ARTICLES

ADVANCING THE REBIRTH OF ENVIRONMENTAL COMMON LAW

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Abstract: Federal law often fails to mitigate environmental harm. An alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private nuisance. A rebirth of the common law is occurring. This Article provides examples of the rebirth of environmental common law and suggests how common law claims and remedies in the environmental context can mitigate environmental harm.


Edward A. Fitzgerald

[Pages 37–106]

Abstract: In 2003, the United States Department of the Interior (DOI) established three distinct population segments (DPSs) for the gray wolf, which encompassed its entire historic range. In addition, DOI downlisted the gray wolf from an endangered to threatened species in the Eastern and Western DPSs, despite the wolf’s continued absence from ninety-five percent of its historic range. The U.S. District Court for the District of Oregon properly invalidated DOI’s dysfunctional downlisting of the gray wolf. DOI’s interpretation of “significant portion of its range” was inconsistent with the text, intent, and purposes of the Endangered Species Act (ESA). In addition, DOI inverted its DPS policy, which provides different populations of the species different levels of protection in different portions of its historic range. Achieving the recovery plan goals did not warrant downlisting the gray wolf. DOI also failed to address the five downlisting factors of section 4(a) of the ESA across a significant portion of the gray wolf’s historic range. Nevertheless, DOI could have established
two DPSs encompassing the populations of gray wolves in the western Great Lakes and northern Rocky Mountains, and could have accordingly downlisted these populations to threatened species status.

NOTES

BALANCING NATIONAL SECURITY WITH A COMMUNITY'S RIGHT-TO-KNOW: MAINTAINING PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION THROUGH EPCRA’S NON-PREEMPTION CLAUSE

Katherine Chekouras

Abstract: Over the past decade, public information regarding potential environmental hazards has been restricted due to national security concerns over terrorism. Citizens across the country are now hampered in their ability to assess the danger of local chemical facilities—and take proper precautionary measures—due to changing laws that limit or deny access to information about these facilities. This Note explains how states can enhance access to public environmental information while respecting legitimate security concerns. By decreasing reporting thresholds and making information accessible on the internet, states can strike a more proper balance between security concerns and a community’s right to know about chemical and environmental dangers. This Note discusses this balance, and suggests that information regarding chemical plant facilities should remain public because it poses a low security risk and offers a high public benefit.

POWER TO THE PEOPLE: THE TENTH CIRCUIT AND THE RIGHT OF CITIZENS TO SUE FOR EQUITABLE RELIEF UNDER SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT

Lisa Donovan

Abstract: The United States Court of Appeals for the Tenth Circuit recently determined that the jurisdictional bar contained in section 309(g)(6)(A) of the Clean Water Act does not preclude citizen plaintiffs from seeking equitable relief, but only bars those actions seeking civil penalties. However, this holding by the Tenth Circuit in Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co. directly conflicts with prior decisions by the First and Eighth Circuits. The First and Eight Circuits have broadly interpreted the juris-
dictional bar to preclude citizens from seeking civil penalties or equitable relief once an administrative enforcement action is underway. An examination of the relevant statutory language, legislative history, and policy rationale, however, reveals that section 309(g)(6)(A) was only intended to bar citizens actions for civil penalties, preserving citizens’ powerful role in the protection and restoration of the navigable waters of this country.

MOUNTAINTOP COAL MINING AND THE CLEAN WATER ACT: THE FIGHT OVER NATIONWIDE PERMIT 21

Julia Fuschino

Abstract: The Clean Water Act’s (CWA) goal of protecting the waters of the United States has been threatened by the Army Corps of Engineers (Corps) increased use of general permits, such as Nationwide Permit 21 (NWP 21). NWP 21 is issued by the Corps to authorize the disposal of material from mountaintop coal mining, even though this type of disposal has serious environmental effects. Recent court rulings have upheld the use of NWP 21. However, by focusing on the questions left unresolved by Congress and the courts, there is an opportunity to help guarantee that the goal of the CWA is achieved. To ensure greater environmental protection, the adequacy of the minimum impact determinations performed by the Corps when it enacts a NWP should be challenged to ensure their adequacy, and minimum impact determinations should be required before any issuance of a NWP.

THE LIMITED POWER OF STATES TO REGULATE NONROAD MOBILE SOURCES UNDER THE CLEAN AIR ACT

Johanna L. Wise Sullivan

Abstract: The federal Clean Air Act (CAA) requires the State of California to obtain Environmental Protection Agency (EPA) permission in order to adopt “standards and other requirements relating to the control of emissions,” but expressly preempts all other states from adopting such regulations. Beginning January 1, 2007, California—which suffers the most severe air pollution in the country—will require all ships operating within twenty-four miles of the coast to limit emissions from auxiliary engines to levels that would be reached by using a certain low-sulfur fuel. If California’s new regulation falls within the CAA definition of “standards and other requirements,” it is invalid without EPA authorization. Courts have generally found that “in-use” regulations, which are
applied to the operation of motor vehicles and ocean vessels, are not covered by the preemption provisions of the CAA. However, a closer examination of differences between the CAA’s treatment of motor vehicles and nonroad vehicles, along with a recent Supreme Court decision interpreting the definition of “standard,” indicates that California’s regulation is preempted unless EPA grants authorization.
ADVANCING THE REBIRTH OF ENVIROMENTAL COMMON LAW

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Abstract: Federal law often fails to mitigate environmental harm. An alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private nuisance. A rebirth of the common law is occurring. This Article provides examples of the rebirth of environmental common law and suggests how common law claims and remedies in the environmental context can mitigate environmental harm.

Introduction

Federal law strives to mitigate environmental harm such as air pollution and hazardous waste contamination, but with mixed results. The Clean Air Act (CAA) requires that air quality standards be established for pollutants that endanger the public health and welfare. Standards already exist for carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. Yet, carbon dioxide is the major force behind global climate change, and no carbon dioxide standards exist despite efforts to make it a “criteria pollutant” under the CAA. In cases of hazardous waste contamination, some polluters agree to perform remedial work that may be unsuccessful or inadequate and does not provide complete property restoration for adjacent landowners. Federal environmental law fails to deter polluters

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3 See infra Part III.A; Kirk Johnson, 3 States Sue E.P.A. to Regulate Emissions of Carbon Dioxide, N.Y. Times, June 5, 2003, at B2; see also infra note 84 and accompanying text.
4 See infra Part III.B.
and protect the environment for a variety of reasons. For example, national standards may not be suitable for greenhouse gases, and federal agencies sometimes lack the resources to effectively perform restoration activities or federal standards are inadequate to restore affected resources to a state’s more stringent standard. An alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private nuisance.

A rebirth of the common law is already occurring. Under a common law public nuisance theory, states have filed suit against energy companies to reduce carbon dioxide emissions. Additionally, private landowners affected by hazardous waste contamination have begun to utilize common law private nuisance claims. A traditional advantage of common law claims is that their remedies allow for compensation to the individual pollution victims. Moreover, with remedies fashioned by the state courts, or federal courts applying state law,

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6 See Véronique Bugnion & David M. Reiner, A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?, 30 Envtl. L. 491, 507 (2000) (“Moreover, the concept of a standard expressed in terms of a parts per million concentration is especially problematic for greenhouse gases because the United States is ‘only’ responsible for perhaps one-quarter of the global concentration of the gases. Thus, setting a national standard in the United States for greenhouse gas emissions would only accomplish a fraction of the emissions reductions needed to meet a global concentration target.”); Nicholle Winters, Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct That It Is Not an “Air Pollutant”? 104 Colum. L. Rev. 1996, 2001-02 (2004) (citing Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003), available at http://www.epa.gov/airlinks/co2_general_counsel_opinion.pdf (concluding that carbon dioxide cannot be regulated under the Clean Air Act (CAA) because “the nature of the global pool would mean that . . . the entire world would either be in or out of compliance. Such a situation would be inconsistent with a basic underlying premise of the CAA regime . . . .”)). While national standards for greenhouse gases may be “unworkable,” according to EPA, “regulating CO₂ emissions from automobiles is perfectly feasible.” Massachusetts v. EPA, 415 F.3d 50, 69–70 (D.C. Cir. 2005) (Tatel, J., dissenting).

7 See infra Part III.B.


10 See Kuhnle, supra note 8, at 191; see also Part III.B (discussing Dyer v. Waste Mgmt. of Wisconsin, Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County argued Dec. 6, 2004)).

11 Kuhnle, supra note 8, at 222.
common law claims can also promote timely restoration of damaged natural resources and polluted lands—goals of the major federal environmental statutes. As administrative agencies can have difficulty in implementing cleanup of polluted sites and deterring pollution, perhaps common law courts should shoulder a greater share of this responsibility.

This Article, from a descriptive standpoint, provides examples of the rebirth of the environmental common law, and, for normative purposes, suggests how common law claims and remedies in the environmental context can continue to flourish. Part I of this Article discusses the common law origins of environmental law, as well as the public policy and environmental costs and benefits of invoking common law remedies in environmental torts. Part II considers whether state common law remedies are preempted by federal environmental statutes. Part III describes two pending cases as examples of the rebirth of the environmental common law, where common law remedies were invoked to abate air and hazardous waste pollution. Part III also counsels on the difficulties of showing causation and determining remedies. Part IV offers up a valuable tool to promote the rebirth of the environmental common law and environmental restoration, arguing that judges should apply a common law damage remedy in cases arising under state law, entitled the common law fund.

I. THE COMMON LAW ORIGINS OF ENVIRONMENTAL LAW

Environmental law and regulation “has evolved . . . from reliance on tort law to an emphasis on end-of-pipe controls through direct regulation and finally to an emphasis on pollution prevention.” Despite the fact that common law tort claims have been used to abate pollution since the seventeenth century, the bulk of common law cases and lawsuits came during the late nineteenth and twentieth centuries, creating what is now known as environmental law.

At common law, landowners have the right to enjoy the benefits of their land free from “unwanted and unreasonable invasions by

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12 See, e.g., Yandle, supra note 8, at 110; Kuhnle, supra note 8, at 223.
14 Yandle, supra note 8, at 88–90 (citing William Aldred’s Case, 77 Eng. Rep. 816 (1611)).
people or pollution”—*sic utere tuo, ut alienum non laedas.* Prior to modern-day command and control statutes, the nuisance cause of action was the main tool for environmental protection. Actions can be either public or private, and the nuisances themselves can be both. A public nuisance claim can be brought against an action that interferes with public health and rights. However, public nuisance actions are generally brought by a public official or a member of the public meeting the “special injury” requirement.

A private nuisance affects a limited number of land owners, and creates “a substantial and unreasonable interference with the use and enjoyment of an interest in land.” The interference may be intentional and unreasonable, or unintentional if negligent, reckless or abnormally dangerous. The *Restatement (Second) of Torts* balances the gravity of the harm against the utility of the conduct to determine whether actions give rise to such a claim. Courts have taken various approaches to the balancing test. Some courts, rather than adopting the *Restatement* balancing approach, instead look for a level of interference that crosses some liability threshold. Despite the prevalence

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16 Yandle, supra note 8, at 91.
17 The Latin phrase means that one should use his or her own property in such a manner as not to injure that of another. Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953).
18 Id., supra note 8, at 91. The line between trespass, a direct physical invasion, and nuisance, an indirect invasion, has blurred over time, and there may be benefits to suing in trespass as opposed to nuisance. For further discussion of common law environmentalism, specifically nuisance and trespass, see Roger Meiners & Bruce Yandle, *Common Law and the Concept of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 926–38 (1999).
19 Id., supra note 8, at 91–92.
21 Id., supra note 8, at 91–92.
22 Id. at 92.
23 Id. (citing Ryan v. City of Emmetsburg, 4 N.W.2d 435 (Iowa 1942) and Lederman v. Cunningham, 283 S.W.2d 108 (Tex. Civ. App. 1955)); see also Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953); Restatement (Second) of Torts §§ 821F, 822 (1979).
24 Restatement (Second) of Torts § 822.
25 Id. § 826. Factors to determine the gravity of harm include the extent and character of harm, social value of plaintiff’s use, suitability to location, and burden on plaintiff to avoid harm. Id. § 827. Factors to determine the utility of the actor’s conduct include social value of actor’s conduct, suitability to location, and impracticality of preventing harm. Id. § 828.
26 See Meiners, Thomas & Yandle, supra note 15, at 69–70.
of environmental tort claims, the difficulty of fashioning appropriate remedies may create problems when using tort law to control pollution and other environmental harms.\textsuperscript{28}

Courts can abate the activity by granting the plaintiff injunctive relief\textsuperscript{29} or requiring the victims to pay damages.\textsuperscript{30} The courts can allow the activity to continue if the defendant pays damages,\textsuperscript{31} or they can simply deny relief. However, an award of permanent damages may fail to abate the pollution because it leaves injured parties without a remedy for future harms and provides no motivation for the polluter to stop polluting if payment of damages is cost-effective.\textsuperscript{32} Common law damage remedies put courts in the difficult informational position of deciding what amount of damages is appropriate to compensate the victims, or whether to limit pollution to a certain level.\textsuperscript{33}

Courts are also reluctant to grant an injunction for fear that its scope may be too broad or narrow and that, if the injunction is ineffective, bargaining will not take place between the parties.\textsuperscript{34} Courts often balance the economic harm caused by the pollution against the costs of the injunction, and, if the harm from the injunction is greater, courts will only award damages.\textsuperscript{35} In addition, tort law plaintiffs face the burden of having to show causation, which can be especially difficult if there are multiple polluters, and often plaintiffs must expend substantial financial resources to bring common law tort actions against entities having potentially far greater resources.\textsuperscript{36}

The difficulties in adjudicating common law tort claims progressively caused a shift from tort actions to more direct regulation of environmental harm.\textsuperscript{37} Both state governments and the federal government became more involved in the creation of command-and-control statutes and other legislation designed to set standards and mandate

\begin{footnotesize}
\begin{enumerate}
\item See Kubasek & Silverman, supra note 13, at 132.
\item See, e.g., Morgan v. High Penn Oil Co., 77 S.E.2d 682, 690 (N.C. 1953).
\item Kubasek & Silverman, supra note 13, at 132.
\item See id.
\item Kubasek & Silverman, supra note 13, at 132.
\item Id.; see also David Doege, A Pile of Legal Issues, Milwaukee J. Sentinel, June 26, 2004, available at http://www.jsonline.com/news/wauk/jun04/238996.asp (last visited Jan. 4, 2007) (Marquette Professor Michael O’Hear stated, “These cases can be tremendously complicated. They can go on for years and they can cost millions just to litigate.”).
\item For a brief summary of the transition from nuisance law to environmental regulation, see Jesse Dukeminier & James E. Krier, Property 777–79 (5th ed. 2002).
\end{enumerate}
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Beginning in the late 1960s and early 1970s, state and federal statutes created regulations to attempt to control pollution, and since that time there has been a proliferation of federal and state environmental statutes and administrative regulations.

Modern environmental law grew out of the common law tort system, and modern regulation of pollution arose in an effort to deal with the inadequacies of the common law. However, in many instances, in light of the complexities and bureaucracies of modern environmental regulation, the common law still provides an effective mechanism for determining appropriate pollution levels. Thus, while neither common or statutory law is wholly sufficient, the legal pendulum is swinging back ever so slightly towards common law tort actions.

State common law can be an effective means to prevent and remedy environmental pollution, as well as provide full compensation for harmed victims. In many circumstances, the federal environmental law regime has proven ineffective. Faced with ever-tightening budgets and the inconsistency of environmental enforcement from administration to administration—continuing through George W. Bush’s presidency—it is no surprise that the Environmental Protection Agency (EPA) has found it difficult to restrain polluters and restore already polluted ecosystems; as a result, cleanup of Superfund sites has been slow, and federal agencies often fail to regulate certain pollutants.

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38 See Kubasek & Silverman, supra note 13, at 135; Yandle, supra note 8, at 108.
39 Yandle, supra note 8, at 108.
41 Yandle, supra note 8, at 108.
42 Id. at 159.
44 After all, the primary goals of CERCLA are deterrence and restoration. See Jason J. Czarnezki & Adrianne K. Zahner, The Utility of Non-Use Values in Natural Resource Damage Assessments, 32 B.C. EnvTL. AFF. L. REV. 509, 525 (2005).
46 See, e.g., Bruce Barcott, Changing All the Rules, N.Y. TIMES MAG., Apr. 4, 2004, at 39.
47 See Congressional Budget Office, Analyzing the Duration of Cleanup at Sites on Superfund’s National Priorities List 8 (March 1994), available at http://www.cbo.gov (follow “Publications by Subject Area” hyperlink; then follow “Environment” hyperlink; then scroll down to “1994” section).
such as carbon dioxide under the CAA. In addition, the cost recovery tools of federal law have themselves become burdensome, while the common law traditionally “allows for damaged parties to recover losses.”

In general, it seems the differences between federal environmental statutes and state common law causes of action “mirror the advantages and disadvantages of federal and state law generally.” However, the advantages of the common law, at least in some circumstances, are substantial. Rigorous enforcement of state nuisance and trespass law may promote a preference for prevention if the proper signals are sent to potential polluters. Under the common law, plaintiffs can recover damages to be used for cleanup and restoration, obtain injunctions more easily, and enjoy broader liability parameters. The common law allows for a “broad array of damages,” yet defendants also can assert caveat emptor.

This is not to say that there are not disadvantages with the common law. Courts may not be able to easily design and monitor cleanups, and predictable outcomes and national standards may not exist without federal agency oversight. Courts may also lack the necessary information to fully assess and determine proper damage calculations, and injunctions may result in inefficient results.

The pros and cons of state common law actions are not limited to legal consequences, but also to the practical logistics of plaintiff litigation. Plaintiffs, or in most instances their attorneys (in light of contingency fees), must hire expensive scientific experts and perform costly and invasive scientific analyses of polluted sites. Plaintiffs must also be prepared to combat opposing expert witnesses. Then again, with

49 Kuhnle, supra note 8, at 221.
51 Kuhnle, supra note 8, at 222–23. Consequential damages (for example, falling land values) are available when using common law remedies. Id.; see also Meiners & Yandle, supra note 18, at 960.
52 Kuhnle, supra note 8, at 198; e.g., Meiners & Yandle, supra note 50.
53 Kuhnle, supra note 8, at 224.
54 Id. at 225–26.
55 Id.
56 Id. at 226; Meiners & Yandle, supra note 50.
financial risks can come high returns. If a plaintiff is successful, polluting defendants will think twice and proceed cautiously before appealing or continuing to pollute. The potential damages are high (making settlement a worthwhile choice if defendants are found liable in the trial court), and it is in the interests of polluting defendants to avoid published appellate decisions stating that certain toxic emissions or leaks are nuisances under state law, despite existing agreements with federal actors.\(^{58}\)

II. Preemption? The Relationship Between Federal Statutes and State Common Law

In order to utilize the common law, these traditional state causes of action must not be preempted by federal statutes.\(^ {59}\) Specifically, does the Clean Water Act (CWA), Clean Air Act (CAA), or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempt state common law doctrines, or is the state free to provide its own common law remedies? The CWA and CAA do not preempt state common law claims,\(^ {60}\) and CERCLA preemption law still permits substantial state common law claims.\(^ {61}\)

A. Nuisance Preemption and the Clean Water Act

Much discussion has focused on the preemptive effect of the CWA, with many analyses concluding that the CWA should be seen as preserving preexisting remedies available under state law.\(^ {62}\) The Supreme Court held, in \textit{International Paper Co. v. Ouellette}, that the CWA did preempt a Vermont nuisance law to the extent that the law imposed liability on a New York point source, but the CWA did not bar individuals from bringing the nuisance claim pursuant to the law of the source state (here, New York).\(^ {63}\) Thus, while the CWA preempted


\(^{59}\) We note that state statutes and federal common law are additional sources of authority, and state statutes may preempt state common law claims.

\(^{60}\) \textit{See infra} Part II.A–B.

\(^{61}\) \textit{See infra} Part II.C.


\(^{63}\) Int’l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (“The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals
one state’s nuisance law from being applied in another state, the CWA did not preempt a nuisance claim of the state where the pollution originated. The Court is less likely . . . to find federal preemption of state common law because it begins ‘with the assumption that the historic police powers of the states were not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress.’ The CWA does not expressly preempt state common law remedies. To the contrary, it preserves such remedies within the savings clause of the citizen suit provision of the Act. Legislative history of the citizen suit provision also indicates “an affirmative recognition that state common-law rights and remedies were meant to survive enactment of the federal statute.” Thus, pursuant to existing case law, the plain language of the Act, and the legislative history behind the Act, the CWA does not preempt state common law environmental claims.

B. Nuisance Preemption and the Clean Air Act

Like the CWA, the CAA does not preempt state common law nuisance claims. In another suit stemming from the facts of Ouellette, the court held that the CAA did not preempt state law nuisance claims by property owners for alleged air pollution damage arising from a paper mill. The court reasoned that “state law nuisance claims have always been available to private parties suing for damages for pollution that travels between state boundaries.” Additional case law supports the finding that the CAA does not preempt state common

from bringing a nuisance claim pursuant to the law of the source State.”). For a critique of current preemption jurisprudence and advocating allowing the nuisance laws of the affected state, see generally Ann M. Lininger, Narrowing the Preemptive Scope of the Clean Water Act as a Means of Enhancing Environmental Protection, 20 Harv. Envtl. L. Rev. 165 (1996).

64 Ouellette, 479 U.S. at 497.
65 See Glicksman, supra note 62, at 183 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981)).
66 See id.
67 Id. at 186 & n.366. The clause provides that “[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.” 33 U.S.C. § 1365(e) (2000).
69 See Rodgers, supra note 62, at 125.
71 Id. at 61.
law claims arising out of various instances of air pollution. Scholars have concluded that the CAA does not preempt state common law tort claims, using the same rationale as when discussing the CWA.

C. Nuisance Preemption and the Comprehensive Environmental Response, Compensation and Liability Act

Sources diverge as to the extent CERCLA preempts state common law claims. CERCLA contains a savings clause, stating that “nothing . . . shall be construed or interpreted as preempts any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.” Thus, it seems that Congress sought to have CERCLA “work in conjunction with other federal and state hazardous waste laws.” However, “CERCLA does preempt the application of state or local law to hazardous waste contamination where the state or local law is in actual conflict with CERCLA.” Courts have found preemption of state law where there is sufficient conflict between the state law and CERCLA’s contribution scheme, or where state law remedies would impair an effective cleanup.

Absent these limited scenarios, CERCLA does not preempt state law claims, including common law claims dealing with harm caused

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72 See Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) (holding that the CAA does not preempt source state common law claims against a stationary source and reasoning that preemption of state common law actions would entirely preclude compensatory relief that plaintiffs may show is justified); see also Abundiz v. Explorer Pipeline Co., 2002 WL 1592604, at *4–5 (N.D. Tex. Jul. 17, 2002) (finding that the CAA did not preempt plaintiffs’ state tort law claims, derived from a spill of MTBE-treated gasoline).

73 See Buchele, supra note 68, at 638–44; see also Andrew Mcfee Thompson, Free Market Environmentalism and the Common Law: Confusion, Nostalgia and Inconsistency, 45 EMORY L.J. 1329, 1344–46 (1996); Kuhnle, supra note 8, at 210–14.


76 Gen. Elec. Co., 335 F. Supp. 2d at 1225 (illustrating actual conflict means that it is impossible to comply with both the federal and state law).


78 The U.S. Court of Appeals for the Ninth Circuit, for example, found an industrial company liable for creating a public nuisance and violating state environmental laws for dumping hazardous chemicals in the ground near its manufacturing site. California v. Campbell, 138 F.3d 772, 782 (9th Cir. 1998). Even though the court lacked jurisdiction to
by hazardous waste.\textsuperscript{79} When CERCLA remedies are inadequate, a plaintiff can turn to common law causes of action for relief, and there is a modern trend toward the expansion of the common law so these causes of action can coexist with a CERCLA action.\textsuperscript{80}

III. Two Case Studies: Invoking the Common Law

This section describes two cases attempting to use state common law doctrines to abate environmental harm.\textsuperscript{81} In the first, we focus on the difficulty of stating a claim and proving causation, while in the second, we focus on the evaluation of damage remedies. In \textit{Connecticut v. American Electric Power Co.}, state and local governments have filed suit against power companies under state public nuisance law in order to mitigate greenhouse gas emissions.\textsuperscript{82} In \textit{Dyer v. Waste Management of Wisconsin}, despite the existence of agreements pursuant to CERCLA between polluters and the federal government, landowners have filed suit under state private nuisance doctrine in an effort to cleanup adjacent lands polluted with hazardous waste.\textsuperscript{83} Can, and should, these lawsuits relying on state doctrines of public and private nuisance prove successful?

allow an interlocutory appeal on the CERCLA issue, the court had the authority to hear both the nuisance claim and the state environmental claims, thus indicating that CERCLA may not preempt state law actions. \textit{Id.} at 775–77. However, it is not at all clear that preemption was argued, and \textit{California v. Campbell} was decided earlier than \textit{Fireman’s Fund Insurance Co. v. City of Lodi}.\textsuperscript{79}

\textsuperscript{79} See, e.g., Feikema v. Texaco, Inc., 16 F.3d 1408, 1416–17 (4th Cir. 1994) (where the Fourth Circuit concluded that state law claims for injunctive relief were preempted by federal statute (although the federal statute here was the Resource Conservation and Recovery Act (RCRA), rather than CERCLA), but that state law claims for damages were not preempted by the federal statute); Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 826–31 (Ill. 1981); State Dep’t of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 154, 160, 166 (N.J. 1983) (finding a corporation liable under theories of nuisance, strict liability, and a New Jersey state environmental law); Wood v. Picillo, 443 A.2d 1244, 1245 (R.I. 1982); see also Alexandra B. Klass, \textit{From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims}, 39 Wake Forest L. Rev. 903, 942–61 (2004) (discussing case law where state common law claims have been used to deal with hazardous wastes).


\textsuperscript{81} For another case study, see generally John Harleston & Kathleen M. Harleston, \textit{The Suffolk Syndrome: A Case Study in Public Nuisance Law}, 40 S.C. L. Rev. 379 (1999).


\textsuperscript{83} Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County argued Dec. 6, 2004).
A. In Lieu of the Clean Air Act

1. Regulating Greenhouse Gas Emissions

An effective tool is needed to help abate overwhelming greenhouse gas emissions. Federal law has shown not to be the best instrument to mitigate greenhouse gas production since carbon dioxide is not defined as a CAA criteria air pollutant requiring National Ambient Air Quality Standards, nor as an air pollutant requiring emission standards for new motor vehicles. The federal government has failed to mitigate carbon dioxide emissions under the CAA despite the plain language of the Act.

Dissenting in Massachusetts v. EPA—the case which upheld EPA’s decision that the agency cannot and should not regulate greenhouse gas emissions from motor vehicles under the CAA—D.C. Circuit Judge Tatel argued that greenhouse gases “plainly fall within the meaning” of air pollutants to be regulated under the CAA. Tatel went on to argue that if the EPA administrator finds the gases contribute to air pollution that puts the public’s health in danger, “then EPA has authority—indeed, the obligation—to regulate their emis-
sions from motor vehicles.” Currently, however, Congress has not explicitly mandated regulating greenhouse gases, and EPA has not voluntarily done so. Other than international initiatives, two other options remain available to mitigate greenhouse gas production: first, state and local responses such as state legislation, municipal programs and initiatives, and second, state common law remedies such as public and private nuisance.

A number of state and local governments have begun to consider programs and policies to limit the production of greenhouse gases. While some of these programs are voluntary, there has been a movement by state officials to recommend greenhouse gas emissions limits. For example, in 2003, Maine passed a law setting a statewide target for reducing greenhouse gas emissions. More recently, the Governor of California outlined a non-binding proposal to reduce the state’s greenhouse gas emissions to year 2000 levels in less than five years, and eighty percent less than 1990 levels in forty-five years.

89 Id. A parallel argument was successfully made by plaintiffs in Lead Indus. Ass’n, Inc. v. EPA, 647 F.2d 1130, 1148–56 (D.C. Cir. 1980), where the D.C. Circuit held that if EPA found lead emissions to endanger health and welfare, a nondiscretionary duty to list it as a criteria air pollutant arose. Thus, this argument might prove persuasive in both section 202 and 108 suits. See McKinstry, supra note 84, at 76–77. But EPA, relying on FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), concluded that “in light of the enormous economic and political consequences of regulating greenhouse gas emissions, Congress would have been far more specific if it had intended to authorize EPA to regulate the subject under § 202(a)(1) of the Clean Air Act.” Massachusetts v. EPA, 415 F.3d at 56 n.1 (citing 58 Fed. Reg. at 52,928).

90 However, states and municipalities are reluctant to pass such laws. See Jonathan H. Adler, Heated Nuisance Suits, TCSDAILY, July 27, 2004, available at http://www.tcsdaily.com/Article.aspx?id=072704C (stating that it imposes costs on a home state to call for state legislation requiring significant emission cuts).


93 38 Me. Rev. S. §§ 574–578 (2004) (calling for creation of a “climate change action plan” to reduce in-state carbon dioxide emissions to 1990 levels by 2010, to ten percent below 1990 levels by 2020, and eventually by as much as eighty percent).


In the absence of strong federal or state initiatives, the common law provides another option for mitigation of greenhouse gas emissions. As a primary example, in July 2004, eight states and New York City filed suit in *Connecticut v. American Electric Power Co.* against five of the country’s largest power companies in an effort to force a reduction in carbon dioxide emissions. Plaintiffs assert claims of federal common law public nuisance, and assert public nuisance under the state common laws where the power plants are located. While the companies do not dispute that carbon dioxide contributes to global warming, they do challenge the plaintiffs’ assertion that carbon dioxide emissions constitute a public nuisance. As the plaintiffs assert, “The action calls on the companies to reduce their pollution, and does not seek monetary damages.”

Specifically, the complaint alleges that the defendant companies have available to them “practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers.” Plaintiffs seek an order holding the defendants jointly and severally liable for a public nuisance, and an injunction against each of the defendants to reduce emissions by “a specified percentage” each year for at least a decade. According to the complaint, global warming is a public nuisance because it adversely affects public health (for example, heat deaths due to prolonged heat waves and asthma), coastal, water, and agricultural resources, the water levels of the Great Lakes, and flora and fauna.

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95 The eight states are California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.


98 Id. ¶ 23.


101 Id. ¶ 6.

102 Id. ¶¶ 3, 108–40.
Since greenhouse gases are not regulated under federal law, the states may have viable nuisance claims under state laws. If global climate change can be found to be a public nuisance and the defendant utilities responsible, the release of carbon dioxide can be abated. However, some have questioned whether the three percent per year emission reduction sought is sufficient to effect global climate change, and, in turn, why the state attorneys general have filed such a claim. While these concerns are certainly legitimate (and exemplify the difficulty in fashioning proper tort remedies), they question the remedy sought and do not raise concerns about using state common law as the underlying cause of action. That said, it is interesting to note that the state attorneys general, except Wisconsin, did not target facilities in their own states.

3. Proving Causation

Two major issues have arisen in determining the validity of state common law public nuisance claims to abate greenhouse gases: (1) whether plaintiffs can properly state a claim that the power companies intentionally and unreasonably contributed to global warming; and (2) whether these claims are in conflict with U.S. foreign policy or congressional regulation of global warming.

103 As stated, the complaint also asserts federal common law nuisance claims. Id. ¶ 1. Professor Adler has argued that these claims would not likely survive on the merits in light of existing federal statutes. Adler, supra note 90 (“Despite their claims, a federal common law cause of action for a public nuisance by carbon dioxide emissions is speculative, at best.”). While the CAA now has a comprehensive permit program like that of the Clean Water Act, which has preempted federal common law (see City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)), the CAA has not been utilized to regulate carbon dioxide emissions. Therefore, since EPA has taken the position that the agency does not have the authority to regulate carbon dioxide emissions under the Act (see Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005); 68 Fed. Reg. 52,922 (Sept. 8, 2003)), perhaps “[t]his makes it less likely that courts would find preemption of federal common law.” Updates to Environmental Regulation Casebook, http://www.law.umaryland.edu/faculty/bpercival/casebook/chap2.asp (last visited Jan. 4, 2007); see also New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981) (reserving judgment of the preemption question while noting that the CAA, unlike the CWA, did not regulate pollution from all sources).


105 Adler, supra note 90 (“The state AGs could have targeted facilities in their own states, bringing a series of state-law-based common law nuisance claims, but that would have meant imposing costs at home.”).


107 See id. at 274.
Plaintiffs could successfully state a claim for public nuisance under various state laws. As an example, under Wisconsin law, greenhouse gas emissions could constitute a public nuisance because these gases interfere with public health and public comfort.\textsuperscript{108} In order to effectively find liability for a public nuisance, a plaintiff must show the “existence of a public nuisance” and that defendants had “actual or constructive notice” of the nuisance.\textsuperscript{109} Producers of greenhouse gases cannot successfully disclaim these elements. They are certainly aware that their power plants and facilities emit greenhouse gases such as carbon dioxide.

Plaintiffs must also show that the defendants’ “failure to abate the public nuisance is a cause of plaintiff’s injuries.”\textsuperscript{110} On its face, proving causation might seem like a major challenge for plaintiffs. The defendants argue that plaintiffs cannot prove causation because their emissions represent less than two percent of global greenhouse gas emissions,\textsuperscript{111} and, while defendants know that their actions contribute to global climate change, they do not agree that they could have known that such emissions might cause the specific injuries asserted by plaintiffs.\textsuperscript{112} In other words, defendants may contribute to global warming, but they do not admit that global warming caused detrimental effects to the plaintiffs.\textsuperscript{113} Thus, courts may have to entertain a number of scientific experts to discuss to what extent our health and natural resources are adversely affected by increases in global temperature. While EPA describes many of these concerns as “uncertainties,”\textsuperscript{114} the Intergovernmental Panel on Climate Change and U.S. Department of

\textsuperscript{108} Wisconsin courts have adopted the Restatement definition of public nuisance. Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 691 N.W.2d 659, 669 (Wis. 2005); see also Restatement (Second) of Torts § 821B (2006). The Restatement requirements for determining a public nuisance are not the same as those found in the CAA. See, e.g., Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000), (“the emission of any air pollutant . . . which in his [or her] judgment . . . may reasonably be anticipated to endanger public health or welfare.”).


\textsuperscript{110} Id. at 794 (emphasis added).


\textsuperscript{113} See id.

State have documented the adverse effects of global warming,\textsuperscript{115} including detrimental effects in many areas of the United States.\textsuperscript{116} Therefore, while gases that emit foul odors have long been considered public nuisances,\textsuperscript{117} greenhouse gases simply create a different, and more scientifically complex, harmful effect.

However, under Wisconsin’s interpretation of the \textit{Restatement}, specific causal identification is not required since “public nuisance is focused primarily on harm to the community or general public, as opposed to individuals who may have suffered specific personal injury or specific property damage.”\textsuperscript{118} Plaintiffs need not prove that the defendants’ emitted gases are present in the states suing and that these gases became a hazard to the public.\textsuperscript{119} As the court stated in \textit{City of Milwaukee v. NL Industries, Inc.}, “Were it otherwise, the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals.”\textsuperscript{120} Evidence that power companies each produced carbon dioxide emissions does create a genuine issue of material fact for a court to deter-

\begin{itemize}
  \item \textsuperscript{115} Intergovernmental Panel on Climate Change, \textit{A Report of Working Group II of the Intergovernmental Panel on Climate Change, Summary for Policymakers}, http://www.grida.no/climate/ipcc_tar/wg2/005.htm (last visited Jan. 4, 2007).
  \item \textsuperscript{117} See \textit{City of Milwaukee v. Milbrew, Inc.}, 3 N.W.2d 386, 390 (Wis. 1942) (citing 2 Wood, \textit{Law of Nuisances} 819, § 609 (3d ed. 1893)); see also \textit{Breese v. Wagner}, 203 N.W. 764, 765–66 (Wis. 1925) (affirming trial court’s conclusion that a constructed roadway was a public nuisance for emitting offensive odors).
  \item \textsuperscript{118} \textit{City of Milwaukee v. NL Indus., Inc.}, 691 N.W.2d 888, 893 (Wis. Ct. App., 2004).
  \item \textsuperscript{120} 691 N.W.2d at 893.
\end{itemize}
mine whether defendants knowingly participated in the creation of the public nuisance of global warming.\textsuperscript{121}

4. Preemption

As discussed in Part II.B \textit{supra}, the CAA does not preempt common law nuisance claims. However, an alternative theory is that these state claims are preempted due to other congressional action and the goals of U.S. foreign policy.\textsuperscript{122} In this respect, common law claims in the greenhouse gas and global warming context are unique because trans-boundary greenhouse gas emissions have a global impact and are subject to the foreign policy concerns of the political branches of government.\textsuperscript{123}

According to Judge Preska of the Southern District of New York in \textit{Connecticut v. American Electric Power Co.}, in fashioning a remedy, the court would be required to consider the impact of the relief granted on “the United States’ ongoing negotiations with other nations concerning global climate change” and “the United States’ energy sufficiency and thus its national security.”\textsuperscript{124} Thus, she concluded that the plaintiffs’ complaints “present non-justiciable political questions that are consigned to the political branches, not the Judiciary.”\textsuperscript{125} This holding has already been appealed to the U.S. Court of Appeals for

\begin{footnotes}
\item\textsuperscript{121} \textit{Accord id.} at 894 (“Evidence that Mautz and NL Industries each promoted the use of lead paint directly to the public and through sales staffs creates a genuine issue of material fact for the jury on the question of whether defendants participated in the creation of a public nuisance of childhood lead poisoning in the City of Milwaukee.”). While the nuisance may affect the suing states, the plaintiffs likely must rely on the law of the source states. Only Wisconsin is home to a plaintiff and a defendant power plant. As Professor William H. Rodgers, Jr. stated:

\begin{quote}
One is tempted to predict that state courts are not likely to be overenthusiastic about proposals to mulct local business for the benefit of strangers residing across the border . . .
\end{quote}

\begin{quote}
Actually, predictions of outcome are likely to be sensitive not so much to the content of the law but to who is applying it. Nuisance law is pretty much the same from state to state, and a federal judge sitting in Vermont might be disposed to apply New York law for the benefit of Vermont residents.
\end{quote}

\item\textsuperscript{122} Id. \textit{at} 272.
\item\textsuperscript{123} Id. \textit{at} 274.
\item\textsuperscript{124} \textit{Id.} at 272.
\item\textsuperscript{125} Id. at 274.
\end{footnotes}
the Second Circuit, and while there are strong reasons to be skeptical of an affirmance, such a ruling, if upheld, is likely limited to the global warming context, and the political question doctrine would not stop similar nuisance claims against air, land, or water pollutants as they are generally not preempted by federal law.

B. *In Lieu of CERCLA*

1. Restoring Hazardous Waste Sites

While success stories exist, EPA has faced difficulties in implementing the goals of CERCLA, and, in turn, cleaning up sites on the National Priorities List (NPL). This has occurred for a number of reasons including politics and bureaucratic red tape, but the traditional criticism against CERCLA is that cleanup of Superfund sites is too slow and too expensive.

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126 One may be skeptical that the Second Circuit will hold that this nuisance case is non-justiciable as a political question as this is not the type of case dealing with the internal workings of the other branches of government, see Nixon v. U.S., 506 U.S. 224, 228 (1993). In addition, the presence of political issues does not necessarily indicate a non-justiciable political question. See Kadic v. Karadžić, 70 F.3d 232, 249 (2d Cir. 1995). Is the question of whether global warming equals a public nuisance best left to the political branches? Perhaps this is a question of institutional competence. See, e.g., Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27 (2003).

127 See supra Part II.


130 Part of this failure by EPA to enforce aggressively hazardous waste cleanup is merely a result of bureaucratic red tape. In order for EPA to issue administrative orders to another federal agency, it must first get acceptance from the Department of Justice. This requirement leads to prolonged negotiations, which in turn result in enormously slow responses to CERCLA by polluters, including federal facilities. Shane Justin Harvey, *Environmental Law Survey*, 71 Denv. U. L. Rev. 961, 967 (1994).

Despite Congress’s directives, however, EPA implementation of the federal hazardous waste statutes has had a tortured history. Cleanup of hazardous waste sites has proceeded slowly. The EPA has failed to meet its statutory deadlines, and Congress has severely criticized EPA regulations and policy under both RCRA and CERCLA. Several causes account for these problems, including the intrusion of partisan politics into Agency operations, the inadequacy of Agency resources, and the magnitude of the Agency’s task. These recurring difficulties have raised doubts about the viability of agency-forcing as an approach to environmental legislation, leading some to call for increased administrative discretion.
reason for slow cleanups; it takes significant time and money to produce scientific analysis that will lead to development and implementation of a site-specific remediation plan, especially if risk-tolerance must be low.

Are CERCLA’s perceived failures due to administrative failure or responsible science? The empirical data is insufficient to answer this question. Finding evidence of systematic agency capture is difficult when cleanups are performed by state agencies and EPA regional offices that may vary greatly in their institutional cultures, effectiveness, and reliance on traditional enforcement mechanisms.131 Discussed infra, the case of Dyer v. Waste Management of Wisconsin is arguably an example of administrative failure or foot-dragging by a potentially responsible party (PRP).132 Despite multiple time-consuming studies and engineering actions, pollution may have continued to migrate from a Superfund site into the property of adjacent landowners.

In addition, there may be reasons to be concerned about administrative failure when dealing with a single or dominant-PRP site. The single or dominant PRP may strategically subvert agency control and cleanup, something much more difficult to do in the dynamic environment of a multiple-PRP site where corporate influences will cancel out, reducing the possibility of agency capture. Though even in the latter cases, a single PRP may control and dominate the multiple-PRP litigation and cleanup process, attempting to maximize future profits while negotiating with trustees (for example, it is better to pay little and delay now, and instead pay later).

At minimum, the sheer number of parties involved in the cleanup of hazardous waste sites may result in jumbled and inconsistent enforcement. Evidence exists, however, that EPA embraces policies which may foreclose expedient cleanup and restoration of damaged property and resources.133 EPA permits “reliance on natural

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131 Federal and state agencies serve as trustees to oversee the cleanup and the natural resource damage assessment process. See, e.g., 43 C.F.R. § 11.14(rr) (2005) (allowing any agency listed in the national contingency plan to be a trustee).

132 Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County, argued Dec. 6, 2004).

133 Office of Solid Waste, Emergency Response Dir. 9200.4-17P, Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Site 1–2 (Apr. 21, 1999) [hereinafter OSWER Dir. 9200.4-17P]; see also Changes in Utility Infrastructure Raise NEPA Consideration, Army Law., Jul. 1998, at 84, 85–86.
attenuation processes (within the context of a carefully controlled and monitored site cleanup approach) to achieve site-specific remediation objectives within a time frame that is reasonable compared to that offered by other more active methods.”\textsuperscript{134} Natural attenuation is a restoration approach “without human intervention.”\textsuperscript{135} In other words, it is a policy of “no action,”\textsuperscript{136} allowing for natural processes to clean the environment over time. Natural Attenuation is unlike most common law jurisprudence where the goal is to restore the polluted area in the immediate future.\textsuperscript{137}

Natural attenuation certainly is an attractive solution for PRPs in light of the costly nature of site cleanup.\textsuperscript{138} Yet it does not encourage cleanup in the foreseeable future and instead endorses long-term, natural remediation. As other scholars have pointed out, “EPA endorses the use of natural attenuation as long as the proper evaluation and monitoring are performed to demonstrate that human health and the environment are sufficiently protected.”\textsuperscript{139} Natural attenuation is permissible so long as the contaminant will decrease over time, there is continual monitoring, and the time-frame is reasonable.\textsuperscript{140} However, combined with EPA approval of cost-benefit analysis in evaluation for site cleanup options,\textsuperscript{141} seventy-five years can be con-

\textsuperscript{134}See OSWER Dir. 9200.4-17P, supra note 133.
\textsuperscript{135} The “natural attenuation processes” that are at work in such a remediation approach include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, mobility, volume, or concentration of contaminants in soil or groundwater. These in-situ processes include: biodegradation; dispersion; dilution; sorption; volatilization; radioactive decay; and chemical or biological stabilization, transformation, or destruction of contaminants. Changes in Utility, supra note 133 at 84, 85–86.
\textsuperscript{136} Robert G. Knowlton & Jeffrie Minier, Recent Trend for Environmental Compliance Provides New Opportunities for Land and Water Use at Brownfields and Other Contaminated Sites, 41 NAT. RESOURCES J. 919, 928 (2001); see also James W. Hayman, Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act, 5 BARRY L. REV. 95, 123–24 (2005) (“The mantra of EPA is that ‘dilution is not a solution to pollution’ . . . .”).
\textsuperscript{137} See infra Part IV.
\textsuperscript{138} See Erik Claudio, Comment, How the EPA May Be Selling General Electric Down the River: A Law and Economics Analysis of the $460 Million Hudson River Cleanup Plan, 13 FORDHAM ENVTL. L. REV. 409, 426–32 (2002); Knowlton & Minier, supra note 136, at 928 (“The potential cost savings in remediation through the application of the natural attenuation strategy . . . .”).
\textsuperscript{139} Knowlton & Minier, supra note 136, at 928 (citing OSWER Dir. 9200.4-17P, supra note 133).
\textsuperscript{140} Id. at 929; see also Changes in Utility, supra note 133, at 85–86.
\textsuperscript{141} Knowlton & Minier, supra note 136, at 931–32.
sidered a reasonable time period.\textsuperscript{142} Despite such long time periods, EPA allows natural attenuation, although “very cautiously,” to be the exclusive remedy at contaminated sites.\textsuperscript{143}

EPA expects that sites that have a low potential for plume generation and migration are the best candidates for monitored natural attenuation.\textsuperscript{144} But concern exists as to whether these strategies are consistently applied across EPA’s regions, or even from one site to another within regions.\textsuperscript{145} It is an open question as to whether regulators are “only accept[ing] natural attenuation as a remedy when it meets all applicable, relevant, and appropriate health requirements.”\textsuperscript{146} There is a very real concern that natural attenuation will be used just to get contaminated sites “off-list” without good data and predictions as to whether contaminants will actually be removed, and contaminated groundwater will not be polluted downgradient in the future.\textsuperscript{147}

With the possibility of administrative failure in a given case, a foot-dragging PRP, and the (over) use of natural attenuation and cost-benefit analysis in site cleanup, sites containing a migrating or existing pollutant affecting a third party may not be remedied within a reasonable timeframe. However, under state common law the same pollutant would be considered a nuisance and promptly abated. An advantage of the common law is that it serves as a tool for more immediate cleanup, in conjunction with CERCLA, to decrease response time in dealing with an existing plume and ensure proper remediation.\textsuperscript{148} Although, if CERCLA works properly in restoring the polluted site and adjacent land, any common law claims may be minimal.

\textsuperscript{142} Id. at 931 (citing Robert G. Knowlton, Jr., \textit{Benefit-Cost Analysis of Groundwater Alternatives at the DOE UMTRA Site Near Riverton, WY 18} (July, 1997) (unpublished report, on file with authors)).

\textsuperscript{143} \textit{Changes in Utility}, supra note 133, at 85 (citing OSWER Dir. 9200.4-17P, \textit{supra} note 133); see also \textit{Environmental Law Division Notes}, ARMY LAW., Mar 1995, at 35, 36 (stating that natural attenuation can be “even a stand-alone remedial alternative”); Nicholas J. Wallwork & Mark E. Freeze, \textit{Managing Environmental Remediation Under Federal CERCLA, SL080 ALI-ABA} 401, 419 (2006) (stating that natural attenuation can “be selected as a sole-remedy”).

\textsuperscript{144} \textit{Changes in Utility}, supra note 133, at 85; see Stephanie Pullen et al., \textit{Recent Developments in Environmental Law}, 30 \textit{Urb. Law.} 945, 980 (1998) (discussing when the use of natural attenuation is appropriate).


\textsuperscript{146} \textit{Environmental Law Division Notes}, \textit{supra} note 143, at 36 (emphasis added).


\textsuperscript{148} Another advantage of the common law is clearly the availability of personal injury damages, unavailable under CERCLA. \textit{See generally Developments in the Law—Toxic Waste Litigation, supra} note 130, at 1602.
2. The Common Law and *Dyer v. Waste Management of Wisconsin*

The now-closed Muskego Sanitary Landfill was permitted to operate in 1954 with consent from the City of Muskego, Wisconsin and in 1971 with permission from the Wisconsin Department of Natural Resources (WDNR). Unfortunately, private wells near the landfill were found to have elevated contaminant levels, eventually resulting in the landfill site’s addition to the National Priorities List (NPL) of hazardous waste sites eligible for long-term remedial action financed under the federal Superfund program.

In *Dyer v. Waste Management of Wisconsin*, landowners allege that defendant Waste Management allowed and accepted illegal liquid waste to be dumped at the landfill adjacent to their property. Plaintiffs allege that this waste included vinyl chlorinated solvents used in paints and degreasers that degrades into vinyl chloride, a known carcinogen, which later migrated from the landfill onto plaintiffs’ properties. The plaintiffs allege that Waste Management did not have a license to dump this liquid waste at the Muskego landfill and that the groundwater quality began to deteriorate around the landfill. The complaint alleges that chlorinated solvents were found at dangerous concentrations in adjacent property owners’ ground water, spring-fed ponds, and drinking water wells.

Plaintiffs assert a variety of state common law claims against Waste Management, including: (1) negligence (failure to exercise duty of reasonable care in operating the landfill); (2) private nuisance (substantial interference with use and enjoyment of land); and (3) trespass (intrusion of hazardous and toxic substances from the landfill onto plaintiffs’ properties).

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150 See id.

151 Complaint at ¶ 4, *Dyer v. Waste Mgmt. of Wisconsin, Inc.* (WMWI), No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Apr. 13, 2004). Co-author Mark Thomsen is an attorney representing the plaintiffs in this case as well as the plaintiffs in the consolidated case of *Muskego Moose Family Center No. 1057 v. WMWI*, No. 04-CV-912 (Wis. Cir. Ct., Waukesha County Apr. 13, 2004). All materials relating to the *Dyer* case are available and on file with the authors.

152 Id. ¶¶ 1–2, 4.

153 Id. ¶¶ 21–22.

154 Id. ¶ 25.

155 Id. ¶¶ 70–78.

156 See id. ¶¶ 96–118.
Federal action has proven less than effective in this case. While the landfill site was added to the NPL in the mid-1980s, even after remedial action, hazardous substances remain above health-based minimum levels. The remedial investigation and feasibility study began in 1987 and was completed in 1992, construction of the landfill cap and gas collection system were completed in 1994, and a limited groundwater pump-and-treat system was completed in 1997. In 1998, owners of private residences located near the landfill were notified by the WDNR and the State of Wisconsin Department of Health and Family Services that vinyl chloride was present in their private water supply wells at concentrations that exceeded state and federal drinking water standards. Thus, federal regulatory action did not restore the contaminated area or groundwater to the required regulatory standards.

3. Enforcing State Common Law

Statutory omissions, administrative problems, and enforcement inefficiencies should not limit common law causes of action that might provide additional remedies to landowners. In light of the inadequacies of the federal regime, common law principles have a role to play. The common law, first, should not be adversely affected by the federal role (for example, CERCLA compliance orders administered by EPA), and, second, should force polluters to be seen as violators of state law, serving as an important deterrent to environmental pollution.

For example, at the preliminary stages of a hazardous waste common law action, expert witnesses should not be allowed to discuss compliance with a consent decree. An expert opinion about an EPA compliance order “simply has no appropriate role to play . . . in the common law causes of action which are being pursued.” A defen-

157 U.S. EPA, NPL Fact Sheets for Wisconsin: Muskego Sanitary Landfill, supra note 149.
158 Id.
159 Letter from State of Wis. Dep’t of Natural Res. to Mr. Art Dyer (Apr. 28, 1998) (on file with authors); Letter from State of Wis. Dep’t of Health and Family Servs. to Mr. and Mrs. Anthony Vitrano (Feb. 17, 1998) (on file with authors).
160 U.S. EPA, NPL Fact Sheets for Wisconsin: Muskego Sanitary Landfill, supra note 149 (“[T]he remedial action resulted in hazardous substances at the site above health-based levels . . . .”).
161 See Charlie Garlow, Environmental Recompense, 1 Appalachian J.L. 1, 9, 17 (2002).
162 Transcript of Proceedings of Sept. 9, 2004 at 60, Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Sept. 9, 2004) (quoting Judge Skwierawski, and referring to CERCLA’s savings clause, which “preserve[s] common law obligations or liabilities under state law”).
dant’s compliance with a federally dictated decree should not be relevant as to whether that defendant has violated state nuisance laws. Retired Wisconsin Circuit Court Judge Michael Skwierawski (acting as Special Master) stated in *Dyer*:

> Plaintiffs’ argument about private nuisance causes of action is absolutely correct. It is irrelevant whether Waste Management’s conduct complied with CERCLA or complied with standards set forth in the National Contingency Plan or any other place if the Plaintiffs can establish that their conduct and the activities on the property caused the leaching of hazardous cancer-causing chemicals into adjacent wells. That’s, I think, a fairly straightforward proposition. It doesn’t make any difference what they did or didn’t do if that’s what happened.\(^{163}\)

In other words, it is irrelevant whether a defendant has complied with the federal rules—statutes, contracts, or otherwise—if there remains a failure to comply with state law. Where there is no federal preemption, states must be free to determine what constitutes environmental harm in their own jurisdictions.

State common law doctrines can therefore become effective deterrents of environmental harms. But, this deterrent effect can only occur if compliance (or lack thereof) with the federal regime does not automatically dictate a liability finding in state jurisdictions.\(^{164}\)

Again, Judge Skwierawski stated:

> The bottom line remains that there are independent common law obligations as argued by the Plaintiffs on the—impressed upon the Defendants that are to be analyzed separately and free from and apart from the existence of CERCLA consent orders and the listing of actions to be taken pursuant to those.\(^{165}\)

Consent decrees or compliance orders do not dictate what is an allowable release under state nuisance and trespass laws.\(^{166}\) State law

\(^{163}\) *Id.* at 61–62.

\(^{164}\) *See id.* at 64.

\(^{165}\) *Id.*

\(^{166}\) *Id.* at 63 (noting that compliance with a consent decree is not relevant in determining whether defendant’s conduct was reasonable or constituted a nuisance); *see also* Garlow, *supra* note 161, at 9 (“[C]ompliance [with natural resource statutes] does not ensure that an activity will not be subject to a nuisance claim.”) (citing Galaxy Carpet Mills v. Mas-
liability should not be affected by the enforcement culture in the federal government.\textsuperscript{167} We note that this conclusion cuts both ways. State common law may be less environmentally friendly than a federal agreement. Thus, a failure to comply with a federal arrangement does not necessarily mean there has been a violation of state common law.

However, while it is arguably easier for the cause of action to proceed in this more traditional pollution nuisance case than in the greenhouse gas context, discussed \textit{supra}, the proper remedy may be more difficult to determine.\textsuperscript{168} Yet, without appropriate (here, common law) remedies, there will be no deterrence under state law. As Judge Skwierawski stated:

The plaintiff makes a powerful argument, I think, about the fact that if alternative sources of water are supplied and the defendants are not required to clean up the mess that they have made in the plaintiffs’ view, then there is no deterrent in the law. They can turn our underground water supplies into sewers and just truck in more water. The community has [sic] a whole just kind of sails onward. That’s, depending on the jury, a potentially powerful argument that may influence a jury to agree with the plaintiffs’ version of restoration damages being the most reasonable measure and the appropriate measure to be assessed. It may influence one way or the other the trial judge at the same time.\textsuperscript{169}

Thus, property owners or possessors may have a right to a clean underground water supply, and the remedy that will fully compensate such persons for the breach of this right must include cost of restoration damages.\textsuperscript{170}

\textsuperscript{167} Transcript of Proceedings of Sept. 9, 2004 at 62–63, Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Sept. 9, 2004) (“[S]tandards under the common law regarding a landowner not to create a nuisance, public or private, cannot be set by a process which is subject to the current whims in enforcement.”).

\textsuperscript{168} See Massachusetts v. EPA 415 F.3d 50, 53 (D.C. Cir. 2005).

\textsuperscript{169} See Transcript of Proceedings of Dec. 6, 2004 at 62–63, Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004) (Skwierawski, J.); see also infra note 202 and accompanying text.

\textsuperscript{170} See Transcript of Proceedings of Dec. 6, 2004 at 62–63, Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004) (Skwierawski, J.); see also infra note 202 and accompanying text.
4. The Remedy and Damages

The common law has long recognized the importance of a clean environment for private property owners and the public at large,\textsuperscript{171} and “[t]hose who poison the land must pay for its cure.”\textsuperscript{172} The Wisconsin Court of Appeals observed “that access to, and use of, an undefiled underground water supply is a right of private occupancy,”\textsuperscript{173} and therefore, it has been the law of Wisconsin and other states “that the cost of repairing and restoring damaged property and water to its original condition is a proper measure of compensatory damages.”\textsuperscript{174}

Restoration cost is an additional appropriate measure of damages even when the diminution in value to the plaintiffs’ properties is considered.\textsuperscript{175} Courts have occasionally applied the rule that a plaintiff is entitled instead to the lesser of the “cost of repairs or diminution in value.”\textsuperscript{176} However, this should not be a steadfast rule to be applied in every case.\textsuperscript{177} For example, the court in \textit{Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Co.},\textsuperscript{178} recognized that the “diminished value land rule” is an archaic rule that does not truly compensate a land owner for the wrongful acts of a defendant:

\textsuperscript{171}\textit{William Blackstone, 3 Commentaries on the Laws of England} 218 (Garland Pub., 1978) (1783) (noting that it is a nuisance “to corrupt or poi[s]on a water-cour[s]e”); see also Hammack v. Mo. Clean Water Comm’n, 659 S.W.2d 595, 600 (Mo. Ct. App. 1983) (“Clean water is the essence and lifeblood of our society. Without it we will perish.”).


\textsuperscript{174}Johnson Controls, Inc. v. Employers Ins. of Wausau, 665 N.W.2d 257, ¶ 57 (Wis. 2003) (quoting Gen. Cas. Co. of Wis. v. Hills, 561 N.W.2d 718, 725 (Wis. 1997)); Anstee v. Monroe Light & Fuel Co., 177 N.W. 26, 27 (Wis. 1920) (“Since no further recurrence of the nuisance is likely to take place, the court properly assessed damages for future as well as past injury to soil and well occasioned by the acts of the defendant complained of. In this way, and in this way only, could plaintiff be made whole in one action for the loss sustained by him by reason of the acts of nuisance already committed by the defendant.”); Magnolia Petroleum Co. v. Smith, 238 S.W. 56, 59 (Ark. 1922) (“[T]he measure of [plaintiff’s] damage was not as for a total destruction of his well and the cost of digging another one, as the learned trial judge found, but the expense which [plaintiff] would necessarily have to incur in order to restore his well to its former use.”). Under current law, individual plaintiffs are entitled to the restoration damages. Compare this outcome to the common fund discussed \textit{infra} Part IV.

\textsuperscript{175}Laska v. Steinpreis, 231 N.W.2d 196, 200 (Wis. 1975).

\textsuperscript{176}See, \textit{e.g.}, id. For a discussion of doctrines to award restoration damages, see James R. Cox, Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts, 20 PACE ENVTL. L. REV. 777, 781–802 (2003).

\textsuperscript{177}See Sch. Dist. No. 15 of Town of Granville v. Kunz, 24 N.W.2d 598, 599 (Wis. 1946) (“A reasonable argument could be made that in any case the cost of rectifying the damage is the proper measure even though it may exceed the diminution in value of the damaged property . . . .”).

\textsuperscript{178}618 So.2d 874, 877 (La. 1993).
Recently, courts and commentators have criticized . . . simplistic tests which require the automatic application of limitations on an owner’s recovery of the cost to restore or repair his damaged property. Such ceilings on recovery not only seem unduly mechanical but also seem wrong from the point of view of reasonable compensation. If the plaintiff wishes to use the damaged property, not sell it, repair or restoration at the expense of the defendant is the only remedy that affords full compensation. To limit repair costs to diminution in value is to either force a landowner to sell the property he wishes to keep or to make repairs partly out of his own pocket. Rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice. Limiting the costs of repairs to the diminution in value of the property appears to fly in the face of the rule requiring that the injured party be restored to his former position.\textsuperscript{179}

As one commentator stated, “Anachronistic limitations on recovery based on property value fail to take into account the public’s interest in ensuring an effective cleanup.”\textsuperscript{180}

**IV. The Common Law Fund**

Stated simply, the common law strives for immediate cleanup of pollution and condemns the destruction of the natural environment. Federal environmental law, such as the CAA and CERCLA, strive for

\textsuperscript{179} Id. (citing Myers v. Arnold, 403 N.E.2d 316, 321 (Ill. App. Ct. 1980)) (awarding $3.6 million to repair structural damage to an historic church building even though church had no present intention to restore) (internal quotations omitted); see also St. Martin v. Mobil Exploration & Producing U.S. Inc., 224 F.3d 402, 410 (5th Cir. 2000) (affirming restoration damages award of $10,000 per acre which exceeded the purchase price and market value of approximately $245 per acre); C.R.T., Inc. v. Brown, 602 S.W.2d 409, 410 (Ark. 1980) (“The fact that it would be expensive to restore the land to its former condition [was] not reason alone to overrule [restoration damages].”); Council of Unit Owners v. Carl M. Freeman Assocs., Inc., 564 A.2d 357, 361–62 (Del. Super. Ct. 1989) (in a case where plaintiffs alleged between $13 and $15 million in restoration damages and defendants alleged that the market value of the properties had increased, the court established the measure of damages as the “cost of repair”).

\textsuperscript{180} Cox, supra note 176, at 809. There are outer-limits to restoration value as the fact-finder should, in determining damages, take into account what can be remedied cost-effectively (in contrast to looking at the point of harmful exposure) and the underlying conduct of the defendant. See id. at 808.
similar outcomes, as the statutes’ goals are deterrence, environmental protection, and reduction and elimination of pollution.\textsuperscript{181} However, CERCLA cleanups and consent decrees typically focus on federal standards, and not the often higher state standards.\textsuperscript{182} Determining nuisance under state common law, however, would look to state air quality or toxic release standards.\textsuperscript{183}

The argument against using state common law is that it will lead to increased litigation costs without the benefit of established federal norms, as well as buck the recent trend to engage in faster, voluntary cleanup with higher risk tolerance; hence the use of natural attenuation and cost benefit analysis.\textsuperscript{184} However, under state common law, cleanup can occur under state mandated contaminant levels (which would determine what constitutes a nuisance under state law) and judicially mandated time frames, working with additional financial resources.

For example, the Wisconsin state standard for vinyl chloride in drinking water is 0.2 parts per billion (ppb),\textsuperscript{185} while the federal standard is a much higher 2.0 ppb.\textsuperscript{186} If landowners are to have full beneficial use of their property,\textsuperscript{187} there must be immediate cleanup to achieve the federal standard instead of waiting many years for natural cleanup, and if landowners are to have full use and enjoyment, then any cleanup and restoration initiative must respond to state standards—a choice that would promote environmental federalism.\textsuperscript{188}

State common law, given the arguably ineffective existing federal regime, makes it possible to achieve pollution deterrence and cleanup in the foreseeable future under higher standards, and provides additional funds to reach an under-funded goal.\textsuperscript{189} “From the standpoint of a plaintiff whose property has become contaminated by environmental pollutants, damage remedies that are designed to promote full

\begin{itemize}
\item \textsuperscript{181} 42 U.S.C. § 7401 (2006); Ohio v. DOI, 880 F.2d 432, 446 (D.C. Cir. 1989).
\item \textsuperscript{182} Cox, \textit{supra} note 176, at 779–80.
\item \textsuperscript{183} See Andrew Jackson Heimert, \textit{Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution}, 27 \textit{Envt. L.} 403, 460–61 (1997).
\item \textsuperscript{184} See \textit{id.} at 414–15.
\item \textsuperscript{187} After all, the federal Maximum Contaminant Level Goal is zero. \textit{Id.}
\item \textsuperscript{189} See Adler, \textit{supra} note 188, at 135–36.
\end{itemize}
restoration of property have been slow to evolve.”¹⁹⁰ The following proposal for a common law fund doctrine, consistent with other equitable proposals to expand the scope of restoration remedies,¹⁹¹ will help by creating more available resources and moving pollution cleanup and deterrence efforts along.

A. Description

Judges have long invoked their equitable powers “to adopt appropriate remedies to meet the exigencies of a given case,”¹⁹² especially when the case requires creative, flexible, and imaginative remedies because traditional forms of monetary relief, such as loss of property value, are inadequate.¹⁹³ Implementation of a common law equitable remedy—the common law fund—would further promote the use of state common law doctrines to restore and repair our natural resources.

Fashioned by state court judges, the common law fund would allow—and possibly mandate in the interests of public policy—damages to be paid into a fund that could be used to restore plaintiffs’ property, often adjacent to hazardous waste disposal sites, damaged by pollutants. While money would go to pay for attorney contingency fees¹⁹⁴ and named plaintiffs may receive some remuneration, the substantial majority of the damages paid would go to restoration, an outcome that often takes too much time due to a shortage of federal resources. Attorneys would be willing to take cases subject to the common law fund because attorneys fees would be paid, and private plaintiffs—

¹⁹⁰ Cox, supra note 176, at 809.
¹⁹¹ See generally Cox, supra note 176, at 777, 805 (suggesting that courts should expand existing equitable trust doctrines and apply them to awards of environmental restoration damages, and noting that it has been suggested by at least one court).
¹⁹³ See Howard W. Brill, Equitable Remedies for Common Law Torts, 1999 Ark. L. Notes 1, 13 (recognizing the need for “alternative creative remedies when a simple exchange of money as a form of substitutionary relief was inadequate[,]” and stating that “[e]quity has inherent and broad powers to fashion, shape and indeed create a remedy to prevent, or if time has passed, to correct a wrong. Those powers also exist, to be exercised creatively and imaginatively, when the wrong to an individual is defined by the rights flowing from the millennium-long growth of the common law.”).
especially environmentally oriented ones or ones who think cleanup of their property is worth more than the lost market value of their property—would make use of the doctrine, as would non-profit environmental groups that now would have a mechanism to fund lawyers. The amount of money to be paid into the fund would be projected reasonable restoration costs, and judges would not have to allocate damages among various plaintiffs. Thus, plaintiffs would have a remedy available that would allow for direct cleanup and full use of their property in the post-restoration future, rather than be paid only a likely smaller amount for their property value diminution.

In addition, the fund would promote efficiency and would protect all future individuals who might be harmed by pollution. Without the fund to clean up all adjacent lands, there is the potential for future, more costly lawsuits by landowners downgradient. This potential will provide a strong incentive for PRPs to move early and cleanup now, creating more sustainable business practices, and the fund could resolve all liability for defendants as to potential future plaintiffs.

The common law fund (here, the actual monies) would require judicial oversight to see that the fund is used properly to support more aggressive, and possibly agency-supervised, cleanup and restoration. A cleanup and restoration plan may be mandated by the court itself—or in conjunction with a court appointed trustee, such as a state environmental protection agency—or the fund could be used to support an existing cleanup plan. In other words, the court, as part of approving the settlement or as a judicial finding, would direct that cleanup would commence. CERCLA would not preempt such a remedy because the fund would further effective cleanup by providing

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195 The common law fund is useful where the resource is undervalued by the market. See supra Part III (discussing the inadequacy of measuring damages by diminution of value). See generally Czarnecki & Zahner, supra note 44 (discussing the undervaluation of non-use values, and discussing the importance of receiving full restoration costs).

196 Accord Cox, supra note 176, at 802 (stating that a “constructive trust’ or ‘equitable trust’ . . . could be created for the benefit of future property owners, neighbors, and/or for interested members of the general public”).

197 1 Daniel P. Selmi & Kenneth A. Manaster, State Environmental Law § 3.23 (2005) (“A consistent theme in case law discussions of nuisance remedies is flexibility in the judicial approach to the problem. The court’s basic aim is to adjust the conflict in a pragmatic way and to settle on a remedy that will intrude least on the prerogatives of property owners.”).

198 Cox, supra note 176, at 780 (discussing the interest in intergenerational equity).

199 Accord Cox, supra note 176, at 807 (stating that the fund “should be administered for the benefit of future property owners and members of the public”).

200 See Cox, supra note 176, at 808–09.
direct resources to the trustees or plaintiffs in control of the cleanup process.201

The common law fund addresses the view that restoration is the only appropriate remedy. For example, hazardous waste might pollute well-water. Damages as a measure of diminution of property value often may be less than the value to a landowner of having clean groundwater. What if diminution of value were accompanied by an alternative water source?202 Polluters should not be able to destroy public resources, so long as they can provide injured parties with, for example, a lifetime and unlimited supply of bottled water or a connection to municipal water. Instead, nuisance law and the common law fund, like environmental statutes, are meant to both deter pollution and restore already polluted areas.203

Creation of the common law fund is not only within the equitable powers of the judiciary, but its development is supported by the rationales for other fund-like arrangements.204 For example, using their equitable powers, judges in the class action context may invoke the *cy pres* doctrine and allow for funds to be distributed, instead of individually, for a benefit other than direct cash compensation to the plaintiffs.205 Such distributions, like the use of the common law fund in environmental cases, can be used successfully because there is a close nexus between the injury (the plaintiff’s property damaged by pollution) and the distribution (to the common fund), which would be used to rem-

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201 See supra note 77 and accompanying text. A recent decision of the U.S. Court of Appeals for the Tenth Circuit, New Mexico v. General Elec. Co., 467 F.3d 1233, 2006 U.S. App. LEXIS 26993 (10th Cir. 2006), attempts to clarify what remedies are available under state common law when EPA maintains ongoing remediation efforts. On the one hand, New Mexico limits the preemptive effect of CERCLA, permits usage of common law claims, and supports common law damage remedies so long as the monies are used for restoration and remediation purposes. *See id.* at *53–54, *60–61, *64–68. On the other hand, the court explicitly questions whether common law claims can be brought before EPA remediation efforts are completed, or, possibly, unless EPA admits that there will be no remedial action on a certain piece of real property. *Id.* at *72–74.

202 Under many circumstances the diminished market value is not sufficient to make the plaintiff whole. Does the furnishing of water or an alternative source of water make a plaintiff whole in this case together with whatever diminished market value may have occurred to these properties? *See Transcript of Proceedings of Dec. 6, 2004 at 61, Dyer v. Waste Mgmt. of Wis., Inc., No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004).*

203 See, e.g., Czarnezi & Zahner, supra note 44, at 525.

204 Like CERCLA’s Superfund, fund arrangements are often found in statutory provisions. *See Offshore Oil Spill Pollution Fund, 43 U.S.C. §§ 1811–1824 (2006); Oil Spill Liability Trust Fund, 26 U.S.C. § 9509 (2006).*

205 *See 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11.20 (4th ed. 2002).*
edy a much wider class of individuals (here, restore damaged property of many adjacent landowners). In fact, the common law fund would directly benefit the plaintiffs, unlike traditional uses of cy pres that provide for more indirect benefits (discounts, charitable donations).

In addition, companies may be more willing to make payments for an environmental fund rather than direct payments to injured plaintiffs, and the fund avoids the possible unjust enrichment if plaintiffs would not “expend the recovered sums on actual property restoration.” Finally, a common law fund may be the only way to truly compensate injured plaintiffs. Like a class action suit, the number of individuals whose property is damaged may be large and many potential plaintiffs are unlikely to file a claim, meaning the common law fund may be the only way to ensure adequate cleanup and restoration, an outcome worth the potential windfall to non-plaintiffs whose land or water source may be restored.

206 See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 209 (D. Me. 2003) (“[M]embers of the public (and thus potentially class members who did not file a claim, as well as those who did) will benefit either in using the CDs themselves or in the general public benefit from recurrent music CD availability.”); cf. Stewart R. Shepherd, Damage Distribution in Class Actions: The Cy Pres Remedy, 39 U. Chi. L. Rev. 448, 457 (1972) (“The goal of the cy pres remedy . . . is to effectuate the normal damage distribution to class members as closely as possible, and this should be the purpose of the courts whenever feasible.”).


208 Cox, supra note 176, at 802.

209 See Dolgow v. Anderson, 43 F.R.D. 472, 484–85 (E.D.N.Y. 1968), rev’d on other grounds, 438 F.2d 825 (2d Cir. 1970) (“The class action is particularly appropriate where those who have allegedly been injured are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”) (internal quotations omitted).


211 See 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, § 10.22 (4th ed. 2002) (“To the extent that cy pres distribution actually benefits a sufficient number of injured class members, the monies paid to third parties are an incidental but necessary cost that must be accepted in order to confer the benefits in a feasible way to a large proportion of the injured class members. This result is fully consistent with and promotes the historic objectives of class actions, which were originally created as a court rule of convenience.”).
B. Application

The common law fund is more easily applied to a case involving hazardous waste releases where restoration costs may exceed diminution in property value.\textsuperscript{212} The fund can be used to cleanup waste from the property and begin immediate restoration efforts. However, in some cases, restoration in the traditional sense is not possible.\textsuperscript{213} For example, while air pollution can cause damage that allows for retrospective correction in the greenhouse gas context—for example, cleaning off black soot or treating asthma in children—the air pollution is also trans-boundary, without “on the ground” effects as easily detectable or remedied; this allows for only prospective relief in public nuisance cases to reduce greenhouse gases that cause global warming.\textsuperscript{214} In these cases, the common law fund could be used, as an alternative to percentage reduction goals, for mandated use of better technology and research to develop new technology to stop future emissions.\textsuperscript{215} The fewer emissions in the future would then offset past production, and industry may be more willing to endow a fixed amount into a fund rather than deal with technology-forcing future reductions that might result in business losses of unknown magnitude.

The idea of the common law fund can be an effective remedy because it allows for both prospective and retrospective relief; thus appeasing both those who seek restoration—governments and environmentalists—and those who lost and expended resources as a result of the pollution, plaintiffs and the plaintiff’s bar.\textsuperscript{216} The common law fund mirrors the supposed restoration and deterrence goals of CERCLA and other federal environmental statutes, and administrative agencies will be willing to work with affected plaintiffs if they know they might have an additional restoration fund available, leading to less pollution in the future, and more efficient and faster cleanups.\textsuperscript{217}

\textsuperscript{212} See Cox, supra note 176, at 807 (discussing the similar case of Ewell v. Petro Processors, Inc., 364 So. 2d 604 (La. Ct. App. 1978)).

\textsuperscript{213} See Garlow, supra note 161, at 10 (discussing the Exxon-Valdez disaster and limitations on retroactive cleanup).

\textsuperscript{214} See id. at 16–17.

\textsuperscript{215} Cf. Garlow, supra note 161, at 17 (“Only by requiring that the violator reduce air/water pollution in an amount equal to or greater than the illegal emissions will violators begin to restore the environment they have damaged.”).

\textsuperscript{216} See Cox, supra note 176, at 779.

\textsuperscript{217} See id. at 780.
Conclusion

Federal administrative agencies are designed to enforce federal law. In the environmental context, EPA, with the resources it has available, must look at polluters and victims on a case by case basis to determine the appropriate course of action, whether such action is a consent decree, litigation, a compliance letter, restoration, or nothing at all. In this manner, administrative agencies function as common law courts determining the rights and remedies of the players in the environmental game. However, if federal administrative agencies are, in fact, at least in some cases, ineffective common law courts because they do not regulate environmental harms or cannot provide certain remedies, then potential plaintiffs should invest their efforts in the state common law. State common law doctrines can effectively determine what is an unreasonable act using state promulgated environmental standards, and provide for alternative or additional remedies. Meanwhile, judicially crafted remedies like the common law fund—allowing portions of state court damages to be paid to a restoration fund—can effectively promote both restoration and deterrence where federal action has proven less than effective.

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218 See generally Cass R. Sunstein, Is Tobacco A Drug? Administrative Agencies as Common Law Courts, 47 Duke L.J. 1013 (1998); Cass R. Sunstein, Justice Scalia’s Democratic Formalism, 107 Yale L.J. 529, 533 (1997) (“Justice Scalia’s discussion neglects the possibility that administrative agencies can discharge some of the functions of common law courts without compromising democratic values.”).

219 Cf. Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 Colum. L. Rev. 2010, 2011 (1997) (arguing that judges are already in a good position to act as “temporary administrative agencies” to deal with complex cases).
DYSFUNCTIONAL DOWNLISTING

EDWARD A. FITZGERALD*

Abstract: In 2003, the United States Department of the Interior (DOI) established three distinct population segments (DPSs) for the gray wolf, which encompassed its entire historic range. In addition, DOI downlisted the gray wolf from an endangered to threatened species in the Eastern and Western DPSs, despite the wolf’s continued absence from ninety-five percent of its historic range. The U.S. District Court for the District of Oregon properly invalidated DOI’s dysfunctional downlisting of the gray wolf. DOI’s interpretation of “significant portion of its range” was inconsistent with the text, intent, and purposes of the Endangered Species Act (ESA). In addition, DOI inverted its DPS policy, which provides different populations of the species different levels of protection in different portions of its historic range. Achieving the recovery plan goals did not warrant downlisting the gray wolf. DOI also failed to address the five downlisting factors of section 4(a) of the ESA across a significant portion of the gray wolf’s historic range. Nevertheless, DOI could have established two DPSs encompassing the populations of gray wolves in the western Great Lakes and northern Rocky Mountains, and could have accordingly downlisted these populations to threatened species status.

Introduction

As North America was settled, wolves and other predators were consciously exterminated.1 The Endangered Species Act (ESA) of 1973 protected the wolf and provided the means for its restoration across its historic range.2 In Minnesota, the sole remaining gray wolf

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population expanded into Michigan and Wisconsin.\(^3\) In the northern Rocky Mountains, gray wolves were reintroduced into Wyoming and Idaho,\(^4\) and naturally recolonized northwest Montana from Canada.\(^5\) Gray wolves were also reintroduced into New Mexico and Arizona.\(^6\) The restoration of the gray wolf in a small part of its historic range “is truly an endangered species success story.”\(^7\)

In 2003, the Department of the Interior (DOI) established three distinct population segments (DPSs) that incorporated the entire historic range of the gray wolf and downlisted the gray wolf in the Eastern and Western DPS to a threatened species.\(^8\) DOI built on the success in six states to downlist the gray wolf in much of its historic range across thirty states, despite the absence of the gray wolf from ninety-five percent of its historic range.\(^9\) Defenders of Wildlife (DOW) brought suit challenging DOI’s decision.\(^10\) In *Defenders of Wildlife v. Secretary, U.S. Department of the Interior*, the U.S. District Court for the District of Oregon found DOI’s action violated the ESA and its regulations.\(^11\) The court held that DOI misinterpreted the legal meaning of “significant portion of its range,” inverted its own DPS policy, and only analyzed the five downlisting factors across the gray wolf’s current range, not historic range.\(^12\)

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\(^7\) U.S. Fish and Wildlife Service (FWS) Director Rappaport Clark stated, “The [Endangered Species Act] gave us the tools we needed to achieve this milestone. We used the law’s protections and its flexibility to structure wolf recovery to meet the needs of the species and those of the people. This is truly an endangered species success story.” Press Release, U.S. Fish and Wildlife Service, Gray Wolves Rebound; U.S. Fish and Wildlife Service Proposes to Reclassify, Delist Wolves in Much of United States (July 11, 2000), available at http://www.r6.fws.gov/PRESSREL/00-18.htm [hereinafter Gray Wolves Rebound].


\(^9\) *Id.* at 15,805; *see* *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1171–72 (D. Or. 2005).

\(^10\) *Defenders of Wildlife*, 354 F. Supp. 2d at 1158.

\(^11\) *Id.* at 1170–71, 1174.

\(^12\) *Id.* at 1167, 1170–71.
This Article demonstrates that the federal district court’s decision in *Defenders of Wildlife* was correct. Part I of the Article provides an overview of the ESA, while Part II provides a brief history of the gray wolf in the United States. Part II also reviews DOI’s attempts to reintroduce the gray wolf into many regions of the country. Part III analyzes the legal meaning of “significant portion of its range,” DOI’s implementation of the DPS policy, the importance of recovery plans, and DOI’s consideration of the five downlisting factors. The Article asserts that DOI could have established two DPSs encompassing the core populations of gray wolves in the western Great Lakes and northern Rocky Mountains, and accordingly downlisted those populations to threatened species status. Subsequent litigation rejecting DOI’s abandonment of a Northeast DPS for gray wolves is reviewed. Part IV concludes the Article by examining DOI’s regulatory changes in the wolf recovery program following this litigation, as well as the House bill amending the ESA.

I. Overview: The Endangered Species Act

The Supreme Court described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”\(^1\) Congress recognized that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” while other species “have been so depleted in numbers that they are in danger of or threatened with extinction.”\(^2\) The ESA requires the Secretary of the Interior (SOI) to protect “species,” including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife.”\(^3\) The ESA protects endangered species, defined as “any species which [are] in danger of extinction throughout all or a significant portion of its range,”\(^4\) and threatened species, which are “any species which [are] likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”\(^5\) Congress recognized that “these species of fish, wildlife, and plants are of esthetic, ecological, educa-

\(^3\) *Id.* § 1532(16).
\(^4\) *Id.* § 1532(6).
\(^5\) *Id.* § 1532(20).
tional, historical, recreational, and scientific value to the Nation and its people.”

The listing process begins with a petition submitted by a concerned party. DOI has ninety days to determine if there is “substantial scientific or commercial information” to go forward. If there is substantial information, DOI has one year to determine whether to list the species and the range of its protection. Utilizing the best scientific evidence, DOI must determine if the species is facing “the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” Each of these five factors is equally important. If the SOI finds that a species is adversely affected by one factor, the species must be listed as endangered or threatened.

Once the species is listed, the SOI must “develop and implement [recovery] plans for the conservation and survival” of the species, unless she “finds that such a plan will not promote the conservation of the species.” DOI equates recovery with conservation, which is defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [ESA] are no longer necessary.” The SOI is instructed to “give priority to those

18 Id. § 1531(a)(3).
19 Id. § 1533(b)(3)(A) (citing 5 U.S.C. § 553 (2000), which states, “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).
20 16 U.S.C. § 1533(b)(3)(A). “Substantial information” is defined as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1) (2003).
22 Id. § 1533(a)(1).
23 See 50 C.F.R. § 424.11(c).
24 Id.
25 Id. § 424.11(d); see also 90-day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. 61,770, 61,773 (Oct. 26, 2005).
27 Id. § 1532(3); 50 C.F.R. § 402.02 (defining recovery as “improvement in the status of listed species to the point at which listing is not longer appropriate under the criteria set out in [the ESA].”).
endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans.”\textsuperscript{28}

Once listed, a species is afforded ESA protection.\textsuperscript{29} Section 7 of the ESA precludes any federal action that “jeopardizes the continued existence of any endangered species or threatened species or results in the destruction or adverse modification of designated critical habitat.”\textsuperscript{30} The federal agency can only proceed with the project if authorized by the Endangered Species Committee.\textsuperscript{31} Section 9 prevents any person from taking an endangered species.\textsuperscript{32} “Take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”\textsuperscript{33} Section 4(d) permits the SOI to adopt rules that allow for the taking of threatened species under certain circumstances.\textsuperscript{34} Regulations issued under section 4(d) are “usually more compatible with routine human activities in the reintroduction area.”\textsuperscript{35}

Section 10(j) permits the SOI to introduce an experimental population of an endangered or threatened species, which is “wholly separate geographically from nonexperimental populations of the same species” and “outside the current range of such species, if the SOI determines that such release will further the conservation of such species.”\textsuperscript{36} Prior to the release, the SOI must decide “whether or not such population is essential to the continued existence of an endangered species or a threatened species.”\textsuperscript{37} The experimental population is treated as a threatened species, and is therefore subject to section 4(d) regulation.\textsuperscript{38} Under section 7, a nonessential experimental population is treated as a threatened species only when in a National Park or National Wildlife Refuge.\textsuperscript{39} All federal agencies must consult

\textsuperscript{29} Id. § 1533(d).
\textsuperscript{30} Id. § 1536(a)(2).
\textsuperscript{31} Id. § 1536(e)(2).
\textsuperscript{32} Id. § 1538(a)(1)(B).
\textsuperscript{33} Id. § 1532 (19).
\textsuperscript{37} Id. § 1539 (j)(2)(B).
\textsuperscript{38} See id.
\textsuperscript{39} Id. § 1539(j)(2)(C)(i).
with DOI to determine that their actions will not harm the species or its habitat.\textsuperscript{40} If outside a National Park or National Wildlife Refuge, a nonessential experimental population is treated as a species proposed for listing.\textsuperscript{41} Federal agencies must still confer with DOI to determine if their actions will jeopardize the species.\textsuperscript{42} However, the results of the conference are only advisory and do not restrict the agency from proceeding with the action.\textsuperscript{43} The agency within DOI responsible for implementation of the ESA is the U.S. Fish and Wildlife Service (FWS).\textsuperscript{44}

II. FROM DECIMATION TO REINTRODUCTION: A RECENT HISTORY OF THE GRAY WOLF IN THE UNITED STATES

At one time, the gray wolf occupied all of the continental United States, except the arid regions of California and the Southeast.\textsuperscript{45} The expansion of human settlement, the move westward, the growth of agriculture and the livestock industry, trapping and hunting, competition with hunters, and federal and state predator control led to the extermination of the wolf.\textsuperscript{46} By the 1970s, the gray wolf had been exterminated from more than ninety-five percent of its historic range.\textsuperscript{47} The only remaining substantial wolf population was located in Minnesota and Michigan,\textsuperscript{48} though wolves dispersed from Canada into the

\textsuperscript{40} \textit{Id.} § 1539(j)(2)(A); Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the Gray Wolf, 70 Fed. Reg. at 1287.

\textsuperscript{41} 16 U.S.C. § 1539(j)(2)(C).


\textsuperscript{44} 50 C.F.R. 402.01(b) (2003). The Secretary of the Interior (SOI) is granted primary responsibility for implementing the ESA with respect to terrestrial species, while the Secretary of Commerce has the same responsibility with respect to marine and anadromous fish species. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(a). These responsibilities have been delegated to the FWS and the National Marine and Fisheries Service, respectively. 50 C.F.R. 402.01(b); see also Jason M. Patlis, \textit{Recovery, Conservation, and Survival Under the ESA}, 17 PUB. LAND & RESOURCES L. REV. 55, 59 n.10 (1996).

\textsuperscript{45} The Southeast was inhabited by the red wolf. For an overview of the red wolf controversy, see Edward A. Fitzgerald, \textit{Seeing Red}: Gibbs v. Babbitt, 13 VILL. ENVTL. L.J. 1, 4 (2002).

\textsuperscript{46} Fitzgerald, \textit{supra} note 6, at 11–19.


\textsuperscript{48} \textit{Id.}
northern Rockies. Following the enactment of the ESA in 1973, various subspecies of the gray wolf were granted protection: the northern Rocky Mountain wolf in 1973, the eastern timber wolf in 1974, the Mexican gray wolf in 1976, and the Texas gray wolf in 1976. In 1978, the FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the continental United States, except in Minnesota where the wolf was downlisted to a threatened species.

The FWS recognized the importance of subspecies distinctions; therefore, recovery plans and management decisions continued to focus on subspecies. The FWS completed a recovery plan for the eastern Timber wolf in 1978, which was revised in 1992; for the northern Rocky Mountain wolf in 1982, which was revised in 1987; and for the Mexican wolf in 1982. In 1994, the FWS considered a proposal to develop a national recovery plan that would incorporate the three recovery plans and provide a national strategy for gray wolf recovery, but

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59 The FWS commissioned David L. Mech to create “A Comprehensive Recovery Strategy for the Gray Wolf in the 48 Contiguous States.” Mech concluded:

The Service has no national strategy or goal for the number and/or distribution of wolves that needs to be reestablished for its ESA responsibility to be met. Nor is there any strategy/policy that would address the above major issues. Instead, the Service seems to be on the course of developing or modifying a recovery plan to cover every place wolves show up. This is a “strategy” of
this effort was abandoned. Meanwhile, the gray wolf prospered in the western Great Lakes region and exceeded recovery goals. Gray wolves from Minnesota migrated to northern Wisconsin and northern Michigan to form a Great Lakes meta-population. Gray wolves from Minnesota also dispersed to North and South Dakota, Illinois, and Missouri. The existence and identity of wolves in the Northeast, however, are unknown.

Gray wolves from Canada also recolonized northwest Montana. In addition, gray wolves were reintroduced into Wyoming and Idaho in 1995 and 1996 as nonessential experimental populations pursuant to section 10(j) of the ESA. Subsequently, the Wyoming Farm Bureau brought suit challenging their reintroduction. The U.S. District Court for the District of Wyoming held that the reintroduction of wolves into Wyoming and central Idaho violated section 10(j) of the ESA. However, the U.S. Court of Appeals for the Tenth Circuit reversed, and found the potential occurrence of an individual naturally dispersing wolf in the experimental area did not violate section 10(j) because an individual dispersing wolf did not constitute a popula-


60 Id. at 9–11, 46–49.
63 Defenders of Wildlife, 354 F. Supp. 2d at 1167.
64 See id.
66 Id. at 15,806 (citing Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park, 59 Fed. Reg. 60,252, 60,266 (Nov. 22, 1974)).
67 Wyo. Farm Bureau Fed’n v. Babbitt, 987 F. Supp. 1349, 1355–58 (D. Wyo. 1997). The National Audubon Society filed a second complaint, alleging that the demotion of the naturally occurring wolves in the experimental population area from endangered to threatened violated the ESA. Id. The Urbigkits, a couple who studied Yellowstone wolves, filed a third complaint, asserting that the Environmental Impact Statement failed to discuss the impacts of reintroduction on the naturally occurring subspecies of wolves in Yellowstone, canis lupus irremotus. Id.
68 Id. at 1376.
tion. The court upheld the FWS determination that the experimental population was “wholly separate geographically” from the natural population, and was released outside “the current range” of the natural population. The Tenth Circuit also found that the SOI could treat all wolves in the experimental population area as part of the experimental population. This would help achieve recovery and avoid law enforcement problems. Since this litigation, wolves in the northern Rockies have exceeded recovery goals.

Mexican wolves were reintroduced into the Blue Range Wolf Recovery Area in New Mexico and Arizona in 1998 as a nonessential experimental population. No recovery goals for downlisting were established. The New Mexico Cattlegrowers Association (NMCCA) brought suit challenging the reintroduction of the Mexican wolf. The U.S. District Court for the District of New Mexico upheld the FWS decision. The court rejected NMCCA’s allegations regarding the livestock depredation rates, the hybridization of the reintroduced population, the existence of a naturally occurring Mexican wolf population, the impact on other endangered and threatened species, federal consultation with state and local governments, and the need for a Supplemental Environmental Impact Statement. The Mexican wolf population is expanding despite numerous obstacles.

In light of the success of wolf recovery, DOI issued a Proposed Rule on July 13, 2000 that established four DPSs in the western Great Lakes, Northeast, West, and Southwest and downlisted the gray wolf from an endangered to threatened species throughout most of its his-

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69 Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1236 (10th Cir. 2000).
70 Id. at 1235–36.
71 Id. at 1237.
72 Id. See generally Fitzgerald, supra note 4.
75 See Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752, 1754 (Jan. 12, 1998). The goal of the reintroduction program was to have at least 100 Mexican wolves occupying 5000 square miles. Id.
77 Id. at *5.
toric range, except the Southwest. Secretary of the Interior, Bruce Babbitt, declared:

Wolves are living symbols of the regard Americans have for things wild. We as a people have made the choice to do the right thing and bring these animals back from the brink of extinction. We have weighed the cost of saving an irreplaceable part of our world and found it to be worth our effort.

The Final Rule, which was issued on April 1, 2003, established only three DPSs in the East, West, and Southwest and downlisted the gray wolves in the Eastern and Western DPSs. All the wolves in the western Great Lakes, specifically those in Michigan and Wisconsin, were reclassified as a threatened species. Gray wolves in the remaining Eastern DPS states, including those in the Northeast, were also downlisted. Wolves in the northern Rockies, including those in Montana and Idaho, were downlisted to threatened species, but the regulation regarding the nonessential experimental populations in Wyoming and Idaho remained in place. Gray wolves were downlisted in the remaining Western DPS states, including Washington, Oregon, California, Nevada, parts of Idaho, Montana, Utah, and Colorado. The downlisting of the gray wolf to threatened species status permitted their taking pursuant to section 4(d) regulations and moved the gray wolf one step closer to delisting. The gray wolf was delisted in fourteen southeastern and mid-Atlantic states because the region was not part of the gray wolf’s historic range. Gray wolves in the Southwest DPS retained their endangered species status. On the

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81 Gray Wolves Rebound, supra note 7.
83 Id.
86 Id. at 15,830.
87 Id. at 15,826.
88 Id. at 15,804.
89 Id.
same day, DOI issued an Advanced Notice of Proposed Rulemaking, which announced its intention to pursue the delisting of the gray wolf in the Eastern and Western DPS and the removal of all nonessential population designations in the northern Rocky Mountains. Secretary Norton stated, “Thirty years ago, the future of the gray wolf in the United States outside of Alaska was anything but certain. Today we celebrate not only the remarkable comeback of the gray wolf, but the partnerships, dedicated efforts and spirit of conservation that have made this success story possible.”

III. The Legal Challenge: Defenders of Wildlife v. Secretary, U.S. Department of the Interior

Defenders of Wildlife (DOW), representing nineteen environmental groups, brought suit challenging the downlisting of the gray wolf across much of its historic range in the Eastern and Western DPSs. The U.S. District Court for the District of Oregon, in Defenders of Wildlife v. Secretary, U.S. Department of the Interior, held in favor of DOW. The court determined that the Secretary of the Interior’s (SOI) interpretation of “significant portion” of the gray wolf’s range was contrary to the ESA and case law. The SOI’s implementation of the DPS policy violated DOI’s own regulation, as well as the ESA. Since the SOI’s analysis was limited to the gray wolf’s current range, her conclusions regarding the five downlisting factors set forth in section 4(a) of ESA were invalid. As a result, the gray wolf remains an endangered species in the continental United States, except in Minnesota and the experimental population areas located in Wyoming, Montana, Idaho, Arizona, New Mexico, and Texas, where it is classified as a threatened species.

91 News Release, U.S. Fish and Wildlife Service, supra note 84. Steve Williams, FWS Director, announced: “The north woods of Minnesota, Wisconsin and Michigan are healthier ecosystem because of the presence of wolves. These animals provide a living laboratory to study how a top predator affects plants and animals within the entire ecosystem.” Id.
93 Id. at 1174.
94 Id. at 1168.
95 Id. at 1170–71.
96 Id. at 1172.
A. Defining “Significant Portion of Its Range”

The ESA defines a species—including subspecies—as endangered if it is “in danger of extinction throughout all or a significant portion of its range.” A species is threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The U.S. Fish and Wildlife Service (FWS) limited its analysis to the gray wolf’s current range—the western Great Lakes and northern Rockies—even though wolves live outside the core areas. The FWS defined “significant portion of its range” as “that area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.” The FWS concluded that “the presence or absence of gray wolves outside of core recovery areas is not likely to have a bearing on the long-term viability of the three wolf populations,” such that threats to the species outside core areas in the western Great Lakes and northern Rockies did not have to be evaluated.

In *Defenders Of Wildlife*, the court rejected DOI’s interpretation, finding the gray wolf “extinct throughout a significant portion of its range [because] there are major geographical areas in which it is no longer viable but once was.” The court held that there are major geographic areas outside the western Great Lakes and northern Rockies in the historic range of the gray wolf that still can provide a suitable habitat for the species. The FWS acknowledged the existence of extensive potential wolf habitat in the Northeast—Maine, New Hampshire, and New York—and the Northwest—Washington and Oregon—and the dispersal of wolves to North and South Dakota.

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99 Id. § 1532(20).
100 *Defenders of Wildlife*, 354 F. Supp. 2d at 1167.
101 Id. at 1164.
103 Id. at 1169 (citing Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,825).
104 Id. at 1167 (citing *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001)).
105 Id. at 1167.
106 *Defenders of Wildlife*, 354 F. Supp. 2d at 1161.
The court recognized that the SOI had broad discretion in determining what constituted a significant portion of the range because the term was not defined in the statute.\textsuperscript{107} Nevertheless, the SOI still had to explain why potential wolf habitat within the wolf’s historic range where the wolf could still survive did not constitute a significant portion of the gray wolf’s range.\textsuperscript{108} The existence of viable wolf populations in the western Great Lakes and northern Rockies did not render areas in the remainder of the gray wolf’s historic range insignificant.\textsuperscript{109} The court found that the SOI’s interpretation was contrary to legislative history and case law.\textsuperscript{110}

The court’s decision was consistent with the text, intent, and purposes of the ESA.\textsuperscript{111} The legislative history of the ESA shows congressional intent to narrow the focus of the ESA from a species facing worldwide extinction to a species facing extinction only in a significant portion of its range, and to extend ESA protection from endangered species to threatened species.\textsuperscript{112} The purpose of the statute is to protect not only endangered and threatened species, but also the ecosystems on which they depend.\textsuperscript{113} The FWS interpretation, which focused solely on the area significant to the taxon as a whole, was contrary to the ESA.\textsuperscript{114} Even the FWS recognized problems with its analysis.\textsuperscript{115} The FWS approach was not supported by the case law.\textsuperscript{116} Finally, significant portions of the gray wolf’s historic range can support gray wolf populations.\textsuperscript{117} The gray wolf could not be downlisted across its historic range because it was absent from ninety-five percent of its historic range.\textsuperscript{118}

1. Legal Meaning of “Significant Portion of its Range”

In \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, the Supreme Court developed a two-step process regarding judicial review

\textsuperscript{107} \textit{Id.} at 1164.
\textsuperscript{108} \textit{Id.} at 1167.
\textsuperscript{109} \textit{Id.} at 1168.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 1159, 1166.
\textsuperscript{112} \textit{Defenders of Wildlife}, 354 F. Supp. 2d at 1159, 1166.
\textsuperscript{113} \textit{See id.} at 1166.
\textsuperscript{114} \textit{Id.} at 1164, 1168.
\textsuperscript{115} \textit{See id.} at 1166–67.
\textsuperscript{116} \textit{See id.} at 1168.
\textsuperscript{117} \textit{Id.}
of an agency’s legal interpretation. First, a court must determine “whether Congress has directly spoken to the precise question at issue.” If Congress has not addressed the issue, a court can “not simply impose its own construction on the statute.” Instead, the court must move on to the second step to determine “whether the agency’s answer is based on a permissible construction of the statute.” Justice Stevens, the author of *Chevron*, later declared that a “pure question of statutory construction [is] for the courts to decide [by] employing traditional tools of statutory construction,” which include the text, intent, and purposes of the statute.

A court’s inquiry begins with the text of the statute, which has been enacted into law through the constitutionally prescribed process. The text, which is known to the litigants and the public, is the best evidence of legislative intent. Reliance on the text confines the court’s inquiry, increases the probability of obtaining judicial agreement in a particular case, and provides certainty and predictability in the law.

The term “significant portion of its range” is ambiguous. The U.S. Court of Appeals for the Ninth Circuit addressed this issue in *Defenders of Wildlife v. Norton* (*Norton-Lizard*), in which the plaintiff challenged the FWS’s refusal to list the flat-tailed horned lizard as an endangered species. The FWS determined that suitable habitat on public land ensured the lizard’s viability, despite threats to the species on private land. DOW argued that the lizard’s private land habitat constituted a significant portion of its range where its survival was in

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120 Id. at 842.
121 Id. at 843.
122 Id. at 842–45.
126 *Defenders of Wildlife v. Norton* (*Norton-Lizard*), 258 F.3d 1136, 1145 (9th Cir. 2001). This Article will refer to this case as *Norton-Lizard* in order to distinguish it from a second case with the same party names, but dealing with the ESA classification of the lynx. See generally *Defenders of Wildlife v. Norton* (*Norton-Lynx*), 239 F. Supp. 2d 9 (D.D.C. 2002).
127 Id. at 1140.
jeopardy. The Ninth Circuit did not find the text of the ESA illuminating. After examining the dictionary definition of extinction, the Ninth Circuit determined the phrase “significant portion of its range” to be an oxymoron because “extinction suggests total rather than partial disappearance.” The statutory language was “inherently ambiguous, as it appear[ed] to use language in a manner in some tension with ordinary usage.”

The Ninth Circuit in Norton-Lizard rejected the SOI’s interpretation that a species was only entitled to ESA protection if it “faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future” because it rendered the “significant portion of its range language” superfluous. The court followed “a ‘natural reading . . . which would give effect to all of [the statute’s] provisions.’” By equating “a significant portion of its range” with all of the gray wolf’s range, the SOI violated the rule. The Ninth Circuit concluded that species could be extinct “throughout . . . a significant portion of range” if there are major geographic areas in which it is no longer viable but once was. The Ninth Circuit decision indicates that a species can have a different status in different portions of its range.

If the text does not answer the interpretative question, the court should examine the legislative history to discover the legislative intent, which is how the enacting legislature would have resolved the interpretative question. Studying the legislative history allows the court to properly defer to the legislature, and establishes criteria of reliability to help the court select and weigh elements of the language

128 Id. at 1140–41.
129 Id.
130 Id. at 1141.
132 Norton-Lizard, 258 F.3d at 1141–42.
133 Id. at 1142 (quoting United Food & Commercial Workers Union Local 757 v. Brown Group, Inc., 517 U.S. 544, 549 (1996)).
134 Id. at 1141–42.
135 Id. at 1145 (quoting 16 U.S.C. § 1532(6) (2000)).
136 Id.
137 For a discussion on the existence of legislative intent, see Reed Dickerson, The Interpretation and Application of Statutes 68–69 (1975); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 642–50 (1990); Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 864 (1930); Tiefer, supra note 124, at 207–08.
in the legislative context.\textsuperscript{138} The two predecessor statutes of the ESA described endangered species as those facing complete extinction. The Endangered Species Preservation Act of 1966 defined an endangered species as one whose “existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance.”\textsuperscript{139} The Endangered Species Conservation Act of 1969 identified an endangered species as one which is threatened with “worldwide extinction.”\textsuperscript{140}

The Endangered Species Act of 1973 expanded the definition of an endangered species to one facing “extinction throughout all or a significant portion of its range.”\textsuperscript{141} The House Merchant Marine and Fisheries Committee stated that this major change represented “a significant shift in the definition in existing laws which considers a species to be endangered only when it is threatened with worldwide extinction.”\textsuperscript{142} The new language was added to encourage greater federal-state cooperation\textsuperscript{143} and grant the SOI greater flexibility regarding wildlife management.\textsuperscript{144}


\textsuperscript{140} Norton-Lizard, 258 F.3d at 1144 (citing Endangered Species Conservation Act, Pub. L. No. 91-135 § 3(a), 83 Stat. 275 (1969)).


\textsuperscript{142} Norton-Lizard, 258 F.3d at 1144 (citing H.R. Rep. No. 93-412, at 149 (1973)).

\textsuperscript{143} Senator Tunney, describing this as “perhaps the most important section of this bill,” declared:

The plan for Federal-State cooperation provides for much more extensive discretionary action on the part of the Secretary and the State agencies. Under existing law . . . a species must be declared "endangered" even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels. \textit{Id.} at 1144–45 (quoting S. Comm. on Env’t and Public Works, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980, at 359–60 (Comm. Print 1982) [hereinafter Legislative History]).

\textsuperscript{144} \textit{Id.} at 1144. The American alligator was cited as an example that demonstrated Congress’s intended meaning of “significant portion of its range.” \textit{Id.} The range of the alliga-
The ESA recognizes that different populations of the same species can have different status in different parts of its range. For example, grizzly bears were listed as threatened species within the forty-eight contiguous states, but not in Alaska.\footnote{145}{"[O]nly the California, Oregon, and Washington populations of the marbled murrelet, whose range in North America extends from the Aleutian Archipelago in Alaska to Central California, are listed as threatened."}

The desert big horn sheep is only listed as an endangered species in peninsular ranges of southern California, although its range extends into Baja California.\footnote{147}{Only the population of Stellar sea lions occurring west of 144 degrees West longitude are listed as endangered species, while the remaining population is listed as threatened.}

Only the Florida population of the Audubon crested caracara, a hawk that ranges from Florida, southern Texas and Arizona, northern Baja California, and south to Panama, is listed as a threatened species.\footnote{149}{The piping plovers in the watershed of the Great Lakes are listed as endangered species, but are only a threatened species throughout the remainder of their range.}

There was an attempt to change the statutory text in 1978.\footnote{151}{Senator Bartlett proposed an amendment, which changed the “significant portion of its range” language to “the essential portion of its range.”}

Senator Bartlett was worried that the construction of the tor in 1973 stretched from Mississippi to Florida, but its distribution varied. \footnote{152}{Id. Senator Tunney explained: An animal might be “endangered” in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species. (quoting Legislative History, supra note 143, at 360).}

\begin{itemize}
  \item \footnote{145}{Id. at 1145.}
  \item \footnote{146}{Id.}
  \item \footnote{147}{Id.}
  \item \footnote{148}{Norton-Lizard, 258 F.3d at 1145.}
  \item \footnote{149}{Id.}
  \item \footnote{150}{Id.}
  \item \footnote{151}{Legislative History, supra note 143, at 1126.}
  \item \footnote{152}{Id.}
\end{itemize}
Lukfata Dam on the Glover River in his home state of Oklahoma would be halted because it diminished the range of the Leopard Darter, an endangered species, by twelve percent.\(^{153}\) Senator Wallop offered an amendment incorporating Senator Bartlett’s language, which defined essential as “that portion of the range necessary for the continued survival and recovery of the species.”\(^{154}\) The Senate passed the amendment, but it was not accepted by the conference committee.\(^{155}\) The failure of Congress to adopt this amendment represents an explicit rejection of DOI’s definition of “significant portion of its range.”\(^{156}\)

There was also language in the 1978 House Merchant Marine and Fisheries Committee Report indicating that the term “range” refers to the “historical range” of the species.\(^{157}\) Section 4(c)(1) required the SOI to publish a list of endangered and threatened species and specify the portion of the range in which they were protected.\(^{158}\) The committee bill amended section 4(c)(1) to require the SOI to include critical habitat designations on endangered and threatened species lists.\(^{159}\) The committee stated that “[t]he term ‘range’ is used in the general sense, and refers to the historical range of the species.”\(^{160}\) The amendment was adopted by the conference committee.\(^{161}\)

Further guidance and clarification of statutory meaning are found in the statutory purposes.\(^{162}\) While more abstract in nature than the legislative intent, statutory purposes help the court to determine legislative intent, direct the court when legislative intent has

\(^{153}\) Id. at 1127.

\(^{154}\) Id. at 1129–1130.


\(^{156}\) See Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987); William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 84–89 (1988). The Supreme Court stated, “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.” Cardoza-Fonseca, 480 U.S. at 442–43.


\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) Id.


not been manifested, and allow the court to keep the statute in harmony with contemporary values.\textsuperscript{163} The ESA is concerned with the protection, conservation, and restoration of endangered and threatened species and the ecosystems on which they depend.\textsuperscript{164} Congress was particularly concerned with the protection of ecosystems.\textsuperscript{165} Congress found “[t]he two major causes of extinction are hunting and destruction of natural habitat.”\textsuperscript{166} The most crucial was the destruction of natural habitat.\textsuperscript{167} Congress recognized that the “critical nature of the interrelationships of plants and animals between themselves and with their environment . . . [demonstrates that the] ecologists’ shorthand phrase ‘everything is connected to everything else’ is nothing more than cold, hard fact.”\textsuperscript{168}

Congress mandated that the ecosystems be preserved to protect endangered and threatened species.\textsuperscript{169} The House Merchant Marine and Fisheries Committee stated: “As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.”\textsuperscript{170} The ESA Amendments of 1982 stressed the importance of ecosystem conservation.\textsuperscript{171} The Senate Environment and Public Works Committee asserted that all taxonomic groups, even plants and invertebrates, should receive equal treatment under the ESA because they “form the

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\item[164] 16 U.S.C. § 1531(b), (c) (2000). The declared purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions . . . .” \textit{Id.} § 1531(b); see also Jenness, supra note 131, at 145.
\item[166] \textit{Id.}
\item[169] \textit{See} 16 U.S.C. § 1531(b).
\item[170] H.R. Rep. No. 93-412, \textit{reprinted in Legislative History}, supra note 143, at 143. The House Report noted that “[f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.” \textit{Id.} at 144.
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\end{footnotesize}
bases of ecosystems and food chains upon which all other life depends. The Act’s stated purpose is to conserve ecosystems.” The conference committee noted that “individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element.” The conference committee declared that “the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.”

The ESA is designed to protect ecosystems, which are defined as “communit[ies] of organisms interacting with one another and with the chemical and physical factors making up their environment.” Ecosystems are comprised of individuals that are linked genetically with past, present, and future members of the same species. Individuals are members of species that have adjusted to different environmental conditions and are storehouses of information about how and why the species exists as it is, as a result of physical, chemical, and biological forces. Ecosystems provide matrices for the interaction and preservation of species. Given the vast array of interactions between species, ecosystems are greater than the sum of their parts.

All organisms rely on a healthy ecosystem, which depends upon the viability of species whose interactions regulate the system. There is a hierarchy within the ecosystem. Keystone species, which link other species to the food chain above and below themselves, in-

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175 See 16 U.S.C. § 1531(b). Barry Commoner, in The Closing Circle, advanced four laws of ecology that are useful for understanding how ecosystems function, as well as the limits of humans in manipulating them: (1) everything is connected to everything else; (2) everything must go somewhere; (3) nature knows best; (4) there is no such thing as a free lunch. Zachary A. Smith, The Environmental Policy Paradox 2–4 (4th ed. 2004).
178 Id. at 5–6.
179 Id. at 6.
180 Id. at 5–6.
181 Id. at 14–15.
182 Id. at 14.
clude predator, prey, plants, links, and modifiers.\textsuperscript{183} All species are interconnected, so the removal of one keystone species can lead to population changes or severe physical disturbances.\textsuperscript{184} Disruptions in the ecosystem cause environmental instabilities that diminish nature’s ability to establish food chains, cycle nutrients, maintain air and water quality, control the climate, maintain the soil, dispose of waste, pollinate crops, and control pests and disease.\textsuperscript{185} Robert Costanza estimated the value of ecosystem services in the range of $16 to $54 trillion per year.\textsuperscript{186}

Ecosystem maintenance requires biodiversity, which is based on a diverse gene pool.\textsuperscript{187} The degree of complexity necessary for healthy maintenance is unknown.\textsuperscript{188} Paul and Anne Ehrlich equate the loss of species to the loss of structural rivets on an airplane—a dozen may never be missed, but the loss of the thirteenth might spell disaster.\textsuperscript{189} Predators, like the wolf, play an important role in the ecosystem.\textsuperscript{190} The wolf provides sustenance for the entire food chain.\textsuperscript{191} After wolves make a kill, other scavengers take their share, insects clean the carcass, and birds feed on the insects.\textsuperscript{192} The wolves also maintain the balance between predators.\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{183} Bergoffen, supra note 177, at 14.
  \item \textsuperscript{184} Id. at 14; see also John Copeland Nagle, Playing Noah, 82 MINN. L. REV. 1171, 1210 (1998).
  \item \textsuperscript{186} Robert Costanza et al., The Value of the World’s Ecosystem Services and Natural Capital, 387 NATURE 253, 259 (1997). Constanza noted:
    
    Because ecosystem services are not fully “captured” in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions. This neglect may ultimately compromise the sustainability of humans in the biosphere. The economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.
    
    \textit{Id.} at 253.
  \item \textsuperscript{187} Parenteau, supra note 185, at 230, 237.
  \item \textsuperscript{188} See Ehrlich & Ehrlich, supra note 185, at xii–xiii; Keith Saxe, Regulated Taking of Threatened Species Under the Endangered Species Act, 39 HASTINGS L.J. 399, 408 (1988).
  \item \textsuperscript{189} Ehrlich & Ehrlich, supra note 185, at xii–xiii.
  \item \textsuperscript{191} Id.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
\end{itemize}
which grows in their absence. This replenishes the coyote’s prey, mainly rodents, which feed predatory birds such as hawks, eagles, and owls. The reduction in the coyote helps the fox, which coexists with the wolf. The wolf keeps its prey in check, affects prey behavior, and increases the supply and diversity of plant life. This “top-down” effect, which is known as a trophic cascade, varies across ecosystems because of food web complexity, diversity, productivity, and other factors. The wolf helps to maintain the health of the ecosystem, which is one of the central purposes of the ESA.

2. DOI’s Analysis

The FWS failed to assess the threats to gray wolves across a significant portion of its range, which includes the suitable habitat within the gray wolf’s historic range. The FWS analysis was limited to gray wolf’s current range. The federal district court in Defenders of Wildlife did not have to defer to the FWS definition regarding the significant portion of the range. The FWS definition, which was developed at a Marymount University meeting in 2000, was not part of the Proposed Rule or the Final Rule. The definition appeared for the first time during the litigation, so was therefore a post-hoc rationalization.

194 Id.
195 Id.
196 Enochs, supra note 190, at 99.
197 See id.
202 Id.
203 Id. at 1164.
204 Id. at 1164–65.
205 Id. at 1165. In 2001, the U.S. Court of Appeals for the Ninth Circuit refused to accord any deference to the FWS’s decision, stating:

Accordingly, we owe the Secretary’s interpretation no deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. As the D.C. Circuit ex-
After the Proposed Rule, but prior to the Final Rule, the Ninth Circuit rendered its decision in *Defenders of Wildlife v. Norton* (*Norton-Lizard*), which defined the significant portion of the range as that area where the species once was but is no more.\(^{206}\) Despite the *Norton-Lizard* decision, the FWS determined that the significant portion of the gray wolf’s range was only its current range.\(^{207}\) Martin Miller, chief of the Branch of Recovery and Delisting in the FWS’s Endangered Species Program, explained that the “‘range’ in ‘significant portion of the range’ should be interpreted in most cases, and specifically for the gray wolf, as ‘current range.’”\(^{208}\) DOI argued that the FWS analysis was not based on the current range.\(^{209}\) Martin Miller later admitted that he did not know enough detail to realize whether he was miscalculating anything or missing something.\(^{210}\) The principal authors of the Final Rule, Ron Refsnider and Ed Bangs, disagreed with Miller’s conclusion and adopted the Marymount definition in the Final Rule, which was consistent with the Ninth Circuit’s decision.\(^{211}\)

It is not relevant whether DOI relied on Miller’s current range or the Marymount definition in the Final Rule. In either case, the result was the same: the unit of analysis was the current range of the gray wolf.
wolf, not its historic range.\textsuperscript{212} Even Ron Refsnider, the author of the Final Rule, recognized problems with this approach. Refsnider noted:

We listed [the gray wolf] across the 48 states, yet we’re recovering it in only three portions of that listed range. Even if the recovery criteria for all 3 recovery plans are fully met, we’ll only have viable gray wolf populations in 5–10 percent of the historical range. Can we delist such a species under the 9th Circuit’s interpretation? We might be able to delist only in [Minnesota], [Wisconsin], the Upper Peninsula of Michigan, and parts of the Rockies.”\textsuperscript{213}

The FWS could not downlist the gray wolf across its historic range because it was absent from a significant portion of its historical range.\textsuperscript{214}

3. Case Law

The SOI’s definition of “significant portion of its range” was contrary to case law. The courts principally adopted a geographic or quantitative definition, and secondarily a functional definition, for “significant portion of its range.”\textsuperscript{215} DOI’s definition that the key factor determining the significant portion of the range was the relevance to the survival of the taxon as a whole was consistently rejected.

In \textit{Norton-Lizard}, the U.S. Court of Appeals for the Ninth Circuit dealt with the SOI’s refusal to list the flat-tailed horned lizard because sufficient public land habitat ensured the viability of the species.\textsuperscript{216} According to the SOI, a species can only be protected if it “faces threats in enough key portions of its range that the entire species is in danger of extinction, or will be within the foreseeable future.”\textsuperscript{217} The SOI “assumes that a species is in danger of extinction in ‘a significant portion of its range’ only if it is in danger of extinction everywhere.”\textsuperscript{218} The Ninth Circuit determined that the SOI’s definition, which focused only on the risk of extinction to the taxon as whole, wrote the “significant portion of its range” language out of the stat-

\textsuperscript{212} See Plaintiffs’ Response Memorandum, supra note 208, at 11; Federal Defendants’ Reply, supra note 210, at 14.
\textsuperscript{213} Plaintiffs’ Response Memorandum, supra note 208, at 10–11.
\textsuperscript{214} \textit{Defenders of Wildlife}, 354 F. Supp. 2d at 1172.
\textsuperscript{215} Maranzana, supra note 131, at 273.
\textsuperscript{216} \textit{Defenders of Wildlife v. Norton} (\textit{Norton-Lizard}), 258 F.3d 1136, 1141 (9th Cir. 2001).
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.}
The Ninth Circuit held “that a species can be extinct ‘throughout . . . a significant portion of its range’ if there are major geographic areas in which it is no longer viable but once was.” The FWS should have analyzed the status of the flat-tailed horn lizard on thirty-four percent of its historic range, which constituted a significant portion of its range.

In *Defenders of Wildlife v. Norton* (*Norton-Lynx*), the federal district court focused on the FWS determination of the significant portion of the lynx range. The historic range of the lynx was comprised of four regions: Northeast, Great Lakes, southern Rocky Mountains, and northern Rocky Mountains. After protracted litigation prompted administrative action, the FWS listed the lynx as a threatened species in a contiguous U.S. DPS, but the “Northeast, Great Lakes, and Southern Rockies do not constitute significant portion of the range of the DPS.” The federal district court rejected the FWS decision to exclude a significant portion of the lynx range as “counterintuitive and contrary to the plain meaning of the ESA phrase ‘significant por-

219 Id. at 1142.
220 Id. at 1145.
221 DOW cited other cases, which addressed whether the loss of a percentage of habitat constituted a significant portion of the species range. Id. at 1143. In *Federation of Fly Fishers v. Daley*, the federal district court found the listing of the steelhead trout was warranted despite protections encompassing sixty-four percent of its range. 131 F. Supp. 2d 1158, 1170 (N.D. Cal. 2000). In *Oregon Natural Resource Council v. Daley*, the federal district court found the listing of the steelhead trout was warranted despite protections extending over thirty-five percent of its range. 6 F. Supp. 2d 1139, 1157 (D. Or. 1998). The FWS listed the Coachella Valley fringe-toed lizard as a threatened species, although fifty percent of its historical habitat remained. *Norton-Lizard*, 258 F.3d. at 1143. The U.S. Court of Appeals for the Ninth Circuit rejected DOW’s strictly quantitative approach and found there is no presumption in the ESA that a loss of predetermined amount of range qualifies for listing. Id. The percentage must be determined on a case by case basis. Id. If there was a bright line, Congress would have so stated. Id. at 1145.

223 Initially, the FWS refused to list the lynx. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997). The federal district court in this case reversed the FWS decision. Id. The FWS’s claims—that real threats to the lynx must be shown in the lower forty-eight states before listing, and that there was no need to protect the lynx in the United States because adequate lynx existed in Canada and Alaska—were rejected by the court. *Id.* at 675, 684–85. After further investigation, the FWS found the lynx warranted listing, but listing was precluded because of other priorities. *Norton-Lynx*, 239 F. Supp. 2d at 15–16. The federal district court again forced the FWS to proceed. *Id.* at 26.
tion of the range.’” 225 The court held that the absence of the lynx in three of the four regions which comprise seventy-five percent of its historical range was a “noticeably or measurably large amount” of species range. 226 The court held that the “FWS’s exclusive focus on one region where the lynx is more prevalent, despite its historic presence in three additional regions, is contrary to the expansive protection intended by the ESA.” 227

In *Southwest Center for Biological Diversity v. Norton*, the federal district court addressed the FWS analysis of the significant portion of the goshawk range. 228 The FWS refused to list the goshawk as an endangered species over Vancouver Island, which constituted one third of its range, because there were viable populations on Queen Charlotte Island. 229 The FWS asserted that the Vancouver Island population was not significant for the survival of the taxon as a whole. 230 The federal district court found the loss of one third of the goshawk habitat was not crucial in itself, but Vancouver Island possessed the most suitable habitat for the goshawk. 231 There was productive old growth forest which contained nineteen of the goshawk’s forty-three nesting areas. 232 The court held that this rich habitat constituted a significant portion of the goshawk range, so the FWS had to analyze the status of the goshawk on Vancouver Island. 233

In *Environmental Protection Information Center v. National Marine Fisheries Service*, the federal district court reviewed the FWS determination of the significant portion of the green sturgeon’s range. 234 The National Marine Fisheries Service (NMFS) discovered that the green sturgeon was not spawning in the South Fork Trinity River, the Eel River, and possibly the San Joaquin River. 235 The green sturgeon population had declined by eighty-eight percent across its historic range. 236 Despite the loss of spawning areas, the NMFS refused to con-

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225 Id. at 19.
226 Id.
227 Id.
229 Id. at *13.
230 Id. at *16.
231 Id.
232 Id.
233 Id. at *16–17.
235 Id. at 18.
236 Id. at 17.
sider whether the green sturgeon was a threatened species in a significant portion of its range.\textsuperscript{237} The federal district court found the decrease in spawning areas raised questions about the species viability in a significant portion of its range.\textsuperscript{238} Green sturgeons have a strong homing instinct.\textsuperscript{239} Green sturgeons not spawning in areas they once were might be dying out.\textsuperscript{240} The court determined that the NMFS did not qualitatively assess the impact of the loss of spawning grounds on the status of the green sturgeon.\textsuperscript{241} Nevertheless, the court specifically noted that the NMFS had to “focus on continued viability of the species . . . in a fixed geographical area that is part of [its] historical range.”\textsuperscript{242}

4. Other Significant Areas of Wolf Habitat

There are other significant areas within the historical range of the gray wolf that can support gray wolves.\textsuperscript{243} Scientific studies show there is suitable wolf habitat in the Pacific Northwest.\textsuperscript{244} Gray wolves have been sighted in Washington and Oregon.\textsuperscript{245} The northern Cascades and Selkirk Mountains in Washington have high potential for wolf recolonization because of their close proximity to the Canadian and northern Rocky Mountain wolf populations, as well as the prevalence of public lands.\textsuperscript{246} Other potential areas include Washington’s Olympic Peninsula, the Blue Mountains of southeastern Washington and northeastern Oregon, the Siskiyou Mountains of southern Oregon and northern California, and the northern Sierra Nevada Mountains in California.\textsuperscript{247} Studies demonstrate that 470 wolves can live in the complex of wildlands that include the Modoc Plateau of California and Oregon and the southern Oregon Cascades.\textsuperscript{248} Another recent study shows that Oregon can support 2200 wolves.\textsuperscript{249}

\textsuperscript{237} Id. at 18.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{241} Id. at 18.
\textsuperscript{242} Id. at 19.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} STATE OF THE WOLF, supra note 243, at 7.
The southern Rocky Mountains, which extend from south-central Wyoming to northern New Mexico, contain some of the best wolf habitat in the United States.\textsuperscript{250} This 41 million-acre region includes 25 million acres of public lands and has abundant elk and deer populations.\textsuperscript{251} The southern Rocky Mountains region contains one and a half times more public land than is available in the Greater Yellowstone Ecosystem, almost twice as much land as available in central Idaho, and six times the amount of public land available in the Blue Range Wolf Recovery Area (BRWRA) in Arizona and New Mexico.\textsuperscript{252} The region contains 1.7 to 25 times more public land than other sites considered for wolf restoration.\textsuperscript{253} The region contains roadless areas and wilderness, which equals seventy percent of the wilderness available to wolves in the Yellowstone area.\textsuperscript{254} It is equivalent to the amount of wilderness available to the wolves in central Idaho and about four times the amount of wilderness available to Mexican wolves in BRWRA.\textsuperscript{255}

The absence of wolves in the southern Rocky Mountains region represents a significant gap in the taxon. Since the region is equidistant from the northern Rockies and the BRWRA, the establishment of a southern Rocky Mountain wolf population would create “a spatially segregated population of wolves that extended from the Arctic to Mexico.”\textsuperscript{256} David Mech, a noted wolf expert, declared that “[southern Rocky Mountain] restoration could connect the entire North American wolf population from Minnesota, Wisconsin, and Michigan through Canada and Alaska, down the Rocky Mountains into Mexico. It would be difficult to overestimate the biological and conservation value of this achievement.”\textsuperscript{257}

FWS studies show the southern Rocky Mountains can support 1100 wolves.\textsuperscript{258} Potential gray wolf restoration sites include the Vermejo Park Ranch/Carson National Forest complex, the San Juan


\textsuperscript{251} Id.

\textsuperscript{252} Michael K. Phillips et al., \textit{Restoring the Gray Wolf to the Southern Rocky Mountains: Anatomy of a Campaign to Resolve a Conservation Issue}, in \textit{People and Predators: From Conflict to Coexistence} 244 (Nina Fascione et al., eds., 2004).

\textsuperscript{253} Id.

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} Id.

\textsuperscript{257} Id. at 244–45.

\textsuperscript{258} \textit{State of the Wolf}, \textit{supra} note 243, at 10.
Mountains, Rocky Mountain National Park, and the Gunnison National Recreation Area. There is also public support for wolf restoration in the region. The southern Rockies have been described as “the mother lode for wolves.”

There are additional areas in the Southwest that are amenable to wolves. These areas include the Sky Islands ecosystem in southern Arizona and New Mexico, the Apache Highlands (White Mountain and San Carlos Apache Reservations), and Big Bend National Park and Big Ben State Park in Texas.

The Northeast is another major geographic area that contains a suitable habitat to support wolves. The population of wolves across the Canadian border in Quebec and Ontario can serve as a source population for recovery in the Northeast. There have been unconfirmed reports of wolf sightings in the Northeast, which are suspected to be Canadian wolves. The FWS suggested the establishment of a separate Northeast DPS in the Proposed Rule. All of the peer reviewers who commented on the issue supported the establishment of the Northeast DPS. Researchers estimate that the region can support over 1000 wolves.

B. Distinct Population Segments (DPSs)

The definition of “species” in the ESA includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when ma-
The ESA does not define “distinct population segment.” In 1996, the FWS and NMFS adopted a joint DPS policy for purposes of listing, reclassifying, and delisting vertebrate species under the ESA. A DPS is a group of vertebrate animals that is both discrete from and significant to the taxon as whole. According to this policy, the population is discrete if it is “markedly separate from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or “it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of [section] 4(a)(1)(D) of the Act.” Complete isolation from other populations of its parent taxon is not a necessary condition of discreteness. State or other intra-national boundaries cannot be used in determining the discreteness of a potential DPS. However, a state boundary can be utilized for the demarcation of the DPS when the state boundary incidentally separates two DPS that are considered to be discrete on other grounds.

The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited to, “the use of an unusual or unique ecological setting; a marked difference in genetic characteristics; or the occupancy of an area that, if devoid of the species, would result in a significant gap in the range of the taxon.” If the population is both discrete and significant, it can

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271 See id. § 1532.
274 Id. at 4725
275 See id. at 4724
276 See id. at 4723–24.
277 See id.
278 Id. at 4724.

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
be evaluated pursuant to the five criteria of section 4(a)(1) for listing, downlisting, or delisting.\textsuperscript{280} The FWS and NMFS recognized that the establishment of a DPS “may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies.”\textsuperscript{281} In the Final Rule, the FWS established the Eastern,\textsuperscript{282} Western,\textsuperscript{283} and Southwestern DPSs, which encompassed the historic range of the gray wolf.\textsuperscript{284} The FWS determined that the areas were discrete because the current populations were separated from one another by large unoccupied areas.\textsuperscript{285} There was no evidence of wolves migrating from one DPS to another DPS.\textsuperscript{286} The three DPSs were significant because the loss of
any DPS would cause a significant gap in the range of the taxon. In addition, the gray wolf populations in the three DPSs did not share the same genetic characteristics, so they represented different reservoirs of diversity.

The federal district court in *Defenders of Wildlife v. Secretary, U.S. Department of the Interior* found the three DPSs inconsistent with the DPS policy and the ESA. The court determined that the DPS policy was designed to encapsulate a population whose conservation status differed from other populations of the same species. The FWS inverted this purpose to downlist large geographic areas. The FWS established three DPSs, but acknowledged that only the gray wolf populations in the western Great Lakes and northern Rocky Mountains were recovered. Other populations in the Northeast and Pacific Northwest were “tenuous or nonexistent.” Instead of isolating the distinct populations in the western Great Lakes and northern Rockies, the FWS extended the boundaries of these two core areas to include the entire historic range of the gray wolf. As a result, the conservation status of the population within each DPS varied from recovered to extinct.

The SOI’s implementation of the DPS policy involved a mix of legal and factual determinations. Generally, the court defers to an agency’s policy decisions because of agency expertise. Nevertheless, a court must perform a “thorough, probing, in-depth review” of agency action. The “hard look” doctrine requires the court to examine the agency action “to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore

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288 *See id.* at 15,819.
290 *Id.*
291 *Id.* at 1171.
292 *See id.* at 1170–71.
293 *Id.* at 1171.
294 *See id.*
296 Policy questions generally “reflect political choices—accommodation of competing interests, application of value choices, and responsiveness to the electorate—methods of decision making thought to be sharply distinguishable from the chief business of the courts, and hence owed great deference.” CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW, RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 34 (1990).
297 *Nat’l Ass’n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003).*
the ascertainable legislative intent.” The court does not owe any deference to an agency when its action is inconsistent with statutory mandate. There is no rational connection between the facts found and the choices made by the agency. The agency ignores analysis of its own scientific experts without a credible explanation. The agency decision, even if based on scientific expertise, is not well-reasoned. The agency relies on factors Congress did not intend for it to consider. The agency fails to consider an important part of the problem. The agency refuses to consider data before it. Rigorous judicial review “ensure[s] that the agency’s decision was a ‘reasoned’ exercise of discretion and not merely a response to political pressures.” The FWS establishment of three DPSs, which encompass the entire historic range of the gray wolf, was inconsistent with the legislative intent, the DPS policy, and the case law.

1. Legislative History

The FWS interpretation of the DPS policy was inconsistent with the legislative history, which demonstrates a progressive narrowing of focus of ESA protection from species, to subspecies, to discrete population segments. The Endangered Species Preservation Act of 1966 provided limited protection for certain species of fish and wildlife threatened with extinction. There was no concern with subspecies or populations. The Endangered Species Conservation Act of 1969 protected species and subspecies of wildlife threatened with world-

302 See Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001).
303 See O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996).
304 See Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43.
305 See Am. Tunaboat Ass’n v. Baldrige, 738 F.2d 1013, 1017 (9th Cir. 1984).
wide extinction.\textsuperscript{310} Congress was concerned with the limited scope of the statutes.\textsuperscript{311} The ESA of 1973 protected endangered species and threatened species through all or a significant portion of their range.\textsuperscript{312} Species were defined as “subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.”\textsuperscript{313}

The Endangered Species Act Amendments of 1978 established the current definition for a species as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature.”\textsuperscript{314} The conference committee explained that the new definition included “distinct populations” of vertebrate fish or wildlife.\textsuperscript{315} Other definitions that excluded subspecies and populations were offered, but rejected in the floor debates.\textsuperscript{316}

The Endangered Species Act Amendments of 1979 did not change the definition of species.\textsuperscript{317} The legislative history is informative because the DPS listing was the subject of debate. The General Accounting Office (GAO) suggested that the DPS listing be terminated because it could “result in the listing of squirrels in a specific city park, even though there is an abundance of squirrels in other parks in the same city, or elsewhere in the country.”\textsuperscript{318} The FWS and the NMFS opposed the GAO’s suggestion because “it would severely limit their ability to require the appropriate level of protection for a species based on its actual biological status.”\textsuperscript{319}

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\item \textsuperscript{310} Pub. L. No. 91–135, 83 Stat. 275 (1969); Gleaves et al., \textit{supra} note 309, at 27–28.
\item \textsuperscript{311} Pub. L. No. 93–205, § 3(4), 87 Stat. 884 (1973).
\item \textsuperscript{312} § 3(4), 87 Stat. at 885.
\item \textsuperscript{313} H.R. Rep. No. 93-740 (1973), \textit{reprinted in Legislative History}, \textit{supra} note 143, at 426, 429.
\item \textsuperscript{315} The Conference Committee Report declares that the definition of species “includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of vertebrate ‘species.’” H.R. Rep. No. 95-1804 (1978), \textit{reprinted in Legislative History}, \textit{supra} note 143, at 1208; \textit{see also} Gleaves et al., \textit{supra} note 309, at 30–31.
\item \textsuperscript{316} Gleaves et al., \textit{supra} note 309, at 31 n.28. See amendments offered by Representative Duncan and Senator Garn. \textit{Legislative History}, \textit{supra} note 143, at 881–84, 1080–07.
\item \textsuperscript{318} S. Rep. No. 96-151 (1979), \textit{reprinted in Legislative History}, \textit{supra} note 143, at 1396–97.
\item \textsuperscript{319} \textit{Id.} at 1397. The FWS proceeded to state:
The Senate Committee on Environment and Public Works, rejecting the GAO proposal, declared:

[T]here may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing of populations may be necessary when the preponderance of evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.

Nonetheless, the committee is aware of the great potential for abuse of this authority and expects the FWS to use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted.\textsuperscript{320}

The Endangered Species Act Amendments of 1982 did not change the definition of species, but were significant for several reasons.\textsuperscript{321} First, special provisions provided for the release of an experimental population of endangered or threatened species, which is “wholly separate geographically from nonexperimental populations of the same species.”\textsuperscript{322} Such a release can occur “outside the current range of such species if the Secretary determines that such release will further the conservation of such species.”\textsuperscript{323} This demonstrates that Congress was aware of the difference between the current and historical range of the species.\textsuperscript{324} Second, only biological categories could be utilized for the listing of “any species or subspecies of fish,

\footnotesize{\textsuperscript{320} Id. at 1396–97; see also Gleaves et al., supra note 309 at 32–33.  
\textsuperscript{322} Id.  
\textsuperscript{324} 16 U.S.C. § 1539(j)(2)(A).}
wildlife or plants and separate populations of vertebrate species.”

Third, only biological information could support listing decisions.

The Endangered Species Act Amendments of 1988 did not change the definition of species, either. The House Merchant Marine and Fisheries Committee Report stated, “[a]ny species or subspecies of fish, wildlife, or plants may be listed. In addition, geographically distinct populations of vertebrate species may be listed.”

2. DPS Policy

The FWS action was inconsistent with its own policy. The DPS policy focuses on discrete population segments, which are “markedly separated . . . as a consequence of physical, physiological, ecological, or behavioral factors [or] . . . delimited by international governmental boundaries.” The DPS must be based on the best available scientific evidence, which includes dispersal distances and other limiting factors, such as significant mountain ranges, bodies of water, deserts, or major urban areas. The DPS policy expressly prohibits use of state boundaries to establish the DPS. The three DPSs established by FWS were not based on science. The FWS accumulated all of the states in the gray wolf’s historic range and divided them into three DPSs. Each DPS was too large and encompassed more territory than the gray wolves in the core areas would ever be able to reach or inhabit. The DPS boundaries were not based on biology, but on politics. Apparently, the FWS believed that this was “the best and

326 Id.
328 Gleaves et al., supra note 309, at 36 (quoting H.R. Rep. No. 100-467 (1988)).
330 Id. at 4722.
334 Id. at 1170.
335 See id. at 1170, 1171–73.
336 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 35. Several comments demonstrated the political nature of the FWS’s action. FWS Western Regional Coordinator Ed Bangs stated, “I think this [reclassification] is the best and quick-
quickest way to get the policy and legal framework greased for wolf delisting.”

In the Western DPS, the core wolf population in three states—Montana, Wyoming, Idaho—was on its way to recovery. Six other states in the Western DPS had few, if any, wolves. The FWS used the success in three core states to downlist the gray wolf in the other six states where its endangered status had not changed. The FWS’s own experts noted that the Western DPS was too large. The boundaries of the Western DPS were not based on natural limitations.

est way to get the policy and legal framework greased for wolf delisting.” Id. at 44. In addition, Scott Johnston noted that “[t]wo significant events have shaped this rule: the June 1998 announcement by the Director and Secretary that indicated our intention to delist wolves in the Western Great Lakes; and, the Minnesota Legislature failing to approve a state management plan.” Id. Another commentator declared that to “[r]eclassify and subsequently delist Eastern Timber Wolf . . . [i s] probably the simplest and quickest approach.” Id. at 45.

Id.


Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 19.

Id. at 19–21, 36.

Id. at 36. FWS peer reviewer Michael Phillips was quoted in the memorandum as stating:

I oppose the Service’s reliance on the 1987 Northern Rocky Mountain Wolf Recovery Plan . . . as the operative document for effecting wolf recovery in the west. It is inappropriate to apply delisting criteria that were originally developed for a 3-state region (i.e. Montana, Wyoming, and Idaho) and according to the Service’s own scientific review are only minimally acceptable . . . to the much larger 9-state western DPS. The proposed reclassification rule, however, indicates that the Service intends to do just that. . . . I recommend that the Service recognize that it is inappropriate to apply the recovery objectives that were developed for Montana, Wyoming, and Idaho to the much larger proposed Western DPS. Effecting wolf recovery in the proposed Western DPS according to such criteria is entirely unwarranted and has no basis in biology or law.

Id. Furthermore, Rolf Peterson, another FWS peer reviewer, stated:

The Northern Rocky Mountains Recovery Plan apparently established recovery criteria primarily with areas in just three states in mind, MT, ID, and WY. The recovery goal of [ten] breeding packs in each of the three recovery areas in these states is, I think, adequate for the original areas considered. However, I don’t believe there is an adequate basis for greatly enlarging the spatial scale for this Plan without a more thorough consideration of both spatial and numerical criteria.

Id. at 37. Brian Kelly, an FWS biologist, also said: “I think it [is] a great leap to claim all western states are recovered based on criteria developed for only 3 states in the N. Rockies.” Id.
or dispersal distances, which are generally 250 miles. FWS Western Regional Coordinator Ed Bangs acknowledged the massive size of the Western DPS when he declared there was no way that any gray wolves in the Western DPS would migrate below Interstate 70.

The Eastern DPS was also not based on biology. The Proposed Rule created two separate DPSs, one in the western Great Lakes and the other in the Northeast. The Final Rule combined both areas into the Eastern DPS. There was no way that the wolves in the western Great Lakes were going to migrate and populate the Northeast because the dispersal distance was too far and there were too many impediments. Even the FWS Eastern Timber Wolf Recovery Team criticized the Eastern DPS for being too large.

FWS experts supported the establishment of a separate Northeast DPS. Ron Refsnider, author of the Final Rule, stated that the FWS abandoned the Northeast DPS because of political pressure.

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342 Id. at 37.
343 Id. Ed Bangs commented on the Western DPS: “I still think there is no way a wolf will get South of I-70 on its own. [The] chances of a breeding pair getting there is zero. If the 4(d) rule [allowing for lethal take of wolves] gets done, it will be even less likely.” Id. Doug Smith, leading wolf biologist for Yellowstone National Park, criticized the FWS for overstating the amount of wolf dispersal among three northern Rocky Mountain wolf populations. Id. at 38.
344 Id. at 35.
348 Id. at 39. The Eastern Timber Wolf Recovery Team recommended a smaller DPS that included Minnesota, Michigan, Wisconsin, and states within a reasonable dispersal distance (North Dakota, South Dakota, Iowa, Illinois, Ohio, Indiana). Id.
349 Id. at 41. The Eastern Wolf Recovery Team noted that a smaller DPS “preserves future options for gray wolf in the Northeastern U.S. to be fully protected under the Endangered Species Act after wolf recovery in the [W]estern Great Lakes area has been achieved.” Id. at 40.
350 Id. at 42. Ron Refsnider stated:

Instead we have this situation in which the former DTE Chief, FWS Director, [DOI] Secretary, and other decision-makers supported establishing a [Northeast] DPS through a rulemaking. They apparently thought it fit the DPS criteria (and some of them were very familiar with the criteria!), regardless of the lack of good evidence that gray wolves currently exist there. We spent 2 years developing and publicizing a national rule based on the premise that a NE DPS was justified and appropriate . . . . But with all those past decision-makers
2001, after the election of George W. Bush, the FWS amalgamated the Northeast DPS into the Eastern DPS. The FWS, noting internal disagreement regarding the issue, defended the abandonment of the Northeast DPS. The FWS asserted that a wolf population had to be present in the Northeast to establish a separate DPS. Furthermore, there was a real possibility that wolves in the Northeast were a different subspecies, possibly the red wolf, the Algonquin wolf, a coyote-hybrid, or another canine. Since there was no data on either the identity or existence of the wolf in the Northeast, a DPS could not be established. A threatened species listing for New York, New Hampshire, Maine and Vermont was retained to protect any wolf that might arrive and preserve the option of recovery. Due to uncertainty, the section 4(d) rule for the Eastern DPS did not apply east of Ohio.

The FWS downlisting of the gray wolf was questionable under either rationale. Wolves in the Northeast were either a different subspecies entitled to greater protection, which could not be amalgamated into a single DPS, or gray wolves whose absence in the region created a significant gap in taxon. Since the benefit of doubt goes to the species, the FWS should not have downlisted wolves in the Northeast.

The Southwest DPS, which extends beyond the historic range and dispersal distances of the reintroduced Mexican wolves, was also

and NE DPS supporters out of the picture, we are on the verge of losing the NE DPS because of largely internal opposition to the idea.

Id. See id.

351 Federal Defendants’ Opposition to Plaintiffs’ Motion For Summary Judgement at 44–47, Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (No. 03-1348 JO) [hereinafter Federal Defendants’ Opposition]. Regions 3 and 5 pushed for a Northeast DPS, but Region 9 “strongly disagreed that designation was consistent with the DPS Policy, and everyone recognized that the decision had major implications for future application of the DPS Policy.” Id. at 46.

352 Id. at 45.

353 Id. at 45–46.

354 Id. at 45.

355 Id.

356 Id. at 45–46.

357 Federal Defendants’ Opposition, supra note 352, at 46.

358 Id. at 45–47.

359 Federal Defendants’ Opposition, supra note 352, at 46.

360 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 41.

too large and not based on scientific factors. Ed Bangs, FWS Regional Coordinator, noted that no Mexican wolves were getting above Interstate 70. Furthermore, the boundary established between the Western and Southwestern DPSs divided the southern Rockies ecosystem, which was identified by FWS experts as having some of the best remaining wolf habitat.

Finally, the FWS argued that all the areas in the gray wolf’s historic range must be included in the three DPSs. The FWS claim was based on a memo by Ron Refsnider. Neither the ESA nor the implementing regulations support the FWS position. The ESA contemplates a national species listing and a DPS for the unique treatment of smaller populations of gray wolves. Therefore, the DPS should be cut out of the historic range of the entire species and accorded unique treatment. It should not serve as a vehicle for downlisting the entire species.

3. Case Law

The courts have not supported the FWS position. In Norton-Lizard, the Ninth Circuit recognized that the ESA provided different levels of protection for different populations of the same species, such as the alligator, grizzly bear, marbled murrelet, desert big horn sheep, Stellar sea lion, Audubon crested caracara, and piping plover.

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362 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 43.
363 See id. at 37, 43–45.
364 Id. at 43. One comment in the administrative record states: “No other region in the U.S. offers that same potential to support a persistent population of wolves on public land . . . .” Id. Another comment notes that “the two areas left most appropriate to wolf recovery are the northeastern DPS (e.g. northern Maine) and the southern rockies (e.g. southern Colorado).” Id.
365 Id. at 33–34.
366 Plaintiffs’ Reply Memorandum, supra note 269, at 23. Refsnider stated in his memorandum that “the entire previously listed range (or the historical range, if the previously listed range erroneously went beyond the documented historical range) must be included in the resulting DPSs.” Id.
367 Plaintiffs’ Memorandum in Support of Summary Judgment, supra note 331, at 34–41.
368 Nat’l Ass’n of Homebuilders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003) (discussing designation of the Arizona pygmy-owl as a DPS).
369 See id.
370 See id.
372 See id.
In *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, the federal district court rejected the FWS attempt to utilize the DPS policy as the means for avoiding ESA requirements.\(^{373}\) Friends of the Wild Swan petitioned to have the bull trout listed as an endangered species.\(^{374}\) Initially, the FWS determined that a national listing was warranted, but later changed its position.\(^{375}\) The FWS, relying on U.S. Forest Service and Bureau of Land Management actions, as well as state bull trout protection agreements, created five DPSs and did not grant the bull trout a national listing.\(^{376}\) The federal district court held that the failure of the FWS to list the bull trout and explain its adoption of five DPSs, which decreased the protection of the species, was arbitrary and capricious.\(^{377}\) The court noted that the DPS “is a proactive measure to prevent the need for listing a species over larger range—not a tactic for subdividing a larger population that [FWS] has already determined, on the same information, warrants listing throughout a larger range.”\(^{378}\)

In *Defenders of Wildlife*, the federal district court recognized that the establishment of three DPSs for the gray wolf was similar to that of the bull trout.\(^{379}\) According to the court, the three DPSs “decreased the protection afforded to the species, even though the population status of wolf was not improved outside of the core recovery areas.”\(^{380}\) The DPS for the gray wolf, like those for the bull trout, “appears to be a tactic for downlisting areas the FWS has already determined warrants listing, despite the unabated threats and low to nonexistent populations outside of the core areas.”\(^{381}\)

**C. Recovery Plans**

Once the species is listed, the FWS “must do far more than merely avoid the elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from


\(^{374}\) *Friends II*, 12 F. Supp. 2d at 1122.

\(^{375}\) *Id.* at 1123–24.

\(^{376}\) *Id.* at 1132–36; *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv. (Friends I)*, 945 F. Supp. 1388, 1400–01 (D. Or. 1996).

\(^{377}\) *Friends II*, 12 F. Supp. 2d at 1133–34.

\(^{378}\) *Id.* at 1133.


\(^{380}\) *Id.*

\(^{381}\) *Id.*
the protected class . . . .”[382] The FWS must “develop and implement a recovery plan ‘for the conservation and survival of any threatened or endangered species’ that will benefit from such a plan.”[383] The plan must contain site management actions, objective and measurable criteria for removing species from the list, and an estimate of the time required and costs to carry out the plan’s goals.[384] The plan is “supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence.”[385] It is supposed to provide a means for achieving the species long-term survival in nature.”[386]

The FWS developed three recovery plans for the gray wolf in the East, northern Rocky Mountains, and Southwest DPSs based on principles of conservation biology: representation, resiliency, and redundancy.[387] The Eastern Recovery Plan covered a geographic area stretching from Minnesota to Maine to northeast Florida.[388] The plan contained two listing criteria, which included at least two populations within the continental United States that met the following conditions: “(1) a Minnesota population that is stable or growing, and whose continual survival is assured and, (2) a second population outside of Minnesota and Isle Royale, having at least 100 wolves in late winter if located within 100 miles of the Minnesota wolf population, or having at least 200 wolves if located beyond that distance.”[389]

Wolves in Wisconsin and Michigan would be downlisted if the population within each state remained above eighty wolves for three consecutive years.[390] When the Final Rule was published in April 2003, the eastern gray wolf population exceeded the numerical criteria for downlisting and delisting set forth in the recovery plan.[391]
The Northern Rocky Mountain Recovery Plan focused on Montana, Idaho, and Wyoming.\textsuperscript{392} The plan established a recovery criterion of at least ten breeding pairs of wolves for three successive years in each of the three recovery areas, with a population of 300 adult wolves prior to delisting.\textsuperscript{393} If one recovery area maintained ten breeding pairs for three consecutive years, that area could be downlisted to threatened status.\textsuperscript{394} However, if two recovery areas maintained ten breeding pairs, or approximately 200 adult wolves, for three consecutive years, gray wolves throughout the entire northern Rocky Mountain area could be reclassified from endangered to threatened.\textsuperscript{395} In 1995, gray wolves captured in Canada were reintroduced into central Idaho and the Yellowstone area.\textsuperscript{396} In 2000, the FWS proposed changing the downlisting and delisting goals.\textsuperscript{397} When the Final Rule was published in 2003, the northern Rocky Mountain gray wolf population exceeded both the original and revised downlisting criteria.\textsuperscript{398}

The Southwest Recovery Plan included portions of Arizona, New Mexico, Texas, and Mexico.\textsuperscript{399} The preliminary goals of the plan were...
to reestablish a population of 100 Mexican wolves within the wolf’s historic range.\textsuperscript{400} In January 1998, the FWS reintroduced Mexican wolves into the Blue Range Wolf Recovery Area as a nonessential experimental population.\textsuperscript{401} By 2003, there were at least twenty-four Mexican wolves in eight packs in the recovery area.\textsuperscript{402} Since the program was in its infancy, the Mexican wolf retained endangered species status, except in the nonessential experimental population area.\textsuperscript{403}

DOI alleged that the decision to downlist the Eastern and Western DPSs from endangered to threatened species status was based on the gray wolf’s recovery progress under the plans and the FWS evaluation of the five-factor threat analysis.\textsuperscript{404} In \textit{Defenders of Wildlife}, the court did not specifically address the significance of meeting recovery plan goals, but its decision indicates that it did not concur with DOI.\textsuperscript{405} The text and legislative history of the ESA demonstrate that meeting recovery plan goals is only a preliminary step in the downlisting process, which must be based on the five factors set forth in section 4(a) of the ESA.\textsuperscript{406} The courts do not treat the recovery plan as a legally enforceable document.\textsuperscript{407} Meeting recovery plan goals in the Eastern and Western DPSs did not constitute a sufficient basis to downlist the gray wolf across this portion of its historic range.\textsuperscript{408}

1. Legislative and Executive Action

The text of the ESA demonstrates that listing, downlisting, and delisting decisions must be done according to the five-factors set out in section 4(a).\textsuperscript{409} The SOI is required to “develop and implement plans . . . for the conservation and survival of endangered species and threatened species . . . unless he finds that such a plan will not promote the conservation of the species.”\textsuperscript{410} The plans must include “objective, measurable criteria which, when met, would result in a deter-

\textsuperscript{400} Id. at 15,818.
\textsuperscript{401} Fitzgerald, supra note 46, at 30–36.
\textsuperscript{402} Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,818.
\textsuperscript{403} Id.
\textsuperscript{404} Id. at 15,810–11, 15,824; Federal Defendants’ Reply, supra note 210, at 18.
\textsuperscript{406} Id. at 1166, 1172.
\textsuperscript{407} Id. at 1172.
\textsuperscript{408} Id.
\textsuperscript{410} 16 U.S.C. § 1533(f)(1).
mination, *in accordance with the provisions of this section*, that the species be removed from the list.”

The legislative history of the ESA reinforces this point. Precursors of the ESA did not focus on species recovery, but on species extinction. The Endangered Species Preservation Act of 1966 established “a program for the conservation, protection, restoration, and propagation” of domestic endangered species. The SOI was required to develop a list of endangered species and encourage other federal agencies to use their authority to protect endangered species. No attention was paid to the removal of species from the list.

Delisting was addressed in the Endangered Species Conservation Act of 1969. The SOI was required to review the endangered species list every five years to determine whether the species “continued to be threatened with worldwide extinction.” Species that were no longer endangered would be removed from the list. The Endangered Species Act of 1973 focused on extinction, but was also concerned with delisting. The ESA was designed to conserve endangered and threatened species. Conservation is defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”

Given the problems posed by listings, designations, and consultations,
little attention was directed at recovery, which remained an aspirational goal.\textsuperscript{424}

The Endangered Species Act Amendments of 1978 focused on the process for delisting species.\textsuperscript{425} Section 4(f) of the ESA required the SOI to develop recovery plans.\textsuperscript{426} The House Merchant Marine and Fisheries Committee declared, “The ultimate goal of the Endangered Species Act is to focus sufficient attention on listed species so that, in time, they can be returned to a healthy state and removed from the list.”\textsuperscript{427} Building on agency practice,\textsuperscript{428} the SOI was required to develop recovery plans that would provide “a framework for actions directed at conserving or, at least insuring the survival” of listed species.\textsuperscript{429} The committee language was changed in the conference committee, which explained that recovery plans were designed “to ensure the conservation or survival of each listed species.”\textsuperscript{430}

The Reagan Administration shifted the emphasis on recovery from an aspirational goal to the delisting of species.\textsuperscript{431} Congress began to discuss recovery in terms of returning species to healthy levels.\textsuperscript{432} The Endangered Species Act Amendments of 1982 instructed the SOI to “give priority in preparation of recovery plans to those species that are, or may be, in conflict with construction or other development projects.”\textsuperscript{433} Congress also mandated that the same process and criteria employed for listing a species be used to delist a species.\textsuperscript{434} The recovery process was not fully implemented.\textsuperscript{435} The 1986

\textsuperscript{424} Oliver A. Houck, \textit{The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce}, 64 U. COLO. L. REV. 277, 345 (1993).
\textsuperscript{428} At the time there were fifty-nine recovery teams developing recovery plans for seventy-three priority species. Cheever, \textit{supra} note 426, at 35; Doremus, \textit{supra} note 414, at 10,444 n.141.
\textsuperscript{430} H.R. Rep. No. 95-1804, \textit{reprinted in Legislative History, supra note 143}, at 1219; See Paltis, \textit{supra} note 414, at 71 n.70 (describing the complete series of changes).
\textsuperscript{432} Id. By 1982, “approximately 160 recovery plans had been proposed and seventy-five approved for implementation.” Houck, \textit{supra} note 424, at 345.
\textsuperscript{434} \textit{Id.} at 12, \textit{as reprinted in 1982 U.S.C.C.A.N. 2812}.
\textsuperscript{435} Houck, \textit{supra} note 424, at 345. By 1986, only four of the 425 domestic species listed were recovered; another sixteen were improving; sixteen others were either extinct or
FWS regulations declared that “recovery is not attained until the threats to the species as analyzed under section 4(a)(1) of the Act have been removed” and the “protective measures provided for listed species under the Act are no longer needed . . . .”\textsuperscript{436}

The Endangered Species Act Amendments of 1988 focused on recovery planning.\textsuperscript{437} The GAO was very critical of the recovery process.\textsuperscript{438} Congress attempted to improve the implementation of recovery plans and link the attainment of recovery goals to delisting by enacting several changes.\textsuperscript{439} First, the SOI was required to compose recovery plans without regard to a species’ taxonomic classification.\textsuperscript{440} No more preference would be given for species of higher taxonomic orders.\textsuperscript{441} Second, resources would be allocated more evenly among species on the basis of biological information, with priority given to species that were most likely to benefit, as well as those posing the greatest obstacles to development activities.\textsuperscript{442} Third, section 4(f) was amended to require that each recovery plan have site specific management activities, objective criteria by which to judge success of the plan, and time frames and estimates of costs to carry out the planned recovery.\textsuperscript{443} The SOI was required to report to Congress on the status of recovery annually.\textsuperscript{444} Fourth, recovered species would be moni-

\textsuperscript{438} U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-89-5, ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM 23 (Dec. 1988), available at http://archive.gao.gov/d17t6/137715.pdf [hereinafter GAO Report]. The GAO found that in the ten years since the 1978 Amendments, only fifty-six percent of the listed species had approved plans. \textit{Id.} Plans for another eighteen percent of the listed species were in preparation. \textit{Id.} The planning process had not yet begun on one fourth of the listed species. \textit{Id.} Species with plans had been listed for an average of six and a half years before recovery plans were completed. \textit{Id.} at 24. Only half of the tasks in sixteen plans chosen for examination had been initiated, although the plans reviewed had been approved for an average of four years. \textit{Id.;} Cheever, \textit{supra} note 426, at 40.
\textsuperscript{440} \textit{Id.} at 9, as reprinted in 1988 U.S.C.C.A.N. 2708.
\textsuperscript{441} \textit{Id.} From fiscal year 1982 to fiscal year 1986, only five percent of listed species had received about forty-five percent of funding for recovery planning. \textit{Id.}
\textsuperscript{442} \textit{Id.}
\textsuperscript{443} \textit{Id.}
tored for five years after delisting.\textsuperscript{445} Emergency listing authority was provided to prevent any significant risks to the species.\textsuperscript{446} Nevertheless, Congress recognized that the recovery of endangered and threatened species would be a very long process.\textsuperscript{447} Such efforts had been underway for a decade or longer for many species, yet recovery still was not in sight.\textsuperscript{448}

The new guidelines instituted after the 1988 Amendments in response to the GAO criticism pointed out that objective measurable criteria were essential for recovery planning.\textsuperscript{449} Long-term survival and delisting were not required objectives of recovery planning.\textsuperscript{450} Drafters of recovery plans were instructed to “[c]hoose among delisting, downlisting, or protection of existing populations. Be ambitious, but do not set an unobtainable objective.”\textsuperscript{451} A minimal viable population “may prove useful” in developing recovery plan objectives, but was not mandatory.\textsuperscript{452} The implementation of recovery planning was crucially important.\textsuperscript{453}

The Clinton Administration, which attempted to prove that the ESA was compatible with economic development, stressed that delisting would be the measure of success for species conservation.\textsuperscript{454} The FWS and the NMFS published a joint policy regarding ESA implementation in 1994, which affected recovery planning.\textsuperscript{455} In 1996, the FWS emphasized the importance of the link between the recovery plan and delisting.\textsuperscript{456}

\begin{thebibliography}{9}
\setcounter{enumiv}{445}
\bibitem{446} \textit{Id}.
\bibitem{447} \textit{Id}.
\bibitem{448} \textit{Id}.
\bibitem{449} Cheever, \textit{supra} note 426, at 41; \textit{see U.S. Fish & Wildlife Serv., Policy and Guidelines for Planning and Coordinating Recovery of Endangered and Threatened Species} 4 (May 25, 1990) [hereinafter FWS Guidelines]; GAO Report, \textit{supra} note 438, at 5. Recovery is defined in guidance documents as the “process by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured.” FWS Guidelines, \textit{supra}, at 1.
\bibitem{450} FWS Guidelines, \textit{supra} note 449, at I-5.
\bibitem{451} \textit{Id}.
\bibitem{452} \textit{Id} at I-12.
\bibitem{453} \textit{See} Cheever, \textit{supra} note 426, at 41.
\bibitem{454} Cheever, \textit{supra} note 431, at 11,306.
\bibitem{455} Notice of Interagency Cooperation Policy on Recovery Plan Participation and Implementation under the Endangered Species Act Section 9 Prohibitions, 59 Fed. Reg. 34,272, 34,273 (July 1, 1994).
\bibitem{456} U.S. Fish & Wildlife Serv., \textit{Report to Congress on the Recovery Program for Threatened and Endangered Species} 2 (1996) [hereinafter 1996 FWS Recovery Re-
In 2002, the FWS, acknowledging the status of recovery plans, declared, “‘Recovery plans’ are central to the recovery of listed species, but are not regulatory documents. Recovery plans . . . serve as the road map for the species’ recovery, laying out where we need to go, how best to get there, and how long we think it will take.” According to the FWS, “[w]e know when a species may be ready for downlisting or delisting by measuring their status against the tangible objectives and criteria developed in its recovery plan.” Nevertheless, the current FWS regulation continues to stress that recovery constitutes “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.”

2. Case Law

The courts have not found the provisions in recovery plans to be legally enforceable. Environmental groups have experienced no success at enforcing provisions of recovery plans. The National Wildlife Federation (NWF) and Wyoming Wildlife Federation (WWF) challenged the National Park Service (NPS) decision to keep Fishing Bridge Campground in Yellowstone National Park open. The NWF and WWF wanted the campground closed in order to avoid human

...
contact with grizzly bears, the primary cause of grizzly bear death.\textsuperscript{464} The federal district court in \textit{National Wildlife Federation v. National Park Service} rejected the NWF and WWF assertions that the campground had to be closed under the terms of the Grizzly Bear Recovery Plan.\textsuperscript{465} The court, recognizing the SOI’s great discretion regarding recovery plans, refused to “second guess the SOI’s motives for not following the recovery plan.”\textsuperscript{466}

The National Audubon Society (NAS) also brought suit to halt the FWS capture of wild condors.\textsuperscript{467} The federal district court halted the program because the FWS failed to justify its departure from former policy, including the Condor Recovery Plan.\textsuperscript{468} However, in \textit{National Audubon Society v. Hester}, the U.S. Court of Appeals for the District of Columbia reversed the district court’s ruling, and refused to force the FWS to comply with the Condor Recovery Plan.\textsuperscript{469}

In a similar suit, Defenders of Wildlife (DOW) brought suit to enforce specific provisions of the 1987 Northern Rocky Mountain Wolf Recovery Plan, which mandated the reintroduction of the gray wolf into Yellowstone National Park.\textsuperscript{470} The federal district court in \textit{Defenders Of Wildlife v. Lujan} rejected the assertion, stating that “[t]he Recovery Plan itself has never been an action document.”\textsuperscript{471} Even the FWS recognized that “only when an actual action plan was in hand could the environmental impact of the recovery effort in Yellowstone be determined.”\textsuperscript{472}

Lastly, the Fund for Animals brought suit to stop the filling of wetlands within the habitat of the endangered Florida panther in violation of the Florida Panther Recovery Plan.\textsuperscript{473} The U.S. Court of Appeals for the Eleventh Circuit in \textit{Fund for Animals, Inc. v. Rice} similarly rejected their argument stating, “Section 1533(f) makes it plain that recovery plans are for guidance purposes only. By providing general

\textsuperscript{464} \textit{Id.}
\textsuperscript{465} \textit{Id.} at 388–89.
\textsuperscript{466} \textit{Id.} at 389.
\textsuperscript{468} \textit{Id.} at 406–07.
\textsuperscript{469} \textit{Id.; Cheever, supra} note 461, at 408–09.
\textsuperscript{471} \textit{Id.}
\textsuperscript{472} \textit{Id.}
\textsuperscript{473} \textit{Fund for Animals, Inc. v. Rice}, 85 F.3d 535, 539, 547 (11th Cir. 1996).
guidance as to what is required in a recovery plan, the ESA ‘breathes discretion at every pore.’”474

3. FWS Expert Opinion

The decision to downlist the gray wolf across the entire Eastern and Western DPSs was contrary to the FWS’s own expert advice.475 The Eastern Wolf Recovery Team did not conclude that satisfaction of the recovery goals justified the downlisting of the gray wolf across the entire Eastern DPS.476 In June 1997, the FWS sought feedback from the Eastern Wolf Recovery Team regarding the goals of the plan, the present status of the taxon, and the 1996 DPS policy.477 The team recommended the downlisting of the gray wolf to a threatened species in the western Great Lakes, but opposed downlisting in the Northeast to preserve future options in the region.478 In January 1998, the recovery team was asked to consider the reoccupation of areas not addressed in the 1992 recovery plan and to provide recommendations on whether to proceed in those areas.479 The recovery team reiterated its support for the creation of a separate Western Great Lakes DPS and the continued protection of the gray wolf in the Northeast as an endangered species.480 The team felt that success in the western Great Lakes did not support the downlisting of the gray wolf throughout its entire historic range.481

The FWS also ignored its own experts regarding the downlisting of the entire Western DPS.482 The FWS changed the recovery criteria

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474 Id. (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975) (internal citations omitted)).
476 Plaintiffs’ Response Memorandum, supra note 208, at 35.
477 Id.
478 Id.
479 Id. at 35–36.
480 Id. at 36; see Plaintiffs’ Reply Memorandum, supra note 269, at 29–30.
481 Plaintiffs’ Response Memorandum, supra note 208, at 36. Rolf Peterson, Eastern Recovery Team leader, stated that the team “stand[s] ready to make necessary changes to the Recovery Plan itself should the DPS designation [Western Great Lakes] be selected by the Service as the appropriate tool to further the wolf delisting process.” Id. Building on the recommendation, the FWS “Work Wolf Plan” called for the recovery team to “undertake a revision of the Eastern Recovery Plan to include criteria for the Northeastern DPS.” Plaintiffs’ Reply Memorandum, supra note 269, at 28–30.
482 Plaintiffs’ Response Memorandum, supra note 208, at 38.
for the Northern Rocky Mountains Recovery Plan in 2002.\footnote{See Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15810 (Apr. 1, 2003).} Ed Bangs, the FWS Wolf Recovery Coordinator, testified in support of the revision, but did not recommend increasing the geographic size of the area.\footnote{Plaintiffs’ Response Memorandum, supra note 208, at 38.} Instead, he limited his conclusion to the gray wolf population in the three states, and expressed no opinion regarding any expansion of the recovery area. \footnote{Id.} The FWS inappropriately used recovery criteria for the northern Rocky Mountains as the standard for downlisting the entire Western DPS.\footnote{Id.} Three of the peer reviewers and one FWS biologist also disagreed with the use of the Northern Rocky Mountain Recovery criteria to downlist the entire Western DPS.\footnote{Id. at 39.}

**D. Section 4(a): A Five Factor Analysis**

Section 4(a) of the ESA provides for the listing of endangered and threatened species based on five factors: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”\footnote{16 U.S.C. § 1533(a)(1) (2000).} The same factors are utilized for downlisting and delisting species.\footnote{Id. § 1533(c); see also Fund for Animals v. Babbitt, 903 F. Supp. 96, 104–05 (D.D.C. 1995).} DOI asserted that the reclassification of the gray wolf in the Eastern and Western DPSs from endangered to threatened species status was based on the gray wolf’s progress under its recovery plans, as well as the FWS evaluation of the five factor threat analysis.\footnote{Memorandum in Support of Federal Defendants’ Motion to Dismiss and for Summary Judgment at 22–23, Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (No. 03-1348 JO) [hereinafter Memorandum in Support of Federal Defendants’ Motion to Dismiss and for Summary Judgment].}

The federal district court in *Defenders of Wildlife v. Secretary, U.S. Department of the Interior* rejected DOI’s contention and found that the downlisting of the gray wolf in the Eastern and Western DPSs was
based solely on success in the two core regions. The FWS limited its analysis to the gray wolf’s current range and failed to conduct the five-factor analysis over much of the gray wolf’s historic range. Therefore, the FWS action violated the ESA. The FWS only analyzed the five factors with respect to core populations that were present in six states: Minnesota, Wisconsin, Michigan, Montana, Idaho, and Wyoming. There are thirty states in the Eastern and Western DPSs that do not have viable wolf populations. The FWS should have analyzed the five factors across a significant portion of the gray wolf’s historic range, rather than its current range. There is much habitat suitable for viable wolf populations outside of the core six states. The gray wolf still faces danger outside the core areas. The change in status from endangered to threatened decreased the protection afforded to the gray wolf.

The Final Rule retained the wolf’s threatened species status in Minnesota and downlisted the gray wolf in Michigan and Wisconsin to a threatened species. Gray wolves in Montana were downlisted to a threatened species, while the gray wolves in the experimental population regions in Wyoming and Idaho retained their threatened species status. The major problem posed by the Final Rule was the downlisting of the gray wolf beyond the two core areas of recovery. The FWS should have established two smaller DPSs encompassing the western Great Lakes and northern Rockies, then downlisted the gray wolf to a threatened species in the two smaller DPSs. The FWS analysis, which was based exclusively on the western Great Lakes and northern Rockies wolf populations, demonstrated that the gray wolves could be downlisted to a threatened species pursuant to section 4(a)

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492 Id. at 1172–73.
493 Id. at 1173, 1174.
494 Id. at 1164.
495 Id. at 1162 (listing the states where DOW challenged the downlisting of the gray wolf).
496 See id. at 1165.
497 Defenders of Wildlife, 354 F. Supp. 2d at 1161, 1166.
498 Id. at 1164–65.
499 Id. at 1158.
501 Id. at 15,804, 15,808.
of the ESA.\textsuperscript{503} The FWS was too aggressive in downlisting the gray wolf across a significant portion of its historic range.\textsuperscript{504}

The FWS compliance with section 4(a) is primarily a fact question.\textsuperscript{505} The court must set aside an FWS action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{506} The court analyzes whether the FWS “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”\textsuperscript{507} The FWS decision will be reversed if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”\textsuperscript{508}

When reviewing the FWS decision, the court “sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the Secretary’s study was factually flawed.”\textsuperscript{509} Judicial review under the arbitrary and capricious standard is “searching and careful,” but “narrow.”\textsuperscript{510} The court “is not empowered to substitute its judgment for that of the agency.”\textsuperscript{511}

1. Destruction of Habitat

The FWS determined that the loss or fragmentation of habitat or a decline in the prey will not affect wolf recovery in the western Great Lakes and northern Rocky Mountain regions.\textsuperscript{512} Habitat or range de-

\textsuperscript{503} Id. at 1164–65.
\textsuperscript{504} See id.
\textsuperscript{505} See id. at 1163. These decisions “are the product either of scientific or expert inquiry and judgment or of an assimilation of detailed and varied evidence or experience, for which the agency is particularly well qualified by virtue of its bureaucratic organization of resources.” Edley, supra note 296, at 31–32.
\textsuperscript{508} Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43; see also Pyramid Lake Paiute Tribe, 898 F.3d at 1414.
\textsuperscript{509} Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993).
\textsuperscript{510} Citizens to Preserve Overton Park, 401 U.S. at 416.
\textsuperscript{511} Id.
\textsuperscript{512} Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,845 (Apr. 1, 2003). One commentator,
struction may affect the number of wolves, but will not place wolves in the two core regions in danger. The gray wolf is a habitat generalist, which means it can live in a variety of habitats where there is an adequate prey base and little human persecution. The gray wolf population in the western Great Lakes region expanded. Wolves from the densely forested northeast corner of Minnesota moved into more agricultural portions of central and northwest Minnesota, northern and central Wisconsin, and entire Upper Peninsula of Michigan. The wolf population in Minnesota grew to 2600, twice the goal of the recovery plan. The wolf population in Wisconsin increased an average of nineteen percent per year since 1985 and twenty-six percent per year since 1993, totaling 320 wolves in 2002. The wolf population in Michigan increased an average of twenty-four percent per year, consisting of at least 280 wolves in 2002. Wolves in the western Great Lakes region reside on public lands that include six national forests, four national parks, and seven national wildlife refuges, and do not face a mortal threat from habitat destruction.

Wolves were reintroduced into Yellowstone and central Idaho as a nonessential experimental population and naturally recolonized northwest Montana from Canada. The wolf population in the northern Rockies continued to expand. In 2002, there were approximately 663 wolves in forty-nine breeding pairs. All three regions in the northern Rockies, including Canada, are interconnected

who was critical of the Western DPS, recognized that there was protection of wolf habitat in the core areas of Wyoming, Idaho, and Montana, where there was more public land and adequate state management plans. Elizabeth A. Schulte, Note, From Downlisting to Delisting: Anticipating Legal Actions if Gray Wolves Are Delisted from the Endangered Species Act, 24 J. LAND, RESOURCES & ENVTL. L. 537, 551–52 (2004).


514 See id. at 15,822.

515 Id. at 15,812–14.

516 Id. at 15,841–42.

517 Id. at 15,842.

518 Id. at 15,804, 15,842.


520 Id. at 15,844–45; see also Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. 15,266, 15,281 (Mar. 27, 2006).


522 Id. at 15,818.

523 Memorandum in Support of Federal Defendants’ Motion to Dismiss and for Summary Judgment, supra note 490, at 19.
and possess an abundance of public lands.524 Therefore, the gray wolf is not endangered by habitat destruction in that region.525

2. Overexploitation for Commercial, Recreational, Scientific, or Educational Purposes

The FWS determined that there may be an increase in the taking of gray wolves for commercial, recreational, scientific, or educational purposes with the downlisting to a threatened species.526 Nevertheless, the impact on the wolf populations in the western Great Lakes and northern Rockies will be minimal.527 Furthermore, the gray wolf will only be downlisted to a threatened species, so all protections will not be removed.528

3. Disease or Predation

The FWS determined that disease and parasites pose a significant potential risk, but this risk will be avoided through diligent monitoring and follow-up.529 The canine parvovirus (CPV) appeared in Minnesota, but did not cause a population decline or significantly impede recovery.530 CPV might have had a negative impact on the Isle Royale wolf population, but other factors were also present.531 Wolves in Wisconsin and Michigan experienced problems with mange, but there was no significant impact on the populations.532 Gray wolves in the northern Rockies suffered from the same ailments, including expo-

525 Id.
530 Id. at 15,846–47.
531 Id. at 15,847.
532 Id. at 15,847–48.
sure to brucellosis in the Yellowstone population.\(^{533}\) However, disease to date has not been a significant impediment to wolf recovery in the regions.\(^{534}\)

The FWS acknowledged that the wolf has no natural predators.\(^{535}\) Humans cause the majority of wolf deaths through shooting and vehicle collisions.\(^{536}\) Nevertheless, the wolf population has continually increased in the western Great Lakes and northern Rockies.\(^{537}\) Human-caused mortality is less than the rate of wolf recovery.\(^{538}\) Furthermore, there is still a major deterrent for killing a threatened species: a $25,000 fine and six months in jail.\(^{539}\) This lesser penalty will continue to deter illegal killing.\(^{540}\)

4. Inadequacy of Existing Regulatory Mechanisms

The FWS determined that depredation control in the western Great Lakes and Northern Rockies does not pose a threat to wolf recovery.\(^{541}\) From 1980 to 1984, an average of 2.2% of the Minnesota wolf population of 1350 wolves was killed annually for depredation.\(^{542}\) From 1985 to 1989, three percent of the Minnesota population of about 1600 wolves was killed annually for depredation.\(^{543}\) Since 1989, the wolf population in Minnesota grew by nearly four percent per year.\(^{544}\) The FWS estimated that two to three percent of the Wisconsin and Michigan wolf population—250 to 300 wolves—will be killed annually for depredation.\(^{545}\) With annual increases in the wolf popula-

\(^{533}\) Id. at 15,848.
\(^{534}\) Id. at 15,846–49; see also Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,285. Recently, there has been an outbreak of canine parvovirus (CPV), which has had an adverse impact on the Yellowstone wolf population. Jim Robbins, Deadly Disease Is Suspected in Decline of Yellowstone Wolves, N.Y. Times (Jan. 15, 2006). NPS had decided not to inoculate wolf pups, so that they may acquire natural immunity. Id.
\(^{536}\) Id. at 15,849–52.
\(^{537}\) Id. at 15,849.
\(^{538}\) Id. at 15,851.
\(^{539}\) Id. at 15,845.
\(^{540}\) Federal Defendants’ Opposition, supra note 352, at 30–33.
\(^{542}\) Id. at 15,853.
\(^{543}\) Id.
\(^{544}\) Id. at 15,854.
\(^{545}\) Id.
tion of nineteen to twenty-four percent in recent years, depredation control is not expected to harm wolf recovery.546

The FWS pointed out that downlisting the gray wolf to a threatened species in the western Great Lakes and Northern Rockies will subject the wolf to section 4(d) rules, which grant the states broader authority to take the species without a formal permit from the FWS.547 Presently wolves in Minnesota can be taken for depredation because they are classified as a threatened species.548 However, wolves in Wisconsin and Michigan can not be taken for depredation because in those states, the wolf is classified as an endangered species.549 Wisconsin and Michigan can only relocate problem wolves.550 Wisconsin and Michigan have experienced a nineteen to twenty percent growth in their wolf populations in recent years, so capturing and finding suitable habitat for wolf relocation is becoming a problem, and generating opposition to the wolf.551 Wisconsin and Michigan want to use the same controls as Minnesota for depredating wolves.552 The FWS concluded that these controls will help to generate greater public acceptance for wolf preservation.553

The same is true in the northern Rockies.554 Most of the wolves on public lands in the region are a threatened species pursuant to section 10(j) of the ESA.555 The remaining wolves in northwest Montana are an endangered species.556 From 1987 to 2002, the U.S. Department of Agriculture removed an average of fifty-three wolves annually, or six percent, of the northwest Montana population.557 This was higher than in other regions because the area lacks millions of

546 *Id.*

547 *See* Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,860; *see also supra* note 87 and accompanying text.

548 *Id.* at 15,854. Minnesota is subject to a special section 4(d) rule. *Id.*

549 *Id.* at 15,852 (attempting to delist the gray wolf in Wisconsin and Michigan from endangered to threatened).

550 *See id.*

551 *Id.* at 15,852–53.

552 *Id.* at 15,853.


554 *Id.* at 15,855, 15,857.


557 *Id.* at 15,856.
acres of contiguous public lands and an adequate prey base. Much of the suitable habitat in the northern Rockies is already occupied. The movement of wolves into livestock areas will generate more conflict and result in greater wolf killings. The section 4(d) regulations in the nonessential experimental population areas in the northern Rockies, which have been in place since 1995, have not jeopardized the gray wolf population. The proposed section 4(d) regulations are similar to the nonessential experimental population regulations. The FWS concluded that the downlisting of the wolf in the northern Rockies and application of the section 4(d) rules will increase management flexibility and create greater toleration for the wolf.

5. Other Natural or Manmade Factors Affecting Existence

The FWS determined that the long-term survival of the gray wolf is dependent on public attitudes. At the hearings on state wolf management plans in the states of Minnesota, Wisconsin, and

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558 See id.
559 Id.
560 Id.
561 Id. at 15,808, 15,856.
563 Id. at 15,857–58.
564 Id. at 15,849.
565 Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. 15,266, 15,287 (Mar. 27, 2006) (to be codified at 17 C.F.R. pt. 50). In 2001, Minnesota Department of Natural Resources completed its comprehensive wolf management plan, which is based on the recommendations of the wolf management roundtable and on the State wolf management law passed in 2000. Id. The plan includes provisions for population monitoring, the management of problem wolves, wolf habitat and prey, the enforcement of laws prohibiting the taking of wolves, public education, and increased staffing for wolf management and research. Id at 15,289–90. The plan divides the state into wolf management Zones A and B, which correspond to Zones 1–4 and 5, respectively, in the Federal Wolf Recovery Plan. See id. at 15,289–90. In Zone A, where over eighty percent of the state’s wolves reside, state protections would be nearly as strict as current protections under the ESA, resulting in little or no post-delisting population decline. Id. at 15,289. The protection provided by the plan to the Zone A wolves will ensure a state wolf population well above 1600 in that zone. Id. at 15,290. In Zone B, wolves could be killed to protect domestic animals, even if attacks or threatening behavior have not occurred. Id. While a significant decrease in the Zone B wolf population may result, such a result would be consistent with the Federal Recovery Plan, which discourages the establishment of a wolf population in that portion of the state. Id. However, the Minnesota legislature has not yet enacted the plan into law. See id. at 15,287.
566 Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,290. The Wisconsin wolf management plan has a goal of
Michigan, there was much public support for wolf recovery. Nevertheless, the public was only agreeable if there would be minimal adverse impacts on recreational activities and livestock production. The same was true in the northern Rocky Mountain states. The FWS concluded that the new section 4(d) rules regarding the taking of wolves will enhance public support for wolf recovery.

IV. POST-LITIGATION DEVELOPMENTS

There were several major developments regarding gray wolf recovery following *Defenders of Wildlife v. Secretary, U.S. Department of the Interior*. The U.S. District Court for the District of Vermont, employing similar reasoning as the district court in *Defenders of Wildlife*, invalidated the FWS’s cessation of wolf recovery efforts in the Northeast. DOI instituted several regulatory changes, which granted Montana, Idaho, Michigan, and Wisconsin greater authority to take

350 wolves outside Native American reservations. It allows for different levels of management within four separate zones. *Id.* at 15,293. The two zones that now contain most of the state’s wolves would be managed to allow limited lethal control of problem wolves—when the population exceeds 250, but in general, lethal control would not be practiced on large blocks of public land. *Id.* at 15,294. In the other two zones, which have limited habitat, control would be less restricted for problem wolves. *Id.* The Wisconsin plan also calls for monitoring, education, reimbursement for depredation losses, habitat management, cooperation with tribes, and development of new legal protections. *Id.* at 15,292. If the population exceeds 350, a proactive depredation control program would be allowed in all four zones and public harvest would be considered. *Id.* at 15,294. Because the wolf population now exceeds this level, the State has taken initial steps to delist the wolf and classify it as a protected wild animal. Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,290–92. If the numbers decline and stay below 250 for three years, the State will relist the wolf as threatened. *Id.* If they decline to less than eighty for one year, the State will relist or reclassify the wolf as an endangered species. *Id.* The Wisconsin Natural Resource Board approved the plan in 1999. See *id.*

567 Under Michigan’s wolf management plan, wolves would be considered recovered in Michigan when a minimum sustainable population of 200 wolves is maintained for five consecutive years. Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. at 15,295. The Upper Peninsula has had more than 200 wolves since 2000. *Id.* Once the gray wolf is federally delisted, it will be eligible for state delisting. *Id.* Following federal delisting, the State intends to reclassify Michigan wolves to protected animal status. *Id.* Such status prohibits taking and details the conditions in which lethal depredation control can be carried out by the Michigan Department of Natural Resources. *Id.*


569 *Id.*

570 See *id.*


Depredating wolves. DOI also proposed the establishment of two separate DPSs in the northern Rocky Mountains and western Great Lakes and the delisting of those gray wolf populations.

A. A Court Challenge to the FWS Creation of the Eastern DPS

The National Wildlife Federation (NWF) and four other plaintiffs filed suit in the U.S. District Court for the District of Vermont, challenging the FWS abandonment of wolf recovery efforts in the Northeast. The FWS initially proposed the establishment of the Northeast DPS, which would contribute to the restoration of the species. FWS experts and scientific reviewers supported the proposal. However, the proposal was abandoned because the existence

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573 See id. at 559.
574 See id. at 562–64.
575 Eric Palola, Director of the National Wildlife Federation’s Northeast Natural Resource Center, stated that “[a]lthough the thriving wolf populations in the Great Lakes and Northern Rockies are indeed wildlife success stories, they cannot be used as an excuse for abandoning the goal of wolf recovery in the Northeast.” Press Release, Nat’l Wildlife Fed’n, NWF Pursues Legal Action to Ensure Wolf Recovery in the Northeast (Sept. 25, 2003), available at http://www.timberwolfinformation.org/info/archive/news papers/viewnews.cfm?ID=985. Palola declared, “[r]ather than walk away from pursuing wolf recovery in the Northeast, the U.S. Fish and Wildlife Service should be educating people about how wolves contribute to a healthy environment for the Northern forests and working to establish agreements with Canada and among the states where habitat exists.” Id.
576 The other plaintiffs were the Maine Wolf Coalition, Maine Audubon Society, Vermont Natural Resources Council, and Environmental Advocates of New York. Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 553.
577 Id.
579 Id. John Kostyack, NWF Senior Counsel for Wildlife Conservation, stated that “[t]he administration’s plan is illegal and contrary to what all the scientific experts recommend for wolf recovery.” Press Release, Nat’l Wildlife Fed’n, New FWS Wolf Proposal Shortsighted (July 16, 2004), available at http://huntingandfishingjournal.org/archives/issues/wolfNWF-WolfDelistingPressRelease-07-04.pdf. Peggy Struhsacker, Coordinator for NWF’s Wolf Recovery Program in Vermont, declared that “[l]umping the vacant wolf habitat in the Northeast with habitat full of wolves in the Great Lakes defies common sense.” Id. Struhsacker later stated, “wolf recovery in this region doesn’t stand a chance without a reversal of this portion of the administration’s rule. . . . The howl of the wolf has been missing too long from the Northern forests and our national wolf recovery efforts cannot be declared complete while that gap remains.” Press Release, supra note 575.
580 See Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 563. Paul Nickerson, the former chief of the endangered species division of the Northeast region of FWS, stated “[t]o leave out the whole Northeast and say they’re recovered, I think we’re kind of kidding ourselves, from a
and identity of the wolf in the Northeast was uncertain and unknown. The FWS combined the Northeast DPS with the western Great Lakes to form the Eastern DPS.

The federal district court rejected the FWS decision on several grounds. First, the court held that the Final Rule must be the “logical outgrowth” of the Proposed Rule, otherwise “affected parties will be deprived of notice and an opportunity to respond to the proposal.” The FWS abandonment of the Northeast DPS in the Final Rule deviated too much from the Proposed Rule. Even the FWS acknowledged that the Final Rule constituted a major departure. Ronald L. Refsnider, the primary author of the Final Rule, proposed publishing “a 6-month extension for the gray wolf proposal in July [2001], based upon internal FWS disagreement . . . . The extension notice would open a comment period . . . and ask for information on 8 or so issues that would help with [FWS’s] decision on the NE DPS.” Nevertheless, the FWS proceeded without additional comment.

Second, the court held that the FWS violated the DPS policy and the ESA. In the Proposed Rule, the FWS determined that the four proposed DPSs were discrete because “each [was] being repopulated by wolves of distinct morphological characteristics which may represent different gray wolf subspecies.” In the Final Rule, the FWS declared that the wolves in the Northeast could be a different subspecies from the wolves in the Midwest. Nevertheless, the FWS combined the two subspecies into a single DPS, which was based on geography.

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582 Id. at 15,818.
584 Id. (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).
585 Id. (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983)).
586 See id. at 562.
587 Id.
588 Id.
590 Id. at 563–64.
591 Id. (citing Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43,473 (July 13, 2000)).
592 Id. (citing Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. 15,804, 15,835–36 (Apr. 1, 2003)).
not biology. This geographic approach, which used “infranational boundaries as a basis for recognizing discrete entities for delisting,” had been rejected by the FWS in the 1996 DPS policy. Although the approach was attractive “[p]articularly when applied to the . . . reclassification of a relatively widespread species for which a recovery program is being successfully carried out in some states,” the FWS found it “inappropriate as a focus for a national program.”

Third, the court held the designation of the Eastern DPS violated the DPS policy and the ESA. The court rejected the FWS assertion that a “non-DPS remnant” could not be created outside the DPS. The SOI could establish a “non-DPS remnant” designation, particularly when the remnant area was already listed within the historic range of the endangered species. The SOI could maintain a national listing and establish a DPS where necessary for management flexibility to protect the species and its habitat from extinction. The FWS could not simply “lump[] together” the core population with a low to non-existent population outside the core area and downlist or delist the entire area. The FWS application of the DPS policy was “inconsistent with the statute under which the regulations were promulgated.”

Finally, the court held that the SOI did not analyze the five factors for downlisting across a significant portion of the gray wolf’s range. The FWS employed a definition of “significant portion of its range” developed while meeting at Marymount University during the comment period of the Proposed Rule, and subsequently determined that the existence of the western Great Lakes wolf population rendered the remainder of the Eastern DPS insignificant, even though “extensive and significant gaps” in range would be created without the

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593 Id.
596 Id. at 564–65.
597 Id. at 564.
598 Id. at 565.
599 See id. at 564.
600 Id. at 565.
601 Nat’l Wildlife Fed’n, 386 F. Supp. 2d at 565 (quoting Mines v. Sullivan, 981 F.2d 1068, 1070 (9th Cir. 1992)).
602 Id. at 565–66.
Northeast DPS.\textsuperscript{603} The Final Rule rendered all areas outside the core area insignificant.\textsuperscript{604} This contradicted the meaning of “significant portion of its range” set forth by the U.S. Court of Appeals for the Ninth Circuit in \textit{Defenders of Wildlife v. Norton (Norton-Lizard)},\textsuperscript{605} dealing with the flat-tailed horned lizard, and the U.S. District Court of the District of Columbia in \textit{Defenders of Wildlife v. Norton (Norton-Lynx)},\textsuperscript{606} dealing with the lynx.\textsuperscript{607} John Kostyack, the National Wildlife Federation attorney, declared the ruling a “major victory for wolves and for all the people who care so much about preserving America’s natural heritage.”\textsuperscript{608}

\textbf{B. Regulatory Action}

On January 6, 2005, the FWS promulgated rule 10(j), which granted western states and Native American tribes with approved wolf management plans (specifically, Montana and Idaho) expanded authority over the nonessential experimental population of wolves within their boundaries.\textsuperscript{609} The new rule permits the following: the taking of wolves attacking livestock, guardian animals, and dogs on private land without authorization; the taking of wolves attacking the aforementioned by permittees on public land grazing allotments without prior authorization; and the taking of wolves determined to have an adverse impact on wildlife by state and tribal officials after public and scientific review.\textsuperscript{610} The new rule also allows states and tribes with wolf management plans to enter into cooperative agreements for the management of experimental populations on public

\textsuperscript{603} Id. The FWS defined “significant portion of its range” as “that area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.” Id. at 565.

\textsuperscript{604} Id. at 566.

\textsuperscript{605} 258 F.3d 1136, 1144–45 (9th Cir. 2001).

\textsuperscript{606} 239 F. Supp. 2d 19, 21 (D.D.C. 2002).

\textsuperscript{607} \textit{Nat’l Wildlife Fed’n}, 386 F. Supp. 2d at 566.

\textsuperscript{608} David Gram, \textit{Judge Orders Feds to Promote Wolf Restoration in Northeast}, PORTSMOUTH HERALD MAINE NEWS, Aug. 20, 2005.


land. This is a valuable experiment that will further the goals of cooperative federalism manifested in the ESA. Both Montana and Idaho have approved wolf management programs. The implementation of the regulation will demonstrate whether the states can adequately manage their gray wolf populations and whether public attitudes are changed by greater state control.

Wyoming was not granted expanded authority because Wyoming’s management plan had not been approved. The FWS instructed Wyoming to change the wolf’s status as a predator throughout most of the state. Designating wolves as “trophy game” statewide would permit Wyoming to implement a management scheme that provides for a self-sustaining population above the recovery goals, and regulates the taking of wolves. Wyoming also had to commit by law to manage at least fifteen wolf packs in the state. Finally, Wyoming’s definition of pack had to be biologically based and consistent with the Montana and Idaho definition. Wyoming brought suit, alleging that its program was rejected because of politics, not science. Wyoming expanded the basis of the suit, alleging that DOI had not adequately monitored wolves and failed to comply with the National Environmental Policy Act (NEPA). The case was heard and dismissed by the U.S. District Court for the District of Wyoming in March 2005. DOI then announced that it was ready to delist the wolves in the northern Rockies once Wyoming’s manage-

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611 *Id.* at 1298–99.
613 In April 2006, the Idaho Fish and Game Department requested permission from the FWS to reduce the wolf population in the Lolo elk management zone of the Clearwater region by as many as forty-three wolves, alleging excess wolf predation of elk. *Idaho Dep’t of Fish & Game, Effects of Wolf Population on North Central Idaho Elk Populations* 7 (Apr. 4, 2006), available at http://fishandgame.idaho.gov/cms/wildlife/wolves/proposal.pdf.
614 *Id.*; *see also* U.S. Fish & Wildlife Serv., *supra* note 609, at 37–40.
616 *Id.*
617 *Id.*
618 *Id.*; *see also* 90-Day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of Gray Wolf, 70 Fed. Reg. 61,770, 61,774 (Oct. 26, 2005) (to be codified at 50 C.F.R. pt. 17).
620 *Id.* at 1224–25.
621 *Id.* at 1244–45.
ment plan was completed.\textsuperscript{622} Wyoming Governor David Freudenthal characterized DOI’s statement as “political blackmail” that was designed to pressure Wyoming into capitulating to the federal government’s management plan, “a move he says the state doesn’t intend to make.”\textsuperscript{623} In April 2006, the Tenth Circuit upheld the dismissal of Wyoming’s suit.\textsuperscript{624}

In April 2005, the FWS granted Wisconsin and Michigan permits pursuant to section 10(a)(1)(A) that allowed the lethal taking of wolves killing livestock.\textsuperscript{625} Section 10(a)(1)(A) authorizes the SOI to permit prescribed actions “for scientific purposes or to enhance the propagation or survival of the affected species . . . .”\textsuperscript{626} The U.S. District Court for the District of Columbia struck down the action because the FWS failed to provide notice and the opportunity to comment prior to issuing the permits.\textsuperscript{627}

On October 26, 2005, the FWS, relying on its earlier analysis, announced that it was considering establishing a Northern Rocky Mountain DPS, and delisting that wolf population.\textsuperscript{628} On March 27, 2006, the FWS proposed the creation of a western Great Lakes DPS and delisting of that wolf population.\textsuperscript{629} The creation of the two DPSs should be applauded, but delisting at this point is still dysfunctional and premature. DOI should heed the warning of Professor Holly Doremus:

Delisting is an aspirational goal, the achievement of which will require substantial regulatory and societal changes, rather than a realistic short-term expectation. The primary

\begin{itemize}
  \item \textsuperscript{622} Kim McGuire, \textit{Feds Not Taking Wolf Off List}, \textsc{Denver Post}, Feb. 3, 2006, at A-16.
  \item \textsuperscript{623} Id.
  \item \textsuperscript{624} Wyoming v. U.S. Dep’t of the Interior, 442 F.3d 1262, 1264 (10th Cir. 2006). Governor Freudenthal, who is seeking re-election, still refuses to renegotiate the wolf-management plan. Associated Press, \textit{Two Candidates Say Wyoming Should Drop Wolf Litigation}, \textsc{Billings Gazette}, Apr. 11, 2006.
  \item \textsuperscript{626} 16 U.S.C. § 1539(a)(1)(A)
  \item \textsuperscript{628} 90-Day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of Gray Wolf, 70 Fed. Reg. 61,770, 61,770 (Oct. 26, 2005) (to be codified at 50 C.F.R. pt. 17).
  \item \textsuperscript{629} Designating the Western Great Lakes Population of Gray Wolves as a Distinct Population Segment, 71 Fed. Reg. 15,266 (Mar. 27, 2006).
\end{itemize}
purpose of the ESA is not delisting; rather it is the protection of species against ill-considered human activity while society works toward the kind of fundamental mechanisms of regulating economic development that might support widespread delisting. The ESA can encourage progress towards such changes, both by making society aware of the shortcomings of its current regulatory efforts and by providing an incentive for improvements in other regulation, but it serves its purpose if it simply provides a safety net against extinction until those changes arrive.\textsuperscript{630}

\section*{C. Threatened and Endangered Species Recovery Act of 2005}

Judicial decisions are political resources that are “best viewed as the beginning of a political process.”\textsuperscript{631} Congress is well aware of judicial decisions regarding statutory interpretations and their implications.\textsuperscript{632} The institutions of government behave as rational actors and attempt to have their policy preferences prevail.\textsuperscript{633} Following the litigation rejecting DOI’s downlisting of the gray wolf and abandonment of the Northeast DPS, the House of Representatives passed the Threatened and Endangered Species Recovery Act of 2005 (TESRA).\textsuperscript{634} The House bill, which was strongly criticized by environmental groups,\textsuperscript{635} did not expressly change any of the statutory

\begin{footnotes}
\item 630 Doremus, supra note 414, at 10,435.
\item 634 H.R. 3824, 109th Cong. (2005).
\item 635 Rodger Schlickeisen, President of DOW, stated that “[Representative] Pombo[‘s] bill is the dream of every irresponsible developer out there . . . . Not only does this bill gut the Endangered Species Act, but it creates a government give away program to greedy developers and provides new loop holes to make it easier to use deadly pesticides that will impact not only wildlife but our children, by polluting our lands and waters.” Press Release, Defenders of Wildlife, House Guts Endangered Species Act (Sept. 29, 2005); see also Nancy Kubasek, Proposed Changes to Endangered Species Act in the Spotlight Again, 34 Real Est. L.J. 235, 241–43 (2005); Press Release, Defenders of Wildlife, Analysis of Representative
\end{footnotes}
provisions involved in the litigation. The “significant portion of its range” language in the definition of endangered and threatened species was not altered. The SOI was instructed to utilize the DPS designation “only sparingly.” Recovery plans were not made legally enforceable. Listing, downlisting, and delisting decisions continued to be based on the five factors enumerated in section 4(a) of the ESA. The failure of the Republican-controlled House of Representatives to alter any of the relevant statutory provisions can be assumed to represent its implicit agreement with the federal district courts interpretation of the ESA in the DOW and NWF cases.

Conclusion

Throughout U.S. history, the wolf has been persecuted and driven from the lower forty-eight states. The Endangered Species Act of 1973 rectified this historical wrong and provided the means to protect and restore the wolf to its historic range. The gray wolf has rebounded in the western Great Lakes and northern Rocky Mountains, and is on the path to recovery in the Southwest. The restoration of the gray wolf is an ESA success story in progress.

In April 2003, DOI established three DPSs and downlisted the gray wolf to a threatened species in a significant portion of its historic range in the Eastern and Western DPSs. The gray wolf retained endangered species status in the Southwest DPS. The gray wolf, however, had only recovered in five percent of its historic range. The remaining ninety-five percent of its historic range was inhabited by phantom wolves.


636 See generally H.R. 3824.
637 See id. § 3.
638 See id. § 4(B).
639 See id. § 9.
640 See id. § 7.
641 Eskridge, supra note 156, at 71–84, 108–122. The Supreme Court has declared that congressional failure to address a controversial judicial interpretation when considering the reenactment of a statute “is itself evidence that Congress affirmatively intended to preserve [the interpretation].” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381–82 (1982).
DOI’s dysfunctional downlisting of the gray wolf. The court rejected DOI’s interpretation of the legal meaning of “significant portion of its range,” which was not consistent with the text, intent, and purposes of the ESA. The court did not uphold DOI’s implementation of its own DPS policy, which provides different populations of the same species different levels of protection in different portions of their range. The court implicitly rejected DOI’s contention that meeting the goals of the recovery plans justified, in part, the downlisting of the gray wolf across much of its historic range in the Eastern and Western DPSs. The court determined that DOI only assessed the five factors across the current range of the gray wolf.

DOI’s analysis did not support the downlisting of the gray wolf across a significant portion of its historic range in the Eastern and Western DPSs. DOI sought to downlist the wolf in as large an area as possible, so that it could delist the wolf as soon as possible, evidenced in the advanced notice of proposed rulemaking, which announced the future delisting of the Eastern and Western DPSs and subsequent proposal to delist the Eastern DPS. Despite DOI’s premature and dysfunctional decision, its analysis was sufficient to support the creation of two DPSs that encompass the current range of the gray wolf in the western Great Lakes and northern Rocky Mountains and the downlisting of the gray wolf in these two core areas to a threatened species.

DOI simply downlisted phantom gray wolves, when it should have been creating conditions for the return of the gray wolf to significant portions of its historic range. Gray wolves had recovered in the two core areas, but they still need the protection that DOI provided by retaining threatened species status. Gray wolves were, however, still absent from a significant portion of their historic range, creating significant gaps in the taxon that will jeopardize recovery. Gray wolves dispersing from the core areas into other sectors of their his-

643 Id.
646 See generally Cheever, supra note 426, at 48–52.
toric range still require the full protection of the ESA. This will guarantee their recovery and their restoration as vital components of the ecosystems across their historic range. Furthermore, DOI’s ESA obligations were not complete, so its abandonment of recovery efforts was premature. As Peggy Struhsacker, the National Wildlife Federation wolf recovery program manager aptly noted, “the administration was ready to announce the marathon over when the finish line is still over the next hill.”

Edward O. Wilson, a Harvard University biologist, warned that the “loss of genetic and species diversity by the destruction of natural habitats . . . is the folly our descendants are least likely to forgive us.” The ESA is explicitly concerned with protection of species and the restoration of ecosystems on which they depend. DOI’s obligation under the ESA is to ensure that gray wolves, not their phantoms, stalk the land. The gray wolf, a summit predator, is a vital component of the ecosystem. The gray wolf helps to preserve biodiversity and maintain ecosystem balance by keeping prey in check, improving their genetic stock, stopping environmental dislocations, promoting the survival of other species, and allowing plant communities to flourish. A balanced ecosystem is characterized by genetic diversity, which provides goods and services beneficial to man. The howl of the wolf in the night signals that all is well for man.

647 Gram, supra note 608.
649 Boyd, supra note 199, at 1291 n.12.
650 Biodiversity is defined as “the natural variety and variability among living organisms, the ecological complexes in which they naturally occur, and the ways in which they interact with each other and with the physical environment.” Robert S. Steneck, An Ecological Context for the Role of Large Carnivores in Conserving Biodiversity, in LARGE CARNIVORES AND THE CONSERVATION OF BIODIVERSITY 9, 13 (Justina C. Ray et al., eds., 2005) (quoting K.H. Redford & B.D. Richter, Conservation of Biology in a World of Use, 13 CONSERVATION BIOLOGY 1246–56 (1999)).
BALANCING NATIONAL SECURITY WITH A COMMUNITY’S RIGHT-TO-KNOW: MAINTAINING PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION THROUGH EPCRA’S NON-PREEMPTION CLAUSE

Katherine Chekouras*

Abstract: Over the past decade, public information regarding potential environmental hazards has been restricted due to national security concerns over terrorism. Citizens across the country are now hampered in their ability to assess the danger of local chemical facilities—and take proper precautionary measures—due to changing laws that limit or deny access to information about these facilities. This Note explains how states can enhance access to public environmental information while respecting legitimate security concerns. By decreasing reporting thresholds and making information accessible on the internet, states can strike a more proper balance between security concerns and a community’s right to know about chemical and environmental dangers. This Note discusses this balance, and suggests that information regarding chemical plant facilities should remain public because it poses a low security risk and offers a high public benefit.

Introduction

Federal government actions such as raising the threshold for the Toxic Release Inventory (TRI) and passing the Critical Infrastructure Information Act of 2002 (CIIA) are criticized for allowing private sector chemical facilities to restrict the dissemination of safety and environmental information to the local community. Proposed changes to raise the threshold reporting requirements for the TRI have been described as putting “the interests of chemical facilities squarely in front of the families in the community.”1 Similarly, the CIIA is portrayed as

* Articles Editor, Boston College Environmental Affairs Law Review, 2006–07.
overly broad, and protecting business interests rather than national security. However, amendments restricting public access to off-site consequence analysis data addressed security concerns voiced by the Federal Bureau of Investigation prior to the terrorist attacks of September 11, 2001, as well as George W. Bush’s election.

As the varying opinions on recent amendments and proposed regulations demonstrate, balancing legitimate national security concerns and a tradition of public disclosure of local environmental information is a complex issue that creates tension between national and local interests. This Note seeks to unravel a few of these complexities and address how states may protect and enhance communication about toxins by enacting state legislation that supplements the federal Emergency Planning and Community Right-to-Know Act (EPCRA), though in a manner that does not conflict with national security legislation.

Part I of this Note provides a brief overview of the preemption doctrine. Many federal environmental statutes originally evolved from state legislation, with commentators arguing both for and against fed-

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3 Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act Section 112(r)(7); Distribution of Off-Site Consequence Analysis Information, 65 Fed. Reg. 24,834, 24,835 (Apr. 27, 2000) [hereinafter OCA Data].

4 This Note does not address nuclear power plants or the economics of disclosing information.
eral preemption of environmental laws.5 Recent federal legislation may preempt states’ attempts to create community right-to-know laws.

Part II surveys how national security concerns have influenced federal legislation. It discusses the Freedom of Information Act (FOIA) and its exemptions to provide an overview of some of the defined instances that have limited a tradition of public disclosure. Additionally, the section examines a series of recent amendments to federal legislation. Each statute discussed has revised public access to environmental information due to a national security concern. For example, recent Safe Drinking Water Act (SDWA) amendments addressed security concerns by requiring facilities to conduct vulnerability assessments.

Part III describes EPCRA, identifies what information is publicly available, and explains why state legislation is not preempted. Part IV provides an analysis of the risk of a chemical attack followed by a description of the role of environmental information in public participation, as well as a discussion of the various types of disclosure. Parts V and VI identify existing state right-to-know laws and explain where state laws supplementing EPCRA may be preempted by federal national security legislation. Part VII examines past federal and state laws, information concerning the risk of a chemical attack, and the need for public participation to suggest manners of balancing national security concerns with the public’s right-to-know. This Note advocates that state right-to-know legislation can avoid the potential implications of higher TRI thresholds, respect legitimate national security concerns, and avoid federal preemption by critically assessing what information is publicly disclosed.

I. PREEMPTION DOCTRINE

The United States Constitution creates a hierarchical structure, which establishes federal law as the highest law in the country.6 The Supremacy Clause of the United States Constitution states that the “Constitution, and the Laws of the United States which shall be made

6 See U.S. CONST. art. VI, amend. X.
in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

However, the Tenth Amendment retains significant powers for the states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Under the Supremacy Clause, the federal government is able to preempt state law, but the powers of the states should remain unconstrained unless there is a clear indication of preemption. A clear indication is necessary because the Tenth Amendment creates a governmental structure in which “states have vast residual powers.” The interaction between the Supremacy Clause and the Tenth Amendment permits federal and state laws to simultaneously regulate the same field.

There is an assumption in areas traditionally dominated by state legislation that the powers of the state should not be superseded by the federal government without Congress expressing a clear and manifest purpose to preempt. For example, the historic police powers of the states should not be superseded by a federal act without either an explicit statement by Congress or an implied preemption through an act’s structure and purpose. However, this assumption regarding preemption is not present when the state regulates an area that has historically been the subject of federal legislation. Federal agencies acting within their congressionally delegated powers can preempt state regulation and render state regulations unenforceable. Preemption is applicable to state laws and regulations; it is generally not applicable to contracts and other voluntary agreements.

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7 Id. art. VI.
8 Id. amend. X.
9 Id. art. VI; see U.S. v. Locke, 529 U.S. 89, 108 (2000).
10 U.S. Const. amend. X; Locke, 529 U.S. at 109.
14 See Locke, 529 U.S. at 108 (summarizing the opinion from Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).
15 Id. at 110; City of New York v. Fed. Commc’n Comm’n, 486 U.S. 57, 63 (1988).
There are three ways in which the federal government can preempt state statutes and regulations.  First, a state statute can be preempted through an explicit statement by a federal act indicating preemption.  Absent such an explicit statement, the U.S. Supreme Court has applied conflict preemption and field preemption principles to evaluate whether a state regulation or statute is preempted. Conflict preemption occurs when either: (1) it is physically impossible to comply with both the state and federal law; or (2) the state law serves as a barrier or obstacle to accomplishing the purpose of the federal law. Field preemption is applicable when the federal scheme “is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”

Under field preemption, determining whether a state statute is consistent with a federal scheme requires examining the structure and purpose of the federal act. The structure and purpose of the federal act may indicate that Congress intended only one set of regulations. If only one set of regulations was implied, then any additional requirements by a state would be interpreted as impeding the federal purpose of a uniform regulatory scheme. For example, in Gade v. National Solid Wastes Management Ass’n, the U.S. Supreme Court decided that while certain provisions of the Occupational Safety and Health Act (OSHA) could indicate that similar state laws requiring additional training for employees handling hazardous waste were acceptable, the overall structure evidenced congressional intent to avoid duplicate regulations. Because the overall structure indicated that duplicate regulations were against the purpose of the act, the state law was preempted.

Congress may attempt to remove ambiguities concerning preemption by including either a non-preemption or a savings clause. A

18 Gade, 505 U.S. at 98.
19 Id.
21 Gade, 505 U.S. at 98 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
22 Id.
23 Id. at 98–99.
24 Id. at 98–100.
25 Id. at 99–100.
26 Id. at 102.
27 See Gade, 505 U.S. at 100.
non-preemption clause indicates that state and federal law are not mutually exclusive.\textsuperscript{28} When federal and state laws are not mutually exclusive, the federal law may be viewed as a minimum standard, which states may then supplement by imposing more stringent standards.\textsuperscript{29} A savings clause indicates a specific segment of state legislation that should not be preempted by the federal act.\textsuperscript{30} The OSHA savings clause, for example, states: “Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect . . . .”\textsuperscript{31} Savings clauses have been interpreted as presupposing a background preemption of all state legislation on the same topic as the federal legislation.\textsuperscript{32} The above OSHA savings clause was interpreted in \textit{Gade} as indicating federal preemption of all state occupational safety and health standards without federal approval as outlined in OSHA.\textsuperscript{33}

II. Access to Environmental Information: The Impact of National Security Concerns on Specific Federal Acts

A. An Overview of Access to Information: Freedom of Information Act

The Freedom of Information Act (FOIA) has been described as establishing the principle that all government records should be publicly available.\textsuperscript{34} Though the Act contains a number of exemptions, only four of those exemptions are likely related to data reporting for chemical facilities due to national security concerns: preclusion by other laws, national security, law enforcement, and well data.\textsuperscript{35} The first is a blanket exemption for all documents excluded from FOIA by other statutes.\textsuperscript{36} Statutes exempting information must “leave no discretion on the issue” and “establish particular criteria for withholding or

\textsuperscript{28} Id.
\textsuperscript{30} See \textit{Gade}, 505 U.S. at 100.
\textsuperscript{32} See \textit{Gade}, 505 U.S. at 100.
\textsuperscript{33} Id. at 99–100.
\textsuperscript{35} See 5 U.S.C. § 552(b).
\textsuperscript{36} Id. § 552(b) (3).
refer to particular types of matters to be withheld.” An example of this type of exemption is the CIIA. The second exemption is applicable to national security and applies to documents classified pursuant to an executive order for reasons of national security or foreign policy. The third exemption is for records or information compiled for law enforcement purposes when production or distribution of such information could “reasonably be expected to endanger the life or physical safety of any individual.” The fourth exemption is applicable to wells, and allows for information concerning geological and geophysical data—including maps of wells—to be excluded from FOIA.

B. Limiting Access: The Clean Air Act and the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act

The Clean Air Act (CAA) incorporates a reporting requirement for stationary sources that emit chemicals. The chemicals covered include at least 100 substances that are “known to cause . . . death, injury, or serious adverse effects to human health or the environment.” This list includes vinyl chloride and fifteen other substances identified by Congress, and it currently includes seventy-seven toxic substances and sixty-three flammable substances. Under CAA section 112(r), stationary sources must report a risk management plan (RMP) to the U.S. Environmental Protection Agency (EPA) that contains an Off-Site Consequence Analysis (OCA). The RMP provides an assessment of the potential effects resulting from an accidental release of a hazardous chemical. The RMP includes the

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37 Id.
39 5 U.S.C. § 552(b)(1). This is considered a limited exemption because not all agencies have the authority to classify information. Conrad, supra note 34, at 724–26. Also, it can be inhibitive for everyday use of the information because of the necessary security clearances and procedures for maintaining document security. Id. However, recent news demonstrates the current administration’s desire to utilize the clause to reclassify documents in the Library of Congress. See Scott Shane, U.S. Reclassifies Many Documents in Secret Review, N.Y. TIMES, Feb. 21, 2006, at A1, A16.
41 Id. § 552(b)(9).
42 See 42 U.S.C. § 7412(r) (2000) (“Stationary sources’ means any buildings, structures, equipment, installations, or substance emitting stationary activities.”)
43 Id. § 7412(r)(3).
44 Id. § 7412(r)(D)(3); 40 C.F.R. § 68.130 (2005).
46 Id. § 7412(r)(7)(B)(ii)(I).
previous release history for the past five years, an accidental release prevention program, and a response program for protecting human health and the environment in the case of an accident.\footnote{Id. § 7412(r)(7)(B)(ii). Every RMP contains an executive summary that states the stationary source and regulated chemical(s), the general accidental release prevention program, chemical-specific prevention steps, the five-year accident history, the emergency response program, and planned changes to safety. 40 C.F.R. § 69.155 (2005).}

The RMP’s OCA summarizes the worst case scenario for a facility.\footnote{42 U.S.C. § 7412(H)(i)(III); 40 C.F.R. § 68.25; Joseph D. Jacobson, Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level, 9 Env'l. Law. 327, 356–59 (2003) (outlining the complete regulations pertaining to three different program levels and what each level must submit).} In some cases, it describes a more likely scenario, referred to as an “alternative release scenario.”\footnote{42 U.S.C. § 7412(H)(i)(III); 40 C.F.R. § 68.28; Jacobson, \textit{supra} note 48, at 359.} The conditions necessary to produce a worst case scenario are noted in the OCA, an example of which might be a fire on a windy day.\footnote{40 C.F.R. § 68.165.} The OCA also describes the vulnerability zone—the area potentially impacted by a worst case scenario—including the total population, public receptors, and environmental receptors that would be affected.\footnote{Id.; Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act Section 112(r) (7); Distribution of Off-Site Consequence Analysis Information, 65 Fed. Reg. 48,108, 48,127–28 (Aug. 4, 2000) [hereinafter OCA Data II].}

Section 112(r) of the CAA mandates that the RMP be available to the public and submitted to the state and any local agency responsible for responding to an accidental release.\footnote{42 U.S.C. § 7412(r)(7)(B)(iii).} The RMP, with OCA data removed, was previously available on the internet.\footnote{See OCA Data, 65 Fed. Reg. 24,834, 24,835 (Apr. 27, 2000); Jessica Barkas, Nuking Freedom of Information and Community Right to Know: How Post-9/11 Secrecy Could Make America Less Safe, 28 Environ's Env'l. L. & Pol'y J. 199, 207 (2005); Jacobson, \textit{supra} note 48, at 360–61 (explaining that OCA data was never posted on the internet); Stephen M. Johnson, Terrorism, Security, and Environmental Protection, 29 Wm. & Mary Env'tl. L. & Pol'y Rev. 107, 118 (2004).} After the passage of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act in 1999 (CSISSFRA),\footnote{Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Pub. L. No. 106-40, 113 Stat. 207 (1999) (codified at 42 U.S.C. §§ 7401, 7412).} EPA pulled the information from the internet and implemented new public access regulations.\footnote{Id.; Jacobson, \textit{supra} note 48, at 361–63.}

The CSISSFRA and its corresponding regulations limited public access to OCA data in order to balance national security concerns and
the public’s right-to-know. The regulations allow a paper copy of the OCA data to be available to the public in at least fifty designated reading rooms located throughout the United States and its territories. Any person can read the reports in these rooms, but they may not remove the report or make a mechanical copy. One reason for limiting taking notes to non-mechanical copies is that technological advances, such as copy machines and digital cameras, have increased the risk that the reports will be reproduced and posted on the internet, thus undermining the government’s attempts to limit the dissemination of OCA information.

Identification is required in order to obtain access to the records, and individuals may not access more than ten OCAs per month. These requirements increase the personal contact necessary to obtain the data, and therefore decrease the risk of illicit use. Between 1999 and 2002, only thirty-three persons in total visited these reading rooms. While limiting the public’s access to paper copies, the new regulations allow citizens to determine whether a location is part of a vulnerability zone through an internet request. EPA currently uses a computer-based indicator, Vulnerable Zone Indicator System (VZIS), to process the requests. The EPA’s VZIS website instructs users to type in their electronic mail address and the location in question’s address or longitude and latitude. Users entering a location that may be within a vulnerability area are notified via electronic mail and provided with

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56 40 C.F.R. § 1400.3, 1400.6 (2005); OCA Data II, 65 Fed. Reg. at 48,109; Dep’t of Justice, Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet 1 (2000) [hereinafter Dep’t of Justice].

57 40 C.F.R. § 1400.3.

58 Id. Handwritten notes are allowed. See id.

59 See Dep’t of Justice, supra note 56, at 46.

60 40 C.F.R. § 1400.3. Personal information should be kept by the government for no longer than three years. Id.

61 See Dep’t of Justice, supra note 56, at 4, 43.


63 40 C.F.R. § 1400.4.


65 See VZIS, supra note 64. The same information can be requested via telephone or mail. 40 C.F.R. § 1400.4.
suggestions on how to obtain more information. Suggested manners for obtaining more information include visiting the reading room and obtaining OCA data, contacting the Local Emergency Planning Committee, searching RMP data on EPA’s website, and viewing other information on EPA’s website. The locations or identity of the individual stationary sources creating the risk is not provided, nor is any additional information concerning health effects or the range of the vulnerability zone.

C. Limited Access to Infrastructure Information: The Critical Infrastructure Information Act

The Critical Infrastructure Information Act of 2002 (CIIA) was part of the Homeland Security Act. CIIA covers information “not customarily in the public domain and related to the security of critical infrastructure or protected systems.” The phrase “in the public domain” was recently defined as “information lawfully, properly and regularly disclosed generally or broadly to the public.” Examples of this information include the ability of a system to resist a potential attack, the misuse of data communications, and any past operational problems regarding the system including repairs or reconstruction. The purpose of CIIA is to gather critical infrastructure information in order to foster an understanding of security risks and prevent, or recover from, interferences in the system.

66 40 C.F.R. § 1400.4; e-mail from Jacob Noble, U.S. Environmental Protection Agency Chemical Emergency Preparedness and Prevention Office, to Katherine Chekouras (March 2, 2006, 11:18:21 EST) (on file with author). Author entered addresses on two separate occasions. One received a response that the location is “likely to be in a vulnerability zone of a potential accidental release” and the other did not receive a response. Id.

67 See Noble, supra note 66. Hyperlinks to the websites were provided in the e-mail. Id. Many Local Emergency Planning Committees (LEPC) do not obtain copies of risk management plans (RMP) or will not release Offsite Consequence Analysis (OCA) and RMP data because of the potential penalty for improper disclosure to the public. NATIONAL INSTITUTE FOR CHEMICAL STUDIES, LOCAL EMERGENCY PLANNING COMMITTEES AND RISK MANAGEMENT PLANS: ENCOURAGING HAZARD REDUCTION 19, 21 (June 2001), available at http://www.nicsinfo.org/LEPCStudyFinalReport.pdf. Public requests for RMPs from LEPCs that do not maintain the full document on file are directed to the facility. Id. at 19.

68 See Noble, supra note 66.


73 Id. § 131(5); Wells, supra note 2, at 1213.
The CIIA covers critical infrastructure information voluntarily submitted to certain federal agencies for security reasons or “other informational purpose[s].” This information is exempt from FOIA, and it cannot be used by any federal, state, or local authority, or a third party in a civil lawsuit without written consent. CIIA states that if the information is given to a state or local government entity, it cannot be made available under local laws requiring disclosure, or used for purposes other than critical infrastructure. However, CIIA does provide that critical infrastructure information can be obtained by state, local, and federal government through other applicable laws including those that disclose the information generally or broadly to the public.

D. A Possible Balance for Information Access: The Safe Drinking Water Act

The Public Health Security and Bioterrorism Preparedness Response Act of 2002 addressed security concerns for water systems by making several amendments to the Safe Drinking Water Act (SDWA). The amendments required community water systems serving more than 3300 persons to conduct an assessment of the systems’ vulnerability to terrorist attacks or other intentional acts that would disrupt service. The vulnerability assessment includes, at the minimum, a review of pipes and physical barriers as well as treatment, storage, and computer systems. Community water systems must submit the vul-
nerability assessment to EPA and create an emergency response plan addressing the vulnerabilities identified in the assessment. The emergency response plan does not need to be submitted directly to EPA, but the community water system should coordinate with the Local Emergency Planning Committees (LEPCs).

Vulnerability assessments are protected from disclosure to state, regional, or local governments and are exempted from FOIA. The amendments may preempt any state or local legislation which seeks to create access to the reports because SDWA states that “[n]o community water system shall be required under State or local law to provide an assessment.”

While exempting vulnerability assessment information from public disclosure, the SDWA also requires contamination reporting to the public. The public notice requirement mandates that a consumer confidence report be distributed to customers of the drinking water supply. The report outlines whether the results exceeded the maximum contaminant level goal, and whether any variances or exceptions were granted. The report must also state in “plain language” the health concerns resulting from any regulated chemical that exceeded the maximum contaminant level that year.

III. THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

The Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 was created with the purpose of providing communities with information concerning potential chemical hazards and facilitating emergency preparedness at the state and local levels. Subchapter I of EPCRA creates State Emergency Response Commissions (SERCs), Emergency Planning Districts, and Local Emergency

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82 Id. § 300i-2(a), (b).
83 Id. § 300i-2(b); Chilakamarri, supra note 79, at 935.
86 Id. §§ 300i-2(a) (3), 300g-3(c) (4).
87 Id. § 300g-3(c) (4).
88 Id. § 300g-3(c) (4) (B).
89 Id.
90 Id. § 11001; Am. Chem. Council v. Johnson, 406 F.3d 738, 739 (D.C. Cir. 2005).
Planning Committees (LEPCs).\textsuperscript{91} Both subchapters include the following forms that must be accessible to the public: emergency notification, material safety data sheets, an emergency and hazardous chemical inventory, and toxic chemical release forms.\textsuperscript{92} Under EPCRA, emergency notifications must be sent by the owner of a facility to the LEPCs impacted by the release of an extremely hazardous substance.\textsuperscript{93} Individual citizens do not need to be contacted by a facility owner.\textsuperscript{94} The notice should include the chemical name, an indication of whether the substance is extremely hazardous as defined by EPCRA, the estimated quantity of the release, the time and duration of the release, the medium or media into which the release occurred, known acute or chronic health risks associated with the emergency, advice regarding medical attention, proper precautions to take as a result of the release, and a contact for further information.\textsuperscript{95}

Owners and operators of facilities are required under EPCRA to have available a material safety data sheet and emergency and hazardous chemical inventory for chemicals considered hazardous under the Occupational Safety and Health Act (OSHA).\textsuperscript{96} Both forms must be submitted to the LEPC, SERC, and the fire department with jurisdiction over the facility.\textsuperscript{97} Chemicals below a threshold amount, usually 10,000 pounds, may be excluded from the material safety data sheet.\textsuperscript{98} The material safety data sheet must contain a list of hazardous chemicals, grouped by category of health and physical hazards as set forth by OSHA, and the hazardous components of the chemicals.\textsuperscript{99}

Facility owners may choose to submit a federal tier I or tier II emergency and hazardous chemical inventory form, unless the SERC, LEPC, or fire department requests a tier II.\textsuperscript{100} Most of the forms sub-

\textsuperscript{91} 42 U.S.C. § 11001.
\textsuperscript{93} 42 U.S.C. § 11004(b)(1).
\textsuperscript{94} Id. § 11004. A release covers almost any type of spill, escape, or leaching into the environment. Id. § 11049(8). The environment is defined broadly as including “water, air, and land.” Id. § 11049(2).
\textsuperscript{95} Id. § 11004(b)(2).
\textsuperscript{96} Id. §§ 11021(a)(1), 11022(a)(1).
\textsuperscript{97} Id. §§ 11021(a)(1), 11022(a)(1).
\textsuperscript{98} Id. § 11021; JAMES M. KUSZAJ, \textit{THE EPCRA COMPLIANCE MANUAL: INTERPRETING AND IMPLEMENTING THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986} at T6–1 (1997).
\textsuperscript{99} 42 U.S.C. § 11021.
\textsuperscript{100} Id. § 11022; KUSZAJ, \textit{supra} note 98, §§ 7.02, 7.05–.06.
mitted are tier II forms. Both tier I and tier II forms require reporting of estimated ranges of the maximum amount of hazardous chemicals present during the preceding year, and of the daily amount of hazardous chemicals released. Tier I forms allow this information to be reported in aggregate terms with hazardous chemicals grouped by OSHA categories of health and physical hazards. A tier II form is more specific and requires reporting for each hazardous chemical, including its chemical name and a brief description of the manner of storage. While tier I forms require disclosure of the general location of each category of chemical, tier II forms require reporting of each chemical’s specific location. Facility owners filing a tier II form, however, may elect to withhold the location of the hazardous material from the public.

The toxic chemical release form differs significantly from the other forms because it is submitted directly to EPA and any designated state agency. The toxic chemical release form only needs to be available to the SERC, LEPR, and the local fire department. In addition, the toxic chemicals reported are not “hazardous chemicals” under OSHA, but a separate list under EPCRA. EPCRA requires reporting of over 300 hazardous chemicals.

Unlike the other reporting sections in EPCRA, the toxic chemical release reporting section only applies to owners and operators of facilities in specified industries that employ more than ten full-time employees. Approximately 6000 facilities in these industries—such as power generation, hazardous waste disposal, and petroleum wholesale—must file reports. The toxic chemical release forms include the name, location, and principal business activities of the facility, how the chemical is used, an estimate of the maximum amount present at the facility throughout the year, a description of the efficiency of the

\[\text{Kuszaj, supra note 98, § 7.04.}\]
\[\text{42 U.S.C. § 11022(d).}\]
\[\text{Id. § 11022(d) (1)(A).}\]
\[\text{Id. § 11022(d) (2).}\]
\[\text{Id. § 11022.}\]
\[\text{Id. § 11022(d) (2)(F).}\]
\[\text{Id. §§ 11004, 11021, 11022, 11023; Kuszaj, supra note 98, at fig.2-2.}\]
\[\text{42 U.S.C. § 11023; see Kuszaj, supra note 98, at fig.2-2.}\]
\[\text{See 42 U.S.C. § 11023(c).}\]
\[\text{42 U.S.C. § 11023(b).}\]
\[\text{Dudley, supra note 110, at 1–2.}\]
disposal process, and the annual quantity of toxins entering the environment.\textsuperscript{113}

A. EPCRA’s Public Availability Section

EPCRA explicitly states that all four forms and the emergency response plan must be available to the general public.\textsuperscript{114} The information must be available during normal working hours at locations designated by the appropriate government entity.\textsuperscript{115} An explicit exclusion from public review exists for the specific location of chemicals as designated on a tier II form and confidential or trade secret information.\textsuperscript{116}

EPCRA states that the toxic chemical release forms were intended to be available to “citizens of communities surrounding covered facilities.”\textsuperscript{117} This intent manifests through the requirement that the forms be available “to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering . . . .”\textsuperscript{118} Congress has also evidenced its intent to make the forms accessible to the public by requiring that the available data be accessible via computer telecommunications and other means.\textsuperscript{119} The TRI database compiles data collected under EPCRA and is currently available on EPA’s website.\textsuperscript{120}

B. EPCRA and Preemption

EPCRA includes a non-preemption clause that explicitly states that the federal government is not preemting state and local measures.\textsuperscript{121} Section 110041 of EPCRA states that nothing in the chapter shall “preempt any State or local law.”\textsuperscript{122} While EPRCA requires that data sheets include information identical to the federal form, a state or locality can require the submission of additional information.\textsuperscript{123}

\textsuperscript{113} 42 U.S.C. § 11023(g).
\textsuperscript{114} Id. § 11044(a).
\textsuperscript{115} Id. Appropriate entities include LEPCs and EPA. Id.
\textsuperscript{116} Id. §§ 11044(a), 11042. This Note will not address trade secrets.
\textsuperscript{117} Id. § 11023(h).
\textsuperscript{118} Id.
\textsuperscript{119} 42 U.S.C. § 11023(j).
\textsuperscript{121} 42 U.S.C. § 11041.
\textsuperscript{122} Id.
\textsuperscript{123} Id. § 11041(b).
For example, in *Ohio Chamber of Commerce v. State Emergency Response Commission*, the SERC adopted rules pursuant to the Commission’s outlined role in EPCRA.124 These rules required owners and operators of regulated facilities to submit scaled maps indicating the location of chemicals.125

The court in *Ohio Chamber of Commerce* addressed whether these rules exceeded the Commission’s authority.126 Opponents to the rule argued that EPCRA intended that the required forms be “consistent with and equivalent in scope, content, and coverage” with the federal form.127 The Commission interpreted EPCRA as a “floor”—or minimum reporting requirement—that not only allows more stringent regulations to be passed by the state, but anticipates that states will expand upon the federal requirements.128 The court ruled that the federal statute explicitly rules out preemption and allows states to create their own form, thus demonstrating that the federal law was created as a comprehensive law leaving room for additional state intervention.129 In addition, the court believed the State Emergency Response Commission rule to be consistent with the stated federal purpose “to provide the public with information concerning hazardous chemicals in their communities and to encourage and support emergency planning efforts at state and local levels.”130

IV. RISKS AND BENEFITS OF DISCLOSING CHEMICAL FACILITY INFORMATION

A. The Risk of a Chemical Attack

The risk of a hazardous substance release from a facility triggered by terrorist activities is considered to be low.131 Of the 353 known or suspected terrorists acts in the United States perpetrated from 1980 to 2000, only a few involved chemical facilities, and as of 2000 there had yet to be a criminally caused chemical release from a facility in the United States.132 Yet the Department of Justice (DOJ) considers the

124 Id. § 11001; 597 N.E.2d 487, 488–89 (Ohio 1992).
125 *Ohio Chamber of Commerce*, 597 N.E.2d at 489.
126 Id.
127 Id. (quoting *Ohio Rev. Code Ann.* § 3750.02(B)(1)).
128 Id. at 490–91.
129 See id. at 490.
130 Id.
131 LINDA-JO SCHIEROW, CHEMICAL PLANT SECURITY 14 (Cong. Research Serv. 2005).
132 Id. at 2; DEP’T OF JUSTICE, supra note 56, at 27.
possibility of an attack a “real and credible” risk based on the increasing number of terrorist attacks against other targets and the risk of mass damage to life and property.\textsuperscript{133} Estimates as to the severity of a chemical release vary depending on whether a flammable or hazardous chemical release occurs, with estimates of the median number of persons impacted ranging from 15 to 1500.\textsuperscript{134}

Another reason that the threat is considered real and credible is the international history of using chemical facilities as weapons.\textsuperscript{135} Outside of the U.S., multiple groups across the globe have utilized intentional chemical releases from industrial facilities as weapons.\textsuperscript{136} For example, during the war in Croatia, Serbian forces attacked a chemical plant producing fertilizer, and in Colombia, the Revolutionary Armed Forces of Colombia exploded a pesticide warehouse resulting in mass evacuations of the surrounding area.\textsuperscript{137}

It is believed that terrorists select a target facility based on criteria similar to that used by the U.S. military.\textsuperscript{138} The military’s approach is based on obtaining nine pieces of crucial information: knowledge of the facility’s existence, the chemicals present, the off-site consequences of a release, the facility’s security, the facility’s layout, the location of the chemicals, knowledge of mitigation measures to limit the damage, the facility’s emergency response plan, and the community’s emergency response plan.\textsuperscript{139}

Chemical plant attackers will likely try to attack a chemical facility at its most vulnerable point.\textsuperscript{140} Assessing the most vulnerable point requires consideration of the security systems’ weaknesses and the operating or environmental conditions that would provide an advantage to the attacker.\textsuperscript{141} Security or protection systems include detection devices such as sensors, physical barriers that cause delays such as locks, strong security response action as demonstrated by the ability to communicate the threat and neutralize it, and mitigation factors including automatic

\textsuperscript{133} See Dep’t of Justice, supra note 56, at 2.
\textsuperscript{135} See Dep’t of Justice, supra note 56, at 2.
\textsuperscript{136} See id. at 22–27.
\textsuperscript{137} See id. at 23, 26.
\textsuperscript{138} See id. at 38.
\textsuperscript{139} See id. at 38–39.
\textsuperscript{140} Nat’l Inst. of Justice, Dep’t of Justice, NCJ 195171, Special Report: A Method to Assess the Vulnerability of U.S. Chemical Facilities 20 (2002) [hereinafter NIJ].
\textsuperscript{141} Id. at 20–21.
shut-down mechanisms.\textsuperscript{142} Vulnerability can be determined by evaluating system features with the least protection, and by predicting the worst case scenario.\textsuperscript{143} Protection systems should also be examined as a whole to determine if there is balanced protection which ensures that an adversary cannot overcome protective measures with one single attack method.\textsuperscript{144} A vulnerability assessment should also take into account advantages that an attacker may have, such as emergency conditions, lack of personnel on site, and inclement weather.\textsuperscript{145}

Terrorists have demonstrated the ability to obtain information through both legal and illegal means.\textsuperscript{146} Terrorist groups have built a reputation for attracting and training members with the specialized operative skills likely required for implementing an attack.\textsuperscript{147} As Joseph D. Jacobson—Judge Advocate then assigned to the Litigation Division of the Air Force Legal Services Agency—argued in an article entitled Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level, terrorists are likely to acquire needed information from raw data more readily than community groups due to their motivation and specialized knowledge.\textsuperscript{148} The counterargument is that providing information online, such as the worst case scenario, creates “one-stop shopping” by providing terrorists with a majority of the information needed to select a target from anywhere in the world.\textsuperscript{149}

\textsuperscript{142} See id. at 16–17, 20.
\textsuperscript{143} See id. at 20.
\textsuperscript{144} Id. at 26.
\textsuperscript{145} Id. at 21.
\textsuperscript{146} Bagley, supra note 2, at 69. The author cites the \textit{al Qaeda Manual} found in Manchester, England by the Metropolitan Police, who found the manual while searching an al Qaeda member’s home, and later translated and introduced it at an embassy bombing trial in New York. \textit{Id.}; see \textit{al Qaeda Manual}, beginning at http://www.usdoj.gov/ag/manualpart1_1.pdf. The manual states that eighty percent of the information needed comes from public sources such as newspapers, books, broadcasts, and jokes by everyday people. \textit{al Qaeda Manual}, supra, at BM-80–82, available at http://www.usdoj.gov/ag/manualpart1_3.pdf. It then states that the other twenty percent can be procured through illegal means such as “[i]ndividuals who are recruited as either volunteers or because of other motives.” \textit{Id.} at BM-82.
\textsuperscript{147} The 9/11 Report: The National Commission on Terrorist Attacks upon the United States, Executive Summary LXXXIV–LXXXV, 522–23 (2004); Bagley, supra note 2, at 69 (citing \textit{al Qaeda Manual}, supra note 146 at BM-82).
\textsuperscript{148} See Jacobson, supra note 48, at 387–91.
B. The Role of Environmental Information in Public Participation

Public involvement in environmental enforcement is supported by three rationales: normative, instrumental, and substantive.\textsuperscript{150} The normative rationale is that communities have a right to know, and the ability to mitigate any negative effects from a chemical facility.\textsuperscript{151} The instrumental rationale argues that information disclosure improves environmental performance because of community response.\textsuperscript{152} This theory also supports the notion that decreasing hazardous wastes is one of the better options for reducing terrorist threats to chemical facilities.\textsuperscript{153} The substantive rationale is that information disclosure leads to the cooperation necessary to understand and solve environmental problems.\textsuperscript{154} This theory can be applied to security concerns by advocating that information shared with the community leads to measures that reduce terrorist threats.\textsuperscript{155}

In 2003, EPA published a report identifying how TRI data is utilized by citizens, citizen groups, industry, investing groups, and government.\textsuperscript{156} The report explained that citizen groups have utilized the information to educate communities, identify environmental justice concerns, and to engage in direct negotiation for pollution reductions.\textsuperscript{157} For example, in July 2005, a community group in Pilsen, Illinois, learned from TRI data that a nearby industry was one of the

\begin{footnotes}
\item[151] Beierle, supra note 150, at 336; see Fiorino, supra note 150, at 227–28.
\item[154] Beierle, supra note 150, at 336; Fiorino, supra note 150, at 227.
\item[155] See Bagley, supra note 2, at 90, 95–100; Beierle, supra note 150, at 336; Fiorino, supra note 150, at 227; Jacobson, supra note 48, at 394.
\item[156] See generally Toxic Release Data Use, supra note 152.
\item[157] Id. at 3–9; see also Mary Graham, \textit{Democracy by Disclosure: The Rise of Technopopulism} 21–61 (2002) (tracing the history and impact of the TRI program on industries and democracy).
\end{footnotes}
city’s largest polluters. With this information, they were able to gain the attention of city and state officials and initiate negotiations between the EPA and the factory for reduced emissions.

The EPA website that allows citizens to search the TRI draws approximately 240,000 searches annually. The website allows access mainly to raw data, which is difficult for citizen groups to utilize because it requires expert knowledge of the chemical in order to draw a conclusion about the potential health impacts. To reduce the difficulty citizens encounter when interpreting raw data, national organizations such as OMB Watch and Environmental Defense analyze the raw data and provide guidance on the health effects of particular toxins released in a geographic area. This interpreted data has attracted twice as many participants; the Environmental Defense Fund’s “scorecard” website draws approximately half a million views per month.

C. Levels of Disclosure

Information may be disclosed at a variety of levels. For example, information may be disclosed only to government agencies and not the general public, such as the case with trade secrets under EPCRA. The next applicable level of disclosure is notification only to

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161 Id.; Durham-Hammer, supra note 92, at 345–46 (outlining possible mistakes citizens may make when attempting to interpret information).


164 Beierle, supra note 150, at 337–38.

those affected, referred to as community disclosure. Community disclosure is implemented in the Safe Drinking Water Act (SDWA) when utility customers are provided with consumer reports. Finally, full disclosure occurs when information is made available to the general public. Full disclosure, which derives from FOIA, is applicable to systems such as TRI reporting that allow citizens public access to government internet databases. According to Thomas C. Beierle, “[a]ll modern models of full disclosure involve the compilation of information into electronic databases that support comparison, ranking, and tracking of facility performance.” The internet is considered a more effective means for disseminating information than traditional methods.

The ability to access information tends to be the greatest under full disclosure and progressively weaker with community and agency disclosure. Because of exemptions in FOIA, CIIA, EPCRA, and SDWA, specific environmental information provided to government agencies can be withheld from public disclosure. This suppression of information results in the government carrying the full burden of enforcement and mitigation of community risk. This government burden goes against the congressional intent of public participation and enforcement in the environmental law realm as demonstrated by citizen suits and disclosure provisions in environmental laws such as EPCRA, CAA, and the Clean Water Act (CWA).

166 See Beierle, supra note 150, at 337.
167 See 42 U.S.C. § 300g-3(c)(4).
168 Beierle, supra note 150, at 337.
170 Beierle, supra note 150, at 337.
172 See Beierle, supra note 150, at 337.
174 See Beierle, supra note 150, at 337.
V. States Going Beyond the Federal Floor

While EPCRA contains a federal right-to-know provision, states including California, Illinois, Massachusetts, and New Jersey have implemented additional reporting requirements. Some state right-to-know laws seek to enhance dissemination of information by notifying citizens directly, instead of through a State Emergency Response Commission (SERC) or Local Emergency Planning Committee (LEPC), as allowed by EPCRA. This section advocates that the Illinois right-to-know law successfully relays information to the public because it embraces methods that have been successful at the state and federal level.

A. The Beginning: New Jersey—Informing Citizens About Health Effects in Plain Language

New Jersey’s environmental surveys create an inventory of the hazardous substances present, similar to EPCRA’s toxic chemical release forms and emergency and hazardous chemical inventory forms. The surveys are available to the public when requested in writing and were available online prior to September 11, 2001. In addition to the inventory, New Jersey’s Right-to-Know Act requires the State Department of Health to create health fact sheets for each regulated chemical. The fact sheets are available online and summarize the health effects of the substance in an accessible form, including recommendations on how to reduce exposure in the workplace, acute and chronic health effects, cancer or reproductive hazards, suggested medical tests for


178 N.J. Stat. Ann. § 34:5A-4–5, -9. The original New Jersey Worker and Community Right-to-Know Act mandated disclosure of information to the public and to workers. N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 590 (3d Cir. 1985). Many of the worker disclosure mandates, such as workplace surveys designed to facilitate the reporting of hazardous substances, have been preempted by the Occupational Safety and Health Administration (OSHA), but the environmental sections of the statute are still valid. Id. at 593. For example, environmental surveys, fact sheets, and the public disclosure of this information are not preempted. Id. at 594–96.


those with high exposure, and commonly asked questions.\textsuperscript{181} For example, one of cadmium sulfate’s acute effects is eye irritation and a common question is “[i]f I have acute health effects, will I later get chronic health effects?”\textsuperscript{182} Although not available on the same form as the facility description, the fact sheet in conjunction with the reporting survey provides communities with health information in a user-friendly format that is beneficial to the public.\textsuperscript{183}

B. An Effective Miss—Agency, but Not Public, Disclosure: California’s Proposition 65

In 1986, California approved Proposition 65 as part of the state’s Safe Drinking Water and Toxic Enforcement Act.\textsuperscript{184} This act is hailed for encouraging agency disclosure, but criticized for failing to provide the general public with information about facilities in their area.\textsuperscript{185} Proposition 65 requires a blanket warning before exposing individuals to a chemical known by the state to cause cancer or reproductive toxicity, and applies to consumer product, work, and environmental exposures.\textsuperscript{186} For environmental exposures, the Proposition 65 warning must be clear and convey that the chemical in the area is known to cause reproductive toxicity or cancer.\textsuperscript{187} No additional information, such as the name of the chemical or its exact location, is necessary.\textsuperscript{188} The notice may be posted in one of three manners: a sign in the area, a mailed notice, or a media announcement.\textsuperscript{189} Proposition 65 has been criticized for lacking critical health information such as the level


\textsuperscript{183} See N.J. Stat. Ann. § 34:5A-5; supra Part IV.B–C (supporting the assertion that interpreted data is more effective than raw data, and internet access is more efficient at disseminating information than other methods).


\textsuperscript{185} Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 Geo. L.J. 257, 346 (2001); Rechtschaffen, supra note 184, at 333–40.


\textsuperscript{188} See Cal. Code Regs. tit. 26, § 22-12601(d).

\textsuperscript{189} Id. § 22-12601(d)(1).
of risk and nature of exposure. In addition, because many companies utilize inconspicuous newspaper advertisements and sometimes do not identify the facility, it can be difficult to determine which facility caused the exposure.

Proposition 65 differs significantly from EPCRA’s TRI because it provides a blanket warning, lacks specific information, and does not produce a “stream of generally available and comparable performance data.” But, like EPCRA’s TRI, Proposition 65 is credited as reducing pollution. Proposition 65’s success has been partly credited to an exemption possibility in the statute. The exemption allows regulated entities demonstrating that the exposure in question poses “no significant risk” to avoid reporting. Professor Bradley C. Karkkainen explains that this exemption creates an incentive to provide the state with credible data to establish no significant risk; thus creating a “rich flow of toxicity and exposure data that has allowed the state to establish regulatory standards for dozens of pollutants, at a far faster pace than under conventional regulatory approaches.”

C. Massachusetts’s Failed Attempt

The Massachusetts Continuing Legal Education Environmental Law Series presents a dim picture of the state’s right-to-know law, noting that “enforcement is at best desultory” and that the Massachusetts Department of Environmental Protection (DEP) “has closed its Right-to-Know office.” The Massachusetts law requires citizens to have knowledge of an environmental harm before being guaranteed access to more information. The statute allows residents of the town or city where the facility is located to file a petition requesting an investi-

190 Rechtschaffen, supra note 184, at 336.
191 See id. at 333, 336.
192 Karkkainen, supra note 185, at 347.
193 See id. at 346–47 (noting Proposition 65’s ability to shift the information burden); Rechtschaffen, supra note 184, at 348 (discussing that the law is “greatly flawed” but it has nonetheless been able to aid in pollution reduction).
194 Cal. Health & Safety Code § 25249.10; see Karkkainen, supra note 185, at 346.
196 Karkkainen, supra note 185, at 346.
gation of the facility with the municipal coordinator. The petition must set forth the grounds for believing that the public health is endangered and provide any information which may assist the municipality’s investigation. The decision to pursue an investigation is at the discretion of the municipal coordinator, with the possibility of review by the DEP. DEP may, but is not obligated to, release material safety data sheets to the petitioner.

The statute mandates that the public keep confidential any information disclosed by the state. Section 21(b) restrains disclosure of the information received by anyone not statutorily authorized. This provision essentially prohibited community members from sharing safety and health information with one another. In Lawlor v. Shannon, the U.S. District Court for the District of Massachusetts found the provision unconstitutional on its face; finding that the section was an abridgement of protected speech in violation of the First Amendment. In its analysis, the court determined that the proposed substantial government interest—“risk of sabotage or robbery”—was unsubstantiated because the government offered no evidence that such concerns were legitimate and that if such risks existed, other states with right-to-know laws, such as New Jersey, would already have experienced robbery or sabotage.

D. Bringing Together the Benefits and Avoiding Prior Pitfalls: Illinois

In response to concerns surrounding groundwater contamination that affected at least seven hundred homes, the Illinois state legislature enacted a bill enhancing the state’s community right-to-know reporting requirements. The bill is described as “putting Illinois at the forefront of State-enacted environmental protection law” and

199 Id.
200 Id.
201 Id.
202 Id.
203 Id. § 21(b).
207 Id. at *14–15.
“making Illinois the nation’s leader in ensuring communities’ right-to-know about potentially dangerous local environmental threats.”

The new law requires that the Illinois Environmental Protection Agency (IEPA) notify property owners of any soil contamination that extended beyond a facility’s property boundaries and poses a threat of public exposure above a specified threshold. For ground water contamination that poses a threat of public exposure, notice must be given to owners of the water systems and the properties affected. Similarly, the Act requires notice when IEPA refers a situation for enforcement or performs an immediate removal. This notice must be given to property owners within 2500 feet, or a distance determined by IEPA, and to county officials.

The act does not mandate the notification method; rather, it states that the method required “shall be determined in consultation with members of the public and appropriate members of the regulated community.” Suggested methods include personal notification, public meetings, signs, electronic notification, and print media. The notification may contain the name and address of the facility, the name of the contaminant released, a specification of whether the contaminant was released or suspected of release, a brief description of the potential adverse health effects, recommendations that the impacted wells be tested, and contact information for a person at IEPA. The law required IEPA to create an internet database of chemical facility information indexed and searchable by notice date, zip code, site or facility name, and geographic location.

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210 415 ILL. COMP. STAT. 5/25d-3(a)(1).

211 Id. at 5/25d-3(a)(2).

212 Id. at 5/25d-3(b); Cornbleet, supra note 209, at 13.

213 415 ILL. COMP. STAT. 5/25d-3(b), (c).

214 Id. at 5/25d-3(c).

215 Id.

216 Id. Reasonable notification costs must be paid for by the potentially responsible party (PRP), but a PRP with an approved community relations plan may use their own agency-approved notifications in lieu of notifications written by IEPA. Id. at 5/25d-3(c)–(d).

EPA databases containing similar information about releases in Illinois.\footnote{218}

Illinois’s right-to-know law requires a direct warning to the public and a description in plain language of the chemicals’ health effects; New Jersey, California, and Massachusetts laws, unlike that in Illinois, fail to include both of these elements.\footnote{219} Illinois, like TRI, allows for easy comparisons between facilities by utilizing the most accessible medium of full public disclosure, the internet.\footnote{220} In addition, there is no showing of public endangerment necessary to gain access to information, thus avoiding Massachusetts’s flaw.\footnote{221} Illinois law provides access that is useful to communities by utilizing the advantages seen in New Jersey and the federal TRI, but it may not spur the agency disclosure seen in California because it has no exemption for facilities posing no significant risk.\footnote{222}

\section*{VI. Navigating Preemption: Options and Boundaries for State Laws}

While the debate continues on whether information disclosure should remain a local issue or be under federal control, states currently have the ability under the Tenth Amendment of the U.S. Constitution and EPCRA’s preemption clause to implement reporting and disclosure requirements that best complement the state’s goals.\footnote{223} This ability is not without limitations because a state law cannot conflict with the federal law by making it physically impossible to comply with both, nor may it serve as a barrier to the federal law.\footnote{224} The Critical Infrastructure Information Act of 2002 (CIIA) and the Safe Drinking Water Act (SDWA) are sources of possible federal preemption regarding the dissemination of information that identifies the specific location of chemical facility infrastructure to the general public under a state’s full disclosure scheme.\footnote{225}

\begin{footnotes}
\footnotetext{218} 415 ILL. COMP. STAT. 5/25d-5; see also IEPA, Notifications, supra note 217.
\footnotetext{219} See supra Part V.A–C.
\footnotetext{220} 415 ILL. COMP. STAT. 5/25d-5; see supra Part IV.C.
\footnotetext{221} See supra Part V.C.
\footnotetext{222} 415 ILL. COMP. STAT. 5/25d-3, 5/25d-3; see supra Parts IV.B–C, V.A, V.B.
CIIA and EPCRA both contain clauses addressing a state’s ability to require disclosure of additional information.\textsuperscript{226} EPCRA explicitly states that it does not preempt the field, thus maintaining an avenue for states to promulgate their own reporting requirements as done by California, Illinois, Massachusetts, and New Jersey.\textsuperscript{227} CIIA, while preempting states from requiring disclosure of voluntarily submitted infrastructure information, maintains that the information can be made available through legal means other than FOIA, ex parte communications, civil action without written consent, and state and local disclosure of information or records laws.\textsuperscript{228} For example, the Maine Public Utilities Commission requires that maps of specified public utility infrastructure be filed with the state.\textsuperscript{229} In a recent dispute, the Commission dismissed AT&T’s argument that such information did not need to be submitted under CIIA by affirming that CIIA “does not limit the ability of a state agency to obtain such information independently.”\textsuperscript{230}

The SDWA excludes vulnerability assessments from public disclosure.\textsuperscript{231} A state law requiring public disclosure of vulnerability assessment information will likely be preempted by SDWA because it would be in direct conflict with the SDWA’s purpose to keep this information from the public by exempting it from FOIA.\textsuperscript{232} While public access to this information could aid safety by motivating communities to negotiate with facilities to improve safety and security measures, state legislation disclosing vulnerability assessments would likely directly conflict with the federal statute prohibiting disclosure.\textsuperscript{233}

\textsuperscript{226} 6 U.S.C. § 133(c); 42 U.S.C. § 11041.
\textsuperscript{228} 6 U.S.C. § 133(c). The Department of Homeland Security rejected a suggested loophole for civil discovery, but the Department acknowledged the possibility that the Act may not protect independently existing information obtained for civil litigation from a source other than CII records, and that those records may be used in litigation. See Procedures for Handling CII, 71 Fed. Reg. 52,252, 52,264–65 (Sept. 1, 2006) (final rule for 6 C.F.R. pt. 29).
\textsuperscript{230} Id. at 2 n.1.
\textsuperscript{233} See 42 U.S.C. § 300i-2; Gade, 505 U.S. at 99–100; Bagley, supra note 2, at 88–89 (arguing for full public disclosure of benchmarks which indicate a vulnerability ranking for a specific facility in order to increase chemical plant safety). Similarly, facilities covered by the Maritime Transportation Security Act of 2002 require vulnerability assessments for
While many public disclosure laws concerning infrastructure information may be preempted, there is an opening for state legislation to make this information available to first responders.\textsuperscript{234} \textit{Ohio Chamber of Commerce v. State Emergency Response Commission} demonstrates the ability of states to require infrastructure information about the exact location of hazardous chemicals for purposes of preparing emergency responders, such as firefighters.\textsuperscript{235}

Despite a potential conflict with the dissemination of vulnerability assessments and infrastructure information, requiring additional data reporting and providing readily interpretable information—such as health effects caused by a chemical—should not conflict with federal legislation.\textsuperscript{236} This information is not explicitly prohibited from public disclosure under CIIA, SDWA, or FOIA.\textsuperscript{237} Often, additional health information will advance the federal government’s goals, including EPCRA’s purpose of providing the public with information concerning hazardous chemicals.\textsuperscript{238}

\section*{VII. Determining What Information to Disclose}

If states implement right-to-know laws, they will likely need to balance the public’s need for access to information against legitimate security concerns as seen in CAA, SDWA, and CIIA.\textsuperscript{239} This section suggests what information should be disclosed to the public, what information may need to be withheld, and what information may need to be disseminated in a manner that reduces risk, but maintains community access to the information. To provide insight into various manners of balancing security information with the community’s right-to-know about hazardous chemicals, this section draws from DOJ's

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{239} See generally 6 U.S.C. § 133; 42 U.S.C. § 300; 42 U.S.C. § 7412(r).
\end{itemize}
\end{footnotesize}
analysis of whether to disclose OCA data, techniques used for assessing vulnerability, and legislators’ past decisions.\(^{240}\)

A. Facility Names, Chemicals Present, Health Effects, and Emergency Release Information Should Be Publicly Disclosed

The facility name, chemicals present, accident history, health effects of the chemicals, and emergency release notifications should be accessible to the public because the information poses a low security risk and provides a community benefit. The risk is low because many facility names and a description of the chemicals stored are currently available through EPCRA’s TRI.\(^{241}\) In addition, basic chemical facility information for many chemicals, not just those covered by TRI, can be found through other sources such as trade organization publications, company and professional organization websites, and telephone books.\(^{242}\) While the argument remains that this information is part of the analysis for selecting a chemical facility for attack, these are only two of the nine criteria needed, and neither of the two adds substantive information that aids in identifying a facility’s greatest vulnerabilities.\(^{243}\) As noted by the U.S. District Court for the District of Massachusetts, similar information has been available in New Jersey for decades and has not resulted in an attack.\(^{244}\)

Disclosure of chemical facility identities and the chemicals present therein poses a security risk, but is essential to all theories underlying public disclosure.\(^{245}\) Without knowing the facility responsible for a release, communities are impeded from negotiations to mitigate the facility’s negative effects.\(^{246}\) Massachusetts and California are examples of state reporting laws that do not include public disclosure of

\(^{240}\) See generally DEP’T OF JUSTICE, supra note 56; NIJ, supra note 140; supra Parts II, V (describing past legislative actions at the federal and state level). This Note’s conclusions are not intended as rules or standards, but rather as reflection on past legislative considerations at the federal and state level based on the tension between national security and communities’ right-to-know.

\(^{241}\) See 42 U.S.C. §§ 11023, 11044 (EPCRA only covers listed chemicals above a specific threshold); U.S. EPA, TRI Explorer, supra note 120.

\(^{242}\) Bagley, supra note 2, at 67–68; see Jacobson, supra note 48, at 389–91; Johnson, supra note 152, at 149–56.

\(^{243}\) See DEP’T OF JUSTICE, supra note 56, at 39; NIJ, supra note 140, at 20–21; supra Part IV.A.


\(^{245}\) See supra Part IV.B–C (describing rationales underlying public disclosure).

\(^{246}\) See supra Part IV.B–C.
the individual chemical facility names. The use of anonymous newspaper advertisements under Proposition 65 has been criticized as not providing the information that citizens need to reduce hazards. The Massachusetts right-to-know law requires a citizen to establish grounds for asserting that a facility poses a risk to the community. This standard may be why the law has had unsatisfactory results. State regulations that require facilities to identify themselves—and the chemicals they possess—can avoid the faults of California and Massachusetts legislation, while not creating additional security risks.

Because of information available in the public realm, augmenting the list of chemicals reported should not pose a security threat and would provide a benefit by imposing market pressure to decrease the use of harmful chemicals. Similarly, lowering TRI reporting may decrease the security risk by lowering the quantities of hazardous chemicals used. Additionally, when the federal government proposed to increase the threshold, it cited the burden of reporting, rather than any national security considerations, indicating that higher thresholds are not directly related to national security.

The accident history of a facility, the health consequences of the chemicals present, and notification of releases should also be disclosed to the public. None of these items are specifically identified as among the criteria used to select a chemical facility as a potential target. The accident history has been available under CAA for years, and larger accidents are often reported by the media; thus terrorist groups can acquire much of the information through alterna-

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248 Rechtschaffen, supra note 184, at 335–36.
250 See id.; MCLE, supra note 197, at § 21.7.1.
255 See N.J. Stat. Ann. § 34:5A–1 (West 2000) (providing an example of how to combine these elements as part of a state right-to-know law); see also Lawlor, No. 86-2516-Mc, 1988 U.S. Dist. LEXIS 15671 at *4 (noting the minimal security risk created by New Jersey’s right-to-know law).
256 See Dep’t of Justice, supra note 56, at 38–39.
tive means. Similarly, the health effects of a specific chemical can be researched independently through scientific journals or a simple Google search. In addition, despite the assessment of Off-Site Consequence Analysis (OCA) by DOJ and the events of September 11, 2001, the accident history reports remain easily accessible on the internet, indicating that public access to this material is not a security concern.

For citizens, having access to accident histories allows for comparisons with other facilities, and furthers their ability to persuade facilities to improve their environmental performance. The importance of informing citizens of health risks in plain language is demonstrated by SDWA’s consumer reports, New Jersey’s fact sheets, and Illinois’s right-to-know law. Utilizing plain language is important because the public is more likely to be able to use interpreted information than raw data. Legislatures have deemed notification of a release a necessary disclosure as indicated by SDWA’s consumer reports, Illinois’s notices, and EPCRA’s emergency notification. Notification of a chemical release has been the focus of legislation because people have an obvious interest in knowing whether a release will affect them or their property. States should follow Illinois’s lead by requiring mailings or notices to the individuals affected rather than only requiring a notice to the LEPC as allowed by EPCRA. Because of the seemingly limited security risk associated with this information and the benefit provided

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259 See ECHO, supra note 257. See generally DEP’T OF JUSTICE, supra note 56.

260 See Johnson, supra note 152, at 149–56.


263 See 42 U.S.C. §§ 300g-3(c), 11004; 415 ILL. COMP. STAT. 5/25d-3(c).


265 See 42 U.S.C. §§ 300-g(c)(4), 11004; 415 ILL. COMP. STAT. 5/25d-3(b).
to citizens, this information should be fully disclosed to the public, ideally through an internet-accessible database.266

B. Chemicals’ Locations and Facility Layouts Should Be Disclosed to Emergency Personnel but Not to the Public

Information regarding facility layout and the location of chemicals within a plant poses a higher security risk and provides minimal community benefit.267 This information is critical for attacking a plant and identifying the facility’s vulnerabilities.268 A facility layout may indicate barriers to entry that are a factor in determining the vulnerability of an area.269 Similarly, the location of the chemical, in conjunction with information about a barrier, would allow for identification of the chemical that would cause the most damage with the least amount of effort.270 The sensitive nature of this information is also reflected in the option to remove specific location information from public disclosure under EPCRA’s tier II form.271 This factor may also have been a consideration for New Jersey when it removed its Community Right-to-Know surveys—which identified the location of the chemicals—from the internet.272

Despite a potential security risk, this more sensitive information must be disclosed to emergency personnel.273 The case Ohio Chamber of Commerce v. State Emergency Response Commission centered on emergency response personnel obtaining a map of the facility with the chemicals’ locations identified.274 The Ohio Fire Chiefs’ Association’s brief of amicus curiae advocated that the requirement of a map or site plan depicting the locations of hazardous chemicals is necessary to effectively plan for a chemical emergency.275 The amicus brief described the need for the map as “critical to averting loss of life or

266 See Beierle, supra note 150, at 336–37.
267 See infra Part VII.B.
268 See Dep’t of Justice, supra note 56, at 38–39; NIJ, supra note 140, at 16–18, 20–22.
269 See NIJ, supra note 140, at 16–18, 20–22.
270 Id.
272 See OMB Watch, supra note 179; N.J. Dept. Envtl. Prot., supra note 179.
275 See Brief for Ohio Fire Chiefs’ Ass’n, Inc. as Amicus Curiae Supporting Appellant, supra note 273, at 9.
property."\textsuperscript{276} EPCRA accounts for emergency personnel needs by granting them access to location information contained on tier II forms even if the facility chooses not to disclose the information to the general public.\textsuperscript{277} Emergency responder advocates claim that the thresholds for reporting are too high and that information regarding \textit{all} chemical storage should be reported.\textsuperscript{278} This claim suggests a need for state legislation providing full information to emergency personnel at lower thresholds than EPCRA requires.\textsuperscript{279}

C. \textit{Specific Security Measures and Vulnerability Assessments Should Not Be Publicly Disclosed}

Specific facility security measures and vulnerability assessments including this information should not be disclosed; this information is critical to planning an attack at a facility and helps to identify the most vulnerable locations.\textsuperscript{280} This information was not previously available through other reporting requirements—such as EPCRA or CAA—and would likely be difficult to access through other means.\textsuperscript{281} Legislatures have repeatedly attempted to keep this information from public disclosure.\textsuperscript{282} Federal legislation requiring vulnerability assessments such as CIIA, SDWA, and the Maritime Transportation Security Act include FOIA exemptions, thus potentially preempting state regulations requiring full disclosure of this information for facilities with voluntarily submitted critical infrastructure information, or regulated by SDWA or Marine Transportation Act.\textsuperscript{283}

\begin{itemize}
\item \textsuperscript{276} Id. at 10.
\item \textsuperscript{277} See 42 U.S.C. § 11022(e) (2000).
\item \textsuperscript{278} U.S. General Accounting Office, Chemical Safety: Emergency Response Community Views on the Adequacy of Federally Required Chemical Information 8–9 (2002).
\item \textsuperscript{279} See id.
\item \textsuperscript{280} See Dep’t of Justice, supra note 56, at 38–39; NIJ, supra note 140, at 16–18, 20–22.
\item \textsuperscript{281} See 42 U.S.C. §§ 7412, 11001; see also Jacobson, supra note 48, at 389–91 (discussing vital information available online, but failing to mention that vulnerability assessments and security measures are similarly available).
\end{itemize}
D. Vulnerability Zone Information Should Be Disclosed but in a Manner That Reduces the Risk of Illicit Use

Knowledge of the vulnerability zone is a critical element for identifying a target, but also involves strong public disclosure interests. The OCA data reported under CAA 112(r) posed similar equities that were resolved by maintaining access to some of the information while reducing its risk of illicit use; similar solutions may be useful at the state level, maintaining access to specific hazardous chemical information while reducing the risk of “one-stop shopping” for terrorists and others.

Maps of the vulnerability zone and the information necessary to create a map were cited as the highest risk information contained in OCA data. Community disclosure is one method utilized with OCA data that states could use to inform the public while reducing a security risk. Community disclosure reduces “one-stop shopping” because it is more difficult to compare facilities over a large geographic range from anywhere in the world. Although community disclosure may prevent comparative analysis, if other information such as accident history and a chemical inventory are accessible via the internet, communities can still compare data and negotiate with chemical facilities.

Community disclosure can be implemented by utilizing a computer program such as the Vulnerable Zone Indicator System (VZIS) or SDWA’s consumer reports. Community disclosure should seek to notify persons living within a vulnerability zone and inform them about the potential health effects of the chemicals stored and the facility’s safety record. Providing interpretable information to citizens would reduce the information chase that EPA’s electronic mail initiates by not identifying the source of the risk, and avoid the bar of having to know about a danger in order to receive more information as Massachusetts requires. Thus the form would mimic that used by

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285 See supra Part II.B (discussing the balance between national security and the public’s right-to-know).
286 See Dep’t of Justice, supra note 56, at 38.
287 See supra Part II.B.
288 See Dep’t of Justice, supra note 56, at 45.
289 See supra Part IV.B–C.
290 42 U.S.C. § 300g-3(c)(4)(B) (2000); VZIS, supra note 64.
291 See supra Part IV.B–C.
Illinois to alert people within an area that could be affected by a release.\textsuperscript{293}

**Conclusion**

Influenced by private sector concerns, TRI threshold requirements are being increased, and federal legislation concerning chemical facility security is constantly proposed and rejected.\textsuperscript{294} In this ever-changing atmosphere, states maintain the ability to supplement EP-CRA and maintain or enhance the dissemination of information to communities. With TRI being heralded as an effective method of decreasing toxics, state efforts at maintaining tough public disclosure requirements may continue to ensure safer facilities. By requiring information that is beneficial to local communities while respecting legitimate security concerns, states can reduce the hazards present and decrease chemical facilities’ attractiveness as terrorist targets.

\textsuperscript{293} See 415 ILL. COMP. STAT. 5/25d-3 (2005).
Abstract: The United States Court of Appeals for the Tenth Circuit recently determined that the jurisdictional bar contained in section 309(g)(6)(A) of the Clean Water Act does not preclude citizen plaintiffs from seeking equitable relief, but only bars those actions seeking civil penalties. However, this holding by the Tenth Circuit in Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co. directly conflicts with prior decisions by the First and Eighth Circuits. The First and Eight Circuits have broadly interpreted the jurisdictional bar to preclude citizens from seeking civil penalties or equitable relief once an administrative enforcement action is underway. An examination of the relevant statutory language, legislative history, and policy rationale, however, reveals that section 309(g)(6)(A) was only intended to bar citizens actions for civil penalties, preserving citizens’ powerful role in the protection and restoration of the navigable waters of this country.

Introduction

On November 8, 2005, the United States Court of Appeals for the Tenth Circuit handed down a landmark decision in Clean Water Act (CWA) litigation, finding that the jurisdictional bar contained in section 309(g)(6)(A) of the CWA1 only precludes citizens from seeking civil penalties when an administrative enforcement action is under-
The Tenth Circuit’s holding in *Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co.* allows citizen plaintiffs to seek equitable relief even when claims for civil penalties are precluded under section 309(g)(6)(A). The *Continental Carbon* decision has contributed to the growing divide among lower courts that have attempted to interpret the preclusive effect of section 309(g)(6)(A). While some lower courts have construed this jurisdictional bar broadly, and as a result have weakened the enforcement power of the CWA, others have interpreted the preclusion provision narrowly, preserving the critical role citizen suits play in the environmental protection scheme.

The Tenth Circuit’s recent decision has made the tension among the courts particularly evident, as its holding in *Continental Carbon* directly conflicts with previous decisions by the First and Eighth Circuits. Specifically, the courts disagree as to which forms of relief are precluded from being sought by citizen plaintiffs when an administrative enforcement action is underway. The First and Eighth Circuits have construed section 309(g)(6)(A) to preclude citizen suits seeking civil penalties or equitable relief. By contrast, the Tenth Circuit held

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3 428 F.3d at 1300.

4 See, e.g., *id.* (holding that section 309(g)(6)(A) bars only civil penalty claims and not claims seeking equitable relief); *Ark. Wildlife Fed’n v. ICI Ams., Inc.*, 29 F.3d 376 (8th Cir. 1994) (holding that section 309(g)(6)(A) precludes actions for both civil penalties and equitable relief); *N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (holding that the section 309(g)(6)(A) ban extends to claims for injunctive relief and civil penalties); *Coal. for a Liveable W. Side, Inc. v. New York City Dep’t of Envtl. Prot.*, 830 F. Supp. 194 (S.D.N.Y. 1993) (holding that section 309(g)(6)(A) only applies to civil penalty actions).


6 Compare *Cont’l Carbon*, 428 F.3d at 1300, with *Ark. Wildlife Fed’n*, 29 F.3d at 383, and *N. & S. Rivers*, 949 F.2d at 558. This Note will directly analyze this conflict.

7 Compare *Cont’l Carbon*, 428 F.3d at 1300, with *Ark. Wildlife Fed’n*, 29 F.3d at 383, and *N. & S. Rivers*, 949 F.2d at 558.

that the section bars only citizen claims for civil penalties, permitting
subsequent claims brought by citizens seeking equitable relief.\(^9\)

The Tenth Circuit’s decision in \textit{Continental Carbon} comes at a
time when United States citizens are questioning the government’s
ability and desire to address a wide range of domestic environmental
problems.\(^10\) Limited resources, state and local economic interests, and
political agendas have led to relaxed federal and state enforcement of
many environmental regulations, including the CWA.\(^11\) Fortunately,
while the Environmental Protection Agency (EPA) and states hold the
primary enforcement power under the CWA, private citizens have
filled many of the gaps in enforcement by filing citizen actions to ad-
dress environmental harms.\(^12\) Citizens are able to act as a check on
the government by initiating federal and state enforcement efforts
and acting as a supplemental enforcement authority when the gov-
ernment fails to act.\(^13\)

Unfortunately, despite the documented effectiveness of citizen
suits, courts have recently narrowed the citizen’s role in enforcing the
CWA.\(^14\) The First and Eighth Circuits have contributed to this erosive
trend by finding that section 309(6)(A) of the CWA precludes citi-
zens from seeking any type of relief when an administrative enforce-
ment action is underway.\(^15\) The Tenth Circuit’s recent decision in \textit{Con-
tinental Carbon} both challenges the First and Eighth Circuit’s broad

\(^9\) \textit{Cont’l Carbon}, 428 F.3d at 1300.

\(^10\) Peter H. Lehner, \textit{The Efficiency of Citizens Suits}, 2 \textit{Alb. L. Env. Outlook} 4, 4
(1995–96); see Steven D. Shermer, \textit{The Efficiency of Private Participation in Regulating and
Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement}, 14 \textit{J. Env. L. &

ernment administration, and the existence of environmental agencies apathetic to the
needs of citizens have contributed to ineffective environmental enforcement. \textit{Id.}

\(^12\) \textit{Id.}; see David R. Hodas, \textit{Enforcement of Environmental Law in a Triangular Federal System:
Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States,

\(^13\) \textit{Plater et al.}, \textit{supra} note 11, at 1028, 1034; Hodas, \textit{supra} note 12, at 1618–19. As
one author articulates: “One of the important lessons citizen suits have taught is that ‘pri-
vate industry, left to its own initiative, will procrastinate indefinitely, even at the expense of
the environment, [and] the government agencies empowered with protecting the envi-
ronment are far from diligent in that regard.’” Hodas, \textit{supra} note 12, at 1621 (quoting

\(^14\) \textit{See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.}, 484 U.S. 49 (1987);
Ark. Wildlife Fed’n \textit{v. ICI Ams., Inc.}, 29 F.3d 376 (8th Cir. 1994); N. \& S. Rivers Watershed
Ass’n, Inc. v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991). \textit{See also} Hodas, \textit{supra} note 12, at
1656; Fisch, \textit{supra} note 5, at 225.

\(^15\) \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383; \textit{N. \& S. Rivers}, 949 F.2d at 558.
interpretation of the section 309(g)(6)(A) bar, and signifies powerful resistance to recent judicial activism that put effective enforcement of the CWA in jeopardy.\textsuperscript{16}

This Note will examine how the Tenth Circuit’s narrow interpretation of section 309(g)(6)(A) of the CWA preserves the public’s vital role in enforcing the laws that protect the navigable waters of the nation from polluters and government inaction. Part I explores the role that citizen suits have played in the CWA’s enforcement scheme and what restrictions have been placed on these suits since their emergence in 1972. Part II reviews the relevant case law regarding the type of relief citizens are barred from seeking under section 309(g)(6)(A) of the CWA. This section of the Note also highlights the current divide between the First, Eighth, and Tenth Circuits’ interpretation of the scope of the jurisdictional bar. Finally, Part III looks to why the statutory language, legislative history, and policy rationales of section 309(g)(6)(A) should persuade the Supreme Court to follow the Tenth Circuit’s reasoning and find that the statutory bar only applies to citizen claims for civil penalties, not equitable relief.

\textbf{I. The Role of Citizen Suits Under the CWA}

The Tenth Circuit recently preserved a citizen plaintiff’s right to sue for declaratory or injunctive relief when the government is engaged in an administrative enforcement action.\textsuperscript{17} There are two types of administrative enforcement actions: Administrative compliance orders and administrative penalty assessments.\textsuperscript{18} Administrative compliance orders have been criticized as the weakest enforcement mechanism because they do not impose civil penalties, are only enforceable by a court order, are not subject to judicial review, and do not have to adhere to public participation requirements.\textsuperscript{19} Alternatively, administrative penalty assessments recover civil penalties for past violations of the CWA, but cannot be used to impose penalties for violations of compliance orders or to impose injunctive relief.\textsuperscript{20} In the Continental Carbon case,
the Tenth Circuit construed the jurisdictional bar contained in section 309(g)(6)(A) to only preclude citizen suits seeking civil penalties when an administrative enforcement action is underway.\textsuperscript{21} However, if this case had been tried in the First or Eighth Circuit, a very different result would have ensued.\textsuperscript{22} Both the First and Eighth Circuits would have dismissed the entire citizen suit, as those jurisdictions have found that section 309(g)(6)(A) of the CWA precludes citizens from seeking both civil penalties and equitable relief.\textsuperscript{23}

\textbf{A. The Emergence of Citizen Suits in Water Pollution Regulation}

In 1972, Congress passed the Federal Water Pollution Control Act Amendments,\textsuperscript{24} dramatically altering the manner in which the federal government controlled the increasingly serious problem of water pollution.\textsuperscript{25} These amendments, most commonly referred to as the CWA, became a powerful tool in the preservation and restoration of the navigable waters of the United States by establishing efficient and effective enforcement methods that prior water pollution regulations lacked.\textsuperscript{26} Specifically, the CWA authorized EPA to monitor the emissions of effluents into navigable waters by the use of National Pollutant Discharge Elimination System (NPDES) permits, which “establish technology-based limits on the volume and concentration of pollutants that can be discharged into the nation’s waters . . . .”\textsuperscript{27} Each state was also given authority to establish its own permit and enforce-

\textsuperscript{21} \textit{Cont'l Carbon}, 428 F.3d at 1300.
\textsuperscript{22} \textit{Compare id.}, with \textit{Ark. Wildlife Fed’n v. ICI Ams., Inc.}, 29 F.3d 376, 383 (8th Cir. 1994), and \textit{N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate}, 949 F.2d 552, 558 (1st Cir. 1991).
\textsuperscript{23} \textit{See Ark. Wildlife Fed’n}, 29 F.3d at 383; \textit{N. & S. Rivers}, 949 F.2d at 558.
\textsuperscript{26} \textit{See Hodas}, supra note 12, at 1563–71; Fisch, supra note 5, at 212; Howard, supra note 25, at 44–45; Leonard, supra note 5, at 557–61.
ment program, provided that the scheme was deemed compatible with the CWA and approved by EPA.\textsuperscript{28}

To broaden and bolster enforcement of the CWA, enforcement power was allocated to the federal government, state governments and—for the first time in a water pollution control law—to private citizens of the United States.\textsuperscript{29} The CWA currently gives private citizens “attorney-general” status to act as enforcers of the Act, empowering them to seek both monetary penalties and equitable relief from alleged violators.\textsuperscript{30} Citizen suits thus enable the general public to act as enforcers of the CWA when the government has failed to do so, either as a result of limited enforcement resources, particular policy objectives, or its own laxity.\textsuperscript{31} For decades, these suits have been a powerful and critical enforcement mechanism, spurring and supplementing government actions and deterring violators from non-compliance.\textsuperscript{32}

1. Statutory Authority for Citizen Suits Under the CWA

The statutory authority for citizen suits was built into the 1972 amendments and lies in section 505 of the CWA.\textsuperscript{33} This provision allows private citizens to commence an action in federal district court against:

\[\text{[A]ny person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or ... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary ... .}\textsuperscript{34}

\textsuperscript{28} Pub. L. No. 92-500, § 402(a)(5), 86 Stat. 850, 880 (1992) (“The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable water within the jurisdiction of such State”); Hodas, supra note 12, at 1569–70; Fisch, supra note 5, at 212–13; Leonard, supra note 5, at 558.


\textsuperscript{30} Plater et al., supra note 11, at 1028, 1034; see Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000).

\textsuperscript{31} See Plater et al., supra note 11, at 1028, 1033; Hodas, supra note 12, at 1618–23.


\textsuperscript{33} 33 U.S.C. § 1365(a).

\textsuperscript{34} Id.
Thus, section 505(a) allows private citizens to bring actions not only against individual or corporate polluters violating the CWA, but also against the government when it is either unable to or has refused to use its resources to effectively enforce the Act. Specifically, this provision permits a federal district court to: (1) enforce the CWA effluent standards and limitations; (2) enforce orders regarding the effluent standards and limitations; (3) order the EPA Administrator to enforce the CWA standards and limitations; and (4) apply the proper civil penalties for a violation.

2. Limitations on Citizen Suits

Several limitations have been placed on these suits since their emergence in the CWA in 1972. For instance, a citizen cannot commence an action until a sixty day notice of the alleged violation has been given to the EPA Administrator, to the state where the supposed violation is taking place, and to the alleged violator of the Act. A citizen is also precluded from filing suit against a polluter if the federal or state government has begun “diligently prosecuting a civil or criminal action” against the polluter in court “to require compliance with the standard, limitation, or order . . . .” These limitations re-emphasize that Congress intended that the primary enforcement authority lies with the government under the CWA, and that citizen suits are supplementary.

B. Expanding the Bar on Citizen Suits

In 1987, Congress expanded the limitations on citizen suits through the passage of the Water Quality Act of 1987. Specifically, the restrictions arose from the addition of section 309(g) to the CWA, establishing a novel administrative procedure for the assessment of

35 See id.
36 Id.
38 33 U.S.C. § 1365(b)(1)(A) (“No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of standard, limitation, or order.”).
40 See Hodas, supra note 12, at 1626–27.
civil penalties. Section 309(g) authorizes the government to seek civil penalties outside of the courtroom for past violations. Its addition to the Act provided a third alternative to the two existing civil enforcement mechanisms available under the CWA: (1) a compliance order issued under section 309(a); and (2) a judicial civil action seeking monetary penalties and injunctive relief issued under section 309(b). Thus, by authorizing the government to request civil penalties from polluters, section 309(g) gives government officials an opportunity for enforcement that “provide[s] greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement.”

To safeguard against the possibility that polluters would be subject to duplicative administrative civil penalties—first sought for by EPA and then again by a citizen enforcement suit—Congress established section 309(g)(6)(A), which limits citizen action against alleged violators when an administrative enforcement action has already commenced and is being diligently prosecuted. However, courts have been unable to agree on the scope of the section 309(g)(6)(A) bar on citizen suits. Some courts have found that the section significantly broadens the preclusion of citizen suits, while others have defined this bar more narrowly.

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42 See 33 U.S.C. § 1319(g); Hodas, supra note 12, at 1630; Leonard, supra note 5, at 565, 570–71.
43 See 33 U.S.C. § 1319(g); Leonard, supra note 5, at 614.
48 Compare Cont’l Carbon, 428 F.3d at 1299–300, and Coal. for a Liveable W. Side, Inc. v. New York City Dep’t of Envtl. Prot., 830 F. Supp. 194 (S.D.N.Y. 1993), with Ark. Wildlife Fed’n, 29 F.3d at 377, 382–83, and N. & S. Rivers, 949 F.2d at 557–58. The debate as to whether section 309(g)(6)(A) should be construed narrowly or broadly extends to the interpretation of other aspects of the section. Other issues raised in a typical section 309(g)(6)(A) analysis include: (1) what types of administrative enforcement actions bar citizen suits; (2) how to decide whether administrative enforcement actions defined under state law are comparable to the administrative penalty assessment provision under the CWA for the purpose of precluding citizen suits; and (3) how to decide whether a governmental agency is engaged in the diligent prosecution of the administrative enforcement action. See Leonard, supra note 5, for a substantive analysis of these issues.
1. Statutory Language of Section 309(g) (6) (A)

Section 309(g) (6) (A) underlines the restrictions an administrative enforcement action places on other sections of the CWA. Courts that narrowly interpret section 309(g) (6) (A) place substantial weight on the plain meaning of the statutory language to support only extending the bar to citizen claims for civil penalties. By contrast, courts that broadly interpret the bar disregard the statute’s plain language and dismiss citizen suits seeking either civil penalties or equitable relief. Under section 309(g) (6) (A), any CWA violation:

(i) with respect to which the [EPA] Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law... shall not be the subject of a civil penalty action under subsection... [505] of this title.

2. Legislative History of Section 309(g)

Before passing section 309(g), Congress noted the importance of citizen actions, calling the suits “proven enforcement tool[s]” that have acted to “both spur and supplement... government enforcement actions... [and] have deterred violators and achieved significant compliance gains.” Congress intended for § 309(g) to “[strike] a balance between two competing concerns: The need to avoid placing obstacles in the path of such citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation.” Furthermore, Congress was clear in its intent to apply the limita-
tion contained in section 309(g) “only to an action for civil penalties for the same violations which [were already] the subject of the administrative civil penalties proceeding.”55 Congress explicitly pronounced that this bar did not apply to “an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).”56 While the legislative history of section 309(g) suggests a congressional intent to preserve citizen claims for equitable relief under section 309(g) (6)(A), the First and Eighth Circuits have ignored the history’s significance in interpreting this section of the CWA.57

II. The Scope of Section 309(g)(6)(a): Does the Bar on Citizen Suits Extend to Equitable Relief?

The Tenth Circuit recently held that the jurisdictional bar on citizen suits contained in section 309(g)(6)(A) applies only to those actions seeking civil penalties.58 This is contrary to decisions made over a decade ago by the First and Eighth Circuits, which found that section 309(g)(6)(A) precluded citizens from seeking both civil penalties and equitable relief once an administrative enforcement action had been commenced and diligently prosecuted.59 While several district court decisions refused to apply the First and Eighth Circuits’ broad jurisdictional bar to citizen suits,60 the Tenth Circuit is the first federal court of appeals to challenge the decisions of these courts.61

A. Supreme Court Precedent: The Gwaltney Decision

While the United States Supreme Court has yet to rule on whether § 309(g)(6)(A) precludes private citizens from seeking equitable relief, lower courts have relied on the Court’s language in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. to determine the intended scope of the bar.62 In Gwaltney, the Court held that section

55 Id.
61 See Cont’l Carbon, 428 F.3d at 1300.
505(a) of the CWA did not confer federal jurisdiction over citizen suits for wholly past violations of the Act. However, lower courts are divided in their interpretation of the Supreme Court’s language and holding in *Gwaltney*. Consequently, the decision has been used by courts to both extend and narrow the preclusive effect of section 309(g)(6)(A) on citizen suits.

Courts sympathetic to defendants and hostile to citizen suits have construed *Gwaltney* to support the view that once an administrative enforcement action has been commenced and diligently prosecuted, a citizen is precluded from seeking any type of relief for the same violation in court. The First and Eighth Circuits have used certain language from *Gwaltney* to maintain this argument. The First Circuit explained:

The statutory language suggesting a link between civilian penalty and injunctive actions, considered in light of the *Gwaltney* opinion’s language outlining the supplemental role the citizen’s suit is intended to play in enforcement actions, leads us to believe that the section 309(g) bar extends to all citizen actions brought under section 505, not merely civil penalties.

By contrast, courts recognizing the critical role citizen suits play in the enforcement of the CWA use *Gwaltney* to narrowly construe the preclusive effect of section 309(g)(6)(A). In *Gwaltney*, the Court emphasized that “the starting point for interpreting a statute is the language of the statute itself.” The Tenth Circuit followed this directive, stressing that the plain meaning of the statutory language suggests that only citizen civil penalty claims should be dismissed when an adminis-

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63 *Gwaltney*, 484 U.S. at 59.
65 See *Cont’l Carbon*, 428 F.3d at 1298–99; *Ark. Wildlife Fed’n*, 29 F.3d at 383; *N. & S. Rivers*, 949 F.2d at 555, 558.
67 See, e.g., *N. & S. Rivers*, 949 F.2d at 555 (“It follows that ‘the citizen suit [under section 505] is meant to supplement rather than to supplant governmental [enforcement] action.’”) (quoting *Gwaltney*, 484 U.S. at 60).
68 Id. at 558.
tative enforcement action is underway.\textsuperscript{71} In addition, legal scholars have noted that Gwaltney should not be an overriding source of authority in defining the scope of the bar since the Court “relied almost entirely on the legislative history of the 1972 amendments to support its suggestion regarding the supplementary role of citizen suits in the CWA enforcement scheme.”\textsuperscript{72} Because the administrative penalty assessment provisions are the product of the 1987 CWA amendments, scholars suggest that the “legislative history of the 1987 amendments is more germane to the interpretation of these provisions than the general precautionary statements regarding the role of citizen suits expressed in the legislative history of the 1972 amendments.”\textsuperscript{73}

B. The Beginning of the Debate: North and South Rivers Watershed Association, Inc. v. Town of Scituate

In 1989, the First Circuit defined the scope of the section 309(g)(6)(A) bar, holding in North & South Rivers Watershed Ass’n, Inc. v. Town of Scituate that a citizen plaintiff is precluded from seeking civil penalties or equitable relief when an administrative enforcement action is being pursued by the government for the same violation.\textsuperscript{74} In North & South Rivers, a citizen group filed suit against the town for violating the federal CWA and sought both civil penalties and equitable relief in district court.\textsuperscript{75} The citizen complaint specifically alleged that a sewage treatment center was illegally discharging pollutants into a coastal estuary.\textsuperscript{76} Two years earlier the Massachusetts Department of Environmental Protection (DEP) issued an administrative order to the town of Scituate in response to these violations, requesting that the town: (1) cease to establish any further connections to its sewage system; (2) take the necessary steps to create new wastewater treatment facilities; and (3) begin upgrading the current treatment center.\textsuperscript{77}

The DEP never assessed any civil or criminal penalties against the town, nor did they establish a timetable or deadline against which compliance could be measured.\textsuperscript{78} Thus, even though the state order

\textsuperscript{71} See Cont’l Carbon, 428 F.3d at 1298–1300.
\textsuperscript{72} Leonard, supra note 5, at 590.
\textsuperscript{73} Id.
\textsuperscript{74} 949 F.2d 552, 558 (1st Cir. 1991).
\textsuperscript{75} Id. at 554.
\textsuperscript{76} Id. at 553.
\textsuperscript{77} Id. at 553–54.
\textsuperscript{78} See id. at 554, 554 n.1; Fisch, supra note 5, at 221.
attempted to address the noncompliance, the town was still in violation of the same state laws two years later.\textsuperscript{79} Despite the town’s disregard for the administrative order and its continuous violation of the CWA, the district court granted the town’s motion for summary judgment, dismissing the plaintiff’s claim.\textsuperscript{80} The court found that the appellants’ citizen suit (seeking both civil penalties and equitable relief) was barred under section 309(g) (6) (A) (ii) because the state had commenced and was in the process of diligently prosecuting the action under state law comparable to the CWA.\textsuperscript{81}

The First Circuit affirmed the district court’s grant of summary judgment.\textsuperscript{82} After finding that the Massachusetts state law was comparable to the CWA and was being diligently enforced by the state, the court applied the bar under section 309(g) (6) (A) (ii) to both the civil and equitable remedies sought by the plaintiff.\textsuperscript{83} The First Circuit found that “both the policy considerations regarding civilian actions under section 505 emphasized by both the Supreme Court and Congress and the fact that section 505 fails to differentiate civilian penalty actions from other forms of civilian relief,” supported the broad scope of the citizen suit preclusion.\textsuperscript{84}

Specifically, the First Circuit found that the citizen suit provision purposefully did not distinguish civil penalty actions from other citizen actions, such as those seeking declaratory or injunctive relief.\textsuperscript{85} The court referenced the Supreme Court’s acknowledgment in \textit{Gwaltney} that civil penalties and injunctive relief are referred to in the same sentence of the same section of the CWA.\textsuperscript{86} The First Circuit thus found that since most other sections of the CWA addressed distinct types of relief in separate subsections, the structure of section 505 suggests that citizen actions for civil penalties and equitable relief are intimately connected.\textsuperscript{87} Consequently, the court assumed that any limitation placed on one type of relief must also be placed on the other.\textsuperscript{88} Therefore, the court found that because section

\textsuperscript{79} See \textit{N. \& S. Rivers}, 949 F.2d at 554–55.
\textsuperscript{80} See id. at 555.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 558.
\textsuperscript{83} Id. at 553, 558.
\textsuperscript{84} Id. at 557.
\textsuperscript{85} \textit{N. \& S. Rivers}, 949 F.2d at 557–58.
\textsuperscript{86} Id. at 558.
\textsuperscript{87} See id.
\textsuperscript{88} See id.; Leonard, \textit{supra} note 5, at 612.
309(g)(6)(A) precludes citizens from seeking civil penalties, such preclusion must also extend to those suits seeking equitable relief.\(^89\)

The First Circuit also relied on the Supreme Court’s discussion in *Gwaltney* concerning the supplemental role citizen suits should play in the CWA enforcement scheme.\(^90\) The Supreme Court’s pronouncement that “the citizen suit is meant to supplement rather than to supplant governmental action”\(^91\) was relied on by the First Circuit in support of the proposition that section 309(g)(6)(A) precludes all citizen suits, not just those seeking civil penalties.\(^92\) The First Circuit stressed that:

Both the Congress and the Supreme Court have recognized: (1) that the primary responsibility for enforcement of Clean Water Acts rests with the government; (2) that citizen suits are intended to supplement rather than supplant this primary responsibility; and (3) that citizen suits are only proper if the government fails to exercise its enforcement responsibility.\(^93\)

The court in *North & South Rivers* believed that once the government takes any action to ensure compliance, any subsequent action by citizens will not only fail, but will impede the process necessary to further the goals of the CWA.\(^94\) In its final words, the First Circuit commented on the absurdity of applying the literal interpretation of the statute.\(^95\) By construing section 309(g)(6)(A) broadly, the court “provide[d] an alternative meaning” of the section that it believed “avoid[ed] irrational consequences.”\(^96\)

C. Following the First Circuit’s Lead: Arkansas Wildlife Federation v. ICI Americas, Inc.

A few years after the First Circuit decided *North & South Rivers*, the Eighth Circuit in *Arkansas Wildlife Federation v. ICI Americas, Inc.* was faced with the same legal issue: Are citizen suits seeking injunctive

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89 See N. & S. Rivers, 949 F.2d at 558; Leonard, *supra* note 5, at 612.
90 See N. & S. Rivers, 949 F.2d at 555, 558; see *Gwaltney of Smithfield, Ltd.*, v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987).
91 *Gwaltney*, 484 U.S. at 60.
92 N. & S. Rivers, 949 F.2d at 555, 558.
93 *Id.* at 558.
94 *See id.*
95 *Id.* (“Where literal interpretation of a statute would lead to an absurd result, the Court must strive to provide an alternative meaning that avoids the irrational consequences.”).
96 *Id.*
or declaratory relief precluded under section 309(g)(6)(A). The district court granted summary judgment in favor of ICI Americas, Inc. (ICI), dismissing Arkansas Wildlife Federation’s claims for injunctive and declaratory relief sought pursuant to section 505(a) of the CWA. The Eighth Circuit, in affirming the district court’s opinion, held in part that the bar on citizen suits contained in section 309(g)(6)(A)(ii) applied to both civil penalty actions and equitable relief.

In *Arkansas Wildlife Federation*, ICI operated a herbicide manufacturing plant that violated the emissions limits of their NPDES permit. After an investigation, the Arkansas Department of Pollution Control and Ecology (PCE) entered a Consent Administrative Order with ICI requiring compliance with the issued NPDES permit. However, after the Order was continually ignored by both PCE and ICI, the Arkansas Wildlife Federation filed a citizen suit.

The Eighth Circuit followed the reasoning set forth by ICI (whose reliance centered on the *North & South Rivers* and *Gwaltney* decisions) in deciding that the district court properly dismissed the citizen plaintiff’s claims for injunctive and declaratory relief. However, the Eighth Circuit did distinguish itself from the First Circuit by stating that its decision “do[es] not go so far as to say that it would be ‘absurd’ to preclude citizens’ claims for civil penalties without also precluding claims for declaratory and injunctive relief under the same circumstances.” Yet, instead of straying further from the reasoning set forth in *North & South Rivers*, the Eighth Circuit voiced its agreement with the First Circuit’s decision that it would be “unreasonable” to bar citizens from seeking civil penalties and not also bar them from seeking equitable relief under section 309(g)(6)(A). The Eighth Circuit concluded that allowing citizens to seek equitable relief after a state has begun its diligent administrative enforcement efforts “could result in undue interference with, or unnecessary du-

97 See *Ark. Wildlife Fed’n v. ICI Ams., Inc.*, 29 F.3d 376, 377 (8th Cir. 1994).
98 *Id.* at 379.
99 *Id.* at 383.
100 *Id.* at 377.
101 *Id.* at 378.
102 *Id.*
105 *Id.*
plication of, the legitimate efforts of the state agency . . . [and] would undermine, rather than promote, the goals of the CWA . . . .”

D. A Building Block for the Tenth Circuit: Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection

While the Tenth Circuit was the first federal appellate court to diverge from the First and Eighth Circuits in defining the scope of the bar on citizen suits under section 309(g), several district courts challenged the two circuits long before the issue was addressed in Continental Carbon. In Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection, the Southern District of New York narrowly defined the scope of the jurisdictional bar on citizen suits under section 309(g)(6)(A). In that case, a citizen suit was filed by various environmental organizations against the New York City Department of Environmental Protection (NYC DEP) for violating permits for two wastewater treatment plants. The citizen suit sought to enjoin the NYC DEP from allowing any additional sewer connections or sewer flows to be made into either wastewater plant unless certain specified conditions were met.

In Coalition for a Liveable West Side, the NYC DEP relied on North & South Rivers to support its position that the citizen plaintiff was barred from bringing any type of enforcement action under section 309(g)(6)(A). However, the district court found that the language of the statute unquestionably applied the bar only to civil penalties. According to the court, the language of the section “ensures that an entity that has violated the CWA will not be subject to duplicative civil penalties for the same violations.” The court believed that by giving deference to the government action but not completely dismissing the citizen suit, a defendant could be certain that he or she would not

106 Id.
108 830 F. Supp. at 197.
109 Id. at 195–96.
110 Id. at 196.
111 Id. at 196–97.
112 Id. (“The language of § 1319 is clear and unambiguous. Its bar applies only to civil penalty actions”).
113 Id. at 197.
be subjected to duplicative or inconsistent equitable remedies.\textsuperscript{114} The reasoning set forth in \textit{Coalition for a Liveable West Side} continues to be used by those courts in favor of preserving the critical enforcement power of citizen suits.\textsuperscript{115}


The Tenth Circuit’s recent decision in \textit{Continental Carbon} has brought the question of what form of relief citizens are barred from seeking under section 309(g)(6)(A) one step closer to being addressed by the United States Supreme Court.\textsuperscript{116} The Tenth Circuit preserved the citizen plaintiff’s right to seek equitable relief in the face of an administrative enforcement action by holding that the jurisdictional bar under section 309(g)(6)(A) precludes only civil penalty claims.\textsuperscript{117}

In this case, Continental Carbon Company (CCC) was a manufacturer of carbon black, a material used in making rubber and plastic products.\textsuperscript{118} The CCC plant was located in Ponca City, Oklahoma and produced wastewater that was subsequently discharged into “retention lagoons” in close proximity to the Arkansas River.\textsuperscript{119} In 1998, CCC successfully obtained a permit from the Oklahoma Department of Environmental Quality (ODEQ), allowing the plant to lawfully discharge its wastewater into the lagoons.\textsuperscript{120} However, in 2002, concerns arose regarding the manner in which wastewater from the plant was being disposed.\textsuperscript{121} CCC’s employee union, Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), along with the Native American Ponca Tribe residing in the area, articulated concerns to the ODEQ that CCC’s discharge activities were exceeding the permitted area.\textsuperscript{122} The Ponca Tribe was particularly concerned be-

\textsuperscript{114} \textit{Coal. for a Liveable W. Side}, 830 F. Supp. at 197.


\textsuperscript{116} See \textit{Cont’l Carbon}, 428 F.3d at 1285.

\textsuperscript{117} Id. at 1300.

\textsuperscript{118} Id. at 1289.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

cause members of the tribe swam, fished, and hunted in the immediate area being contaminated by the illegal discharge from the plant.\textsuperscript{123} The Ponca Tribe also obtained their drinking water from a well system they owned in the polluted area.\textsuperscript{124} Their concern led to the eventual issuance of a citizen complaint by PACE and the Ponca Tribe, which alleged that CCC was discharging industrial wastewater unlawfully into marshland east of the lagoons in even closer proximity to the Arkansas River.\textsuperscript{125}

An investigation by ODEQ verified the complaint.\textsuperscript{126} ODEQ observed that the water in the marshland in question was black.\textsuperscript{127} Furthermore, oily substances were discovered on the surface of the marshland that had identical components to those chemicals found in the plant’s wastewater.\textsuperscript{128} After the ODEQ issued a Notice of Violation (NOV) informing the plant of its regulatory violations, the agency and CCC entered into a consent decree entailing a promise by CCC to take certain remedial measures.\textsuperscript{129} CCC agreed to: (1) conduct a permeability study; (2) submit a water balance report; (3) perform an approved Supplemental Environmental Project (SEP); and (4) monitor emissions from the plant.\textsuperscript{130} Several months after the agreement was finalized, a discrepancy in CCC’s 1998 discharge permit application was discovered by ODEQ.\textsuperscript{131} The discrepancy regarded the “depth-to-groundwater” measurement reported in CCC’s permit application.\textsuperscript{132} CCC had reported the depth between the wastewater impoundments and groundwater impoundments to be eighty feet.\textsuperscript{133} However, after examining data related to other water wells in the region, ODEQ believed the depth between the two impoundments was actually less than fifteen feet.\textsuperscript{134} Such a low level of depth between the wastewater and groundwater impoundments was a violation of Oklahoma law.\textsuperscript{135} Despite this violation of Oklahoma’s water pollution regulations, ODEQ and CCC agreed to settle the discrepancy through

\textsuperscript{123} Brief of Plaintiff–Appellant, \textit{supra} note 122, at 4–5 n.1.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Cont’l Carbon}, 428 F.3d at 1289.
\textsuperscript{126} See \textit{id.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Cont’l Carbon}, 428 F.3d at 1289.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 1289–90.

On June 19, 2002, after PACE and the Ponca Tribe were deprived of relevant information regarding the current state of CCC’s violations and turned away from meetings with both the company and ODEQ, the citizen plaintiffs served a notice of intent to sue upon the U.S. Attorney General, EPA, the State of Oklahoma, and CCC. On November 26, 2002, the plaintiffs filed a citizen suit against CCC under section 505(a) of the CWA. The complaint alleged three claims: “(1) unauthorized discharges of wastewater; (2) misrepresentation of facts in the 1998 permit application; and (3) failure to report unauthorized discharge in the lagoons, including but not limited to the discharges identified in Claim 1.” Plaintiffs sought both monetary and equitable damages from CCC. Specifically, the plaintiffs requested: (1) a declaratory judgment stating that the company violated both the CWA and Oklahoma statutes through the unsafe operation of its plant; (2) the maximum amount of civil penalties authorized by the CWA; and (3) an injunction imposing a compliance schedule on CCC and prohibiting all discharges not permitted under the CWA and Oklahoma law.

In response to the citizen suit, CCC filed a motion to dismiss for failure to state a claim and lack of jurisdiction. CCC’s motion to dismiss based on lack of jurisdiction triggered the district court’s analysis of the scope of section 309(g)(6)(A) of the CWA. The court first ruled that the section applied to the citizen action because the Oklahoma law was comparable to the CWA. Next, the district court held that section 309(g)(6)(A) precluded only civil penalties from being sought by citizens. Consequently, the court granted CCC’s motion to dismiss for the civil penalty claim, but left the citizens’ claims seeking

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136 Id. at 1290.
137 Cont’l Carbon, 428 F.3d at 1290.
138 Id. The citizen plaintiffs were also angered by the fact that the remedial measures called for in the consent decree ignored the fraction of CCC’s land where the discharge violations had taken place. Brief of Plaintiff–Appellant, supra note 122, at 15–17.
139 Cont’l Carbon, 428 F.3d at 1290.
140 Id.
141 Id.
142 Id.
143 Id. at 1290.
144 Id. at 1290–91.
146 Id. at 1291.
injunctive and declaratory relief intact. Because the district court realized its decision had “waded into uncharted waters” on several issues, it stayed its order and allowed CCC to petition for interlocutory appeal, which the Tenth Circuit subsequently granted.

On interlocutory appeal, the Tenth Circuit affirmed the district court’s decision that the citizen plaintiffs were only precluded from seeking civil penalties because the jurisdictional bar under section 309(g)(6)(A) does not extend to claims for equitable relief. The court explained that “[d]espite the fact that two other circuit courts have considered and rejected the district court’s view [that the bar only applies to civil penalties and not equitable relief], our reading of the statutory language and relevant precedent persuades us that the district court’s conclusion is correct.” Because the lower court’s decision was grounded in the statutory language of the CWA, reflected the legislative history of the Act, and led to a rational outcome, the Tenth Circuit refused to rule in accordance with the First and Eighth Circuits’ broad interpretation of section 309(g)(6)(A).

1. Supreme Court Precedent: Gwaltney from Another Angle

While the Tenth Circuit cited to the Supreme Court’s Gwaltney decision, it challenged the manner in which CCC and the First and Eighth Circuits used the case to broadly construe the section 309(g)(6)(A) bar on citizen suits. Furthermore, the Tenth Circuit disagreed with CCC’s view that Gwaltney stands for the proposition that civil penalties and injunctive remedies are “inextricably intertwined.” The Tenth Circuit explained that the Supreme Court’s ruling that citizens can only seek civil penalties for a CWA violation if they also seek injunctive relief was held to purposefully eliminate citizen recovery of penalties for wholly past violations. The court viewed the Gwaltney holding as the mirror image of the matter with which it was grappling: whether citizens can seek injunctive or other

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147 Id.
148 Id.
149 Id. at 1297, 1300.
150 Id. at 1297.
151 Cont’l Carbon, 428 F.3d at 1300.
152 See id. at 1298–1300.
153 Id. at 1299.
154 Id. at 1298–99; see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 58–59 (1987).
forms of equitable relief without seeking civil penalties.\textsuperscript{155} The Tenth Circuit found that the policy rationale motivating the \textit{Gwaltney} decision was not relevant to the issue of whether citizens are barred from seeking civil penalties and equitable relief under section 309(g)(6)(A).\textsuperscript{156} The court found that civil penalties and equitable relief are not “inextricably intertwined” as CCC argued because a citizen action seeking injunctive relief is never based on a wholly past violation.\textsuperscript{157} Thus, the Tenth Circuit also found the First and Eighth Circuits’ reliance on \textit{Gwaltney}’s holding and analysis in determining the scope of section 309(g)(6)(A) to be improper.\textsuperscript{158}

2. Statutory Language

The Tenth Circuit offered the statutory language of the CWA as powerful support that Congress did not intend for equitable remedies to be excluded under section 309(g)(6)(A).\textsuperscript{159} The court scrutinized both section 505(a) and section 309(g) of the CWA before coming to the conclusion that the jurisdictional bar on citizen suits contained in section 309(g)(6)(A) applies only to civil penalties, not equitable relief.\textsuperscript{160} The court first highlighted that section 505(a) gives citizens authorization to “commence a civil action” against a violator of the CWA and grants the district court jurisdiction “to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under § [309](d) . . . .”\textsuperscript{161} The court contrasted section 505(a) with section 309(g)(6)(A), which states that a violation “shall not be the subject of a civil penalty action under . . . section [505] of this title” if a state “has commenced and is diligently prosecuting an action” with respect to that same violation under the CWA or a comparable state law.\textsuperscript{162}

The Tenth Circuit emphasized a subtle but meaningful difference in word choice made by Congress in these two sections, noting the use of the term “civil action” in section 505(a) and the term “civil

\textsuperscript{155} \textit{Cont’l Carbon}, 428 F.3d at 1299; see \textit{Gwaltney}, 484 U.S. at 58–59.

\textsuperscript{156} See \textit{Cont’l Carbon}, 428 F.3d at 1298–99; Leonard, supra note 5, at 614 (arguing that “administrative penalty actions only address past violations, while citizen suits for injunctive relief seek to enjoin a defendant from violating the CWA again in the future”).

\textsuperscript{157} \textit{Cont’l Carbon}, 428 F.3d at 1299.

\textsuperscript{158} See id. at 1299–300.

\textsuperscript{159} Id. at 1297–98, 1300.

\textsuperscript{160} See id. 1297–98.

\textsuperscript{161} Id. at 1297 (quoting Clean Water Act § 505, 33 U.S.C. § 1365 (2000)).

\textsuperscript{162} 33 U.S.C. § 1319(g) (6) (A); \textit{Cont’l Carbon}, 428 F.3d at 1297–98.
penalty action” in section 309(g)(6)(A). According to the court, “Congress chose to use the words ‘civil action’ in § [505] authorizing citizen suits but chose the narrower term ‘civil penalty action’ in the § [309] exclusion from the § [505] grant.” The Tenth Circuit found that this word choice purposefully clarified that civil penalties are distinct from other remedies available under the CWA. The Tenth Circuit stated:

Congress explicitly grants jurisdiction to “enforce” an effluent standard of limitation (by presumably issuing a declaratory judgment or an injunction) and to “apply any appropriate civil penalties” (by assessing the appropriate fine). A strict reading of the statute, then, indicates that while § [505] grants jurisdiction over all types of civil remedies, the limitation in § [309] only strips jurisdiction with regard to the district court’s ability to impose civil penalties.

To give additional support to this statutory interpretation, the Tenth Circuit pointed out that there is a wholly separate provision of the CWA used to bar injunctive remedies from being sought by citizens. The court noted that section 505(b)(1)(B) explicitly limits any private action from being filed by citizens when a “State has commenced and is diligently prosecuting a civil or criminal action in a court of . . . a State to require compliance with the standard.” The court in Continental Carbon referred to the resulting statutory effect as a “two-tiered claim preclusion scheme.” Accordingly, the “broadest preclusion exists when a state commences and diligently prosecutes a court action to enforce the standard.” The court found that when this occurs, section 505(b)(1)(B) is triggered, limiting all types of action commenced by a citizen. The second tier of preclusion, or what the court termed as “narrower preclusion,” exists when the state commences an action that is less than judicial enforcement, such as an administrative enforcement action. The court found that when

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163 Cont’l Carbon, 428 F.3d at 1298; see 33 U.S.C. §§ 1319(g)(6)(A), 1365(a).
164 Cont’l Carbon, 428 F.3d at 1298; see 33 U.S.C. §§ 1319(g)(6)(A), 1365(a).
165 Cont’l Carbon, 428 F.3d at 1298.
166 Id. at 1298.
167 Id. at 1298; 33 U.S.C. § 1365(b)(1)(B).
168 Cont’l Carbon, 428 F.3d at 1298 (quoting 33 U.S.C. § 1365(b)(1)(B)).
169 Id. at 1298.
170 Id.; see 33 U.S.C. § 1365(b)(1)(B).
171 See Cont’l Carbon, 428 F.3d at 1298.
172 Id.
an administrative enforcement action is commenced by citizens, section 309(g)(6)(A) “specifically excludes civil penalties from the scope of permissible private enforcement remedies, but does not preclude other equitable relief.”\textsuperscript{173}

3. Legislative History

The Tenth Circuit also found that when examined alongside the statutory language, the legislative history of the 1987 amendments demonstrates that Congress contemplated and intended precluding only civil penalties from being sought when a state has commenced and is diligently prosecuting the same violation under comparable state law.\textsuperscript{174} The court emphasized that the House Conference Committee Report states that:

No one may bring an action or recover civil penalties under section . . . [505] for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action . . . [T]his limitation would not apply to 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).\textsuperscript{175}

The Tenth Circuit found that this language evinces congressional intent that courts narrowly construe the section 309(g)(6)(A) bar.\textsuperscript{176}

4. Policy Rationale

Lastly, the Tenth Circuit articulated its disagreement with the North \& South Rivers court’s reasoning that applying the literal statutory interpretation of section 309(g) would lead to an “inconceivable result.”\textsuperscript{177} The court determined that the rationale behind the section’s implementation—to avoid duplicative monetary penalties for the same violation—is satisfied without barring citizens from seeking equitable remedies.\textsuperscript{178} The court found that no duplicative civil penalties or equitable relief can be sought when a judicial proceeding was underway because section 505(b)(1)(B) precludes all private suits from being

\textsuperscript{173} Id.; see 33 U.S.C. § 1319(g)(6)(A).
\textsuperscript{174} See Cont’l Carbon, 428 F.3d at 1299–300.
\textsuperscript{175} Id. (quoting H.R. Rep. No. 99-1004, at 133 (1986) (Conf. Rep.)).
\textsuperscript{176} Id. at 1299–300.
\textsuperscript{177} Id. at 1300 (quoting N. \& S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991)).
\textsuperscript{178} Id.
Similarly, no duplicative equitable or civil remedies will be issued under section 309(g)(6)(A) because the section explicitly bars citizens from seeking civil penalties and a court could stay a citizen action that it found to be duplicative of the administrative enforcement action. The Tenth Circuit thus found the result of applying the literal statutory interpretation of the section anything but “inconceivable.” Rather, the inadequacy of certain state measures to prevent or stop pollution and the inability of pure monetary penalties to always ensure compliance led the Tenth Circuit to believe that its interpretation of section 309 would promote a rational and desirable result.

III. STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND POLICY RATIONALES: WHY CITIZENS ARE NOT PRECLUDED FROM SEEKING INJUNCTIVE RELIEF UNDER SECTION 309(g)(6)(A) OF THE CWA

Section 309(g)(6)(A) of the CWA has sparked controversy among the circuits on a host of questions: What types of enforcement actions preclude citizen suits; which is the proper test for “comparability;” how to define “diligent prosecution;” and, most recently, what forms of relief can be sought by citizen plaintiffs when an administrative enforcement action is underway. The current trend of the courts has been to restrict the citizen’s role in water pollution regulation with the hope of restoring greater enforcement authority to the government. While there are many reasons why this trend is perilous and unsound, there is only one way to put an end to it. The U.S. Supreme Court must take the opportunity to analyze, clarify, and apply section 309(g) of the CWA in the manner that the statutory language, legislative history, and policy rationales have directed. Even though the scope of section 309(g)(6)(A)’s bar on citizen suits may only be one of the many issues the Supreme Court rules on in a given

181 See Cont’l Carbon, 428 F.3d at 1300.
182 See id.
183 See generally Leonard, supra note 5. While many of these questions are beyond the scope of this Note, Arne R. Leonard’s comprehensive article discusses how section 309(g)(6)(A) should properly be interpreted, and addressed each of these remaining issues. Id.
184 Fisch, supra note 5, at 211, 225; see, e.g., Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).
185 See Hodas, supra note 12, at 1651–55; Shermer, supra note 10, at 468–81.
case, the re-establishment of a liberal interpretation of citizen standing under the CWA is not only correct under the statute, but critical to preserve the health and well-being of the citizens of this country.\footnote{186 See Hodas, \textit{supra} note 12, at 1651–55; Shermer, \textit{supra} note 10, at 468–81; Fisch, \textit{supra} note 5, at 226–27; Leonard, \textit{supra} note 5, at 611–17.}

Several district court opinions and legal scholars have disputed the First and Eighth Circuits’ decisions to preclude citizens from filing suit for civil penalties or equitable relief when an administrative enforcement action is being pursued by a government agency.\footnote{187 See, e.g., Cal. Sportfishing Prot. Alliance v. City of W. Sacramento, 905 F. Supp. 792, 806–07 (E.D. Cal. 1995); Coal. for a Liveable W. Side, Inc. v. New York City Dep’t of Envtl. Prot., 830 F. Supp. 194, 196–97 (S.D.N.Y. 1993); Leonard, \textit{supra} note 5, at 611–17.} The Tenth Circuit, however, is the first federal court of appeals to voice its opinion on the issue, agreeing with many lower courts and scholars that section 309(g)(6)(A) only bars citizen claims for civil penalties.\footnote{188 Paper, Allied-Indus., Chem. and Energy Workers Int’l Union v. Cont’l Carbon Co., 428 F.3d 1285, 1298–300 (10th Cir. 2005); see Leonard, \textit{supra} note 5, at 611–17.} An examination of the relevant statutory language, legislative history, and policy rationales strongly suggests that section 309(g)(6)(A) was never intended to bar citizens from seeking equitable relief.\footnote{189 See \textit{Cont’l Carbon}, 428 F.3d at 1300; Leonard, \textit{supra} note 5, at 611–17.} Furthermore, in applying the First and Eighth Circuits’ analysis to the factual situation in \textit{Continental Carbon}, it becomes clear that barring citizens from seeking equitable relief under section 309(g)(6)(A) would lead to a large gap in CWA enforcement that could have devastating effects on communities across the country.\footnote{190 See Fisch, \textit{supra} note 5, at 225–27.} With the Tenth Circuit’s clear deviation from the other two circuit courts, the issue is now ripe for Supreme Court adjudication.\footnote{191 Compare \textit{Cont’l Carbon}, 428 F.3d at 1300, with Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994), and N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).} The Court should follow the lead of the Tenth Circuit and hold that when an administrative enforcement action is underway, section 309(g)(6)(A) only precludes citizen claims for civil penalties, leaving citizen plaintiffs free to seek equitable relief.\footnote{192 See \textit{Cont’l Carbon}, 428 F.3d at 1300; Fisch, \textit{supra} note 5, at 225–27.}

A. \textit{Shooting Down Structural Variation in Favor of Statutory Language and Legislative History}

The Tenth Circuit’s view that section 309(g)(6)(A) only precludes citizens from seeking civil penalties in a subsequent action di-
rectly conflicts with the First and Eighth Circuits’ findings that the section bars citizen plaintiffs from seeking either civil penalties or equitable relief. While the First and Eighth Circuits mustered support for their position from the existing structural variations between the citizen suit provision of the CWA and other sections of the Act, the Tenth Circuit provided a compelling justification that the correct statutory analysis of section 309(g)(6)(A) should center on the plain language and legislative history of the statute.

The First and Eighth Circuits rested, in large part, on the fact that the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* explicitly acknowledged the citizen suit provision’s structural composition. In *Gwaltney*, the Court specifically noted that section 505 of the CWA does not differentiate between civil penalty actions and actions for injunctive relief, but “rather, the two forms of relief are referred to in the same section, even in the same sentence.” The First and Eighth Circuits argued that because injunctive relief and civil penalties are so intimately united in the citizen suit provision—unlike in most other provisions of the CWA—Congress must have intended that both forms of relief be barred from being sought by citizens under section 309(g)(6)(A).

Thus, the two circuit courts extended the significance of section 505’s structural composition to any provision of the CWA that involves citizen suits. The circuit courts made this extension despite the fact that civil penalties and injunctive relief are addressed in an entirely separate section of the administrative penalties provision of the Act (i.e., section 309(g)).

While the First and Eighth Circuits’ statutory structural analysis was not entirely misguided, the courts plainly ignored the guidelines set forth in *Gwaltney* concerning the appropriate manner in which to interpret a statutory provision of the CWA. The Supreme Court emphasized in *Gwaltney* that “it is well settled that ‘the starting point for

193 See *Cont’l Carbon*, 428 F.3d at 1300.
interpreting a statute is the language of the statute itself.’”201 The two circuits even acknowledged their dismissal of the plain language of the statute in favor of an interpretation that sharply contrasted with the language’s literal meaning.202 The First Circuit attempted to rationalize its decision by stating that the literal interpretation of the section would lead the court to an “inconceivable result.”203 Similarly, the Eighth Circuit argued that applying the literal meaning would lead to an “unreasonable” outcome.204

The Tenth Circuit, on the other hand, properly focused on the plain language of the statute throughout its entire analysis.205 Section 309(g)(6)(A) of the CWA states that when an administrative enforcement action is commenced and diligently prosecuted under the Act, the violations “shall not be the subject of a civil penalty action under . . . section [505] of this title.”206 There is no reference in section 309(g)(6) to extending the bar to suits seeking injunctive, declaratory, or any other type of relief.207 If Congress intended the bar on citizen suits to extend to forms of equitable relief, it surely would have phrased the wording of the section differently.208 However, instead of replacing the words “civil penalty” with the term “civil action” or the phrase “civil penalty or equitable relief,” Congress purposefully barred citizens from seeking only a “civil penalty” under section 309(g)(6)(A) of the CWA.209 In finding that the bar extended to those suits seeking civil penalties or equitable relief, the North & South Rivers court thus impermissibly redrafted an unambiguous statute.210

The Tenth Circuit also offered the legislative history of the 1987 amendments to provide additional support for its decision to narrowly construe the bar.211 The legislative history demonstrates that Congress

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203 N. & S. Rivers, 949 F.2d at 558.
204 Ark. Wildlife Fed’n, 29 F.3d at 383.
209 See id.
211 Cont’l Carbon, 428 F.3d at 1299–300.
intended the section 309(g)(6)(A) bar on citizen suits to extend only to citizen claims for civil penalties, not equitable relief.\textsuperscript{212} In drafting the 1987 amendments, Congress emphasized the importance of citizen suits in the enforcement of the CWA, stating that citizen suits “are a proven enforcement tool” that “have deterred violators and achieved significant compliance gains.”\textsuperscript{213} Furthermore, in structuring section 309(g), Congress explicitly contemplated the “need to avoid placing obstacles in the path of such citizen suits.”\textsuperscript{214} Keeping this concern in mind, the Conference Committee directed that the “limitation would not apply to [a citizen] action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).”\textsuperscript{215} The statutory language, coupled with the legislative history, thus demonstrates Congress’s clear intent to define the bar narrowly, making it extremely difficult for the First and Eighth Circuits to judiciously reach the decisions they did.\textsuperscript{216} When given the opportunity, the Supreme Court should draw on the Tenth Circuit’s statutory analysis of section 309(g)(6)(A), weighing heavily the plain language and legislative history of the section to conclude that only citizen claims for civil penalties are subject to the bar.\textsuperscript{217}

**B. Policy Rationales Behind Section 309(g)(6)(A) Are Not Frustrated by Narrowly Construing the Bar on Citizen Suits**

The First Circuit in *North & South Rivers* avoided using the plain language and legislative history to construe section 309(g)(6)(A) by arguing that the “literal interpretation . . . would lead to an absurd result.”\textsuperscript{218} The First Circuit searched for an alternative interpretation of the section that would prevent “irrational consequence[s].”\textsuperscript{219} The court feared that a literal reading of the section would strip the government of its primary enforcement authority when a citizen suit sought relief beyond civil penalties.\textsuperscript{220} It stressed that the policy rationale designating the government as the primary enforcer of the


\textsuperscript{214} Id.


\textsuperscript{216} See Clean Water Act §§ 309(g)(6)(A), 505(a), 33 U.S.C. §§ 1319(g)(6)(A), 1365(a) (2000); *Cont'l Carbon*, 428 F.3d at 1298; id.

\textsuperscript{217} *Cont'l Carbon*, 428 F.3d at 1298–300.

\textsuperscript{218} N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).

\textsuperscript{219} Id.

\textsuperscript{220} Id.
CWA is not constrained to such limited circumstances.221 While the Eighth Circuit did not go as far as to say that applying the plain language of the statute would be “absurd,” it agreed that a literal interpretation would lead to an “unreasonable” outcome, as it would cause “undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency.”222

It is clear that citizen suits were designed to supplement government enforcement efforts.223 It is also clear that one of the underlying policy rationales for barring certain citizen actions under section 309(g)(6)(A) focuses on the prevention of unfairly burdening violators of the CWA with duplicative penalties for the same violation.224 However, the First and Eighth Circuits incorrectly used these policy rationales to excuse themselves from performing the proper statutory analysis of section 309(g)(6)(A).225

First, the legislative history of the 1987 amendments shows that the government’s ability to assess administrative civil penalties under section 309(g) was “designed to address past, rather than continuing, violations of the Act.”226 However, the only instance in which a citizen plaintiff would seek injunctive relief is when there is an ongoing violation of the CWA that the citizen desires to stop from continuing in the future.227 Because a citizen suit seeking injunctive relief is not addressing a purely past violation, the Tenth Circuit was correct in finding that the section 309(g)(6) bar—purposefully designed to prevent duplicative penalties from being sought by citizens suing over past violations—only applies to civil penalty claims that can properly address past violations.228

Furthermore, the First and Eighth Circuits’ argument that applying the literal meaning of the statute would improperly strip the government of its primary enforcement authority is flawed.229 The two courts emphasize that the government, not citizens, have the primary

221 Id.
222 Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994).
223 See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987); Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1619.
227 Leonard, supra note 5, at 614.
228 See Paper, Allied-Indus., Chem. and Energy Workers Int’l Union v. Cont’l Carbon Co., 428 F.3d 1285, 1300 (10th Cir. 2005); Leonard, supra note 5, at 614.
responsibility to carry out Congress’s intent and to prevent duplicative penalties. The circuits are correct that citizen suits were designed by Congress to be a gap filler where the government was unable to carry out its enforcement duties. However, categorically banning all citizen suits when an administrative enforcement action is underway does not prevent the government from exercising its primary enforcement authority. This is because the government can remain the primary enforcer of the CWA even when a citizen suit for equitable relief is allowed to proceed in the face of an ongoing administrative enforcement action.

In applying the section 309(g)(6)(A) citizen suit bar only to civil penalty actions, the only instance in which the government may not have complete control over enforcement of the CWA occurs when a state is “pursuing something less than judicial enforcement” and the citizen plaintiff is “pursuing an injunction in federal court.” However, even in the rare instance when injunctive relief is sought by the state agency in an administrative compliance action and simultaneously by a citizen plaintiff in federal court, the government does not automatically lose its position as the “primary enforcer” of the CWA. As the district court in Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection noted, a court has the ability to “manage the action so as to ensure the diligently pursued state enforcement action will dominate and the city will not be whipsawed by multiple actions.” For example, a court could decide to “stay the citizen action while [the agency] demonstrate[s] that the State is indeed diligently prosecuting its action and seeking adequate

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231 Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1626.
232 Cont’l Carbon, 428 F.3d at 1299–300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
233 Cont’l Carbon, 428 F.3d at 1299–300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
234 Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1626.
235 Cont’l Carbon, 428 F.3d at 1299. The Tenth Circuit in Continental Carbon correctly pointed out that when the government is involved in judicial enforcement of a CWA violation, it can unquestionably prevent both duplicative civil penalties and duplicative issuances of equitable relief. Id.; See. Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000). Under section 505(b)(1)(B), a citizen is precluded from seeking any type of relief against a violator of the CWA if the government has begun “diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(B). Therefore, section 309(g)(6)(A) gives the government the primary authority to prevent duplicative civil penalties when the state is engaged in an administrative enforcement action, while section 505(b)(1)(B) restricts any type of duplicative action from ensuing when the government is engaged in a judicial enforcement action. 33 U.S.C. §§ 1319(g)(6) (A), 1365(b)(1)(B).
236 Cont’l Carbon, 428 F.3d at 1299–300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
relief.”

If the state is found to be seeking and achieving adequate compliance gains, the government’s primary enforcement authority would be preserved and the citizen plaintiffs would be able to conserve their resources. On the other hand, if the government’s efforts are found to be inadequate to achieve proper compliance with the CWA or comparable state law, the citizen plaintiffs would be allowed to resume their suit for equitable relief, resting assured that their efforts would not usurp the authority of the government or be duplicative in nature.

Accordingly, the First and Eighth Circuits improperly ignored the plain language and the legislative history in interpreting the scope of section 309(g)(6)(A). Allowing citizens to seek equitable relief under section 309(g)(6)(A) does not force the government to give up its role as the primary enforcer of the CWA, nor does it take away the government’s ability to prevent duplicative penalties for past violations of the Act. Hence, when given the chance, the Supreme Court should cast aside the idea that using the legislative history and plain language of section 309(g)(6)(A) to define the scope of the section would lead to an “absurd” or “unreasonable” outcome, and instead apply the proper statutory construction that narrowly restricts citizen actions.

C. Continental Carbon from Another Angle: Why the First and Eighth Circuits’ View of the Section 309(g)(6)(A) Citizen Suit Preclusion Frustrates the Goals of the CWA

If the Tenth Circuit had followed the First and Eighth Circuits’ reasoning in Continental Carbon, both the citizen plaintiffs’ civil penalty claim and claims for injunctive and declaratory relief would have been dismissed. Furthermore, a large gap in CWA enforcement would have been left unfilled. When the facts of Continental Carbon are closely considered under the First and Eighth Circuits’ analysis of section 309(g)(6)(A), the CWA not only fails in its mission to restore

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237 Id.
238 See Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
239 See Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
240 See discussion, supra Part III.A–B.
241 See discussion, supra Part III.B.
242 See Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.
243 See Cont’l Carbon, 428 F.3d at 1300; Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).
244 See Cont’l Carbon, 428 F.3d at 1299–300; Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 558.
and preserve the navigable waters of this country, but innocent people fall victim to the economic and political choices of a state authority that overlooks the health and safety of an entire community.245

In performing this analysis, it is important to remember that even though there were two citizen plaintiffs in Continental Carbon—the employee union (PACE) and the Ponca Tribe—it was the Ponca Tribe that had the potential to be gravely affected by Continental Carbon Company’s (CCC) continued violations of the CWA.246 The Ponca Tribe swam, fished, and hunted in the contaminated area.247 The Tribe also received their drinking water from a well system in the polluted region.248 Complaints by the two citizen plaintiffs led to the Oklahoma Department of Environmental Quality’s (ODEQ) discovery of hazardous black water and oily substances on the surface of marshland outside CCC’s permitted discharge area.249 Once the contamination was confirmed to be a product of CCC’s wastewater discharge, ODEQ took several response measures.250 The state agency first issued a notice of violation (NOV) to CCC.251 The NOV cited three violations and also noted that monetary penalties could be assessed up to $10,000 per day per violation (even though no penalties were ever sought by the agency).252 Next, ODEQ entered into a consent decree with CCC, requiring the company to take several remedial measures.253 However, ODEQ did not require these remedial measures to be taken with respect to the retention lagoon largely responsible for the contamination, nor did it require CCC to pay any penalties.254

A few months later, a misrepresentation in CCC’s discharge permit application was discovered.255 Specifically, the plant reported the depth between the wastewater impoundments and the groundwater underneath the impoundment at a level of eighty feet.256 Other data, however, suggested to ODEQ that the depth to ground water level was
at most fifteen feet: a direct violation of the state water pollution law.\textsuperscript{257} Again, after sending CCC an NOV highlighting the violations, the agency only required the plant to modify its permit before extending it for another five years.\textsuperscript{258}

Had the Tenth Circuit followed the First and Eighth Circuits’ reasoning in the \textit{Continental Carbon} case, the citizen plaintiffs’ claims for declaratory and injunctive relief would have been precluded because ODEQ was found to be diligently prosecuting an administrative enforcement action under state law.\textsuperscript{259} However, because ODEQ on its own did not order CCC to abide by a strict compliance schedule, did not assess civil penalties, and barely even addressed the discharge and groundwater violations, it may have been years before CCC took suitable action to resolve the contamination problem.\textsuperscript{260} Because the government did not have the time, resources, or desire to bring an action into federal court, it resorted to weak administrative enforcement measures instead.\textsuperscript{261} If this case had been tried in the First or Eighth Circuits, the citizen plaintiffs would have been barred from seeking injunctive relief under section 309(g)(6)(A) and innocent people would have been forced to continue to suffer the long term effects of pollution.\textsuperscript{262} Without citizen action, it appears that ODEQ would have allowed CCC to continue its unlawful and hazardous waste discharge practices indefinitely.\textsuperscript{263} As a result, members of the Ponca Tribe would have continued to swim in industrial waste, would have eaten contaminated fish and animals, and would have cooked with and drank contaminated groundwater.\textsuperscript{264}

Utilizing the broad rule enunciated in \textit{North & South Rivers} and \textit{Arkansas Wildlife Federation} prevents courts from looking at the facts of a case to determine what measures may still need to be taken despite

\begin{itemize}
\item \textsuperscript{257} \textit{Id.}
\item \textsuperscript{258} \textit{See id. at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 15–16.}
\item \textsuperscript{259} \textit{Compare Cont’l Carbon, 428 F.3d at 1289, with Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994), and N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).}
\item \textsuperscript{260} \textit{Cont’l Carbon, 428 F.3d at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 4–6, 8, 14–16.}
\item \textsuperscript{261} \textit{See Cont’l Carbon, 428 F.3d at 1289–90. For further analysis of the inadequacies of state enforcement actions, see Hodas, supra note 12, at 1620–22.}
\item \textsuperscript{262} \textit{See discussion, supra Part I.B–C.}
\item \textsuperscript{263} \textit{Cont’l Carbon, 428 F.3d at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 4–6, 8, 14–16.}
\item \textsuperscript{264} \textit{Brief for Plaintiff–Appellant, supra note 122, at 4–5 n.1.}
\end{itemize}
a state’s administrative enforcement action.265 The Tenth Circuit, in Continental Carbon, recognized Congress’s concern over duplicative penalties and took that concern into consideration when dismissing the civil penalty claim and deciding not to dismiss the claims for equitable relief.266 The citizen plaintiffs in Continental Carbon did not think ODEQ’s steps to achieve compliance with the CWA and Oklahoma water pollution laws were enough to protect the health and safety of their community.267 The citizens wanted the contamination to cease and believed the measures ODEQ was taking would not achieve such a goal.268 While ODEQ’s enforcement efforts may have been similar to other state enforcement efforts under the CWA, this does not mean that citizens should be left to suffer at the hands of a government’s economic or political agenda.269 As one legal scholar discovered, state agencies regularly ignore discharge violations, treat reporting violations as insignificant and not worthy of enforcement efforts, and limit enforcement actions to sending violators letters of NOV or making phone calls.270 Citizen suits were included in the CWA to resolve this very issue: to achieve compliance with the statute when the government is unable to do so because of a lack or resources or concern.271 The Supreme Court should clarify that section 309(g)(6)(A) only prevents citizens from seeking civil penalties when an administrative enforcement action is being pursued.272 This should be done before more courts follow the flawed analysis of the First and Eight Circuits and frustrate the purposes of the CWA by leaving a gap in enforcement that endangers the environment and human lives.273

Conclusion

The First and Eighth Circuits’ broad interpretation of the jurisdictional bar contained in section 309(g)(6)(A) precludes citizens from seeking civil penalties or equitable relief when an administrative

265 See Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 558; Fisch, supra note 5, at 225.
266 See Cont’l Carbon, 428 F.3d at 1300.
267 See id.; Brief for Plaintiff–Appellant, supra note 122, at 5–8.
268 See Cont’l Carbon, 428 F.3d at 1289–90.
269 See Hodas, supra note 12, at 1620–23.
270 Id. at 1620.
271 Id. at 1618–23.
272 See discussion, supra Part III.
273 See Hodas, supra note 12, at 1618–23.
enforcement action is being pursued. However, these circuit courts improperly ignore the statutory language, legislative history, and policy rationales behind the section in reaching their decisions. Until the Tenth Circuit’s recent holding in *Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co.*, only district courts and legal scholars disputed the First and Eighth Circuits’ view that citizens are precluded from seeking equitable relief under section 309(g)(6)(A). The Tenth Circuit’s decision that an administrative enforcement action only bars citizens from seeking civil penalties under section 309(g)(6)(A) not only leaves citizens free to seek injunctive or declaratory relief in subsequent suits, but also reaffirms the critical role citizen suits play in the CWA enforcement scheme.

The Tenth Circuit’s recent decision in *Continental Carbon* provides hope that the trend toward narrowing the private citizen’s role in water pollution regulation may be curbed, or at least addressed in the near future by the U.S. Supreme Court. Section 309(g)(6)(A) of the CWA was designed to protect alleged violators from being subject to duplicative penalties and to preserve the government’s primary enforcement authority under the Act. The section was not designed to frustrate the purposes of the CWA by forcing citizens to stand helplessly by while lax and ineffective administrative enforcement measures are pursued by the government. Since 1972, citizen suits have been an integral part of the CWA, and the Supreme Court should follow the Tenth Circuit’s lead to assure that citizens retain a powerful tool to preserve and restore the navigable waters of this nation.

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274 See Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).

275 See discussion, supra Part III.A–B.


277 See Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1620–23.


280 See id.

281 See Cont’l Carbon, 428 F.3d 1285.
Abstract: The Clean Water Act’s (CWA) goal of protecting the waters of the United States has been threatened by the Army Corps of Engineers (Corps) increased use of general permits, such as Nationwide Permit 21 (NWP 21). NWP 21 is issued by the Corps to authorize the disposal of material from mountaintop coal mining, even though this type of disposal has serious environmental effects. Recent court rulings have upheld the use of NWP 21. However, by focusing on the questions left unresolved by Congress and the courts, there is an opportunity to help guarantee that the goal of the CWA is achieved. To ensure greater environmental protection, the adequacy of the minimum impact determinations performed by the Corps when it enacts a NWP should be challenged to ensure their adequacy, and minimum impact determinations should be required before any issuance of a NWP.

Introduction

Several fatal accidents in early 2006 brought national attention to the dangers of coal mining, an industry that has played a central role in the Appalachian economy since the mid-1800s. Recently, however, the increased use of mountaintop coal mining—a method of surface mining involving the removal of the upper section of a mountain to access underground coal seams—has brought attention to coal mining’s harmful environmental impacts, as well.

The Army Corps of Engineers (Corps) currently issues a general permit—Nationwide Permit 21 (NWP 21)—to authorize the disposal of material from mountaintop coal mining. Under section 404 of the Clean Water Act (CWA), the Corps may only grant general permits...
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...authorizing mountaintop coal mining when no more than “minimal adverse environmental effects” result from the activity.\(^5\) Environmentalists, however, claim that the Corps’s issuance of NWP 21 violates the CWA because mountaintop coal mining has serious damaging environmental effects.\(^6\) This Note addresses the conflict that has arisen as a result of the Corps’s use of NWP 21 and discusses court rulings on the subject, indicating concerns still unresolved.

Part I of this Note describes the current issues surrounding Appalachian coal mining, and provides a brief description of what mountaintop coal mining entails. Part II reviews the history of both the CWA and the authority of the Corps. Part III examines section 404 of the CWA, providing information on its creation and its use by the Corps to grant permits. Part IV discusses the types of permits—general and specific—that can be issued by the Corps under section 404, court rulings affirming such use, and the specific details of NWP 21. Part V reviews the debate over the Corps’s issuance of NWP 21, examining three primary court cases on the topic. Finally, Part VI considers the future of NWP 21 given the Corps’s increasing authority over permitting and recent court rulings. Part VI also points out issues that have not yet been addressed by the courts, and suggests how environmentalists can use these to fight for stronger environmental protection in the future.

I. Appalachian Coal Mining

A. Coal Mining and Safety

Since the mid-1880s, coal mining has been a major part of the Appalachian economy, and accounted for more than half of the United States’ total production of coal in 2000.\(^7\) In 2005, West Virginia alone produced over 153 million tons of coal,\(^8\) providing almost sixty percent of the state’s business tax revenue.\(^9\) Coal mining, how-

\(^7\) Duffy, supra note 2, at 143.
\(^8\) Ian Urbina, West Virginia Governor Urges Mining Moratorium, N.Y. Times, Feb. 2, 2006, at A15 [hereinafter Mining Moratorium] (“West Virginia is the nation’s second-largest coal producing state, after Wyoming . . . .”).
ever, is not without risks. Although safety has improved over time, recent coal mining accidents in West Virginia make clear that mining is still dangerous.

In early 2006, devastating coal mining accidents in West Virginia killed fourteen miners and prompted federal officials to take a serious look at federal mining safety regulations and their enforcement. Questions have arisen as to whether the current system of fines is sufficient to induce mine operators to follow safety regulations, while miners are saying “some mining operations see paying fines as less expensive than adhering to rules.” Also, the Federal Mine Safety and Health Administration stated that it could close sections of mines for violations, but it has little ability to close a mine for “accumulated bad acts.”

While federal officials decided what should be done, West Virginia Governor Joe Manchin III acted, “urg[ing] all coal companies in the state to cease operations until safety could be reviewed.” The West Virginia Senate and House of Delegates also responded by unanimously passing a bill requiring greater safety measures in mines. This bill, approved by the Governor on January 26, 2006, requires mine operators to store extra breathing packs in their mines as well as give miners devices that would help them locate the packs in emergencies.

B. Mountaintop Coal Mining and the Environment

Along with attacks over the lack of safety enforcement, the coal mining industry has currently been facing severe criticism over the environmental damage caused by mountaintop coal mining. Although not a new practice, mountaintop coal mining—a method of surface

10 See id.
11 See Senators Have Strong Words, supra note 1.
12 See id. An explosion at the Sago Mine in West Virginia killed twelve miners on January 2, 2006, and on January 19, 2006, two miners were killed at the Aracoma Alma Mine No. 1 near Melville from a conveyer belt fire. Id.
13 Id. (“According to Mine Safety and Health Administration records, the Sago Mine received 208 citations in 2005, up from 68 in 2004.”).
15 Senators Have Strong Words, supra note 1.
16 Mining Moratorium, supra note 8.
17 Senators Have Strong Words, supra note 1.
19 See Duffy, supra note 2, at 143.
mining—only became widespread in Appalachia in the 1990s. Since then, significant debates have arisen over the legality of general permits issued by the Corps. Specifically, many environmentalists contend that the Corps cannot use NWP 21 to authorize the disposal of material from this type of mining.

Mountaintop coal mining involves the removal of the entire upper section of a mountain to access underground coal seams. The rock above the seam is removed and placed in adjacent valleys. After the coal is extracted, the removed rock—known as overburden—is replaced in an effort to achieve the original contour of the mountain. However, because broken-up rock occupies a larger volume than it does in its natural state, excess overburden remains in the valleys.

Considerable disruption to the immediate environment occurs as a result of these practices, causing a clash between environmentalists and mining corporations. Environmentalists claim that mountaintop coal mining has serious environmental effects. Excess overburden that remains in valleys creates valley fills that often bury intermittent and perennial streams and drainage areas near the mountaintop. This can increase the risk of flooding, contribute to landslides, and pollute streams and rivers in the region. However, the most notable effect of mountaintop coal mining is the change in topography—converting areas of high, forested mountains surrounded by deep valleys and gorges into treeless plateaus. This not only changes the aesthetic appeal of the area, but destroys high-quality forest habitats, threatening migratory birds and other wildlife populations in the area.

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20 Bragg v. W. Va. Coal Ass’n, 248 F.3d 275, 286 (4th Cir. 2001); Duffy, supra note 2, at 144.
21 See Duffy, supra note 2, at 143.
22 See, e.g., Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley II), 429 F.3d 493, 505 (4th Cir. 2005); Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III), 317 F.3d 425 (4th Cir. 2003); Bragg, 248 F.3d 275.
23 Bragg, 248 F.3d at 286.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Bragg, 248 F.3d at 286; Duffy, supra note 2, at 144.
30 Bragg, 248 F.3d at 286; Duffy, supra note 2, at 144.
31 Duffy, supra note 2, at 144.
32 Id.
In section 404 of the Clean Water Act (CWA), Congress tried to appease both environmentalists and mining corporations. Accordingly, the Corps may only grant general permits authorizing disposal of dredge and fill material from mountaintop coal mining when no more than “minimal adverse environmental effects” result from the activity. While conceding that mining does have some environmental impacts, mining companies emphasize that the land is reclaimed when the mining operations are completed. Mountaintop removal is thought to be the most profitable and efficient mountaintop mining technique, enabling companies to maximize coal production at comparatively low costs and thereby supply jobs and increased tax revenues to Appalachian communities. Companies also stress that coal mining is not only critical to the local economies, but is also necessary for generating electricity for the entire country. Therefore, there has been considerable debate over whether the Corps’s issuance of general permits for mountaintop mining violates section 404 of the CWA.

II. The History of the CWA and the Rivers and Harbors Appropriations Act

A. Overview of the CWA

The CWA, derived from the old Federal Water Pollution Control Act (FWPCA), was given its modern form in its 1972 amendments. Through these amendments, Congress intended to create a national program to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” This goal was to be achieved by

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36 Duffy, supra note 2, at 144.
38 Duffy, supra note 2, at 143.
39 Zygmunt J.B. Plater et al., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 620 (3d. ed. 2004). Although the Federal Water Pollution Control Act had come to be known as the CWA, the label “Clean Water Act” was not officially acknowledged by Congress until the 1977 amendments. Murchison, supra note 33, at 557.
prohibiting the discharge of any pollutant into the waters of the United States without a permit.\textsuperscript{41}

Although the CWA has placed restrictions on what can be released into the waters of the United States, it does not cover all discharges.\textsuperscript{42} It divides sources of pollution into two types—point sources and nonpoint sources\textsuperscript{43}—and defines “discharge of a pollutant” as the “addition of any pollutant to navigable waters from any point source.”\textsuperscript{44} The CWA sets effluent limitations only upon the discharge of pollutants from point sources.\textsuperscript{45} Nonpoint sources are not covered; therefore, no strict effluent limitations are imposed on these sources by the CWA.\textsuperscript{46}

It has been ruled that certain conditions created by, or equipment used in, mining operations and land clearing constitute point sources subject to regulation under the CWA.\textsuperscript{47} The U.S. Court of Appeals for the Fifth Circuit held that surface runoff from rainfall, when collected or channeled by mine operators, constitutes a point source of pollution.\textsuperscript{48} Hence, spoil piles—waste removed from a coal extraction—are classified as point sources of pollution if pollutants are transported from the piles by rainfall runoff through erosion-created ditches and gulleys and eventually deposited in navigable waters.\textsuperscript{49} Also, certain pieces of clearing equipment that cause discharge of soil elsewhere—such as bulldozers fitted with V-blades and raking blades and ditch excavation equipment—were found to be point sources of pollution.\textsuperscript{50}

\begin{itemize}
    \item \textsuperscript{41} See id. § 1342(a)(1).
    \item \textsuperscript{42} See id. § 1311(b)(1)(A).
    \item \textsuperscript{43} See id. §§ 1311(b)(1)(A), 1362(12).

    The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

    \textit{Id.} § 1362(14).
    \item \textsuperscript{44} Id. § 1362(12).
    \item \textsuperscript{45} See 33 U.S.C. § 1311(b)(1)(A).
    \item \textsuperscript{46} See id. § 1311.
    \item \textsuperscript{47} Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45, 47 (5th Cir. 1980).
    \item \textsuperscript{48} Id. at 47.
    \item \textsuperscript{49} Id. at 45.
    \item \textsuperscript{50} Avoyelles Sportmen’s League v. Alexander, 473 F. Supp. 525, 532 (W.D. La. 1979).
\end{itemize}
Except for those exempted under section 404(f)(1),\(^{51}\) point sources of pollution are regulated by permit programs under sections 402 and 404 of the CWA.\(^{52}\) Section 402 of the CWA established the National Pollutant Discharge Elimination System (NPDES), giving the Environmental Protection Agency (EPA) authority to issue permits limiting discharges of specific concentrations of pollutants.\(^{53}\) However, as a result of Congress’s concern that the NPDES would prohibit work needed to maintain navigation, section 404 of the CWA was also enacted.\(^{54}\)

Section 404 authorizes the Corps to regulate discharges of dredge and fill material into the navigable waters\(^{55}\) of the United States.\(^{56}\) Dredge material is defined by the Corps as “material that is excavated or dredged from waters of the United States.”\(^{57}\) Fill is defined as “material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States.”\(^{58}\) Rocks, soil, sand, clay, and overburden from mining or other excavation activities are examples of fill material regulated by the Corps under section 404.\(^{59}\)

B. A Brief History of the Corps’s Authority

Created by Congress in 1802, the Corps began as a military and civil works agency.\(^{60}\) Over the course of the nineteenth century, the Corps’s activities expanded to include altering rivers and harbors to

\(^{51}\) This section exempts from the permitting process the discharge of dredge and fill material from certain activities, such as normal farming and some forms of maintenance and construction. 33 U.S.C. § 1344(f)(1).

\(^{52}\) See id. §§ 1342, 1344.

\(^{53}\) Id. § 1342.


\(^{55}\) 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”); 33 C.F.R. § 329.4 (2005) (“Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”).

\(^{56}\) 33 U.S.C. § 1344.

\(^{57}\) 33 C.F.R. § 323.2(c). Discharge of dredged materials includes any runoff or overflow from a contained land or water disposal area, as well as any addition of dredged material into the waters of the United States that is incidental to any activity, other than incidental fallback—the redeposit of small amounts of dredged material into essentially the same place as the initial removal. Id. § 323.2(d).

\(^{58}\) Id. § 323.2(e)(1).

\(^{59}\) Id. § 323.2(e)(2). Trash and garbage are not considered fill. Id. § 323.2(e)(3).

\(^{60}\) Addison & Burns, supra note 54, at 623–24.
promote navigation. In response to the 1888 Supreme Court decision in Willamette Iron Bridge Co. v. Hatch—holding that where there was no federal regulatory scheme, states could authorize or prohibit dams, bridges, and other obstructions to navigation—Congress enacted the Rivers and Harbors Act of 1899 (RHA). RHA required approval from the Corps for all construction activities and other obstructions to navigation, as well as for depositing refuse into navigable waters.

Although the Corps initially limited its monitoring and enforcement activities under the RHA, in the late 1950s and 1960s it felt pressure to broaden its regulation to cover water quality and natural resource conservation. The Corps thus adopted a “public interest” criterion for granting permits under the RHA. The Corps, however, was not expressly required to protect the environment until the enactment of the CWA. With the creation of section 404, the Corps’s authority was extended beyond the coverage of the RHA to include permitting for dredge and fill materials in waters of the United States.

III. The Exception: Section 404

Unique in the CWA, section 404 operates as an exception to both the CWA’s general prohibition against pollution in waterways and the National Pollutant Discharge Elimination System. In the absence of section 404, dredged spoil disposal could violate the CWA by smothering benthic life, displacing water with land, and potentially discharging prohibited chemicals into the water. In addition, section 404 goes against the CWA’s general scheme by placing discharge permitting authority in the Corps rather than EPA, which was otherwise

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61 Id.
62 125 U.S. 1, 17 (1888).
65 See Addison & Burns, supra note 54, at 625.
66 Id.
67 Id. at 626.
68 Murchison, supra note 33, at 548.
69 Addison & Burns, supra note 54, at 627.
70 Benthic life consists of organisms that live at or near the bottom of the sea. THE OXFORD ENGLISH DICTIONARY 117 (2d ed. 1989).
71 Addison & Burns, supra note 54, at 627.
given administrative responsibility for the CWA. The Corps, however, does not exercise its authority under section 404 independently. Sharing responsibility for the control of dredge or fill materials, EPA has authority to promulgate guidelines governing the Corps’s issuance of permits. Also, EPA can veto a permit granted by the Corps when it finds that the activity would have “an unacceptable adverse effect” on water quality.

A. The History of Section 404: National Resource Defense Council, Inc. v. Callaway

The scope of section 404 extends to navigable waters, making the definition of “navigable waters” highly important. The Corps and EPA initially had vastly different meanings for the term. Consistent with the RHA, the Corps interpreted “navigable waters” to mean waters that are “subject to the ebb and flow of the tide or were, are, or could be made navigable in fact.” However, EPA relied on the legislative history of the CWA and adopted a broader definition that included non-navigable tributaries in addition to waters covered by the Corps’s definition.

The conflict between the two definitions was resolved in Natural Resources Defense Council, Inc. v. Callaway, a lawsuit brought by citizen environmental groups. The D.C. District Court held in favor of EPA’s definition, reasoning that Congress did not intend the term “navigable waters” to be restricted solely to traditional tests of navigability. Instead, the court found that “navigable waters,” having been defined as “the waters of the United States, including the territorial seas,” was meant to assert jurisdiction to the maximum extent permissible under the Commerce Clause of the Constitution. The court concluded that the Secretary of the Army and Chief of the Corps acted “unlawfully and in derogation of their responsibilities” under

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73 See id. § 1344(c).
74 See id. § 1344(b).
75 See id. § 1344(c).
76 See id. § 1344.
77 Addison & Burns, supra note 54, at 628.
78 Id.
79 Id.
81 Id. at 686.
82 Id.
the CWA by adopting a different definition.\textsuperscript{83} Thus, by requiring the Corps to adopt the broader meaning of “navigable waters,” this decision vastly extended the Corps’s regulatory domain.\textsuperscript{84}

**B. Beginning of Permitting for the Corps**

After the decision in *Callaway*, the Corps proposed regulations for implementing section 404.\textsuperscript{85} After receiving numerous comments on the proposed regulations,\textsuperscript{86} the Corps promulgated a set of interim final section 404 regulations and requested further comment.\textsuperscript{87} As part of these regulations, a procedure for processing general permits was created.\textsuperscript{88} The Corps hoped that this mechanism would facilitate the establishment of a more administratively manageable regulatory program.\textsuperscript{89} Accordingly, instead of issuing individual permits, the District Engineer was to issue a single permit for certain “clearly described categories of structures or work.”\textsuperscript{90} Conditions specifying the maximum quantity of material authorized to be discharged, the category or categories of activities, and the type of waters in which the activity could occur were to be set by the District Engineer when issuing a general permit.\textsuperscript{91}

Although the Corps may not have anticipated that its expanded jurisdiction would last, it continued.\textsuperscript{92} In 1977, Congress amended the CWA, affirming prior developments in the section 404 program.\textsuperscript{93} Accordingly, section 404 still applied to the discharge of dredge or fill material into navigable waters, with these waters now being defined as “waters of the United States.”\textsuperscript{94} Thus, Congress confirmed the broad

\textsuperscript{83} Id.
\textsuperscript{84} Addison & Burns, *supra* note 54, at 629.
\textsuperscript{85} See id.
\textsuperscript{87} Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).
\textsuperscript{88} Id. at 31,335.
\textsuperscript{89} Id. at 31,322.
\textsuperscript{90} Id. at 31,335.
\textsuperscript{91} *Id*.
\textsuperscript{92} Addison & Burns, *supra* note 54, at 631.
\textsuperscript{93} Id. at 632.
scope given section 404 by the *Callaway* court.\(^{95}\) In doing so, it rejected the idea of limiting the jurisdictional scope of section 404, which had been brought up by the previous Congress.\(^{96}\)

When the Corps issued revisions to its regulations in July 1977, it reorganized its entire regulatory program.\(^{97}\) Altering its jurisdictional limits, the Corps extended the scope of its regulation.\(^{98}\) To cope with the new expansive definitions, the Corps increased its use of general permits, issuing a number of them under both section 10 of the RHA\(^ {99}\) and section 404 of the CWA.\(^ {100}\)

### IV. Issuance of Permits for Dredge and Fill Under the CWA

#### A. Types of Permits

The Corps has authority to issue two types of permits—individual and general—for the discharge of dredged or fill materials.\(^ {101}\) Section 404(a) of the CWA authorizes the Corps to issue individual permits for the discharge of this material into the navigable waters at specified disposal sites only after notice and opportunity for public hearings.\(^ {102}\) The Corps authorizes an individual permit following an intensive case-by-case evaluation of a specific project.\(^ {103}\)

To reduce paperwork and delay, and thereby alleviate some of the Corps’s burden, Congress added section 404(e) to the CWA.\(^ {104}\) This enabled the Corps to “define categories of discharge activities that do not require permittees and the Corps to undergo the exten-
sive individual permit review process of Section 404(a).”

Unlike the individual permits under section 404(a), general permits under section 404(e) allow certain activities to go forward with minimal involvement by the Corps.

A general permit is issued on a national or regional basis for a category of activities when the activities are “substantially similar in nature and cause only minimal individual and cumulative environmental impacts.” General permits can also be issued when doing so “would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.”

Nationwide permits (NWPs) are general permits which are national in scope. According to the Corps, these permits are used to authorize minor activities that are generally uncontroversial. When issuing, reissuing, or modifying a NWP, the Corps complies with the National Environmental Policy Act (NEPA) by issuing an Environmental Assessment (EA), which “consider[s] the environmental effects of each NWP from a national perspective.” Although the Corps is preparing a voluntary programmatic environmental impact statement (EIS) for the NWP program, it contends that the program does not reach the level of significant impacts that requires the preparation of an EIS. The Corps based this determination on the fact that NWPs are authorized only for activities that have no more than minimal adverse effects

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105 Id.
106 See 33 U.S.C. § 1344. The relevant portion states:

In carrying out his functions relating to the discharge of dredged or fill material under this section, the [Corps] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall . . . set forth the requirements and standards which shall apply to any activity authorized by such general permit.

Id. § 1344(e).
107 33 C.F.R. § 323.2(h).
108 Id.
109 Ohio Valley I, 410 F. Supp. 2d at 455.
111 Id. at 2025.
112 Id.
on the aquatic environment.\textsuperscript{113} The Corps also reasoned that the reissuance process of NWPs every five years helps ensure there are no more than minimal impacts.\textsuperscript{114}

B. The Courts’ Views on Section 404

Although Congress appears satisfied with the extent of the Corps’s authority over dredge and fill activities, the courts have still had to address the issue on numerous occasions.\textsuperscript{115} In \textit{Buttrey v. United States}, for example, the U.S. Court of Appeals for the Fifth Circuit confirmed the constitutionality of the Corps’s role under section 404.\textsuperscript{116} Rejecting the plaintiff’s claim that section 404 is unconstitutional because it delegates jurisdiction to a part of the military, the court noted that the constitutional authority for section 404 rests in the Commerce Clause, and that administration by the Corps does not infringe upon any of the provisions of the Constitution.\textsuperscript{117} However, the court made it clear that “the Corps is limited in its authority to that which Congress provides and remains subject to revocation of that authority at any time at the will of Congress.”\textsuperscript{118}

In the absence of further congressional action, the courts—having been left to address section 404 questions—usually rely on the congressional intent.\textsuperscript{119} Thus, in \textit{United States v. Riverside Bayview Homes, Inc.}, the Supreme Court affirmed the constitutionality of the Corps’s broad authority,\textsuperscript{120} holding that the Corps acted reasonably in interpreting the CWA to require permits for the discharge of fill material into all wetlands adjacent to navigable or interstate waters and their tributaries.\textsuperscript{121} The Court has, however, recognized that some constitutional limits exist as to how far Congress can extend the CWA’s coverage beyond navigable-in-fact waters.\textsuperscript{122} In \textit{Solid Waste Agency v. United States}, the Court noted that the constitutional authority for section 404 rests in the Commerce Clause, and that administration by the Corps does not infringe upon any of the provisions of the Constitution.\textsuperscript{117} However, the court made it clear that “the Corps is limited in its authority to that which Congress provides and remains subject to revocation of that authority at any time at the will of Congress.”\textsuperscript{118}

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\begin{itemize}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{116} 690 F.2d 1186, 1189–90 (1982).
\item \textsuperscript{117} Id. at 1189.
\item \textsuperscript{118} Id. at 1190.
\item \textsuperscript{119} See \textit{Solid Waste Agency}, 531 U.S. at 172–73; \textit{Riverside}, 474 U.S. at 130.
\item \textsuperscript{120} See \textit{474 U.S. at 134} (concluding that frequent flooding is not required to be considered waters of the United States).
\item \textsuperscript{121} Id. at 133 (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”).
\item \textsuperscript{122} See \textit{Solid Waste Agency}, 531 U.S. at 173.
\end{itemize}
U.S. Army Corps of Engineers, the Court held that permanent and seasonal ponds with no hydrological connection to other waterways are beyond section 404’s regulatory authority. The Court stated that for there to be jurisdiction under the CWA, there must be a “significant nexus between the wetlands and ‘navigable waters.’”

Although it has been argued that Solid Waste Agency was meant to significantly restrict the Corps’s jurisdiction, the lower courts have not always agreed. In United States v. Deaton and United States v. Rapanos, the Fourth and Sixth Circuits held that where wetlands drain into a ditch which must pass through other waterways to get to navigable-in-fact water, there is jurisdiction under the CWA. Similarly, in United States v. Hubenka, the Tenth Circuit reasoned that non-navigable tributaries which enable potential pollutants to migrate to navigable waters downstream can constitute a “significant nexus.”

In Rapanos v. United States, the U.S. Supreme Court ruled on the definition of “navigable waters” under the CWA. It held that the term “navigable waters” includes only relatively permanent, standing or flowing bodies of water and does not include intermittent or ephemeral flows of water. Thus, the Court articulated limits—although broad ones—to the Corps’s authority.

C. Nationwide Permit 21 (NWP 21)

Relying on section 404(e) of the CWA, the Corps issued NWP 21. NWP 21 is a general permit for discharges into the waters of the United States of dredged or fill material associated with surface coal mining and reclamation operations. According to NWP 21, project

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123 Id. at 163, 173–74.
124 Id. at 167.
126 Deaton, 332 F.3d at 702, 712; Rapanos, 339 F.3d at 449, 453.
127 438 F.3d 1026, 1034 (10th Cir. 2006).
128 126 S. Ct. 2208, 2225 (2006)
129 Id.
130 See id.
132 Id. at 2020, 2081. NWP 21 states:

Discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the “Notification” General Condition. In addi-
proponents must file a preconstruction notification (PCN) with the appropriate district.\textsuperscript{133} Also, unlike other NWPs, the Corps must support all NWP 21 projects by written authorization before the projects can proceed to construction.\textsuperscript{134} Historically, however, the Corps has approved almost every application it has received for the disposal of fill in the form of mountaintop spoil placed in valleys.\textsuperscript{135}

By law, a NWP is effective for a period of five years.\textsuperscript{136} Therefore, every five years the Corps reviews and reissues NWPs.\textsuperscript{137} The most recent review occurred in 2002, when the Corps reissued NWP 21 and made several changes.\textsuperscript{138} First, the Corps required that before it authorizes any project, it must make a case-by-case determination that the adverse effects to the aquatic environment caused by the proposed activity are minimal both individually and cumulatively.\textsuperscript{139} Second, the Corps began to require a compensatory mitigation plan to ensure that losses to the aquatic environment are minimal.\textsuperscript{140}

V. Authority of the Corps over Mountaintop Mining: The NWP 21 Debate

The issuance of NWP 21 has caused significant debate over the Corps’s authority to grant a general permit for the disposal of material from mountaintop coal mining.\textsuperscript{141} District courts in Appalachia have repeatedly ruled in favor of the environmentalists, holding that the Corps does not have the authority to enforce this type of regulation.\textsuperscript{142} These recent decisions have run “counter to the Bush administration’s

\textsuperscript{133} Id. at 2090.

\textsuperscript{134} Id.

\textsuperscript{135} Duffy, supra note 2, at 145.


\textsuperscript{138} Issuance of Nationwide Permits, 67 Fed. Reg. at 2020, 2039.

\textsuperscript{139} Id. at 2038.

\textsuperscript{140} Id.

\textsuperscript{141} See generally Duffy, supra note 2, at 143 (discussing the debate over whether the disposal of waste from mountaintop coal mining is illegal under federal environmental laws).

stated goals of both maximizing domestic fuel production and easing federal environmental restrictions on coal mining operations.”

In contrast, however, the U.S. Court of Appeals for the Fourth Circuit has either avoided the question or ruled in favor of the Corps.

A. The First Attempt to Challenge the Corps’s Authority: Bragg v. Robertson

Finding that the primary purpose for disposing spoil is to dispose waste—which is regulated by section 402—the district court in Bragg v. Robertson held that the Corps does not have authority under section 404 to regulate the disposal of spoil in valley fills. However, the Fourth Circuit vacated the district court’s injunction, concluding that sovereign immunity bars a citizen-suit challenge against a state official in federal court under the Surface Mining Control and Reclamation Act (SMCRA). Importantly though, the Fourth Circuit upheld the settlements that the parties arrived at with the district court’s approval.

According to the settlements, the Corps and several other federal entities agreed to prepare a comprehensive EIS to analyze the adverse environmental impacts of mountaintop strip mining. The Corps also agreed to postpone issuing NWP 21 permits for valley fills in West Virginia that could affect watersheds greater than 250 acres. Although the Corps agreed to comply with the terms of this settlement when it reissued NWP 21 in 2002, it chose not to extend the 250-acre restriction to jurisdictions outside of West Virginia.

Another result of this lawsuit was that the Corps decided to revise its definition of “discharge of fill material” to be compatible with EPA’s definition. Thus, the Corps removed the “primary purpose” clause from its definition. Under its previous definition of “discharge of fill materials”—which included a “primary purpose” clause—the Corps could not issue a permit if fill was discharged as waste instead of used to

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143 Duffy, supra note 2, at 143.
144 See Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley II), 429 F.3d 493, 496 (4th Cir. 2005); Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III), 317 F.3d 425, 436, 448 (4th Cir. 2003); Bragg, 248 F.3d at 286.
145 Robertson, 72 F. Supp. 2d at 657.
146 Bragg, 248 F.3d at 286, 289.
147 Id. at 286.
149 Id.
150 Id.
151 Id.; Duffy, supra note 2, at 177.
152 Duffy, supra note 2, at 177.
convert water to dry land.\textsuperscript{153} Thus, by changing its definition, the Corps hoped to prevent the possibility that a subsequent court ruling would find general permits for valley fills to be illegal.\textsuperscript{154}

B. \textit{Challenging the Minimal Impacts}: Kentuckians for the Commonwealth v. Rivenburgh

Following in the footsteps of \textit{Bragg}, Kentuckians for the Commonwealth (KFTC) brought suit in response to the Corps’s issuance of a NWP 21, which allowed the Martin County Coal Corporation (MCCC) to fill streams with spoil from coal strip mining.\textsuperscript{155} Noting that over the past twenty years, these activities have buried over 1500 miles of streams in Kentucky and West Virginia, KFTC attempted to stop further damage to the environment by pointing out that mountaintop mining causes more than minimal environmental impacts.\textsuperscript{156}

As in \textit{Bragg}, the District Court for the Southern District of West Virginia initially heard the case.\textsuperscript{157} Again siding with the plaintiffs, the district court concluded that Congress did not intend the Corps’s section 404 authority to extend to fill disposed of as waste.\textsuperscript{158} Thus, the court sustained the plaintiff’s challenge to NWP 21 and enjoined the issuance of the permit in question.\textsuperscript{159} In addition, the court enjoined any future permits by the Corps’s Huntington District office that have no primary purpose except to allow the disposal of spoil removed from mountaintop mining into the valley.\textsuperscript{160}

On appeal, the Fourth Circuit vacated the district court’s preliminary injunction against future permits, finding it broader than necessary to grant relief to the plaintiffs.\textsuperscript{161} Also, the court found that the Corps did not need a constructive purpose to authorize valley fills.\textsuperscript{162} The Corps’s interpretation of “fill material” under section 404—

\textsuperscript{153} See \textit{id.} at 177–78.
\textsuperscript{154} \textit{Id.}; Issuance of Nationwide Permits, 67 Fed. Reg. at 2039.
\textsuperscript{155} See Kentuckians for the Commonwealth, Inc. v. Rivenburgh (\textit{Rivenburgh I}), 204 F. Supp. 2d 927, 930 (S.D. W. Va. 2002). By authorizing twenty-seven valley fills, the permit would bury 6.3 miles of streams. \textit{Id.}
\textsuperscript{158} \textit{Id.} at 788, 808.
\textsuperscript{159} \textit{Id.} at 808.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} Kentuckians for the Commonwealth, Inc. v. Rivenburgh (\textit{Rivenburgh III}), 317 F.3d 425, 436 (4th Cir. 2003).
\textsuperscript{162} See \textit{id.} at 448.
as defined as “all material that displaces water or changes the bottom elevation of a water body except for ‘waste’”—was determined to be reasonable.163

C. Using NEPA and CWA to Challenge NWP 21: Ohio Valley Environmental Coalition v. Bolen

Not willing to give up the fight over NWP 21, West Virginia environmental groups joined together to sue the Corps, claiming that the issuance of NWP 21 does not comply with the National Environmental Policy Act (NEPA) or the CWA, and is therefore “arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.”164 The plaintiffs identified eleven projects approved by the Corps pursuant to NWP 21, together having a total impact on approximately 140,000 feet of waters in West Virginia.165

The U.S. District Court for the Southern District of West Virginia held for the plaintiffs, finding that the Corps’s approach to authorizing valley fills and surface impoundments pursuant to NWP 21 fails the first part of the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,166 because it does not comply with the plain language of the CWA.167 The district court concluded that 404(e) of the CWA: (1) “directs the Corps to determine that certain activities will invariably have only minimal effects on the environment;” (2) requires the Corps to issue NWPs only for those activities determined before issuance to have minimal environmental impact; and (3) requires that general permits authorize discharges to proceed without further involvement from the Corps.168

163 *Id.* (indicating that “waste” refers to garbage, sewage, and effluent, not mining overburden).
165 *Id.* at 456–57.
166 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). When a court reviews an agency’s construction of a statute which it administers, it must first ask whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, then that intent must be followed. However, if Congress has not directly addressed the precise question at issue, the court cannot impose its own construction on the statute. Instead, if the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency answer is based on a permissible construction of the statute. *Id.*
167 *Ohio Valley I*, 410 F. Supp. 2d at 453, 466. The court found that “Nationwide Permit 21 does not comply with the plain language, structure, and legislative history of the Clean Water Act.” *Id.* at 453.
168 *Id.*
The district court found, however, that NWP 21 violates all of these CWA requirements.\footnote{Id. at 466–71; Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley II), 429 F.3d 493, 497 (4th Cir. 2005).} In reaching this conclusion, the court reasoned that NWP 21 “defines a procedure instead of permitting a category of activities” as well as “provides for a post hoc, case-by-case evaluation of environmental impact.”\footnote{Ohio Valley I, 410 F. Supp. 2d at 466.} It also found that NWP 21 authorized projects to proceed only after receiving individualized approval from the Corps, in contradiction to Congress’s intent for no individualized approval for general permits under the CWA.\footnote{Id.} Finally, the district court concluded that NWP 21 violated the statutory requirement that the Corps provide notice and opportunity for public hearing before issuing a permit.\footnote{Id. at 470–71.}

As a result of these discrepancies between the CWA and the Corps’s NWP 21, the district court determined that the permit was facially invalid, and enjoined the Corps from issuing authorizations pursuant to NWP 21 in the Southern District of West Virginia.\footnote{Id. at 470–71.} The district court also ordered the Corps to suspend authorizations for valley fill and surface impoundments for the specific mining sites challenged by the plaintiff on which construction had not commenced as of July 8, 2004.\footnote{Id.} In August 2004, the court extended its injunction to cover all NWP 21 permits issued prior to its July order, under which fill or impoundment construction had not begun as of the July order.\footnote{Id.}

The Corps appealed to the Fourth Circuit.\footnote{Lawrence G. McBride, Mining 2004 Annual Report, 2004 A.B.A. Env’t, Energy, & Resources L.: Year in Rev. 227, 229 (2005).} Although many believed the district court’s ruling would be affirmed,\footnote{Ohio Valley II, 429 F.3d 493, 497.} the Fourth Circuit found that the Corps complied with Section 404 of the CWA when it issued NWP 21.\footnote{Joseph Dawley, Unintended Consequences: Clean Air Act’s Acid Rain Program, Mountain-top Mining and Related Litigation, 36 Trends: A.B.A. Section of Env’t, Energy & Resources NewsL. 13, 13 (Jan./Feb. 2005).} Thus, the Fourth Circuit vacated the district court’s decision, reinstating the use of nationwide general per-
mits to allow coal companies to dispose of mining waste in valleys and streams.\textsuperscript{179}

In reaching this conclusion, the court of appeals discussed the lower court’s reasons for its decision, rejecting each one in turn.\textsuperscript{180} First, the court concluded that NWP 21 does not define a procedure, as was claimed by the district court, but instead “plainly authorizes a ‘category of activities.’”\textsuperscript{181} The court also noted that nothing in section 404(e) restricts the use of procedural, along with substantive, parameters to define a category.\textsuperscript{182}

Second, the court of appeals found that the district court erred in determining that the Corps did not make the required minimal-impact determinations before issuance of the nationwide permit.\textsuperscript{183} The Corps argued that section 404(e) does not unambiguously require these determinations be made before issuance of a nationwide permit.\textsuperscript{184} However, the court did not rule on this issue.\textsuperscript{185} It simply concluded that minimal-impact determinations were completed by the Corps before issuing NWP 21.\textsuperscript{186} Again, however, the court did not consider whether these determinations were arbitrary or capricious.\textsuperscript{187} It left the argument up to the plaintiffs to reassert on remand.\textsuperscript{188}

\textsuperscript{179} See id.
\textsuperscript{180} Id. at 498–504.
\textsuperscript{181} Id. at 498. The court stated in full:

The category of activities authorized by NWP 21 consists of those discharges of dredged or fill material that (1) are associated with surface coal mining and reclamation operations, so long as those operations are authorized by the Department of Interior or by states with approved programs under the Surface Mining Control and Reclamation Act of 1977, (2) are preceded by notice to the Corps, and (3) are approved by the Corps after the Corps concludes that the activity complies with the terms of NWP 21 and that its adverse environmental effects are minimal both individually and cumulatively.

\textsuperscript{182} Id.
\textsuperscript{183} Id. at 498–99.
\textsuperscript{184} Ohio Valley II, 429 F.3d at 498 n.3.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 499–500 (finding that the Corps took account of a variety of factors, such as public commentators’ opinions, the Surface Mining Control and Reclamation Act’s (SMCRA) requirements, the nature of the coal mining activities authorized by NWP 21, the applicability of a variety of general conditions to NWP 21, and data about usage of previous versions of NWP 21).
\textsuperscript{187} Id. at 502 n.6.
\textsuperscript{188} Id. The plaintiff on remand could assert this claim if, for example, the Corps either relied on erroneous premises or ignored relevant data. Id.
The court did, however, find that the issuance of a general permit does not “guarantee ab initio that every instance of the permitted activity will have only a minimum impact.” It concluded that the Corps’s ex ante determinations of minimal impact could not be anything more than reasoned predictions. The court also stated that no provision of the CWA specifies “how the Corps must make the minimal-impact determinations, the degree of certainty that must undergird them, or the extent to which the Corps may rely on post-issuance procedures in making them.”

Third, the Fourth Circuit concluded that section 404 does not “unambiguously prohibit[] the Corps from creating a general permit that authorizes activities to proceed only after receiving individualized approval from the Corps.” Since the term “general permit” is not defined in the CWA, the court concluded that there is no explicit textual basis for this argument. Also, the court reasoned that section 404 does not prohibit the creation of a general permit with a requirement of individualized consideration of approval simply because it provides separate provisions for individual and general permits.

Finally, overruling the district court’s last basis for invalidating NWP 21, the court of appeals concluded that section 404 does not require notice and a hearing before the Corps authorizes an individual project under a general permit. All that is statutorily required is that notice and opportunity for public hearing be provided before the general permit itself is issued. Thus, the court found that the Corps fulfilled its obligation under the CWA to provide notice and opportunity for public hearing before determining that the category of activi-

189 Id. at 500–01. (reasoning that section 404(e)(2) recognizes “the possibility that activities authorized by a general permit could result in a more-than-minimal impact, as well as the impossibility of making an ex ante guarantee that the authorized activities could never result in a more-than-minimal impact”).
190 Ohio Valley II, 429 F.3d at 501.
191 Id. at 500. The court found that because the CWA is silent on the issue of whether the Corps can make its pre-issuance minimal-impact determinations by relying in part on the fact that its post-issuance procedures will ensure that the authorized projects will have only minimal impacts, it must defer to the Corps’s conclusion that it may do so. Id. at 501. However, the court suggests that section 404(e) does not permit the Corps to completely defer to minimum-impact determinations until after issuance of the permit. Id. at 502.
192 Id. at 503.
193 Id.
194 Id. (finding that because the CWA does not speak to this issue, and that the Corps’s interpretation is reasonable, the Corps’s construction is entitled to Chevron deference).
195 Id. at 504 (“[O]ne cannot infer such a requirement from the fact that individual permits can issue only after notice and opportunity for public hearing.”).
196 Ohio Valley II, 429 F.3d at 504.
ties authorized by NWP 21 would have only minimal adverse effects on the environment.  

VI. The Future of NWP 21

Although recent coal-mining accidents have prompted national attention concerning the dangers to mine workers, the movement to protect the environment from coal-mining dangers has encountered a considerable roadblock. Frequent lawsuits have helped portray the significant damage that can result from mountaintop coal mining; however, the Fourth Circuit’s rulings in Bragg v. W. Va. Coal Ass’n, Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III), and Ohio Valley Environmental Coalition v. Bulen (Ohio Valley II) have made the fight to protect the environment difficult by upholding the use of NWP 21. The environmental movement may have stalled, but the numerous questions left unresolved by Congress and the courts indicate that the fight is far from over. Although the use of NWP 21 will likely continue, a better balance can still be reached to ensure greater environmental protection.

A. The Corps’s Permitting and Its Environmental Consequences

By finding that NWP 21 does not violate the CWA, the court in Ohio Valley II followed the path laid out by numerous earlier court rulings, granting increasing environmental regulatory power to the Corps. However, because the Corps has tried to deal with its expanding workload by increasing the use of general permits—and courts have by and large allowed this—the Corps’s growing power has not always been matched with increased environmental protection.

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197 See id. at 503–04.
198 See Senators Have Strong Words, supra note 1.
201 See Ohio Valley II, 429 F.3d at 505; Rivenburgh III, 317 F.3d at 436; Bragg, 248 F.3d at 286.
202 See Ohio Valley II, 429 F.3d at 498–99 n.3, 502 n.6.
204 See Ohio Valley II, 429 F.3d at 505; Rivenburgh III, 317 F.3d at 436.
The U.S. District Court for the Southern District of West Virginia was correct in concluding that the Corps’s decision to change its definition of “discharge of fill material”—so that it could regulate the disposal of spoil in valley fills with decreased likelihood of a court finding the permit to be illegal—was not in the interest of the environment. However, in *Rivenburgh III*, the Fourth Circuit allowed for this change in definition anyway. This ruling permitted the Corps’s increased jurisdiction under its 404 permits, enabling the Corps to issue more general permits, specifically NWP 21.

Although the Corps stated that NWPs are used to authorize minor activities that are generally uncontroversial, it issued NWP 21 for the very controversial activity of discharging dredge or fill materials from mountaintop coal mining, which now includes discharge into valley fills. Because they provide a higher level of environmental protection, specific permits are preferable over nationwide permits. They require notice and opportunity for public hearings before each individual project, and are authorized only after a case-by-case evaluation of the specific project. Nationwide permits, however, allow a project to move forward with minimal involvement by the Corps, and provide notice and opportunity for public hearing only before the Corps issues the general permit, not before each individual project is authorized under the permit. Therefore, it is likely that activities that could cause environmental harm will be overlooked under NWPs.

B. *Continuing the Fight Against NWP 21 After Ohio Valley II*

Considered a setback for environmental groups, *Ohio Valley II* simply reinstated what the Corps had been doing—issuing NWP 21 for mountaintop coal mining. While seemingly anti-environment, the court in *Ohio Valley II* left many issues in the NWP 21 debate unresolved,


206 *Rivenburgh III*, 317 F.3d at 436.

207 See id.


209 See *Rivenburgh III*, 317 F.3d at 436.


211 Crutchfield v. County of Hanover, 325 F.3d 211, 214 (4th Cir. 2003).

212 See 33 U.S.C. § 1344(e).

enabling environmentalists to raise them another time.\footnote{214 See id. at 498 n.3, 502 n.6.} Thus, although the Fourth Circuit’s previous rulings indicate that it is likely to find NWP 21 to be legal,\footnote{215 See id. at 497, 505; Kentuckians for the Commonwealth, Inc. v. Rivenburgh (\textit{Rivenburgh III}), 317 F.3d 425, 436 (4th Cir. 2003).} the door is open to future litigation that could have beneficial environmental impacts.

Environmentalists can challenge NWP 21 by arguing that the minimum-impact determinations made by the Corps in enacting NWP 21 were arbitrary, capricious, or an abuse of discretion.\footnote{216 See \textit{Ohio Valley II}, 429 F.3d at 502.} In \textit{Ohio Valley II}, the court did not rule on the sufficiency of the minimum-impact determination.\footnote{217 See id. at 502 & n.6.} It simply found that the Corps had made a minimum-impact determination, and left the arbitrary, capricious or an abuse of discretion argument for the plaintiffs to reassert on remand.\footnote{218 Id. at 502 n.6.} Concluding that no provision of the CWA specifies “how the Corps must make the minimal-impact determination, the degree of certainty that must undergird them, or the extent to which the Corps may rely on post-issuance procedures in making them,” the Fourth Circuit has left these decisions to the discretion of the Corps.\footnote{219 Id. at 500.}

However, given the courts’ tendency to side with the Corps and the priorities of the Bush administration,\footnote{220 See id. at 497, 505; \textit{Rivenburgh III}, 317 F.3d at 436; Bragg v. Robertson, 248 F.3d 275, 286 (4th Cir. 2001); Duffy, \textit{supra} note 2, at 143.} plaintiffs will have a difficult time showing that the Corps’s actions were arbitrary, capricious, or an abuse of discretion.\footnote{221 See \textit{Ohio Valley II}, 429 F.3d at 501.} This is especially true because the court has recognized that it is nearly impossible to initially guarantee that an activity authorized under a NWP will result in no more than minimal environmental impacts.\footnote{222 See id.} Because the Corps must try to forecast the authorized activity’s potential environmental consequences if undertaken anywhere in the country under any set of circumstances, such conclusions are bound to be faulty.\footnote{223 See \textit{Ohio Valley II}, 429 F.3d at 501.} While conceding that minimum-impact determinations for NWPs cannot be more than reasoned predictions, the court in \textit{Ohio Valley II} still upheld the legality of NWP 21.\footnote{224 Id.}
Aside from the courts, environmentalists could encourage EPA to help promote the protectionist goals of the CWA by revoking NWP 21. 225 While the Corps has primary control over the granting of permits, EPA has authority to repeal a permit issued by the Corps. 226 However, the goals of the current Administration—“[to] maximiz[e] domestic fuel production and eas[e] federal environmental restrictions on coal mining operations”—indicate that a push to strengthen the environmental safeguards built into the Corps’s general permitting authority is unlikely. 227

A stronger argument for environmentalists to make concerns the timing of the minimal-impact determinations. 228 Because the court has held that NWPs are valid even though accurate minimal-impact determinations cannot be performed prior to their authorization, 229 environmentalists must push for a ruling that section 404(e) unambiguously requires minimum-impact determinations before issuance of a NWP, and especially before a project commences. 230 If a determination is made prior to the start of the activity—as long as it is based on solid research, even if faulty—it is better than no initial determination at all. Initial research could indicate potential environmental impacts not previously considered, allowing for more adequate mitigation, modification, or even cancellation of the activity.

Not requiring minimal-impact determinations to be made before issuance of a NWP weakens the CWA’s primary purpose of protecting the environment. 231 To ease the burden imposed on the Corps, Congress allowed it to issue general permits; however, Congress was aware that the use of general permits could reduce environmental protection. 232 Therefore, Congress authorized the Corps to issue general permits only after it has concluded that the activity will cause “only

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226 Id. § 1344(b)–(c).
227 See Duffy, supra note 2, at 143.
228 See Ohio Valley II, 429 F.3d at 501.
229 See id.
230 33 U.S.C. § 1344(e)(1). Section 404 of the CWA states that general permits can only be issued if the Corps determines that the activities “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” Id.; see Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley III), 437 F.3d 421, 423 (4th Cir. 2006) (King, J., dissenting) (stating that the Corps’s ability to create post-issuance evaluations does not relieve it of its responsibility under section 404(e) to perform minimal-impact determinations prior to issuance of a NWP).
231 See Ohio Valley III, 437 F.3d at 422.
232 Id.
Removal of the procedural hurdle eviscerates the distinction drawn by Congress between individual and general permits issued under section 404 of the CWA.234 If the Corps is unable to make the required minimal-effects determination, it should be required to utilize the more burdensome procedures of section 404(a) and only issue individual permits.235 Allowing the Corps to issue general permits without first making minimal-impact determinations makes section 404(e) significantly weaker than Congress intended.236 The strong protectionist goal of the CWA will be undermined and the environment will suffer as a result.237

Even putting aside legislative intent, one would be compelled to conclude that the Corps is required to make minimal-impact determinations by following its own rational for upholding the validity of NWPs.238 The Corps contends that the NWP program is valid without requiring an environmental impact statement (EIS) because NWPs are authorized only for activities that have no more than minimal adverse effects on the aquatic environment.239 However, if activities are commenced before the potential effects are determined, the Corps’s reasoning fails.240 The NWP will already have been authorized, even though it has not yet been concluded that the activities permitted will cause no more than minimal impacts.

By requiring minimal-impact determinations before a project commences, the chance of significant environmental harm occurring can be minimized, if not eliminated. However, if these determinations take place after a project begins, and the project causes more than minimal adverse effects, the damage must be mitigated.241 Under a section 404 permit, a permittee is required to perform mitigation for the environmental damage that results from its activities,242 but this mitigation is often not completed.243 Even when it is completed, it is often

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233 See 33 U.S.C. § 1344(e).
234 See id. § 1344; Ohio Valley III, 437 F.3d at 422, 423 (noting that “the primary distinction between an individual permit . . . and a general permit . . . is that a general permit requires a pre-issuance determination of minimal environmental effects.”).
235 See Ohio Valley III, 437 F.3d at 423.
236 See 33 U.S.C. § 1344; Ohio Valley III, 437 F.3d at 423.
237 See Ohio Valley III, 437 F.3d at 423.
239 See id.
240 See id.
241 See id. at 2092.
242 See id.
243 See NAT’L RES. COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 101 (2001) [hereinafter NRC REPORT].
either “poorly designed or carelessly implemented.” Thus, the mitigation provisions in the permits cannot be relied upon for effective enforcement. If harm is identified before it occurs, it can be prevented. Thus, it would not be necessary to fall back on the unreliable environmental safety measure of mitigation.

Conclusion

The strength of the CWA—with its goal of protecting the waters of the United States—has been threatened by the Corps’s increased use of general permitting in mountaintop coal mining. Recent lawsuits have illustrated the significant damage that can result from mountaintop coal mining, but the Fourth Circuit has made it difficult to protect the environment by upholding the use of NWP 21. Ohio Valley II, although consistent with previous rulings granting increasing environmental regulatory power to the Corps, did not put an end to this environmental debate. By focusing on the questions left unresolved by Congress and the court, environmentalists still have an opportunity to help guarantee that the goal of the CWA is achieved.

To ensure greater environmental protection, two aspects of the Corps’s general permitting process should be challenged. First, the adequacy of the minimum-impact determinations the Corps was required to perform when it enacted NWP 21 should be contested. The courts have held that authorization of a NWP is not precluded by the impossibility of an initial guarantee that an activity authorized under a NWP will result in no more than minimal environmental effects; however, a more detailed initial investigation should still be mandated.

Second, the wording of section 404, the legislative intent, and the Corps’s own reasoning all indicate that section 404(e) requires that minimum-impact determinations be made before issuance of a NWP. Any other ruling would eviscerate the distinction drawn by Congress between individual and general permits, and significantly weaken the protectionist goals of the CWA. If the Corps cannot adequately perform the required minimal-effects determination, it should be required to employ the more cumbersome procedures of section 404(a) and issue individual permits only.

245 See id.
246 See id.; NRC Report, supra note 243, at 101.
Recent coal mining accidents have attracted national attention to the issue of mining safety, resulting in the review of coal mining safety regulations, as well as a push by both the states and federal government toward stricter enforcement of the current regulations. Given this focus on coal mining, it is possible—although unlikely with the current Administration—that the regulations pertaining to mountaintop coal mining will be considered anew. It is a good time, however, for environmentalists to push their cause and make the general public more aware of mountaintop coal mining’s adverse environmental effects.
THE LIMITED POWER OF STATES TO REGULATE NONROAD MOBILE SOURCES UNDER THE CLEAN AIR ACT

Johanna L. Wise Sullivan*

Abstract: The federal Clean Air Act (CAA) requires the State of California to obtain Environmental Protection Agency (EPA) permission in order to adopt “standards and other requirements relating to the control of emissions,” but expressly preempts all other states from adopting such regulations. Beginning January 1, 2007, California—which suffers the most severe air pollution in the country—will require all ships operating within twenty-four miles of the coast to limit emissions from auxiliary engines to levels that would be reached by using a certain low-sulfur fuel. If California’s new regulation falls within the CAA definition of “standards and other requirements,” it is invalid without EPA authorization. Courts have generally found that “in-use” regulations, which are applied to the operation of motor vehicles and ocean vessels, are not covered by the preemption provisions of the CAA. However, a closer examination of differences between the CAA’s treatment of motor vehicles and nonroad vehicles, along with a recent Supreme Court decision interpreting the definition of “standard,” indicates that California’s regulation is preempted unless EPA grants authorization.

Introduction

On December 8, 2005, the California Air Resources Board (CARB) adopted a regulation that could significantly reduce the emission of pollutants by the numerous ships visiting the State’s ports while engaged in international commerce.¹ The regulation will require all ships, foreign- and U.S.-flagged, to limit emissions from auxiliary engines to the levels that would be achieved by the use of a certain low-sulfur fuel when operating within twenty-four miles of the California

coastline. While California is demonstrably in need of such measures to remedy its severe air pollution, the regulation pushes the limits of federalism.

Air pollution regulation in the United States has always been a joint effort between the federal and state governments. For the most part, states have considerable freedom in determining how they will meet the federal air quality standards. However, under the federal Clean Air Act (CAA), elements of mobile source air pollution regulation are primarily the responsibility of the federal government, and states are preempted from applying certain regulations to mobile sources. California is provided an exception: the CAA waives it from preemption under certain circumstances and with Environmental Protection Agency (EPA) authorization. California’s waiver recognizes that the state has been a leader in finding creative solutions to air pollution control.

The CAA provisions dealing with pollution from nonroad mobile sources, such as ships, establish a preemption structure that is inconsistent with the analogous provisions for motor vehicles. This Note examines the role of states, and particularly California, in the regulation of nonroad mobile sources under the CAA, and concludes that CARB’s new regulation is preempted by the CAA unless CARB obtains

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3 See Clean Air Act § 209(e), 42 U.S.C. § 7543(e) (2000). To enhance clarity, the text of this Note will refer to Clean Air Act (CAA) section numbers in the text, as opposed to their codified section numbers in the United States Code. However, the footnotes will refer to the codified section numbers in the Code; see also Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1087–95 (D.C. Cir. 1996); Associated Press, Los Angeles Has the Worst Air Pollution in the United States, Government Says, ENVTL. NEWS NETWORK, Nov. 15, 2005, http://www.enn.com/today.html?id=9255 (last visited Dec. 30, 2006) [hereinafter L.A. Air Pollution]. See generally NO NET INCREASE TASK FORCE, REPORT TO MAYOR HAHN AND COUNCILWOMAN HAHN BY THE NO NET INCREASE TASK FORCE: LEGAL WORKING GROUP MEMORANDUM (2005), available at www.portoflosangeles.org/DOC/REPORT_NNI_FINAL.pdf [hereinafter No Net Increase] (discussing state authority to regulate air pollution sources).

4 Engine Mfrs. Ass’n, 88 F.3d at 1078; No Net Increase, supra note 3, at 5-4.

5 Engine Mfrs. Ass’n, 88 F.3d at 1078–79.

6 42 U.S.C. § 7543; Engine Mfrs. Ass’n, 88 F.3d at 1079.

7 42 U.S.C. § 7543; Engine Mfrs. Ass’n, 88 F.3d at 1079.

8 Engine Mfrs. Ass’n, 88 F.3d at 1079 (quoting Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979)).

authorization from EPA.\textsuperscript{10} However, by slightly altering the regulation, CARB may be able to avoid preemption and enforce emissions restrictions without EPA authorization.\textsuperscript{11}

Part I provides an overview of the trade activity occurring at California’s ports, as well as the pollution it causes. Part II details the EPA’s efforts to regulate air pollution from nonroad sources under the CAA. Part III describes the statutory role of states in regulating air pollution from mobile sources, the scope of preemption under the CAA, and several cases concerning states’ authority. Finally, Part IV reviews the analysis for determining the CAA’s preemptive effect on a particular regulation, applies the analysis to California’s regulation, and suggests an alteration which could allow California to avoid preemption.

**I. Overview: California’s Ports & Pollution**

**A. International Trade and Economic Impact**

California is home to the busiest ports in the nation.\textsuperscript{12} Large volumes of international goods enter the United States through the Ports of Los Angeles, Long Beach, and Oakland, which are the first, second, and fourth busiest ports in the country, respectively.\textsuperscript{13} From the ports, imports are distributed by truck and rail all over California and the U.S.\textsuperscript{14}

The quantity of goods imported through California’s ports is increasing rapidly.\textsuperscript{15} In 2004, 1900 ships visited California’s ports, eighty-seven percent of which were foreign vessels.\textsuperscript{16} Estimates show

\textsuperscript{10} See 42 U.S.C. § 7543(e).
\textsuperscript{12} CAL. ENVT'L. PROT. AGENCY AIR RES. BD., DRAFT EMISSION REDUCTION PLAN FOR PORTS AND INTERNATIONAL GOODS MOVEMENT IN CALIFORNIA, at II-8 (2005) (on file with author) \textsuperscript{[hereinafter Draft Emission Reduction Plan].}
\textsuperscript{13}Id. at II-6; Port of Oakland: Facts & Figures, http://www.portofoakland.com/maritime/factsfig.asp (last visited Dec. 30, 2006). The majority of international trade conducted through California ports is with East Asian countries, including China, Japan, Singapore. The Port of Long Beach: Overview, http://www.polb.com/about/overview/default.asp (last visited Dec. 30, 2006) \textsuperscript{[hereinafter Port of Long Beach: Overview].}
\textsuperscript{14} DRAFT EMISSION REDUCTION PLAN, supra note 12, at II-1.
\textsuperscript{15} Id. at II-2. For example, the container traffic at the Port of Oakland doubled between 1990 and 2004, and the number of containers at the Ports of Los Angeles and Long Beach increased by forty percent from 2000 to 2004. \textit{Id.}
\textsuperscript{16} Id. at III-6. This number does not include the number of port visits by individual ships, many of which make numerous trans-ocean trips annually. The Ports of Los Angeles and Oakland report significantly higher numbers for the number of annual cargo vessel arrivals, with 2646 and 1902 arrivals respectively. See The Port of Los Angeles: Frequently Asked Questions (FAQs), http://www.portoflosangeles.org/about_faq.htm#14 (last visited Dec. 30,
that freight volumes will more than double in the Los Angeles region over the next twenty years.\footnote{Draft Emission Reduction Plan, \textit{supra} note 12, at II-2.}

This trade through California’s ports is essential to the health of the state’s economy.\footnote{Id. at ES-1; The Port of Los Angeles: An Economic Powerhouse, http://www.portoflosangeles.org/about_economicimpact.htm (last visited Dec. 30, 2006) [hereinafter Port of Los Angeles: Economic Powerhouse].} The Port of Los Angeles alone generates \$1.4 billion in state and local tax revenue annually,\footnote{Port of Los Angeles: Economic Powerhouse, \textit{supra} note 18.} while the Ports of Los Angeles and Long Beach together account for approximately \$5.4 billion annually in United States Customs revenues.\footnote{Port of Long Beach: Overview, \textit{supra} note 13.} Additionally, the Port of Los Angeles provides 16,360 jobs directly, and the movement of goods through the ports ultimately supplies a total of 259,000 jobs in the region, approximately one in twenty-nine jobs.\footnote{See Draft Emission Reduction Plan, \textit{supra} note 12, at II-1.} The growth of the ports continually creates more jobs within the state, many with significant opportunities for advancement.\footnote{See \textit{id.} at II-2.}

\subsection*{B. Impact of Port Activities on Air Quality}

The international trade activities conducted at California’s ports and throughout the state also contribute significantly to California’s severe air pollution problem.\footnote{L.A. Air Pollution, \textit{supra} note 3. The Los Angeles South Coast Air Basin is deemed a nonattainment area for ozone, carbon monoxide, and particulate matter because it exceeds the National Ambient Air Quality Standards (NAAQS) established by the Environmental Protection Agency (EPA) for those pollutants. Scorecard: The Pollution Information Site, http://scorecard.org/env-releases/cap/naa-counties.tcl?naa_id=084 (last visited Dec. 30, 2006).} The Los Angeles region has the worst air pollution in the country.\footnote{See \textit{Draft Emission Reduction Plan,} \textit{supra} note 12, at chs. I–II.} The activities at the adjacent Ports of Los Angeles and Long Beach, the two busiest container ports in the country, emit large amounts of diesel particulate matter (PM), nitrogen oxides (NOx), and sulfur oxides (SOx), pollutants which are associated with asthma, cancer, and other health problems.\footnote{Draft Emission Reduction Plan, \textit{supra} note 12, at II-2.} Currently,
the emissions of these pollutants attributable to the ports cause an estimated 750 premature deaths each year.\textsuperscript{26}

Every stage of the goods movement process creates air pollution.\textsuperscript{27} The ships that carry the goods use “high emitting [diesel] bunker fuel,” which emits pollutants both during transit and through power generation when berthed in the harbor.\textsuperscript{28} Once in the harbor, smaller boats such as tugboats support the large ocean vessels; cargo handling equipment such as cranes unload the ships; and trucks and locomotives transport the goods from the ports to other locations in California and the rest of the country.\textsuperscript{29} Each of these uses—harbor craft, cargo handling equipment, trucks, and locomotives—uses diesel fuel that emits PM, NOx, and SOx into the air.\textsuperscript{30}

As of 2001, ships were responsible for forty-three percent of the PM, twenty-three percent of the NOx, and ninety-two percent of the SOx emitted by the goods movement industry in California.\textsuperscript{31} Estimates show that by the year 2020, ships will be the greatest contributor of PM, NOx, and SOx emissions attributable to the goods movement industry in California.\textsuperscript{32} This predicted proportional increase is due in part to new engine standards and fuel requirements that are expected to reduce emissions from trucks, locomotives, harbor craft, and cargo handling equipment.\textsuperscript{33} At the same time, trade volume is expected to continue to increase, thus increasing the emissions of the now-unregulated ships.\textsuperscript{34}

While their emissions rates are greater, ships create proportionately smaller health effects than land sources such as trucks, locomotives, and cargo handling equipment because pollutants disperse as they move farther from their source.\textsuperscript{35} Pollutants emitted from ships over the ocean travel further, and are therefore less concentrated when they reach a community, than pollutants emitted over land.\textsuperscript{36} Nonetheless, ships provide large amounts of pollutants that contribute

\begin{itemize}
  \item \textsuperscript{26} Id. at I-2, II-2.
  \item \textsuperscript{27} Id. at ES-4 to ES-6.
  \item \textsuperscript{28} Id. at ES-4, II-1.
  \item \textsuperscript{29} Id. at II-1.
  \item \textsuperscript{30} Id. at II-4, tbl.II-1.
  \item \textsuperscript{31} DRAFT EMISSION REDUCTION PLAN, supra note 12, at II-5, fig.II-3.
  \item \textsuperscript{32} Id. at II-9, fig.II-7.
  \item \textsuperscript{33} Id. at II-4.
  \item \textsuperscript{34} Id. at II-4, II-7.
  \item \textsuperscript{35} Id. at II-2.
  \item \textsuperscript{36} Id.
\end{itemize}
to the air pollution problem, and unless addressed, it will only worsen as the trade volumes continue to increase over the coming decades. \(^{37}\)

C. California’s Response to Port-Related Air Pollution

Partially in response to the state’s severe air pollution, the California Environmental Protection Agency (CalEPA) and Business, Transportation, and Housing Agency have initiated a Goods Movement Action Plan (GMAP). \(^{38}\) A main goal of GMAP is to improve air quality and protect public health by reducing the amount of pollution caused by the goods movement industry in California. \(^{39}\)

Pursuant to GMAP, on December 8, 2005, the California Air Resources Board (CARB) adopted a regulation for the purpose of “reduc[ing] emissions of diesel PM, NOx, and SOx from . . . engines operated on ocean-going vessels” in coastal waters. \(^{40}\) The regulation will apply to:

any person who owns, operates, charters, rents, or leases an ocean-going vessel, including foreign-flagged vessels, within any of the Regulated California Waters, which include all California inland waters . . . and all waters . . . within 24 nautical miles, inclusive, of the California baseline, including but not limited to, the Territorial Sea, the Contiguous Zone, and any California port, roadstead, or terminal facility. \(^{41}\)

Effective January 1, 2007, \(^{42}\) the regulation will limit emission levels of PM, NOx, and SOx from the auxiliary engines of large ocean-

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\(^{39}\) Id. at III-1. The other main policy goals of the Goods Movement Action Plan (GMAP) are to generate jobs, increase mobility, relieve traffic congestion, enhance public and port safety, and improve California’s quality of life, all through improvement and expansion of California’s goods movement industry and infrastructure. Id.

\(^{40}\) CalEPA News Release, supra note 1; Proposed Regulation, supra note 2, at A-5 to A-6. The California Air Resources Board (CARB) is a department of the California Environmental Protection Agency that “oversees all air pollution control efforts in California to attain and maintain health based air quality standards.” CalEPA News Release, supra note 1.

\(^{41}\) Proposed Regulation, supra note 2, at A-1.

going vessels. There, the regulation requires that vessels’ auxiliary engines do not emit PM, NOx, or SOx in excess of what would
result from the use of “marine gas oil [or] marine diesel oil . . . with a sulfur content of no more than 0.5 percent by weight.” Compliance
with the regulation will be presumed when the vessel does in fact use the specified fuels.

II. Federal Marine Environmental Regulation: The Clean Air Act

A. Statutory Background and Structure

Under the CAA, the federal government assumes primary responsibility for regulating mobile sources of air pollution. Prior to
the CAA Amendments of 1990, nonroad sources, such as ocean vessels, were not federally regulated, although some states did regulate them. In 1990, Congress expanded the scope of federal regulation and added nonroad sources to the list of air pollution sources subject to regulation by EPA under the CAA. EPA’s regulatory power, however, is limited to emission standards on new nonroad engines and vehicles.

The CAA does not require the owners or operators of nonroad diesel vehicles to use emission-controlling engines or low-polluting fuel. Rather, the CAA applies the requirements at the production

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44 Proposed Regulation, supra note 2, at A-5 to A-6. Beginning January 1, 2010, the sulfur content of marine gas oil will be limited further to 0.1 percent by weight. Id. at A-6.

45 Id.

46 Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1079 (D.C. Cir. 1996); No Net Increase, supra note 3, at 5-4 to 5-5.

47 “Nonroad vehicle” is defined as “a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.” 42 U.S.C. § 7550(11) (2000). “Nonroad engine” is defined as “an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title or 7521 of this title.” 42 U.S.C. § 7550(10).

48 Engine Mfrs. Ass’n, 88 F.3d at 1080.


51 See id. §§ 7545, 7547.
level, both to new nonroad engines and vehicles and to the manufacturers of fuel.\footnote{Id. An important difference between the fuel provisions and the engine/vehicle provisions of the CAA is that the fuel requirements apply to specific people involved in the fuel business who must comply, while the engine/vehicle provisions apply specifically to the engines and vehicles. Id.} This approach presumably results in their use by the vehicle operators.\footnote{Id.}

B. Section 213: New Nonroad Engines and Vehicles

In section 213 of the CAA, Congress mandated that EPA promulgate regulations setting emissions standards for new nonroad engines and vehicles, including ocean vessels.\footnote{Id. § 7547.} Specifically, EPA has the authority to set emissions standards for NOx, carbon monoxide, and volatile organic compounds which are known to cause adverse health effects.\footnote{Id. § 7547(a).} The standards must “achieve the greatest degree of emission reduction achievable through the application of technology . . . which . . . will be available” to the manufacturers of the engines while taking cost and safety into account.\footnote{42 U.S.C. § 7547(a)(3). Specifically, Congress requires EPA to adopt standards which shall “achieve the greatest degree of emission reduction achievable through the application of technology . . . available for the engines or vehicles to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.” Id.}

1. EPA’s Regulations

Pursuant to this authority, EPA has promulgated emissions standards and control programs for new nonroad engines and vehicles, including marine vessels.\footnote{40 C.F.R. §§ 89, 94 (2005).} EPA has interpreted the definition of “new” to mean “show-room new . . . an engine or vehicle [i]s no longer new once it has left the retail showroom.”\footnote{Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1084 (D.C. Cir. 1996).} Thus, EPA applies the regulations to the vehicles during production, or at their original sale, but not to the use of the vehicles by their ultimate purchasers.\footnote{Id. The Engine Manufacturers Association challenged this definition of “new,” arguing instead to define “new” as engines “not in existence on the effective date of the 1990 amendments” to the CAA. However, the D.C. Circuit Court rejected this definition in favor of the EPA’s definition, which is consistent with the regulations applying to motor vehicles. Id. at 1084–87. For a further discussion of Engine Mfrs. Ass’n, see infra Part III.C.}
The ocean vessels that are subject to California’s new regulation, and of concern to this Note, are Category 3 marine diesel engines, defined by EPA as “very large marine engines used primarily for propulsion power on ocean-going vessels such as container ships, tankers, bulk carriers, and cruise ships.”\(^{60}\) EPA adopted two-tiered standards for regulating emissions from Category 3 engines.\(^{61}\) The Tier 1 standards, which were effective January 1, 2004, require new marine diesel engines to use technology that limits NOx emissions to the international standards set by the International Maritime Organization in MARPOL Annex VI.\(^{62}\) Tier 1 regulations do not apply to foreign-flag marine vessels.\(^{63}\) In fact, EPA specifically decided not to apply regulations to foreign vessels in U.S. waters, because it interpreted the CAA as not authorizing it.\(^{64}\) Even without foreign regulation, however, EPA estimates that the Tier 1 standards will reduce the NOx emissions of Category 3 engines by twenty percent by the year 2030.\(^{65}\) EPA noted that the standards of Annex VI adopted in Tier 1 have generally been followed by manufacturers since 2000, and thus immediate compliance can be reasonably expected.\(^{66}\)


\(^{61}\) Bluewater Network, 372 F.3d at 408.

\(^{62}\) Id.; Environmental Protection Agency, EPA420-12-03-004, Final Regulatory Support Document: Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder 1-1 to 1-2 (2003), available at http://www.epa.gov/otaq/regs/nonroad/marine/ci/r03004.pdf [hereinafter Support Document]; see 40 C.F.R. § 94. Annex VI, the most recent international agreement of the International Convention for the Prevention of Pollution from Ships, set limits on emissions of SOx and NOx from ship exhausts and set a 4.5% cap on the allowable sulfur content of diesel fuel used by ships. International Maritime Organization, Prevention of Air Pollution From Ships, http://www.imo.org/home.asp (Follow “Marine Environment” hyperlink; then follow “Air Pollution” hyperlink) (last visited Dec. 30, 2006) [hereinafter IMO, Prevention]. The U.S. Senate has not yet ratified the treaty, but it became effective on May 14, 2005. U.S. Department of State, Ocean Treaties, Sept. 29, 2005, available at http://www.state.gov/g/oes/rls/rm/54128.htm [hereinafter Ocean Treaties]; IMO, Prevention, supra. The issue of whether MARPOL VI affects California’s authority to enforce its new regulation is beyond the scope of this Note.

\(^{63}\) See 40 C.F.R. §§ 89.1(a), 94.1(b)(2).

\(^{64}\) Id.; Clay J. Garside, Comment, Forcing the American People to Take the Hard NOx: The Failure to Regulate Foreign Vessels Under the Clean Air Act as Abuse of Discretion, 79 Tul. L. Rev. 779, 796–98 (2005).

\(^{65}\) Bluewater Network, 372 F.3d at 408 (quoting Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. at 9746, 9757, 9762).

\(^{66}\) Id. at 410.
Meanwhile, EPA is considering more stringent standards for Tier 2, which will go into effect no later than April 27, 2007. EPA is also considering whether the CAA authorizes EPA to regulate foreign vessels, and if so, whether to begin such regulation.

2. EPA’s Responsibilities as Defined in Bluewater Network v. EPA

In Bluewater Network v. EPA, an environmental group challenged EPA’s decision to defer regulation of engines on foreign vessels. Bluewater argued that the CAA requires EPA to adopt emissions standards for foreign vessels, but the D.C. Circuit Court disagreed. During the rulemaking process, EPA had found that delaying regulation of foreign vessels would not make any significant difference, because foreign vessels were already expected to comply with MARPOL Annex VI standards regardless of what EPA did. Furthermore, the language of the CAA did not clearly require EPA to apply regulations to foreign vessels. Accordingly, the court found that EPA’s decision to postpone regulations of foreign vessels adequately fulfilled its responsibilities under the statute.

Despite the U.S. Senate’s refusal to ratify MARPOL Annex VI, the emissions standards promulgated by EPA are equivalent to those of Annex VI. Thus, while the U.S. is not a party to the treaty, it has chosen to apply the same standards as the majority of the international community with which the U.S. conducts trade.

C. Section 211: Fuel Requirements

In section 211 of the CAA, Congress authorized EPA to regulate fuel and fuel additives—including fuel used by nonroad engines and vehicles—in order to decrease the adverse health and environmental

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67 Id. at 408, 410 (quoting Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. at 9746, 9757, 9762).
69 372 F.3d at 412.
70 Id.
71 Id. at 413.
72 Id. at 412.
73 Id. at 413.
74 See Ocean Treaties, supra note 62.
75 See Garside, supra note 64, at 788.
effects of fuel. Specifically, EPA may impose requirements on manufacturers and processors of fuel prior to the sale or introduction of the fuel into commerce. Congress also set sulfur content limits for motor vehicle diesel fuel, by prohibiting the “manufacture, [sale], supply, offer for sale or supply, dispense, transport, or introduction] into commerce” of any motor vehicle fuel containing greater than 0.05% sulfur by weight. Additionally, EPA had authority to require importers to segregate diesel fuel not intended for use in motor vehicles from motor vehicle diesel fuel. However, Congress did not set sulfur content requirements for nonroad diesel fuel like that used in large ocean vessels, but instead gave EPA discretion to make that determination.

Accordingly, EPA established allowable levels of sulfur in diesel fuels used by marine engines that will reduce their PM and SOx emissions. These regulations are applicable to refiners of diesel fuel used by nonroad, locomotive, and marine engines. EPA will implement the limit in three phases, the first phase effective June 1, 2007, with lower levels of sulfur allowed in each succeeding phase.

III. STATE POWER TO REGULATE EMISSIONS FROM MOBILE SOURCES

A. MOTOR VEHICLE REGULATION

Under the CAA, the “States and the Federal Government [are] partners in the struggle against air pollution,” although California has broader power than other states. Since Congress enacted the CAA, a primary role of the states has been the regulation of stationary

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78 Id. § 7545(a).
79 Id. § 7545(i).
80 Id. § 7545(i)(2).
81 Id. § 7545(i).
82 Env’tl. Prot. Agency, EPA420-R-04-007, Final Regulatory Analysis: Control of Emissions from Nonroad Diesel Engines ES-5 (2004), available at http://www.epa.gov/nonroad-diesel/2004fr/420r04007a.pdf [hereinafter Final Regulatory Analysis]. The sulfur in diesel fuel impairs the emission control devices on the engines, so an additional benefit of using low-sulfur fuel is that it “will enable advanced high efficiency emission control technology to be applied to nonroad engines” that will achieve even greater emission reductions than merely the use of the fuel itself. Id.
83 Id.
84 Id. at ES-5 to ES-6.
sources of air pollution, such as factories. However, the regulation of mobile sources of air pollution, such as motor vehicles, is left primarily to the federal government. Congress eventually adopted section 209(a) of the CAA, which expressly preempts states from regulating new motor vehicles. There were two rationales for preemption: First, state regulation of motor vehicles would complicate enforcement due to the frequency with which motor vehicles move across state boundaries; and second, different regulations in each state would create tremendous difficulty for automobile manufacturers and would severely obstruct interstate commerce.

Despite the potential problems with state regulation of new motor vehicles, Congress acknowledged that California already led the country in regulating automotive pollution. Congress granted California an exemption from preemption under section 209(a), and thereby allowed California to continue its regulation of emissions from new motor vehicles. In the 1977 Amendments of the CAA, Congress permitted states to choose between the California regulations and the federal regulations.

Additionally, Congress explicitly preserved the power of states to regulate motor vehicles in certain ways. Section 209(d) provides “[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.” This provision has generally been interpreted as maintaining state power to regulate pollution from motor vehicles once they are no longer new; for instance, through in-use regulations such as carpool lanes and other incentive programs.

86 Engine Mfrs. Ass’n, 88 F.3d at 1078–79; see 42 U.S.C. § 7475.
87 Engine Mfrs. Ass’n, 88 F.3d at 1079.
88 42 U.S.C. § 7543(a); Engine Mfrs. Ass’n, 88 F.3d at 1079. The text of section 209(a) provides, “[n]o State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.” 42 U.S.C. § 7543(a).
90 Engine Mfrs. Ass’n, 88 F.3d at 1079.
91 42 U.S.C. § 7543(b) (1); Engine Mfrs. Ass’n, 88 F.3d at 1079–80.
92 42 U.S.C. § 7507; Engine Mfrs. Ass’n, 88 F.3d at 1080.
93 42 U.S.C. § 7543(d).
94 Id.
95 Engine Mfrs. Ass’n, 88 F.3d at 1094.
B. State Regulatory Power of Nonroad Engines

In the Clean Air Act Amendments of 1990, Congress mandated EPA regulation of nonroad engines and vehicles.\(^96\) To some extent, it replicated the state-federal regulatory regime of motor vehicles.\(^97\) First, the statute explicitly prohibits any state from setting emissions standards relating to new locomotive engines and to new engines in construction and farm equipment that are less than 175 horsepower.\(^98\) Next, section 209(e) explicitly preempts states from adopting their own emission standards for other nonroad engines and vehicles, except for California, which may avoid federal preemption of “standards and other requirements relating to the control of emissions from [nonroad] vehicles or engines” under certain circumstances.\(^99\)

Specifically, section 209(e)(2) provides: “In the case of any nonroad vehicles or engines other than [new locomotive engines and smaller engines in farm or construction equipment], the [EPA] Administrator shall . . . authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines . . . .”\(^100\) EPA may authorize California’s “standards and other requirements” only if “California determines that [its] standards will be at least as protective of the public health and welfare as the applicable Federal standards.”\(^101\) Furthermore, EPA must deny authorization if it finds that California’s standards are unnecessary, or if the standards and enforcement procedures are inconsistent with the rest of section 209.\(^102\)

Every other state may adopt California’s “standards relating to the control of emissions from nonroad vehicles or engines.”\(^103\) Congress

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\(^97\) See id.

\(^98\) 42 U.S.C. § 7543(c) (1). These types of engines are not at issue in this Note.

\(^99\) Id. § 7543. California’s preemption waiver in this section is different from its exemption for motor vehicle regulations in section 209(b) (1) because it does not specifically use the word “new” to describe the nonroad vehicles that California may regulate. See id.; supra notes 89–92 and accompanying text.

\(^100\) 42 U.S.C. § 7543(e)(2). Ocean vessels and their engines fall within the meaning of “nonroad vehicles” under the statute. See id. The CAA defines nonroad engine as “an internal combustion engine that is not used in a motor vehicle” and nonroad vehicle as one that “is powered by a nonroad engine and is not a motor vehicle.” Id. § 7550.

\(^101\) Id. § 7543(e)(2)(A).

\(^102\) Id.

\(^103\) Id. § 7543(e)(2)(B) (emphasis added) (“Any state other than California . . . may adopt and enforce . . . standards relating to the control of emissions from nonroad vehi-
did not allow for other states to adopt California’s “other requirements” relating to control of emissions from nonroad vehicles.104

Unlike other related parts of the CAA, section 209(e) does not use the word “new” to describe the nonroad engines that California may regulate with EPA authorization.105 Instead, the word “any” describes the nonroad engines that California may regulate.106 In contrast, EPA specifically has the authority to regulate emissions of only new nonroad sources.107 Additionally, the corresponding portion of section 209, which provides waiver from federal preemption for motor vehicle emissions regulations, specifically applies to “standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines.”108

C. Engine Manufacturers Ass’n v. EPA and Implied Preemption

One case has interpreted the breadth of state power to regulate emissions of nonroad engines and vehicles under CAA section 209(e).109 Engine Manufacturers Ass’n v. EPA examined two main issues: (1) which nonroad engines and vehicles states may regulate; and (2) what types of regulations states may enforce.110 In Engine Manufacturers Ass’n, the Engine Manufacturers Association (EMA) challenged several aspects of EPA’s interpretation of the scope of implied preemption under section 209(e).111 Two of these aspects are relevant to this Note: (1) whether section 209(e) preempts states from regulating non-new engines and vehicles; and (2) whether in-use regulations are “other requirements” under section 209(e) and are therefore implicitly preempted.112

The parties agreed that the structure of section 209(e) implied preemption.113 As the D.C. Circuit Court explained:

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104 Id.
105 Id. §§ 7543(a), (b), (e), 7547; see Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996).
106 42 U.S.C. § 7543(e)(2)(A) (“In the case of any nonroad vehicles or engines other than those referred to in [section 209(e)(1)] . . . .” (emphasis added)).
107 Id. §§ 7543(e)(2)(A), 7547(a)(3).
108 Id. § 7543(a) (emphasis added).
109 See Engine Mfrs. Ass’n, 88 F.3d 1075.
110 Id. at 1087–94.
111 Id. at 1082–94.
112 Id. at 1078.
113 Id. at 1087. Courts may find that a federal law implicitly preempts a state law when “the federal statute’s structure and purpose, or nonspecific statutory language, reveal clear, but implicit, preemptive intent.” 81A C.J.S. States § 51 (2005).
Obviously, if no state regulation were preempted, California would have no need to seek authorization for its regulations, and other states would not need to opt in to the California rules. Thus, the California authorization provision assumes the existence of a category of sources that are subject to pre-emption. In other words, states must be preempted from adopting any regulation for which California could receive authorization.\footnote{Engine Mfrs. Ass’n, 88 F.3d at 1087–88 (citations omitted).}

However, the parties disagreed over which nonroad engines and vehicles, and which types of regulations, were covered by the preemptive provisions of the statute.\footnote{Id. at 1087.}

1. Nonroad Vehicles States Can Regulate

Specifically, EMA argued that the implied preemption of section 209(e) was not limited to new nonroad engines as EPA had decided.\footnote{Id.} Instead, EMA contended that the statute’s preemption covered state regulation of any nonroad engines and vehicles—new and non-new—other than the locomotive, construction, and farm engines covered in section 209(e)(1).\footnote{Id.; see supra note 98 and accompanying text.} EMA’s argument relied on the “plain statement” of the statute.\footnote{Engine Mfrs. Ass’n, 88 F.3d at 1088.} The language of the statute itself—the absence of the word “new” from section 209(e)(2), and the presence of the word “any” to modify the nonroad engines and vehicles for which California may seek authorization to regulate\footnote{See supra notes 105–108 and accompanying text.}—indicates that the preemption is not limited to “new” nonroad engines and vehicles.\footnote{Engine Mfrs. Ass’n, 88 F.3d at 1088.}

EPA argued, however, that the word “new” should be read into section 209(e)(2) in order to avoid a discrepancy in the authorization regime.\footnote{Id. at 1088–89.} Because EPA is only authorized to regulate new nonroad engines and vehicles, there would be no applicable federal standards to compare to California’s regulations of non-new, nonroad sources in the authorization process as required by section 209(e)(2).\footnote{Id. at 1088–89.} Therefore, EPA argued, “the statute does not provide any basis for the EPA to determine whether to authorize a proposed California regula-
tion.” Furthermore, EPA argued, Congress could not have intended to leave a regulatory gap by preemption states from regulating non-new engines and vehicles that EPA cannot regulate itself.

After finding nothing helpful in the legislative history, the D.C. Circuit Court found EMA’s literal reading of the statute—that state regulation of both new and non-new engines and vehicles was preempted—to be correct. The absence of the word “new” in section 209(e)(2) is not insignificant, and therefore EPA’s interpretation that states were only preempted from regulating “new” nonroad sources was erroneous. Section 209(e)(2), the court found, preempts states from regulating both new and non-new sources, and requires California to obtain authorization for regulation of such sources.

The court reasoned that despite the seemingly odd structure of the statute, the word “new” cannot be read into the statute without evidence that Congress intended such a reading of the statute. EPA’s contention that the odd result demonstrated that Congress simply could not have intended the statute to be read literally was unconvincing and inappropriate without any support from the legislative history or elsewhere. Instead, the court declared, “[i]t is . . . conceivable that Congress meant to require California to come to the EPA before regulating sources not within the EPA’s own regulatory authority.”

Additionally, the court did not agree that the “regulatory gap” referred to by EPA required a nonliteral reading of the statute, because all nonroad sources were subject to regulation under the statute. Specifically, the court found, “the statute does not [actually] exempt any class of nonroad sources from regulation,” and thus any gap is insignificant.

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123 Engine Mfrs. Ass’n, 88 F.3d at 1089.
124 Id.
125 Id. at 1090–92.
126 Id. at 1090.
127 See id. at 1090–91.
128 Id. at 1092.
129 Engine Mfrs. Ass’n, 88 F.3d at 1092–93 (“Essentially, the EPA concludes that the conferees inadvertently left out the word new in § 209(e)(2), and the EPA is, in fact, adhering to what was intended. Without a showing that the text is demonstrably at odds with Congressional intent, much less that the regulatory scheme is unworkable or absurd, however, the court must take Congress at its word.”).
130 Id. at 1090.
131 Id.
132 Id.
2. Types of Regulations States Can Enforce

Next, EMA challenged EPA’s interpretation of what types of regulations states are permitted to adopt. EMA had decided that states’ in-use regulations are not preempted under section 209(e)(2) because they are “neither standards [nor] other requirements relating to the control of emissions.” EMA challenged this decision on the grounds that in-use regulations aimed at reducing emissions are in fact “other requirements relating to the control of emissions” that states are preempted from adopting and enforcing. Thus, EMA argued that states are only permitted to make in-use regulations that are unrelated to emissions control.

Instead of independently analyzing the language of the statute, the court deferred to EPA’s interpretation, and noted EMA’s failure to offer a satisfying alternative interpretation. EPA contended that the “other requirements” that states are preempted from adopting under section 209(e) are only “certification, inspection, or approval” requirements which relate to the control of emissions. EPA pointed out that in other parts of section 209, the words “require” and “requirement” referred to “certification, inspection, or approval” relating to emissions. EPA accordingly argued, and the court accepted, that the word “requirements” in section 209(e)(2) must also refer to certification, inspection, or approval requirements, and not to in-use requirements, consistent with the rest of section 209.

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133 Id. at 1093.
134 Id. at 1094. In-use regulations are applied to the actual use of the engine or vehicle, such as carpool lanes and idling restrictions. See id.
136 Engine Mfrs. Ass’n, 88 F.3d at 1093; see 42 U.S.C. § 7543(e)(2). The court noted that EMA did not challenge EPA’s previously approved interpretation of “standard” to mean “quantitative levels of emissions.” Engine Mfrs. Ass’n, 88 F.3d at 1093 (citing Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1112–13 (D.C. Cir. 1979)).
137 Engine Mfrs. Ass’n, 88 F.3d at 1094.
138 See id. at 1093–94.
139 Id. at 1093.
140 Id.; see 42 U.S.C. § 7543.
141 Engine Mfrs. Ass’n, 88 F.3d at 1093. EMA argued that the absence of the words “certification, inspection, or approval” indicated Congress’s intent to assign a different meaning to “requirement” in section 209(e)(2). Id. The court replied that EMA’s argument did not take into account that section 209(e)(2)(B) gives states the power only to adopt California’s “standards,” not California’s “other requirements.” Id. Without further reasoning, the court concluded that “[t]hough the text does not compel the EPA’s interpretation, it does not forbid it either.” Id.
Once it determined the meaning of “requirements” in section 209(e), the court also found that section 209(d) preserves the states’ rights to enforce in-use regulations of nonroad engines and vehicles. The court did not formulate its own interpretation of what this cross-reference means. Again, the court simply deferred to EPA’s interpretation, noting EMA’s “fail[ure] to offer any coherent alternative.”

EPA argued that because section 209(d) was already in effect at the time that sections 213 and 209(e) were adopted, the reference in section 213 to section 209 could reasonably be interpreted as adding nonroad vehicles to the end of the paragraph in section 209(d). EPA used this interpretation to support its position that section 209(d) preserves the rights of states to regulate the use of nonroad vehicles, in addition to motor vehicles.

Acknowledging the ambiguity of section 209(e) when read in conjunction with sections 209 and 213 of the CAA, the court adopted

\[\text{References:}\]

\[142\] Id. at 1093–94.
\[143\] 42 U.S.C. § 7543(d).
\[144\] Engine Mfrs. Ass’n, 88 F.3d at 1094.
\[145\] Id. at 1093–94.
\[146\] 42 U.S.C. § 7547(d); Engine Mfrs. Ass’n, 88 F.3d at 1094; see 42 U.S.C. § 7543.
\[147\] See Engine Mfrs. Ass’n, 88 F.3d at 1094.
\[148\] Id.
\[149\] Section 213 of the CAA concerns only nonroad vehicles and engines. See supra Part II.B.
\[150\] Engine Mfrs. Ass’n, 88 F.3d at 1093–94.
\[151\] See 42 U.S.C. §§ 7543(d)–(e), 7547; Engine Mfrs. Ass’n, 88 F.3d at 1094. EPA’s interpretation amounted to a change in the text of section 209(d) to say the following: “Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor or nonroad vehicles.” See 42 U.S.C. § 7543(d); Engine Mfrs. Ass’n, 88 F.3d at 1094.
EPA’s view that the statutory structure must preserve the states’ right to impose in-use regulations on nonroad vehicles.\textsuperscript{152} After deciding that section 209(d) could be interpreted to include nonroad vehicles and engines, EPA and the court further supported their conclusion with comparison to the motor vehicle regulatory regime, which has always permitted states to adopt in-use regulations intended to control emissions, “such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles.”\textsuperscript{153}

3. EPA’s Responding Regulations

In response to the D.C. Circuit’s decision, EPA changed its regulations promulgated pursuant to section 209(e).\textsuperscript{154} First, EPA expressly adopted the court’s decision by clarifying that California is required to obtain EPA authorization to enforce all of its “adopted standards and other requirements relating to the control of emissions from nonroad vehicles or engines,” instead of only requiring EPA authorization for California’s regulation of new nonroad vehicles or engines.\textsuperscript{155} Furthermore, EPA clarified its opinion that states are not “precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer new.”\textsuperscript{156} Thus, according to EPA, CAA section 209(e) does not require California to obtain authorization to enforce a regulation limiting the sulfur concentration of fuel used by large ocean vessels, because it is a regulation of their use and operation.\textsuperscript{157} The California Air Resources Board also takes this position in its statement of legal authority for adopting and enforcing the new regulation.\textsuperscript{158}

\textsuperscript{152} \textit{Engine Mfrs. Ass’n}, 88 F.3d at 1094.
\textsuperscript{153} \textit{Id}.
\textsuperscript{155} 62 Fed. Reg. at 67,735; \textit{see} 40 C.F.R. § 85.1604.
D. The Definition of Standards: Engine Manufacturers Ass’n v. South Coast Air Quality

The D.C. Circuit’s ruling that states are not preempted by section 209(e) from adopting in-use regulations for nonroad engines and vehicles is questionable in light of the Supreme Court’s more recent decision in Engine Manufacturers Ass’n v. South Coast Air Quality Management District.\textsuperscript{159} In South Coast Air Quality, EMA—once again the plaintiff—challenged regulations adopted by the South Coast Air Quality Management District (SCAQMD).\textsuperscript{160} The challenged regulations, collectively called the Fleet Rules, applied to the operators of fleets of motor vehicles, such as public transit vehicles, urban buses, street sweepers, waste collection vehicles, and taxicabs, among others.\textsuperscript{161} The Fleet Rules prescribed the types of vehicles that operators were permitted to purchase or lease for their fleets, requiring either that the vehicles were alternatively fueled,\textsuperscript{162} or that they meet certain emission specifications of the state.\textsuperscript{163}

EMA challenged the Fleet Rules on the grounds that they were prohibited by the motor vehicle preemption provisions of section 209.\textsuperscript{164} The District Court of California granted summary judgment in favor of the defendants, holding that the Fleet Rules were not “standards” within the meaning of section 209.\textsuperscript{165} Instead, the District Court reasoned, they only regulated the purchase of vehicles, distinguishable from the regulation of sales which mandate that manufacturers of engines and vehicles meet certain emissions requirements.\textsuperscript{166}

\textsuperscript{159} See 541 U.S. 246 (2004).

\textsuperscript{160} Id. at 249. The South Coast Air Quality Management District is the California entity responsible for developing the Los Angeles basin’s comprehensive plan for reducing emissions and achieving state and federal ambient air quality standards. Id. (citing CAL. HEALTH & SAFETY CODE ANN. § 40402(e) (West 1996)).

\textsuperscript{161} Id.

\textsuperscript{162} Alternative-fuel vehicles are defined in various ways, but generally include those that are powered by something other than diesel fuel, such as liquefied natural gas, liquefied petroleum gas, methanol, electricity, or fuel cells. Id. at 249 n.1.

\textsuperscript{163} Id. at 249–50.

\textsuperscript{164} Id. at 251. Section 209(a) prohibits states from adopting “standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines.” Clean Air Act § 209(a), 42 U.S.C. § 7543(a) (2000).

\textsuperscript{165} S. Coast Air Quality, 541 U.S. at 251.

\textsuperscript{166} Id. at 251–52. “Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard.” Id. (quoting Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1118 (C.D. Cal. 2001)).
Justice Scalia, writing for the majority of eight,\textsuperscript{167} rejected the District Court’s reasoning.\textsuperscript{168} The Supreme Court held that equating the Fleet Rules with “standards” did not depend on whether they regulate the purchase or sale of vehicles, but rather depended on whether they fall within the definition of the word standard, “assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.”\textsuperscript{169}

Accordingly, the Court turned to the dictionary to determine the meaning of “standard.”\textsuperscript{170} Webster’s Dictionary defines standard as that which “is established by authority, custom, or general consent, as a model or example; criterion; test.”\textsuperscript{171} Thus, the Court found:

\[\text{the criteria referred to in § 209(a) relates to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of “standard” throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, or emission-control technology with which they must be equipped.}\textsuperscript{172}

In addition, the Court explicitly rejected the argument that under the CAA, “standards” only include production mandates applicable to manufacturers.\textsuperscript{173} The Court explained that standards are altogether different from the method of their enforcement.\textsuperscript{174} “While standards target vehicles or engines, standard-enforcement efforts . . . can be directed to manufacturers or purchasers.”\textsuperscript{175} The CAA does not limit enforcement of emissions standards to the manufacturers of

\textsuperscript{167} Justice Souter was the lone dissenter. See \textit{id.} at 259 (Souter, J., dissenting).
\textsuperscript{168} \textit{id.} at 252 (majority opinion).
\textsuperscript{169} \textit{id.} (quoting Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).
\textsuperscript{170} \textit{id.} at 252–53.
\textsuperscript{171} \textit{S. Coast Air Quality}, 541 U.S. at 253–54 (quoting WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945)).
\textsuperscript{172} \textit{id.} at 253 (internal citations omitted).
\textsuperscript{173} \textit{id.}
\textsuperscript{174} \textit{id.}
\textsuperscript{175} \textit{id.} at 253.
vehicles, but rather allows also for standard enforcement against vehicle sellers and purchasers.\(^{176}\)

The Supreme Court ordered the trial court to consider several issues in light of its decision.\(^{177}\) The Court recognized that several issues had not been raised on appeal that could affect the overall result of the case.\(^{178}\) On remand, the District Court of Central California addressed the issues that had not been heard before the Supreme Court, and ultimately found that the Fleet Rules were not preempted by section 209.\(^{179}\) The court’s reasoning was unrelated to the Supreme Court’s definition of standard.\(^{180}\) Instead, the court found that the application of the Fleet Rules to state and local governments falls within the market participant doctrine, which provides that actions by a state which are proprietary, rather than regulatory, are not preempted by federal law unless Congress expressly preempts such proprietary conduct.\(^{181}\)

**IV. Applying Section 209(e) to California’s New Regulation**

**A. Regulatory Structure Under Section 209(e)**

Together, the Supreme Court’s decision in *Engine Manufacturers Ass’n v. South Coast Air Quality Management District* and the D.C. Circuit Court’s decision in *Engine Manufacturers Ass’n v. EPA* clarify that CAA sections 209(e) and 213 create a multi-part regulatory structure for nonroad vessels.\(^{182}\) While California and EPA share regulatory authority in a seemingly odd way, other states are wholly preempted from making any “standard or other requirement relating to the control of emissions” from nonroad vehicles.\(^{183}\)

When new nonroad vehicles and engines are the subject of the regulation, California and EPA share dual authority to adopt and enforce “standards and other requirements relating to the control of...
emissions.”\textsuperscript{184} However, California must obtain EPA authorization, and must fulfill the other statutory requirements of section 209(e) by showing that the state has a need for the regulations, and that they will be at least as protective of the public health as federal standards.\textsuperscript{185}

When non-new nonroad engines are the subject of the regulation, California has the sole authority to adopt and enforce “standards and other requirements relating to the control of emissions.”\textsuperscript{186} Again, however, California must obtain EPA authorization.\textsuperscript{187} While it does seem odd that Congress would structure a regulatory regime in this way—odd enough that EPA’s argument that Congress must have made a mistake in leaving out the word “new” is plausible—the statute, on its face, requires this reading.\textsuperscript{188}

Lastly, when the regulations are neither “standards [nor] other requirements relating to the control of emissions,” states are not preempted from adopting and enforcing regulations against any nonroad engines or vehicles.\textsuperscript{189} Similarly, California is not required to obtain EPA authorization for such regulations.\textsuperscript{190}

**B. Preemption Analysis Under Section 209(e)**

The first question when evaluating the preemptive effect of section 209(e) on a regulation is whether the regulation is a “standard or other requirement relating to the control of emissions.”\textsuperscript{191} If not, then the regulation is not preempted by the CAA.\textsuperscript{192} However, if the regulation is a standard or other requirement, then it is preempted for all states except California.\textsuperscript{193} California, however, must look at which vehicles it regulates; if it regulates vehicles covered by section 209(e) (1), then it is

\textsuperscript{184} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1090.

\textsuperscript{185} 42 U.S.C. § 7543(e) (2).

\textsuperscript{186} Id.; see Engine Mfrs. Ass’n, 88 F.3d at 1090–92.

\textsuperscript{187} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1091.

\textsuperscript{188} Engine Mfrs. Ass’n, 88 F.3d at 1092–93 (“Without a showing that the text is demonstrably at odds with Congressional intent, much less that the regulatory scheme is unworkable or absurd, however, the court must take Congress at its word.” (citation omitted in original)).

\textsuperscript{189} See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090; see also S. Coast Air Qual- ity, 541 U.S. at 253.

\textsuperscript{190} See 42 U.S.C. § 7543(e) (2); Engine Mfrs. Ass’n, 88 F.3d at 1090.

\textsuperscript{191} See 42 U.S.C. § 7543(e) (2).

\textsuperscript{192} See supra notes 182–90 and accompanying text.

\textsuperscript{193} See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090.
preempted. If it regulates any other nonroad vehicle, then California must obtain authorization from EPA to avoid preemption.

1. The Definition of Standard: The Effect of South Coast Air Quality on the Scope of Section 209(e)’s Preemption

The Supreme Court’s decision in Engine Manufacturers Ass’n v. South Coast Air Quality Management District clarifies the preemption analysis to be applied under section 209(e). In its redefinition of “standard,” the Supreme Court effectively broadened the scope of state regulations preempted by the CAA. As a result, the D.C. Circuit Court’s decision in Engine Manufacturers Ass’n v. EPA regarding in-use regulations is highly questionable.

At the time of Engine Manufacturers Ass’n v. EPA, the D.C. Circuit Court had already approved EPA’s definition of standard to mean “quantitative levels of emissions,” and therefore summarily decided that in-use regulations were not standards. However, in South Coast Air Quality, the Supreme Court adopted a more expansive definition of standard—“a criteria relat[ing] to the emission characteristics of a vehicle or engine.” Consequently, now a court must examine whether a regulation sets a standard under this broader definition, and some in-use regulations may be standards under section 209(e), while others are not. Regulations are subject to a different scrutiny in determining whether they are “standards” that are preempted by CAA section 209(e).

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194 See 42 U.S.C. § 7543(e)(1); Engine Mfrs. Ass’n, 88 F.3d at 1090.
195 See 42 U.S.C. § 7543(e)(2); Engine Mfrs. Ass’n, 88 F.3d at 1090.
196 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 252–54. Although the Supreme Court’s decision interpreted the word “standard” as used in CAA section 209(a), which covers only motor vehicles, the Court explicitly stated that its definition of “standard” is consistent throughout CAA Title II, which contains all of section 209. S. Coast Air Quality, 541 U.S. at 253 (“This interpretation is consistent with the use of ‘standard’ throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply or emission-control technology with which they must be equipped . . . .” (internal citations omitted)). In addition, sections 209(a) and 209(e) use the same language—“standards relating to the control of emissions”—further indicating that their meaning is the same. See 42 U.S.C. § 7543(a), (e).
197 See S. Coast Air Quality, 541 U.S. at 253.
198 See id. at 252–53; Engine Mfrs. Ass’n, 88 F.3d at 1093–94; see also supra Part III.C.2.
199 See Engine Mfrs. Ass’n, 88 F.3d at 1093–94.
200 S. Coast Air Quality, 541 U.S. at 252–53; see Engine Mfrs. Ass’n, 88 F.3d at 1093.
201 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 252–53; Engine Mfrs. Ass’n, 88 F.3d at 1093.
202 See S. Coast Air Quality, 541 U.S. at 252–53; Engine Mfrs. Ass’n, 88 F.3d at 1093–94.
At the same time, the Supreme Court’s newly adopted definition of standard, while accurate according to the dictionary, is less precise than the previously accepted “quantitative level of emissions.” While the Supreme Court’s definition offers minimal guidance for what actually falls within it, the Court stated: “[In order to meet the standards,] the vehicle must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.” At the very least, this list indicates that any regulation which falls within one of the stated categories is a standard. Furthermore, the language suggests that the given categories comprise an exhaustive list of the types of regulations that are “standards relating to the control of emissions” covered by the preemption provisions of section 209(e). The Court did not indicate that this list amounts to mere examples of what is a standard under section 209, but rather implied that this list encompasses a complete description of what is a “standard relating to the control of emissions.”

2. **Engine Manufacturers Ass’n v. EPA Incorrectly Found That In-Use Regulations of Nonroad Vehicles Are Not Preempted**

EPA’s reasoning, which the court adopted in *Engine Manufacturers Ass’n v. EPA*, for finding non-preemption of in-use regulations under section 209(e) was unmistakably flawed. EPA relied on a comparison with states’ accepted power to adopt in-use regulations intended to control emissions from motor vehicles. However, blindly applying the same preemption analysis to nonroad engines is erroneous because section 209(e) preempts a broader range of regulations for nonroad vehicles than section 209(a) does for motor vehicles.

Because section 209(a) only preempts states from adopting emissions standards for *new* motor vehicles, in-use regulations of motor vehicles are, by definition, never preempted. By the time a motor vehicle is “in-use,” it is no longer new, and therefore not covered by

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203 *S. Coast Air Quality*, 541 U.S. 252–53; see *Engine Mfrs. Ass’n*, 88 F.3d at 1093.
204 *S. Coast Air Quality*, 541 U.S. at 253.
205 See id.
206 42 U.S.C. § 7543; see *S. Coast Air Quality*, 541 U.S. at 253.
207 42 U.S.C. § 7543; see *S. Coast Air Quality*, 541 U.S. at 253.
208 See 88 F.3d at 1093–94.
209 See supra note 135 and accompanying text.
210 See supra Parts III.C.1, III.D.
211 See 42 U.S.C. § 7543(a).
the express preemption of section 209(a).

In contrast, section 209(e) preempts states from adopting emissions standards for both new and non-new nonroad vehicles. Therefore, using the shorthand term “in-use” to describe a regulation of a nonroad source does not address any relevant characteristic in the preemption analysis. Regardless of whether a vehicle is new, non-new, or in-use, the relevant question remains whether a state regulation is a “standard or other requirement relating to the control of emissions.”

C. CARB Must Obtain EPA Authorization for the New Regulation

1. California’s Regulation Is the Type Which Requires EPA Authorization

California must obtain EPA authorization to enforce its new regulation, because it is a “standard relating to the control of emissions.” The California Air Resources Board (CARB) maintains that EPA authorization is not required because the new rule is an in-use regulation, but this does not address the proper question of whether the regulation is a “standard” as defined by the Supreme Court in South Coast Air Quality.

The first question is whether California’s new regulation—which prohibits Category 3 engines from emitting levels of PM, NOx, or SOx higher than the rates achievable by use of certain fuels—imposes “standards . . . relating to the control of emissions from [nonroad] vehicles or engines.” If this question is answered in the affirmative, then California must obtain EPA authorization for the regulations.

The regulation is a standard if it sets “criteria . . . relat[ing] to the emission characteristics of a vehicle or engine . . . [such as a requirement that] a vehicle must not emit more than a certain amount of a

212 See id.

213 See 42 U.S.C. § 7543(e); supra Part III.C.1.

214 See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090.

215 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253; see also supra Part IV.B.1.

216 See 42 U.S.C. § 7543(e)(2); S. Coast Air Quality, 541 U.S. at 252–53. See generally Proposed Regulation, supra note 2.

217 See S. Coast Air Quality, 541 U.S. at 252–53; CARB’s Legal Authority, supra note 158; supra Part IV.B.

218 42 U.S.C. § 7543(e); see S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.

219 See 42 U.S.C. § 7543(e); Engine Mfrs. Ass’n, 88 F.3d at 1090–92.
given pollutant.” California’s regulation is clearly covered by this first category of regulations that the Supreme Court identified as falling within the standards expressly preempted by section 209.

California’s regulation requires that vessels limit their emissions of PM, NOx, and SOx to the levels that would result from the use of marine gas oil or marine diesel oil with 0.5% sulfur content or less. In order to comply with the regulation, vessels “must not emit more than a certain amount of a given pollutant” and therefore the regulation falls within one of the specific categories listed by the Supreme Court as a standard relating to the control of emissions under section 209. The “certain amount” is the amount that would be emitted by the use of the specified low-sulfur fuels. The “given pollutants” are PM, NOx, and SOx. Thus, because it is a standard, section 209(e) requires California to obtain EPA authorization before enforcing the regulation.

It is crucial that California sets emission levels based on certain fuels rather than simply requiring certain fuels. Although the regulation itself does not explicitly set a specific number limit on the level of emissions from ships, it does set a specific level that is calculable for each individual ship, thereby setting a “certain amount” over which each ship is not permitted to emit. Under the rule, each ship owner or operator can determine its allowable “certain amount” by calculating what quantity of the pollutants the ship would emit if 0.5% sulfur fuel were used. The ship owner or operator can then decide either to use the specified fuel or to use a different technique to insure that the calculated “certain amount” of allowable pollutants is not ex-

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220 S. Coast Air Quality, 541 U.S. at 252–53.
221 See id.; Proposed Regulation, supra note 2, at A-5 to A-6.
222 Proposed Regulation, supra note 2, at A-5 to A-6.
223 S. Coast Air Quality, 541 U.S. at 253; see Proposed Regulation, supra note 2, at A-5 to A-6.
224 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-6.
225 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-6.
226 See Clean Air Act § 209(e), 42 U.S.C. § 7543(e) (2000); S. Coast Air Quality, 541 U.S. at 252–53.
228 S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
229 See Proposed Regulation, supra note 2, at A-5 to A-6. It is likely that ships can be classified by engine type and size, and then the permissible “certain amount” for each class calculated. Although CARB does not provide such a classification with specific numbers in the regulation, it nonetheless sets a “certain amount” of pollutants which may not be exceeded. See generally id.
Thus, California does not evade qualification of the regulation as a “standard” simply by not providing actual numbers in its regulation, because the regulation still sets a knowable “certain amount” of emissions that ships may not exceed.

2. Regulations Applied to Ocean-Going Vessels Are Not Expressly Preempted by the CAA

California’s new regulation is not expressly preempted by section 209(e)(1), because the vessels it regulates are not farm or construction engines or equipment of less than 175 horsepower, or locomotives. Therefore, because the CAA authorizes California to regulate both new and non-new sources other than those covered by section 209(e)(1), California is not preempted by the CAA from regulating the ocean-going vessels which are the subject of the new regulation.

3. California Fulfills the Section 209(e) Requirements to Obtain EPA Authorization

California’s regulation fulfills the requirements for obtaining EPA authorization under section 209(e). First, California’s regulation will be “at least as protective of the public health and welfare as the applicable Federal standards.” While EPA has not set any similar standards because it cannot regulate non-new vessels, the United States has recognized Annex VI as customary international law. Annex VI sets a worldwide cap on sulfur content in fuel at 4.5%, with designated areas requiring no more than 1.5% sulfur fuel. By basing emissions limits on 0.5% sulfur fuel, California’s regulation will be more protective than the international rule.

The second requirement for obtaining EPA authorization is that California needs standards that are different from the federal man-

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230 See S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
231 See S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.
234 See 42 U.S.C. § 7543(e)(2); Proposed Regulation, supra note 2; supra Part I.B.
236 See supra note 62.
237 See id.
238 See id.; Proposed Regulation, supra note 2, at A-6.
The severity of California’s air pollution sufficiently demonstrates that the state needs stricter restrictions on diesel emissions. As discussed previously, California’s air pollution is the most severe in the country, and is responsible for numerous adverse health effects, including asthma and cancer. Furthermore, the new regulation is applied to large ocean vessels, which are the source of significant quantities of pollutants and are expected to emit increasingly greater amounts in the near future. Thus, California’s uniquely serious air pollution problem, and the contribution of ocean vessels to that problem, clearly illustrate California’s need for further controls such as the new regulation.

D. Possibilities for California to Regulate Without EPA Authorization

In \textit{South Coast Air Quality}, the Supreme Court enumerated the “criteria” that qualifies as a standard under section 209: “To meet them the vehicle must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions.” California is likely not preempted by section 209(e) from adopting regulations which do not fall within one of the three enumerated categories without EPA authorization.

Accordingly, if California instead adopted a fuel-type regulation which required the use of a specific fuel—as EPA has decided is allowable—EPA authorization would not be required to avoid preemption under section 209(e), because a fuel-type requirement does not fall into any of the categories listed by the Supreme Court in \textit{South Coast Air Quality}. Unlike the newly adopted regulation, a regulation which requires the use of a certain fuel by nonroad engines would not fall into the category of “standards” which prohibit emissions over a

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\begin{itemize}
\item 239 42 U.S.C. § 7543(e)(2).
\item 240 See \textit{id.}; \textit{L.A. Air Pollution}, supra note 3.
\item 241 See \textit{supra} notes 23–26 and accompanying text.
\item 242 See \textit{supra} notes 31–34 and accompanying text.
\item 243 See 42 U.S.C. § 7543(e)(2)(A)(ii); \textit{supra} Part I.B.
\item 244 541 U.S. at 252–53; see \textit{supra} notes 204–07 and accompanying text.
\item 245 42 U.S.C. § 7543(e); \textit{South Coast Air Quality}, 541 U.S. at 253; Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996).
\item 246 “EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as . . . sulfur limits on fuel . . . once the engine is no longer new.” 40 C.F.R. § 89 subpt. A, app. A (2005).
\item 247 See 42 U.S.C. § 7543(e); \textit{South Coast Air Quality}, 541 U.S. at 253; \textit{Proposed Regulation}, \textit{supra} note 2, at A-5 to A-6.
\end{itemize}
“certain amount of a given pollutant.” A simple fuel-type requirement is not equivalent to one which prohibits the engine or vehicle from emitting more than a certain amount of a pollutant, because a vehicle that achieves the same numerical emission rate by alternative means would still violate the fuel-type requirement.

For example, suppose the California regulation simply required ships to use fuel with a maximum of 0.5% sulfur content. A ship that did not use the fuel, but instead used a device, such as a filter, to limit its emissions to a level lower than the rates achieved by using the prescribed fuel would still violate the regulation. Thus, this hypothetical regulation does not prohibit a vehicle from emitting more than a certain amount of pollutants, because compliance with the regulation would not be determined by a quantitative measure of the vehicle’s emissions, unlike California’s new regulation. In effect, this hypothetical—and narrower—regulation would achieve the same result as California’s actual regulation, which allows alternative means of compliance. However, by providing fewer options for compliance than the regulation California has actually adopted, California may avoid classification as a “standard,” and thereby avoid the EPA authorization process.

Additionally, a fuel-type requirement does not fall within any of the other categories of “standards” listed by the Supreme Court, and therefore would not be preempted by section 209(e). A fuel-type requirement does not require engines or vehicles to “be equipped with a certain type of pollution-control device,” nor does it require “some other design feature related to the control of emissions.”

The practical difference between the new California regulation and the one suggested without EPA authorization is minimal, but the difference is decisive in determining the preemptive effect of the complicated and seemingly odd structure of section 209. The slight

248 See S. Coast Air Quality, 541 U.S. at 253.
249 See id.; 40 C.F.R. § 89 subpt. A, app. A.
250 See Proposed Regulation, supra note 2, at A-5 to A-6.
251 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253.
252 See S. Coast Air Quality, 541 U.S. at 252–53; Proposed Regulation, supra note 2, at A-5 to A-6; supra notes 220–31 and accompanying text.
253 See Proposed Regulation, supra note 2, at A-5 to A-6.
254 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 252–53; Proposed Regulation, supra note 2, at A-5 to A-6.
255 See 42 U.S.C. § 7543(e)(2); S. Coast Air Quality, 541 U.S. at 253.
256 See S. Coast Air Quality, 541 U.S. at 253.
257 See id. at 252–53; Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1090–92 (D.C. Cir. 1996); Proposed Regulation, supra note 2, at A-5 to A-6; supra Part III.
difference between emissions limits based on the use of a certain fuel and requirements for use of that same fuel is enough to make the former fall within the definition of “standards relating to the control of emissions,” while the latter avoids such a classification. As a result, section 209(e) preempts California from adopting and enforcing the emission limit based on a fuel type unless it obtains EPA authorization, although California is most likely not preempted by section 209(e) from adopting a fuel-type requirement that achieves virtually the same result.

Conclusion

Section 209(e) of the CAA establishes federal preemption of state regulation of emissions from nonroad vehicles and engines that is much broader in scope than the preemption covering motor vehicles. Specifically, states are preempted from adopting “standards or other requirements relating to the control of emissions” from both new and non-new nonroad vehicles, whereas for motor vehicles, states are only preempted from regulating new engines and vehicles. California is provided an exception, and may avoid preemption if it obtains EPA authorization for its regulations that fall under the definition of “standards or other requirements relating to the control of emissions.” Consequently, the threshold question in a preemption analysis under section 209(e) is whether the state regulation is a “standard or other requirement relating to the control of emissions,” according to the definition adopted by the Supreme Court.

Section 209(e) preempts California’s new regulation unless California obtains EPA authorization, because it establishes a “standard relating to the control of emissions from nonroad vehicles.” California’s regulation qualifies as one of the types of regulations falling within the Supreme Court’s definition of “standard” under section 209 because it requires that the ocean vessels do “not emit more than a certain amount” of pollutants. Therefore, California must obtain EPA authorization in order to avoid preemption. However, California may be able to sidestep the EPA authorization requirement by adopting a slightly altered regulation. A California regulation requiring ships to use a specific low-sulfur fuel may not require EPA authorization because it does not fall within the defined categories of standards

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258 See 42 U.S.C. § 7543(e); S. Coast Air Quality, 541 U.S. at 253; Proposed Regulation, supra note 2, at A-5 to A-6.

259 See 42 U.S.C. § 7543(e); supra Part VI.C.
under section 209. By adopting a regulation with this subtle difference, California may be able to avoid both preemption and the EPA authorization process, while taking sorely needed steps to reduce the state’s air pollution.