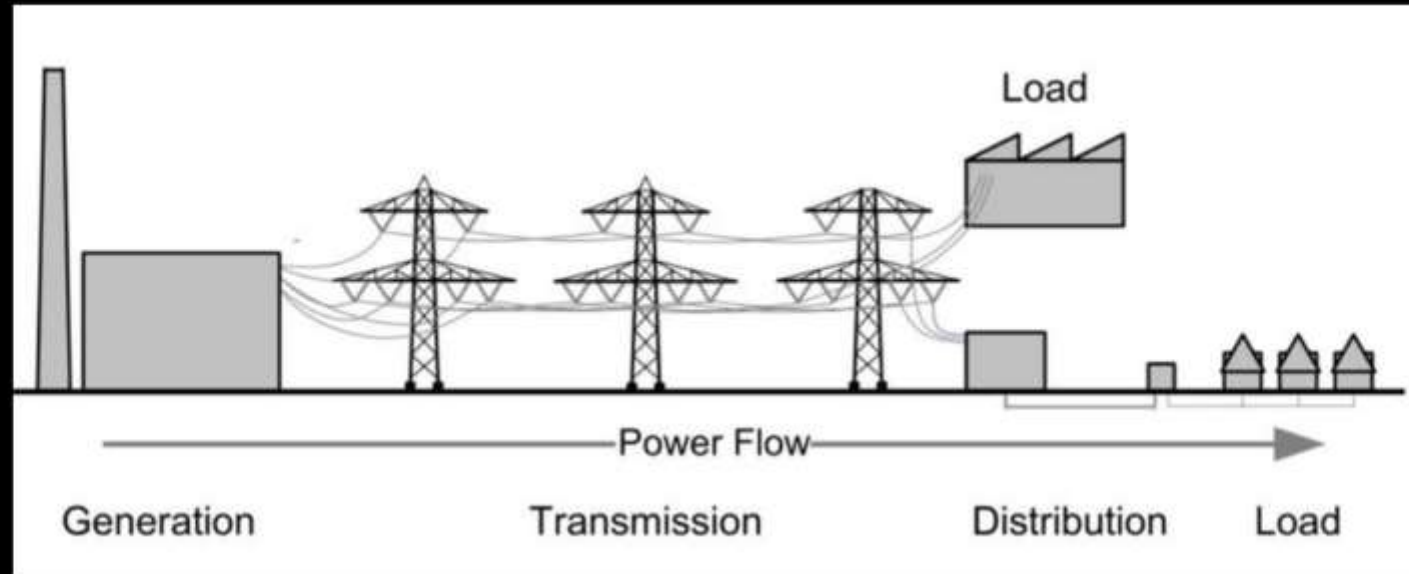
PJM

California
(CAISO)

REGIONAL
TRANSMISSION
ORGANIZATIONS

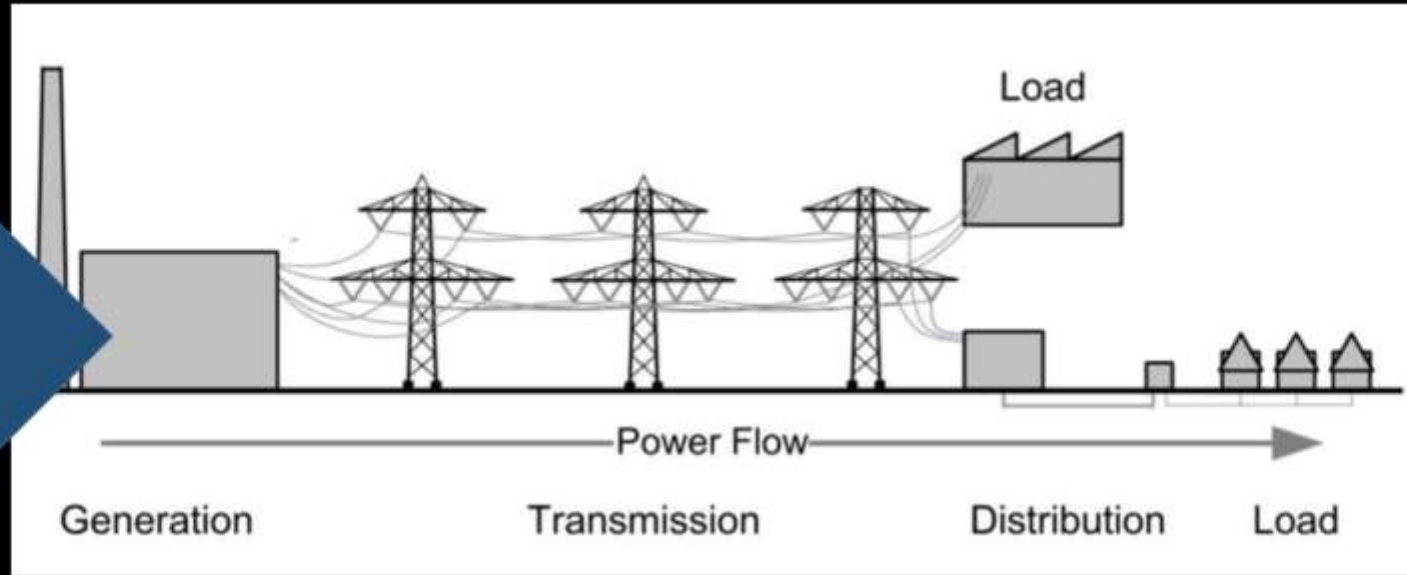
THIS MAP WAS CREATED USING
ENERGY VELOCITY, NOVEMBER 2015

Role of the Electricity System in Responding to Climate Change



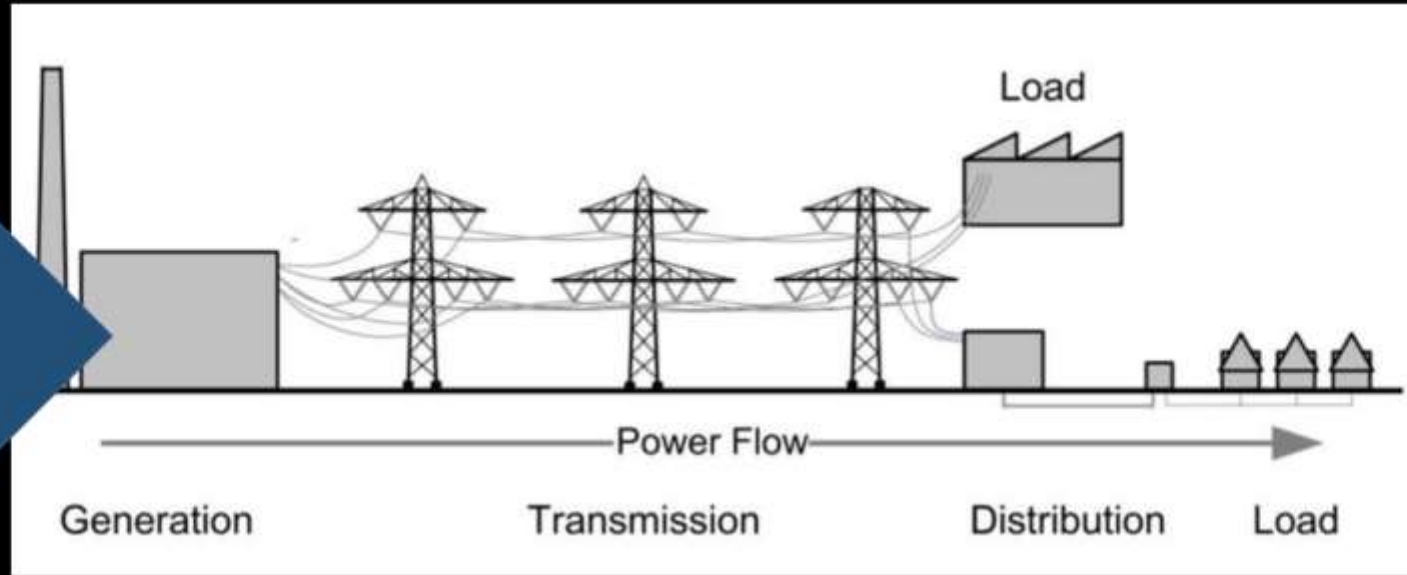
Role of the Electricity System in Responding to Climate Change

62% Fossil Fuels
19% Nuclear
7% Hydropower
7% Wind
2% Solar



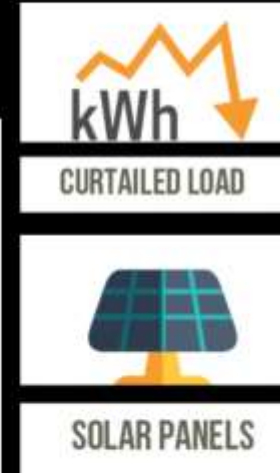
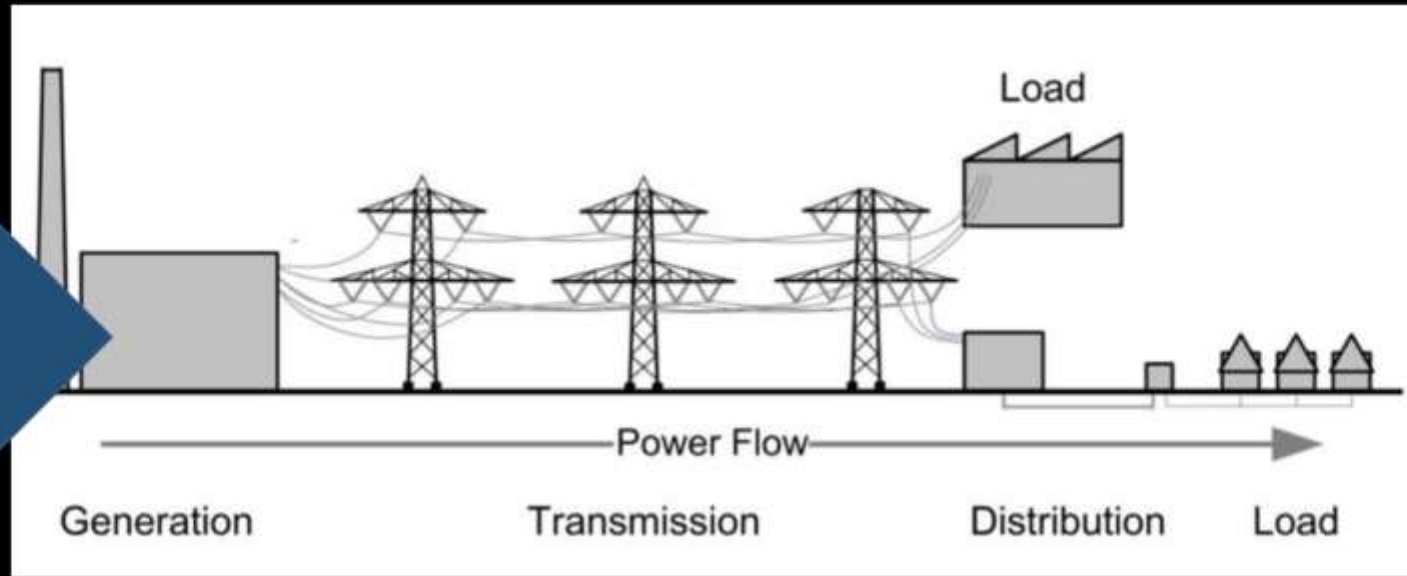
Role of the Electricity System in Responding to Climate Change

62% Fossil Fuels
19% Nuclear
7% Hydropower
7% Wind
2% Solar



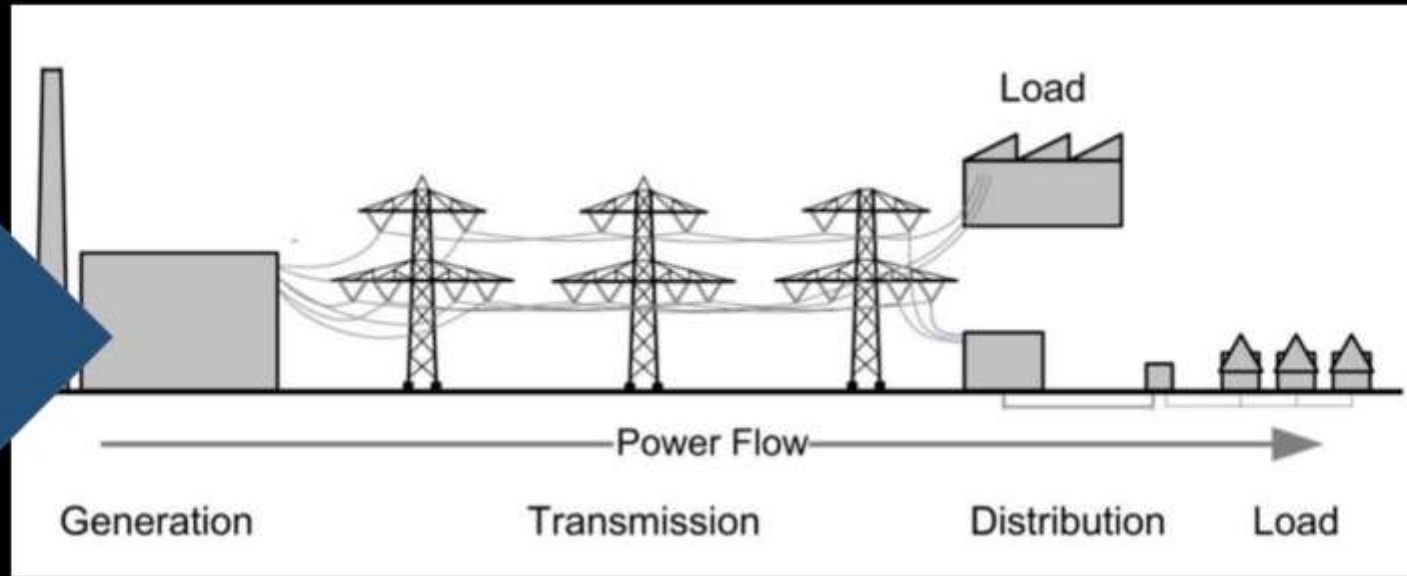
Role of the Electricity System in Responding to Climate Change

62% Fossil Fuels
19% Nuclear
7% Hydropower
7% Wind
2% Solar



Role of the Electricity System in Responding to Climate Change

62% Fossil Fuels
19% Nuclear
7% Hydropower
7% Wind
2% Solar



CURTAILED LOAD



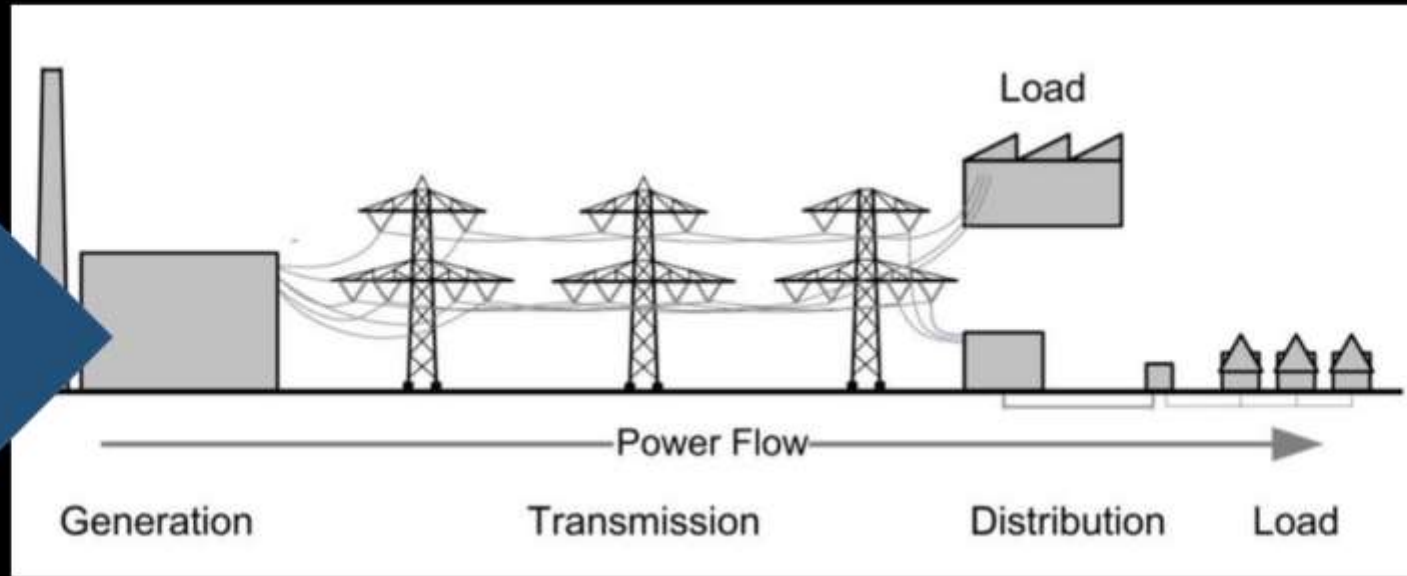
SOLAR PANELS



BATTERY STORAGE

Role of the Electricity System in Responding to Climate Change

62% Fossil Fuels
19% Nuclear
7% Hydropower
7% Wind
2% Solar



CURTAILED LOAD



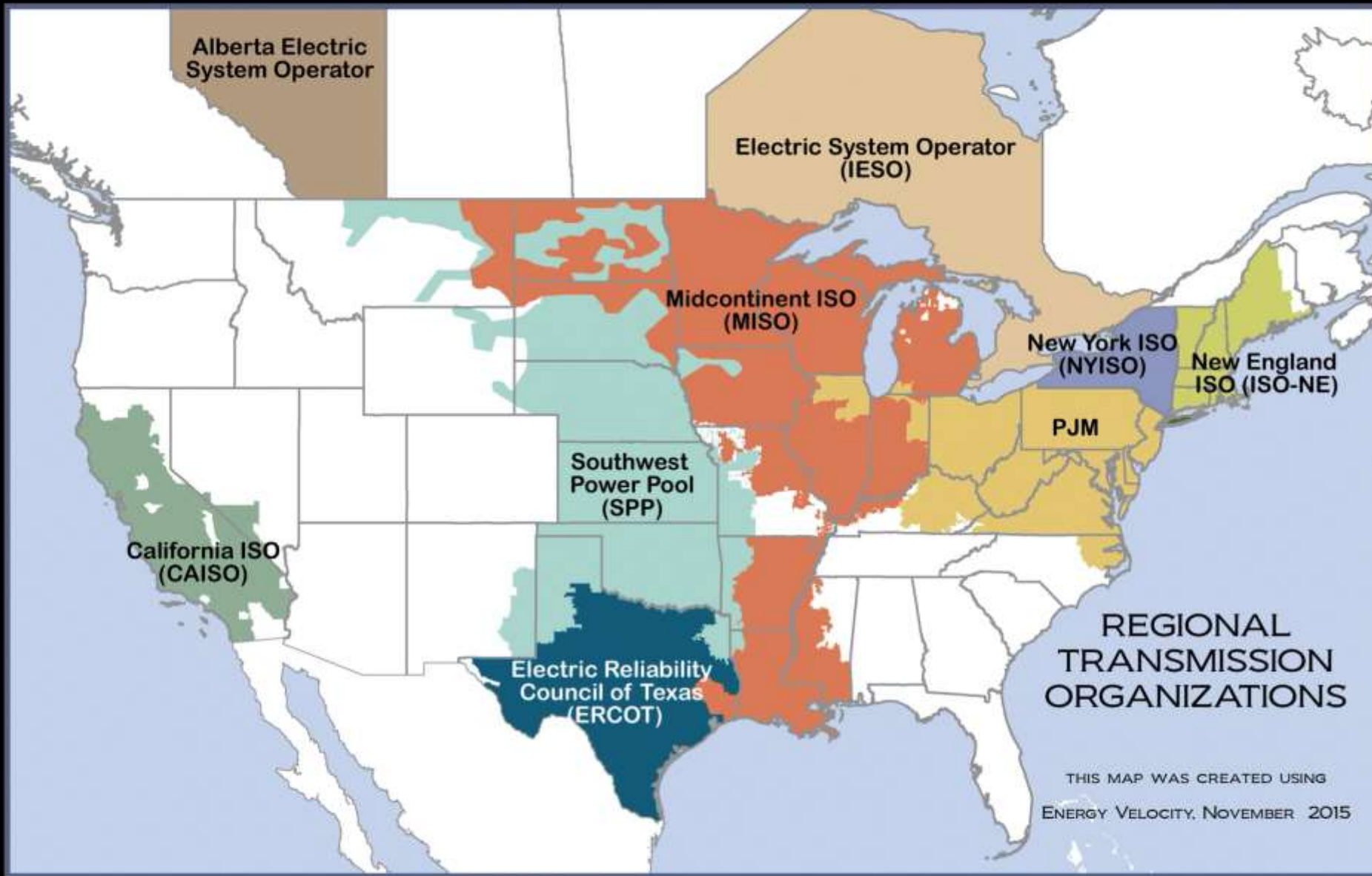
SOLAR PANELS

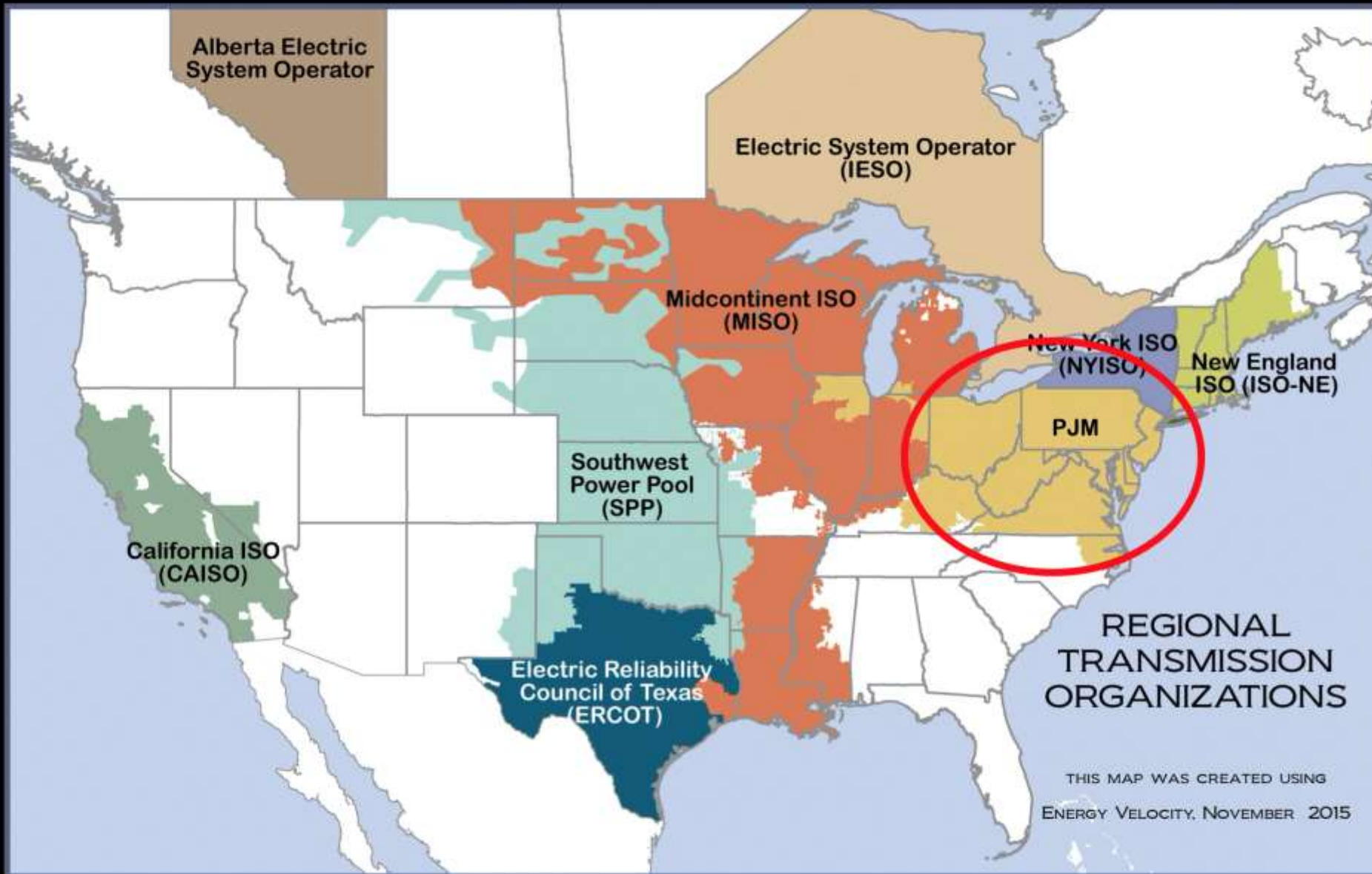


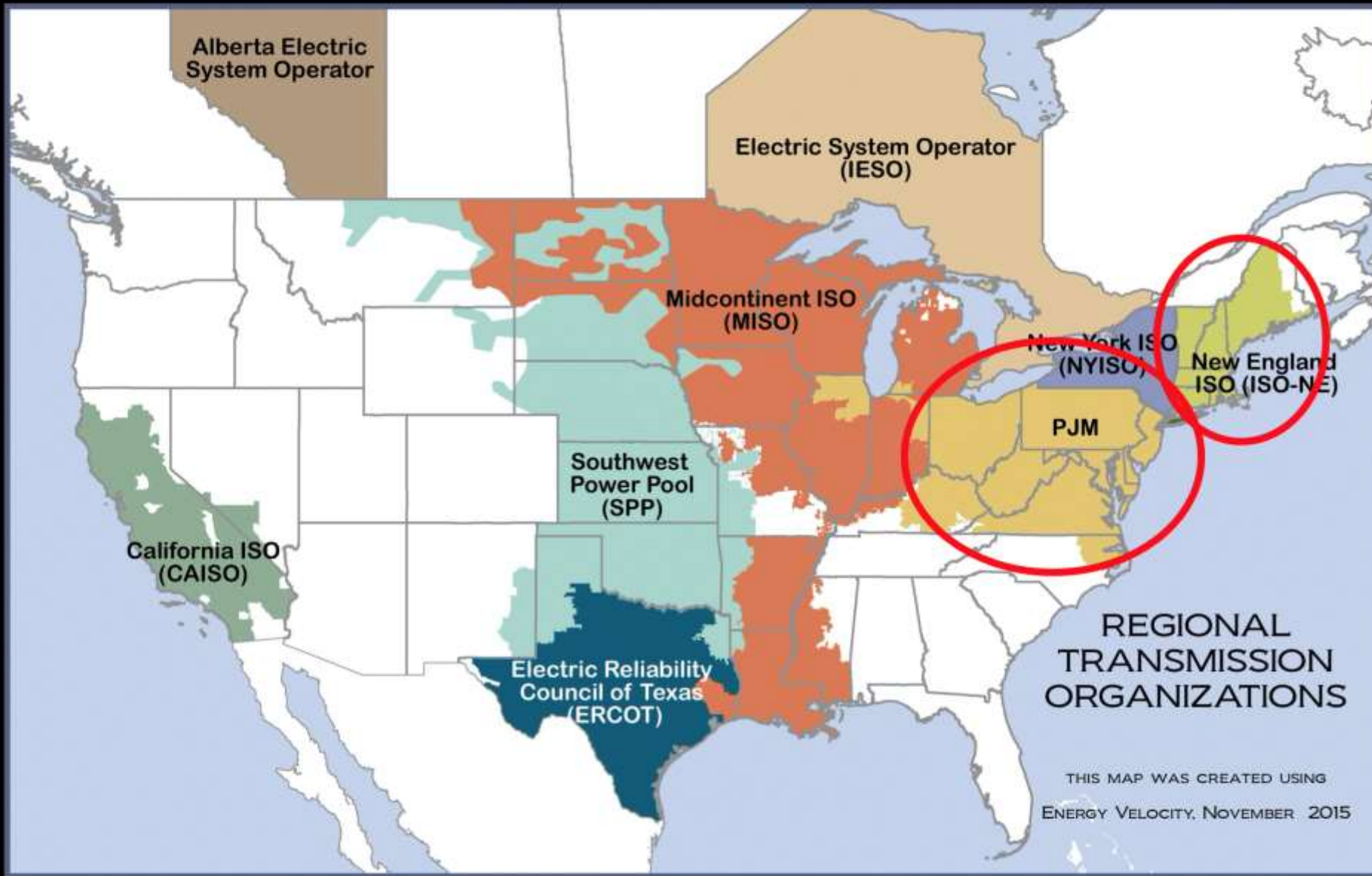
BATTERY STORAGE



EV CHARGERS







**FERC move to raise PJM capacity
market bids shows 'clear bias' against
new, clean generation: Glick**

FERC move to raise PJM capacity market bids shows 'clear bias' against new, clean generation: Glick

PJM, utilities 'messing with' state sovereignty is 'biggest threat' to climate goals: Maryland commissioner

FERC move to raise PJM capacity market bids shows 'clear bias' against new, clean generation: Glick

PJM, utilities 'messing with' state sovereignty is 'biggest threat' to climate goals: Maryland commissioner



UTILITY DIVE

RTOs' Dual Accountability Gaps

- State regulators & their statutory prerogatives
- Federal regulators & their ability to shape market rules

RTOs' Dual Accountability Gaps

- State regulators & their statutory prerogatives



Give regional-state committees a veto or filing rights

- Federal regulators & their ability to shape market rules

RTOs' Dual Accountability Gaps

- State regulators & their statutory prerogatives



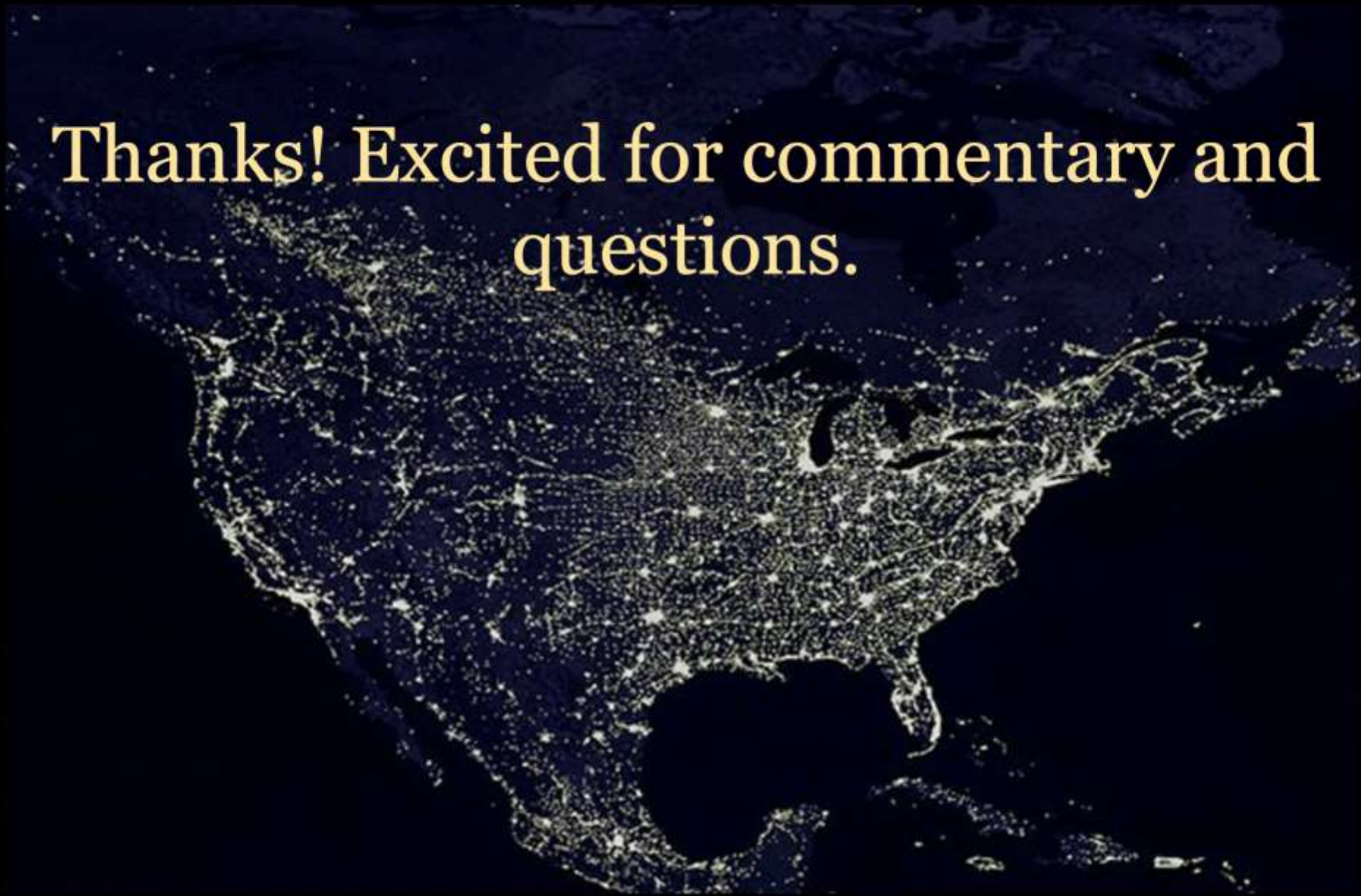
Give regional-state committees a veto or filing rights

- Federal regulators & their ability to shape market rules



Regulate RTOs as policy-making bodies

Thanks! Excited for commentary and questions.





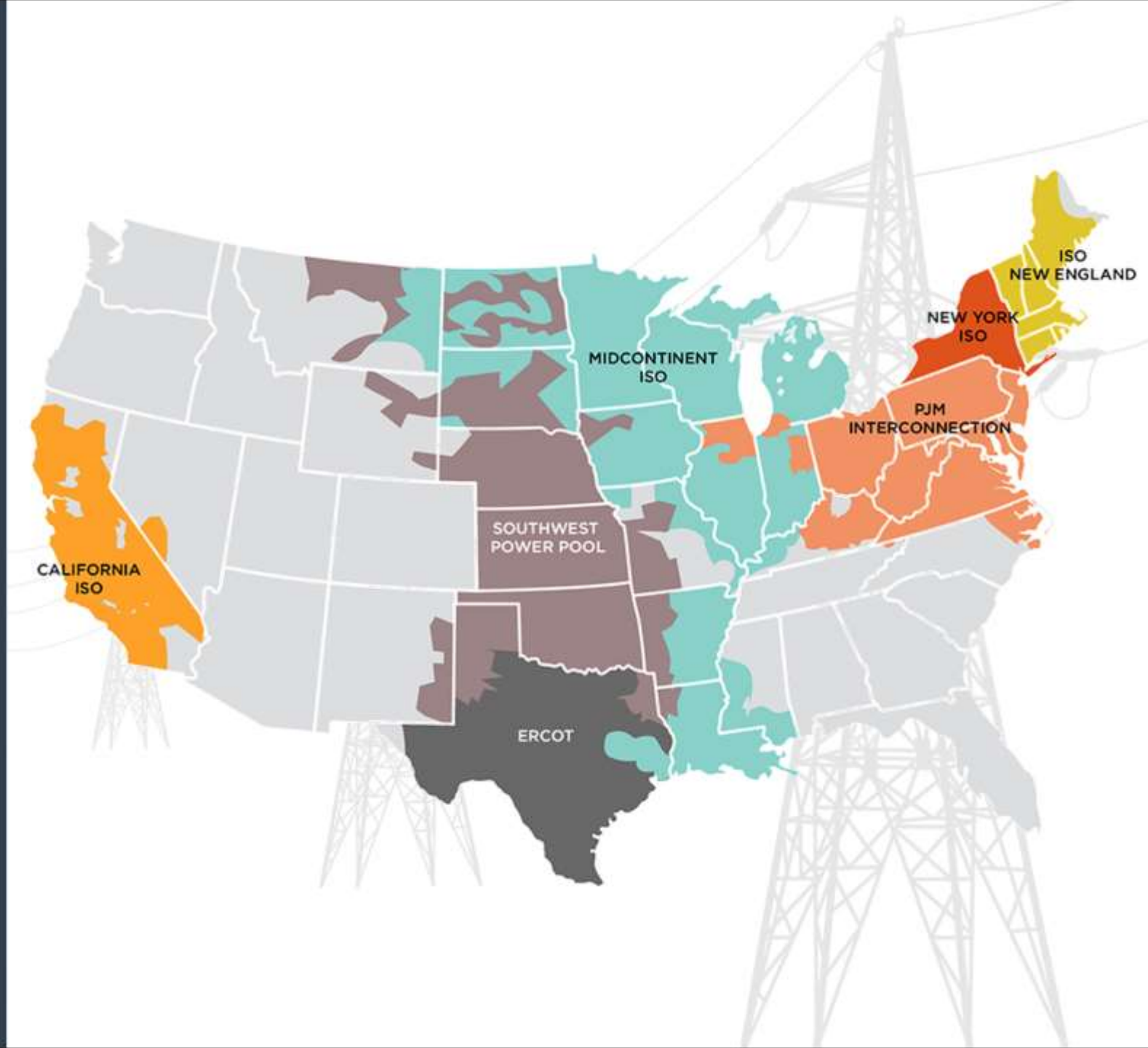
The Organized Wholesale Market Improvement Paradox

*Response to "Rethinking Grid Governance
for the Climate Change Era"*

Tom Hassenboehler, Partner, COEFFICIENT
March 2022

Introduction/Background

- RTOs are necessarily and unnecessarily complex due to their default status as policy decision-makers.
- Organized markets have recently become a key topic at states and in regions where they don't exist due to the rise of the engaged, active electricity customer.





3 Key Takeaways

1. If delivery of reliable, affordable, resilient and increasingly clean energy are the intended outcome of our evolving electricity system – organized markets have helped to get us on a path there – but more must be done.
2. The role of the customer is the new wildcard.
3. In order to fundamentally improve RTOs, ultimately, Congress by enacting legislation and providing political will to FERC, is the only place that can fix the problem.



Rethinking Grid Governance

Environmental Law and Policy Annual
Review 2022

Casey Roberts
Sierra Club, Senior Attorney
casey.roberts@sierraclub.org



Sierra Club's Advocacy at RTOs

- Ensuring that RTO market rules and transmission policies don't unnecessarily support fossil fuel resources or serve as barriers to clean resource entry.
- Consumer protection is front and center.
- Skeptical of RTOs as a forum to advance decarbonization for its own sake, see Welton, *Electricity Markets and the Social Policy of Decarbonization*
- Demonstrating the model of influence without membership
 - Targeted engagement in stakeholder process and at FERC
 - Supporting work of aligned RTO members and engaging outside voices

Overview

1. Nature of FERC's control and influence over RTO tariffs – **more than meets the eye?**
2. Practical opportunities and limits on FERC reform of RTO governance // States and consumer advocates **can and do** influence RTOs even with little to no voting power

FERC's Ability to Shape RTO Tariffs is Substantial

- What RTOs file under Section 205 is often the middle, not the beginning, of the story.
- Section 206 is a powerful and underutilized tool
- It's all relative: limitations on FERC's authority aren't unique to RTOs, and RTO stakeholder processes create a record and opportunities for public interest advocates far superior to what's available for traditional utilities.

FERC can reform RTO governance, but only to a point . . .

- Membership rules and quality of stakeholder deliberation directly affect rates and are within FERC's jurisdiction
 - *NEPOOL Participants Committee*, 166 FERC ¶ 61,062 (2019) (reporters can't be excluded from membership)
 - PJM, 157 FERC ¶ 61,229 (2016) (approving funding mechanism for PJM consumer advocates)
- But . . . practical limitations on FERC's ability to use this authority.

Political environment in which RTOs operate can moderate their pro-incumbent tendencies

- Perceptions of RTO legitimacy and fairness matter
- Explore mechanisms to increase transparency and accountability to state policymakers – see New England States Committee on Electricity, *Advancing the Vision* governance recommendations
- States should not neglect what's within their direct authority that could shift the balance in RTO-land
 - Conditional requirements for RTO membership
 - Better funding for consumer advocates and state regulator staff

Thank you!



Please check our website for the recording and slides from today's conference. Articles and comments will be published and available on the website in August.

<https://www.eli.org/environmental-law-and-policy-annual-review>



VANDERBILT
LAW SCHOOL